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CasePrepPlus

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COURT OF APPEALS

CRIMINAL LAW, EVIDENCE.

HERE THE DEFENDANT CLAIMED HE ACTED IN SELF-DEFENSE WHEN HE STABBED THE VICTIM WITH A PEN KNIFE; THE DEFENDANT SOUGHT TO INTRODUCE EVIDENCE OF THE VICTIM'S PRIOR VIOLENT ACTS IN SUPPORT OF THE JUSTIFICATION DEFENSE; THE TRIAL JUDGE INSTRUCTED THE JURY ON THE JUSTIFICATION DEFENSE BUT DID NOT ALLOW EVIDENCE OF THE VICTIM'S PRIOR VIOLENT ACTS TO BE CONSIDERED ON THAT ISSUE; THE COURT OF APPEALS AFFIRMED, UPHOLDING THE RULE THAT THE VICTIM'S PRIOR VIOLENT ACTS ARE NOT ADMISSIBLE PROOF OF JUSTIFICATION UNLESS THE DEFENDANT WAS AWARE OF THE PRIOR VIOLENT ACTS AT THE TIME OF THE INCIDENT.

The Court of Appeals, over a two-judge dissenting opinion, affirming defendant's conviction, determined the rule that evidence of a victim's prior violent acts should not be admitted in support of the justification defense unless defendant was aware of those prior violent acts at the time of the incident. Here there was evidence the victim had four youthful offender adjudications in which the victim acted violently. The defendant stabbed the victim with a pen knife and claimed the victim was attacking him with a broken beer bottle. The trial judge instructed the jury on the justification defense: "Defendant stabbed the victim in the chest with a small knife, causing life-threatening injuries. At trial, the court determined that defendant was entitled to raise a justification defense. Defendant sought to introduce evidence of the specific violent conduct underlying four of the victim's prior youthful offender adjudications to prove that the victim was the initial aggressor with respect to deadly physical force … . Supreme Court, in accordance with Miller, prohibited the jury from considering that evidence for that purpose. The Appellate Division affirmed … . 'Youthful Offender status provides youth four key benefits: relief from [a] record of a criminal conviction, reduced sentences, privacy from public release of the youth's name pending the Youthful Offender determination on misdemeanor offenses only, and confidentiality of the Youthful Offender record' (Report of the Governor's Commission on Youth, Public Safety, and Justice 135 [2014]). Youthful offender designations are given to those who have 'a real likelihood of turning their lives around,' and the protection gives these individuals 'the opportunity for a fresh start, without a criminal record' … . Given these policy concerns, we see no reason to revisit the Miller rule in this case." ***People v. Guerra*, 2023 N.Y. Slip Op. 01352, CtApp 3-16-23**

CRIMINAL LAW, EVIDENCE.

THE UNEXPLAINED DELAY OF 38 MONTHS IN SEEKING A WARRANT FOR A DNA SAMPLE FROM THE DEFENDANT, WHO HAD BEEN IDENTIFIED AS THE RAPIST BY THE COMPLAINANT RIGHT AWAY, VIOLATED DEFENDANT'S RIGHT TO A SPEEDY TRIAL; CONVICTION REVERSED.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a dissenting opinion, reversing the Appellate Division, determined that the inexplicable delay in seeking a DNA sample from the defendant in this rape case violated defendant's right to a speedy trial. The complainant reported the rape right away and named the defendant as the perpetrator. The defendant denied having sex with the complainant and refused to voluntarily provide a DNA sample. 38 months later the People applied for and were granted a warrant for the DNA sample. Defendant was convicted after a trial. The majority opinion went through the *Taranovich* (37 NY2d 442) pre-indictment-delay factors: " 'Generally when there has been a protracted delay, certainly over a period of years, the burden is on the prosecution to establish good cause' … . It has not established good faith in this case. Here, 24 months are wholly unexplained by the record or any of the People's papers in this matter and 7 months at a point late in the timeline are flimsily justified as necessary to decide the case required DNA evidence and then figure out how to get DNA evidence from defendant. The People's own submissions demonstrate the emptiness of the claim that the police and the People did not know how to obtain defendant's DNA and could not have figured it out sooner: not only did the assigned ADA obtain guidance on the warrant process in November of 2010—two years before the People filed their ultimately successful warrant application—but the investigator who eventually prepared the warrant application managed to figure out the procedure in part of a day. Indeed, our own case law dating back to at least 1982 provides the needed guidance on how to address this routine legal matter …". ***People v. Regan*, 2023 N.Y. Slip Op. 01353, CtApp 3-16-23**

LANDLORD-TENANT, MUNICIPAL LAW.

PLAINTIFFS-TENANTS DID NOT SHOW DEFENDANT LANDLORD ENGAGED IN A FRAUDULENT SCHEME TO DEREGULATE; THEREFORE THE DEFAULT FORMULA TO SET THE BASE DATE RENT PURSUANT TO THE RENT STABILIZATION CODE SHOULD NOT BE USED.

The Court of Appeals, reversing the Appellate Division, determined that the default formula for determining the plaintiffs-tenants' legal regulated rent pursuant to the Rent Stabilization Code should not be used because there was no evidence of a fraudulent scheme to deregulate. Rather defendants' deregulation was based upon a misinterpretation of the law: "*Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. and Community Renewal* was decided after Supreme Court granted plaintiffs' motion (35 NY3d 332 [2020]). There, this Court made clear that, under the pre-Housing Stability and Tenant Protection Act of 2019 law applicable here, 'review of rental history outside the four-year lookback period [i]s permitted only in the limited category of cases where the tenant produced evidence of a fraudulent scheme to deregulate and, even then, solely to ascertain whether fraud occurred—not to furnish evidence for calculation of the base date rent or permit recovery for years of overcharges barred by the statute of limitations' ... . In fraud cases, because the reliability of the base date rent has been tainted, 'this Court sanctioned use of the default formula to set the base date rent' ... . *Regina* also held that 'deregulation of [ ] apartments during receipt of J-51 benefits was not based on a fraudulent misstatement of fact but on a misinterpretation of the law [and so] a finding of willfulness is generally not applicable to cases arising in the aftermath of *Roberts* [and] [b]ecause conduct cannot be fraudulent without being willful, it follows that the fraud exception to the lookback rule is generally inapplicable to *Roberts* overcharge claims' ... . Plaintiffs failed to meet their burden on summary judgment. Defendants' deregulation of the apartments was based on this same 'misinterpretation of the law' involved in *Regina* and therefore that conduct did not constitute fraud ... . Defendants' subsequent re-registering of the apartments occurred after the four-year lookback period, and plaintiffs have failed to offer evidence that it somehow affected the reliability of the actual rent plaintiffs paid on the base date." ***Casey v. Whitehouse Estates, Inc*****., 2023 N.Y. Slip Op. 01351, CtApp 3-16-23**

FIRST DEPARTMENT

CORPORATION LAW, COOPERATIVES, FIDUCIARY DUTY.

A CORPORATION (HERE A COOPERATIVE) DOES NOT OWE A FIDUCIARY DUTY TO THE SHAREHOLDERS; THE INDIVIDUAL BOARD MEMBERS MAY OWE A FIDUCIARY DUTY TO THE SHAREHOLDERS FOR INDIVIDUAL ACTIONS BUT NO ALLEGATIONS OF WRONGDOING BY BOARD MEMBERS WERE MADE.

The First Department, reversing (modifying) Supreme Court, noted that a corporation (or, in this case a cooperative) does not owe a fiduciary duty to its shareholders: "[T]he second cause of action for breach of fiduciary duty as against the cooperative and the board member defendants also does not state a claim upon which relief may be granted. The cause of action cannot be sustained as against the cooperative 'because a corporation owes no fiduciary duty to its shareholders' ... . Furthermore, even assuming that the cause of action was addressed to the actions taken by the individual board member defendants, it 'does not allege any individual wrongdoing by the members of the board separate and apart from their collective actions' taken in their capacity as board members ...". ***Tahari v. 860 Fifth Ave. Corp*****, 2023 N.Y. Slip Op. 01269, First Dept 3-14-23**

CRIMINAL LAW, EVIDENCE.

INTRODUCTION OF DEFENDANT'S TWO-YEAR-OLD FIREARM CONVICTION UNDER THE THEORY THAT DEFENDANT "OPENED THE DOOR" WAS REVERSIBLE ERROR; DEFENDANT HAD NOT QUESTIONED THE PROPRIETY OF THE POLICE CONDUCT OR THE OFFICER'S CONCLUSION THE BULGE IN DEFENDANT'S POCKET WAS A FIREARM; THE JUDGE SHOULD HAVE APPLIED THE TWO-STEP MOLINEUX ANALYSIS, WHICH DOES NOT SUPPORT INTRODUCTION OF THE PRIOR CONVICTION.

The First Department, in a full-fledged opinion by Justice Gesmer, reversing defendant's conviction, determined the People's introduction of evidence of defendant's two-year-old possession of a weapon conviction was not was not justified under the Molineux criteria. A police officer, Lafemina, who was aware of defendant's prior firearm conviction and a parole warrant for defendant's arrest, saw a bulge in defendant's pocket which Lafemina thought could have been a firearm. The defendant ran when approached by Lafemina and, during the chase, entered and exited two buildings. Because Lafemina radioed that defendant may be armed, more than 100 officers responded to the chase. Defendant was charged with burglary based upon the building-entries. No firearm was recovered: "[O]n the erroneous theory that defendant opened the door, the trial court admitted evidence that defendant was previously convicted of second-degree attempted criminal possession of a weapon ostensibly to explain Lafemina's actions on the day defendant was arrested. We find this was improper. The trial court should have, but failed to follow the necessary two-step Molineux test: first, determine whether the evidence is relevant to a material issue, and then, if so, whether its probative value outweighs any potential prejudice to defendant. Instead, the court improperly relied on Santana [16 AD3d 346], which does not apply here because defendant never opened the door. ... The court erred by granting the People's application before defendant raised any issues as to the propriety of the officers' conduct or as to the accuracy of Lafemina's belief that defendant was armed ...". ***People v. Woody*****, 2023 N.Y. Slip Op. 01263, First Dept 3-14-23**

CRIMINAL LAW, EVIDENCE.

THERE WAS NO EVIDENCE THE POLICE ANNOUNCED THEIR PURPOSE (ARREST WARRANT) BEFORE ENTERING THE APARTMENT; THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined the suppression motion should have been granted because there was no evidence the police announced their purpose (arrest warrant) before entering the apartment: "The hearing evidence supports findings as follows: The police executing the arrest warrant knocked and heard movement in the apartment but received no response, they announced that they were police and again received no response, and they then entered the apartment after finding that the door was unlocked. Only after opening the door, and after entering the apartment, a detective announced, 'NYPD arrest warrant.' There was no evidence that in any way suggests that the police, before entering the apartment, attempted to satisfy the statutory requirement of giving 'notice' of their 'purpose' (CPL 120.80[4] ...). Accordingly, the court should have granted defendant's motion to suppress the physical evidence at issue." ***People v. Jones*, 2023 N.Y. Slip Op. 01262. First Dept 3-14-23**

FAMILY LAW, EVIDENCE.

THE EVIDENCE FATHER NEGLECTED THE DAUGHTER (EXCESSIVE CORPORAL PUNISHMENT) WAS SUFFICIENT; BUT THE EVIDENCE FATHER DERIVATIVELY NEGLECTED THE SON WAS NOT,

The First Department, reversing (modifying Family Court) determined the evidence father derivatively neglected the son was insufficient: "Family Court's determination that respondent derivatively neglected his son J.L. was not supported by a preponderance of the evidence. The finding was based entirely on the excessive corporal punishment of the daughter, which took place outside the home. There was no evidence that respondent's excessive corporal punishment was ever directed at the older child, who was 14 years old at the time, or that he was even aware of the abuse. Furthermore, there was no evidence that the son was at risk of becoming impaired, as he continued to reside with respondent after the petitions were filed ...". ***Matter of C.L. (Edward L.)*, 2023 N.Y. Slip Op. 01260, First Dept 3-14-23**

INSURANCE LAW, NEGLIGENCE.

THE NEGLIGENCE CAUSE OF ACTION AGAINST PLAINTIFFS' INSURANCE BROKERS SHOULD NOT HAVE BEEN DISMISSED; PLAINTIFFS ALLEGED THE BROKERS FAILED TO PROCURE ADEQUATE COVERAGE AND FAILED TO INFORM PLAINTIFFS OF THE DEFINITIONS AND TERMS OF THE POLICY.

The First Department, reversing (modifying) Supreme Court, determined the plaintiffs-insureds' negligence cause of action against their insurance brokers should not have been dismissed: "Supreme Court improperly dismissed plaintiffs' causes of action for negligence against Thompson Flanagan and WIA, the brokers. Plaintiffs sufficiently pleaded a cause of action for negligence against the brokers which was distinct and not duplicative of their breach of contract claim. 'The law is reasonably settled . . . that insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so' ... . Thus, 'a party who has engaged a person to act as an insurance broker to procure adequate insurance is entitled to recover damages [for breach of contract] from the broker if the policy obtained does not cover a loss for which the broker contracted to provide insurance, and the insurance company refuses to cover the loss' ... .. Additionally, '[a]n insurance agent or broker can be held liable in negligence if he or she fails to exercise due care in an insurance brokerage transaction' and '[t]hus, a plaintiff may seek to hold a defendant broker liable under a theory of either negligence or breach of contract' ... . Here, in addition to alleging both brokers breached a contract to procure adequate insurance coverage, plaintiffs also assert that they failed to inform them of the definitions and terms of the policy. The latter allegations implicate a duty and potential breach by the brokers independent from the contract ...". ***Florence Capital Advisors, LLC v. Thompson Flanagan & Co., LLC*, 2023 N.Y. Slip Op. 01358, First Dept 3-16-23**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY, AGENCY.

PLAINTIFF ALLEGEDLY TRIPPED ON DEBRIS AND FELL INTO A TWO-TO-THREE-FOOT-DEEP PIT FROM WHICH THE PLYWOOD COVER HAD BEEN REMOVED TRIGGERING POTENTIAL LIABILITY UNDER LABOR LAW §§ 240(1) AND 241(6); ONE DEFENDANT MAY BE LIABLE AS A STATUTORY AGENT OF THE OWNER WITH SUPERVISORY AUTHORITY; TWO DEFENDANTS MAY BE LIABLE UNDER LABOR LAW § 200 FOR THE DANGEROUS CONDITIONS; THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversed Supreme Court and reinstated the complaint in this Labor Law §§ 240(1), 241(6) and 200 action. Plaintiff's decedent allegedly tripped on debris and fell into a two-to-three-foot deep pit from which the plywood cover had been removed: "[P]laintiff has raised an issue of fact as to whether application of Labor Law § 240 governs this claim sufficient to defeat defendants' various motions for summary judgment ... . [P]laintiff raised issues of fact barring dismissal of the Labor Law § 241(6) cause of action, as Industrial Code §§ 23-1.7(e) and 23-1.30 may apply to circumstances of plaintiff's accident. Plaintiff's decedent testified that he tripped over debris in a passageway and then into a pit in an area that was arguably a work area ... . As to Baring's liability under the Labor Law, it failed to establish that it is not a statutory agent for purposes of Labor Law §§ 240(1) or 241(6). Baring's contract with Plaza delegated the authority to Baring to supervise and control the installation of kitchen equipment and obligated it to exercise such supervision over any of its subcontractors, such as decedent's employer. That it may not have actually done so is not dispositive ... . With respect to the Labor Law § 200 and common-law negligence causes of action as against NYY Steak and Plaza, there is an issue of fact as to whether those defendants were on notice that the

illumination at the site was insufficient ... .. Plaintiff also adduced evidence of constructive notice as to the uncovered pit. …". ***Devita v. NYY Steak Manhattan, LLC*, 2023 N.Y. Slip Op. 01257, First Dept 3-14-23**

MENTAL HYGIENE LAW.

THE MENTAL HYGIENE LAW DOES NOT REQUIRE A TESTIMONIAL HEARING BEFORE THE REMOVAL OF A GUARDIAN FOR AN INCAPACITATED PERSON.

The First Department noted that removal of a guardian does not require a testimonial hearing: "The Mental Hygiene Law does not support appellants' contention that they were entitled to a testimonial hearing in this case before being removed. Mental Hygiene Law § 81.35 provides that a guardian may be removed when she or he 'fails to comply with an order, is guilty of misconduct, or for any other cause which to the court shall appear just' ... . A motion on notice, served on the persons specified in Mental Hygiene Law § 81.16 (c), is required but there is no statutory right to a hearing ... . This relaxed requirement stands in distinction to Mental Hygiene Law § 81.11 (a), which provides that the petition for the appointment of a guardian for an alleged IP [incapacitated person], whose liberty interests are at stake, 'shall be made only after a hearing' ... . The reason a guardian has 'no due process right to a full hearing,' nor is a 'full blown' hearing necessary for their removal, is that a guardian has no 'property interest' to protect ...". ***Matter of Edgar V.L.*, 2023 N.Y. Slip Op. 01360, First Dept 3-16-23**

SECOND DEPARTMENT

CIVIL PROCEDURE, CONTRACT LAW, JUDGES.

THE COMPLAINT ALLEGED AN ORAL JOINT VENTURE AGREEMENT BUT DID NOT ALLEGE THE PARTIES AGREED TO SHARE THE LOSSES; THE STATUTE OF FRAUDS THEREFORE APPLIED AND THE COMPLAINT WAS DISMISSED; PLAINTIFF'S MOTION TO AMEND THE COMPLAINT TO ALLEGE THE PARTIES AGREED TO SHARE THE LOSSES SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the plaintiff's motion to amend the complaint should have been granted. The initial breach of contract complaint was dismissed because it was not alleged the parties to the oral joint venture agreed to share the losses (therefore the statute of frauds applied to the agreement). The amendment sought to include the allegation the parties agreed to share the losses: "... Supreme Court improperly denied the plaintiff's motion on the basis that the breach of contract causes of action in the amended complaint had previously been dismissed ... . Moreover, under the circumstances here, the court should have granted the plaintiff's motion. The defendants cannot be prejudiced or surprised by the proposed amendments, which were premised upon the same facts, transactions, or occurrences alleged in the amended complaint and 'simply sought to cure the deficiencies cited by the Supreme Court in its earlier order which resulted in the dismissal' ... . Further, the plaintiff explained that the omission of a loss-sharing allegation from the amended complaint was inadvertent, and he diligently sought to amend the pleading to correct the defect ...". ***Benjamin v. 270 Malcolm X Dev., Inc.*, 2023 N.Y. Slip Op. 01275, Second Dept 3-15-23**

CRIMINAL LAW.

ALTHOUGH THE READY-FOR-TRIAL ANNOUNCEMENT WAS TIMELY, IT WAS ILLUSORY BECAUSE THE CERTIFICATE OF COMPLIANCE WITH DISCOVERY OBLIGATIONS HAD NOT BEEN FILED; INDICTMENT PROPERLY DISMISSED.

The Second Department, affirming the "speedy trial" dismissal of the indictment, noted that, although the ready-for-trial announcement was timely, it was illusory because the certificate of compliance with discovery obligations had not been filed: "... County Court properly granted the defendant's motion to dismiss the indictment. Contrary to the People's contention, their October 28, 2020 statement of readiness, which, technically, was within the speedy trial time limit, was nevertheless illusory, as they never certified their compliance with their discovery obligation under CPL 245.20 in a certificate of compliance that they were required to file with the court before or at the time they announced their readiness for trial (see CPL 30.30[5]; 245.50[1], [3]). The People's ... statement of readiness was therefore insufficient to stop the running of the speedy trial clock ... , and the statutory period to declare readiness had lapsed for speedy trial purposes as of the time the defendant moved to dismiss the indictment." ***People v. Brown*, 2023 N.Y. Slip Op. 01306, Second Dept 3-15-23**

CRIMINAL LAW.

PURSUANT TO THE MARIHUANA REGULATION AND TAXATION ACT (MRTA) (1) DEFENDANT'S MARIHUANA CONVICTION WAS PROPERLY VACATED (2) ANOTHER CONVICTION WAS PROPERLY SUBSTITUTED FOR THE VACATED CONVICTION (3) BUT COUNTY COURT COMMITTED REVERSIBLE ERROR BY FAILING TO CONSIDER WHETHER SUBSTITUTING ANOTHER CONVICTION SERVED THE INTEREST OF JUSTICE; MATTER REMITTED.

The Second Department, in a full-fledged opinion by Justice Dillon, reversing County Court, determined: (1) defendant's marijuana conviction was properly vacated under the Marihuana Regulation and Taxation Act (MRTA); (2) once vacated, the court had the authority to substitute a conviction for the vacated conviction (which it did); but (3) the court committed reversible error by failing to consider whether substituting a conviction served the interest of justice. The matter was remitted for the "interest of justice" ruling: "[T]he main questions presented are whether the County Court, having vacated the defendant's conviction under Penal Law former article 221, had the authority pursuant to CPL 440.46-a(2)(b)(ii) to substitute a conviction under Penal Law article 222 for his vacated conviction, and whether the court

failed to consider if it was not in the interests of justice to do so. We hold that the court, having vacated the defendant's conviction under Penal Law former article 221, had the authority pursuant to CPL 440.46-a(2)(b)(ii) to substitute a conviction under Penal Law article 222 for his vacated conviction. We further hold that the court committed reversible error by failing to consider, as required by the statute, whether it was not in the interests of justice to substitute a conviction for an appropriate lesser offense." ***People v. Graubard*, 2023 N.Y. Slip Op. 01308, Second Dept 3-15-23**

FAMILY LAW, EVIDENCE, JUDGES.

THE JUDGE SHOULD HAVE HELD A HEARING IN THIS PARENTAL-ACCESS PROCEEDING AND SHOULD NOT HAVE RELIED ON A REPORT BY A FORENSIC EVALUATOR WHICH WAS NOT ADMITTED IN EVIDENCE.

The Second Department, reversing Family Court, determined a hearing should have been held in this parental-access proceeding: "Custody and parental access determinations should '[g]enerally be made only after a full and plenary hearing and inquiry' ... . 'While the general right to a hearing in [parental access] cases is not absolute, where 'facts material to the best interest analysis, and the circumstances surrounding such facts, remain in dispute,' a hearing is required' ... . Here, the record demonstrates disputed factual issues so as to require a hearing on the issue of the mother's parental access ... . Further, the Family Court, in making its determination without a hearing, relied upon the report of the forensic evaluator, which had not been admitted into evidence, and the evaluator's opinions and credibility were untested by the parties ...". ***Matter of McCabe v. Truglio*, 2023 N.Y. Slip Op. 01299, Second Dept 3-15-23**

PERSONAL INJURY, EVIDENCE.

CONFLICTING EVIDENCE OF THE WEATHER AT THE TIME OF THE ICE SLIP AND FALL PRECLUDED SUMMARY JUDGMENT BASED ON THE STORM-IN-PROGRESS RULE; IN ADDITION, THERE WAS EVIDENCE THE ICE WAS THERE FOR SOME TIME BEFORE THE FALL AND DEFENDANTS DID NOT DEMONSTRATE THEY LACKED ACTUAL OR CONSTRUCTIVE NOTICE OF IT; DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this ice slip and fall case should not have been granted: There was conflicting evidence about the weather at the time of the accident, so the storm-in-progress defense was not established. There was evidence the ice was on the sidewalk for some time before the accident and defendants did not demonstrate they lacked actual or constructive notice of the condition: "Contrary to the Supreme Court's determination, the defendants failed to demonstrate their prima facie entitlement to judgment as a matter of law dismissing the complaint based on the storm in progress rule. The defendants submitted transcripts of the deposition testimony of the plaintiffs and the defendants' representatives, who gave conflicting testimony as to the weather conditions at the approximate time of the accident ... . In addition, the defendants' submissions failed to eliminate all triable issues of fact as to whether the ice upon which the injured plaintiff slipped existed prior to the day of the accident and whether the defendants lacked actual or constructive notice of a preexisting condition...". ***Licari v. Brookside Meadows, LLC*, 2023 N.Y. Slip Op. 01284, Second Dept 3-15-23**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF CHANGED LANES, CUT OFF DEFENDANTS VEHICLE AND CRASHED INTO THE REAR OF THE CAR IN FRONT; DEFENDANTS' MOVED FOR SUMMARY JUDGMENT PURSUANT TO THE EMERGENCY DOCTRINE; SUPREME COURT DENIED THE MOTION DESPITE PLAINTIFF'S FAILURE TO OPPOSE IT; THE SECOND DEPARTMENT AWARDED DEFENDANTS SUMMARY JUDGMENT PURSUANT TO THE EMERGENCY DOCTRINE.

The Second Department, reversing Supreme Court, determined the PTM defendants' motion for summary judgment in this rear-end collision case should have been granted. Plaintiff suddenly changed lanes, cut off the PTM defendants' truck and then plaintiff struck the car in front. The emergency doctrine applied to the PTM defendants. It is worth noting that plaintiff did not oppose the PTM defendants' motion: "[T]he PTM defendants submitted an affidavit from Murrel [the driver of the PTM truck], which demonstrated, prima facie, that he had a nonnegligent explanation for striking the rear of the plaintiff's vehicle and that he acted reasonably when he was faced with an emergency situation not of his own making ... . According to Murrel, prior to the accident, he was operating his vehicle behind Acevedo's vehicle at a reasonable and safe distance. The plaintiff's vehicle, suddenly and without warning, cut in front of Murrel's vehicle and, seconds later, struck the rear of Acevedo's vehicle and then came to a sudden stop. Due to traffic conditions, Murrel could not safely change lanes, and although he applied the brakes, he could not avoid colliding with the plaintiff's vehicle." ***Martin v. PTM Mgt. Corp.*, 2023 N.Y. Slip Op. 01285, Second Dept 3-15-23**

THIRD DEPARTMENT

FREEDOM OF INFORMATION LAW (FOIL).

BOTH THE HIPAA PRIVACY RULE AND THE PUBLIC OFFICERS LAW APPLY TO THE FOIL REQUEST FOR RECORDS DOCUMENTING INJURIES SUFFERED BY ATHLETES USING THE OLYMPIC TRAINING FACILITIES IN THE ADIRONDACK PARK; THE HIPAA DEIDENTIFICATION PROCEDURE SHOULD BE APPLIED TO THE REQUESTED RECORDS.

The Third Department noted that the HIPAA deidentification procedure was applicable to the FOIL request for sports-related injuries at the Olympic facilities in the Adirondack Park. The FOIL request was made to the respondent NYS Olympic Regional Development Authority: "[T]he health-related information contained in the reports at issue is subject to the protections of both HIPAA and Public Officers Law § 87 (2) (b). Specifically, the HIPAA Privacy Rule, among other things, addresses the use and disclosure of 'individually identifiable health information,' which is defined as 'any information, including demographic information collected from an individual, that . . . is created or received by a health care provider, . . . relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and . . . identifies the individual . . . or[,] with respect to which[,] there is a reasonable basis to believe that the information can be used to identify the individual' (42 USC § 1320d [6]). Further, as relevant here, Public Officers Law § 89 (2) (b) (i) expressly provides for the protection of medical history, which refers to 'information that one would reasonably expect to be included as a relevant and material part of a proper medical history' ... . Upon our review, we conclude that the information provided on the subject forms falls within these protections, as it directly pertains to the relevant individual's present health condition and would reasonably be included as part of his or her medical history." ***Matter of Getting the Word Out, Inc. v. New York State Olympic Regional Dev. Auth*., 2023 N.Y. Slip Op. 01334, Third Dept 3-16-23**

PERSONAL INJURY, EVIDENCE.

CONFLICTING EXPERT EVIDENCE ABOUT ICE ON THE PARKING LOT BEFORE THE SNOWSTORM BEGAN PRECLUDED SUMMARY JUDGMENT IN THIS SLIP AND FALL ACTION.

The Third Department, reversing Supreme Court, over a two-justice dissent, determined there were questions of fact raised by conflicting expert evidence in this ice slip and fall case. Although it was snowing at the time of the fall, there were questions of fact whether the ice was there before it began snowing: "[W]e find that [defendant] established triable issues of fact as to whether the ice that he slipped on existed prior to the storm that was in progress and whether defendants had actual or constructive notice of same ... . Plaintiff's experts based their opinions on weather data similar to that of defendant's expert, as well as additional sources of meteorological data. In reviewing this data, it cannot be said that plaintiff's experts' affidavit was not based on data or was conclusory ... . Significantly, any disagreements between the experts would present a credibility determination appropriate for the finder of fact, such that summary judgment was inappropriate ...". ***Marra v. Zaichenko*, 2023 N.Y. Slip Op. 01335, Third Dept 3-16-23**

FOURTH DEPARTMENT

APPEALS, CIVIL PROCEDURE.

TWO DISSENTERS ARGUED THE UNPRESERVED ISSUE, WHICH INVOLVED SETTLED LAW, SHOULD NOT HAVE BEEN CONSIDERED ON APPEAL.

The Fourth Department, over a two-justice dissent, considered an unpreserved issue on appeal (the date from which prejudgment interest begins to run). The dissenting justices argued the unpreserved issue involved settled law and there was, therefore, no reason to consider it: "The majority assumes that the issue is unpreserved but reaches the merits of claimant's contention through application of an exception to the preservation rule ... . In other words, on this appeal as of right from a final judgment (see CPLR 5701 [a] [1]), the majority is not limiting this Court's scope of review to those matters brought up for review pursuant to CPLR 5501 (a). We respectfully disagree with the majority to the extent that it elects to address an unpreserved issue of statewide interest inasmuch as it does nothing more than adhere to this Court's well-settled and decades-long precedent on that particular issue . In short, under the circumstances of this case, we disagree with the majority's decision to invoke what should be a very rare exception to rules of preservation only just to double down on our long-standing precedent. Indeed, by reaching claimant's contention challenging that precedent, the majority fails to fully recognize that the policy reasons underlying the preservation rule, and the ... rarity of times when we except from it, are 'especially acute when the new issue seeks change in a long-established common-law rule,' as is the case here ...". ***Sabine v. State of New York*, 2023 N.Y. Slip Op. 01455, Fourth Dept 3-17-23**

CIVIL PROCEDURE, DEBTOR-CREDITOR.

PLAINTIFF'S ACTION RELIED ON EXTRINSIC EVIDENCE AND WAS NOT AN ACTION FOR THE PAYMENT OF MONEY ONLY WHICH CAN BE BROUGHT BY SUMMONS IN LIEU OF A COMPLAINT PURSUANT TO CPLR 3213.

The Fourth Department, reversing Supreme Court, determined plaintiff's cause of action was not for the payment of money (CPLR 3213) for which a summons in lieu of a complaint was an appropriate vehicle: "As proof of the agreement to reduce defendant's liability under the guaranty and the amount of that reduction, plaintiff relies on evidence extrinsic to the instrument consisting of representations in the affidavit

of its chief operating officer, deposit receipt printouts from the online system of plaintiff's bank, and a guaranty balance chart apparently generated by plaintiff showing the calculation of defendant's revised liability. In our view, '[g]oing that far afield from the [financial] instrument itself does not appear to comport with the simple standards' embodied in the statute and related case law ... . Indeed, inasmuch as plaintiff's moving papers demonstrate that outside evidence beyond 'simple proof of nonpayment or a similar de minimis deviation from the face of the document[s]' is needed to determine the amount due, we conclude that '[p]laintiff's action falls far short of satisfying the [CPLR] 3213 threshold requirement' ...". ***Counsel Fin. II LLC v. Bortnick*, 2023 N.Y. Slip Op. 01441, Fourth Dept 3-17-23**

Practice Point: Plaintiff relied on extrinsic evidence. The action was not, therefore, for the "payment of money only" within the meaning of CPLR 3213 and was not properly brought by a summons in lieu of complaint.

CRIMINAL LAW.

DEFENDANT WAS CONVICTED OF GRAND LARCENY BASED UPON OVERCHARGING HER EMPLOYER; THE RESTITUTION SHOULD NOT HAVE INCLUDED THE LABOR COSTS INCURRED BY THE EMPLOYER FOR INVESTIGATING THE CRIME OR THE TRAVEL COSTS FOR WITNESSES TO TESTIFY AT TRIAL; THE FOURTH DEPARTMENT REFUSED TO FOLLOW A THIRD DEPARTMENT DECISION RE: TRAVEL EXPENSES AND LOST WORK ASSOCIATED WITH TESTIFYING AT TRIAL.

The Fourth Department determined restitution in this grand larceny case should not include the victim's (Homecare's) labor costs associated with investigating the defendant's theft or the travel expense of witnesses who testified at trial: "Defendant was charged with grand larceny ... after HomeCare conducted an audit of her time sheets and mileage vouchers and determined that she had received more than $14,000 in overpayments during the course of her employment as a registered nurse. ... ... County Court ... determined that HomeCare and its insurance carrier were entitled to restitution in the amount of $24,469.10 ...: $14,207.67 for overpayments made to defendant in wages and mileage reimbursements ... , $9,658.02 to HomeCare for labor costs incurred with respect to its employees who investigated defendant's crime and appeared at her trial; and $603.41 to HomeCare for mileage, meal and hotel expenses incurred by its employees who appeared at trial. We conclude that the labor costs allegedly incurred by HomeCare for employees who investigated the crime are not 'actual out-of-pocket' losses within the meaning of Penal Law § 60.27. ... With respect to the travel expenses incurred by HomeCare employees who appeared at defendant's trial, we note that ... section 60.27 does not impose a duty on the defendant to pay for the costs associated therewith inasmuch as such expenses are not directly caused by the defendant's crime. ... The People rely on *People v Denno* (56 AD3d 902, 903-904 ...), where the Third Department determined that the sentencing court did not improvidently exercise its discretion when it ordered that the defendant pay reparations to the victim's mother to cover the expenses of traveling by airplane from Florida to New York to speak at sentencing, and to cover the lost wages caused by missing four days of work. ... [W]e do not follow *Denno* because we do not read Penal Law § 60.27 as requiring a criminal defendant to pay for expenses incurred by the victim to testify at trial or investigatory costs incurred by the victim." ***People v. Case*, 2023 N.Y. Slip Op. 01438, Fourth Dept 3-17-23**

CRIMINAL LAW, ATTORNEYS, JUDGES.

IF A PREMATURE CERTIFICATE OF COMPLIANCE WITH DISCOVERY OBLIGATIONS WAS NOT FILED IN GOOD FAITH, THE STATEMENT OF READINESS FOR TRIAL IS ILLUSORY; MATTER REMITTED FOR A DETERMINATION WHETHER THE CERTIFICATE WAS FILED IN GOOD FAITH; THE JUDGE CONSIDERED ONLY WHETHER DEFENDANT WAS PREJUDICED BY THE POST-CERTIFICATE PRODUCTION OF DISCOVERY.

The Fourth Department, remitting the matter, found the judge applied the wrong criteria for determining whether the People's premature filling of the certificate of compliance with discovery obligations (CPL § 245.50) rendered the ready-for-trial announcement illusory: "[T]he criminal action was commenced on June 9, 2021 (see CPL 1.20 [17]). The People filed their certificate of compliance and statement of readiness on August 6, 2021. On February 12, 2022, defendant moved to dismiss the indictment on speedy trial grounds, arguing that the People's failure to provide all of the discovery required by CPL 245.20 rendered the certificate of compliance improper and the statement of readiness illusory. Defendant argued that the People should be charged with the entire eight month period and that the indictment should be dismissed (see CPL 30.30 [1] [a]). The court denied defendant's motion, concluding that the People's certificate of compliance was proper because defendant had not been prejudiced by the People's belated disclosure of certain required discovery and that the statement of readiness therefore was not illusory. ... [T]he court's use of a prejudice-only standard for evaluating the propriety of the certificate of compliance was error because the clear and unambiguous terms of CPL 245.50 establish that a certificate of compliance is proper where its filing is 'in good faith and reasonable under the circumstances' ... . On a CPL 30.30 motion, the question is not whether defendant was prejudiced by an improper certificate of compliance ... . In light of the court's failure to consider whether the People's certificate of compliance was filed in 'good faith and reasonable under the circumstances' despite the belated discovery, we hold the case, reserve decision, and remit the matter to Supreme Court to determine whether the People's certificate of compliance was proper under the terms of CPL 245.50 and thus whether the statement of readiness was valid." ***People v. Gaskin*, 2023 N.Y. Slip Op. 01415, Fourth Dept 3-17-23**

CRIMINAL LAW, EVIDENCE.

THE PEOPLE DID NOT DEMONSTRATE THE OFFICERS WHO MADE THE TRAFFIC STOP HAD THE TRAINING AND QUALIFICATIONS TO MAKE A VISUAL ESTIMATE OF THE SPEED OF A VEHICLE; THE SUPPRESSION MOTION SHOULD HAVE BEEN GRANTED.

The Fourth Department, granting the suppression motion and dismissing the indictment, over a dissent, determined the People did not demonstrate the legality of the traffic stop. Two police officers testified the stop was based on a visual estimate of the vehicle's speed, 40 to 45 miles per hour in a 30 mph zone. But neither officer had any training in making visual speed estimates: "It is undisputed that the officers did not use radar at any point, nor did they pace the vehicle—i.e., follow it at a consistent distance—to confirm their visual estimates before initiating the stop. When questioned regarding their training to visually estimate a vehicle's speed without pacing, one officer stated that he did not recall receiving such training, and the other testified that he did not believe such training existed. On further questioning, one of the officers testified that he had experience visually estimating speed due to the amount of time he spent on the road as a patrol officer, but failed to provide a reasoned explanation of how the time he spent driving on city streets enabled him to acquire the ability to visually estimate speed. ... [T]he People failed to establish the officers' training and qualifications to support their visual estimates of the speed of the vehicle in which defendant was a passenger ... . [I]nasmuch as the People failed to meet their burden of showing the legality of the police conduct in stopping the vehicle in which defendant was a passenger in the first instance, we conclude that the court erred in refusing to suppress the physical evidence seized as a result of the traffic stop." ***People v. Suttles*, 2023 N.Y. Slip Op. 01380, Fourth Dept 3-17-23**

CRIMINAL LAW, EVIDENCE.

THE JURY SHOULD NOT HAVE BEEN INSTRUCTED ON CONSTRUCTIVE POSSESSION IN THIS CRIMINAL POSSESSION OF A WEAPON PROSECUTION.

The Fourth Department, reversing Supreme Court and ordering a new trial, determined the jury should not have been instructed on constructive possession in this criminal possession of a weapon prosecution: "[W]e agree with defendant that the court erred in instructing the jury on constructive possession because there is no view of the evidence from which a jury could have concluded that defendant constructively possessed the handgun on the night in question—i.e., that he exercised dominion or control over the handgun by a sufficient level of control over the area where it was recovered ... . We further conclude that the error is not harmless inasmuch as we cannot determine whether the jury's general verdict was based upon defendant's actual possession of the handgun or his constructive possession of it ...". ***People v. Ross*, 2023 N.Y. Slip Op. 01381, Fourth Dept 3-17-23**

CRIMINAL LAW, EVIDENCE.

THE EVIDENCE OF "PHYSICAL INJURY" IN THIS ASSAULT SECOND PROSECUTION WAS LEGALLY INSUFFICIENT.

The Fourth Department, reversing defendant's second degree assault conviction, determined the physical-injury element of the offense was not supported by legally sufficient evidence: "[T]he evidence of the injury inflicted here, viewed objectively, established only that the correction officer sustained slight scraping and scratching, perhaps some bruising, minor swelling in the wrist, a small laceration, and abrasions or redness, without any bleeding ... . Indeed, although medical staff at the correctional facility purportedly noted bruising on the correction officer's forearm, no bruising is apparent in the photographs taken shortly after the incident, and the photographs otherwise depict only minimal redness on the correction officer's arm and hand, a minuscule nick on the knuckle of his index finger, and a slight scratch along his arm ...". ***People v. Dowdell*, 2023 N.Y. Slip Op. 01432, Fourth Dept 3-17-23**

CRIMINAL LAW, EVIDENCE.

FLIGHT ALONE DID NOT JUSTIFY THE PURSUIT AND SEARCH OF DEFENDANT IN A STREET STOP.

The Fourth Department determined that a .22 caliber magazine found in defendant's pocket in a street stop should have been suppressed. Although the defendant fled, that alone was not enough to justify the search and seizure: "[T]he police witness testified that he received a report that two black males wearing dark clothing had fled the scene of an armed robbery. Soon after receiving the report, while driving in the vicinity of the incident, the officer observed two individuals in dark clothing, who fled as soon as the officer stopped his vehicle. The officer could not determine the gender or race of the individuals as he approached because they were facing away from him. Assuming, arguendo, that police lawfully approached defendant and the second individual to request information about the robbery ... , we conclude that the subsequent pursuit of defendant was unlawful. The officer's testimony did not establish that he determined that the individuals matched the sex or race of the robbery suspects before he undertook pursuit, and the evidence was therefore insufficient to demonstrate that the officer had 'a reasonable suspicion that defendant ha[d] committed or [was] about to commit a crime' ... . Although defendant ran from the officer, '[f]light alone is insufficient to justify pursuit because an individual has a right to be let alone and refuse to respond to police inquiry ...". ***People v. Austin*, 2023 N.Y. Slip Op. 01442, Fourth Dept 3-17-23**

Practice Point: The flight of someone approached by the police on the street, is not enough to justify a pursuit, seizure and search of the person.

INSURANCE LAW, CONTRACT LAW.

PLAINTIFFS PROVED THE "ENSUING LOSS" EXCEPTION TO THE "FAULTY WORKMANSHIP" EXCLUSION IN THE HOME INSURANCE POLICY APPLIED; PLUMBING WORK WAS FAULTY, RESULTING IN FLOODING THROUGHOUT THE HOUSE; THE WATER DAMAGE WAS COVERED UNDER THE "ENSUING LOSS" EXCEPTION TO THE "FAULTY WORKMANSHIP" EXCLUSION.

The Fourth Department, reversing Supreme Court, determined the "ensuing loss' exception to the "faulty workmanship" exclusion. The plumbers apparently used the wrong adhesion material for a water-pipe connection. The connection failed and the house was flooded. The "ensuing loss" exception to the "faulty workmanship" exclusion "provide[s] coverage when, as a result of an excluded peril, a covered peril arises and causes damage": "We conclude that the ensuing loss exception applies to provide coverage for the household water damage because the excluded peril of faulty workmanship resulted in 'collateral or subsequent damage' ... 'to property 'wholly separate from the defective property itself' ' ... , and plaintiffs' claim is for 'a new loss to property that is of a kind not excluded by the policy,' i.e., sudden and accidental water leakage from within a plumbing system ... . In other words, the ensuing loss exception provides coverage here because, as a result of an excluded peril (faulty workmanship), a covered peril arose (water discharge from a plumbing system) and caused other harm (water damage) to separate property (areas throughout the house) ...". ***Ewald v. Erie Ins. Co. of N.Y.*, 2023 N.Y. Slip Op. 01439, Fourth Dept 3-17-23**

MUNICIPAL LAW, CONTRACT LAW.

PLAINTIFF SUED THE TOWN ALLEGING BREACH OF CONTRACT; TOWN LAW § 65(3) REQUIRED PLAINTIFF TO FILE A NOTICE OF CLAIM WITHIN SIX MONTHS (WHICH PLAINTIFF FAILED TO DO) AND MAKES NO PROVISION FOR FILING A LATE NOTICE; THE COMPLAINT SHOULD HAVE BEEN DISMISSED.

The Fourth Department, reversing Supreme Court, determined plaintiff in this breach of contract action against the town did not comply with the notice-of-claim requirement in the Town Law and the action therefore should have dismissed. Unlike other notice statutes, Town Law § 65(3) does not allow a late notice of claim: "Plaintiff commenced this action to recover payment for highway repair work it performed for defendant, asserting causes of action for breach of contract, unjust enrichment, and quantum meruit. Defendant moved to dismiss the complaint on the ground, inter alia, that plaintiff failed to comply with the notice of claim provision under Town Law § 65 (3) and plaintiff cross-moved for leave to file a late notice of claim. Supreme Court denied the motion and granted the cross motion, concluding that, although plaintiff failed to comply with section 65 (3), it should be permitted to file a late notice of claim inasmuch as defendant had actual notice of the essential facts of the claim and did not demonstrate any prejudice that would arise from the late filing of the claim. Defendant appeals. We agree with defendant that the court erred in denying the motion and in granting the cross motion. Town Law § 65 (3) requires that a written verified claim be filed with the town clerk 'within six months after the cause of action shall have accrued.' '[I]n contrast to other notice statutes, Town Law § 65 (3) contains no provision allowing the court to excuse noncompliance with its requirements' ...". ***Accadia Site Contr., Inc. v. Town of Pendleton*, 2023 N.Y. Slip Op. 01386, Fourth Dept 3-17-23**

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