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CasePrepPlus

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Editor: **Bruce Freeman**

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FIRST DEPARTMENT

CIVIL PROCEDURE, JUDGES.

WHERE THERE IS AN INCONSISTENCY BETWEEN AN ORDER OR A JUDGMENT AND THE DECISION UPON WHICH IT IS BASED, THE DECISION CONTROLS.

The First Department noted that where a judgment or order is inconsistent with the decision upon which it is based, the decision controls: " 'A written order [or judgment] must conform strictly to the court's decision and in the event of an inconsistency between a judgment and a decision or order upon which it is based, the decision or order controls' ... . 'Such an inconsistency may be corrected either by way of a motion for resettlement or on appeal' ... . The motion court's decision, amended to grant plaintiff's motion for summary judgment on his first cause of action for breach of the … agreement, also found that plaintiff was entitled to a money judgment in his favor for past due amounts owed. Because there is a conflict between the relief the motion court found plaintiff was entitled to in its decision, and the relief granted to plaintiff in the judgment, which made no provision for a money judgment as to plaintiff's first cause of action, the court's decision controls." ***Schwartzbard v. Cogan*, 2021 N.Y. Slip Op. 01523, First Dept 3-16-21**

CIVIL PROCEDURE, JUDGES.

THE REQUEST TO POLL THE JURY SHOULD NOT HAVE BEEN DENIED; THE JUDGE SHOULD NOT HAVE DISCHARGED THE JURY FOREMAN FOR ARGUING WITH ONE OR MORE JURORS WITHOUT INTERVIEWING ALL INVOLVED.

The First Department, ordering a new trial in this personal injury action, determined the trial judge should not have denied plaintiff's request to poll the jury and the jury foreman should not have been discharged for arguing with one or more jurors which interviewing all involved: "It is fundamental error to deny a party's request to poll the jury ... . Defendants' argument that the issue was not preserved for appeal is unavailing, as plaintiff's counsel clearly requested that the jury be fully polled ... . It was also reversable error for the court to discharge the jury foreman, who was alleged to have been in a verbal altercations with another juror during deliberations, without interviewing the jury foreman and the other involved juror or jurors to determine the nature and extent of the disagreement ... . That jurors have heated exchanges, does not, without more, form a valid basis for substitution of a juror without the consent of the parties ...". ***Garcia v. Rosario*, 2021 N.Y. Slip Op. 01555, First Dept 3-18-21**

EMPLOYMENT LAW, ARBITRATION, CONTRACT LAW, CIVIL PROCEDURE.

CPLR 7515, ENACTED IN 2018, DOES NOT APPLY RETROACTIVELY TO PROHIBIT MANDATORY ARBITRATION OF SEXUAL HARASSMENT CLAIMS.

The First Department, reversing Supreme Court, determined CPLR 7515, enacted in 2018, should not be applied retroactively to prohibit arbitration of a sexual harassment claim: "The provisions of CPLR 7515 relied on by plaintiff are not retroactively applicable to arbitration agreements, like the one at issue, that were entered into preceding the enactment of the law in 2018, so that plaintiff's argument that this law prohibits arbitration of her claims is unavailing ...". ***Newton v. LVMH Moet Hennessy Louis Vuitton Inc.*, 2021 N.Y. Slip Op. 01558, First Dept 3-18-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF HAD TO USE AN A-FRAME LADDER ON TOP OF A SCAFFOLD TO REACH THE WORK AREA; THE SCAFFOLD MOVED AND PLAINTIFF FELL TO THE GROUND; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION AND DEFENDANT WAS NOT ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW § 241(6) CAUSE OF ACTION.

The First Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action and one of the Labor Law § 241(6) causes of action properly survived summary judgment. Plaintiff was using a scaffold that wasn't high enough. He therefore used an A-frame ladder in the closed position on top of the scaffold. The scaffold moved, the ladder fell over and plaintiff fell to the ground: "... [D]efendants failed to raise a triable issue. Defendants' contention that plaintiff's actions were the sole proximate cause of the accident is unavailing,

since he was not provided a proper safety device to prevent his fall, and that failure is a cause of his injuries ... . Additionally, contrary to defendants' argument, there is no requirement for Labor Law § 240(1) purposes that plaintiff know exactly the cause of his accident, or what caused the scaffold or ladder to move, where there is no dispute that the safety devices failed ... . Moreover, it is not relevant that the ladder and scaffold were free from defects ... . [Defendant] failed to establish prima facie entitlement to summary judgment dismissing plaintiff's Labor Law § 241(6) claim predicated on alleged violations of Industrial Code §§ 23-1.21(b)(4)(ii) and (iv), as there is sufficient testimony in the record to support such violations, including that the ladder was unsecured and lacked rubber footing, and no one was holding it in place at the time of plaintiff's fall. [Defendant] failed to establish as a matter of law that the alleged violations were not a proximate cause of plaintiff's accident." ***Martinez v. ST-DIL LLC*, 2021 N.Y. Slip Op. 01513, First Dept 3-16-21**

INSURANCE LAW.

THE INSURER'S NEARLY TWO-MONTH DELAY BEFORE DISCLAIMING COVERAGE RENDERED THE DISCLAIMER UNTIMELY AS A MATTER OF LAW.

The First Department, reversing Supreme Court, determined the insurer's disclaimer of coverage was not timely as a matter of law. The delay in notification was about two months: " '[A] timely disclaimer pursuant to Insurance Law § 3420(d) is required when a claim falls within the coverage terms but is denied based on a policy exclusion' ... . The purpose of Insurance Law § 3420 is to protect the insured, injured party, or any other claimant with an interest in the outcome, from prejudice based on a delayed denial of coverage ... . '[T]imeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage' ... . The question as to whether the insurer disclaimed coverage as soon as reasonably possible after it first learns of the ground for disclaimer is necessarily case-specific ... . 'However, where there is no excuse or mitigating factor, the issue poses a legal question for the court, and courts have found relatively short periods to be unreasonable as a matter of law' ... . Here, defendant's disclaimer, dated December 24, 2014, was untimely as a matter of law. Defendant's position that it only received plaintiff's claim on December 16, 2014 is unpersuasive. Defendant was on notice of the underlying accident several months before it disclaimed coverage and commenced an investigation with respect to the alleged accident. Therefore, defendant was sufficiently aware of the facts that would support a disclaimer, but waited almost two months before disclaiming coverage ...". ***ADD Plumbing, Inc. v. Burlington Ins. Co.*, 2021 N.Y. Slip Op. 01498, First Dept 3-16-21**

PERSONAL INJURY.

ON A COLD DAY DEFENDANTS HOSED DOWN THE SIDEWALK WHERE PLAINTIFF SLIPPED AND FELL ON ICE; ANY COMPARATIVE NEGLIGENCE ON PLAINTIFF'S PART IS NOT A BAR TO SUMMARY JUDGMENT.

The First Department, reversing Supreme Court and recalling and vacating a decision in the same matter dated December 17, 2020, determined defendants' motion for summary judgment in this slip and fall case should not have been granted. Defendant restaurants hosed down the sidewalk where plaintiff, an EMT responding to a call, slipped and fell on ice. Any comparative negligence on plaintiff's part is not a bar to summary judgment: "To obtain partial summary judgment, a plaintiff does not have to demonstrate the absence of his own comparative fault ... . Moreover, plaintiff is not required to show that 'defendants' negligence was the sole proximate cause of the accident to be entitled to summary judgment' ... . The evidence plaintiff submitted in support of his motion shows that defendants-tenants ... created the dangerous condition when their employees hosed the sidewalk on a cold winter day ... . Defendants-owners Concord Partners 46th Street LLC (Concord) and Elo Equity, LLC, had a non delegable duty to maintain the sidewalk. Elo had notice that the restaurant employees had created a dangerous condition, because Elo's superintendent had observed the restaurants' employees hosing the sidewalk. The property manager for Concord did not personally observe the restaurant employees hosing down the sidewalk on the date in question; however, he testified that it was the general practice to hose down the sidewalk at approximately 7:30 a.m. In opposition, defendants did not raise a question of fact with respect to the issue of their liability. Defendant restaurants admit that the evidence shows that their employees hosed the sidewalk with water before the incident occurred. Furthermore, defendants' argument that there are triable issues of fact on the basis that plaintiff should have sought an alternative route to safely care for the patient relates to the issue of comparative negligence and, therefore, does not preclude summary resolution of the issue of their liability ...". ***Benny v. Concord Partners 46th St. LLC*, 2021 N.Y. Slip Op. 01550, First Dept 3-18-21**

PERSONAL INJURY, CONTRACT LAW.

THE ELEVATOR COMPANY, BY CONTRACT, HAD COMPLETE RESPONSIBILITY FOR ELEVATOR MAINTENANCE; THEREFORE, THE BUILDING OWNER AND MANAGER WERE ENTITLED TO SUMMARY JUDGMENT DISMISSING THE COMPLAINT AGAINST THEM IN THIS RES IPSA LOQUITUR ELEVATOR-MALFUNCTION-ACCIDENT CASE.

The First Department, recalling and vacating a decision in this case released on December 8, 2020, determined the building owner (1067 Fifth) and manager (Elliman) did not have constructive or action notice of the defect in the elevator door which allegedly caused it to close on plaintiff's shoulder, pinning her while the elevator descended. However, liability may be demonstrated under the res ipsa loquitur theory. But because the building owner and manager had, by contract,

relinquished all control over the maintenance of the elevator to defendant elevator company, American, their motions for summary judgment were granted: "... [U]nder the terms of its contract with 1067 Fifth, American was responsible for providing 'full comprehensive maintenance and repair services' for the elevators, which included maintaining '[t]he entire vertical transportation system,' including 'all engineering, material, labor, testing, and inspections needed to achieve work specified by the contract.' Further, under the terms of the contract, maintenance 'include[s], but is not limited to, preventive services, emergency callback services, inspection and testing services, repair and/or direct replacement component renewal procedures.' The contract also provided for American to 'schedule [ ] systematic examinations, adjustments, cleaning and lubrication of all machinery, machinery spaces, hoistways and pits,' and to do all 'repairs, renewals, and replacements . . . as soon as scheduled or other examinations reveal the necessity of the same.' Further, American agreed to provide emergency call-back service 24 hours a day, 7 days a week. Given such broad contractual responsibilities, American's contract can be said to have 'entirely displaced' the responsibility of 1067 Fifth and Elliman to maintain the safety of the building's elevators, which gave rise to a duty owed directly to plaintiff by American (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002])." ***Sanchez v. 1067 Fifth Ave. Corp.*, 2021 N.Y. Slip Op. 01522, First Dept 3-16-21**

SECOND DEPARTMENT

CIVIL PROCEDURE, NEGLIGENCE, CONTRACT LAW, LANDLORD-TENANT.

PLAINTIFF SHOULD NOT HAVE BEEN ALLOWED TO AMEND THE BILL OF PARTICULARS AFTER DISCOVERY WAS CLOSED TO RAISE A NEW THEORY OF LIABILITY STEMMING FROM FACTS NOT PREVIOUSLY ALLEGED; DEFENDANT OUT-OF-POSSESSION LANDLORD DEMONSTRATED THE LEASE DID NOT REQUIRE THE LANDLORD TO MAINTAIN THE DOOR WHICH PLAINTIFF ALLEGED CLOSED ON HER HAND.

The Second Department, reversing Supreme Court, determined plaintiff's motion to amend the bill of particulars after discovery was complete should not have been granted and defendant out-of-possession landlord's motion for summary judgment should have been granted. Plaintiff alleged the door of a retail store closed on her hand as she was pushing a cart with merchandise through the doorway. She alleged the door was not properly maintained. After discovery she sought to amend her bill of particulars to allege there was a crack in the floor which caused the cart to get stuck as she was attempting to pass through the doorway: " 'While leave to amend a bill of particulars is ordinarily to be freely given in the absence of prejudice or surprise' ... , 'once discovery has been completed and the case has been certified as ready for trial, [a] party will not be permitted to amend the bill of particulars except upon a showing of special and extraordinary circumstances' ... . In such a case, leave may properly be granted 'where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant' ... . However 'where a motion for leave to amend a bill of particulars alleging new theories of liability not raised in the complaint or the original bill is made on the eve of trial, leave of court is required, and judicial discretion should be exercised sparingly, and should be discreet, circumspect, prudent, and cautious' ... . 'In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom' ... . [T]he proposed amendment to the bill of particulars raised an entirely new theory of liability well after discovery had been completed, and was advanced only in response to the defendant's motion for summary judgment. Moreover, the plaintiff failed to proffer a reasonable excuse for her delay in seeking the amendment ... , and the proposed amendment was prejudicial to the defendant ... . * * * ... [T]he defendant [out-of-possession landlord] demonstrated its ... entitlement to summary judgment dismissing the complaint by submitting, inter alia, the lease, which established that the tenant enjoyed complete and exclusive possession of the demised premises at the time of the plaintiff's injury and that the defendant was not responsible for maintenance of the door." ***King v. Marwest, LLC*, 2021 N.Y. Slip Op. 08225, Second Dept 3-17-20**

CRIMINAL LAW, EVIDENCE.

THE POLICE DID NOT DEMONSTRATE A LAWFUL BASIS FOR IMPOUNDING DEFENDANT'S VEHICLE AND CONDUCTING AN INVENTORY SEARCH; DEFENDANT'S MOTION TO SUPPRESS THE SEIZED EVIDENCE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's motion to suppress evidence seized from his vehicle should have been granted. The police did not demonstrate a lawful bas for impounding the vehicle and conducting an inventory search: "... [T]he People failed to establish the lawfulness of the impoundment of the defendant's vehicle and subsequent inventory search ... . Although, at the suppression hearing, a police officer testified that the defendant's vehicle was 'parked on the corner' at the time of the defendant's arrest, there was no testimony that the vehicle was parked illegally or that there were any posted time limits pertaining to the space where the vehicle was parked. The People presented no evidence demonstrating any history of burglary or vandalism in the area where the defendant had parked his vehicle, and the officer testified that the vehicle was driven to the precinct because it was used in the commission of a crime. Thus, the People failed to establish that the impoundment of the defendant's vehicle was in the interests of public safety or part of

the police's community caretaking function ... . Moreover, although the officer who performed the inventory search of the defendant's vehicle testified that the policy for conducting such searches was located in the Patrol Guide, the People presented no evidence demonstrating the requirements of the policy for impounding and searching a vehicle, or whether the officer complied with that policy when she conducted the inventory search of the defendant's vehicle ...". ***People v. Rivera,* 2021 N.Y. Slip Op. 08256, Second Dept 3-17-21**

ELECTION LAW, ATTORNEYS.

PETITIONER, A JOURNALIST, UNDER THE ELECTION LAW, DID NOT HAVE THE CAPACITY OR STANDING TO EXAMINE 353 BALLOTS CAST IN THE PRIMARY ELECTION FOR QUEENS COUNTY DISTRICT ATTORNEY, WHICH WAS WON BY ONLY 55 VOTES.

The Second Department, in a full-fledged opinion by Justice Wooten, determined petitioner, a journalist, was not entitled under the Election Law to examine 353 ballots cast in the primary election for Queens County District Attorney which was won by only 55 votes: "Election Law § 16-112 ... only empowers the court to direct the examination of a ballot by a candidate whose name appeared thereon (or his or her agent). Thus, insofar as Election Law § 3-222 provides that voted ballots may be examined by court order, the court would not be empowered to direct the examination of ballots by the petitioner, who was not a candidate (or a designated agent of a candidate). Further, the petitioner has not set forth a purpose for examination of the affidavit ballots which could possibly have been intended by the legislature in enacting Election Law § 3-222 ... . Moreover, insofar as the petitioner does not claim to have any interest in the outcome of the primary election, the petitioner has failed to set forth any injury which the subject proceeding is intended to address so as to confer standing. In fact, the petitioner has not set forth any interest different from any other member of the public, aside from his desire to obtain access to information to aid in his career as a journalist. Moreover, any determination that the petitioner has standing to petition the court for access to the affidavit ballots at issue would be in contravention of the legislature's clear intent 'to guard against unjustified erosion of the policies of ballot secrecy and finality' ...". ***Matter of Hamm v. Board of Elections in the City of New York, 2021 N.Y. Slip Op. 08232, Second Dept 3-17-21***

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THE REACH OF LIABILITY UNDER LABOR LAW § 241(6) AND THE MEANING OF "OWNER" AS USED IN THAT STATUTE EXPLAINED.

The Second Department, reversing (modifying) Supreme Court, determined defendant 2 Big Meadows' motion for summary judgment on the Labor Law § 241(6) cause of action should not have been granted. The court explained the reach of liability under Labor Law 241 (6) and the meaning of the term "owner" as used in the statute: "Liability under Labor Law § 241(6) extends to '[a]ll contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith.' '[T]he burden placed upon a defendant seeking summary judgment on the ground that it is not an owner is a heavy one' ... . * * * ... '[T]he term 'owner' is not limited to the titleholder of the property where the accident occurred and encompasses a person 'who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit' ... . '[T]he critical factor in determining whether a party is an 'owner' is whether it 'possessed the right to insist that proper safety practices were followed; that is, the right to control the work' ... . The evidentiary submissions furnished by 2 Big Meadow in support of its motion for summary judgment did not eliminate triable issues of fact as to whether 2 Big Meadow, which clearly benefitted from the renovation of its property, was involved in contracting to have the construction project performed or had the authority to insist on proper safety practices." ***Cruz v. 1142 Bedford Ave., LLC,* 2021 N.Y. Slip Op. 08220, Second Dept 3-17-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW §§ 240(1) AND 241(6) CAUSES OF ACTION; DEFENDANTS WERE ENTITLED TO SUMMARY JUDMENT ON THE LABOR LAW 200 CAUSE OF ACTION.

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's motions for summary judgment on his Labor Law §§ 240(1) and 241(6) causes of action should have been granted. In addition defendants' motion for summary judgment on the Labor Law 200 cause of action should have been granted, Plaintiff was standing on a scaffold with no railing when a piece of concrete fell from the ceiling and knocked him off the scaffold: "... [T]he plaintiff demonstrated his prima facie entitlement to judgment as a matter of law on the issue of liability on the Labor Law § 240(1) cause of action, through his deposition testimony that the scaffold he was using lacked any safety railings and that he tried to grab onto something as he fell from the scaffold but 'there was nothing to grab' ... . Similarly, the plaintiff met his prima facie burden with respect to so much of the Labor Law § 241(6) cause of action as was predicated upon 12 NYCRR 23-5.3(e), by establishing that the scaffold lacked safety railings in violation of that regulation and that such violation was a proximate cause of his injuries ... . * * * [Re: the Labor Law 200 cause of action:] ... [T]he defendants ... demonstrated ... that they did not have the authority to supervise or control the plaintiff's work ... . The defendants ... further demonstrated ... that they did not create or have actual or constructive notice of any alleged defect in the concrete ceiling. Since the concrete ceiling had been

covered by a drop ceiling until the drop ceiling was demolished ... , any alleged defect in the concrete ceiling was latent and not discoverable upon a reasonable inspection ...". ***Leon-Rodriguez v. Roman Catholic Church of Sts. Cyril & Methodius*, 2021 N.Y. Slip Op. 08228, Second Dept 3-17-21**

EDUCATION-SCHOOL LAW, PERSONAL INJURY.

THE SCHOOL TOOK REASONABLE STEPS TO PREVENT A STUDENT, J. P., FROM ASSAULTING AN UNIDENTIFIED STUDENT AFTER THE SCHOOL LEARNED OF A RUMOR THAT J.P. INTENDED TO FIGHT SOMEONE; WHEN CONFRONTED AND WARNED J.P. DENIED THAT HE INTENDED TO ASSAULT ANYONE; TWO DAYS LATER J.P. ASSAULTED PLAINTIFF'S CHILD; THE SCHOOL'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE NEGLIGENT SUPERVISION ACTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the defendant school district's motion for summary judgment in this negligent supervision case should have been granted. Plaintiff's child was assaulted at school by another child, J.P. The assistant principal had been warned that J.P. was going to fight with someone. The assistant principal warned J.P. of the consequences and alerted school security. When the assistant principal warned J.P. he denied that he intended to fight someone: "A necessary element of a cause of action alleging negligent supervision is that the district knew or should have known of J.P.'s propensity for violence ... . The defendant established that the complaint and bill of particulars did not allege that J.P. had a propensity to engage in violence or that the district knew or should have known that J.P. had a propensity for violence ... . The defendant established, prima facie, that it was not made aware of any particularized threat against the child. Furthermore, the evidence presented by the defendant established that the assistant principal took reasonable steps to prevent J.P. from fighting by warning J.P. about the consequences of fighting, informing his mother of the alleged threat and the consequences of fighting, and informing the head of school security that there was an alleged threat that J.P. intended to fight someone, notwithstanding that the assistant principal was not aware of J.P.'s intended target. Under these circumstances, the defendant reasonably responded to a rumor of a threat and could not have anticipated that J.P. would have attacked the child two days later ... . Further, the defendant established that 'the incident occurred in so short a period of time that any negligent supervision on its part was not a proximate cause of the infant plaintiff's injuries' ...". ***Wienclaw v. East Islip Union Free Sch. Dist.*, 2021 N.Y. Slip Op. 08277, Second Dept 3-17-21**

PERSONAL INJURY, MUNICIPAL LAW.

THE COUNTY POLICE OFFICER'S STATEMENT TO PLAINTIFF'S DECEDENT TO THE EFFECT SHE HAD NO REASON TO FEEL UNSAFE DID NOT CREATE A SPECIAL RELATIONSHIP; THEREFORE THE COUNTY WAS NOT LIABLE FOR THE SHOOTING DEATH OF PLAINTIFF'S DECEDENT AT THE HANDS OF THE FATHER OF HER YOUNG CHILD.

The Second Department determined the complaint failed to state a cause of action against the county stemming from the shooting death of plaintiff's decedent at the hands of the father of her child (Jenkins). Plaintiff's decedent had repeatedly requested of the county police that Jenkins be arrested and allegedly was told there was no reason for her to feel unsafe. The officer's statement did not create a special relationship with the county such that the county could be held liable: " 'Generally, a municipality may not be held liable for the failure to provide police protection because the duty to provide such protection is owed to the public at large, rather than to any particular individual' ... . 'A narrow exception to the rule exists where a special relationship exists between the municipality and the injured parties' ... . The elements of a special relationship are (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured, (2) knowledge on the part of the municipality's agents that inaction could lead to harm, (3) some form of direct contact between the municipality's agents and the injured party, and (4) the injured party's justifiable reliance on the municipality's affirmative undertaking ... . Contrary to the plaintiff's contentions, the complaint fails to allege facts that could establish an affirmative undertaking or justifiable reliance on any such undertaking by the defendants ... . The complaint alleged that the decedent was told by an officer, weeks before the killing, that the officer 'did not see any reason why Mr. Jenkins would hurt [the decedent or her sister] and that there was no reason for them to feel unsafe.' This statement, or statements to that effect, which could not be construed as conveying any promise or intention to protect the decedent, are not a basis on which a special duty may be premised ...". ***Coleman v. County of Suffolk*, 2021 N.Y. Slip Op. 08219, Second Dept 3-17-21**

THIRD DEPARTMENT

ADMINISTRATIVE LAW.

THE LEGISLATURE PROPERLY EMPOWERED THE COMMITTEE ON LEGISLATIVE AND EXECUTIVE COMPENSATION TO RECOMMEND LEGISLATIVE AND EXECUTIVE BRANCH SALARY INCREASES AND THE COMMITTEE DID NOT EXCEED THE SCOPE OF ITS AUTHORITY.

The Third Department, in a full-fledged opinion by Justice Lynch, determined the Committee on Legislative and Executive Compensation was properly created by the Legislature in the 2018 budget bill and the recommendations of salary increases did not exceed the scope Committee's authority: "Plaintiffs commenced this declaratory judgment action seeking, among other things, declarations that (1) the enabling statute was an unlawful delegation of legislative authority under the NY Constitution, (2) the Committee exceeded the scope of any authority lawfully delegated to it, (3) the disbursement of funds according to the Committee's report was unlawful under State Finance Law § 123, and (4) the Committee's report was void under the Open Meetings Law (see Public Officers Law art 7). Defendants filed a pre-answer motion to dismiss the complaint pursuant to CPLR 3211 (a) (7). * * * 'While the Legislature cannot delegate its lawmaking functions to other bodies, there is no constitutional prohibition against the delegation of power to an agency or commission to administer the laws promulgated by the Legislature, provided that power is circumscribed by reasonable safeguards and standards' ... . Although the NY Constitution vests in the Legislature the authority to 'determine its own compensation' ... , plaintiffs have proffered no persuasive authority supporting the proposition that the Legislature may not delegate such authority to an independent body in the manner done here, so long as the Legislature makes the basic policy choice and provides reasonable standards and safeguards circumscribing the body's authority." ***Delgado v. State of New York*, 2021 N.Y. Slip Op. 01534, Third Dept 3-18-21**

CIVIL PROCEDURE, FORECLOSURE.

ALTHOUGH PLAINTIFF BANK IN THIS FORECLOSURE ACTION DID NOT HAVE A JUSTIFIABLE EXCUSE FOR FAILING TO COMPLY WITH THE 90-DAY DEMAND TO FILE A NOTE OF ISSUE PURSUANT TO CPLR 3216, THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED.

The Third Department, reversing Supreme Court, determined the complaint in this foreclosure action should not have been dismissed pursuant to CPLR 3216, even though plaintiff's excuse for failure to comply with the 90-day demand to file a note of issue was not justifiable: "Because there was no compliance with the 90-day demand, the party seeking to avoid dismissal had to demonstrate a 'justifiable excuse for the delay and a good and meritorious cause of action' ... . The opposition to defendant's motion advanced only a conclusory and unsubstantiated claim of law office failure by plaintiff's prior counsel as the justifiable excuse. Although the failure to detail and substantiate a claim of law office failure would justify dismissal of the complaint ... , even when presented with an unjustifiable excuse, a court still retains some residual discretion to refuse dismissal of a complaint as a penalty under CPLR 3216 ... . [S]ome of the delay in this case was not attributable to plaintiff. Taking into account that CPLR 3216 is 'extremely forgiving of litigation delay' ... , as well as the public policy of resolving disputes on the merits ... , defendant's motion, under the particular circumstances of this case, should have been denied to the extent that it sought dismissal of the complaint, and plaintiff's cross motion should have been granted to the extent that it sought an extension of time to file the note of issue ...". ***Chase Home Fin., LLC v. Shoumatoff*, 2021 N.Y. Slip Op. 01537, Third Dept 3-18-21**

CONSTITUTIONAL LAW, RELIGION.

THE REPEAL OF THE RELIGIOUS EXEMPTION TO THE PUBLIC HEALTH LAW REQUIRING VACCINATION AGAINST MEASLES IS CONSTITUTIONAL.

The Third Department, in a full-fledged opinion by Justice Pritzker, determined that the repeal of the religious exemption to the Public Health Law which allowed parents to refuse to vaccinate their children against measles was constitutional. The statute also allows a medical exemption, which was not repealed. The declaratory-judgment complaint was dismissed for failure to state a cause of action: "It is well settled that, 'the right of free exercise [of religion] does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that [one's] religion prescribes (or proscribes)' ... . As such, to state a federal free exercise claim, a plaintiff generally must establish that 'the object or purpose of a law is the suppression of religion or religious conduct' ... . Significantly, if the law is neutral and of general applicability, a rational basis is all that is required to meet constitutional muster under the First Amendment, even if the law 'proscribes (or prescribes) conduct that [one's] religion prescribes (or proscribes)' ... . * * * Those school children with medical exemptions have been advised by a physician that certain immunizations may be detrimental to their physical health (see Public Health Law § 2164 [8]). There are many arguments to be made as to how children formerly subjected to the religious exemption may also be detrimentally impacted, however, documented concerns as to the physical well-being of children with medical exemptions is a sufficient basis upon which to distinguish the two groups. Indeed, it would be irrational to sacrifice the physical health of some children in the pursuit of

protecting public health. In attempting to address the vulnerabilities in its current immunization scheme, the Legislature was permitted to exercise such 'broad discretion required for the protection of the public health' ...". ***F.F. v. State of New York*, 2021 N.Y. Slip Op. 01541, Third Dept 3-18-21**

CRIMINAL LAW, ANIMAL LAW.

DEFENDANT'S FOR CAUSE CHALLENGE TO A JUROR IN THIS ARSON AND ANIMAL TORTURE CASE SHOULD HAVE BEEN GRANTED; THE JUROR EXPRESSED A HIGHLY EMOTIONAL RESPONSE TO INJURY TO ANIMALS AND THE COURT NEVER SPECIFICALLY ASKED IF SHOULD COULD BE FAIR AND IMPARTIAL.

The Third Department, reversing defendant's convictions of arson and torturing animals, determined defendant's for cause challenge to a juror who expressed her highly emotional reaction to the injury of animals should have been granted: "Defendant challenged this prospective juror for cause on the ground that 'because of the animals, she couldn't be fair and impartial.' County Court denied this challenge noting that prospective juror No. 16 had indicated that 'it would be very difficult' and that 'she would cry,' not that she had stated she could not be impartial. Defendant then exercised a peremptory challenge to remove prospective juror No. 16, and later exhausted his peremptory challenges. Relative to the ability of prospective juror No. 16 to be fair and impartial due to her affinity for animals, despite being asked twice, she never unequivocally stated that she could be ... . Thus, the court should have posed questions to rehabilitate the prospective juror 'by obtaining such assurances or, if rehabilitation was not possible,' excuse her ... . By failing to do so, the court committed reversible error, considering that defendant exercised a peremptory challenge to remove this prospective juror and exhausted such challenges ...". ***People v. Rios*, 2021 N.Y. Slip Op. 01530, Third Dept 3-18-21**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

DEFENDANT PRESENTED SUFFICIENT EVIDENCE OF INEFFECTIVE ASSISTANCE OF COUNSEL AND RECANTATION TESTIMONY TO WARRANT A HEARING ON HIS MOTION TO VACATE HIS CONVICTION, COUNTY COURT REVERSED.

The Third Department, reversing County Court, determined defendant's motion to vacate his conviction should not have been denied without a hearing. The defendant presented sufficient evidence of ineffective assistance of counsel and newly discovered evidence (recantation testimony), as well as evidence of actual innocence, to warrant a hearing on all three issues: "Defendant avers, in his sworn affidavit, that he repeatedly advised his trial counsel that the victim's allegation that defendant did not live with her at the time of the incident was false and that this false claim could be easily disproven, but trial counsel 'was not interested and did nothing.' Defendant supported this claim with four sworn affidavits of witnesses who all stated that defendant lived with the victim at the time of the incident. These affidavits were not merely conclusory, but rather contained factual allegations based upon firsthand observations by the witnesses ... . * * * ... [D]efendant proffered three separate affidavits from witnesses, as well as text messages purportedly from the victim, asserting that they established that the victim had fabricated the allegations against him. * * * Although we are mindful that recantation testimony is 'inherently unreliable' ... , the 'totality of the circumstances' presented here demonstrates that a hearing is required to scrutinize the circumstances regarding the recantations as well as the credibility of the witnesses, and to create a record ...". ***People v. Stetin*, 2021 N.Y. Slip Op. 01529, Third Dept 3-18-21**

FAMILY LAW, CRIMINAL LAW.

RESPONDENT JUVENILE WAS DENIED HER RIGHT TO A SPEEDY TRIAL IN THIS JUVENILE DELINQUENCY PROCEEDING.

The Third Department, reversing Family Court, determined respondent juvenile was denied her right to a speedy trial in this juvenile delinquency proceeding. The respondent initially waived her speedy trial rights to allow a diagnostic evaluation, which would take 90 days. Before the evaluation was complete, in response to allegations that respondent was acting aggressively in the nonsecure facility where she was detained, Family Court ordered respondent to a secure facility, thereby making the diagnostic evaluation impossible. At that point respondent rescinded her speedy trial waiver: "... [A]lthough respondent waived her right to a speedy fact-finding hearing during the first appearance held on April 4, 2019, the waiver was expressly limited to the time necessary to complete the diagnostic evaluation. By entering an order on June 26, 2019 directing respondent's transfer from Elmcrest Children's Center to a secure facility, Family Court knowingly eliminated the possibility that the diagnostic evaluation would be continued and completed. Under such circumstances, respondent's waiver of her speedy trial rights effectively expired on June 26, 2019. Consequently, Family Court should have commenced a fact-finding hearing within three days of June 26, 2019 or, alternatively, brought the parties before it and either obtained a further waiver of respondent's speedy trial rights or set forth on the record its reasons for adjourning the fact-finding hearing beyond the prescribed three-day period ... . Inasmuch as Family Court failed to do any of the foregoing and instead did not commence the fact-finding hearing until August 15, 2019, some 50 days after the expiration of respondent's speedy trial waiver, we find that Family Court violated respondent's right to a speedy fact-finding hearing ...". ***Matter of Erika UU.*, 2021 N.Y. Slip Op. 01543, Third Dept 3-18-21**

MENTAL HYGIENE LAW, CRIMINAL LAW.

THE EVIDENCE DEMONSTRATED RESPONDENT, WHO HAD ENTERED A PLEA OF NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT TO RAPE, ASSAULT AND OTHER CHARGES, SUFFERED FROM A DANGEROUS MENTAL DISORDER REQUIRING CONTINUED PLACEMENT IN A SECURE FACILITY, SUPREME COURT REVERSED.

The Third Department, reversing Supreme Court, determined respondent constituted a danger to himself and others and should remain in a secure facility. Respondent had entered a plea of not responsible by reason of mental disease or defect to rape, assault, criminal possession of a weapon and endangering the welfare of a child. Supreme Court had found that respondent was no longer suffering from a dangerous mental disorder and placed him in a nonsecure facility: "To establish that a person suffers from a dangerous mental disorder requiring commitment in a secure facility, the petitioner bears the burden of demonstrating, by a fair preponderance of the evidence, that the person suffers from a 'mental illness,' as that term is statutorily defined (see Mental Hygiene Law § 1.03 [20]), and 'that because of such condition he [or she] constitutes a physical danger to himself [or herself] or others' (CPL 330.20 [1] [c]). * * * Supreme Court rejected petitioner's evidence and instead concluded that respondent no longer suffered from a dangerous mental disorder, implicitly crediting the opinion of respondent's expert. However, the court's factual findings were self-contradictory. Supreme Court credited petitioner's expert's diagnoses of respondent, finding, among other things, that respondent has bipolar disorder and a traumatic brain injury. These diagnoses, which cause impaired judgment and impulse control, contributed to the opinion of petitioner's expert that respondent constituted a present danger to himself and to his female peers. Without explanation, respondent's expert omitted the diagnoses of bipolar disorder and traumatic brain injury. In concluding that respondent no longer suffers from a dangerous mental disorder, Supreme Court relied upon an opinion that did not account for diagnoses that the court found respondent to have. Thus, the court never considered the impact that the diagnoses have on respondent's behavior and present dangerousness." ***Matter of James Q.*, 2021 N.Y. Slip Op. 01545, Third Dept 3-18-21**

FOURTH DEPARTMENT

ADMINSTRATIVE LAW, ATTORNEYS.

PETITIONER SOUGHT ATTORNEY'S FEES AS THE PREVAILING PARTY PURSUANT TO NEW YORK'S EQUAL ACCESS TO JUSTICE ACT UNDER THE "CATALYST THEORY;" THE FOURTH DEPARTMENT REJECTED THE CATALYST THEORY, FINDING PETITIONER WAS NOT THE PREVAILING PARTY UNDER THE TERMS OF THE STATUTE.

The Fourth Department, reversing Supreme Court, determined that the so-called "catalyst theory" did not apply to New York's Equal Access to Justice Act (EAJA). The EAJA, in certain circumstances, allows a prevailing party to recover attorney's fees against the state. Here petitioner argued that petitioner's seeking reconsideration of a determination by the NYS Office for People with Developmental Disabilities (OPWDD) prompted the OPWDD to grant petitioner's application. Petitioner argued the request for reconsideration was the "catalyst" for the OPWDD's granting the application and petitioner was therefore entitled to attorney's fees. The Fourth Department determined petitioner was not a "prevailing party" within the meaning of the NYS EAJA: "This Court has yet to address the issue, but we now reject application of the catalyst theory in State EAJA cases. Where, as here, litigation is rendered moot by an administrative change in position, the petitioner or plaintiff has not prevailed 'in the civil action' (CPLR 8602 [f])." ***Matter of Criss v. New York State Dept. of Health*, 2021 N.Y. Slip Op. 01642, Fourth Dept 3-19-21**

CIVIL PROCEDURE, EVIDENCE.

ALTHOUGH DEFENDANT'S MOTION TO VACATE THE DEFAULT JUDGMENT SHOULD NOT HAVE BEEN GRANTED, DEFENDANT DID RAISE A QUESTION OF FACT ON THE VALIDITY OF THE SERVICE OF PROCESS WHICH REQUIRES A HEARING.

The Fourth Department, reversing Supreme Court, determined defendant's motion to vacate the default judgment on the ground defendant had not been properly served with the complaint should not have been granted. The matter was remitted for a hearing to determine the validity of the service of process: " 'Ordinarily, the affidavit of a process server constitutes prima facie evidence that the defendant was validly served' ... . Although 'bare and unsubstantiated denials are insufficient to rebut the presumption of service . . . , a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing' ... . Here, the presumption of service was created by the affidavit of plaintiff's process server, but defendant rebutted that presumption by submitting, inter alia, his sworn affidavit in which he averred that he had never been personally served, that since at least 2013 he had rented out the dwelling at the address reflected on the affidavit of the process server, that it had been rented to the individual reflected on the affidavit of service, that defendant 'did not live or otherwise reside [at the address] in any form,' and instead that he had been living at another address at the time of the purported service. Contrary to plaintiff's

contention, defendant's submissions raised 'a genuine question' on the issue whether service was properly effected in accordance with CPLR 308 (2) ...". ***Garvey v. Global Asset Mgt. Solutions, Inc.*, 2021 N.Y. Slip Op. 01664, Fourth Dept 3-19-21**

CONTEMPT, FAMILY LAW.

THE CONTEMPT APPLICATIONS IN THIS NEGLECT/CUSTODY PROCEEDING WERE JURISDICTIONALLY DEFECTIVE.

The Fourth Department, reversing Supreme Court, determined the contempt charges in this neglect/custody proceeding were jurisdictionally defective: "We... conclude that the court erred in granting in part plaintiff's contempt applications because they were jurisdictionally defective under Judiciary Law § 756. Section 756 provides that a contempt 'application shall contain on its face a notice that the purpose of the hearing is to punish the accused for a contempt of court, and that such punishment may consist of fine or imprisonment, or both, according to law together with the following legend . . . : WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT.' It is well settled that the failure to include the notice or the warning language of Judiciary Law § 756 constitutes a jurisdictional defect, requiring the court to deny the application ... . Here, it is undisputed that plaintiff's initial and amended contempt applications did not include, verbatim, the required warning language of Judiciary Law § 756. Importantly, plaintiff's contempt applications omitted the language warning defendant that his 'failure to appear in court may result in [his] immediate . . . imprisonment for contempt of court' (id.). Thus, because plaintiff's contempt applications failed to include the required warning language, they did not strictly comply with Judiciary Law § 756, rendering them jurisdictionally defective ...". ***Rennert v. Rennert*, 2021 N.Y. Slip Op. 01630, Fourth Dept 3-19-21**

COURT OF CLAIMS, CIVIL PROCEDURE.

THE COURT OF CLAIMS, NOT SUPREME COURT, IS THE PROPER FORUM FOR THIS BREACH OF CONTRACT ACTION AGAINST THE STATE.

The Fourth Department, reversing Supreme Court, determined the proper forum for this breach of contract cause of action against the state was the Court of Claims: "The Court of Claims has subject matter jurisdiction over claims for breach of contract against the State ... . As long as the primary claim is for money damages, the Court of Claims 'may [also] apply equitable considerations' and grant incidental equitable relief ... . Here, because the relief sought in the complaint arises out of an alleged breach of contract, the proper forum for this action is the Court of Claims ...". ***Rice v. New York State Workers' Compensation Bd.*, 2021 N.Y. Slip Op. 01669, Fourth Dept 3-19-21**

CRIMINAL LAW.

COUNTY COURT DID NOT FOLLOW THE PROPER PROCEDURE FOR DETERMINING WHETHER DEFENDANT IS ELIGIBLE FOR YOUTHFUL OFFENDER STATUS; MATTER REMITTED.

The Fourth Department remitted the mater for a determination whether defendant is eligible for youthful offender status: "Because defendant was convicted of an armed felony offense ... , he is ineligible to receive a youthful offender adjudication unless the court determines that one of two mitigating factors is present ... . If the court, in its discretion, determines that neither of the mitigating factors is present and states the reason for its determination on the record, then no further determination on the youthful offender application is required ... . If, however, the court determines that one or more of those mitigating factors are present, and that defendant is therefore an eligible youth, it must then determine whether defendant is a youthful offender ... . Here, the court did not follow the procedure set forth in *Middlebrooks* [25 NY3d 516], inasmuch as it made no on-the-record determination of defendant's eligibility for a youthful offender adjudication at sentencing ...". ***People v. Reed*, 2021 N.Y. Slip Op. 01590, Fourth Dept 3-19-21**

CRIMINAL LAW.

THE THREE-STEP BATSON PROCEDURE WAS NOT FOLLOWED WHEN THE DEFENDANT OBJECTED TO THE PEOPLE'S PEREMPTORY CHALLENGE TO AN AFRICAN AMERICAN PROSPECTIVE JUROR, MATTER REMITTED FOR FURTHER PROCEEDINGS TO SATISFY BATSON.

The Fourth Department, remitting the matter, determined the three-step Batson procedure was not followed when the defense objected to the People's peremptory challenge to an African-American prospective juror: "After defendant made a prima facie showing of discrimination in step one, the prosecutor offered a race-neutral explanation for the peremptory challenge ... , namely, that the prospective juror had a sister who was incarcerated for assaulting someone with a gun and that the prospective juror said that the criminal justice system could have treated her sister better. When defense counsel attempted to respond, the court interrupted him and stated, 'I ruled. There is no Batson issue.' Defense counsel timely objected to the court's ruling. In our view, defense counsel should have been 'given the opportunity to argue that the prosecutor's explanation[was] a pretext for discrimination' ... . * * * ... [W]hen it interrupted defense counsel, 'the court improperly rushed and compressed the Batson inquiry,' precluding defendant from meeting 'his burden of establishing an equal protection violation' ... . To be distinguished are situations in which defense counsel does not make 'any attempt to respond

or protest[ ]' ... or in which the court implicitly rejects the pretext argument by letting the challenge stand after hearing a defense counsel's arguments concerning pretext ...". ***People v. Singleton*, 2021 N.Y. Slip Op. 01638, Fourth Dept 3-19-21**

CRIMINAL LAW.

SENTENCE DEEMED UNDULY HARSH.

The Fourth Department reduced defendant's sentence, finding it unduly harsh. The defendant was several hours late in surrendering to the jail and the sentence initially promised was increased. The Fourth Department imposed the lesser sentence initially promised: "... [T]his Court 'has broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range,' and we may exercise that power, 'if the interest of justice warrants, without deference to the sentencing court' ... . Here, the court initially promised to sentence defendant to a concurrent eight-year determinate term of imprisonment on each count of the indictment and agreed to release him until 9:00 a.m. on the ensuing Monday to allow him to attend his mother's wedding on the intervening weekend. Defendant accepted the plea offer and was released as promised but did not surrender himself to the jail until 5:30 p.m. on the appointed date. Nevertheless, the record establishes that he surrendered voluntarily and that he called the jail prior to the appointed time and reported that he was having transportation difficulties. In addition, the record establishes that defendant has a lengthy record, but no violent felonies, and that he had not been arrested in the 10 years preceding these incidents, which involve sale and possession of small amounts of cocaine. Under these circumstances, as a matter of discretion in the interest of justice, we modify the judgment by reducing the sentence of imprisonment imposed under each count of the indictment to a determinate term of eight years, to be followed by the three years of postrelease supervision imposed by the court, and directing that the sentences run concurrently with each other." ***People v. Brinson*, 2021 N.Y. Slip Op. 01648, Fourth Dept 3-19-21**

CRIMINAL LAW.

SENTENCE DEEMED UNDULY HARSH.

The Fourth Department determined defendant's sentence was unduly harsh and directed that all but one of the sentences run concurrently: "For the kidnapping and murder counts, defendant was sentenced to concurrent terms of incarceration of 25 years to life. For the burglary and robbery counts, related to the crimes committed at the victim's residence, defendant received determinate terms of incarceration of 15 years. Although those sentences run concurrently with each other, they were directed to run consecutively to the kidnapping and murder sentences. In addition, defendant received an indeterminate term of incarceration of 1 to 4 years for the count of tampering with physical evidence, which was to run consecutively to all other counts. It is well settled that this Court's 'sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court' ... and that 'we may 'substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence' ... . Here, the record establishes that defendant, who was 22 years old and gainfully employed at the time of the crimes, had no prior criminal history. In addition, although she was an accessory to the crimes committed at the victim's residence, the evidence establishes that she was one block away during that incident and did not physically participate in those crimes. There is also evidence suggesting that defendant was the victim of repeated acts of domestic abuse perpetrated by one of the codefendants. Under the circumstances, we conclude that the sentence imposed is unduly harsh and severe. We therefore modify the judgment as a matter of discretion in the interest of justice by directing that all sentences except the sentence imposed on the count of tampering with physical evidence run concurrently with each other ...". ***People v. Colon*, 2021 N.Y. Slip Op. 01652, Fourth Dept 3-18-21**

CRIMINAL LAW.

SENTENCE DEEMED UNDULY HARSH.

The Fourth Department determined the defendant's sentence (12 years) was unduly harsh and imposed a sentence (eight years) close to that promised before defendant rejected the offer and went to trial: "The charges arose from defendant's unsuccessful attempt to rob a cab driver at knifepoint. Sitting behind the victim, defendant pulled out a knife and put it to the victim's neck. The victim grabbed the knife and a struggle ensued during which the vehicle, which had been stopped, started moving and crashed into a tree. During the struggle, the victim sustained a wound to his hand (from grabbing the knife) and a cut on his neck that was not life threatening. Both men then exited the vehicle. ... After realizing that the victim had been injured, defendant yelled for help and said, 'I did it.' Defendant took off his sweatshirt and offered it to the victim to staunch the bleeding. When neighbors and others arrived at the scene, they saw defendant crying and pleading with them to help the victim. Although no one prevented him from fleeing, defendant remained at the scene until the police arrived and was taken into custody without incident. When approached by the responding officer, defendant said, 'Officer, I stabbed him. I was trying to rob him.' While in custody, defendant repeatedly asked whether the victim was going to be all right. The victim was given stitches for his wounds and released from the hospital later that night. We agree with defendant that, under the unique circumstances of this case, the sentence is unduly harsh and severe. Defendant was 41 years old when he committed the crimes in this case, and he had previously been convicted of only one other crime, a misdemeanor

in 2001 for which he was sentenced to probation. The presentence report indicates that defendant has an extensive history of mental illness and no prior incidents of violence." ***People v. Zdatny*, 2021 N.Y. Slip Op. 01659, Fourth Dept 3-19-21**

CRIMINAL LAW.

WHEN DEFENDANT BECAME DISRUPTIVE JUST BEFORE THE PROSPECTIVE JURORS WERE BROUGHT IN THE JUDGE HAD HIM REMOVED FROM THE COURTROOM WITHOUT FIRST WARNING HIM AS REQUIRED BY STATUTE; NEW TRIAL ORDERED.

The Fourth Department, reversing defendant's conviction, determined the failure to warn defendant before removing him from the courtroom during jury selection required a new trial: "On the morning that jury selection was scheduled to begin, but before the prospective jurors had been brought into the courtroom, defendant began shouting, insisting that the court was calling him by the wrong name and that he could not wear the clothes provided to him. The court immediately had defendant removed from the courtroom, stating that it deemed defendant to have waived his right to be present based on his 'outburst and behavior.' After defendant had been removed, the court stated that defendant's 'voice was raised to a level of almost deafening proportions, and it was very clear that it was imminent he was going to turn violent.' Defendant was absent for the selection of the first 11 jurors, but returned to the courtroom at the next recess and did not cause any further disruption. A defendant has a fundamental right to be present at all material stages of trial, and that right is 'violated by his or her absence during the questioning of prospective jurors during the impaneling of the jury' ... . However, '[a] defendant's right to be present during trial is not absolute' ... . CPL 260.20 provides, in relevant part, 'that a defendant who conducts himself in so disorderly and disruptive a manner that his trial cannot be carried on with him in the courtroom may be removed from the courtroom if, after he has been warned by the court that he will be removed if he continues such conduct, he continues to engage in such conduct' ...". ***People v. Brown*, 2021 N.Y. Slip Op. 01668, Fourth Dept 3-19-21**

CRIMINAL LAW, APPEALS.

THE APPEAL WAIVER WAS INVALID AND THE SENTENCE WAS UNDULY HARSH.

The Fourth Department determined defendant's waiver of appeal was invalid and his sentence was unduly harsh. The sentences were modified to run concurrently, not consecutively: "We agree with defendant that the purported waiver of the right to appeal is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant 'understood the nature of the appellate rights being waived' ... . Here, County Court provided no oral explanation of the waiver of the right to appeal and the written waiver executed by defendant 'mischaracterized the waiver of the right to appeal, portraying it in effect as an absolute bar to the taking of an appeal' ... . We note that the better practice is for the court to use the Model Colloquy, which 'neatly synthesizes . . . the governing principles' ...". ***People v. Smith*, 2021 N.Y. Slip Op. 01666, Fourth Dept 3-19-21**

CRIMINAL LAW, EVIDENCE.

THE ALLEGED VICTIM IN THIS RAPE PROSECUTION TESTIFIED SHE PROMPTLY NOTIFIED HER BOYFRIEND OF THE RAPE AND, A FEW HOURS LATER, NOTIFIED HER MOTHER; HER MOTHER TESTIFIED BUT THE BOYFRIEND WAS NOT CALLED; THE DEFENSE REQUEST FOR A MISSING WITNESS JURY INSTRUCTION SHOULD NOT HAVE BEEN DENIED ON THE GROUND THE TESTIMONY WOULD BE CUMULATIVE; THE CONCEPT OF "CUMULATIVE" EXPLAINED IN SOME DEPTH.

The Fourth Department, reversing defendant's conviction, determined the defense request for the missing witness jury instruction should have been granted. The alleged victim in this rape case testified she promptly reported the rape to her boyfriend and, a few hours later, told her mother. The People called her mother as a witness, but not her boyfriend. The trial judge denied the missing witness charge on the ground that the testimony would be cumulative: "In *People v Smith* (33 NY3d 454 [2019]), the Court of Appeals held that the proponent of a missing witness charge has no initial burden to show that the missing testimony would not be cumulative of the remaining testimony, and that the concept of cumulativeness in this context functions only as a tool for defeating an otherwise-meritorious request for a missing witness instruction (id. at 458-460). Thus, the Court of Appeals explained, the opponent of the missing witness instruction has the burden of showing that the missing testimony would be cumulative in order to defeat the requested instruction on that ground (id.). Applying the standard set forth in Smith, we conclude that the People failed to show that the boyfriend's testimony would have been cumulative of the mother's testimony. The respective accounts would concern different outcries, separated by several hours and many blocks. The boyfriend could not have duplicated the mother's account of the complainant's outcry, because the boyfriend was not present during that particular event. Conversely, the mother could not have duplicated the boyfriend's account of the complainant's outcry, because the mother was not present during that particular event." ***People v. Garcia*, 2021 N.Y. Slip Op. 01571, Fourth Dept 3-19-21**

CRIMINAL LAW, EVIDENCE.

THE SENTENCE FOR CRIMINAL POSSESSION OF A WEAPON SHOULD HAVE BEEN CONCURRENT WITH THE SENTENCE FOR MURDER.

The Fourth Department determined the sentence for criminal possession of a weapon should not have been imposed consecutively to the sentence for murder: "... [T]he court erred in directing that the sentence imposed on count three of the indictment, charging criminal possession of a weapon in the second degree under Penal Law § 265.03 (3), run consecutively to the sentence imposed on count one, i.e., murder in the second degree. The People had the burden of establishing that the consecutive sentences were legal, i.e., that the crimes were committed through separate acts or omissions ... , and they failed to meet that burden. The People failed to present evidence at trial that defendant's act of possessing the loaded firearm 'was separate and distinct from' his act of shooting the victim ...". ***People v. Alligood*, 2021 N.Y. Slip Op. 01628, Fourth Dept 3-19-21**

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S SUPPRESSION MOTION PAPERS RAISED A FACTUAL ISSUE REQUIRING A HEARING, MATTER REMITTED.

The Fourth Department, remitting the matter, determined defendant had raised a factual issue requiring a suppression hearing: " 'When made before trial, suppression motions must be in writing, state the legal ground of the motion and contain sworn allegations of fact made by defendant or another person' ... . A hearing may be denied 'unless the papers submitted raise a factual dispute on a material point which must be resolved before the court can decide the legal issue' ... . Here, defendant specifically alleged that officers 'responded to [the scene] after . . . defendant, or someone at his behest, called 911' and that defendant, upon their arrival, told them that he 'found [the victim] on the stairs bleeding and was trying to help him.' Defendant alleged that, based on that information, '[t]he police removed [him] from the scene and placed him in the back of a police vehicle, and took his personal cell phone from him' without reasonable suspicion or probable cause justifying the intrusion. Although the People contended that defendant made other statements to the officers that heightened their level of suspicion and justified the intrusion, defendant's motion papers disputed this assertion, alleging instead that, at the time of the intrusion, 'the police knew nothing more than [that the victim] appeared to have been shot, and [that defendant] . . . had discovered him and summoned help while trying to give assistance at the scene.' Indeed, at oral argument on the motion, defendant further explained that he specifically disputed what information the police had at the time of the intrusion. We conclude that, under these circumstances, defendant sufficiently raised a factual issue necessitating a hearing ...". ***People v. White*, 2021 N.Y. Slip Op. 01639, Fourth Dept 3-19-21**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE PROOF OF CONSTRUCTIVE POSSESION OF WEAPONS WAS LEGALLY INSUFFICIENT.

The Fourth Department reversed defendant's convictions for criminal use of a firearm and criminal possession of weapon because the proof of constructive possession was legally insufficient: "... [T]he evidence is legally insufficient to support her conviction of the counts of criminal use of a firearm in the first degree, criminal possession of a weapon in the third degree, and criminal possession of a weapon in the fourth degree, and we therefore modify the judgment accordingly. Those counts were based on defendant's constructive possession of a rifle that was found in the house after the police entered. The People failed to establish that defendant 'exercised dominion or control over [the rifle] by a sufficient level of control over the area in which [it was] found' to establish that she had constructive possession of it ...". ***People v. Lora*, 2021 N.Y. Slip Op. 01597, Fourth Dept 3-19-21**

CRIMINAL LAW, EVIDENCE, APPEALS.

STATEMENTS MADE AFTER DEFENDANT ASSERTED HIS RIGHT TO REMAIN SILENT SHOULD HAVE BEEN SUPPRESSED, BUT THE ERROR WAS HARMLESS; CRIMINAL POSSESSION OF A WEAPON WAS A CONTINUING CRIME AND SHOULD HAVE BEEN CHARGED AS A SINGLE COUNT, NOT FOUR COUNTS; AN OBJECTION OR A MOTION FOR A MISTRIAL IS NECESSARY TO PRESERVE AN ERROR AFTER A CURATIVE INSTRUCTION HAS BEEN GIVEN.

The Fourth Department determined statements made after defendant unequivocally asserted his right to remain silent should have been suppressed, but the error was harmless. In addition the Fourth Department dismissed three counts of criminal possession of a weapon because all four counts related to the uninterrupted possession of a single weapon at different times. The court also noted that if the trial court gives a curative instruction after an objection, another objection or a motion for a mistrial is necessary to preserve the issue for appeal: "... [D]efendant told the police three times that he did not wish to speak to them. We conclude that the court's determination that defendant did not unequivocally invoke his right to remain silent is supported by the record with respect to the first such instance, because in that instance he 'did not

clearly communicate a desire to cease all questioning indefinitely' ... , 'especially in light of his continued participation in the conversation' ... . We further conclude, however, that the remainder of the court's determination is not supported by the record, inasmuch as, twice more during the questioning, 'defendant said that he did not want to talk about [the crimes], thus unequivocally invoking his right to remain silent' ... . Consequently, the court was required to suppress the statements that defendant made after invoking his right to remain silent for the second time. * * * Defendant ... contends in his main brief that the court erred in refusing to dismiss various counts of the indictment charging criminal possession of a weapon in the second degree under Penal Law § 265.03 (3) inasmuch as the indictment charged him with multiple counts of that crime based on his commission of a singular continuing offense. We agree. 'An indictment cannot charge a defendant with more than one count of a crime that can be characterized as a continuing offense unless there has been an interruption in the course of conduct' ... . Here, the indictment charged defendant with four separate counts of criminal possession of a weapon in the second degree under Penal Law § 265.03 (3) for the uninterrupted possession of a single weapon at different times. We conclude that such possession 'constituted a single offense for which he could be prosecuted only once' ... . Consequently, we affirm that part of the judgment convicting defendant of criminal possession of a weapon in the second degree under Penal Law § 265.03 (3) in count 17 of the indictment, and we modify the judgment by reversing those parts convicting him of that crime under counts 8, 11, and 16 of the indictment and dismissing those counts of the indictment." ***People v. Johnston*, 2021 N.Y. Slip Op. 01632, Fourth Dept 3-19-21**

CRIMINAL LAW, EVIDENCE, APPEALS.

AN APPELLATE COURT CANNOT CONSIDER A MOTION NOT RULED UPON BELOW; MATTER REMITTED FOR A RULING ON DEFENDANT'S MOTION FOR A TRIAL ORDER OF DISMISSAL.

The Fourth Department remitted the case for a ruling on defendant's motion for a trial order of dismissal. An appellate court cannot consider a motion not ruled upon: "Defendant ... contends that the evidence is legally insufficient to support the conviction with respect to all counts. At the close of proof, defendant moved for a trial order of dismissal, and the court reserved decision. There is no indication in the record that the court ruled on defendant's motion (cf. CPL 290.10 [1]). Thus, we may not address defendant's contention because, 'in accordance with *People v Concepcion* (17 NY3d 192, 197-198 [2011]) and *People v LaFontaine* (92 NY2d 470, 474 [1998], rearg denied 93 NY2d 849 [1999]), we cannot deem the court's failure to rule on the . . . motion as a denial thereof' ... . We therefore hold the case, reserve decision, and remit the matter to Supreme Court for a ruling on defendant's motion ...". ***People v. Johnson*, 2021 N.Y. Slip Op. 01675, Fourth Dept 3-19-21**

CRIMINAL LAW, EVIDENCE, VEHICLE AND TRAFFIC LAW.

THE PEOPLE WERE NOT GIVEN THE OPPORTUNITY TO RESPOND TO THE ISSUE WHETHER THE CHEMICAL BREATH TEST SHOULD BE SUPPRESSED; NEW SUPPRESSION HEARING ORDERED.

The Fourth Department, on an appeal by the People, determined County Court should not have suppressed the chemical breath test evidence in this DWI case because the People were not given an opportunity to respond to that suppression issue. The matter was remitted for a new suppression hearing: "... [T]he court erred in granting that part of defendant's omnibus motion seeking to suppress evidence because the court failed to notify the People of its intention to consider that issue and failed to give the People an opportunity to present evidence at the hearing on that issue ... . At the Huntley hearing, the issues of the officer's compliance with Vehicle and Traffic Law § 1194 and defendant's limited right to counsel were merely ancillary. Moreover, we reject defendant's contention that the limited evidence that was admitted at the hearing supports the court's determination to suppress the chemical breath test results. The evidence at the hearing established that the police administered a field breath test and then a chemical breath test at the jail, only the latter of which is the subject of section 1194 (2) (a) and would be admissible at trial ... , but the court conflated the administration of both tests in determining that suppression was warranted. On this record, it is unclear whether the officer complied with section 1194 (2) (b) by warning defendant of the consequences of refusal in 'clear and unequivocal language' before administering the chemical test ... . The record is also unclear whether defendant, who made a request to speak with his attorney, was afforded the opportunity to do so prior to deciding whether to submit to the chemical breath test ...". ***People v. Williams*, 2021 N.Y. Slip Op. 01570, Fourth Dept 3-19-21**

EMPLOYMENT LAW, HUMAN RIGHTS LAW, CIVIL PROCEDURE, ATTORNEYS, EVIDENCE.

DEFENDANTS WERE NOT ENTITLED TO A DIRECTED VERDICT ON THE EMPLOYMENT DISCRIMINATION CAUSE OF ACTION; DEFENSE COUNSEL'S REMARK ABOUT THE FINANCIAL CONSEQUENCES OF A PLAINTIFF'S VERDICT DEPRIVED PLAINTIFF OF A FAIR TRIAL; THE COURT OF CLAIMS HAS EXCLUSIVE JURISDICTION OVER ACTIONS SEEKING MONEY DAMAGES FROM THE STATE, RELEVANT CAUSES OF ACTION PROPERLY DISMISSED.

The Fourth Department, reversing Supreme Court, over a dissent, determined defendants' motion for a directed verdict should not have been granted and the defense attorney's remark in summation warranted a new trial. Plaintiff alleged he was denied promotion at the Central New York Psychiatric Center (CNYPC) because the defendants deemed him mentally unstable due to his status as a veteran of the Iraq war. The directed verdict awarded defendants on that issue was reversed. The defense counsel's remark in summation that one of the individual defendants would have to "open up her checkbook and write somebody a check" if plaintiff wins deprived plaintiff of a fair trial (the state is required to indemnify defendants as state officers and employees). This case was brought in Supreme Court. The Fourth Department noted that the Court of Claims has exclusive jurisdiction over actions against the state for money damages (apparently the relevant causes of action were properly dismissed for that reason): "Plaintiff … contends that the court erred in granting defendants' motion for a directed verdict with respect to plaintiff's cause of action under the New York Human Rights Law alleging discrimination based on military status … . We agree. * * * Based upon the ... testimony that plaintiff was not promoted because '[t]here was a question after [plaintiff's] military service about his [mental] stability,' the jury could have rationally inferred that defendants refused to promote plaintiff in part because they perceived that combat veterans, such as plaintiff, develop dangerous and disqualifying mental health issues as a result of their military service. Thus, 'it cannot be said that 'it would . . . be utterly irrational for a jury to reach [a verdict in favor of plaintiff]' ... . * * * ... [R]emarks about a party's financial status 'have been universally condemned by the courts of this State' ... . The defense attorney's argument that his clients should not be 'forced to open [their] checkbook' likely conveyed that the individual defendants would be required to pay any damages out-of-pocket. That remark was 'grossly improper' ... . Moreover, it misrepresented the law to the jury. The State has a duty to indemnify its employees for judgments that arise out of actions within the scope of their public duties, although that duty does not arise from injury or damage resulting from intentional wrongdoing on the part of the employee (see Public Officers Law § 17 [3] [a])." ***Hubbard v. New York State Off. of Mental Health, Cent. N.Y. Psychiatric Ctr.*, 2021 N.Y. Slip Op. 01661, Fourth Dept 3-19-21**

FAMILY LAW.

THE GENETIC MARKER TESTING TO ESTABLISH PATERNITY SHOULD NOT HAVE BEEN ORDERED IN THE ABSENCE OF A HEARING TO DETERMINE THE BEST INTERESTS OF THE CHILD.

The Fourth Department. reversing Family Court, determined genetic marker testing to establish paternity should not have ordered without holding a hearing to determine if the testing is in the best interests of the child: "We agree with the mother that the court erred in ordering genetic marker testing without first holding a hearing to determine whether testing was in the best interests of the child. It is undisputed that, at the time of the child's birth, respondents were married to one another, and respondents alleged that they had access to each other during the relevant time frame such that the presumption of legitimacy would apply. Although the court has the authority to order genetic marker and DNA testing in order to establish paternity, '[n]o such test shall be ordered . . . upon a written finding by the court that it is not in the best interests of the child on the basis of . . . the presumption of legitimacy of a child born to a married woman' ... . On this record, '[t]here was insufficient evidence before the court to determine the child's best interests,' and we thus conclude that, before ordering the genetic marker test, the court should have conducted a hearing to determine whether it was in the best interests of the child to do so, based on the presumption of legitimacy ...". ***Matter of Kirk M.B. v. Rachel S.*, 2021 N.Y. Slip Op. 01602, Fourth Dept 3-19-21**

FAMILY LAW, CIVIL PROCEDURE.

FATHER'S PETITION FOR CUSTODY SHOULD NOT HAVE BEEN DISMISSED WITHOUT MAKING A DETERMINATION ON THE MERITS, MATTER REMITTED; THE USUAL PROOF REQUIREMENTS FOR AWARDING CUSTODY TO A NONPARENT DO NOT APPLY TO A TEMPORARY PLACEMENT WITH A NONPARENT.

The Fourth Department, remitting the matter for a hearing, determined father's petition for modification of custody should not have been dismissed as moot without making a determination of the merits. The court noted that the usual requirements for awarding custody to a nonparent did not apply to the maternal aunt in this case because she did not petition for custody and the children were merely placed with her temporarily: "The father initially filed a petition for modification of custody and visitation against the mother, seeking primary residential custody of their three children. Petitioner Genesee County Department of Social Services then commenced a neglect proceeding against the mother, and the mother consented

to the entry of orders finding the subject children to be neglected children. Family Court held a joint hearing regarding the neglect petition and the father's custody petition ... , after which the court placed the children with their maternal aunt with the mother's consent but over the father's objection, and dismissed the father's custody petition as moot. ... [W]e agree with the father that the court erred in dismissing his petition for modification of custody and visitation as moot without making a determination on the merits of his petition pursuant to Family Court Act article 6 ... . We further agree with the father that, '[a]s between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' ... . Nevertheless, on the facts of this case, we conclude that the maternal aunt did not have the burden of making a showing of extraordinary circumstances inasmuch as she did not file a petition in this matter and was not awarded custody of the children, but rather the children were placed with her for the pendency of the article 10 proceeding pursuant to Family Court Act § 1017 ...". ***Matter of Michael J.M. v. Lisa M.H.*, 2021 N.Y. Slip Op. 01573, Fourth Dept 3-19-21**

FAMILY LAW, CIVIL PROCEDURE.

PETITIONER DID NOT DEMONSTRATE THE NEGLECT PETITION WAS PROPERLY MAILED TO MOTHER AND MOTHER PRESENTED EVIDENCE REBUTTING THE PROCESS SERVER'S AFFIDAVIT; A HEARING ON WHETHER MOTHER WAS PROPERLY SERVED IS REQUIRED.

The Fourth Department, reversing Family Court, determined a hearing on whether mother was properly served with the neglect petition was necessary: "... [P]etitioner failed in the first instance to establish that the documents were mailed to the mother's 'last known address' inasmuch as '[t]he affidavit of service says that the [papers] were mailed [by prepaid, first class mail] . . . , without identifying th[e] address' to which they were mailed ... . In any event, even assuming, arguendo, that the process server's affidavit was sufficient to create the presumption of valid service, we conclude that the mother's submissions were sufficient to rebut that presumption. The mother's attorney submitted an affidavit from his legal assistant establishing that the person who accepted service mistakenly thought the papers were for his daughter, who shared the same first name as the mother. That person also informed the legal assistant that the mother had never resided at that address and that the mother's father, with whom petitioner believed the mother was residing, 'had moved out of the home months earlier.' We thus conclude that the mother rebutted any presumption that she was properly served at her 'actual place of business, dwelling place or usual place of abode so as to satisfy the requirements of CPLR 308 (2) [or (4)]' ... . Additionally, we note that petitioner's own submissions in the application for an order of substituted service raise a question whether the mother ever resided at the address listed in the affidavit of service inasmuch as that address was not among the numerous identified addresses for her." ***Matter of William A. (Jessica F.)*, 2021 N.Y. Slip Op. 01580, Fourth Dept 3-19-21**

FAMILY LAW, CIVIL PROCEDURE.

FAILURE TO TIMELY FILE THE OBJECTIONS TO THE SUPPORT MAGISTRATE'S DETERMINATION DID NOT WARRANT DISMISSAL OF THE OBJECTIONS.

The Fourth Department, reversing Family Court, determined that the failure to time file proof of service of respondent's objections to the determination of the Support Magistrate did not warrant dismissal of the objections: "Family Court Act § 439 (e) provides that a party filing objections to the determination of the Support Magistrate must serve those objections upon the opposing party, and that proof of service 'shall be filed with the court at the time of filing of objections.' Here, the record indicates that respondent timely filed his objections and served a copy of those objections upon petitioner on the same day, but respondent failed to file proof of service with Family Court until two days later. Under the particular circumstances of this case, we substitute our discretion for that of Family Court and conclude that dismissal of respondent's objections is not warranted ... . Although respondent failed to comply with the statutory deadline for filing proof of service, '[s]trict adherence to this deadline is not required,' and courts have 'discretion to overlook a minor failure to comply with the statutory requirement' ... . Here, there is no dispute that petitioner was not prejudiced by the late filing inasmuch as she was served with a copy of respondent's objections within the statutory time period (see Family Ct Act § 439 [e]). Indeed, the record shows that petitioner filed a rebuttal to respondent's objections." ***Matter of Sigourney v. Santaro*, 2021 N.Y. Slip Op. 01591, Fourth Dept 3-19-21**

LABOR LAW-CONSTRUCTION LAW, EVIDENCE, PERSONAL INJURY.

THE ACKNOWLEDGED VIOLATION OF THE INDUSTRIAL CODE WAS MERELY "SOME EVIDENCE OF NEGLIGENCE" TO BE CONSIDERED BY THE FACTFINDER AND WAS NOT SUFFICIENT TO WARRANT SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF ON THE LABOR LAW § 241 (6) CAUSE OF ACTION.

The Fourth Department, reversing (modifying) Supreme Court determined plaintiff was not entitled to summary judgment on the Labor Law § 241(6) cause of action, despite the acknowledged violation of an Industrial Code provision, 12 N.Y.C.R.R.

§ 23-1.7 (d). Plaintiff alleged he slipped and fall on metal decking on which there was some snow. 12 N.Y.C.R.R. § 23-1.7 (d) requires that snow be removed from places where worker walk. The Fourth Department noted that the violation of the regulation, as opposed to a statute, is merely "some evidence of negligence" to be considered by the jury: "... [P]laintiff's claim that defendants are liable under Labor Law § 241 (6) is based on the alleged violation of 12 NYCRR 23-1.7 (d), which, in pertinent part, directs that workers not be permitted to use 'a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition' and requires that substances such as snow and ice be 'removed . . . or covered to provide safe footing.' It is undisputed that '12 NYCRR 23-1.7 (d) mandates a distinct standard of conduct, rather than a general reiteration of common-law principles, and [thus] is precisely the type of 'concrete specification' upon which liability under section 241 (6) may be premised ... . Moreover, defendants do not challenge plaintiff's showing that the subject regulation was violated. As defendants correctly contend, however, the violation of 12 NYCRR 23-1.7 (d) is not conclusive with respect to defendants' liability and, instead, merely constitutes 'some evidence of negligence and thereby reserve[s], for resolution by a [factfinder], the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances' ... . In particular, we conclude that plaintiff's own submissions, including the deposition of [defendant] Burke's owner who testified—in contrast to plaintiff's testimony—regarding his efforts to clear snow from the metal decking upon arriving at the work site prior to any workers, 'raised factual issues with respect to the reasonableness of the safety measures undertaken at the work site' ...". ***Chrisman v. Syracuse Soma Project, LLC*, 2021 N.Y. Slip Op. 01663, Fourth Dept 3-19-21**

MEDICAL MALPRACTICE.

MENTAL HEALTH TREATMENT PROVIDERS, WHO WERE TREATING MOTHER, DID NOT OWE A DUTY OF CARE TO HER SON, WHO WAS STABBED AND KILLED BY MOTHER.

The Fourth Department, reversing Supreme Court, determined defendant medical/mental health facilities and psychiatrist, who were treating plaintiff's wife, did not owe a duty to plaintiff's son, who was killed by plaintiff's wife. Plaintiff had called defendant Unity Mental Health (UMH) several times seeking additional care because his wife's condition was worsening. Plaintiff was told his wife should keep her psychiatric appointment which was two weeks away. Two days later plaintiff's wife stabbed their son (decedent): "Generally, medical providers owe a duty of care only to their patients, and courts have been reluctant to expand that duty to encompass nonpatients because doing so would render such providers liable 'to a prohibitive number of possible plaintiffs' ... .The scope of that duty of care has, on occasion, been expanded to include nonpatients where the defendants' relationship to the tortfeasor 'place[d] [them] in the best position to protect against the risk of harm,' and 'the balancing of factors such as the expectations of the parties and society in general, the proliferation of claims, and public policies affecting the duty proposed herein . . . tilt[ed] in favor of establishing a duty running from defendants to plaintiffs under the facts alleged' ... . Under the circumstances of this case, however, we conclude that those factors do not favor establishing a duty running from defendants to decedent. The complaint herein does not allege that plaintiff's wife sought treatment specifically in order to prevent physical injury to decedent or her family, that defendants were aware whether she had threatened or displayed violence towards her family in the past, or that defendants directly put in motion the danger posed by the patient ...". ***Cardenas v. Rochester Regional Health*, 2021 N.Y. Slip Op. 01641, Fourth Dept 3-19-21**

ENVIRONMENTAL LAW, PERSONAL INJURY, REAL PROPERTY LAW.

PLAINTIFF, WHO PURCHASED THE PROPERTY, SUED THE PRIOR OWNER IN NEGLIGENCE FOR DAMAGES STEMMING FROM PLAINTIFF'S EXPOSURE TO CHEMICAL CONTAMINATION ON THE PROPERTY; LIABILITY FOR A DANGEROUS CONDITION ON PROPERTY GENERALLY CEASES UPON TRANSFER OF THE PROPERTY; THE NEGLIGENCE CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED.

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiff's negligence cause of action seeking damages for exposure to contaminants on the land plaintiff purchased from defendant city should have been dismissed. A property owner's liability for a dangerous condition ceases upon the transfer of the property: "We ... agree with defendant that the court erred in denying the motion with respect to the negligence cause of action, and we therefore further modify the order accordingly. That cause of action is based on allegations that plaintiff was injured due to a dangerous condition on the parcel of property that defendant sold to plaintiffs, i.e., chemical contamination, to which plaintiff was exposed after the sale. It is well settled that '[o]ne's liability in negligence for the condition of land ceases when the premises pass out of one's control before injury results. Such is the general rule' ... . Thus, under that general rule, defendant's liability for negligence based on a dangerous condition on the property ended when it sold the parcel to plaintiffs ... , and 'liability may be imposed upon defendant only if the allegedly dangerous condition . . . existed at the time [it] relinquished possession and control of the premises 'and the new owner has not had a reasonable time to discover the condition, if it was unknown, and to remedy the condition once it is known' ... . Here, defendant met its burden on the motion of establishing that any injury

allegedly sustained by plaintiff was caused by exposure after defendant sold the property. In response, 'plaintiff[s have] offered nothing to show that [they, as] the new owner[s,] did not have adequate time to discover and remedy such defects' ...". ***Powers v. City of Geneva*, 2021 N.Y. Slip Op. 01684, Fourth Dept 3-19-21**

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