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FIRST DEPARTMENT

ATTORNEYS.

PLAINTIFF COULD NOT MOVE TO DISQUALIFY LAW FIRMS WHICH NEVER REPRESENTED PLAINTIFF.

The First Department, reversing Supreme Court, determined plaintiff did not have standing to move to disqualify two law firms (SZA and ABZ), one of which represented defendant, on conflict of interest grounds in this foreclosure/property-ownership dispute because neither law firm ever represented plaintiff. Apparently there was some overlap of personnel in the two law firms: "The basis for a disqualification motion is the alleged breach of the fiduciary duty owed by an attorney to a current or former client ... . When the law firm targeted by the disqualification motion has never represented the moving party, that firm owes no duty to that party. '[I]t follows that if there is no duty owed there can be no duty breached' ... . Since plaintiff never had an attorney-client relationship with either SZA or ABZ, plaintiff had no standing to bring a motion to disqualify ... . To be sure, a court has the authority to act sua sponte to disqualify counsel if it finds a conflict of interest warranting disqualification ... . However, the record before us does not support disqualification. The two defendants present a united front to plaintiff at this juncture. Their answers raise virtually the same affirmative defenses and counterclaims to the complaint, and the defenses and counterclaims of one defendant do not undermine the position of the other ... . If defendants' interests do come to diverge in this litigation then counsel of course has a duty to ensure compliance with rule 1.7 of the New York Rules of Professional Conduct (22 NYCRR 1200.0)." ***HSBC Bank USA, N.A. v. Santos*, 2020 N.Y. Slip Op. 03976, First Dept 7-16-20**

CRIMINAL LAW.

DEFENDANT'S SENTENCE REDUCED TO TIME-SERVED BASED UPON HIS HEALTH.

The First Department reduced defendant's sentence for assault second, aggravated harassment and criminal possession of a weapon based upon defendant's health: "The trial evidence established that the defendant engaged in a 10-month campaign of harassment, wherein he terrorized the attorneys and two female staff at the law firm representing his wife in divorce proceedings. The defendant called the firm more than 1,500 times during that period, and engaged in vile communication which became progressively more sexual, racist and threatening in nature. The evidence likewise supports the conclusion that defendant caused physical injury to his wife's matrimonial lawyer when defendant hit the victim in the shin with his four-pronged cane during a court proceeding. * * * While we otherwise find no basis to disturb defendant's sentence and do not consider him deserving of this court's leniency, we exercise our interest of justice jurisdiction. In so doing, we extend to him the compassion and consideration he neglected to show the four women simply doing their jobs, and reduce his sentence to time served because of defendant's age and chronic health conditions (including coronary artery disease, hypertension and diabetes), and the fact that he has only a few months to serve before his release date." ***People v. Spinac*, 2020 N.Y. Slip Op. 04002, First Dept 7-16-20**

FREEDOM OF INFORMATION LAW (FOIL), ADMINISTRATIVE LAW, CIVIL PROCEDURE.

AN ARTICLE 78 REVIEW OF THE RESPONSE TO A FOIL REQUEST MAY ONLY CONSIDER THE GROUND FOR THE INITIAL AGENCY DECISION; THE GROUNDS FOR A SUBSEQUENT DECISION ISSUED AFTER THE ARTICLE 78 PROCEEDING WAS COMMENCED SHOULD NOT HAVE BEEN CONSIDERED; PETITIONER'S REQUEST FOR THE METADATA OF THE DISCLOSED DOCUMENTS MUST BE DENIED BECAUSE METADATA WAS NOT 'REASONABLY DESCRIBED' IN THE FOIL REQUEST.

The First Department, reversing Supreme Court, determined the Article 78 review must be confined to the ground asserted in the agency's initial FOIL decision and could not consider the grounds asserted in the agency's subsequent decision issued after petitioner brought the Article 78 proceeding. The ground for the initial decision had been abandoned in the second decision. The court noted that the petitioner's demand for the metadata of the disclosed documents must be denied because metadata was not "reasonably described" in the FOIL request: "This proceeding is not in the nature of mandamus to compel. Instead, the standard of review is whether the denial of the FOIL request was 'affected by an error of law' (CPLR 7803[3] ...), for which judicial review is 'limited to the grounds invoked by the agency' in its determination ... . Since respondents abandoned the exemption raised in their initial decision, they cannot meet their burden to 'establish[] that the .

. . documents qualif[y] for the exemption' … . Further, as respondents 'did not make any contemporaneous claim that the requested materials' fit the newly raised exemptions, 'to allow [them] to do so now would be contrary to [Court of Appeals] precedent, as well as to the spirit and purpose of FOIL' ... . An agency is only required to produce "a record reasonably described" (Public Officers Law § 89[3][a]). Contrary to petitioner's contention, the FOIL request for 'complete copies' of communications and documents cannot fairly be read to have implicitly requested metadata associated with those copies." ***Matter of Barry v. O'Neill*, 2020 N.Y. Slip Op. 04007, First Dept 7-16-20**

PERSONAL INJURY, EVIDENCE.

DEFENDANT DID NOT DEMONSTRATE IT DID NOT CREATE THE DANGEROUS CONDITION AND DID NOT DEMONSTRATE IT DID NOT HAVE KNOWLEDGE OF THE CONDITION; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendant's (Stop 1's) motion for summary judgment in this slip and fall case should not have been granted. The decision does not describe the facts but apparently rainfall had something to do with the fall: "Defendant (Stop 1) did not meet its initial burden of demonstrating 'that it neither created a hazardous condition, nor had actual or constructive notice of its existence' ... , as it made no specific, affirmative showing that it did not have actual or constructive notice of the hazardous condition. Defendants failed to establish their prima facie entitlement to summary judgment as they 'failed to offer specific evidence as to their activities on the day of the accident, including evidence indicating the last time [the area in question] was inspected, cleaned, or maintained before [the] fall' ... . Witness Nashwen Nagi testified that he was not in the bodega at the time of plaintiff's accident because he was on vacation, and did not have any knowledge of the accident until Stop 1 received a letter from plaintiff's lawyer. According to Nagi, Stop 1 did not maintain employment or repair records for the bodega. The record in any event raises triable issues of fact sufficient for trial, as the affidavit from a nonparty witness presents an issue as to how long before the accident the rain had started." ***Ruiz v. Stop 1 Gourmet Deli*, 2020 N.Y. Slip Op. 04000, First Dept 7-16-20**

PERSONAL INJURY, EVIDENCE, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

WHETHER THE TRAFFIC ACCIDENT INVOLVING A SALT-SPREADING TRUCK OCCURRED ON A PUBLIC OR PRIVATE PARKING LOT AFFECTED THE APPROPRIATE STANDARD OF CARE UNDER THE VEHICLE AND TRAFFIC LAW, PROOF ON THAT ISSUE SHOULD HAVE BEEN ALLOWED; DEFENDANTS' ACCIDENT RECONSTRUCTIONIST SHOULD HAVE BEEN ALLOWED TO TESTIFY; THE $12 MILLION VERDICT WAS PROPERLY SET ASIDE AS EXCESSIVE.

The First Department, reversing (modifying) Supreme Court, determined a new trial was necessary on both liability and damages in this traffic accident case. Supreme Court had found the $12,000,000 verdict and had ordered a new damages trial. The accident occurred in a parking lot at LaGuardia Airport during a snowfall and involved a salt-spreading truck. Proof whether the parking was public or private should have been allowed because the reckless disregard standard (Vehicle and Traffic Law) would apply if the parking lot was public. The First Department further found that the defendants' accident reconstructionist should have been allowed to testify: "Plaintiff, an employee at a Dunkin Donuts franchise in LaGuardia Airport, was involved in an accident with a salt spreading truck operating in parking lot 10 of the airport during a snowfall. The trial court erred in truncating proof on the issue of whether lot 10 was public or private. This error then directly impacted whether the jury should have been charged with the recklessness standard as set forth in Vehicle and Traffic Law § 1103, or Vehicle and Traffic Law § 1163 ... . The error in the charge warrants a new trial ... . The court also erred in precluding defendants' accident reconstructionist from testifying ... . The court's in limine inquiry of the expert concerning scientific studies was not relevant, as the subject of the testimony, accident reconstruction and perception reaction time are not novel scientific theories, such as to require a Frye hearing ... . The proposed expert testimony was based on evidence in the record concerning the accident, and was not entirely speculative ... . Similarly, defendants' notice of expert exchange was not insufficient such as to warrant his in toto preclusion. The remedy for any alleged failures in specificity could have been handled by limiting his testimony to the subject matters listed in the exchange (CPLR 3101[d])." ***Cabrera v. Port Auth. of N.Y. & N.J.*, 2020 N.Y. Slip Op. 03993, First Dept 7-16-20**

SECOND DEPARTMENT

ATTORNEYS, CONTRACT LAW.

SUSPENDED ATTORNEY ENTITLED TO QUANTUM MERUIT COMPENSATION FOR WORK DONE PRIOR TO THE SUSPENSION.

The Second Department, reversing Supreme Court, determined a suspended attorney was entitled to quantum meruit compensation for work done prior to the suspension. The matter was remitted for a hearing to determine the appropriate amount of compensation: "The nonparty-appellant, a suspended attorney, contends that he is entitled to legal fees in quantum meruit for work performed on behalf of the plaintiff in this personal injury action prior to his suspension from the prac-

tice of law; the suspension was unrelated to his representation of the plaintiff in this action. The Supreme Court should have granted the appellant's motion for that relief. 22 NYCRR 1240.15(g) of the rules for attorney disciplinary matters provides as follows: 'Compensation. A respondent who has been disbarred or suspended from the practice of law may not share in any fee for legal services rendered by another attorney during the period of disbarment or suspension but may be compensated on a quantum meruit basis for services rendered prior to the effective date of the disbarment or suspension. On motion of the respondent, with notice to the respondent's client, the amount and manner of compensation shall be determined by the court or agency where the action is pending or, if an action has not been commenced, at a special term of the Supreme Court in the county where the respondent maintained an office. The total amount of the legal fee shall not exceed the amount that the client would have owed if no substitution of counsel had been required' ...". ***Ragland v. Molloy*, 2020 N.Y. Slip Op. 03933, Second Dept 7-15-20**

CIVIL PROCEDURE, JUDGES.

THE COURT'S ORDER DIRECTING PLAINTIFFS TO FILE A NOTE OF ISSUE DID NOT COMPLY WITH THE CRITERIA FOR A 90-DAY NOTICE PURSUANT TO CPLR 3216; THE COURT SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT.

The Second Department, reversing Supreme Court, determined plaintiffs' motion to restore the action to active status and to extend the time to serve and file a note of issue should have been granted. Supreme Court, after a compliance conference, directed plaintiffs to file a note of issue by August 4, 2016, which was 21 days from the date of the compliance conference order. The compliance order therefore did not meet the statutory criteria for a valid 90-day notice pursuant to CPLR 3216. Supreme Court should not have, sua sponte, directed dismissal of the complaint pursuant to CPLR 3216: "The compliance conference order dated July 14, 2016, did not constitute a valid 90-day demand pursuant to CPLR 3216 because it directed the plaintiffs to file a note of issue within 21 days, rather than 90 days, of the date of the order ... . Furthermore, the compliance conference order failed to set forth any specific conduct constituting neglect by the plaintiffs in proceeding with the litigation (see CPLR 3216[b][3] ...). In addition, the Supreme Court failed to give the parties notice and an opportunity to be heard prior to, sua sponte, directing dismissal of the complaint pursuant to CPLR 3216 ... . Since the statutory preconditions to dismissal were not met, the Supreme Court should not have, sua sponte, directed dismissal of the complaint pursuant to CPLR 3216 ... . Contrary to the respondents' contention, this action could not have properly been dismissed pursuant to CPLR 3126, since there was no motion requesting this relief ...". ***Christiano v. Heatherwood House at Holbrook II, LLC*, 2020 N.Y. Slip Op. 03891, Second Dept 7-15-20**

CORPORATIONS, CIVIL PROCEDURE, FORECLOSURE.

DEFENDANT DID NOT DEMONSTRATE THE FOREIGN CORPORATION WAS DOING BUSINESS IN NEW YORK WITHOUT AUTHORIZATION; DEFENDANT'S MOTION TO DISMISS THE COMPLAINT IN THIS FORECLOSURE ACTION ON THAT GROUND SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined a defendant in this foreclosure action brought by a foreign corporation did not demonstrate the corporation was doing business in New York without authorization. Therefore defendant's motion to dismiss the complaint on that ground should not have been granted: " 'Business Corporation Law § 1312(a) constitutes a bar to the maintenance of an action by a foreign corporation found to be doing business in New York without . . . the required authorization to do business there' ... . 'The purpose of that section is to regulate foreign corporations which are doing business' within the State, not . . . to enable the avoidance of contractual obligations' ... . '[T]he party relying upon this statutory barrier bears the burden of proving that the corporation's business activities in New York were not just casual or occasional, but so systematic and regular as to manifest continuity of activity in the jurisdiction'... . '[A]bsent proof establishing that the [subject corporation] is doing business in New York, it is presumed that [it] is doing business in [the] State of incorporation, and not in New York' ... . The defendant failed to establish, prima facie, that '[the appellant] conducted continuous activities in [New York] essential to its corporate business' ... . Therefore, 'the presumption that [the appellant] does business, not in New York but in its State of incorporation has not been overcome ...". ***JPMorgan Chase Bank, N.A. v. Didato*, 2020 N.Y. Slip Op. 03903, Second Dept 7-15-20**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

THE EX PARTE ORDER ALLOWING THE PROSECUTOR TO SEIZE AND READ DEFENDANT'S NON-LEGAL MAIL DID NOT REQUIRE DISQUALIFICATION OF THE PROSECUTOR OR A MISTRIAL; THE PROSECUTOR'S DEMONSTRATION OF THE OPERATION OF THE MURDER WEAPON (A KNIFE) DID NOT WARRANT A MISTRIAL; AND THE FAILURE TO NOTIFY THE COURT AND THE ATTORNEYS OF THE JURY NOTE REQUESTING THE EXAMINATION OF THE KNIFE WAS NOT AN *O'RAMA* VIOLATION AND DID NOT WARRANT A MISTRIAL.

The First Department, in a full-fledged opinion by Justice Oing, affirmed defendant's murder conviction after addressing several unusual issues in depth: (1) The prosecutor obtained a ex parte order allowing the opening and reading of defendant's non-legal mail to determine whether defendant was threatening an eyewitness. After reading two batches of mail, the prosecutor determined no threats were being made, informed defense counsel of the order and turned the mail over

to defense counsel. The First Department determined there were no related grounds for disqualifying the prosecutor or for granting a mistrial. (2) When the defendant was on the stand he denied knowing the knife (murder weapon) could be flipped open with one hand. During her questioning the prosecutor demonstrated that the knife could be flipped open. The Second Department determined the "prosecutor-as-an-unsworn witness" argument did not warrant a mistrial, in part because of the curative instructions to the jury. (3) The knife was brought into the jury room after a request from the jury about which the court and the attorneys were not made aware. The judge and the attorneys had agreed that the jury's examination of the knife would be allowed and the examination was done according to the agreed procedure. This was not an *O'Rama* violation because it involved only the examination of a physical object, not an instruction or the substance of any trial evidence. Therefore a mistrial on this ground was not warranted. ***People v. Jenkins*, 2020 N.Y. Slip Op. 04014, First Dept 7-16-20**

CRIMINAL LAW, JUDGES.

JUSTIFICATION DEFENSE JURY INSTRUCTION WAS NOT SUFFICIENT; NEW TRIAL MUST BE BEFORE A DIFFERENT JUDGE BECAUSE OF THE JUDGE'S EXCESSIVE INVOLVEMENT.

The Second Department, reversing defendant's convictions for assault second and criminal possession of a weapon fourth degree, determined: (1) the jury charge did not adequately convey that if the jury acquitted on the top count (assault first) based upon the justification defense, it must not consider the lesser counts; and (2) the new trial must be before a different judge because of the judge's excessive involvement. The jury acquitted defendant of assault first: "... [T]he Supreme Court's jury charge failed to adequately convey to the jury that if it found the defendant not guilty of assault in the first degree based on justification, then 'it should simply render a verdict of acquittal and cease deliberation, without regard to' assault in the second degree and criminal possession of a weapon in the fourth degree ... . Thus, the court's instructions may have led the jurors to conclude that deliberation on each of the two counts required reconsideration of the justification defense, even if they had already acquitted the defendant of assault in the first degree based on justification ... . Because we cannot say with any certainty and there is no way of knowing whether the acquittal on assault in the first degree was based on a finding of justification, a new trial is necessary ... . In light of the defendant's acquittal on the charge of assault in the first degree, the highest offense for which the defendant may be retried is assault in the second degree ... . In this case, the new trial must be before a different Justice. At trial, the Supreme Court engaged in extensive questioning of witnesses, usurped the roles of the attorneys, elicited and assisted in developing facts damaging to the defense on direct examination of the People's witnesses, bolstered the witnesses' credibility, and generally created the impression that it was an advocate for the People ...". ***People v. Savillo*, 2020 N.Y. Slip Op. 03928, Second Dept 7-15-20**

FAMILY LAW, CIVIL PROCEDURE.

ALTHOUGH MOTHER WAS GENERALLY AWARE FATHER HAD MOVED TO DELAWARE, FATHER DID NOT SPECIFY AN AGENT FOR SERVICE AS REQUIRED BY THE FAMILY COURT ACT; THEREFORE SERVICE OF MOTHER'S OBJECTIONS TO THE SUPPORT MAGISTRATE'S ORDER AT FATHER'S LAST KNOWN ADDRESS WAS PROPER.

The Second Department, reversing Family Court, determined mother's objections to the Support Magistrate's order should not have been rejected on the ground father was not properly served. The papers were served at father's prior address in Brooklyn. Although mother was aware father may live in Delaware from representation made to the court, father did not specify an agent for service as required by Family Court Act. Therefore service at father's last know address was proper: " 'Family Court Act § 439(e) provides, in pertinent part, that [a] party filing objections shall serve a copy of such objections upon the opposing party,' and that [p]roof of service upon the opposing party shall be filed with the [Family Court] at the time of filing of objections and any rebuttal' ... . Here, the mother served her objections upon the father at an address in Brooklyn, which was the same address she listed for the father in her petition. The court rejected the proof of service because, inter alia, the court file reflected a Delaware address for the father. While the mother was generally aware that the father represented to the court that his address was in Delaware, there was no evidence in the record that the address was ever disclosed to the mother. Moreover, following the mailing of the original summons to the father's Brooklyn address, he filed an Address Confidentiality Affidavit. In his Address Confidentiality Affidavit, the father failed to specify an agent for service, and there was no evidence that the mother ever received notice of an agent for service for the father as required by Family Court Act § 154-b(2)(c). Under these circumstances, the mother had insufficient notice of the father's purported new address in Delaware and lacked notice of an agent for service for the father. Therefore, service upon the father at the address last known to the mother was proper (see CPLR 2103[b][2] ...)." ***Matter of Deyanira P. v. Rodolfo P.-B.*, 2020 N.Y. Slip Op. 03918, Second Dept 7-15-20**

FORECLOSURE, CIVIL PROCEDURE.

SUPREME COURT SHOULD NOT HAVE CONFIRMED THE REFEREE'S REPORT ABSENT A HEARING.

The Second Department, reversing Supreme Court, determined the referee's report should not have been confirmed in the absence of a hearing on notice to the property owner, TEP: "... [T]he Supreme Court should not have confirmed the referee's report in the absence of a hearing on notice to TEP (see CPLR 4313 ...). Although the notice accompanying the plaintiff's proposed referee's oath notified TEP of the due date for the submission of documents to the referee, it did not indicate that the submission of such papers would be in lieu of a hearing ... . Further, the Supreme Court erred in rejecting TEP's contention, raised in opposition to the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale, that ' [t]he referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record inasmuch as the computation was premised upon unproduced business records' ... . Moreover, the referee's report also failed to identify any documents or other sources upon which the referee based her finding that the mortgaged premises should be sold in one parcel ...". ***HSBC Bank USA, N.A. v. Tigani*, 2020 N.Y. Slip Op. 03901, Second Dept 7-15-20**

FORECLOSURE, EVIDENCE.

PLAINTIFF BANK DID NOT DEMONSTRATE IT HAD STANDING TO BRING THE FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined plaintiff bank (US Bank) did not demonstrate it had standing to bring the foreclosure action: "A plaintiff has standing to maintain a mortgage foreclosure action where it is the holder or assignee of the underlying note at the time the action is commenced ... . Here, the plaintiff established that Chase had possession of the note at issue at the time this action was commenced. However, the plaintiff failed to establish that Chase had the authority to act on its behalf at that time ...". ***US Bank N.A. v. Cusati*, 2020 N.Y. Slip Op. 03943, Second Dept 7-15-20**

LANDLORD-TENANT, TRESPASS, NUISANCE, CIVIL RIGHTS LAW.

CAUSES OF ACTION FOR WRONGFUL EVICTION AND TRESPASS WERE PROPERLY ALLEGED.

The Second Department, reversing (modifying) Supreme Court, determined the causes of action against all but two of the defendants should have been dismissed. Defendant alleged she had an arrangement with the landlord which allowed her to stay in the basement of the premises rent-free in exchange for maintenance of the property. When the landlord died, the landlord's wife (Brigitte) changed the locks. The Second Department held that the causes of action for wrongful eviction against the landlord's wife and estate, and the trespass against the landlord's wife, were sufficiently alleged. However, the causes of action for nuisance, invasion of privacy (Civil Rights Law), and false arrest were not sufficiently alleged. The court also noted that there is no civil cause of action for harassment in New York: "... [T]he plaintiff's allegation that she performed maintenance on the building in exchange for the exclusive use and possession of the basement, yard, and two closets, and that this arrangement continued following the expiration of the lease ... , indicated that a month-to-month tenancy was created and was in effect for as long as she remained in possession of the premises (see Real Property Law § 232-c ...), which, according to the complaint, was until March 2017, when she allegedly was wrongfully evicted from the premises. The plaintiff's allegation that in March 2017, Brigitte changed the locks on the door of the building and refused to provide keys to the plaintiff and permitted her entry into the basement through the cellar door only in response to the plaintiff contacting the police in May 2017, suggests that Brigitte, in effect, acting as agent for the estate, resorted to self-help measures to evict the plaintiff from the premises (see RPAPL 711, 853 ...). The complaint, therefore, adequately stated a cause of action alleging wrongful eviction against Brigitte and the estate ... . The plaintiff's allegation that ... Brigitte entered the basement and yard whenever she wanted for no reason and disturbed the plaintiff's personal property in the basement sufficiently stated a cause of action alleging trespass ...". ***Trec v. Cazares*, 2020 N.Y. Slip Op. 03941, Second Dept 7-15-20**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

DEFENDANT DOCTORS' MOTIONS FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN GRANTED; ONE DOCTOR DID NOT DEMONSTRATE HE DID NOT PARTICIPATE IN THE RESUSCITATION OF THE NEWBORN; THERE WAS A QUESTION OF FACT WHETHER A SECOND DOCTOR EMPLOYED THE PROPER RESUSCITATION METHOD.

The Second Department, reversing Supreme Court, determined the summary judgment motions brought by two defendant doctors in this medical malpractice action should not have been granted. Essentially the alleged malpractice concerned the resuscitation of plaintiffs' baby, E.K., in the seconds and minutes after birth. There were questions of fact about whether Dr. De Christofaro participated in the resuscitation efforts. And there were questions of fact whether Dr. Aleti-Jacobs used a proper resuscitation method: "De Christofaro failed to demonstrate his prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against him. The expert affirmations submitted in support of De Christofaro's motion failed to address, inter alia, the plaintiffs' allegation i... that De Christofaro departed from the standard of care with regard to the resuscitation and intubation that took place in the minutes following E. K.'s birth. In particular, De Christofaro failed to eliminate triable issues of fact regarding his level of participation in the resuscitation and intubation of

E. K. ... . While De Christofaro testified at his deposition that there was nothing in E. K.'s medical records indicating that he was present in the delivery room during the intubation of E. K., the record does not conclusively establish his absence ... . Critically, De Christofaro testified that he could not place an exact time at which he first became involved in E. K.'s care, that he 'most certainly could have been there and helped in the resuscitation,' and that he could not recall the circumstances regarding E. K.'s intubation or who performed the intubation. ... [T]he plaintiffs raised a triable issue of fact through the affirmation of their expert, who opined, inter alia, that Aleti-Jacobs breached the standard of care by administering PPV [positive pressure ventilation] to E. K. upon his birth rather than immediately intubating him. The plaintiffs' expert opined that a baby, such as E. K., who was born with an Apgar score of one should have been intubated 'within the first 15 to 20 second[s] of life.' According to one hospital record, E. K. was not successfully intubated until four minutes after his birth. Additionally, the plaintiffs' expert's opinion was sufficient to raise a triable issue of fact as to whether the alleged failure to timely intubate E. K. was a proximate cause of his injuries." ***E.K. v. Tovar*, 2020 N.Y. Slip Op. 03904, Second Dept 7-15-20**

PERSONAL INJURY.

DEFENDANT DID NOT DEMONSTRATE THE RUNG ON THE SIDE OF A DUMPSTER, WHICH WAS ALLEGED TO HAVE CAUSED PLAINTIFF'S SLIP AND FALL, WAS NOT DANGEROUS, AND DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE CONDITION; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that defendant's motion fore summary judgment in this slip and fall case should not have been granted. Plaintiff alleged he slipped and fell because the top rung on the side of a dumpster was bent: "... [t]he defendant failed to establish its prima facie entitlement to judgment as a matter of law. The evidence submitted by the defendant in support of its motion, including a transcript of the plaintiff's deposition testimony and a photograph of the dumpster, failed to establish, prima facie, that the top rung of the dumpster was not in a hazardous condition ... , or that the plaintiff did not know what caused him to fall … . The defendant also failed to establish, prima facie, that it did not have constructive notice of the alleged hazardous condition of the top rung of the dumpster. The defendant did not submit any evidence as to when the dumpster was last inspected prior to the incident, and given the photographic evidence, it cannot be said as a matter of law that the alleged hazardous condition was not visible and apparent, and had not existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it ... . In addition, the defendant failed to establish, prima facie, that the plaintiff was the sole proximate cause of the accident ... ". ***Rosales v. Five Star Carting, Inc.*, 2020 N.Y. Slip Op. 03934, Second Dept 7-15-20**

PERSONAL INJURY.

THE DEMONSTRATION THAT THE APPELLANTS' VEHICLE WAS STOPPED WHEN IT WAS STRUCK FROM BEHIND WAS SUFFICIENT TO WARRANT SUMMARY JUDGMENT IN APPELLANTS' FAVOR.

The Second Department, reversing Supreme Court, determined appellants' motion for summary judgment in this rear-end collision case should have been granted. Appellants demonstrated their vehicle was stopped when it was struck from behind by a vehicle driven by Bruce. Bruce's assertion that appellant's vehicle made a sudden stop was not sufficient to raise a question of fact: "The appellants established their prima facie entitlement to judgment as a matter of law dismissing the second amended complaint and all cross claims insofar as asserted against them by demonstrating that their vehicle was stopped when it was struck in the rear by the vehicle operated by Bruce ... . Bruce's bare assertion that the appellants' vehicle made a sudden stop, without more, was insufficient to raise a triable issue of fact as to whether ... the operator of the appellants' vehicle, was partly at fault, so as to defeat summary judgment ...". ***Ross v. JFC Intl., Inc.*, 2020 N.Y. Slip Op. 03935, Second Dept 7-15-20**

PERSONAL INJURY.

THE CASINO WHERE PLAINTIFF WAS DRINKING WITH THE MAN WHO ASSAULTED HER AFTER SHE LEFT THE CASINO DID NOT OWE A DUTY TO PLAINTIFF AFTER SHE LEFT THE PREMISES.

The Second Department determined the defendant casino's motion for summary judgment in this third-party assault case was properly granted. Plaintiff alleged she was drinking in defendant casino and left with the man who had brought her drinks. The man sexually assaulted the plaintiff in a car: "A cause of action alleging negligence 'must be founded upon a breach by a defendant of a legal duty owed to a plaintiff' ... . 'Landowners in general have a duty to act in a reasonable manner to prevent harm to those on their property' ... . 'In particular, they have a duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control' ... . However, a landowner's duty is 'limited to conduct on its premises, which it had the opportunity to control, and of which it was reasonably aware' ... . Here, the defendant demonstrated, prima facie, that it did not owe a legal duty to the plaintiff with respect to her subsequent, off-premises sexual assault perpetrated by a man she met at a casino bar earlier in the evening ...". ***Stenson v. Genting N.Y., LLC*, 2020 N.Y. Slip Op. 03939, Second Dept 7-15-20**

PERSONAL INJURY.

CONTRACTOR WHICH WAXED THE FLOOR WHERE PLAINTIFF ALLEGEDLY SLIPPED AND FELL DID NOT OWE PLAINTIFF A DUTY OF CARE BECAUSE IT WAS NOT DEMONSTRATED THE CONTRACTOR LAUNCHED AN INSTRUMENT OF HARM.

The Second Department, reversing Supreme Court, determined the contractor which waxed the floor where plaintiff allegedly slipped and fell did not owe a duty of care to the plaintiff because it was not demonstrated the contractor launched an instrument of harm (*Espinal* factor): " .Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party' (Espinal v. Melville Snow Contrs., 98 NY2d 136, 138). Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party ... . 'A contractor may be said to have assumed a duty of care and, thus, be potentially liable in tort, to third persons when the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm' ... . 'Where such a duty is alleged, a defendant contractor moving for summary judgment has the burden of eliminating all material issues of fact, and establishing conclusively, that it did not launch a force or instrument of harm by negligently creating the dangerous or defective condition complained of' ... . 'A defendant may not be held liable for the application of wax, polish, or paint to a floor . . . unless the defendant had actual, constructive, or imputed knowledge' that the product could render the floor dangerously slippery' ... . 'In the absence of evidence of a negligent application of floor wax or polish, the mere fact that a smooth floor may be shiny or slippery does not support a cause of action to recover damages for negligence, nor does it give rise to an inference of negligence' ...". ***Union v. Excel Commercial Maintenance*, 2020 N.Y. Slip Op. 03942, Second Dept 7-15-20**

PERSONAL INJURY, CIVIL PROCEDURE, LANDLORD-TENANT.

CAUSE OF ACTION AGAINST THE LANDOWNER FOR A SLIP AND FALL IN THE LESSEE'S SHOPPING CENTER PARKING LOT SHOULD NOT HAVE BEEN DISMISSED BECAUSE THE LANDOWNER HAD SOME REPAIR RESPONSIBILITIES UNDER THE LEASE; ALTHOUGH THE ORIGINAL SUMMONS AND COMPLAINT DESCRIBED THE WRONG PROPERTY ADDRESS, THE AMENDED COMPLAINT, SERVED AFTER THE EXPIRATION OF THE STATUTE OF LIMITATIONS, WAS TIMELY UNDER THE RELATION-BACK DOCTRINE.

The Second Department, reversing (modifying) Supreme Court, determined the complaint against the landowner in this slip and fall case should not have been dismissed. Plaintiff allegedly slipped and fell in the parking lot of a shopping center. Plaintiff sued the landowner three days before the statute of limitations expired. The property address of the shopping center was wrong on the original summons and complaint. A couple of months later plaintiff served a supplemental summons and amended complaint which corrected the address and added defendants. The cause of action against the landowner should not have been dismissed because the lease gave the property owner some authority over keeping the premises safe and because the relation-back theory rendered the amended complaint timely. The causes of action against the added defendants were deemed time-barred because the relation-back doctrine did not apply to them: "A motion to dismiss a cause of action pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes the plaintiff's allegations, thereby conclusively establishing a defense as a matter of law ... . Here, the defendants' own affidavits do not constitute documentary evidence within the meaning of CPLR 3211(a)(1) ... , and the ground lease between them and Stavan, Inc., failed to utterly refute the plaintiff's factual allegations. 'Generally, a landowner owes a duty of care to maintain his or her property in a reasonably safe condition' ... . Although 'a landowner who has transferred possession and control is generally not liable for injuries caused by dangerous conditions on the property' ... , and, here, the lease required the lessee to 'keep [the subject property] in good repair' and 'make or cause to be made any and all repairs both inside and outside,' the lease also gave the defendants the right to reenter the subject property and 'perform and do such acts and things, and make such payments and incur such expenses as may be reasonably necessary to make . . . repairs to comply with the requirements' under the lease. Thus, the lease failed to conclusively establish a defense as a matter of law ... . 'The linchpin' of the relation-back doctrine is whether the new defendant had notice within the applicable limitations period' ... . Here, the plaintiff failed to demonstrate that the relation-back doctrine applied inasmuch as she did not establish that the additional defendants had knowledge of the claim or occurrence within the applicable limitations period, and that her failure to name them as defendants in the original complaint was due to a mistake on her part ... . ***Pirozzi v. Garvin*, 2020 N.Y. Slip Op. 03932, Second Dept 7-15-20**

PERSONAL INJURY, EVIDENCE.

EVIDENCE THE AREA WAS INSPECTED ONCE A MONTH DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE CONDITION OF THE DRIVEWAY IN THIS SLIP AND FALL CASE; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court in this slip and fall case, determined there were questions of fact about the cause of the fall (cracks in the asphalt), whether the defendant had notice of the condition, and whether the defect was trivial. Evidence the area was inspected once a month was no sufficient. Therefore defendant's motion for summary

judgment should not have been granted: "The defendant ... failed to establish, prima facie, that it did not have constructive notice of the alleged hazardous condition of the driveway ... . To meet its initial burden to show a lack of constructive notice, the defendant must offer probative evidence demonstrating a proximity in time between when the area in question was last cleaned or inspected relative to the time when the plaintiff fell ... . The affidavit of the defendant's maintenance worker submitted in support of the defendant's motion referred only to his general inspection practices but did not refer to any specific inspection in the area of the plaintiff's fall relative to the date of the incident. Another employee of the defendant averred in an affidavit that she had inspected the driveway approximately seven weeks prior to the plaintiff's fall and found all routes were clear of obstructions. She also averred that the defendant's maintenance department inspected the driveway at least once per month. This evidence was insufficient to establish, prima facie, lack of constructive notice ... . The defendant also failed to establish its prima facie entitlement to judgment as a matter of law on the basis that the alleged defect was trivial. The defendant failed to establish, prima facie, that the cracked condition of the driveway was trivial as a matter of law, and thus, nonactionable ...". ***Croshier v. New Horizons Resources, Inc.*, 2020 N.Y. Slip Op. 03892, Second Dept 7-15-20**

PERSONAL INJURY, LANDLORD-TENANT.

THE LANDLORD AND PROPERTY MANAGER DEMONSTRATED THE POWER-OPERATED DOOR WHICH ALLEGEDLY STRUCK PLAINTIFF WAS NOT DEFECTIVE AND THEY HAD NO NOTICE OF ANY DEFECTS.

The Second Department determined the landlord (North Shore Towers) and the property manager (Greenthal Management) demonstrated the power-operated door which allegedly struck plaintiff as she walked through the doorway was not defective. Therefore the defendants' motion for summary judgment was properly granted: "A landowner has a duty to maintain its property in a reasonably safe condition to prevent the occurrence of foreseeable injuries ... . 'In order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence' ... . Here, North Shore Towers and Greenthal Management established their prima facie entitlement to judgment as a matter of law by demonstrating that the subject door did not constitute a dangerous or defective condition ... .. In support of their motion, they submitted evidence that they conducted daily inspections of the door, that the door activating system had been fully replaced two months before the incident, that, after the new system had been installed, there had been no complaints of the door malfunctioning prior to the incident, and that the door functioned in accordance with industry standards.' ***Alkon v. North Shore Towers Apts. Inc.*, 2020 N.Y. Slip Op. 03883, Second Dept 7-15-20**

PERSONAL INJURY, MUNICIPAL LAW.

WATER VALVE CAP OVER WHICH INFANT PLAINTIFF TRIPPED AND FELL WHILE PLAYING BASKETBALL IN THE STREET WAS A TRIVIAL DEFECT AS A MATTER OF LAW.

The Second Department, affirming Supreme Court but on different grounds, determined the water valve cap over which infant plaintiff allegedly slipped (tripped) and fell while playing basketball in the street was a nonactionable trivial defect. Supreme Court had granted the city's motion for summary judgment on the ground the city did not receive written notice of the defect: "Generally, the issue of whether a dangerous or defective condition exists depends on the facts of each case and is a question of fact for the jury ... . However, a property owner 'may not be held liable for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip' ... . 'In determining whether a defect is trivial, the court must examine all of the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury' ... . 'A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses'... . 'Photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable' ... . Here, the defendants established their prima facie entitlement to judgment as a matter of law by submitting, inter alia, a transcript of the deposition testimony of the infant plaintiff's father, photographs, and a transcript of the infant plaintiff's deposition testimony describing the time, place, and circumstances of the injury. This evidence established, prima facie, that the alleged defect was trivial as a matter of law and did not possess the characteristics of a trap or nuisance, and therefore, was not actionable ...". ***Acevedo v. City of Yonkers*, 2020 N.Y. Slip Op. 03881, Second Dept 7-15-20**

REAL PROPERTY TAX LAW.

CALIFORNIA NONPROFIT WHICH PURCHASED PROPERTY IN THE TOWN OF ISLIP WAS ENTITLED TO AN EXEMPTION FROM PROPERTY TAX; HOWEVER IF A PORTION OF THE PROPERTY IS USED FOR OTHER PURPOSES, THE EXEMPTION WOULD BE PARTIAL.

The Second Department determined the California nonprofit corporation which places international students with families in the United State was entitled to tax exempt status with respect to real estate purchased in the Town of Islip, New York. However, with respect to a building on the property, the exempt status would apply only to those portions of the building used by the corporation and would not apply to portions leased for other purposes: "Under RPTL [Real Property Tax

Law] 420-a, even when the property owner is shown to have an exempt purpose, the owner must still demonstrate that the property is used exclusively for that exempt purpose ... . Within the context of § 420-a, whether the property is being used exclusively for statutory exempt purposes depends on whether the primary use of the property is in furtherance of permitted purposes ... . Here, it is undisputed that the petitioner uses the property as its headquarters, in furtherance of its exempt purpose. However, the property is improved with a two-story office building measuring more than 17,700 square feet, and there are no record facts as to what portion of the building is actually used by the petitioner in furtherance of its purpose ... . In addition, the petitioner indicated on its application that it plans to lease 2,500 square feet of the property to a tenant. RPTL 420-a(2) provides that '[i]f any portion of such real property is not so used exclusively to carry out thereupon one or more of such purposes but is leased or otherwise used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be exempt,' unless the tenant and its use of the property is also exempt from taxation. Therefore issues of fact exist as to whether the petitioner is entitled to a full or partial tax exemption for the property for the tax year 2018/2019." ***Matter of International Student Exch., Inc. v. Assessors Off. of the Town of Islip*, 2020 N.Y. Slip Op. 03911, Second Dept 7-15-20**

THIRD DEPARTMENT

FREEDOM OF INFORMATION LAW (FOIL).

DEPARTMENT OF HEALTH PROPERLY DENIED THE FOIL REQUEST FOR CERTAIN DOCUMENTS ON THE GROUND THE DOCUMENTS WERE NOT 'REASONABLY DESCRIBED.'

The Third Department determined the respondent's (NYS Department of Health's) denial of petitioners' request for certain documents relating to respondents' communications with Ancestry.com concerning death records was properly denied on the ground the requested documents were not "reasonably described" such that they could be located with a "reasonable effort:" "... [R]espondent established that its indexing system did not permit searching either its paper or electronic records by the name of an entity, and that it had no method of searching its correspondence records, whether on paper or in digital form, for the terms provided in petitioners' request. * * * ... [W]e find that respondent satisfied its burden to demonstrate that petitioners' FOIL request did not provide a reasonable description of the records sought that was adequate to permit respondent to identify and locate the requested documents ...". ***Matter of Reclaim the Records v. New York State Dept. of Health*, 2020 N.Y. Slip Op. 03968, Third Dept 7-16-20**

UNEMPLOYMENT INSURANCE.

CLAIMANT FINANCIAL ADVISOR HIRED TO SELL INSURANCE PRODUCTS WAS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department determined claimant financial advisor who entered a written agreement to sell insurance products for Penn Mutual was an employee entitled to unemployment insurance benefits: "Claimant testified that he filled out an application with Penn Mutual, participated in an interview at which his commission rate and initial stipend were discussed, underwent a background check and thereafter signed a full-time soliciting agent's contract ... . Although claimant had to pay a monthly telephone fee, as well as any postage or photocopying costs that he incurred, he was provided a cubicle at Penn Mutual's office, the use of the company's receptionist and the ability to book a conference room, all at no charge to him. Claimant was given an in-house email address as well as letterhead and business cards bearing the agency's name and address. Additionally, claimant was afforded the opportunity to qualify for health/dental insurance ... and to participate in a matching 401(k) program; claimant also initially was covered under Penn Mutual's errors and omissions policy. Claimant acknowledged that he was able to set his own schedule and to sell insurance products other than those offered by Penn Mutual; however, he also testified that he was required to meet with his managing director almost weekly, and that the managing director, in turn, scheduled training workshops that claimant was strongly encouraged to attend, reviewed and, if necessary, corrected the client applications submitted by claimant, directed claimant to develop a business plan and helped him do so, provided feedback on claimant's performance, as set forth in the sales quarterly reports generated by Penn Mutual, and warned him that his contract might not be renewed if his performance was not satisfactory ...". ***Matter of Thorndike (Penn Mut. Life Ins. Co.--Commissioner of Labor)*, 2020 N.Y. Slip Op. 03964, Third Dept 7-16-20**

FOURTH DEPARTMENT

ANIMAL LAW.

COUNTY COURT MISAPPREHENDED THE LAW WHEN IT AFFIRMED TOWN COURT'S ORDER TO EUTHANIZE RESPONDENT'S DOG; MATTER REMITTED TO TOWN COURT.

The Fourth Department, reversing County Court and remitting the matter to Town Court, determined County Court misapprehended the applicable law in affirming Town Court's finding that respondent's dog (Brady) is a dangerous dog and directing the dog be euthanized pursuant to the Agricultural and Markets Law: "... [T]he court repeatedly misstated the

applicable law. Before the hearing commenced, the court stated that, if it determined Brady was a dangerous dog, the court had only 'two options'— euthanasia or permanent confinement. After the hearing, before delivering its decision from the bench, the court stated that it 'can' order euthanasia 'upon a finding the dog is dangerous.' Those statements are subtly different, and both are in error. As discussed above, mere dangerousness does not empower the court to order euthanasia or permanent confinement, which may be imposed only upon the establishment of an aggravating circumstance. Even where an aggravating circumstance is established, euthanasia and permanent confinement are not the court's only options (see Agriculture and Markets Law § 123 [2], [3]). As a result of its mistaken understanding of the applicable law, the court ordered euthanasia without determining whether petitioner had established the existence of an aggravating circumstance and without considering other available relief. We therefore modify County Court's order by vacating that part affirming the order of the Justice Court insofar as it directed that respondent's dog be euthanized, and we remit the matter to the Justice Court for a determination whether petitioner established the existence of an aggravating circumstance and for the imposition of remedial measures as permitted by statute and 'as deemed appropriate under the circumstances; (Agriculture and Markets Law § 123 [2])." ***Matter of Town of Ogden v. LaVilla*, 2020 N.Y. Slip Op. 04032, Fourth Dept 7-17-20**

CONTEMPT, EMPLOYMENT LAW.

BECAUSE PETITIONER WAS REINSTATED IN HER JOB AND BACKPAY HAD BEEN PROVIDED FOR THE PERIOD OF WRONGFUL SUSPENSION BY THE TIME THE CONTEMPT HEARING WAS HELD, PETITIONER COULD NOT SHOW SHE HAD BEEN PREJUDICED BY ANY FAILURE TO COMPLY WITH THE RELEVANT ORDER; THEREFORE THE EMPLOYER SHOULD NOT HAVE HELD IN CONTEMPT.

The Fourth Department, reversing Supreme Court, determined petitioner's employer (NYS Department of Transportation [DOT}]) should not have been held in contempt for the alleged failure to quickly restore petitioner to the payroll and provide backpay because DOT had fulfilled those directives by the time the contempt hearing was held: "... [W]e conclude that the court erred in granting that part of petitioner's motion seeking to have the DOT respondents adjudged in contempt of the October 2015 judgment. 'A finding of civil contempt must be supported by four elements: (1) a lawful order of the court, clearly expressing an unequivocal mandate, was in effect; (2) [i]t must appear, with reasonable certainty, that the order has been disobeyed; (3) the party to be held in contempt must have had knowledge of the court's order, although it is not necessary that the order actually have been served upon the party; and (4) *prejudice* to the right of a party to the litigation must be demonstrated' ... . A movant seeking a contempt order bears the burden of establishing the foregoing elements by clear and convincing evidence ... . We review a court's ruling on a contempt motion for an abuse of discretion ... . Here, we conclude that petitioner failed to show by clear and convincing evidence that the failure of the DOT respondents to immediately comply with the directives of the October 2015 judgment ' defeat[ed], impair[ed], impede[d] or prejudice[d]' ' petitioner's rights ... . We are mindful that '[a]ny penalty imposed [for a civil contempt] is designed not to punish but, rather, to compensate the injured private party or to coerce compliance with the court's mandate or both' ... . By the time the court conducted the hearing on petitioner's contempt motion, it was undisputed that she had been restored to the payroll, was receiving payment, and had been awarded back pay for the time she was wrongly suspended without pay. Thus, the goals of civil contempt would not be furthered by granting petitioner's motion absent any prejudice to her once the relevant DOT respondents complied with the directives of the October 2015 judgment and restored her to paid status." ***Matter of Mundell v. New York State Dept. of Transp.*, 2020 N.Y. Slip Op. 04099, Fourth Dept 7-17-20**

CRIMINAL LAW.

THE PROSPECTIVE JUROR AND A PROSECUTION WITNESS WERE FRIENDS; DEFENDANT'S FOR CAUSE CHALLENGE TO THE JUROR SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing defendant's conviction and ordering a new trial, determined that defendant's for cause challenge to a juror should have been granted. The juror and a prosecution witness were friends: "... [T]he prospective juror gave 'some indication of bias' ... by stating that her friendship with a prosecution witness 'might' 'affect [her] ability to be fair and impartial in this case' and that serving as a juror 'might be awkward' in light of that friendship ... .Contrary to the court's determination, the prospective juror did not give an unequivocal assurance of impartiality by merely stating, during follow-up questioning, that she would not feel compelled to 'answer' to the witness for her verdict. The fact that a prospective juror would not feel compelled to answer to another person for their verdict does not necessarily mean that such prospective juror 'can be fair' ... . Indeed, a person could be unable to judge a case impartially while simultaneously being confident that he or she would not have to answer for the verdict to any other person. Thus, the prospective juror's assurances that she would not feel compelled to answer to the witness for her verdict does not constitute the unequivocal assurance of impartiality required by law." ***People v. Cobb*, 2020 N.Y. Slip Op. 04055, Fourth Dept 7-17-20**

CRIMINAL LAW.

DEFENDANT'S SENTENCE FOR MANSLAUGHTER REDUCED BASED UPON DEFENDANT'S BACKGROUND, REMORSE AND LACK OF A CRIMINAL HISTORY.

The Fourth Department reduced defendant's sentence for manslaughter based upon his background, remorse, and lack of a criminal history: "... [T]he 24-year determinate sentence is unduly harsh and severe considering, inter alia, defendant's background, genuine show of remorse, and lack of prior criminal history. Thus, we modify the judgment as a matter of discretion in the interest of justice by reducing the sentence to a determinate term of imprisonment of 19 years and five years of postrelease supervision, which falls within the sentence range negotiated by the parties ...". ***People v. Jeffords*, 2020 N.Y. Slip Op. 04037, Fourth Dept 7-17-20**

CRIMINAL LAW, APPEALS.

DECISION ON APPEAL RESERVED AND MATTER REMITTED FOR A DETERMINATION WHETHER DEFENDANT SHOULD BE AFFORDED YOUTHFUL OFFENDER STATUS.

The Fourth Department, reserving decision on the appeal and remitting the matter, determined County Court should have ruled on whether defendant should be afforded youthful offender status: "Pursuant to CPL 720.10 (2) (a) (ii) and (3), because defendant was convicted of an armed felony offense (see CPL 1.20 [41]), he is ineligible for a youthful offender adjudication unless the court determines that one of two mitigating factors is present. 'If the court, in its discretion, determines that neither of the CPL 720.10 (3) factors is present and states the reasons for that determination on the record, then no further determination is required' (... see People v. Middlebrooks, 25 NY3d 516, 527 [2015]). 'If, on the other hand, the court determines that one or more of those factors are present, and therefore defendant is an eligible youth, the court then must determine whether he is a youthful offender' ... . As the People correctly concede, the court failed to follow the procedure set forth in Middlebrooks." ***People v. Williams*, 2020 N.Y. Slip Op. 04092, Fourth Dept 7-17-20**

CRIMINAL LAW, APPEALS.

THE BURGLARY PLEA COLLOQUY DID NOT INDICATE DEFENDANT INTENDED TO COMMIT A CRIME OTHER THAN TRESPASS IN THE PREMISES; THEREFORE THE COLLOQUY NEGATED AN ESSENTIAL ELEMENT OF THE CRIME; PRESERVATION FOR APPEAL IS NOT REQUIRED FOR THIS GENRE OF ERROR.

The Fourth Department vacated defendant's plea to burglary because the colloquy negated an essential element of the offense. The court noted that this type of error does not require preservation for appeal. The intent to commit burglary includes the intent to commit a crime in the premises other than trespass: "Although we agree with the People that defendant failed to preserve his contention for our review because he did not move to withdraw the plea or to vacate the judgment of conviction on that ground ... , this case nevertheless falls within the rare exception to the preservation requirement ... . Where a defendant's recitation of the facts 'negates an essential element of the crime pleaded to, the court may not accept the plea without making further inquiry to ensure that [the] defendant understands the nature of the charge and that the plea is intelligently entered' ... . Here, defendant's factual recitation negated at least one element of the crime. Specifically, defendant negated the 'intent to commit a crime therein' element of burglary (Penal Law § 140.25) because his factual recitation contradicted any allegation that 'he intended to commit a crime in the apartment other than his trespass' (... see § 140.25). Criminal trespass in the second degree 'cannot itself be used as the sole predicate crime in the intent to commit a crime therein' element of burglary' ... . The court thus had a duty to conduct an inquiry to ensure that defendant understood the nature of the crime ... . Instead, the court stated, 'I just want to make sure . . . [that] you still accept [the plea deal], because you have an absolute right to go to trial . . . I think you understand . . . [t]hat your defense of you going to the bathroom may be a difficult sell to a jury.' Because that minimal inquiry by the court did not clarify the nature of the crime in order to ensure that the plea was intelligently entered, the court erred in accepting the guilty plea." ***People v. Hernandez*, 2020 N.Y. Slip Op. 04049, Fourth Dept 7-17-20**

CRIMINAL LAW, APPEALS.

ALTHOUGH THE 'LEGALLY INSUFFICIENT EVIDENCE' ISSUE WAS NOT PRESERVED BY THE MOTION FOR A TRIAL ORDER OF DISMISSAL, THE APPEAL WAS HEARD IN THE INTEREST OF JUSTICE; THE ELEMENT OF RECKLESSNESS IN THIS ASSAULT CASE WAS LEGALLY INSUFFICIENT; INDICTMENT DISMISSED.

The Fourth Department, reversing defendant's assault convictions and dismissing the indictment, determined the evidence of recklessness was legally insufficient. Although the issue was not preserved by the motion for a trial order of dismissal, the appeal was heard in the interest of justice. The facts were not described: "Defendant failed to preserve that contention for our review, however, 'because [her] motion for a trial order of dismissal was not specifically directed at the ground[] advanced on appeal' ... . We nevertheless exercise our power to review her challenge as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). We agree with defendant that the conviction of both counts of assault in the third degree is not supported by legally sufficient evidence ... . The evidence submitted by the People is insufficient to establish that defendant acted recklessly, 'i.e., that [s]he perceived a substantial and unjustifiable risk of [injury] and that [her] conscious

disregard of that risk constituted a gross deviation from the standard of conduct that a reasonable person would observe in that situation' ...". ***People v. Romeiser*, 2020 N.Y. Slip Op. 04054, Fourth Dept 7-17-20**

CRIMINAL LAW, ATTORNEYS.

THE INITIAL PROSECUTOR IN DEFENDANT'S CASE BECAME THE TRIAL JUDGE'S LAW CLERK; DEFENDANT WAS NOT INFORMED AND WAIVED HIS RIGHT TO A JURY TRIAL; THE WAIVER WAS NOT 'KNOWINGLY' AND 'INTELLIGENTLY' MADE.

The Fourth Department, reversing Supreme Court, determined defendant's motion to vacate his conviction after a bench trial should have been granted. The initial prosecutor in defendant's case became the trial judge's law clerk. Defendant was never informed and waived his right to a jury trial. Defendant argued he would not have waived a jury trial had he known the former prosecutor was the trial judge's law clerk: "The evidence at the hearing established that the prosecutor who appeared for over six months on the People's behalf during the preliminary proceedings in this case was subsequently appointed to serve as the trial court's confidential law clerk. When the law clerk brought that conflict to the trial court's attention, the trial court appropriately screened the law clerk off from any participation in this case. When defendant sought to waive his right to a jury trial and to be tried by the court alone, however, the trial court—which had recognized the conflict and had already taken steps to mitigate it—failed to inform defendant that its law clerk had previously prosecuted defendant in this case. Moreover, although defense counsel was aware of the law clerk's prior role as prosecutor, it is undisputed that defense counsel failed to inform defendant of that fact. Defense counsel subsequently admitted that, had he recalled the fact that the prosecutor had become the trial court's law clerk, he would have advised defendant to retain his right to a jury trial. Additionally, defendant testified at the posttrial hearing that he would not have waived his right to a jury trial had he been aware of the fact that his former prosecutor was now serving as the trial court's law clerk. Contrary to the motion court's determination, defendant's testimony in that regard was not incredible. Indeed, defendant identified rational, case-specific reasons why he distrusted the fairness of the law clerk. Under the unique circumstances of this case, we conclude that defendant's waiver of his right to a jury trial, which was made when he was the only participant in the waiver proceeding who was ignorant of the fact that his former prosecutor had become the trial judge's legal advisor, was not tendered 'knowingly and understandingly' and was not 'based on an intelligent, informed judgment' ...". ***People v. Mineccia*, 2020 N.Y. Slip Op. 04028, Fourth Dept 7-17-20**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH SECONDARY EVIDENCE (HEARSAY TESTIMONY) AND EXTRINSIC DOCUMENTARY EVIDENCE ARE NOT ADMISSIBLE FOR COLLATERAL MATTERS LIKE IMPEACHING CREDIBILITY, SUCH EVIDENCE IS ADMISSIBLE WHEN IT IS RELEVANT TO A CORE ISSUE; HERE THE CONTENTS OF A NOTE PRESENTED TO A BANK EMPLOYEE WAS RELEVANT TO THE 'THREATENED USE OF FORCE ' ELEMENT OF ROBBERY.

The Fourth Department, reversing defendant's robbery conviction and ordering a new trial on that count, determined the defendant should have been allowed to present a witness to demonstrate the note he presented to the bank employee did threaten the use of force (an element of the robbery charge). The Fourth Department noted that secondary evidence (hearsay testimony) and extrinsic documentary evidence, which is prohibited for collateral issues, may be admissible when the evidence is relevant to a core issue: " 'It is well established that the party who is cross-examining a witness cannot introduce extrinsic documentary evidence or call other witnesses to contradict a witness' answers concerning collateral matters solely for the purpose of impeaching that witness' credibility' ... . That rule, however, '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 jury 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' ' ... . Here, defendant sought to call a witness whose testimony related to the content of the note defendant presented to the bank employee in the first incident. Defendant specifically sought to establish that the note he presented contained language that, according to defendant, did not threaten the immediate use of force, contrary to the testimony of the bank employee who received it. Although a threat of immediate use of force may be implicit and does not require the use of any specific words ... , the use of threatening language is nevertheless a factor for the jury to consider when determining whether the defendant presented such a threat ... . Inasmuch as the content of the note was relevant to whether defendant, either explicitly or implicitly, threatened the use of force, we conclude that the proposed testimony pertained to a noncollateral issue and that the court should have allowed the proposed witness to testify ...". ***People v. Snow*, 2020 N.Y. Slip Op. 04024, Fourth Dept 7-17-20**

EMPLOYMENT LAW, MUNICIPAL LAW, ATTORNEYS.

FIREFIGHTER WAS SOLELY RESPONSIBLE FOR THE DELAY IN HOLDING HIS DISCIPLINARY HEARING AND THEREFORE WAS NOT ENTITLED TO BACK PAY FOR THE PRE-HEARING PERIOD OF SUSPENSION.

The Fourth Department, reversing Supreme Court. determined a firefighter was not entitled to back pay for the suspension period while awaiting a disciplinary hearing because the firefighter (or his attorney) was responsible for the delay: "Civil Service Law § 75 provides that a public employee may be suspended without pay for a maximum of 30 days while awaiting a hearing on disciplinary charges (see § 75 [3]). Although an employee suspended without pay for a longer period under those circumstances is generally entitled to receive back pay, he or she waives any claim to back pay if a delay in the disciplinary hearing beyond the 30-day maximum is "occasioned by" his or her own conduct ... . We agree with respondents that petitioner is not entitled to reinstatement or back pay because petitioner was solely responsible for the delay. Petitioner's attorney is an experienced practitioner familiar with Civil Rights Law § 50-a. As such, petitioner's attorney either knew or should have known that, in order to secure production of the [the disciplinary file of Kelly, another firefighter], section 50-a required that he obtain either Kelly's consent or a court order. Indeed, respondents publicly announced in multiple press releases several months before the arbitration that Kelly's file was confidential pursuant to section 50-a. Moreover, petitioner's attorney had specific knowledge of the contents of the file because he was involved professionally in the investigation of Kelly's misconduct. Based on that experience and knowledge, petitioner could have taken steps to obtain the file long before the arbitration commenced, such as asking Kelly for his consent or commencing a proceeding to obtain a court order. Because petitioner failed to take any action, 'the entire period of delay in holding the hearing resulted from his dilatory tactics' ...". ***Matter of Carcone v. City of Utica*, 2020 N.Y. Slip Op. 04103, Fourth Dept 7-17-20**

FAMILY LAW, APPEALS.

FAMILY COURT SHOULD NOT HAVE AWARDED CUSTODY OF THE CHILDREN TO A NONPARENT WITHOUT FIRST MAKING A FINDING WHETHER EXTRAORDINARY CIRCUMSTANCES EXISTED; THE ISSUE WAS NOT PRESERVED, APPEAL HEARD IN THE INTEREST OF JUSTICE.

The Fourth Department, reversing Family Court, determined Family Court did not make the required initial finding of extraordinary circumstances before awarding custody of the children to a nonparent. Although the issue was not preserved, it was heard in the interest of justice: " '[A]s between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances . . . The nonparent has the burden of proving that extraordinary circumstances exist, and until such circumstances are shown, the court does not reach the issue of the best interests of the child' ... . That rule ' applies even if there is an existing order of custody concerning that child unless there is a prior determination that extraordinary circumstances exist' ... . A prior consent order does not by itself constitute a judicial finding or an admission of extraordinary circumstances ... . There is no indication in the record that the court previously made a determination of extraordinary circumstances ...". ***Matter of Byler v. Byler*, 2020 N.Y. Slip Op. 04025, Fourth Dept 7-17-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY, EVIDENCE.

CERTAIN LABOR LAW 200, COMMON LAW NEGLIGENCE, AND LABOR LAW § 241(6) CAUSES OF ACTION SHOULD HAVE BEEN DISMISSED; QUESTION OF FACT RE: WHETHER PLAINTIFF WAS THE SOLE CAUSE OF THE ACCIDENT IN THIS LADDER-FALL CASE; THE PROJECT COORDINATOR MET SEVERAL DEFINITIONS OF 'OWNER' WITHIN THE MEANING OF LABOR LAW § 240(1), INCLUDING AS THE HOLDER OF AN EQUITABLE INTEREST IN THE PROPERTY.

The Fourth Department, reversing (modifying) Supreme Court, over a two-justice dissent, determined common law negligence and Labor Law § 200 causes of action should have been dismissed re: several defendants because of the absence of supervisory control, several of the Labor Law § 241(6) causes of action should have been dismissed because the Industrial Code provisions did not apply, and plaintiff should not have been awarded summary judgment on his Labor Law § 240(1) cause of action because there was a question of fact whether plaintiff was the sole proximate cause of the fall, The dissenters argued plaintiff's summary judgment motion on his Labor Law § 240(1) cause of action was properly granted. Plaintiff fell when he switched from one ladder to another and the ladder kicked out from under him. The definition of "owner" within the meaning of Labor Law § 240(1) was discussed in some depth: "Although the term owner generally refers to the titleholder of the property, it may "also encompass[ ] one who has an interest in the property [and] . . . who contracted for or otherwise ha[d] the right to control the work" ... . Here, Tucker Homes [the project coordinator] had an equitable interest in the property by virtue of provisions in its contract with the titleholders that permitted it to take possession of the deed and obtain legal title to the property if the titleholders did not pay for the home's construction. Moreover, Tucker Homes, as the only entity that had a contractual relationship with RGGT [defendant subcontractor], was the only entity that could insist

that RGGT adhere to safety practices and obtain insurance. The titleholders, by contrast, had no contractual relationship with RGGT and did not obtain any insurance on the project. Thus, the court properly concluded that Tucker Homes, "as the only party with [both] a property interest and the right to insist on safety practices," was an owner within the meaning of the Labor Law ... . Even if Tucker Homes was not an 'owner' for purposes of the Labor Law, we conclude that the court properly determined that Tucker Homes was a general contractor based on its power to enforce safety standards and essentially select the responsible subcontractors to perform work on the project, such as RGGT ... . Plaintiff also met his burden of establishing that Tucker Homes was, at the very least, a statutory agent of the titleholders, and Tucker Homes did not raise a triable issue of fact in opposition ... . Unrefuted evidence established that, under the terms of the subcontract, Tucker Homes had the power to supervise and control the work being done by RGGT at the time of the accident ... . [T]he court erred in granting plaintiff's motion with respect to the Labor Law § 240 (1) claim, and we further modify the order accordingly. Plaintiff failed to meet his initial burden on that part of the motion inasmuch as issues of fact exist whether plaintiff was the sole proximate cause of his accident ...". ***Walkow v. MJ Peterson/Tucker Homes, LLC*, 2020 N.Y. Slip Op. 04098, Fourth Dept 7-17-20**

PERSONAL INJURY, EVIDENCE.

DEFENDANT IN THIS INTERSECTION TRAFFIC ACCIDENT HAD THE RIGHT OF WAY WHEN THE TRUCK IN WHICH PLAINTIFF WAS A PASSENGER APPARENTLY FAILED TO YIELD THE RIGHT OF WAY AND PULLED INTO DEFENDANT'S PATH; THE MAJORITY HELD THERE WAS A QUESTION OF FACT WHETHER DEFENDANT SAW WHAT SHE SHOULD HAVE SEEN; THE DISSENTERS ARGUED DEFENDANT SHOULD HAVE BEEN AWARDED SUMMARY JUDGMENT.

The Fourth Department, over a two-justice dissent, determined plaintiff was not entitled to summary judgment in this intersection traffic accident case. Plaintiff was a passenger in a truck which apparently failed to yield the right of way and pulled into the path of defendant's car. The majority held there was a question of fact whether defendant saw what she should have seen when approaching the intersection. The dissenters argued defendant was entitled to assume the truck would yield the right of way: " 'It is well settled that a driver who has the right-of-way is entitled to anticipate that drivers of other vehicles will obey the traffic laws requiring them to yield' (... see Vehicle and Traffic Law § 1142 [a]). 'Nevertheless, a driver cannot blindly and wantonly enter an intersection . . . but, rather, is bound to use such care to avoid [a] collision as an ordinarily prudent [motorist] would have used under the circumstances' ... . Here, defendant's own submissions, including her own deposition testimony, raised an issue of fact whether she met her 'duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident' ...". ***Brooks v. Davis*, 2020 N.Y. Slip Op. 04021,, Fourth Dept 7-17-20**

REAL PROPERTY LAW, NUISANCE, TRESPASS, CIVIL RIGHTS LAW, CIVIL PROCEDURE.

PLAINTIFF PRESENTED CLEAR AND CONVINCING EVIDENCE SUPPORTING THE CAUSES OF ACTION AGAINST A NEIGHBOR FOR TRESPASS, PRIVATE NUISANCE, AND VIOLATION OF THE CIVIL RIGHTS LAW; THE MOTION FOR A PRELIMINARY INJUNCTION SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined plaintiff's motion for a preliminary injunction in this dispute between neighbors should have been granted. Plaintiff alleged the neighbor repeatedly damaged and defaced plaintiff's property and installed a surveillance camera aimed at plaintiff's property. The Fourth Department went through the elements required for issuance of a preliminary injunction and described the proof offered in support of the trespass, private nuisance and Civil Rights Law causes of action: "Plaintiff's supplemental affidavit and photographs submitted in support of the motion demonstrate that Nichols repeatedly drove across her lawn and blew snow with his snowblower onto the side of plaintiff's house, allegedly causing damage to her awning and fence. Both events were intentional invasions of plaintiff's interest in the exclusive possession of her land. Furthermore, although 'an action for trespass over the lands of one property owner may not be maintained where the purported trespasser has acquired an easement of way over the land in question' ... , plaintiff established that the acts allegedly committed by Nichols on the easement exceeded the scope of the easement and did not constitute a reasonable use of his interest in the easement ... . Thus, plaintiff demonstrated a likelihood of success on the merits of her trespass claim. ... The evidence submitted by plaintiff established that Nichols drove across plaintiff's lawn, used a snowblower to blow snow onto her house, tampered with and removed her property markers, parked his vehicle so as to obstruct plaintiff's driveway, drove on the freshly paved driveway and left tire tracks in the asphalt, and repeatedly painted a white line across the driveway. That conduct exceeds the scope of the easement and may fairly be characterized as a substantial interference with plaintiff's use and enjoyment of her property. Thus, plaintiff demonstrated a likelihood of success on the merits of her private nuisance claim. Plaintiff's affidavit and video evidence also submitted on the motion demonstrate that Nichols threatened to install a '150-foot night vision camera' in his backyard and to point it directly into plaintiff's backyard and at her living room. As Nichols installed the surveillance camera, he stated to plaintiff, 'It's gonna look right in your fucking living room! . . . You're on camera bitch! . . . Smile for the camera bitch!' Thus, plaintiff

also demonstrated a likelihood of success on the merits of her claim under Civil Rights Law § 52-a." ***Cangemi v. Yeager*, 2020 N.Y. Slip Op. 04023, Fourth Dept 7-17-20**

TRUSTS AND ESTATES, EVIDENCE.

THE PROOF DID NOT SUPPORT SURROGATE'S COURT'S FINDING THAT THERE WAS A CONFIDENTIAL RELATIONSHIP BETWEEN RESPONDENTS AND THE DECEDENT AND THE PROOF DID NOT SUPPORT THE FINDING THAT RESPONDENTS EXERTED UNDUE INFLUENCE UPON DECEDENT.

The Fourth Department, reversing Surrogate's Court, determined the evidence did not support the finding that the respondents, decedent's daughter Ellen and her son, Alex, exerted undue influence upon the decedent. In addition, the proof did not support the finding of a confidential relationship between respondents and the decedent: "Here, although the record establishes that Ellen and Alexander held a position of trust with decedent, and that Ellen assisted decedent with her finances and was named decedent's power of attorney, the record also reflects that, despite Ellen's position of trust, decedent was actively and personally involved in managing her real estate and in drafting her estate plan, and that she directed her personal attorney and the branch manager at her bank to act according to her own desires based on her own personal, stated reasons. ... Here, the record reflects that Ellen and Alexander wanted to benefit from decedent's estate, and that Ellen assisted decedent in executing the relevant estate plan and making the disputed transactions. The relevant inquiry, however, is not what Ellen and Alexander may have wanted, asked for, or facilitated, but rather whether decedent's free will, independent action, and self-agency were overcome by their conduct ... . In this case, the record establishes that decedent informed her attorney in 2011 that she did not want petitioner to have any further power over her affairs, that decedent thereafter worked with her attorney directly in order to revise her estate plan, and that decedent discussed with her attorney her personal reasons for altering her prior estate plan to the exclusion of petitioner. Indeed, decedent's attorney testified that he never prepared a document that decedent did not personally authorize, and testimony from numerous non-beneficiaries established decedent's capacity and active management of her own affairs during the relevant time frame, albeit with the assistance of Ellen. Simply put, the record does not reflect that decedent at any time lost her free will or agency, and instead the record reflects that she took the disputed actions based on her stated personal motives." ***Matter of Kotsones*, 2020 N.Y. Slip Op. 04102, Fourth Dept 7-17-20**

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