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COURT OF APPEALS

CRIMINAL LAW.

THE TRIAL JUDGE DID NOT MAKE AN ADEQUATE INQUIRY ABOUT THE REASONS FOR A SITTING JUROR'S ABSENCE BEFORE SUBSTITUTING AN ALTERNATE JUROR; NEW TRIAL ORDERED,

The Court of Appeals, in a full-fledged opinion by Judge Garcia, reversing the Appellate Division, determined the trial judge did not make an adequate inquiry about a sitting juror's absence before substituting an alternate juror for the sitting juror (Juror Number 9). The defendant had moved for a mistrial on that ground: "... [T]he trial court failed to conduct the requisite "reasonably thorough inquiry" before substituting Alternate Number 1 for Juror Number 9 (see CPL 270.35 [2] [a]). When it ordered the substitution, the court had merely stated its 'belie[f]' that Juror Number 9 had an 'appointment for a family member,' and incorrectly claimed that Juror Number 9 had stated during voir dire that she had a medical appointment for her son in Rochester. Not only did the court provide only limited — and inaccurate — reasons to support a finding of unavailability, there is nothing on the record reflecting that it made any inquiry into Juror Number 9's whereabouts or likelihood of appearing prior to ordering the substitution of Juror Number 9 with Alternate Number 1. On this record, the court failed to satisfy the requirement that a trial court conduct a 'reasonably thorough inquiry' to ensure that its substitution determination is adequately informed ...". ***People v. Lang*, 2020 N.Y. Slip Op. 03487, CtApp 6-23-20**

ENVIRONMENTAL LAW, EMINENT DOMAIN, REAL PROPERTY LAW, UTILITIES.

THE CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY ISSUED BY THE FEDERAL ENERGY REGULATORY COMMISSION (FERC) EXEMPTED THE GAS PIPELINE COMPANY FROM ANY REVIEW REQUIREMENTS OF THE EMINENT DOMAIN PROCEDURE LAW (EDPL); THE COMPANY WAS FREE TO EXERCISE EMINENT DOMAIN OF THE LAND IN DISPUTE.

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Stein, over a two-judge dissent, determined that the certificate of public convenience and necessity issued to petitioner, National Fuel Gas Supply, for construction of a gas pipeline, exempted National Fuel from any requirements of the Eminent Domain Procedure Law (EDPL). Therefore National Fuel did not need to comply with the notice and hearing requirements of the EDPL before exercising eminent domain of the land in dispute: "In 2017, the Federal Energy Regulatory Commission issued a certificate of public convenience and necessity to petitioner National Fuel Gas Supply for its proposed construction of a 99-mile natural gas pipeline spanning from Pennsylvania to Western New York. ... [t]his certificate ...—which did not condition National Fuel's eminent domain power on receipt of a water quality certification and which remained valid and operative at all relevant times despite the New York State Department of Environmental Conservation's intervening denial of National Fuel's application for such a certification—exempted National Fuel from the public notice and hearing provisions of article 2 of the Eminent Domain Procedure Law (EDPL) in accordance with EDPL 206 (A). ... The question before us distills to whether the certificate of public convenience and necessity issued by the Federal Energy Regulatory Commission (FERC) to National Fuel satisfies EDPL 206 (A) so as to entitle National Fuel to exercise eminent domain over the land in dispute without undertaking additional review of the pipeline's public benefit. If satisfied, EDPL 206 (A) excuses compliance with various provisions of EDPL article 2 where a proposed condemnor has successfully completed a review of the project's public benefit and use before a state, federal, or local agency. * * * ... [W]here, as here, a gas company holds a valid certificate of public convenience or necessity from FERC for the proposed construction of a pipeline and that certificate places no relevant conditions on the eminent domain power and has not been stayed or revoked by FERC or a federal court properly reviewing its issuance, compliance with article 2 is excused under EDPL 206 (A)." ***Matter of National Fuel Gas Supply Corp. v. Schueckler*, 2020 N.Y. Slip Op. 03563, CtApp 6-25-20**

SUMMARY OF THE FOURTH DEPARTMENT DECISION REVERSED BY THE COURT OF APPEALS ON JUNE 25, 2020 (SUMMARIZED ABOVE)

ALTHOUGH THE FEDERAL ENERGY REGULATORY COMMISSION (FERC) APPROVED THE GAS PIPELINE, THE STATE DID NOT ISSUE A WATER QUALITY CERTIFICATION (WQC) FOR THE PROJECT, THEREFORE THE PIPELINE

COMPANY CAN NOT SEEK EASEMENTS OVER PRIVATE LAND PURSUANT TO THE EMINENT DOMAIN PROCEDURE LAW (EDPL) TO INSTALL THE PIPELINE.

The Fourth Department, in a full-fledged opinion by Justice NeMoyer, over a two-justice dissent, considering a matter of first impression, reversing Supreme Court, determined that a gas supply company could not acquire easements over private property by eminent domain for the installation of a pipeline for which the state denied a permit: "In February 2017, the FERC [Federal Energy Regulatory Commission] granted petitioner's application for a certificate of public convenience and necessity to construct and operate a 97-mile natural gas pipeline from Pennsylvania into western New York. The pipeline's proposed route travels directly across respondents' land ... . Within the voluminous certificate, the FERC found that petitioner's 'proposed [pipeline] project is consistent with the Certificate Policy Statement,' i.e., the public interest. 'Based on this finding and the environmental review for the proposed project,' the FERC further found 'that the public convenience and necessity require approval and certification of the project.' ... [T]he New York State Department of Environmental Conservation (DEC) denied petitioner's application for a WQC [water quality certification]. The WQC application, held the DEC, 'fails to demonstrate compliance with New York State water quality standards.' Petitioner has taken various steps to challenge the WQC denial, including the filing of a petition for judicial review in the Second Circuit pursuant to 15 USC § 717r (d). It appears that those challenges have not yet been finally resolved. It is undisputed, however, that if the WQC denial is ultimately upheld, the pipeline cannot be built ... . * * * ... [P]etitioner is trying to expropriate respondents' land in furtherance of a pipeline project that, as things currently stand, cannot legally be built. Such an effort turns the entire concept of eminent domain on its head. If the State's WQC denial is finally annulled or withdrawn, then petitioner can file a new vesting petition. But until that time, petitioner cannot commence a vesting proceeding to force a sale without going through the entire EDPL [Eminent Domain Procedure Law] article 2 process." ***Matter of National Fuel Gas Supply Corp. v. Schueckler*, 2018 N.Y. Slip Op. 07550, Fourth Dept 11-9-18**

FAMILY LAW, APPEALS.

THE MAJORITY HELD THE ISSUES WHETHER MOTHER HAD MADE ALLEGATIONS OF DOMESTIC ABUSE IN A SWORN PLEADING OR WHETHER MOTHER HAD PROVEN DOMESTIC ABUSE ALLEGATIONS AGAINST FATHER WERE NOT PRESERVED FOR APPEAL; THE DISSENT ARGUED THE ISSUES WERE PRESERVED AND WOULD REMIT FOR A BEST INTERESTS OF THE CHILD ANALYSIS.

The Court of Appeals, over a detailed and comprehensive dissent, affirmed the award of custody to father, finding that the issues raised on appeal by mother were not preserved. Defendant mother argued she had made allegations of domestic abuse in a sworn pleading (petition) and, therefore, pursuant to Domestic Relations Law § 240(1)(a), the court was required to consider the effect of the domestic violence on the best interests of the child: "Defendant failed to preserve her arguments regarding Domestic Relations Law § 240 (1) (a). As a result, the parties never litigated, and Supreme Court did not pass upon, or make any findings with respect to, whether a withdrawn family offense petition constitutes "a sworn petition" for purposes of this statute or whether defendant proved allegations of domestic violence 'by a preponderance of the evidence' (Domestic Relations Law § 240 [1] [a]) — issues that are essential to the arguments defendant now raises. Record evidence supports the affirmed custody award. * * * **From the dissent:** Because the issue is preserved, I would reverse and remit to Supreme Court for a new best interest of the child analysis consistent with the framework of Domestic Relations Law § 240 (1) (a), and any development of the record as needed." ***Cole v. Cole*, 2020 N.Y. Slip Op. 03489, CtApp 6-23-20**

VEHICLE AND TRAFFIC LAW. ADMINISTRATIVE LAW, EVIDENCE.

THE RECORD SUPPORTED THE SUSPENSION OF PETITIONER BUS DRIVER'S LICENSE FOR CAUSING SERIOUS PHYSICAL INJURY TO A PEDESTRIAN WHILE FAILING TO EXERCISE DUE CARE; APPELLATE DIVISION REVERSED.

The Court of Appeals, reversing the Appellate Division, determined the proof before the Department of Motor Vehicles (DMV) was sufficient to find that petitioner bus driver caused serious physical injury to a pedestrian warranting suspension of petitioner's driver's license for six months: "In November 2014, a New York City Transit bus driven by petitioner struck the victim, an 88-year-old pedestrian. At the time of the accident, the victim was in a marked crosswalk with the right of way, and petitioner was making a right turn. The bus ran 'over [the victim's] legs . . . with the front passenger's side tire,' pinning him under the bus. The victim was transported to the hospital, where he died less than four weeks later. A summons was issued to petitioner alleging that he caused serious physical injury to a pedestrian while failing to exercise due care (see VTL § 1146 [c]). The Administrative Law Judge found that the charge was established by clear and convincing evidence. The DMV's Traffic Violations Bureau Appeal Board affirmed, and petitioner's license was suspended for six months (see VTL § 510 [2] [b] [xiv]). ... On this record, the agency's determination — that clear and convincing evidence demonstrated that petitioner caused serious physical injury while failing to exercise due care in violation of VTL § 1146 (c) — is supported by substantial evidence ...". ***Matter of Seon v. New York State Dept. of Motor Vehs.*, 2020 N.Y. Slip Op. 03564, CtApp 6-25-20**

SUMMARY OF FIRST DEPARTMENT DECISION REVERSED BY THE COURT OF APPEALS ON JUNE 25, 2020 (SUMMARIZED ABOVE)

APPLYING THE CLEAR AND CONVINCING EVIDENTIARY STANDARD, THE DEPARTMENT OF MOTOR VEHICLES' (DMV'S) SUSPENSION OF PETITIONER BUS DRIVER'S LICENSE BASED UPON STRIKING A PEDESTRIAN WAS NOT SUPPORTED BY EVIDENCE OF THE EXTENT OF THE INJURY OR ANY CONNECTION BETWEEN THE INJURY AND THE PEDESTRIAN'S DEATH A MONTH LATER, DETERMINATION ANNULLED AND LICENSE REINSTATED.

The First Department, annulling the determination of the Department of Motor Vehicles (DMV), over a two-justice dissenting opinion, determined the record did not support the suspension of petitioner-bus-driver's license for a violation of Vehicle and Traffic Law § 1146. The court noted that the standard of proof in the DMV hearing is "clear and convincing" and the standard of proof in the instant Article 78 proceeding is "substantial evidence." Effectively, therefore, the "clear and convincing" standard applies to the Article 78. Here, on a dark and rainy night, an 88-year-old pedestrian apparently came into contact with the bus in the crosswalk when the bus was turning. The man died a month later. In the opinion of the majority, the hearing evidence did not demonstrate how seriously the man was injured by the bus, or a connection between any injury and the man's death a month later: "Here, DMV was required to establish that petitioner violated Vehicle and Traffic Law § 1146(c)(1), which imposes liability on '[a] driver of a motor vehicle who causes serious physical injury as defined in article ten of the penal law to a pedestrian or bicyclist while failing to exercise due care.' The referenced definition of 'serious physical injury' includes 'physical injury . . . which causes death,' ... which is presumably the basis for the charge against petitioner since he was not issued a summons until after the pedestrian died in the hospital. Thus, DMV was required to present clear and convincing evidence of both failure to exercise care and that such failure led to the pedestrian's demise. * * * To be sure, one could speculate, as does the dissent, that the pedestrian suffered a 'serious physical injury.' But to engage in speculation would be to ignore the underlying standard of clear and convincing evidence, which even the dissent agrees applied in the administrative proceeding and is relevant to our review. 'Clear and convincing evidence is evidence that satisfies the factfinder that it is highly probable that what is claimed actually happened . . . and it is evidence that is neither equivocal nor open to opposing presumptions'... . Given that standard, and the remarkable lack of compelling evidence before us, we would be abdicating our role were we simply to defer to the conclusions drawn by the Administrative Law Judge, and raising a serious question as to the very purpose of having any appellate review in this matter." ***Matter of Seon v. New York State Dept. of Motor Vehs.*, 2018 N.Y. Slip Op. 02240, First Dept 3-29-18**

FIRST DEPARTMENT

CIVIL PROCEDURE, TAX LAW, LABOR LAW, EMPLOYMENT LAW.

ALTHOUGH DISFAVORED, DISCLOSURE OF REDACTED TAX RETURNS WAS WARRANTED IN THIS CASE.

The First Department noted that the disclosure of tax returns is disfavored, but agreed with Supreme Court that disclosure of the redacted returns in this Labor-Law/employment-law dispute was warranted: "Plaintiffs claim that between 2010 and 2016 defendant employed them as a caretaker for her ailing aunt and that defendant violated, inter alia, several sections of the Department of Labor Regulations (12 NYCRR) requiring overtime pay, a minimum wage, and additional pay for split shifts. Defendant denies that she was plaintiffs' employer for purposes of the regulations and provisions of the Labor Law, but admits that she paid plaintiffs by check from 2014 to 2016, albeit on her aunt's behalf. Plaintiffs claim they were paid in cash by defendant between 2010 and 2013. Defendant, who denies that she was the source of the cash payments, seeks plaintiffs' federal and state tax returns for 2010 to 2013, claiming she needs the returns to verify the cash amounts, as well as plaintiffs' assertion that they were employees, and not independent contractors. ... [D]efendant demonstrated both that the specific information ordered disclosed was necessary to defend the action, and unavailable from other sources ... . Since plaintiffs were paid in cash between 2010 and 2013 and there is no other evidence in the record establishing who paid their wages and how much they were paid during those years, defendant showed a specific need for the production of the three years of tax returns, which might show the amounts claimed by plaintiffs as income from the caretaker work, as well as whether they claimed the income as wages or as money earned through self-employment. Defendant demonstrated that investigating plaintiffs' bank accounts would be inconclusive, since pay deposited in the accounts could have been commingled with other amounts, and because one of the plaintiffs claimed that she used several banking institutions and did not make deposits on a predictable basis. We note that the court already inspected the tax returns in camera and deemed them relevant." ***Currid v. Valea*, 2020 N.Y. Slip Op. 03590, First Dept 6-25-20**

CONTRACT LAW.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IN THIS COMPLEX BREACH OF CONTRACT ACTION INVOLVING THE SALE OF A BUSINESS AND A RELATED LEASE WAS PROPERLY GRANTED; THE TERMS OF THE CONTRACTS WERE UNAMBIGUOUS AND NEITHER THE DOCTRINE OF PREVENTION NOR THE DOCTRINE OF FRUSTRATION OF PURPOSE APPLIED.

The First Department, in a full-fledged opinion by Justice Mazzarelli, determined plaintiffs' motion for summary judgment in this complex business-sale and lease breach of contract action was properly granted. The transaction involved the sale of an ambulatory surgery business and lease of the premises to the buyer. More specifically, the transaction included an asset purchase agreement, an administrative services agreement, a lease agreement and a personal guarantee. The facts are too involved to fairly summarize. Essentially, the buyers (defendants) defaulted on several aspects of the contracts and their defenses were rejected. The First Department held the terms of the contracts were clear and unambiguous, the doctrine of prevention did not apply, and the frustration of purpose doctrine did not apply: " '[U]nder the doctrine of prevention, when a party to a contract causes the failure of the performance of the obligation due, it cannot in any way take advantage of that failure' ... . In other words, 'a party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition' ... . 'In order to invoke the doctrine of frustration of purpose, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense' ... . Examples of a lease's purposes being declared frustrated have included situations where the tenant was unable to use the premises as a restaurant until a public sewer was completed, which took nearly three years after the lease was executed ... , and where a tenant who entered into a lease of premises for office space could not occupy the premises because the certificate of occupancy allowed only residential use and the landlord refused to correct it ... . However, 'frustration of purpose . . . is not available where the event which prevented performance was foreseeable and provision could have been made for its occurrence' ...". ***Center for Specialty Care, Inc. v. CSC Acquisition I, LLC*, 2020 N.Y. Slip Op. 03631, First Dept 6-25-20**

CRIMINAL LAW, ATTORNEYS, IMMIGRATION LAW.

DEFENDANT ALLEGED DEFENSE COUNSEL OVERSTATED THE RISK OF DEPORTATION CAUSING HIM TO REJECT A FAVORABLE PLEA OFFER; DEFENDANT ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS CONVICTION BASED UPON INEFFECTIVE ASSISTANCE.

The First Department, reversing Supreme Court, determined a hearing was necessary on defendant's motion to vacate his conviction based upon ineffective assistance of counsel. Defendant alleged defense counsel overstated the risk of deportation causing defendant to reject a favorable plea offer: "A defense attorney's performance is deficient as a matter of law where he or she fails to accurately advise a client of the risk of deportation ... . Here, defendant complains that his counsel overstated the immigration consequences of accepting an offer of a guilty plea to petit larceny by advising him that it would 'definitely' result in deportation, when in fact it would only have rendered him deportable with the possibility of discretionary relief. Thus, defendant asserts that he rejected a favorable plea offer based on erroneous advice that the conviction would result in mandatory deportation. We find that a hearing is necessary to determine whether counsel inaccurately advised defendant of the risk of deportation and if so, whether defendant was prejudiced by the attorney's misadvice ...". ***People v. Qinghua Ni*, 2020 N.Y. Slip Op. 03621, First Dept 6-25-20**

FAMILY LAW, CIVIL PROCEDURE.

PETITIONER DID NOT HAVE THE STATUTORILY REQUIRED CLOSE RELATIONSHIP WITH THE RESPONDENT IN THIS FAMILY OFFENSE PROCEEDING; FAMILY COURT DID NOT HAVE SUBJECT MATTER JURISDICTION.

The First Department, reversing Family Court, determined Family Court did not have subject matter jurisdiction over this family offense proceeding because the petitioner and the respondent were not members of the same family or household and had not been in an intimate relationship: "The court lacks subject matter jurisdiction over this family offense proceeding brought by the foster mother of respondent's biological children. Petitioner failed to establish that she and respondent, who are not members of the same family or household, are or have been in an intimate relationship (see Family Court Act § 812[1][e] ...). Petitioner testified that she did not even know respondent's first name. It appears from the record that petitioner's contact with respondent has been limited to scheduling visitation with the children at the agency and, perhaps, interacting with respondent when she went to petitioner's home to pick up the children for visits." ***Matter of Veronica C. v. Ariann D.*, 2020 N.Y. Slip Op. 03612, First Dept 6-25-20**

INSURANCE LAW.

PLAINTIFFS ALLEGED THEY PAID A BROKER FOR THE INSURANCE POLICY ISSUED BY DEFENDANT INSURER BUT THE INSURER CANCELLED THE POLICY FOR NONPAYMENT; THE INSURER ALLEGED THE BROKER WAS NOT IN THE CHAIN OF BROKERS LEADING FROM PLAINTIFFS TO THE INSURER; QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT.

The First Department, reversing (modifying) Supreme Court, determined defendant-insurer's (Interstate's) motion for summary judgment in this "wrongful policy cancellation" suit should not have been granted. Plaintiffs alleged they paid a broker for the policy issued by Interstate. The premiums never reached Interstate. Interstate alleged the broker was not in the chain of brokers leading from plaintiffs to Interstate. The policy was cancelled for nonpayment: "Plaintiffs allege that they paid a broker the initial premium for the excess liability coverage issued by defendants, and that the broker also procured a financing agreement for them for the balance of the premiums. The party financing the premiums paid the broker on plaintiffs' behalf and plaintiffs complied with the financing agreement. Plaintiffs' president testified that plaintiffs only dealt with that broker, who delivered the policies to them. However, the premiums never reached defendants, who canceled the policies. Thereafter, three persons were killed during the term of the policies in an accident on plaintiffs' premises when the decedents inhaled hydrogen sulfide fumes (the accident). Defendants disclaimed coverage. Where an insured makes timely payment to a broker in the chain of brokers and the insurer delivers the policy to the broker pursuant to the broker's request, Insurance Law § 2121 precludes the insurer from canceling the policy based on nonpayment of premiums where the broker did not remit the payment to the insurer ... . Here, the record is replete with triable issues of fact as to whether the broker with whom plaintiffs state they dealt was in the chain of brokers leading from plaintiffs to Interstate, such that the payment of the premiums to the broker was sufficient to bind Interstate. Plaintiffs referred to the testimony of their president that the broker was the only broker used by them, and that the broker's employee delivered the policies to them. Moreover, the premium checks were made payable to the broker, who prepared a loss summary, and no evidence was presented demonstrating that another broker delivered the policies to plaintiffs. However, the absence of significant paperwork naming the broker cited by plaintiffs as a broker in the transaction, the testimony of the wholesale brokers that they did not deal with the broker cited by plaintiffs and would not do so, and the Notice of Excess Line Placement naming a different entity as plaintiffs' broker, raise questions that preclude summary judgment in favor of either plaintiffs or Interstate." ***Royal Waste Servs., Inc. v. Interstate Fire & Cas. Co.*, 2020 N.Y. Slip Op. 03616, First Dept 6-25-20**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

QUESTIONS OF FACT WHETHER INDUSTRIAL CODE PROVISIONS RE: DEBRIS IN PASSAGEWAYS AND KEEPING EQUIPMENT IN GOOD REPAIR IN THIS LABOR LAW § 241(6) ACTION PRECLUDED SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS.

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment on the Labor Law § 241(6) causes of action should not have been granted. There were questions of fact whether the Industrial Code provisions re: debris in passageways and keeping equipment in good repair were violated. Plaintiff was injured when a wheeled dumpster allegedly tipped over: "Plaintiff's claim premised upon § 23-1.7(e)(2), which concerns debris in passageways, is viable because the area where the accident occurred was a passageway for the purposes of that provision ... . The provision applies not just when loose debris causes a direct trip and fall, but also in circumstances similar to those involved here ... . With regard to § 23-1.28(b), which pertains to hand-propelled vehicles, and § 23-1.5(c), which prohibits use of machinery or equipment that is not in good repair and safe working condition, defendants failed to make a prima facie showing that the wheeled dumpster was not defective ...". ***Sancino v. Metropolitan Transp. Auth.*, 2020 N.Y. Slip Op. 03615, First Dept 6-25-20**

PERSONAL INJURY, MUNICIPAL LAW, MEDICAL MALPRACTICE.

THE MEDICAL RECORDS DID NOT PROVIDE NOTICE TO THE HOSPITAL OF A POTENTIAL MEDICAL MALPRACTICE ACTION AND PETITIONER FAILED TO SHOW THE HOSPITAL WOULD NOT BE PREJUDICED BY THE DELAY IN SERVING A NOTICE OF CLAIM; LEAVE TO SERVE A LATE NOTICE OF CLAIM SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined leave to file a late notice of claim should not have been granted in this action against NYC Health & Hospitals Corp (HHP) alleging a failure to timely diagnose breast cancer. The medical records did not alert HHP to injury from malpractice and petitioner failed to show the HHP was not prejudiced by the delay in serving a notice of claim: "Petitioner failed to show that HHC had actual notice of her claim within 90 days of accrual of the claim, or a reasonable time thereafter. HHC's 'mere possession or creation of medical records does not ipso facto establish that it had actual knowledge of a potential injury where the records do not evince that the medical staff, by its acts or omissions, inflicted any injury on plaintiff' ... . Here, HHC records of petitioner's treatment do not on their face show any negligence, malpractice or injury to plaintiff, and plaintiff did not submit a physician's affirmation to make such a showing

... . Likewise, petitioner failed to demonstrate the lack of any prejudice to HHC from the delay, as HHC's 'possession of medical records that could not alert it to a claim of malpractice obviously cannot, ipso facto, establish a lack of prejudice' ... . Because petitioner offered no other basis for the lack of prejudice to HHC, the burden never shifted to HHC to show prejudice from the delay ...". ***Matter of Atkinson v. New York City Health & Hosps. Corp.*, 2020 N.Y. Slip Op. 03609, First Dept 6-25-20**

PERSONAL INJURY, TOXIC TORTS, LANDLORD-TENANT, MUNICIPAL LAW.

PLAINTIFFS WERE ENTITLED TO SUMMARY JUDGMENT FINDING DEFENDANT-LANDLORD VIOLATED NYC LOCAL LAW NO. 1 BY FAILING TO TAKE REASONABLE MEASURES TO ADDRESS THE HAZARDOUS LEAD-PAINT CONDITION IN PLAINTIFFS' APARTMENT; HOWEVER DEFENDANTS RAISED A QUESTION OF FACT WHETHER DEFENDANTS' NEGLIGENCE WAS THE PROXIMATE CAUSE OF THE CHILD'S INJURIES.

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Moulton, determined plaintiffs demonstrated defendants violated Local Law No. 1 of the City of New York in failing to take reasonable measures to address the hazardous lead-based paint condition in plaintiffs' apartment. However defendants' medical expert raised a question of fact whether defendants' negligence was the proximate cause of the plaintiff's child' (S.T.'s) injuries: "Under Local Law 1 defendants' liability is not predicated on their observations of peeling paint or whether they are informed of it. Defendants' liability does not depend on the mother demonstrating that she credibly complained about each and every instance or location of peeling paint. Even assuming that the mother never complained about the paint condition, defendants are charged with notice of the hazardous lead-based paint condition under Local Law 1 from the time that defendants were aware that S.T. moved into apartment. Moreover, Local Law 1 imposes on landlords 'a specific duty to ameliorate hazardous levels of lead-based paint' ... . Defendants cannot avoid liability by attempting to shift their statutory obligation to the mother by questioning her memory or her credibility, or for failing to inform them when the paint began to peel. Shifting the burden to the mother is inconsistent with the purpose of Local Law 1 which 'is unquestionably intended to protect a definite class of persons [plaintiffs] from a particular hazard they are incapable of avoiding themselves' ...". ***S.T. v. 1727-29 LLC*, 2020 N.Y. Slip Op. 03630, First Deptp 6-25-20**

SECOND DEPARTMENT

ARBITRATION, CIVIL PROCEDURE, INSURANCE LAW.

PETITION TO STAY ARBITRATION IN THIS UNDERINSURED MOTORIST PROCEEDING WAS SERVED AFTER THE 20-DAY STATUTORY PERIOD FOR SERVICE AND WAS NOT SERVED IN THE MANNER REQUIRED BY THE STATUTE (CPLR 7503(c)); THEREFORE THE APPLICATION TO STAY ARBITRATION WAS JURISDICTIONALLY DEFECTIVE.

The Second Department, reversing Supreme Court, determined the insurer's (State Farm's) notice and petition to stay arbitration was not served within the required 20 days and was not properly served. The petition therefore should have been dismissed: "... [T]he insured, Joyce Reid, sent State Farm Insurance Company (hereinafter State Farm) a demand for supplemental underinsured motorist (hereinafter SUM) arbitration, which was received by State Farm on February 14, 2019. On March 22, 2019, State Farm filed a notice of petition and petition seeking to temporarily stay the arbitration pending the completion of pre-arbitration discovery. That notice and petition were served upon counsel for Reid by first-class mail on March 22, 2019. ... CPLR 7503(c) requires that an application to stay arbitration be made within 20 days after service of a demand to arbitrate. 'This limitation is strictly enforced and a court has no jurisdiction to entertain an untimely application' ... . CPLR 7503(c) also directs that notice of an application to stay arbitration 'shall be served in the same manner as a summons or by registered or certified mail, return receipt requested.' ... State Farm did not file its notice of petition and petition until March 22, 2019, which was beyond the 20-day statute of limitations. Consequently, the proceeding is time-barred ... . Moreover, State Farm's notice of petition and petition to stay arbitration were served by regular first-class mail, rather than by registered or certified mail, return receipt requested. Since there was a lack of compliance with CPLR 7503(c), the present proceeding was jurisdictionally defective ...". ***Matter of State Farm Ins. Co. v. Reid*, 2020 N.Y. Slip Op. 03517, Second Dept 6-24-20**

CIVIL PROCEDURE, NEGLIGENCE, ARCHITECTURAL MALPRACTICE, CONTRACT LAW.

THE COMPLAINT ADEQUATELY ALLEGED THE TOLLING OF THE STATUTE OF LIMITATIONS PURSUANT TO THE CONTINUOUS REPRESENTATION DOCTRINE AND THE EXISTENCE OF THE FUNCTIONAL EQUIVALENT OF PRIVITY BETWEEN PLAINTIFF AND THE DEFENDANT ARCHITECT; SUPREME COURT REVERSED.

The Second Department, reversing Supreme Court, determined the complaint alleging architectural malpractice should not have been dismissed pursuant to CPLR 3211. Plaintiff leased the first floor of a building to operate a pizza restaurant. Plaintiff hired a contractor which in turn hired an architect for the heating, ventilation and air conditioning (HVAC) design. The gas line hookup was completed in 2014. Subsequently, in 2016, National Grid shut off the gas, alleging plaintiff was stealing gas. In 2017 the defendant architect allegedly attempted to remedy the problem with the gas line. The complaint

adequately pled the statute of limitations was tolled by the continuous representation doctrine and a privity-like relationship between the plaintiff and the architect: 'The law recognizes that the supposed completion of the contemplated work does not preclude application of the continuous representation toll if inadequacies or other problems with the contemplated work timely manifest themselves after that date and the parties continue the professional relationship to remedy those problems' ... . In support of its motion, the architect submitted documentary evidence which included a final invoice issued by it dated August 14, 2014, and a letter of completion issued by the New York City Department of Buildings to the architect stating that its work was completed on December 20, 2014. In opposition, the plaintiffs' submissions, which included evidence of continuing communications between [plaintiff] and the architect, and evidence of the architect's efforts to remedy the alleged error uncovered by National Grid regarding the gas line connection for the premises, raised a question of fact as to the application of the continuous representation doctrine and supported the denial of those branches of the architect's motion which were pursuant to CPLR 3211(a)(1) and (5) to dismiss the amended complaint insofar as asserted against it ... . Contrary to the architect's contention, the fact that two years had elapsed between the completion of its services and its subsequent efforts to remedy the problem does not render the continuous representation doctrine inapplicable as a matter of law ... . We also reject the architect's contention, as an alternative ground for affirmance, that dismissal of the amended complaint insofar as asserted against it was warranted pursuant to CPLR 3211(a)(1) and (7), on the ground that it was not in privity with the plaintiffs. The evidence submitted by the architect, which included a copy of the contract entered into between it and the contractor, failed to utterly refute the factual allegations supporting the plaintiffs' contention that a relationship existed between them and the architect that was the 'functional equivalent of privity' ...". ***Creative Rest., Inc. v. Dyckman Plumbing & Heating, Inc.*, 2020 N.Y. Slip Op. 03499, Second Dept 6-24-20**

CRIMINAL LAW, APPEALS, EVIDENCE.

THE OPINION CHANGING THE CRITERIA FOR THE DEPRAVED-INDIFFERENCE MENS REA CAME DOWN BEFORE DEFENDANT'S CONVICTION BECAME FINAL; DESPITE THE AFFIRMANCE OF DEFENDANT'S MURDER CONVICTION ON APPEAL, THE DENIAL OF A MOTION TO REARGUE THE APPEAL, THE DENIAL OF THE MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS, AND THE DENIAL OF DEFENDANT'S PETITION FOR A WRIT OF HABEAS CORPUS IN FEDERAL COURT, SUPREME COURT SHOULD HAVE GRANTED DEFENDANT'S MOTION TO VACATE HIS CONVICTION.

The Second Department, reversing Supreme Court, determined defendant's motion to vacate his depraved-indifference murder conviction should have been granted. The Court of Appeals opinion which changed the proof requirements for the depraved indifference *mens rea* was issued before defendant's conviction became final. The proof at defendant's trial demonstrated defendant acted intentionally as opposed acting with "depraved indifference:" "... [T]he defendant moved pursuant to CPL 440.10(1)(h) to vacate so much of the judgment as convicted him of depraved indifference murder, arguing that, in light of People v. Payne (3 NY3d 266), which was decided 15 days after this Court affirmed the judgment of conviction on his direct appeal but before his conviction became final (see Policano v. Herbert, 7 NY3d at 593), the evidence at trial was legally insufficient to establish that he acted with the requisite mens rea for depraved indifference murder. The Supreme Court denied the motion without a hearing, as both procedurally barred by CPL 440.10(2)(a) and meritless. The court reasoned that the defendant's legal sufficiency argument based on the change of law set forth in People v. Payne had been addressed and rejected by this Court in denying the defendant's motion for leave to reargue his direct appeal, by the Court of Appeals in denying the defendant's motion for leave to appeal, and by the federal court in denying the defendant's petition for a writ of habeas corpus. With respect to the merits of the defendant's motion, the Supreme Court determined that, viewing the evidence in the light most favorable to the prosecution, the evidence was legally sufficient to support the jury's verdict. * * * ... [T]he trial evidence was not legally sufficient to support a verdict of guilt of depraved indifference murder (see People v. Payne, 3 NY3d at 272; People v. Hernandez, 167 AD3d at 940)." ***People v. Illis*, 2020 N.Y. Slip Op. 03535, Second Dept 6-24-20**

CRIMINAL LAW, CONSTITUTIONAL LAW.

THE SENTENCE FOR KIDNAPPING MUST RUN CONCURRENTLY WITH THE SENTENCE FOR FELONY MURDER; MOTION TO VACATE THE CONVICTION PROPERLY BROUGHT PURSUANT TO CRIMINAL PROCEDURE LAW § 440.20.

The Second Department, reversing Supreme Court, determined: (1) the judge should have analyzed the motion to vacate the conviction under Criminal Procedure Law (CPL) § 440.20, as well as § 440.10; (2) the sentence for kidnapping should be concurrent with the sentence for felony murder; and (3) the judge failed to address whether the running of the kidnapping sentence consecutively to the other murder convictions violated defendant's rights to equal protection. Matter remitted for consideration of the equal-protection argument: "The Supreme Court erred in construing the defendant's motion as one solely pursuant to CPL 440.10. Rather, the motion also sought resentencing on the basis that the kidnapping sentence 'was unauthorized, illegally imposed or otherwise invalid as a matter of law' (CPL 440.20[1]) because it should have been made to run concurrently with the felony murder conviction under count three of the indictment, and it should have been made to run concurrently with all of the murder convictions based on his rights to equal protection. That branch of the motion was

properly made pursuant to CPL 440.20 (see CPL 440.20[4]). ... [T]he imposition of consecutive sentences for the kidnapping conviction under count four of the indictment and the felony murder conviction under count three of the indictment was unlawful, since the kidnapping ... , of which the defendant was convicted under count four of the indictment, also constituted the underlying felony in his murder conviction under count three of the indictment, thereby constituting a 'material element' of that crime (Penal Law § 70.25[2] ...). ... The Supreme Court failed to address the only remaining issue raised by the defendant on this appeal—that the running of the sentence on the kidnapping conviction consecutively to the sentences on the other murder convictions violated his rights to equal protection. Accordingly, we remit the matter to the Supreme Court, Queens County, for a determination of that issue." ***People v. Khan*, 2020 N.Y. Slip Op. 03537, Second Dept 6-24-20**

CRIMINAL LAW, EVIDENCE.

DEFENSE 'FALSE CONFESSION' EXPERT SHOULD HAVE BEEN ALLOWED TO TESTIFY, CONVICTION REVERSED; RIGHT TO CONFRONT WITNESSES NOT VIOLATED BY STATEMENTS IN THE VIDEO INTERROGATION THAT NONTESTIFYING WITNESSES HAD IMPLICATED THE DEFENDANT.

The Second Department, reversing defendant's murder conviction, determined the defense "false confession" expert should have been allowed to testify. The defendant was 15 when arrested. He maintained his innocence for two hours and 45 minutes of interrogation before confessing. The Second Department rejected defendant's argument that he was denied his right to confront witnesses by statements in the video interrogation that nontestifying witnesses had implicated the defendant: "Contrary to the defendant's contention, his right to confrontation was not violated when the Supreme Court allowed into evidence portions of his videotaped statement to law enforcement officials that contained statements that nontestifying witnesses had implicated him in the crime. The statements were not received for their truth, but to explain the defendant's reaction to hearing them ... . Further, the court properly instructed the jury that it was not to consider any of the statements as evidence against the defendant, and the jury is presumed to have followed this admonition ... . * * * ... Supreme Court improvidently exercised its discretion in denying the defendant's application to permit testimony from his expert witness on the issue of false confessions. We have previously determined that 'it cannot be said that psychological studies bearing on the reliability of a confession are, as a general matter, within the ken of the typical juror' ... . Thus, here, the court should not have precluded the testimony of the defendant's expert witness on this ground. Further, '[w]ith regard to expert testimony on the phenomenon of false confessions, in order to be admissible, the expert's proffer must be relevant to the [particular] defendant and interrogation before the court' ... . Here, the report of the defendant's expert was sufficiently detailed so that it was relevant to this particular defendant, including discussing characteristics that heightened his vulnerability to manipulation, and the interrogation conducted by the detectives, such as the techniques that were utilized and the improper participation of the defendant's mother during the interview." ***People v. Churaman*, 2020 N.Y. Slip Op. 03526, Second Dept 6-24-20**

CRIMINAL LAW, EVIDENCE.

THE MAJORITY HELD THE WARRANTLESS SEARCH OF DEFENDANT'S BACKPACK WAS JUSTIFIED BECAUSE IT OCCURRED CLOSE IN TIME TO DEFENDANT'S ARREST ON THE STREET AND WAS JUSTIFIED BY EXIGENT CIRCUMSTANCES; THE DISSENT ARGUED THERE WAS NO PROOF THE BACKPACK WAS WITHIN THE GRABBABLE AREA AND NO PROOF OF EXIGENT CIRCUMSTANCES.

The Second Department, over a dissent, determined the warrantless search of defendant's backpack occurred close in time to the arrest and was justified by exigent circumstances. The dissent argued there was no evidence the backpack was within the grabbable area of the defendant and no evidence there were exigent circumstances. Defendant had fallen off his bicycle after he was stopped by the police, the complainant had identified the defendant at the scene, and there were five or six officers around the defendant at the time of the search of the backpack: "According to the testimony adduced at the suppression hearing, after being chased by the police, the defendant fell off his bicycle onto the street. When the complainant arrived one minute later and identified the defendant, the defendant was standing up and had not yet been handcuffed. Immediately after the complainant's identification, the defendant was placed under arrest. Approximately two minutes after the defendant's arrest, the police searched the subject backpack which was 'on the street, at the location of the arrest.' These facts show that the arrest and search of the backpack were for all practical purposes conducted at the same time and in the same place ... . Additionally, at the time of the arrest, the backpack, which was 'on the street, at the location of the arrest,' could have been accessed by the defendant and had not yet been reduced to the exclusive control of the police. Additionally, the circumstances support a reasonable belief that the search of the backpack was necessary to ensure the safety of the arresting officers and the public. The police responded to and arrested the defendant for a burglary, a violent crime. In addition, the defendant was not cooperative with the police. Indeed, the defendant was arrested at the conclusion of a police chase, following his flight from the police on a bicycle. Moreover, the setting of the defendant's arrest and search of the backpack was a public street. These circumstances gave rise to objective and legitimate reasons for the search of the backpack ...". ***People v. Mabry*, 2020 N.Y. Slip Op. 03540, Second Dept 6-24-20**

CRIMINAL LAW, EVIDENCE, JUDGES.

TRIAL JUDGE ASSUMED THE ROLE OF THE PROSECUTOR AND ELICITED CRUCIAL IDENTIFICATION TESTIMONY, NEW TRIAL ORDERED.

The Second Department, ordering a new trial, determined the trial judge assumed the role of the prosecutor in eliciting crucial identification testimony: " While neither the nature of our adversary system nor the constitutional requirement of a fair trial preclude a trial court from assuming an active role in the truth-seeking process,' the court's discretion in this area is not unfettered' ... . The principle restraining the court's discretion is that a trial judge's 'function is to protect the record, not to make it' ... . Accordingly, while a trial judge may intervene in a trial to clarify confusing testimony and facilitate the orderly and expeditious progress of the trial, the court may not take on 'the function or appearance of an advocate' ... . Here, the record demonstrates that after the two complainants, in response to questions by the prosecutor, were unable to positively identify the defendant as the perpetrator of the robbery, the Supreme Court improperly assumed the appearance or the function of an advocate by questioning the complainants until it elicited a positive in-court identification of the defendant from each of them ... . Under these circumstances, the court's decision to elicit such testimony was an improper exercise of discretion and deprived the defendant of a fair trial." ***People v. Mitchell*, 2020 N.Y. Slip Op. 03541, Second Dept 6-24-20**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

SUPREME COURT'S DENIAL OF DEFENDANT'S PETITION TO MODIFY HIS SORA RISK LEVEL CLASSIFICATION WITHOUT HOLDING A HEARING VIOLATED THE CORRECTION LAW.

The Second Department, reversing Supreme Court, determined the failure to hold a hearing on defendant's petition to modify his risk level classification violated Correction Law § 168-o(4): "... [T]he defendant moved pursuant to Correction Law § 168-o(2) for a downward modification of his risk level classification under the Sex Offender Registration Act ... . The Supreme Court denied the defendant's petition without holding a hearing. We reverse. Since the Supreme Court failed to conduct a hearing on the defendant's petition, as set forth in Correction Law § 168-o(4), we reverse the order and remit the matter to the Supreme Court, Queens County, for a hearing and, thereafter, a new determination of the defendant's petition ...". ***People v. Banuchi*, 2020 N.Y. Slip Op. 03553, Second Dept 6-24-20**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

PEOPLE'S REQUEST FOR AN UPWARD DEPARTURE IN THIS SORA RISK ASSESSMENT PROCEEDING SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the People's request for an upward department in this SORA risk assessment proceeding should not have been granted: "The Supreme Court should not have granted the People's request for an upward departure. 'A departure from the presumptive risk level is generally the exception, not the rule. Where the People seek an upward departure, they must identify an aggravating factor that tends to establish a higher likelihood of reoffense or danger to the community not adequately taken into account by the Guidelines, and prove the facts in support of the aggravating factor by clear and convincing evidence' ... . If the People do not satisfy these two requirements, 'the court does not have the discretion to depart from the presumptive risk level' ... . Here, the People failed to establish that the defendant's conduct was so brutal, heinous, extreme, or depraved as to amount to an aggravating factor that tends to establish a higher likelihood of reoffense or danger to the community not adequately taken into account by the Guidelines ...". ***People v. Murray*, 2020 N.Y. Slip Op. 03554, Second Dept 6-24-20**

FAMILY LAW.

FATHER HAD PAID ALL THE CHILD SUPPORT HE OWED; THE SENTENCE OF INCARCERATION SHOULD NOT HAVE BEEN IMPOSED.

The Second Department, reversing Family Court, determined that the court should not have imposed a sentence of incarceration on father because father had paid all of the child support he owed: "We disagree ... with the Family Court's imposition of a sentence of incarceration upon its finding of willfulness since the parties agreed at the hearing that the father had paid the full amount due and owing. Although the court is empowered to impose a sentence of incarceration of up to six months for willful failure to comply with a support order (see Family Ct Act § 454[3][a] ...), such incarceration may only continue until the offender complies with the support order (see Judiciary Law § 774[1] ...). Here, the court sentenced the father to a period of incarceration of 40 days, to be suspended under certain conditions, after the parties already had agreed that the father had paid all that was due and owing at that time. Under such circumstances, no period of incarceration should have been imposed ... . Accordingly, since the court imposed a sentence of incarceration in contravention of Judiciary Law § 774(1), that provision of the ... order must be deleted." ***Matter of Augliera v. Araujo*, 2020 N.Y. Slip Op. 03510, Second Dept 6-24-20**

FAMILY LAW.

EDUCATIONAL NEGLECT FINDING FOR EIGHT-YEAR-OLD WAS SUPPORTED; BUT THE DERIVATIVE EDUCATIONAL NEGLECT FINDING FOR THE FOUR-MONTH-OLD WAS NOT.

The Second Department, reversing (modifying) Family Court, held the educational neglect finding was supported for the eight-year-old child, but the derivative educational neglect finding for four-month-old child was not supported: "The record demonstrates that the older child was absent 48 days and was late 78 other days during the 2016-2017 school year. The record also shows that the older child was reported to be failing and had previously repeated the first grade. Thus, the petitioner met its prima facie burden of establishing educational neglect of the older child by submitting unrebutted evidence of that child's excessive absences and tardiness ... . The mother's excuses for the older child's absences and tardiness did not constitute a reasonable justification for the child's excessive absences and tardiness ... . Moreover, the court drew the strongest negative inference against the mother for her failure to testify ... . However, under the circumstances of this case, we disagree with the Family Court's determination that proof of the mother's educational neglect of the older child is proof that she derivatively neglected the younger child. 'Although Family Court Act § 1046(a)(i) allows evidence of abuse or neglect of one sibling to be considered in determining whether other children in the household were abused or neglected, the statute does not mandate a finding of derivative neglect' ... . Here, there is no likelihood that the educational neglect of the older child, who was eight years old at the time of the proceeding, had any detrimental impact on the younger child, who was four months old at the time of the events in issue. Thus, the preponderance of the evidence did not support a finding that the mother derivatively neglected the younger child, who was not of school age or even close to being so ...". ***Matter of Nevetia M. (Tiara M.)*, 2020 N.Y. Slip Op. 03515, Second Dept 6-24-20**

FAMILY LAW, CONTRACT LAW, CIVIL PROCEDURE.

THE ACTION TO ENFORCE THE POSTNUPTIAL AGREEMENT WAS GOVERNED BY THE THREE-YEAR STATUTE OF LIMITATIONS IN THE DOMESTIC RELATIONS LAW, NOT THE SIX-YEAR CONTRACT STATUTE OF LIMITATIONS IN CPLR 213; THEREFORE THE ACTION WAS TIME-BARRED.

The Second Department, reversing Supreme Court, determined the statute of limitations with respect to the enforcement of a postnuptial agreement is that provided for in Domestic Relations Law § 250, not the six-year statute of limitations for contract actions generally: "... [T]he six-year statute of limitations that pertains to breach of contract causes of action (see CPLR 213[2]) is not applicable. Rather, the applicable statute of limitations is provided for in Domestic Relations Law § 250. Pursuant to Domestic Relations Law § 250, the statute of limitations for claims arising from prenuptial and postnuptial agreements is three years and that period is tolled, as relevant here, until process has been served in a matrimonial action. The language of the statute makes it broadly applicable to claims arising from prenuptial and postnuptial agreements, such that it applies equally where a party seeks to invalidate the agreement and where a party seeks to enforce it ... . Here, the defendant did not assert his claim to enforce the postnuptial agreement until more than 4½ years after he was served with process in the matrimonial action. Accordingly, the defendant's claim is untimely, and should have been rejected." ***Washiradusit v. Athonvarangkul*, 2020 N.Y. Slip Op. 03562, Second Dept 6-24-20**

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

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1304 NOTICE REQUIREMENTS NOT MET; PLAINTIFF BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate compliance with the notice provisions of Real Property Actions and Proceedings Law (RPAPL) 1304. Therefore plaintiff's motion for summary judgment in this foreclosure action should not have been granted: "... [T]he plaintiff failed to establish its entitlement to judgment as a matter of law with respect to compliance with the notice requirement of RPAPL 1304. Proper service of RPAPL 1304 notice containing the statutorily mandated content is a condition precedent to the commencement of the foreclosure action, and failure of a plaintiff to make this showing requires denial of its motion for summary judgment ... . The lender must submit proof of mailing (such as an affidavit of service or domestic return receipts with attendant signatures) or an affidavit either from the individual who performed the actual mailing or an individual with personal knowledge of the lender's standard office mailing procedure ... . Here, the unsubstantiated and conclusory statement of the plaintiff's attorney in an affidavit submitted in support of the motion that RPAPL 1304 notice was properly mailed to the defendant is insufficient to establish compliance with the statute as a matter of law ...". ***Ventures Trust 2013-I-H-R by MCM Capital Partners, LLC v. Williams*, 2020 N.Y. Slip Op. 03561. Second Dept 6-24-20**

FREEDOM OF INFORMATION LAW (FOIL), ATTORNEYS.

ALTHOUGH PETITIONER ULTIMATELY PREVAILED AND WAS PROVIDED WITH THE NASSAU COUNTY TRAFFIC AND PARKING VIOLATIONS AGENCY (TPVA) RECORDS PURSUANT TO ITS FREEDOM OF INFORMATION LAW (FOIL) REQUEST, BECAUSE THE TPVA PERFORMS EXEMPT ADJUDICATORY FUNCTIONS AS WELL AS NON-EXEMPT PROSECUTORIAL FUNCTIONS THE COUNTY HAD A REASONABLE BASIS FOR INITIALLY WITHHOLDING THE RECORDS; $30,000 ATTORNEY'S-FEES AWARD REVERSED.

The Second Department, reversing Supreme Court, determined that, although the petitioner ultimately prevailed in its Freedom of Information Law (FOIL) action, it was not entitled to attorney's fees. The petitioner sought records re: Nassau County's photo speed monitoring system. The records were held by the Nassau County Traffic and Parking Violations Agency (TPVA). Initially the request was denied on the ground that the TPVA is part of the judiciary and therefore was not an "agency" within the meaning of the Public Officers Law. However, the Court of Appeals has clarified that there are aspects of the TPVA which are adjudicatory and aspects which are prosecutorial. Ultimately it was determined the sought records related to the prosecutorial function and were made available to the petitioner. The Supreme Court awarded petitioner over $30,000 in attorney's fees. But the Second Department reversed: "We disagree with the Supreme Court's determination to grant the petitioner's motion for an award of attorney's fees. Here, the petitioner 'substantially prevailed' in the proceeding, inasmuch as the petitioner eventually received the documents sought from the TPVA (see Public Officers Law § 89[4][c] ...). However, the TPVA had a reasonable basis for denying the petitioner's request for its records based on its reliance upon the Court of Appeals' statement that 'the TPVA was intended to be an arm of the District Court' ... , and FOIL's express exclusion of 'judiciary' from its definition of "agency" (Public Officers Law § 86[1], [3]). Although it was ultimately determined that TPVA records concerning its nonadjudicatory responsibilities are not exempt from disclosure pursuant to the Public Officers Law, it remains that TPVA had a reasonable basis in law for withholding the requested materials ... . Accordingly, the petitioner's motion should have been denied." ***Matter of Law Offs. of Cory H. Morris v. County of Nassau*, 2020 N.Y. Slip Op. 03513, Second Dept 6-24-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE, JUDGES.

LABOR LAW § 200 CAUSE OF ACTION BASED UPON A DANGEROUS CONDITION PROPERLY SURVIVED SUMMARY JUDGMENT, APPELLANTS DID NOT DEMONSTRATE A LACK OF ACTUAL OR CONSTRUCTIVE NOTICE OF THE CONDITION; JUDGE SHOULD NOT HAVE, SUA SPONTE, DENIED A MOTION ON A GROUND NOT RAISED BY A PARTY.

The Second Department determined the Labor Law § 200 and common-law negligence causes of action properly survived summary judgment. The Second Department noted the court should not have, sua sponte, denied appellants' motion on the ground the deposition transcripts were inadmissible because that issue was not raised. Plaintiff was working in the bottom of a hole which was muddy from heavy rain and littered with boulders and rocks. Plaintiff was injured when he allegedly slipped and fell because of the mud. The Second Department held that the causes of action were based upon a dangerous condition, not the method and manner of work, and the appellants did not demonstrate they lacked actual or constructive notice of the condition: "Labor Law § 200 is a codification of the common-law duty imposed on owners, contractors, and their agents to provide workers with a safe place to work ... . There are 'two broad categories of actions that implicate the provisions of Labor Law § 200' ... . The first category involves worker injuries arising out of alleged dangerous or defective conditions on the premises where the work is performed ... . In those circumstances, '[f]or liability to be imposed on the property owner, there must be evidence showing that the property owner either created a dangerous or defective condition, or had actual or constructive notice of it without remedying it within a reasonable time' ... . The second category of actions under Labor Law § 200 involves injuries arising from the method and manner of the work ... . A property owner will be held liable under this category only if it possessed the authority to supervise or control the means and methods of the work ... . Contrary to the appellants' contention, the plaintiff's accident arose from a dangerous premises condition, not from the method and manner of the work. Where a plaintiff alleges that he or she was injured at a work site as a result of a dangerous premises condition, a property owner's liability under Labor Law § 200 and for common-law negligence rests upon whether the property owner created the condition, or had actual or constructive notice of it and a reasonable amount of time within which to correct the condition ...". ***Modugno v. Bovis Lend Lease Interiors, Inc.*, 2020 N.Y. Slip Op. 03508, Second Dept 6-24-20**

PERSONAL INJURY, MUNICIPAL LAW.

VILLAGE DID NOT DEMONSTRATE IT DID NOT CREATE THE DEFECT IN THIS SIDEWALK/TREE-WELL SLIP AND FALL CASE; THEREFORE THE VILLAGE'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the village's motion for summary judgment in this sidewalk/tree-well slip and fall case should not have been granted. The Village demonstrated it did not have the required written notice of the defect, but did not demonstrate it did not create the defect: " 'A municipality that has adopted a prior written notice law cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless

an exception to the requirement applies' ... . 'Two exceptions to the prior written notice requirement have been recognized, namely, where the locality created the defect or hazard through an affirmative act of negligence and where a special use confers a special benefit upon the locality' ... . '[T]he prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings' ... . Here, the plaintiff alleged in her complaint and bill of particulars that the Village affirmatively created the defect that caused the accident. Therefore, in order to establish its prima facie entitlement to judgment as a matter of law, the Village had to demonstrate both that it did not have prior written notice of the defect and that it did not create the defect ... . The Village established, prima facie, that it did not have prior written notice of the defect, but it failed to establish, prima facie, that it did not affirmatively create the alleged defect ...". ***Nigro v. Village of Mamaroneck*, 2020 N.Y. Slip Op. 03518, Second Dept 6-24-20**

THIRD DEPARTMENT

APPEALS, FAMILY LAW.

THE 3RD DEPARTMENT REFUSED TO AMEND THE NOTICE OF APPEAL TO INSERT AN ORDER FROM WHICH NO APPEAL HAD BEEN TAKEN; APPEAL DISMISSED.

The Third Department, dismissing respondent mother's appeal, determined mother failed to timely appeal the order terminating her parental rights, Mother submitted a notice of appeal after she was served with the April 2018 permanency hearing order, not within 35 days of her being service with the November 2016 order terminating her parental rights: "Respondent contends that the affidavit submitted with her notice of appeal demonstrates that she intended to appeal the November 2016 order terminating her parental rights, rather than the April 5, 2018 permanency hearing order. Accordingly, respondent asks this Court to 'construe [her appeal] as such, and deem it timely filed.' Despite this request, the order terminating respondent's parental rights was entered and mailed to respondent in November 2016, 18 months before her May 2018 notice of appeal. Thus, even if we were to construe it as respondent requests, because the notice of appeal was not filed and served 'within 35 days after the order was mailed' to respondent, it was untimely and we lack jurisdiction to hear the appeal ... . Further, despite respondent's contention that her affidavit accompanying the notice of appeal demonstrates her intent to appeal the order terminating her parental rights, this affidavit explicitly and repeatedly references the permanency hearing order. Although this Court 'may treat a notice of appeal which contains an inaccurate description of the judgment or order appealed from as valid,' it may not, as respondent requests, 'amend a notice of appeal so as to insert therein an order from which no appeal has in fact ever been taken' ...". ***Matter of Alan VV. (Amanda RR.)*, 2020 N.Y. Slip Op. 03574, Third Dept 6-26-20**

PERSONAL INJURY, WORKERS' COMPENSATION, CIVIL PROCEDURE, EMPLOYMENT LAW.

PERSONAL INJURY ACTION BY MOTHER OF A 14-YEAR-OLD KILLED WHEN WORKING ILLEGALLY ON DEFENDANT FARM PROPERLY DISMISSED; THE RECOVERY UNDER THE WORKERS' COMPENSATION LAW WAS THE EXCLUSIVE REMEDY BECAUSE THE INTENTIONAL-TORT EXCEPTION DID NOT APPLY; THE ACTION WAS PRECLUDED BY THE RES JUDICATA DOCTRINE; IN ADDITION THERE WAS NO EVIDENCE DEFENDANTS ACTED WILLFULLY OR INTENTIONALLY (THIRD DEPT).

The Third Department determined the personal injury action brought by decedent's mother was properly dismissed because the recovery pursuant to the Workers' Compensation Law was the exclusive remedy. Plaintiff's decedent, 14-years-old, was killed operating a skid steer while illegally employed by defendant's (Park's) farm. Although plaintiffs recovered Workers' Compensation benefits, plaintiffs argued an exception to the exclusive-remedy restriction for intentional torts applied. The Third Department held the exclusive-remedy restriction applied and there was no evidence of willful or intentional conduct on the part of the defendants: "Inasmuch as the [Workers' Compensation] Board had already 'determined that [decedent's] injuries were suffered accidentally and in the course of employment' for the Farm, the claim that the Farm or its employees are liable 'for an intentional tort based on the same event is barred by the exclusive remedy and finality provisions of the Workers' Compensation Law, and by principles of res judicata' ... . Even if the Board's decision did not have preclusive effect, however, Supreme Court properly rejected the contention that Park engaged in 'deliberate acts . . . to injure [decedent] or to have him injured' so as to bring this case within an exception to the exclusivity provisions of the Workers' Compensation Law ... . The record reflects that decedent used the skid steer without anyone's knowledge and that, following the investigation into decedent's death, Park pleaded guilty to willful failure to pay unemployment insurance contributions (see Labor Law § 633), endangering the welfare of a child (see Penal Law § 260.10) and prohibited employment of a minor (see Labor Law § 133). It could be inferred from those facts that Park was negligent in failing to supervise decedent, or even reckless in exposing decedent to dangerous work that his age left him unsuited for, but not that Park acted out of a 'willful intent to harm' decedent, as required ...". ***Smith v. Park*, 2020 N.Y. Slip Op. 03583, Third Dept 6-25-20**

PERSONAL INJURY, MUNICIPAL LAW, EVIDENCE.

DESPITE EVIDENCE THAT BOTH DRIVERS WERE FAMILIAR WITH THE INTERSECTION WHERE THE TRAFFIC ACCIDENT OCCURRED, PLAINTIFFS' EXPERT RAISED A QUESTION OF FACT WHETHER PROPER SIGNAGE COULD HAVE PREVENTED THE ACCIDENT; THE TOWN'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Third Department, reversing Supreme Court, determined plaintiffs' expert raised a question of fact whether proper signage at the intersection where the traffic accident occurred could have prevented the collision. The fact that both drivers were familiar with the intersection did not require that the town's motion for summary judgment be granted (as Supreme Court had found): " 'As a general rule, the question of proximate cause is to be decided by the finder of fact,' but it may be decided as a matter of law 'where only one conclusion may be drawn from the established facts' ... . Here, in support of its motion for summary judgment, the Town submitted evidence revealing that the drivers had some familiarity with the intersection, together with expert proof that the existing markings and traffic control devices were appropriate and consistent with applicable design standards. However, plaintiffs countered the Town's showing with evidence that additional devices, such as a stop sign and painted stop bar, as well as pavement markings indicating the proper turning radius, were required for the subject intersection by applicable design standards; plaintiffs' expert opined that the absence of such markings and devices was a substantial contributing factor to this collision. Notably, 'a disagreement . . . between experts merely creates a question of credibility to be resolved by the finder of fact' ... . Upon review, we do not find the opinions expressed by plaintiffs' expert in this matter to be lacking in either substance or foundation ...". ***O'Keefe v. Wohl*, 2020 N.Y. Slip Op. 03579, Third Dept 6-25-20**

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