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# COURT OF APPEALS

## CRIMINAL LAW, APPEALS.

MISDEMEANOR COMPLAINTS AND INFORMATIONS CANNOT BE CORRECTED BY AMENDMENT; RATHER A SUPERSEDING INSTRUMENT SUPPORTED BY A SWORN STATEMENT WITH THE CORRECT FACTS MUST BE FILED; THE ISSUE WAS NOT WAIVED BY DEFENDANT'S GUILTY PLEA TO THE AMENDED INSTRUMENT.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, reversing the Appellate Term and overruling precedent from 1954, over a two-judge dissent and an additional dissent, determined the misdemeanor complaint and the information to which the complaint was converted should not have been amended to correct wrong dates. The Criminal Procedure Law does not include a provision allowing amendment of misdemeanor complaints and informations. The proper procedure is to file a superseding accusatory instrument with a sworn statement supporting the correct facts. This appellate issue was not waived by defendant's guilty plea: "The text, structure, and legislative history of the CPL, as well as a straightforward application of our canons of statutory construction, all demonstrate that the CPL does not permit the kinds of factual amendments once countenanced by [People v. Easton (307 NY 336 [1954])]. The CPL does provide its own pathway for correcting factual errors in complaints and informations, through the filing of a superseding accusatory instrument (CPL 100.50), not through a prosecutor's amendment of facts averred by someone else. We recognize that the October 25, 2015 date in the accusatory instrument here cannot possibly be correct and that the correct date can be inferred from information outside the four corners of the accusatory instrument. However, in evaluating the sufficiency of an accusatory instrument we do not look beyond its four corners (including supporting declarations appended thereto) ... . It is the People's responsibility to obtain a sworn statement with the correct factual allegations and proceed on a superseding instrument." ***People v. Hardy*, 2020 N.Y. Slip Op. 05803, CtApp 10-15-20**

# FIRST DEPARTMENT

## CRIMINAL LAW.

BOTH A FEDERAL HOBBS ACT ROBBERY CONVICTION AND A NORTH CAROLINA BREAKING AND ENTERING CONVICTION ARE EQUIVALENT TO NEW YORK FELONIES; DEFENDANT PROPERLY SENTENCED AS A SECOND FELONY DRUG OFFENDER.

The First Department, in detailed analyses, determined a federal Hobbs Act robbery conviction, as well as a North Carolina breaking and entering conviction, constituted equivalents of New York felonies and therefore supported defendant's status as a second felony drug offender: "As this Court held in People v. Robles, (115 AD3d 420, 421 [1st Dept 2014], lv denied 23 NY3d 1066 [2014]), a Hobbs Act robbery is equivalent to the crime of larceny by extortion in New York (Penal Law 155.05), and a Hobbs Act robbery does not encompass a broader range of behavior than larceny by extortion. Contrary to defendant's contention, the intent elements of each crime require proof that a defendant intended to commit a larceny, but do not require a specific intent that defendant intended to instill fear in order to extort; it is sufficient to show that the actus reus occurred in tandem with a defendant's intent to commit a larceny ... . ... The North Carolina statute, entitled 'Breaking or Entering Buildings Generally,' independently qualifies as a predicate felony offense to justify enhanced sentencing in New York because it is equivalent to third-degree burglary. The North Carolina statute provides that a person is guilty of this crime when he 'breaks or enters any building with intent to commit any felony or larceny therein' (see N.C.G.S.A. § 14-54[a]). New York's third-degree burglary statute provides that a person is guilty of a class D felony if a person 'knowingly enters or remains unlawfully in a building with intent to commit a crime' (PL 140.20). 'A person . . . remains unlawfully in or upon premises when he is not licensed or privileged to do so' (PL 140.00[5])." ***People v. Sylvester*, 2020 N.Y. Slip Op. 05702, First Dept 10-13-20**

## CRIMINAL LAW, APPEALS, EVIDENCE.

THE ELEMENT OF THE UNLAWFUL POSSESSION OF AMMUNITION STATUTE WHICH REQUIRES PROOF THE DEFENDANT WAS NOT AUTHORIZED TO POSSESS A PISTOL OR REVOLVER IS AN EXCEPTION, NOT A PROVISO; CONVICTION VACATED IN THE INTEREST OF JUSTICE DESPITE LACK OF PRESERVATION.

The First Department, vacating defendant's conviction of unlawful possession of ammunition pursuant to NYC Administrative Code § 10-131[i][3], determined the language of the statute required that the People prove defendant was not authorized to possess a pistol or a revolver, which was not established by the evidence: "... [T]he language of the ammunition possession statute (Administrative Code § 10-131[i][3]) concerning authorization to possess a pistol or revolver within the City is an exception, not a proviso (Tatis, 170 AD3d at 48). Therefore, the People were required to prove, as an element of the offense, that defendant was not authorized to possess a pistol or revolver, regardless of whether defendant raised the issue in the first instance (id.). The evidence at trial did not establish that fact. Accordingly, we exercise our interest of justice jurisdiction to vacate that conviction." ***People v. Anonymous*, 2020 N.Y. Slip Op. 05689, First Dept 10-13-20**

## FAMILY LAW, EVIDENCE.

THE EVIDENCE DID NOT SUPPORT A FINDING OF NEGLECT FOR FAILURE TO PROVIDE ADEQUATE SHELTER.

The First Department, reversing Family Court, determined the neglect finding based upon an alleged failure to provide adequate shelter was not supported by the evidence: "While the apartment was in a deteriorated condition, there is no evidence that the child, age thirteen, was in danger or imminent danger of impairment due to the condition of the apartment; indeed, the caseworker testified that she observed the child to be healthy and appropriately groomed, the child was at the appropriate grade level, and the child denied any concerns about the father ... . The strong inference drawn by the court against the father for failing to testify is insufficient by itself to provide the necessary link between the conditions in the apartment and any imminent harm to the child ...". ***Matter of Angelica M. (Joe M.)*, 2020 N.Y. Slip Op. 05685, First Dept 10-13-20**

## FAMILY LAW, EVIDENCE.

EVIDENCE DID NOT SUPPORT A NEGLECT FINDING BASED UPON THE CONDITION OF THE HOME.

The First Department, in affirming neglect findings based upon leaving the children unattended in a car and in the bathtub, determined that the evidence did not support the neglect finding based upon the condition of the home: "The only evidence that respondents failed to maintain the home in a sanitary condition was the caseworker's testimony about her observations during a single visit, which is insufficient to support the finding of neglect on that basis ...". ***Matter of Dream F. (Phillystina R.)*, 2020 N.Y. Slip Op. 05832, First Dept 10-15-20**

## PERSONAL INJURY, EVIDENCE.

DEFENDANT DID NOT DEMONSTRATE WHEN THE STAIRWAY HAD LAST BEEN CLEANED OR INSPECTED IN THIS SLIP AND FALL CASE; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendant was not entitled to summary judgment in this slip and fall case because it did not demonstrate when the stairway where plaintiff slipped and fell was last cleaned or inspected: "Defendant did not demonstrate that it lacked constructive notice of the grease as it failed to show when the stairwell was last cleaned or inspected ... . Proof of a regular maintenance schedule 'does not suffice for purposes of showing that it was followed' ... , and since the superintendent was due to clean the hallways and stairs on the day of the accident, plaintiff's observation of debris on the stairs shows that no such maintenance was done prior to her fall." ***White v. MP 40 Realty Mgt. LLC*, 2020 N.Y. Slip Op. 05838, First Dept 10-15-20**

## PERSONAL INJURY, MUNICIPAL LAW.

THE CURB AND TREE WELL ARE NOT AREAS OF A SIDEWALK WHICH ARE THE RESPONSIBILITY OF THE ABUTTING PROPERTY OWNER; THE PROPERTY OWNER'S/MANAGER'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined the areas near the sidewalk where plaintiff slipped and fell were the curb and a tree well. Both the curb and the tree well, according to the NYC Administrative Code, are not the responsibility of the abutting property owner (Gore/UA): "The owner of premises abutting the public sidewalk has a nondelegable duty to maintain and repair the sidewalk abutting the premises (Administrative Code of the City of New York § 7—210 ...). The sidewalk includes 'the intersection quadrant for corner property' (Admin Code § 7-210[a]). 'Although section 7-210 does not define the term 'sidewalk,' Administrative Code § 19-101 (d) defines sidewalk as 'that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians' ... . In the absence of a definition in section 7-210, this Court has held that the definition in section 19-101(d) should govern ... . We find that Gore/UA's motion for summary judgment should have been granted.

Review of the photographs clearly show that the area where plaintiff fell is a curb, intended for the use of pedestrians. Therefore, the definition of the term sidewalk in section 19-101(d) shows that Gore and UA did not have a duty to maintain or repair the area where plaintiff fell. Further, to the extent that plaintiff's injuries were caused by the tree well, Administrative Code § 7-210 'does not impose civil liability on property owners for injuries that occur in city-owned tree wells' ...". ***Brown v. New York City Dept. of Transp.*, 2020 N.Y. Slip Op. 05807, First Dept 10-15-20**

# SECOND DEPARTMENT

## CIVIL PROCEDURE, DEBTOR-CREDITOR.

ALTHOUGH VACATING A JUDGMENT STEMMING FROM A CONFESSION OF JUDGMENT MUST ORDINARILY BE ACCOMPLISHED BY BRINGING A PLENARY ACTION, A MOTION TO VACATE IS APPROPRIATE WHERE IT IS ALLEGED THE COURT WHICH ENTERED THE JUDGMENT DID NOT HAVE SUBJECT MATTER JURISDICTION; HERE THE MOTION TO VACATE WAS THE CORRECT VEHICLE BUT THE MOTION WAS PROPERLY DENIED ON THE MERITS.

The Second Department noted that ordinarily the only way to vacate a judgment entered by the filing of an affidavit of confession of judgment is a plenary action. However, if, as here, the ground for vacating the judgment is the lack of subject matter jurisdiction, a motion to vacate is proper. Here, although the motion was the proper vehicle, the court did have jurisdiction to enter the judgment: " 'Generally, a person seeking to vacate a judgment entered upon the filing of an affidavit of confession of judgment must commence a separate plenary action for that relief' ... . However, a claim that the court lacked the authority to enter the judgment is an exception to the general rule requiring a plenary action, and may be raised by a motion to vacate ... . Thus, the defendants' contention that the Supreme Court, Westchester County, lacked subject matter jurisdiction to enter a confession of judgment against them was properly raised by way of motion. Nevertheless, the contention is without merit. Pursuant to the version of CPLR 3218(b) applicable at the time the affidavit of confession was filed, 'the clerk of the county designated in the affidavit' had authority to enter a judgment by confession against a nonresident defendant (former CPLR 3218[b])." ***Funding Metrics, LLC v. A & A Fabrication & Polishing Corp.*, 2020 N.Y. Slip Op. 05724, Second Dept 10-14-20**

## COURT OF CLAIMS, NEGLIGENCE, VEHICLE AND TRAFFIC LAW.

THE DRIVER OF THE STATE DUMP TRUCK WHO SIDESWIPED PLAINTIFF'S MOPED IN THE BICYCLE LANE WHILE LOOKING FOR DEAD DEER DID NOT ACT RECKLESSLY WITHIN THE MEANING OF THE VEHICLE AND TRAFFIC LAW.

The Second Department, reversing the Court of Claims, determined the driver of a Department of Transportation (DOT) dump truck did not act recklessly within the meaning of Vehicle and Traffic Law § 1103(b). The driver was traveling partially in the bicycle lane looking for dead deer and didn't see the plaintiff on a moped in the bicycle lane: "A State vehicle 'actually engaged in work on a highway' is exempt from the rules of the road and may be held liable only for damages caused by an act done in 'reckless disregard for the safety of others' (Vehicle and Traffic Law § 1103[b] ... ). 'Reckless disregard . . . requires more than a momentary lapse in judgment' ... . In order to meet the standard required by Vehicle and Traffic Law § 1103(b), a claimant must show that 'the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome'... ... [T]he evidence was insufficient to establish that the DOT workers exhibited a 'reckless disregard for the safety of others' (Vehicle & Traffic Law § 1103[b]). The claimant failed to establish that the DOT workers acted in conscious disregard of a known or obvious risk that was so great as to make it highly probably that harm would follow ...". ***Rascelles v. State of New York*, 2020 N.Y. Slip Op. 05788, Second Dept 10-14-20**

## CRIMINAL LAW, EVIDENCE, APPEALS.

EVIDENCE OF PHYSICAL INJURY LEGALLY INSUFFICIENT, ROBBERY AND BURGLARY FIRST CONVICTIONS REDUCED.

The Second Department, reducing defendants' convictions, determined the evidence of physical injury was legally insufficient: "Physical injury is defined as 'impairment of physical condition or substantial pain' (Penal Law § 10.00[9]). The complainant stated that her injuries consisted of a laceration on her neck from the defendant pulling off her necklace and scratches on her wrist from the defendant pulling off her bracelets. She did not go to the hospital and testified that her neck was sore and her wrist felt a little sore and afterwards she had pain in her neck and wrist, although she did not specify when the pain began or as to its duration. The officer who responded to the scene testified that the complainant had a scratch on her neck. Under these circumstances, there was insufficient evidence from which a jury could infer that the complainant suffered substantial pain or impairment of her physical condition ... . Accordingly, the defendant's convictions of burglary in the first degree and robbery in the second degree should be reduced to burglary in the second degree and robbery in the

third degree, respectively, which lesser crimes were proven at trial ...". ***People v. Smith*, 2020 N.Y. Slip Op. 05782, Second Dept 10-14-20**

## FAMILY LAW, CIVIL PROCEDURE, JUDGES, APPEALS.

THE 2ND DEPARTMENT CRITICIZED THE PIECEMEAL DECISION-MAKING BY SUPREME COURT IN THIS COMPLEX DIVORCE PROCEEDING WHICH RESULTED IN AN INADEQUATE RECORD ON APPEAL; HOWEVER THE 2ND DEPARTMENT ADDRESSED MANY OF THE FACTUAL ISSUES IN A DETAILED OPINION WORTH READING BUT IMPOSSIBLE TO SUMMARIZE HERE.

The Second Department, in a detailed, fact-specific opinion by Justice Scheinkman, criticized the piecemeal approach to the decisions made by Supreme Court in this divorce proceeding, which resulted in an inadequate record for the appellate court. The Second Department took it upon itself to resolve the factual issues which could be gleaned from the record. The factual discussion is too detailed to fairly summarize here. With respect to the piecemeal decision-making and the inadequate record on appeal the court wrote: "These appeals and cross appeal, as well as the two other appeals in the same case also decided today, are a graphic illustration of the prolixity that may ensue when a complicated matrimonial case is cabined into constituent parts which are heard and decided piecemeal by the Supreme Court. The court bifurcated the trial into phases but, in the end, only conducted one of the two promised phases of the trial. Because some of the issues did not lend themselves to a neat division, the issues, and the court's seriatim determination of them, overlap. As a consequence of the incremental approach to the serial determination of the significant issues raised, which were followed by sequential appeals and cross appeals from the various orders and the final judgment, which appeals are prosecuted on voluminous appendices and supplemental appendices, this Court has not been provided with either a clear, comprehensible, and accessible record or a unified, comprehensive analysis by each party as to what determinations were made by the Supreme Court and which of those decisions each party accepts or challenges. Moreover, with respect to equitable distribution of the parties' substantial investment assets, the judgment of divorce entered by the court merely incorporated by reference its prior decisions, without specifying what is actually ordered, adjudged, and decreed, except that it set forth certain deviations from those prior decisions. Since the decisions conflict with each other in important respects, it is unclear what the court actually directed as to the equitable distribution of major and valuable assets." ***Kaufman v. Kaufman*, 2020 N.Y. Slip Op. 05732, Second Dept 10-14-20**

## FAMILY LAW, EVIDENCE, CRIMINAL LAW.

THE HEARSAY EXCEPTION IN ARTICLE 10 OF THE FAMILY COURT ACT DOES NOT APPLY IN ARTICLE 8 FAMILY OFFENSE PROCEEDINGS; ORDER OF PROTECTION REVERSED.

The Second Department, reversing the Family Court's order of protection imposed after a finding appellant had committed a family offense, determined the finding was based upon inadmissible hearsay. The hearsay exception in Article 10 of the Family Court Act does not apply to family offense (Article 8) proceedings: "In a family offense proceeding, '[o]nly competent, material and relevant evidence may be admitted in a fact-finding hearing' (Family Ct Act § 834). In child protective proceedings brought pursuant to articles 10 and 10-A of the Family Court Act, there is a statutory hearsay exception for 'previous statements made by the child relating to any allegations of abuse or neglect' (Family Ct Act § 1046[a][vi]). '[A]lthough the hearsay exception contained in Family Court Act § 1046(a)(vi) has been applied in the context of custody proceedings commenced pursuant to Family [Court] Act article 6 where the basis of the custody proceeding is founded on neglect or abuse such that the issues are inextricably interwoven,' section 1046(a)(vi) is inapplicable in a family offense proceeding pursuant to Family Court Act article 8 ... . ... Dhanmatie Godfrey filed a family offense petition against Zahamin Bahadeur, in which she alleged that Bahadeur committed a family offense against one of her children. The only evidence presented by Godfrey in support of the allegations in the family offense petition were the child's inadmissible hearsay statements, as testified to by Godfrey. The Family Court erred in admitting the child's hearsay statements into evidence because the hearsay exception set forth in Family Court Act § 1046(a)(vi) does not apply in family offense proceedings pursuant to Family Court Act article 8 ...". ***Matter of Godfrey v. Bahadeur*, 2020 N.Y. Slip Op. 05750, Second Dept 10-14-20**

## FAMILY LAW, IMMIGRATION LAW.

THE FACT THAT PATERNITY HAD NOT BEEN ESTABLISHED DID NOT PRECLUDE MOTHER'S GUARDIANSHIP PETITION OR FINDINGS TO ALLOW THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS).

The Second Department, reversing Family Court, determined the petition to have the child's mother appointed guardian and to make findings necessary for the child to petition for special immigrant juvenile status (SIJS) should have been granted: "The Family Court should not have dismissed the guardianship petition on the ground that paternity had not been established. A natural parent may be appointed guardian of his or her own child (see Family Ct Act § 661 [a] ...), and the mere fact that paternity has not been established for the putative father does not preclude the guardianship petition or the issuance of an order making specific findings enabling the subject child to petition for SIJS ... . ... Here, the subject child is under the age of 21 and unmarried, and since we have found that the mother should have been appointed as the subject

child's guardian, a finding also should have been made that the child is dependent on a juvenile court within the meaning of 8 USC § 1101(a)(27)(J)(i) .... Further, based upon our independent factual review, the record supports a finding that reunification of the subject child with his father is not a viable option due to parental abandonment .... Lastly, the record supports a finding that it would not be in the best interests of the subject child to return to Guatemala ...". ***Matter of Mardin A. M.-I. (Reyna E. M.-I.--Mardin H.)*, 2020 N.Y. Slip Op. 05754, Second Dept 10-14-20**

## FAMILY LAW. JUDGES.

SUPREME COURT SHOULD NOT HAVE DEVIATED FROM THE FORMULA FOR DETERMINING TEMPORARY SPOUSAL MAINTENANCE IN THIS DIVORCE PROCEEDING WITHOUT MAKING A FINDING THAT USING THE FORMULA WOULD RESULT IN AN UNFAIR AMOUNT.

The Second Department, reversing (modifying) Supreme Court in this divorce proceeding, determined Supreme Court should not have deviated from the temporary spousal maintenance formula without making a finding the formula resulted in an unjust or inappropriate amount: " 'The formula to determine temporary spousal maintenance that is outlined in Domestic Relations Law § 236(B)(5-a)(c) is intended to cover all of a payee spouse's basic living expenses, including housing costs, the costs of food and clothing, and other usual expenses' ... . Here, the Supreme Court's directive that the defendant pay pendente lite maintenance in the sum of $6,940 per month plus real estate taxes, homeowner's insurance, and homeowner's association fees on the marital residence resulted in a double shelter allowance, since the formula used to calculate the presumptive temporary maintenance award is intended to cover all of the plaintiff's basic living expenses, including housing costs ... . It was error to deviate in this manner from the guideline amount of temporary maintenance without making a finding that such amount was unjust or inappropriate based upon the factors enumerated in Domestic Relations Law § 236(B)(5-a)(h) ...". ***Capozzoli v. Capozzoli*, 2020 N.Y. Slip Op. 05715, Second Dept 10-14-20**

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

PLAINTIFF DID NOT DEMONSTRATE STRICT COMPLIANCE WITH RPAPL 1304 IN THIS FORECLOSURE ACTION; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court in this foreclosure action, determined plaintiff (CV) did not provide the proof required by Real Property Actions and Proceedings Law (RPAPL) 1304: "The version of RPAPL 1304(2) as it existed at the time this action was commenced, provided that, '[t]he notices required by this section shall contain a current list of at least five housing counseling agencies that serve the region where the borrower resides from the most recent listing available from the department of financial services' ... ... CV failed to submit evidence to demonstrate that the 90-day notices contained either five housing agencies that served the region where the defendants resided or were from the most recent listing available from the department of financial services. ... Additionally, CV did not submit an affidavit of service or proof of mailing by the United States Postal Service evidencing that the defendants were properly served pursuant to RPAPL 1304. Instead, CV relied upon the affidavit of Matthew W. Regan, its executive vice president, who averred that 90-day notices were sent in accordance with the statute. In his affidavit, Regan referenced copies of 90-day notices, which, however, did not bear any postmark. Moreover, '[t]he presence of 20-digit numbers on the copies of the 90-day notices . . . standing alone, did not suffice to establish, prima facie, proper mailing under RPAPL 1304' ... . Also, Regan's affidavit was insufficient to establish that the required notices were sent in the manner required by RPAPL 1304, as Regan did not attest to personal knowledge of the mailing practices of the entity which sent the notices, and provided no independent evidence of the actual mailing ...". ***CV XXVIII, LLC v. Trippiedi*, 2020 N.Y. Slip Op. 05721, Second Dept 10-14-20**

## FORECLOSURE, REAL PROPERTY ACTIONS PROCEEDINGS LAW (RPAPL), EVIDENCE.

PLAINTIFF DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF RPAPL 1304 AND THE MORTGAGE; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this foreclosure action should not have been granted. Plaintiff did not demonstrate compliance with the notice provisions of RPAPL 1304 and the mortgage: "... [T]he evidence submitted in support of the motion failed to establish, prima facie, the plaintiff's strict compliance with RPAPL 1304 and that the required notice of default was in fact mailed to the defendants by first-class mail, or actually delivered to the designated address if sent by other means, as required by the terms of the mortgage as a condition precedent to foreclosure ...". ***Deutsche Bank Natl. Trust Co. v. Buah*, 2020 N.Y. Slip Op. 05722, Second Dept 10-14-20**

## PERSONAL INJURY.

DEFENDANTS' DID NOT DEMONSTRATE AS A MATTER OF LAW THAT THE ASSUMPTION OF THE RISK DOCTRINE APPLIED TO PLAINTIFF'S USE OF DEFENDANTS' HOVER BOARD IN DEFENDANTS' DRIVEWAY; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants did not demonstrate as a matter of law that the assumption of the risk doctrine applied to plaintiff's use of defendants' hover board in defendants' driveway. Plaintiff was

injured falling off the hover board: "Under the doctrine of primary assumption of risk, a voluntary participant in a sporting or recreational activity 'consents to those commonly appreciated risks [that] are inherent in and arise out of the nature of the sport generally and flow from such participation' ... . 'As a general rule, application of assumption of the risk should be limited to cases appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic and recreative activities, or athletic and recreational pursuits that take place at designated venues' ... . Here, the plaintiff was operating the hover board in the defendants' driveway, not a designated athletic or recreational venue; nor did the defendants actively sponsor or promote the activity ... . Accordingly, the defendants failed to establish, prima facie, that the doctrine of primary assumption of risk applied to the circumstances of this case …". ***Scally v. J.B.*, 2020 N.Y. Slip Op. 05791, Second Dept 10-14-29**

## PERSONAL INJURY, CIVIL PROCEDURE, CONTRACT LAW.

THE MOTION TO SET ASIDE THE VERDICT AS INCONSISTENT AFTER IT WAS DEEMED A DEFENSE VERDICT VIOLATED THE BINDING SUMMARY TRIAL STIPULATION; THE MOTION TO SET ASIDE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined granting the motion to set aside the verdict in this personal injury trial violated the binding summary jury trial stipulation which was entered into pursuant to Richmond County Summary Jury Trial Rules: "The plaintiff commenced this action to recover damages for personal injuries she allegedly sustained in an automobile accident. The parties subsequently entered into a stipulation to submit this matter to a binding summary jury trial pursuant to the Richmond County Summary Jury Trial Rules. In its verdict sheet, the jury found that the [defendant's] ... negligence was not a substantial factor in causing the accident, but went on to assess her percentage of fault at 49%. The jury did not determine whether the plaintiff had sustained a serious injury and did not award any damages. Upon receiving the jury's verdict sheet, the Supreme Court informed the jury that 'there was no need to go on past' the finding that [defendant's] negligence was not a substantial factor in causing the accident, and after ascertaining that all six jurors had signed the form, the trial court dismissed the jurors and announced that '[t]his constitutes a defense verdict.' Four days later, the plaintiff moved, in effect, to set aside the verdict on the ground that it was internally inconsistent, and the Supreme Court granted the motion. As the defendants contend, the Supreme Court 'exceeded the boundaries of the parties' agreement by setting aside the verdict' ...". ***Conio v. Talarico*, 2020 N.Y. Slip Op. 05720, Second Dept 10-14-20**

## PERSONAL INJURY, MEDICAL MALPRACTICE, EVIDENCE.

PLAINTIFFS' EXPERT'S AFFIDAVIT WAS CONCLUSORY AND SPECULATIVE AND RELIED ON FACTS NOT IN THE RECORD; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the defendants' motion for summary judgment in this medical malpractice should not have granted because plaintiffs' expert's affidavit relied on facts not in the record: "... [W]e disagree with the Supreme Court's determination that the affirmation of the plaintiffs' expert, submitted in opposition to the motion, was sufficient to raise a triable issue of fact as to whether the defendants deviated or departed from accepted medical practice. Even assuming that the plaintiffs' expert was qualified to opine on the placement of an epidural catheter, the expert's opinion that [defendant] departed from the standard of care was conclusory and speculative, and relied on facts that were not supported by the record ...". ***Herrera v. Sanroman*, 2020 N.Y. Slip Op. 05726, Second Dept 10-14-20**

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