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FIRST DEPARTMENT

ADMINISTRATIVE LAW, MUNICIPAL LAW, CONSTITUTIONAL LAW, APPEALS.

THE COURT WAS TROUBLED BY NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIAL AND HEARINGS' (OATH'S) REQUIREMENT THAT PETITIONER PAY THE ORDERED RESTITUTION OF OVER $234,000 BEFORE PETITIONER COULD APPEAL THE DETERMINATION; THE ISSUE WAS NOT RAISED BY THE PARTIES AND THEREFORE COULD NOT BE DECIDED.

The First Department noted it was troubled by the New York City Office of Administrative Trial and Hearings' (OATH'S) requirement that petitioner pay the ordered restitution as a prerequisite to appealing the determination. The issue was not raised by the parties so the First Department could not decide it: "Although neither specifically preserved nor raised on appeal, we are troubled by the constitutional ramifications of an administrative tribunal insulating its decision by making judicial review contingent on satisfaction of its order, including, as here, the payment of money ... . It seems patently unfair to force a litigant to pay restitution as a condition for filing an appeal where the litigant has received a waiver of prior payment of his fine due to financial hardship ... . Petitioner here is excused from paying a $5,000 fine as a condition to filing an appeal based on financial hardship, but, notwithstanding its financial hardship, it is forced to pay almost a quarter of a million dollars ($234,152.57) before it can file an appeal. Under this system, if you do not have the financial means to pay, you cannot come into court and seek review regardless of the merits of the challenged administrative determination ... . Nonetheless, because this constitutional issue was not fully briefed before us, we do not decide it." ***Matter of Sahara Constr. Corp. v. New York City Off. of Admin. Trials & Hearings*, 2020 N.Y. Slip Op. 03715, First Dept 7-2-20**

CRIMINAL LAW.

FOR CAUSE CHALLENGE TO A JUROR SHOULD HAVE BEEN GRANTED, NEW TRIAL ORDERED.

The First Department, ordering a new trial, determined defendant's for cause challenge to a juror should have been granted: "The challenged panelist stated that he could not be 'fully fair' if defendant did not testify and 'defend himself,' and that it might be difficult for him to acquit a defendant who did not testify, because then 'we only get one side.' This reflected a state of mind likely to preclude the rendering of an impartial verdict (see CPL 270.20[1][b]), and the court did not elicit an unequivocal assurance that he would set aside any bias and render an impartial verdict based on the evidence ... . When the court asked if he would 'hold it against" defendant if defendant did not testify, he responded "No, not hold it against him, but —- I don't know.' When the court further asked whether defendant's failure to testify would trouble the panelist to the point where he could not give defendant a fair trial, he responded 'I think I'll be able to give him a fair trial.' Although expressions such as 'I think' are not disqualifying, here the panelist's responses, viewed as a whole, fell short of the required express and unequivocal declarations ... . 'If there is any doubt about a prospective juror's impartiality, trial courts should err on the side of excusing the juror, since at worst the court will have replaced one impartial juror with another' ...". ***People v. Laverpool*, 2020 N.Y. Slip Op. 03745, First Dept 7-2-20**

SECOND DEPARTMENT

ARCHITECTURAL MALPRACTICE, CONTRACT LAW, CIVIL PROCEDURE.

QUESTIONS OF FACT WHETHER THE CONTINUOUS REPRESENTATION DOCTRINE TOLLED THE STATUTE OF LIMITATIONS IN THIS ARCHITECTURAL MALPRACTICE/BREACH OF CONTRACT ACTION.

The Second Department, reversing Supreme Court, determined there were questions of fact about whether the continuous representation doctrine tolled the statute of limitations in this architectural malpractice/breach of contract action. Defendant's decedent was hired by plaintiff to construct a four-story condominium. Although the work was completed in 2008 there were problems getting approval by the city and new architectural services contracts were entered in 2015 and 2018. The court noted that, where a motion to dismiss pursuant to CPLR 3211 is made on statute-of-limitations grounds, a plaintiff may remedy any defects in the pleadings in an affidavit: " '[A]n action to recover damages for malpractice, other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort' is subject to a three-year statute of limitations (CPLR 214[6] ...). Such an action, founded upon 'defective design or construction accrues

upon the actual completion of the work to be performed and the consequent termination of the professional relationship' ... . However, 'a professional malpractice cause of action asserted against an architect or engineer may be tolled under the continuous representation' doctrine if the plaintiff shows its reliance upon a continued course of services related to the original professional services provided' ... . * * * Even if the defendant had met her prima facie burden, the plaintiff raised a question of fact as to whether the continuous representation toll applied. Specifically, the plaintiff averred in an affidavit in opposition to the motion that [defendant's decedent] continued to work on the project from 2008 through the time that the parties entered into the 2015 agreement, including by continuing to revise the plans so as to subdivide the property, regularly meeting with the plaintiff, renewing building permits with the plaintiff, meeting with a 'commissioner' at the DOB [NYC Department of Buildings] to discuss revised plans, and filing an application concerning the project with the DOB in 2014." ***Anderson v. Pinn*, 2020 N.Y. Slip Op. 03636, Second Dept 7-1-20**

CIVIL PROCEDURE.

DEFENDANTS' MOTION TO DISMISS ON THE GROUND OF FORUM NON CONVENIENS IN THIS PERSONAL INJURY ACTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' motion to dismiss this personal injury case on the ground of forum non conveniens grounds (CPLR 327) should have been granted: "On a motion pursuant to CPLR 327 to dismiss the complaint on the ground of forum non conveniens, the burden is on the movant to demonstrate the relevant private or public interest factors that militate against a New York court's acceptance of the litigation. 'Among the factors the court must weigh are the residency of the parties, the potential hardship to proposed witnesses, the availability of an alternative forum, the situs of the actionable events, and the burden which will be imposed upon the New York courts, with no one single factor controlling' ... . New York courts need not entertain causes of action lacking a substantial nexus with New York ... . In this case, the accident occurred in New Jersey, the decedent was a resident of New Jersey and, as a result of the accident, received medical treatment in New Jersey before her death; the plaintiff is a resident of Georgia, and none of the potential witnesses are believed to be residents of New York. Although the defendant Port Authority of New York and New Jersey is a statutory resident of New York ... , and the defendant Champlain Enterprises, Inc., is a New York corporation, when taking into consideration all of the relevant factors … , we find that the defendants established that New York is an inconvenient forum in which to prosecute this action ... . However, in order to assure the availability of a forum for the action, our reversal and granting of the motion to dismiss the complaint pursuant to CPLR 327 is conditioned on the defendants stipulating to waive jurisdictional and statute of limitations defenses as indicated herein\ ... .' ***Sikinyi v. Port Auth. of N.Y. & N.J.*, 2020 N.Y. Slip Op. 03683, Second Dept 7-1-20**

CIVIL PROCEDURE, DEBTOR-CREDITOR.

THE PROMISSORY NOTE WAS NOT DEMONSTRATED TO BE AN INSTRUMENT FOR THE PAYMENT OF MONEY ONLY, THE MOTION FOR SUMMARY JUDGMENT IN LIEU OF COMPLAINT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in lieu of complaint (CPLR 3213) based upon a promissory note should not have been granted. The note was not demonstrated to be an instrument for the payment of money only: "Pursuant to CPLR 3213, a plaintiff demonstrates its prima facie entitlement to judgment as a matter of law with respect to a promissory note if it shows 'the existence of a promissory note, executed by the defendant, containing an unequivocal and unconditional obligation to repay, and the failure by the defendant to pay in accordance with the note's terms' ... . 'Where the instrument requires something in addition to defendant's explicit promise to pay a sum of money, CPLR 3213 is unavailable' ... . Once the plaintiff has established its prima facie entitlement to judgment as a matter of law, 'the burden then shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense' ... . Here, the plaintiffs failed to establish, prima facie, that the subject promissory note was an instrument for the payment of money only ... . In support of their motion, the plaintiffs submitted the promissory note, which refers to the asset sale/purchase agreement and provides the defendants with 'an absolute right of set-off against the entire unpaid principal balance of [the] Note based upon any and all provisions of the Asset Sale/Purchase Agreement.' Under the circumstances, 'outside proof' was required, 'other than simple proof of nonpayment,' to establish the plaintiffs' prima facie case ...". ***Express Valentine Auto Repair Shop, Inc. v. New York Taxi 2, Inc.*, 2020 N.Y. Slip Op. 03644, Second Dept 7-1-20**

CRIMINAL LAW.

RESTITUTION PAYABLE TO THE CRIME VICTIMS BOARD EXCEEDED THE STATUTORY CAP FOR A FELONY.

The Second Department noted that the restitution amount payable to the Crime Victims Board exceeded the statutory cap: "... [T]he amount of restitution payable to the Crime Victims Board for the family of Sherman Richardson improperly exceeds $15,000 and violates the statutory cap in Penal Law § 60.27(5)(a). Penal Law § 60.27(5)(a) provides that, except with the consent of the defendant or in instances where restitution is ordered as a condition of probation or conditional discharge, 'the amount of restitution or reparation required by the court shall not exceed fifteen thousand dollars in the case of a conviction for a felony' ... . This provision is qualified by Penal Law § 60.27(5)(b), which allows a court to order resti-

tution in excess of this amount as long as the sum is 'limited to the return of the victim's property, including money, or the equivalent value thereof' ... . As for the restitution payable to the Crime Victims Board for Richardson's family, the amount in excess of $15,000 did not meet the requirements of Penal Law § 60.27(5), since the amount of the defendant's restitution set by the Supreme Court was not intended as reimbursement for the value of the property destroyed. However, restitution in the sum of $3,374.75 to Enterprise Rent-A-Car, the owner of the vehicle operated by the defendant and later set on fire, was proper ...". ***People v. Grant*, 2020 N.Y. Slip Op. 03674, Second Dept 7-1-20**

CRIMINAL LAW.

DEFENDANT'S INTELLECTUAL DISABILITY REQUIRED A MORE PROBING COLLOQUY BEFORE ACCEPTING THE GUILTY PLEA AND THE WAIVER OF APPEAL, PLEA VACATED.

The Second Department, vacating defendant's guilty plea to murder, in a full-fledged opinion by Justice Manzanet-Daniels, determined defendant's intellectual disability required a more probing colloquy to ensure defendant understood the ramifications of the plea and the waiver of appeal: "Defendant's psychological assessments cast serious doubt about his ability to enter a knowing and voluntary plea. DOE records showed defendant to have been diagnosed as mentally retarded and to suffer from 'severe academic delays.' The records indicated that with an IQ of only 56, defendant had 'extremely low' 'general cognitive ability,' with 'overall thinking and reasoning abilities' in the bottom 0.2%. Those records further indicated that defendant's verbal comprehension, perceptual reasoning, working memory, and processing speed were 'extremely low,' in the bottom 0.2 to 2%. The CPL 390 report, ordered by the trial court in aid of sentencing, confirmed the doubts regarding defendant's mental capacity and ability to understand or participate in the proceedings. Doctors at Bellevue observed defendant to suffer from an intellectual disability with 'extremely low' intellectual functioning. Defendant's IQ placed him in the bottom one percentile as compared to his peers. The report noted that defendant's limited cognitive abilities placed him at increased risk of impulsive behavior without regard to the consequences of his actions." ***People v. Patillo*, 2020 N.Y. Slip Op. 03754, Second Dept 7-2-20**

CRIMINAL LAW, APPEALS.

ALTHOUGH DEFENDANT COMPLETED HIS SENTENCE HE IS ENTITLED TO A DETERMINATION WHETHER HE SHOULD BE ADJUDICATED A YOUTHFUL OFFENDER; THE ORDER OF PROTECTION EXCEEDED THE STATUTORY TIME LIMIT.

Although defendant had already completed his sentence, the Second Department held he was entitled to a determination whether he should be adjudicated a youthful offender, even if that relief was not requested. In addition, the Second Department noted the order of protection exceeded the maximum time allowed in the Criminal Procedure Law and did not take into account defendant's jail-time: "In People v. Rudolph (21 NY3d 497, 499), the Court of Appeals held that compliance with CPL 720.20(1), which provides that the sentencing court 'must' determine whether an eligible defendant is to be treated as a youthful offender, 'cannot be dispensed with, even where defendant has failed to ask to be treated as a youthful offender, or has purported to waive his or her right to make such a request.' Compliance with CPL 720.20(1) requires the sentencing court to actually consider and make an independent determination of whether an eligible youth is entitled to youthful offender treatment ... . Here, the record does not demonstrate that the Supreme Court considered whether to adjudicate the defendant a youthful offender. 'Generally, under such circumstances, the sentence is vacated, and the matter remitted to the sentencing court for resentencing after determining whether the defendant should be treated as a youthful offender'... . However, in this case, the defendant has served his sentences. Under these circumstances, we remit the matter to the Supreme Court, Kings County, to determine whether the defendant should be afforded youthful offender treatment and thereafter submit a report to this Court advising of its determination, and hold the appeals in abeyance in the interim ...". ***People v. Shehi*, 2020 N.Y. Slip Op. 03676, Second Dept 7-1-20**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH IT WAS ERROR TO DENY THE DEFENSE REQUEST FOR A *RODRIGUEZ* HEARING BASED UPON THE PROSECUTOR'S ASSERTION THE COMPLAINANT AND THE DEFENDANT KNEW EACH OTHER, THE TRIAL TESTIMONY DEMONSTRATED THE COMPLAINANT AND DEFENDANT IN FACT KNEW EACH OTHER; THE DISSENT ARGUED THE COURT OF APPEALS REQUIRES THAT THE IDENTIFICATION ISSUE BE RESOLVED BEFORE TRIAL.

The Second Department affirmed defendant's conviction over a substantive dissent. Arguing against a *Wade* hearing addressing the suggestiveness of the complainant's identification of the defendant from single photograph displays, the prosecutor told the judge the complainant and the defendant knew each other and the identification procedures were merely confirmatory. Defendant denied knowing the complainant and requested a *Rodriguez* hearing. The judge denied the request based on the People's assertion the identification procedures were confirmatory. The denial of the *Rodriguez* hearing was deemed to be error, but the majority concluded the hearing was not necessary because the trial testimony demonstrated the complainant knew the defendant. The dissent argued the Court of Appeals, in the *Rodriguez* case, required resolution of the identification issue before trial: "The Supreme Court erred in relying on the People's mere assurances of familiarity in

denying the defendant's pretrial request for a Rodriguez hearing ... . Nevertheless, a hearing with regard to the single-photograph identifications made by the complainant soon after the shooting was ultimately unnecessary inasmuch as the complainant's trial testimony demonstrated that he was sufficiently familiar with the defendant, whom he knew and referred to by the defendant's street name,'Chulo,' such that the complainant's identification of the defendant from the photo display was merely confirmatory ... . * * * 'When a crime has been committed by a . . . long-time acquaintance of a witness there is little or no risk that comments by the police, however suggestive, will lead the witness to identify the wrong person' ... . Any suggestiveness of the initial photo identification procedure or the purported taint thereafter was not a concern since ' the protagonists are known to one another' ...". ***People v. Carmona*, 2020 N.Y. Slip Op. 03672, Second Dept 7-1-20**

FAMILY LAW.

THE PARENT'S INABILITY TO CONTROL THE CHILD'S BROTHER PRECLUDED THE RETURN OF THE CHILD TO THE PARENT'S CUSTODY AFTER TEMPORARY REMOVAL.

The Second Department, reversing Family Court, determined the record did not support the return of the child to the parent's custody after temporary removal. The Second Department found that the parent's difficulty controlling the child's brother, who requires constant supervision, put the child at risk: " 'An application pursuant to Family Court Act § 1028(a) for the return of a child who has been temporarily removed shall be granted unless the court finds that the return presents an imminent risk to the child's life or health' ... . 'In a proceeding for removal of a child, the Family Court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal' ... . 'Ultimately, the Family Court must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests' ... . On appeal, this Court must assess whether the record provides a sound and substantial basis to support the Family Court's determination ... . Here, the Family Court's determination granting the parents' application pursuant to Family Court Act § 1028 for the return of the child to their custody lacks a sound and substantial basis in the record ... . The evidence at the hearing demonstrates that the child's sibling, Michael, has special needs that require him to be under constant supervision, and that on a prior occasion the parents' inability to control Michael resulted in serious physical injuries to one of the child's siblings. Notwithstanding the parents' willingness to comply with court-ordered services, the parents and Michael had not yet completed those services at the time of the hearing. In our view, the parents' inability to adequately control Michael would present an imminent risk to the child's life or health if the child were returned to the parents. Given the circumstances of the family's living situation at the time of the hearing, this risk could not be mitigated by the conditions imposed by the court." ***Matter of Nicholas O. (Jenny F.)*, 2020 N.Y. Slip Op. 03663, Second Dept 7-1-20**

FAMILY LAW, CIVIL PROCEDURE, JUDGES.

THE CONDITIONAL DIRECTIVE THAT FATHER BE AWARDED SOLE CUSTODY IF MOTHER DID NOT RETURN FROM SWEDEN WITH THE CHILD IS NOT ENFORCEABLE; A CHANGE IN CUSTODY MUST BE BASED ON THE BEST INTERESTS OF THE CHILD AND SHOULD NOT BE USED TO PUNISH A PARENT,

The Second Department, reversing Family Court, determined the conditional directive that sole custody of the child be awarded to father if mother did not return from Sweden with the child within 30 days was not enforceable. There was no application for a change of custody before the court. The conditional directive was issued to punish mother for moving to and remaining in Sweden and was not based upon the best interests of the child: "The paramount concern in any custody determination is the best interests of the child, under the totality of the circumstances ... . Reversal or modification of an existing custody order ' should not be a weapon wielded as a means of punishing a recalcitrant' or contemptuous parent' ... . In addition, 'where no party has moved for a change in custody, a court may not modify an existing custody order in a non-emergency situation absent notice to the parties, and without affording the custodial parent an opportunity to present evidence and to call and cross-examine witnesses' ... . Here, the Family Court's conditional directive that sole legal and physical custody of the child shall be transferred to the father if the mother did not return the child to New York City within 30 days was meant to punish the mother and was not based on the court's determination of the best interests of the child. The court should not have considered a change in custody in the absence of an application for such relief with notice to the mother .... Further, the court's conditional award of custody to the father was improper in light of the court's determination otherwise that it was in the child's best interests to remain in the custody of the mother, and considering, among other things, that the mother had always been the child's primary caretaker, the father did not have overnight visits with the child, and the court had previously expressed concerns about the father's ability to care for the child for an extended period of time ...". ***Matter of Ross v. Ross*, 2020 N.Y. Slip Op. 03668, Second Dept 7-1-20**

MEDICAL MALPRACTICE, NEGLIGENCE.

MOTHER CANNOT RECOVER DAMAGES FOR EMOTIONAL DISTRESS FOR INJURY IN UTERO WHERE, AS HERE, THE CHILD WAS BORN ALIVE.

The Second Department determined plaintiff-mother's action for damages for emotional harm stemming from the birth of her child was properly dismissed. A mother cannot recover for emotional distress for injury in utero if the child is born alive: "A mother cannot recover damages for emotional harm where the alleged malpractice causes in utero injury to a fetus that is born alive ... . New York State Public Health Law defines a 'live birth' as 'the complete expulsion or extraction from its mother or a product of conception, irrespective of the duration of the pregnancy, which, after such separation, breathes or shows any other evidence of life such as beating of the heart' ... . According to the defendants' submissions, the plaintiff's infant was born with a spontaneous heartbeat of less than 60 beats per minute and was given an Apgar score of '1' at 1 minute, 5 minutes, and 10 minutes after delivery based on a heartbeat of less than 100 beats per minute. The hospital records submitted with the defendants' motions show that respiratory effort was absent, the infant's muscle tone was flaccid, her color was 'blue/pale,' and there were no reflex responses. The records also show that resuscitative efforts were initiated, but the infant's heart rate remained at less than 60 beats per minute with no respiratory effort, and the infant died in the delivery room that same day, less than 20 minutes after she was born. .. . In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff submitted the affidavit of a medical expert in pediatric neurology who conceded that the infant was born with a heartbeat and who never opined that the infant was stillborn. Although the plaintiff's expert attested that the infant did not show signs of brain activity, was never conscious, was not viable, and was 'clinically and legally dead at the time of delivery,' the affidavit of the plaintiff's expert was insufficient to raise an issue of fact as to whether the infant was stillborn ... . Inasmuch as the plaintiff contends that she should be able to recover for emotional injuries because a wrongful death cause of action on behalf of the infant would not have a viable accompanying cause of action for conscious pain and suffering since the records show that the infant was never conscious, 'we conclude that this is an inherent aspect of wrongful death actions rather than a specific problem with prenatal medical malpractice actions' ...". ***Waring v. Matalon*, 2020 N.Y. Slip Op. 03686, Second Dept 7-1-20**

MEDICAL MALPRACTICE, NEGLIGENCE, CIVIL PROCEDURE.

NEW THEORY PRESENTED IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE LACK-OF-INFORMED-CONSENT CAUSE OF ACTION SHOULD NOT HAVE BEEN CONSIDERED.

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's lack-of-informed-consent cause of action in this medical malpractice case should have been dismissed. Plaintiff had alleged a new theory in response to defendant's motion for summary judgment which should not have been considered because the theory was not discernable from the pleadings: "... [T]he Supreme Court should have granted that branch of the defendant's motion which was for summary judgment dismissing the cause of action to recover damages for lack of informed consent insofar as asserted against him. The defendant made a prima facie showing of his entitlement to judgment as a matter of law dismissing that cause of action insofar as asserted against him through the affidavit of his expert, the deposition testimony, and the written consent form signed by the plaintiff, which demonstrated that the defendant disclosed to the plaintiff the risks, benefits, and alternatives to the procedure ... . In opposition, the plaintiff alleged, for the first time, a new theory that the procedure performed by the defendant exceeded the scope of her consent in specific respects, a theory that was not referred to when the plaintiff's counsel questioned the defendant at his deposition. The general rule is that ' [a] plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars' ... . If the theory is discernable from the pleadings, it may be considered ... , especially if the theory is referred to in the depositions ... . In this case, the assertion of the new theory was not discernable from the pleadings, nor alluded to by the plaintiff's counsel when deposing the defendant ... . Therefore, that theory should not have been considered." ***Larcy v. Kamler*, 2020 N.Y. Slip Op. 03652, Second Dept 7-1-20**

THIRD DEPARTMENT

ADMINISTRATIVE LAW, INSURANCE LAW, RELIGION, CONSTITUTIONAL LAW, CIVIL PROCEDURE.

THE REGULATION REQUIRING NEW YORK HEALTH INSURANCE POLICIES TO COVER MEDICALLY NECESSARY ABORTION SERVICES, WHICH INCLUDES AN EXEMPTION FOR 'RELIGIOUS EMPLOYERS,' IS CONSTITUTIONAL AND WAS PROPERLY PROMULGATED.

The Third Department, in a full-fledged opinion by Justice Colangelo, affirming Supreme Court, determined the regulation requiring health insurance policies in New York to provide coverage for medically necessary abortion services, which includes an exemption for "religious employers," was properly promulgated and was constitutional. The Court of Appeals decision upholding a similar regulation for prescription contraceptives, *Catholic Charities of Diocese of Albany v. Serio* (7 NY3d 510 [2006] ...), was deemed the controlling precedent: "At issue in Catholic Charities of Diocese of Albany was the validity

of a provision of the Women's Health and Wellness Act (...[hereinafter WHWA]) that requires health insurance policies that provide coverage for prescription drugs to include coverage for prescription contraceptives ... . The WHWA also provided an exemption from coverage for 'religious employers' (Insurance Law § 3221 [l] [16] [E]), which exemption contains the identical criteria as the exemption applicable here ... . As the constitutional arguments raised by plaintiffs here are the same as those raised and rejected in Catholic Charities of Diocese of Albany, Supreme Court properly concluded that they must meet the same fate by operation of the doctrine of stare decisis. 'Stare decisis is the doctrine which holds that common-law decisions should stand as precedents for guidance in cases arising in the future and that a rule of law once decided by a court will generally be followed in subsequent cases presenting the same legal problem' ... . We agree with Supreme Court that an analysis of the Boreali factors [Boreali v. Axelrod, 71 NY2d 1] weighs in favor of rejecting plaintiffs' challenge that the Superintendent exceeded regulatory authority in promulgating the regulation at issue here." ***Roman Catholic Diocese of Albany v. Vullo*, 2020 N.Y. Slip Op. 03707, Third Dept 7-2-20**

CRIMINAL LAW.

BECAUSE THE GRAND JURY MINUTES WERE NOT PART OF THE MOTION TO AMEND THE INDICTMENT OR THE RECORD ON APPEAL, IT COULD NOT BE DETERMINED WHETHER THE DEFENDANT WAS ACTUALLY INDICTED ON THE OFFENSE CHARGED IN THE AMENDED INDICTMENT; PLEA VACATED AND AMENDED INDICTMENT DISMISSED.

The Third Department, vacating defendant's guilty plea and dismissing the amended indictment, held that, because the grand jury minutes did not accompany the motion to amend the indictment and were not available to the appellate court, it could not be determined whether defendant was indicted on the charged offense, a jurisdictional defect. The People argued that the grand jury voted on the offense charged in the amended indictment but the wrong subdivision of the statute was set forth in the original indictment: " 'The right to indictment by a [g]rand [j]ury has . . . been recognized as not merely a personal privilege of the defendant but a public fundamental right, which is the basis of jurisdiction to try and punish an individual'... . '[S]ince an infringement of defendant's right to be prosecuted only by indictment implicates the jurisdiction of the court,' this claim is not waived by a guilty plea and may be raised for the first time on appeal ... . Thus, '[b]efore a person may be publicly accused of a felony, and required to defend against such charges, the [s]tate must a [g]rand [j]ury that sufficient legal reasons exist to believe the person guilty' ... . To that end, an indictment ensures that 'the crime for which the defendant is brought to trial is in fact one for which he [or she] was indicted by the [g]rand [j]ury, rather than some alternative seized upon by the prosecution' ... , providing a safeguard against prosecutorial authority by requiring the grand jury to 'assess[] the sufficiency of the prosecutor's case' ... . The record before us only establishes that a grand jury indicted defendant for violating subdivision (7) of Penal Law § 120.05, not subdivision (3) of that statute. In their motion to amend, the People stated that 'the grand jury was instructed on the correct section of the statute' — presumably subdivision (3) of Penal Law § 120.05 ... — and that the amendment therefore did not change the theory of their case 'as reflected in the instructions and the evidence before the [g]rand [j]ury,' asserting that the charge in the original indictment (under subdivision [7]) was an 'inadvertent misstatement.' It is unclear if the People were representing that the grand jury actually indicted defendant under subdivision (3)." ***People v. Mathis*, 2020 N.Y. Slip Op. 03696, Third Dept 7-2-20**

CRIMINAL LAW, APPEALS.

ANY CHALLENGE BASED ON A DEFECT IN THE SUPERIOR COURT INFORMATION AND WAIVER OF APPEAL FOR FAILURE TO SET FORTH THE DATE AND TIME OF THE OFFENSE WAIVED BY THE GUILTY PLEA; THE PLEA WAS INVALID BECAUSE OF THE INCOMPLETE COLLOQUY.

The Third Department, vacating defendant's guilty plea, determined the plea colloquy did not demonstrate defendant fully understood and voluntarily waived his right to trial. The court noted that the failure to set forth the date and time of the offense in the superior court information (SCI) and the waiver of indictment was not a jurisdictional defect and any related error was not preserved for appeal and was forfeited by the guilty plea: "Notwithstanding the omission of the date and approximate time of the offense, the waiver of indictment and the SCI, together with the underlying accusatory instruments prepared in connection with the incident, gave defendant reasonable notice of the felony sex crime with which he was being charged. In light of this, as well as the absence of any indication that defendant raised an objection before County Court to the sufficiency of the waiver of indictment or the SCI, or requested a bill of particulars, defendant's challenge to the waiver of indictment and the SCI was forfeited by his guilty plea ... . Preliminarily, we note that defendant's challenge to the voluntariness of the plea is not precluded by his appeal waiver ... and was preserved by his unsuccessful postallocution motion to withdraw his plea ... . During the plea proceedings, County Court advised defendant that he was giving up a number of important rights by pleading guilty, including the right 'to take the case to trial,' the 'right to cross-examine people who testified against you,' and 'the right to testify yourself or call your own witnesses.' The court further explained that he could not be convicted at trial unless the People proved to a jury beyond a reasonable doubt that he was guilty of the crime. The court, however, failed to mention the privilege against self-incrimination or ascertain whether defendant conferred with counsel regarding the trial-related rights that he was waiving and the constitutional consequences of entering a guilty plea

... . Absent an affirmative showing that defendant fully understood and voluntarily waived his trial-related constitutional rights, the plea was invalid and must be vacated ...". ***People v. Oliver*, 2020 N.Y. Slip Op. 03697, Third Dept 7-2-20**

FORECLOSURE, CIVIL PROCEDURE, TRUSTS AND ESTATES.

ATTEMPTS TO DE-ACCELERATE THE DEBT, INCLUDING VOLUNTARY DISCONTINUANCES AFTER THE DEATH OF THE DEFENDANT, WERE INEFFECTUAL, THE FORECLOSURE ACTION IS TIME-BARRED.

The Third Department, over a two-justice concurrence, determined the statute of limitations began to run in 2009 when the mortgage debt was accelerated in this foreclosure action and the attempts to subsequently de-accelerate the debt after the death of the defendant, including voluntary discontinuances, were ineffectual. Therefore the action was time-barred: "With respect to the notices of discontinuance in the 2009 and 2013 actions, we note that we, as well as other Appellate Divisions, have held that the voluntary discontinuance of an action, without more, will not generally constitute an affirmative act that revokes a lender's election to accelerate a debt ... . * * * In the 2009 action, plaintiff filed its notice of voluntary discontinuance roughly 13 months after decedent had passed away, without having sought substitution of a legal representative to act on behalf of decedent's estate (see CPLR 1021; see also SCPA 1002, 1401, 1402 [1] [b]). Thus, as the action was stayed and there was no substitution of a proper defendant, the notice of voluntary discontinuance filed in the 2009 action was without effect. ... As for the notice of discontinuance filed in the 2013 action, plaintiff commenced that action against decedent, despite the fact that she had died more than two years earlier. As a result, the 2013 action was a nullity from its inception and the subsequent notice of voluntary discontinuance was void ... . We similarly find that, under the circumstances of this case, the July 2015 and September 2015 notices did not constitute affirmative acts that would notify decedent's legal representative that the prior debt acceleration was revoked, that the debt was de-accelerated and that the loan was reinstated to installment payments. Irrespective of the content and substance of the July 2015 and September 2015 notices, plaintiff addressed the notices to decedent, who had been deceased for more than four years, and mailed them to the mortgaged property. The record reflects that the September 2015 letter, which was sent by both regular mail and certified mail, was returned as undeliverable." ***Beneficial Homeowner Serv. Corp. v. Heirs at Large of Ramona E. Thwaits*, 2020 N.Y. Slip Op. 03709, Third Dept 7-2-20**

UNEMPLOYMENT INSURANCE, EMPLOYMENT LAW, ARBITRATION, CIVIL PROCEDURE.

ARBITRATOR'S DECISION FINDING CLAIMANT WAS PROPERLY DISCHARGED FOR MISCONDUCT ENTITLED TO COLLATERAL ESTOPPEL EFFECT IN THE UNEMPLOYMENT INSURANCE PROCEEDING.

The Third Department, reversing the Unemployment Insurance Appeal Board, determined the arbitration decision pursuant to the collective bargaining agreement should have been given collateral estoppel effect by the Administrative Law Judge (ALJ) in the unemployment insurance proceeding. The arbitrator found that the claimant engaged in misconduct warranting discharge. The arbitrator's decision was issued prior to the ALJ's decision. The ALJ found claimant did not engage in misconduct and was entitled to unemployment insurance benefits: "Although 'the Board is not bound by arbitration decisions regarding [a] claimant's discharge issued subsequent to the time the Board rendered its decision'... , the Board was informed of the arbitration decision prior to its decision. As such, the factual findings of the arbitrator should have been accorded collateral estoppel effect in relation to the final unemployment insurance decision, so long as the parties had a full and fair opportunity to litigate the misconduct issue at the arbitration hearing ... . The fact that the arbitration decision was issued after the conclusion of the unemployment insurance hearing does not preclude its consideration for collateral estoppel purposes, as 'the final factfinder in the administrative process is the Board, not the ALJ' ... . As the Board indicated that the arbitrator's decision was not part of the record before it — despite that decision being the focus of, and a copy of it annexed to, the employer's administrative appeal — the matter must be remitted in order for the employer to submit the arbitration decision into the record and to provide an opportunity for claimant and the employer to provide additional evidence and testimony regarding the nature of the arbitration hearing ...". ***Matter of Bruce (Town of N. Hempstead--Commissioner of Labor)*, 2020 N.Y. Slip Op. 03705, Third Dept 7-2-20**

WORKERS' COMPENSATION.

CLAIMANT ENTITLED TO A SCHEDULE LOSS OF USE (SLU) AWARD DESPITE RETURNING TO WORK AT PREINJURY WAGES.

The Third Department, reversing the Workers' Compensation Board, determined claimant was entitled to a schedule loss of use (SLU) award even though claimant returned to work at preinjury wages: "For the reasons set forth in *Matter of Arias v. City of New York* (182 AD3d 170 [2020]), we find that the Board's disregard of *Matter of Taher v. Yiota Taxi, Inc.* (162 AD3d 1288 [2018] ...) was in error and, therefore, reverse. As this Court has recently held, 'where a claimant who has sustained both schedule and nonschedule permanent injuries in the same work-related accident has returned to work at preinjury wages and, thus, receives no *award* based on his or her nonschedule permanent partial disability *classification*, he or she is entitled to an SLU award' ... . As there was a finding of permanency as to claimant's neck injury and he has returned to work at preinjury wages, he is entitled to an SLU award for the remaining injuries ...". ***Matter of Cruz v. Suffolk County Police Dept.*, 2020 N.Y. Slip Op. 03713, Second Dept 7-2-20**

Similar issues and result: ***Matter of Cosides v. Town of Oyster Bay Sanitation*, 2020 N.Y. Slip Op. 03710, Third Dept 7-2-20**

WORKERS' COMPENSATION.

ALTHOUGH THERE WAS NO SCHEDULE LOSS OF USE (SLU) AWARD FOR THE PRIOR (2003) INJURY, THE AMOUNT OF THE AWARD FOR THE CURRENT (2015) INJURY MUST BE REDUCED BY THE LOSS OF USE ATTRIBUTED TO THE PRIOR INJURY.

The Third Department, reversing the Workers' Compensation Board, determined the schedule loss of use (SLU) award should have been apportioned between the effects of a prior (2003(injury for which claimant was not compensated and the current (2015) injury to the same body member. The prior injury would have been compensable but for the finding the injury was caused by an injury at work: "In August 2015, claimant sustained another injury to his right shoulder while at work, and his ensuing claim was established for injury to the right shoulder. Ultimately, a WCLJ found that claimant had a 50% SLU of the right arm that was causally related to the 2015 accident. The WCLJ [Workers' Compensation Law Judge] rejected the carrier's assertion that there should be apportionment between the 2015 claim and the 2003 noncompensable injury, stating that the carrier had successfully argued at the time of the 2003 claim that one of claimant's consultants was not credible and that there was no SLU for the 2003 injury and that it would be contradictory to now reduce claimant's award based on that consultant's prior SLU opinion. ... It is standard practice to apportion an SLU award involving two compensable injuries to the same body member and thus hold each carrier responsible for only that portion of the overall loss of use attributable to the injury covered by them). That same principle is applicable to an SLU case involving a prior, noncompensable injury when the prior injury was disabling 'in a compensation sense' before the occurrence of the subsequent injury. Because an SLU award 'is not given for an injury sustained, but[, rather,] for the residual permanent physical and functional impairments' to the subject body member ... , the question is whether there is documented prior 'loss of use, function or range of motion of the body member in question' ... . In other words, 'apportionment may be applicable in an SLU case if the medical evidence establishes that the claimant's prior injury [to the same body member] — had it been compensable — would have resulted in an SLU finding' ...". ***Matter of St. Aubin v. Office of Children & Family Servs.*, 2020 N.Y. Slip Op. 03706, Third Dept 7-2-20**

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