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COURT OF APPEALS

ADMINSTRATIVE LAW, ATTORNEYS, CRIMINAL LAW.

2016 REGULATIONS RESTRICTING ATTORNEY'S FEES FOR CLAIMS MADE TO THE OFFICE OF VICTIM SERVICES (OVS) ARE CONSISTENT WITH THE STATUTORY LANGUAGE (EXECUTIVE LAW) AND RATIONAL.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a two-judge dissent and a concurrence, reversing the Appellate Division, determined that the Office of Victim Services (OVS) regulations limiting attorney's fees for crime victim claimants were consistent with the statutory language and rational: "OVS regulations formerly provided that claimants had a 'right to be represented . . . at all stages of a claim' ... and, '[w]henever an award [was] made to a claimant who [was] represented by an attorney, [OVS was required to] approve a reasonable fee commensurate with the services rendered, up to $1,000,' unless the request for attorneys' fees was premised on a claim 'submitted without legal or factual basis' ... . OVS acknowledges that this meant that attorneys' fees, if reasonable, were available at all stages of a claim. However, effective January 13, 2016, OVS amended 9 NYCRR § 525.9 to provide that '[a]ny claimant . . . may choose to be represented before [OVS], at any stages of a claim, by an attorney-at-law . . . and/or before the Appellate Division upon judicial review of the office's final determination,' but 'only those fees incurred by a claimant during: (1) the administrative review for reconsideration of such decision . . . ; and/or (2) the judicial review of the final decision of [OVS] . . . may be considered for reimbursement' ... . OVS issued a regulatory impact statement indicating that the 'purpose of th[e] rule change [wa]s to limit attorneys' fees pursuant to article 22 of the Executive Law.' OVS stated that the amendments were 'designed to conform the regulations to the enacting statute,' explaining that the prior regulations permitted claimants to recover attorneys' fees that 'far exceed[ed]' the 'reasonable expenses' specified under Executive Law § 626 (1). OVS indicates that Victim Assistance Programs (VAPs) are federally funded with a state match, and it emphasized in its regulatory impact statement that it 'fund[ed] 228 [VAPs] across New York State, distributing in excess of $35 million to these programs to assist and advocate on behalf of victims and claimants.' The required services provided by the VAPs include, among other things, 'assist[ing] victims and/or claimants in completing and submitting OVS applications and assist[ing] claimants through the claim process.' OVS determined that the legislature did not intend that attorneys' fees incurred in relation to assistance within the scope of services provided by VAPs would be considered reasonable under the statute." ***Matter of Juarez v. New York State Off. of Victim Servs., 2021 N.Y. Slip Op. 01091, CtApp 2-18-21***

CRIMINAL LAW, EVIDENCE.

THE SEARCH WARRANT DID NOT AUTHORIZE THE SEARCH OF DEFENDANT'S VEHICLES; SEIZED ITEMS PROPERLY SUPPRESSED.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a three-judge dissent, determined that the search warrant did not authorize the search of defendant's vehicles and the items seized were properly suppressed: "The requirement that warrants must describe with particularity the places, vehicles, and persons to be searched is vital to judicial supervision of the warrant process ... . Warrants 'interpose the detached and independent judgment of a neutral Magistrate between the interested viewpoint of those engaged in ferreting out crime and potential encroachments on the sanctity and privacy of the individual' ... . To further that role, our constitution assigns to the magistrate the tasks of evaluating whether probable cause exists to initiate a search and defining the subjects to be searched ... . The particularity requirement protects the magistrate's determination regarding the permissible scope of the search. Thus, to be valid, a search warrant must be 'specific enough to leave no discretion to the executing officer' ... . So important is the role of the neutral and detached magistrate that we have in the past parted ways from federal constitutional jurisprudence when we believed that an emerging rule of federal constitutional law 'dilute[s] . . . the requirements of judicial supervision in the warrant process' ... . The application contained no mention of the existence of the vehicles ultimately searched, much less evidence connecting them to any criminality. Indeed, the observed pattern, as described in the affidavit, was for Mr. Gordon [defendant] to proceed from the residence to the street and back, without detouring to any vehicles parked at the residence. ... '[N]o observation was reported as to any movement of persons between the house and the [vehicles]' ... that would substantiate a belief that the vehicles searched were utilized in the alleged criminal activity. Nor do we believe that the warrant for Mr. Gordon's 'person' or 'premises'—in the context of the factual allegations averred by the detectives—authorized a search of the vehicles. ... [T]he mere presence

of a vehicle seen at the sight of premises wherein the police suspect criminal activity to be occurring does not by itself provide probable cause to search the vehicle ...". ***People v. Gordon*, 2021 N.Y. Slip Op. 01093, CtApp 2-18-21**

FORECLOSURE, CIVIL PROCEDURE.

A MORTGAGE DEBT CAN BE ACCELERATED ONLY BY AN UNEQUIVOCAL OVERT ACT, I.E., COMMENCING A FORECLOSURE ACTION OR A DOCUMENT MAKING IT CLEAR THE ENTIRE DEBT IS IMMEDIATELY DUE (NOT THAT IT WILL BE DUE IN THE FUTURE); A MORTGAGE DEBT CAN BE DE-ACCELERATED BY A VOLUNTARY DISCONTINUANCE, EVEN IF ITS PURPOSE IS TO STOP THE STATUTE OF LIMITATIONS FROM RUNNING.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a partial dissent and a concurrence, clarified how courts should handle two recurring issues in the sea of foreclosures which have inundated the courts: (1) how is the mortgage debt accelerated such that the entire amount becomes due and the six-year statute of limitations for a foreclosure action starts running; and (2) how is the debt de-accelerated such that the statute of limitations for a foreclosure action stops running and the borrower can resume monthly installment payments? The Court of Appeals held that acceleration of the debt must be done by an unequivocal overt act. In the Vargas case, the foreclosure action did not refer to the correct loan, which had been modified and did not therefore accelerate the debt. In the *Wells Fargo* case, the letter did not ask for immediate payment of the entire debt and therefore did not accelerate the debt. As for de-acceleration, that can be accomplished by voluntarily discontinuing the foreclosure action: "There are sound policy reasons to require that an acceleration be accomplished by an 'unequivocal overt act.' * * * [Re: Acceleration, the *Vargas* case] ... [W]here the deficiencies in the [foreclosure] complaints were not merely technical or de minimis and rendered it unclear what debt was being accelerated—the commencement of these [foreclosure] actions did not validly accelerate the modified loan ... . * * * [Re: Acceleration, the *Wells Fargo* case] ... [T]he letter did not seek immediate payment of the entire, outstanding loan, but referred to acceleration only as a future event, indicating the debt was not accelerated at the time the letter was written. * * * [Re: De-acceleration] ... [W]hen a bank effectuated an acceleration via the commencement of a foreclosure action, a voluntary discontinuance of that action—i.e., the withdrawal of the complaint—constitutes a revocation of that acceleration. In such a circumstance, the noteholder's withdrawal of its only demand for immediate payment of the full outstanding debt, made by the 'unequivocal overt act' of filing a foreclosure complaint, 'destroy[s] the effect' of the election ... . We reject the theory ... that a lender should be barred from revoking acceleration if the motive of the revocation was to avoid the expiration of the statute of limitations on the accelerated debt. A noteholder's motivation for exercising a contractual right is generally irrelevant." ***Freedom Mtge. Corp. v. Engel*, 2021 N.Y. Slip Op. 01090, CtApp 2-18-21**

PERSONAL INJURY.

GRANDMOTHER WHO WITNESSED DEBRIS FROM THE FACADE OF A BUILDING INJURE HER TWO-YEAR-OLD GRANDDAUGHTER IS "IMMEDIATE FAMILY" WITHIN THE MEANING OF "ZONE OF DANGER" JURISPRUDENCE; GRANDMOTHER CAN THEREFORE MAINTAIN AN ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over two concurrences, reversing the Appellate Division, determined that a grandmother who witnessed the death of her grandchild is "immediate family" such that she may recover damages for emotional distress under the "zone of danger" theory (negligent infliction of emotional distress): "This case begins with the heart-breaking death of a child. Our responsibility is to determine whether plaintiff-grandparent Susan Frierson, who was in close proximity to the decedent-grandchild at the time of the death-producing accident, may pursue a claim for bystander recovery under a 'zone of danger' theory. We have applied the settled 'zone of danger' rule to 'allow[] one who is . . . threatened with bodily harm in consequence of the defendant's negligence to recover for emotional distress' flowing only from the 'viewing [of] the death or serious physical injury of a member of [that person's] immediate family' ... . Unsettled at this juncture, however, are 'the outer limits' of the phrase 'immediate family' ... . Once again, we are not asked to fix permanent boundaries of the 'immediate family.' Instead, our task simply is to determine whether a grandchild may come within the limits of her grandparent's 'immediate family,' as that phrase is used in zone of danger jurisprudence. We conclude that the grandchild comes within those limits. Consistent with our historically circumspect approach expanding liability for emotional damages within our zone of danger jurisprudence, our increasing legal recognition of the special status of grandparents, shifting societal norms, and common sense, we conclude that plaintiff's grandchild is 'immediate family' for the purpose of applying the zone of danger rule. On May 17, 2015, plaintiff Susan Frierson and her two-year-old granddaughter, decedent Greta Devere Greene, were in front of a building when they were suddenly struck by debris that fell from the facade of that edifice. Emergency measures taken to save Greta's life failed, and she died the next day." ***Greene v. Esplanade Venture Partnership*, 2021 N.Y. Slip Op. 01092, CtApp 2-18-21**

FIRST DEPARTMENT

CIVIL PROCEDURE, MEDICAL MALPRACTICE, NEGLIGENCE.

OVERRULING PRECEDENT, THE FAILURE TO TIMELY FILE A CERTIFICATE OF MERIT IN A MEDICAL MALPRACTICE ACTION IS NOT A GROUND FOR DISMISSAL OF THE ACTION; IT IS NOT NECESSARY TO DEMONSTRATE THE ACTION HAS MERIT OR AN EXCUSE FOR THE FAILURE TO FILE IN SEEKING AN EXTENSION TO FILE THE CERTIFICATE.

The First Department, in a full-fledged opinion by Justice Kennedy, overruling precedent, determined that the failure to timely file a certificate of merit pursuant to CPLR 3012-a in a medical malpractice action does not require dismissal of the action. In addition, a showing that the action has merit and an excuse for failing to file are not necessary when seeking an extension for filing: "Had the legislature intended to permit dismissal for failure to comply with CPLR 3012-a, the statute would empower the court to do so ... . Accordingly, the sanction of dismissal is not authorized and to the extent that this Court's decisions in *Blasoff v New York City Health & Hosps. Corp*. (147 AD3d 481), *Grad v Hafliger* (68 AD3d 543), *George v St. John's Riverside Hosp*. (162 AD2d 140), and *Perez v Lenox Hill Hosp*. (159 AD2d 251) are not in accord with the foregoing, they should no longer be followed. Moreover, generally, a showing of a meritorious action and a reasonable excuse is required to vacate a pleading default and the failure to make this showing necessarily mandates dismissal of the pleading. However, since this sanction is improper in the context of a CPLR 3012-a violation, it follows that the failure to comply with this provision is not a pleading default and a plaintiff is not required to make this showing ... .Accordingly, a showing of a meritorious action through the submission of an affidavit of merit and a reasonable excuse for failing to comply with CPLR 3012-a is not required to obtain an extension of time to comply with the statute." ***Fortune v. New York City Health & Hosps. Corps.*, 2021 N.Y. Slip Op. 01122, First Dept 2-18-21**

CONTRACT LAW.

FORBEARANCE CAN BE ADEQUATE CONSIDERATION CREATING A VALID CONTRACT.

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Gonzalez, determined summary judgment should not have been awarded dismissing the breach of contract cause of action in the multi-million-dollar lawsuit involving Russian oil and gas. The opinion is too detailed to summarize here. On the breach of contract cause of action, the court noted that forbearance can be adequate consideration creating a valid contract: " 'A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other' ... . Indeed, 'any basic contemporary definition would include the idea that [consideration] consists of either a benefit to the promisor or a detriment to the promisee' ... . 'The slightest consideration is sufficient to support the most onerous obligation' ... . When plaintiff first agreed to join defendants in the oil business, he allegedly did so as a one-third partner. According to the Undisputed Statement of Facts, the parties disputed their respective obligations and 'discussed [for several years] options for compensating [plaintiff] for the stock and cash he caused to be transferred.' In 2001, when the parties drafted the Investment Agreement, plaintiff agreed to a 15% stake and a 15% share of the profits, a marked reduction in what he would have expected to receive as an alleged one-third partner. Plaintiff also agreed to forego any right to profits pre-dating October 2001. ... The record thus suggests ... that the 2001 Investment Agreement was a binding contract supported by plaintiff's forbearance. Notably, ... defendants began to perform under the agreement ... , ... suggesting that it was a binding accord for which plaintiff's forbearance had supplied consideration." ***Lebedev v. Blavatnik*, 2021 N.Y. Slip Op. 01002, First Dept 2-16-21**

CRIMINAL LAW, APPEALS.

SNATCHING A PURSE DANGLING FROM THE VICTIM'S ARM DID NOT INVOVLE THE PHYSICAL FORCE NECESSARY FOR ROBBERY THIRD, RENDERING THE CONVICTION AGAINST THE WEIGHT OF THE EVIDENCE; REDUCED TO PETIT LARCENY.

The First Department, reducing defendant's robbery 3rd conviction to petit larceny, determined that the physical force element was not involved rendering the conviction against the weight of the evidence: "Judgment * * * unanimously modified, on the facts and as a matter of discretion in the interest of justice, to the extent of reducing the robbery conviction to petit larceny and reducing the sentence on that conviction to time served .... Defendant's conduct in snatching the purse that was dangling from the victim's arm did not involve the physical force required to sustain a conviction of robbery (*see People v Dobbs*, 24 AD3d 1043 [3d Dept 2005]; *People v Middleton*, 212 AD2d 809, 810 [2d Dept 1995]; compare *People v Santiago*, 62 AD2d 572, 579 [2d Dept 1978], *aff'd* 48 NY2d 1023 [1980]). Accordingly, defendant's conviction of robbery in the third degree was not supported by legally sufficient evidence, and that verdict was against the weight of the evidence ...". ***People v. Kourouma*, 2021 N.Y. Slip Op. 01011, First Dept 2-16-21**

CRIMINAL LAW, EVIDENCE.

DEFENDANT, A MEMBER OF THE PROUD BOYS, WAS CONVICTED OF ATTEMPTED GANG ASSAULT OF A MEMBER OF ANTIFA; A BOOT IS A DANGEROUS INSTRUMENT; EXPERT TESTIMONY ON THE ANIMOSITY BETWEEN THE PROUD BOYS AND ANTIFA PROPERLY ALLOWED.

The First Department affirmed the conviction of a member of the Proud Boys for the attempted gang assault of an Antifa member. The court held that a boot may constitute a dangerous instrument within the meaning of the assault statutes. In addition, the First Department noted that the People were properly allowed to call an expert witness on extremist groups to explain the animosity between the Proud Boys and Antifa: "Defendants' intent and attempt to cause physical injury were demonstrated by defendant Kinsman, who while wearing brown leather boots, repeatedly kicked the victim while she was still on the ground and after she had just been repeatedly kicked by another Proud Boy and by defendant Hare who punched the victim and also kicked her multiple times while he was wearing Doc Marten boots ... . The court providently exercised its discretion in permitting the People to call an expert witness on extremist groups. Some background information regarding the ideology and past conduct of the Proud Boys was permissible to explain the preexisting animosity between the Proud Boys and Antifa at the time of the incident at issue ... . While some of the evidence regarding the Proud Boys' practices, and in particular racist remarks made by the group's founder, were immaterial to the issues at trial, and their potential for prejudice outweighed any probative value, the court issued a limiting instruction that the background information provided by the expert was not proof of the defendants' mental states." ***People v. Kinsman*, 2021 N.Y. Slip Op. 01009, First Dept 2-15-21**

SECOND DEPT

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

PLAINTIFF MORTGAGE COMPANY DID NOT DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION AND THERE WAS A QUESTION OF FACT WHETHER PLAINTIFF NEGOTIATED IN GOOD FAITH PURSUANT TO CPLR 3408(f).

The Second Department, reversing Supreme Court, determined the plaintiff mortgage company did not demonstrate standing to bring the foreclosure action and did not establish it had negotiated in good faith pursuant to CPLR 3408(f): "The plaintiff was not in possession of the note at the time of commencement of the action. Further, the plaintiff failed to submit evidence establishing, prima facie, that it was authorized to act on behalf of FHLBC to commence the foreclosure action, since the plaintiff did not submit any power of attorney, servicing agreement, or other agreement authorizing the plaintiff to commence this action ... . Moreover, the affidavits relied upon by the plaintiff contained only conclusory assertions that the plaintiff was the loan servicer, without asserting the existence of any agreement delegating to the plaintiff the authority to commence this action on FHLBC's behalf in 2012. * * * ... [T]here is no evidence that the plaintiff attempted to obtain a waiver of the investor's self-employment restriction, which, according to the plaintiff's own denial letter, was the reason for its denial of the defendant's first and second loan modification applications. ... Since the defendant's submissions raise a factual issue as to whether the plaintiff failed to negotiate in good faith and deprived him of a meaningful opportunity to resolve this action through loan modification or other potential workout options ... , the Supreme Court should have held a hearing to determine this issue before deciding that branch of the defendant's cross motion which was to dismiss the complaint insofar as asserted against him ...". ***Citimortgage, Inc. v. Lofria*, 2021 N.Y. Slip Op. 01026, Second Dept 2-17-21**

FORECLOSURE, ESTATES AND TRUSTS, EVIDENCE.

THE ESTATE IS NOT A NECESSARY PARTY IN THIS FORECLOSURE ACTION; THE REFEREE'S FINDINGS WERE BASED UPON UNPRODUCED BUSINESS RECORDS.

The Second Department, reversing Supreme Court, determined the estate was not a necessary party in this foreclosure action and the referee's finding were based on unproduced business records: " 'The rule is that a mortgagor who has made an absolute conveyance of all his [or her] interest in the mortgaged premises, including his [or her] equity of redemption, is not a necessary party to foreclosure, unless a deficiency judgment is sought on his [or her] bond' ... . Here, [decedent] conveyed all of the interest in the subject property prior to his death, and prior to the commencement of the instant action. Moreover, the plaintiff moved to amend the complaint to remove any language seeking a deficiency, and the court granted that motion. However, 'the referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record inasmuch as the computation was premised upon unproduced business records'...". ***Federal Natl. Mtge. Assn. v. Home & Prop. Works, LLC*, 2021 N.Y. Slip Op. 01031, Second Dept 2-17-21**

PERSONAL INJURY, MUNICIPAL LAW, IMMUNITY, EMPLOYMENT LAW.

PLAINTIFF NYC SANITATION WORKER STEPPED ON A LIVE POWER LINE AFTER HIS SUPERVISOR ALLEGEDLY TOLD HIM THE POWER WAS OFF; QUESTION OF FACT WHETHER THERE WAS A SPECIAL DUTY OWED BY THE CITY DEFENDANTS TO THE PLAINTIFF; CITY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the NYC and NYC Department of Sanitation's motions for summary judgment in this electrocution case should not have been granted. Plaintiff, a NYC sanitation department employee was doing clean up after Hurricane Sandy when he stepped on a live power line. Plaintiff alleged he was told by his supervisor the power had been turned off. The court applied the usual analysis for municipal liability for negligence: (1) the city was engaged in a governmental function; (2) there may have been a special relationship between the city defendants and the plaintiff; (3) it does not appear that a discretionary act was involved such that governmental immunity would apply: "... [T]he City defendants met their prima facie burden of establishing that they were engaged in a governmental function at the time that the causes of action arose ... . However, the City defendants failed to establish, prima facie, the absence of a special duty to the plaintiff. In this case, the plaintiff had an employer-employee relationship with the New York City Department of Sanitation. Therefore, the plaintiff cannot be equated with a member of the general public. It appears from this record that there exists a triable issue of fact as to whether the City defendants voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally that generated the plaintiff's justifiable reliance ... . This Court has applied the doctrine of governmental immunity to an employee of the New York City Department of Sanitation, but in that case, the issue was whether the City of New York engaged in discretionary governmental actions based upon reasoned judgment in selecting equipment ... . On this record, it does not appear that this case involves discretionary determinations ...". ***Lewery v. City of New York*, 2021 N.Y. Slip Op. 01035, Second Dept 2-17-21**

THIRD DEPARTMENT

CIVIL PROCEDURE, SOCIAL SERVICES LAW.

CLASS CERTIFICATION FOR PERSONS DENIED PUBLIC ASSISTANCE BASED ON THE FAIR MARKET VALUE (FMV) OF THEIR VEHICLES WAS PROPER; THE OPT-IN PROCEDURE SHOULD BE USED TO IDENTIFY CLASS MEMBERS.

The Third Department, in a full-fledged opinion by Justice Lynch, determined the opt-in procedure should be used to identify members of the class who were denied public assistance based upon the fair market value (FMV) of their cars. The class certification by Supreme Court was found proper: "In our prior decision regarding this matter, we affirmed so much of Supreme Court's judgment as annulled a determination of the Office of Temporary and Disability Assistance (hereinafter OTDA) denying petitioner's application for public assistance ... . We agreed with Supreme Court that the methodology that OTDA was using to calculate whether an applicant had available resources from an automobile — which focused on the fair market value (hereinafter FMV) of the applicant's vehicle in excess of the statutory exemption (see Social Services Law § 131-n [e]) regardless of whether the applicant had any equity interest therein — was 'irrational and unreasonable' ... . * * * ... [T]he opt-in approach would prove more efficient ... . In those instances where the opt-in notice is returned as undeliverable, OTDA should then be required to conduct a manual file review." ***Matter of Stewart v. Roberts*, 2021 N.Y. Slip Op. 01105, Third Dept 2-18-21**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE FOUR WITNESSES WHO MAY HAVE CALLED INTO QUESTION THE EYEWITNESS'S ABILITY TO SEE THE SHOOTING AND THE DEFENDANT'S WHEREABOUTS AT THE TIME OF THE SHOOTING; DEFENDANT'S MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS SHOULD HAVE BEEN GRANTED.

The Third Department, reversing County Court, determined defendant's motion to vacate his conviction, after a hearing, should have been granted on ineffective assistance grounds. Defense counsel was aware of three witnesses who called into question whether the eyewitness to the shooting was outside where she could have seen the shooting, or inside where she could not. In addition, defense counsel was aware of an alibi witness. Defense counsel did not sufficiently investigate these witnesses: "... [T]he case against defendant centered, in part, upon the identification of him as the shooter by the eyewitness. The witnesses identified in the letter sent by the People would have cast further doubt on the eyewitness' identification testimony, as well as whether she could have even seen the shooting. Yet, the record reflects that counsel made little efforts to reach out to these witnesses and minimal follow-up efforts. Defendant also argues that he received ineffective assistance due to counsel's failure to investigate an alibi witness. At the hearing, defendant's uncle testified that defendant was with him in a house at the time of the shooting and that they were nowhere near the area where the shooting occurred. The uncle further stated that he was willing to testify at trial and left numerous voice messages for defendant's counsel. Defendant's counsel testified that she did not receive any voice messages from the uncle but recalled that the uncle would be an alibi

witness. Other than stating in a conclusory manner that she was unable to locate the uncle, the record fails to show diligent attempts by counsel to reach him. The uncle's testimony would have bolstered the defense by providing the jury with conflicting evidence as to defendant's whereabouts at the time of the shooting. In our view, the failure to investigate this potential alibi defense and the witnesses who would have refuted the eyewitness' location at the time of the shooting cannot be considered a reasonable trial strategy ...". ***People v. Lanier*, 2021 N.Y. Slip Op. 01094, Third Dept 2-18-21**

EMPLOYMENT LAW, MUNICIPAL LAW, ADMINISTRATIVE LAW.

THE FINDINGS LEADING TO THE TERMINATION OF PETITIONER WERE CONCLUSORY AND DID NOT ALLOW MEANINGFUL REVIEW; PETITIONER'S SUPERVISOR, WHO BROUGHT THE MISCONDUCT CHARGES, CHOSE THE HEARING OFFICER AND TESTIFIED AT THE HEARING, SHOULD RECUSE HERSELF FROM FURTHER PROCEEDINGS ON REMITTAL.

The Third Department, annulling the termination petitioner's employment with the county, determined the findings were conclusory and therefore did not allow meaningful review. In addition, the Third Department held that petitioner's supervisor, Kissane, who brought the misconduct charges, chose the hearing officer and testified at the hearing, should be disqualified from the proceedings on remittal: " 'Administrative findings of fact must be made in such a manner that the parties may be assured that the decision is based on the evidence in the record, uninfluenced by extralegal considerations, so as to permit intelligent challenge by an aggrieved party and adequate judicial review' ... . The Hearing Officer made, at most, conclusory statements that petitioner was guilty of the relevant charges. More to the point, he failed to support these conclusions with any factual evidence adduced at the hearing ... . In the absence of specific factual findings, meaningful judicial review cannot be conducted. Accordingly, the determination must be annulled and the matter remitted for the development of appropriate findings ... . * * * 'Although involvement in the disciplinary process does not automatically require recusal, . . . individuals who are personally or extensively involved in the disciplinary process should disqualify themselves from reviewing the recommendations of a Hearing Officer and from acting on the charges' ...". ***Matter of Morgan v. Warren County*, 2021 N.Y. Slip Op. 01107, Third Dept 2-18-21**

FAMILY LAW, CIVIL PROCEDURE.

FAMILY COURT DID NOT FOLLOW THE PROCEDURE MANDATED BY THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT BEFORE RULING OHIO HAD JURISDICTION IN THE CUSTODY MATTER; MOTHER'S NEW YORK FAMILY OFFENSE PETITION SHOULD NOT HAVE BEEN DISMISSED BECAUSE NEW YORK HAS SUBJECT MATTER JURISDICTION OVER FAMILY OFFENSES OCCURRING IN OHIO.

The Third Department, in a full-fledged opinion by Justice Egan, reversing Family Court, determined: (1) Family Court did not follow the procedure required by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) before ruling that Ohio had jurisdiction based on father's custody petition there and dismissing mother's New York child support and custody petitions; and (2) Family Court should not have dismissed mother's New York family offense petition, even though the majority of alleged offenses occurred in Ohio: "Family Court failed to satisfy the procedural mechanisms required by the UCCJEA when a custody petition is pending in another state. After becoming aware of the Ohio proceeding, Family Court properly communicated with the Ohio court ... . The extent of these communications is unclear; however, they apparently resulted in the transmittance of the Ohio order to Family Court. Although the contents of the Ohio order strongly implied that the Ohio court intended to retain jurisdiction, as evidenced by its scheduling of the matter for trial, this did not absolve Family Court of its obligation to create a record of its communications and to provide that record to the parties ... . Family Court's brief summary of its determination following the communication, which was not placed on the record in the presence of the parties, does not satisfy this statutory mandate ... . Moreover, although it was a permissible exercise of discretion for Family Court not to permit the parties to participate in its communication with the Ohio court ... , the court was then required to allow the parties an opportunity to present facts and legal arguments before it rendered a decision, which it failed to do ... . Thus, '[i]nasmuch as we cannot discern from the record whether Family Court erred in determining that it lacked jurisdiction and, on that basis, dismissing the mother's custody petition, we reverse and remit' for Family Court to render a determination after creating an appropriate record and, if required, affording the parties an opportunity to present facts and legal arguments ... . [A]lthough the majority of the acts alleged in the family offense petition occurred in Ohio, Family Court's jurisdiction is not subject to the same geographic limitations as placed on that of the criminal courts, as nothing 'requires the predicate acts of a family offense to have occurred in a particular county, state, or country in order for the Family Court to possess subject matter jurisdiction' ...". ***Matter of Vashon H. v. Bret* I.2021 N.Y. Slip Op. 01103, Third Dept 2-18-21**

FAMILY LAW, EVIDENCE.

THE CHILD'S STATEMENTS ABOUT SEXUAL TOUCHING WERE ADEQUATELY CORROBORATED AND FATHER'S EXPLANATION FOR THE TOUCHING WAS NOT SUPPORTED BY THE EVIDENCE.

The Third Department, reversing Family Court, determined the evidence supported sexual abuse and neglect by respondent-father. The child's statements were sufficiently corroborated and the father's explanation for touching the child was not credible: "... [T]he proof of the child's consistent descriptions of the inappropriate touching to various individuals, the

child's dramatic change in behavior, the reenactment of the touching through sand and play therapy and respondent's admissions satisfied the relatively low threshold of corroboration ...". ***Matter of Lily BB. (Stephen BB.)*, 021 N.Y. Slip Op. 01106, Third Dept 2-18-21**

FREEDOM OF INFORMATION LAW (FOIL).

THE ZIP CODES ASSOCIATED WITH THE HOME ADDRESSES OF STATE EMPLOYEES SHOULD NOT BE PROVIDED PURSUANT TO A FOIL REQUEST BECAUSE THE FULL HOME ADDRESSES COULD EASILY BE FOUND ON THE INTERNET BY SEARCHING FOR AN EMPLOYEE'S NAME WITH THE RELATED ZIP CODE.

The Third Department, in a full-fledged opinion by Justice Garry, reversing (modifying) Supreme Court, determined the request for the zip codes association with the residences of state employees should not have been granted on invasion-of-privacy grounds. The court noted that the employees' full addresses could easily be determined by using the Internet to search for the person by name along with the related zip code: "As to special protections for state employee records, the Legislature's enactment of Public Officers Law § 89 (7) indicates its desire to protect public employees from harassment at home. That statute provides that '[n]othing in [FOIL] shall require the disclosure of the home address of an officer or employee' of the state ... . Moreover, by executive order the Governor has prohibited state agencies from disclosing state employees' home addresses except when 'compelled . . . by lawful service of process, subpoena, court order, or as otherwise required by law' ... . These policy goals are relevant to the interests in protecting the personal privacy of government employees. The scenario of numerous — or perhaps most — state employees being contacted at home by a private individual or organization that knows who they are, where they live and what they do for a living seems likely to be offensive and objectionable to most reasonable people ... . Thus, release of home zip codes would constitute an unwarranted invasion of personal privacy under these circumstances. Accordingly, as respondent met its burden of proving that the requested zip codes are exempt from disclosure under FOIL, Supreme Court erred in ordering the disclosure of such data." ***Matter of Suhr v. New York State Dept. of Civ. Serv.*, 2021 N.Y. Slip Op. 01113, Third Dept 2-18-21**

PERSONAL INJURY, EVIDENCE.

QUESTION OF FACT WHETHER LEAVING AN ELEVEN-YEAR-OLD BOY UNSUPERVISED CONSTITUTED NEGLIGENCE; THE BOY, WHO WAS VISITING HIS 13-YEAR-OLD FRIEND'S HOME, WAS SEVERELY INJURED ATTEMPTING TO DO A FLIP OFF A PICNIC TABLE.

The Third Department determined whether defendant was negligent in leaving an eleven-year-old boy unsupervised for six hours is a question of fact. School had been cancelled because of snow and defendant went to work. The boy was severely injured when he attempted to do a flip off a picnic table in the backyard: " 'The adequacy of supervision and proximate cause are generally issues of fact for the jury' .... It is undisputed that the child was left unattended without any adult supervision for approximately six hours. Although some may argue that it is not unreasonable to leave a child his age unsupervised to allow a parent to go to work, there is no bright line test with regard to age, and we are loathe to impose same. When viewed in a light most favorable to plaintiff, a question of fact exists as to whether Beadle exercised reasonable supervision of the 11-year-old child. As to proximate cause, we discern no reason under the facts here to deviate from the general rule that proximate cause is a jury question ...". ***Justin M. v. Beadle*, 2021 N.Y. Slip Op. 01108, Third Dept 2-18-21**

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