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FIRST DEPARTMENT

ATTORNEYS, LEGAL MALPRACTICE, NEGLIGENCE, TRUSTS AND ESTATES.

ABSENT FRAUD OR COLLUSION, STRICT PRIVITY PRECLUDES THE PROSPECTIVE BENEFICIARIES OF AN ESTATE FROM BRINGING A LEGAL MALPRACTICE ACTION AGAINST THE ATTORNEY WHO PLANNED THE ESTATE; THE ATTORNEY OWED NO DUTY TO THE BENEFICIARIES.

The First Department, reversing Supreme Court, determined the malpractice action by the prospective beneficiaries of an estate against the attorney who planed the estate should have been dismissed because there was no privity between the beneficiaries and the attorney: "In the context of estate planning malpractice actions, strict privity applies to preclude a third party, such as beneficiaries or prospective beneficiaries like plaintiffs, from asserting a claim against an attorney for professional negligence in the planning of an estate, absent fraud, collusion, malicious acts or other special circumstances ... . While plaintiffs argue their claim against defendant attorneys is couched as one for simple negligence, as opposed to legal malpractice, plaintiffs have not pleaded facts to show that defendant attorneys owed plaintiffs a duty of care in the drafting of their client's will and trust agreement. The strict privity requirement here protects estate planning attorneys against uncertainty and limitless liability in their practice ... . Thus, plaintiffs' negligence claim is unavailing for lack of factual allegations to demonstrate that defendants owed plaintiffs a duty. Plaintiffs have not pleaded sufficient factual allegations in their amended complaint to indicate that circumstances of fraud, collusion and/or aiding and abetting exist in this case to override the strict privity rule. Plaintiffs have not alleged fraud with requisite specificity as, inter alia, there are no allegations defendants knowingly made material misrepresentations in the will and trust for the purpose of inducing justifiable reliance by their client (since deceased) upon such misrepresentations, and moreover the allegations made do not support favorable inferences in that regard ...". ***Phillips v. Murtha*, 2023 N.Y. Slip Op. 01767, First Dept 4-4-23**

CIVIL PROCEDURE, JUDGES, EVIDENCE.

THE SPOLIATION OF EVIDENCE AFFECTED ONLY THE COUNTERCLAIMS, STRIKING THE ENTIRE ANSWER AND COUNTERCLAIMS WAS TOO SEVERE A SANCTION.

The First Department, reversing (modifying) Supreme Court, determined the sanctions imposed for spoliation of evidence were too severe: "[T]he drastic remedy of striking the entire answer and all the counterclaims was not warranted ... . Here, plaintiff failed to establish that the unavailability of the lost and destroyed evidence prejudiced it and left it unable to prosecute its action. Indeed, plaintiff argued only that its ability to defend the counterclaims was compromised. Therefore, the appropriate sanction under the circumstances should have been directed solely to the counterclaims." ***Harry Winston, Inc. v. Eclipse Jewelry, Corp.*, 2023 N.Y. Slip Op. 01840, First Dept 4-6-23**

CONTRACT LAW. LIMITED LIABILITY COMPANY LAW.

BUYERS OF THE HOME HEALTHCARE AGENCY SEEK SPECIFIC PERFORMANCE OF THE PURCHASE AGREEMENT; THE SPECIFIC PERFORMANCE PROVISIONS SURVIVE THE TERMINATION OF THE AGREEMENT; BUT THE BUYER'S MOTION FOR SUMMARY JUDGMENT SEEKING SPECIFIC PERFORMANCE SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing (modifying) Supreme Court, in a factually complex opinion by Justice Oing, determined (1) the specific performance provisions in the purchase agreement survived termination of the purchase agreement; and (2) the buyer's summary judgment motion seeking specific performance should not have been granted. The facts of the case are far too detailed to summarize here. "This dispute arises out of a failed sale of a home healthcare agency. The seller accuses the buyer of repudiating the contract; the buyer charges that seller thwarted its efforts to close the deal because of seller's remorse. At stake: who owns the business. If the seller prevails, it retains the termination fee; if the buyer prevails, the contractual remedy of specific performance compels the seller to close and sell the company to the buyer. ... The parties entered into the Membership Interest Purchase Agreement, dated September 25, 2019, wherein the seller agreed to sell its interest in Extended Nursing to the buyer for $49 million. The Purchase Agreement required the buyer to make an initial escrow deposit of $1.47 million, which amount would be retained as a termination fee by the seller in the event that the buyer did not close. One of the critical components of the purchase, for which the seller specifically negotiated, was that closing should occur at the earliest practicable time. ... The outside date was March 25, 2021 — 18 months after the date the parties executed the Purchase Agreement. The seller claims that the outside date was an essential term ... . § 14.17 of the Purchase Agreement provides the buyer with the remedy of specific performance, which, under Purchase Agreement § 12.2(c), survives termination of the Purchase Agreement." ***Extended CHHA Acquisition, LLC v. Mahoney*, 2023 N.Y. Slip Op. 01762, First Dept 4-4-23**

CRIMINAL LAW, CONSTITUTIONAL LAW.

WHEN DEFENDANT PLED GUILTY IN 2002 HE WAS NOT INFORMED OF THE PERIOD OF POST RELEASE SUPERVISION (PRS) AND HE DID NOT MOVE TO WITHDRAW THE PLEA IN 2010 WHEN PRS WAS ADDED TO HIS SENTENCE; DEFENDANT DID NOT WAIVE HIS RIGHT TO CONTEST THE CONSTITUTIONALITY OF THE 2002 CONVICTION RE: A PERSISTENT FELONY OFFENDER DESIGNATION.

The First Department, reversing Supreme Court, determined defendant should have been allowed to contest the constitutionality of his 2002 conviction because he was not informed of the period of post release supervision (PRS) before he pled guilty. Defendant's failure to move to withdraw the 2002 plea when he was resentenced in 2010 to add PRS to his sentence did not waive his right to claim prejudice in a challenge to the constitutionality of a predicate felony: "At the persistent violent felony offender proceeding in this case, defendant claimed that he would have gone to trial in the 2002 case had he known that PRS would ultimately be a consequence of his plea ... . The sentencing court conducted a hearing on this claim, which included defendant's testimony. After the hearing, the court expressly declined to rule on this claim of prejudice. Instead, the court ruled that defendant was barred from making such a challenge because he declined an opportunity to withdraw his 2002 plea when he was resentenced in 2010. However, that opportunity, offered when defendant had only weeks left to serve on the 8½ year sentence imposed in 2002, would not have provided a remedy for the constitutional defect that defendant is claiming, which is that he would not have pleaded guilty in 2002 had he known of the ultimate PRS component of his sentence. Accordingly, we find that defendant's 2010 failure to withdraw the 2002 plea did not waive his right to claim prejudice in the context of a challenge to the constitutionality of a predicate felony, and we remand for a ruling on that claim." ***People v. Graham*, 2023 N.Y. Slip Op. 01852, First Dept 4-6-23**

CRIMINAL LAW, EVIDENCE, APPEALS.

DEFENDANT'S BURGLARY CONVICTION WAS BASED SOLELY ON A SODA CAN WITH HIS DNA ON IT; THE CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE.

The First Department determined the burglary conviction was against the weight of the evidence: "The verdict convicting defendant of a burglary of a doctor's office that occurred in July 2015 was against the weight of the evidence ... . Defendant was connected to this burglary solely through the presence of his DNA on an opened soda can in the reception area. The office manager's testimony failed to address whether there was any innocent explanation for the presence of defendant, or of the soda can, at that location. ...". ***People v. Taylor*, 2023 N.Y. Slip Op. 01848, First Dept 4-6-23**

MEDICAL MALPRACTICE, EVIDENCE.

THE MOTION TO SET ASIDE THE VERDICT APPORTIONING LIABILITY TO THE GYNECOLOGIST WHO NOTED IN HIS REPORT HE FOUND "NO ABNORMALITIES" SHOULD HAVE BEEN GRANTED; PLAINTIFF DID NOT PROVE THE NOTATION MISLED THE PRIMARY CARE PHYSICIAN RESULTING IN A DELAY IN DIAGNOSING APPENDICITIS.

The First Department, reversing Supreme Court, determined defendant Dr. Subramanyam's motion to set aside the verdict apportioning liability to him in this medical malpractice case should have been granted. Plaintiff experienced abdominal and was referred by her primary physician (defendant Dr. Selitsky) to Dr. Subramanyam for a gynecological exam. Dr. Subramanyam' noted in his report that "no abnormalities" were found. Plaintiff argued the "no abnormalities" finding misled Dr. Selitsky causing a delay in diagnosis of plaintiff's appendicitis: "We find that the record was insufficient to support the jury's findings that Dr. Subramanyam's notation of 'no abnormalities' misled Dr. Selitsky, who was plaintiff's primary care physician, and thereby delayed plaintiff's treatment for appendicitis. Defendant Dr. Selitsky, testified that she did not rely upon Dr. Subramanyam's sonogram report in ruling in or out the possibility of appendicitis, a diagnosis she already had considered as part of her differential diagnosis. She further testified that her referral of plaintiff to Dr. Subramanyam was solely to determine whether the source of plaintiff's pain was gynecological in origin. Furthermore, Dr. Selitsky testified that while she assumed that she had received a copy of the report, she could not recall reading it, and, if she had read it, when she did so. Dr. Subramanyam also testified that it was not within his role to provide recommendations in his report or advise physicians what they should do next." ***Ameziani v. Subramanyam*, 2023 N.Y. Slip Op. 01759, First Dept 4-4-23**

SECOND DEPARTMENT

CIVIL PROCEDURE, CONTRACT LAW, DEBTOR-CREDITOR.

PLAINTIFFS OBTAINED A NEW JERSEY DEFAULT JUDGMENT IN A BREACH OF CONTRACT ACTION AGAINST THREE DEFENDANTS WHO ARE JOINTLY AND SEVERALLY LIABLE; PLAINTIFFS NEED ONLY SERVE ONE OF THE DEFENDANTS TO ENFORCE THE FOREIGN JUDGMENT AGAINST THAT DEFENDANT.

The Second Department, reversing Supreme Court, determined plaintiffs, who obtained a New Jersey default judgment against three defendants, need only serve one of the defendants in this action to enforce the foreign judgment: "In October 2013, the plaintiffs contracted with the defendant Tirepool, LLC ... for the purchase of a used car. The contract was negotiated by the defendants Jeff Massicott and Vivian Wallace, the owners/managers of Tirepool. The defendants breached the contract and retained the plaintiffs' down payment. ... [T]he plaintiffs commenced an action against the defendants in the Superior Court of New Jersey (hereinafter the New Jersey action). The defendants failed to answer the complaint, and the plaintiffs obtained a default judgment against the defendants in the principal sum of $26,548.32. ... CPLR 1501 provides: 'Where less than all of the named defendants in an action based upon a joint obligation, contract or liability are served

with the summons, the plaintiff may proceed against the defendants served, unless the court otherwise directs, and if the judgment is for the plaintiff it may be taken against all the defendants.' Here, the defendants are jointly and severally liable for the judgment in the New Jersey action and, therefore, the plaintiffs are permitted to proceed against Wallace without effectuating service on the other defendants. Accordingly, the Supreme Court should have granted that branch of the plaintiffs' motion which was for summary judgment in lieu of complaint insofar as asserted against Wallace." ***Obed v. Tirepool*, LLC, 2023 N.Y. Slip Op. 01802, Second Dept 4-5-23**

CIVIL PROCEDURE, CORPORATION LAW.

ALTHOUGH DEFENDANT CORPORATION WAS NOT SERVED WITH THE SUMMONS AND COMPLAINT, THE CORPORATE DEFENDANT "APPEARED INFORMALLY" THROUGH THE CEO'S AFFIDAVIT; PLAINTIFFS WERE ENTITLED TO A DEFAULT JUDGMENT AGAINST THE CORPORATION.

The Second Department, reversing Supreme Court, determined that, although the defendant corporation was not served with the summons and complaint, it "appeared informally" in the action and, therefore, plaintiffs' motion for a default judgment should have been granted. The "informal appearance" was in the form of the corporate CEO's affidavit: "... '[I]n addition to the formal appearances listed in CPLR 320(a), the law continues to recognize the so-called 'informal' appearance' .. . An informal appearance 'comes about when the defendant, although not having taken any of the steps that would officially constitute an appearance under CPLR 320(a), nevertheless participates in the case in some way relating to the merits' ... . 'When a defendant participates in a lawsuit on the merits, he or she indicates an intention to submit to the court's jurisdiction over the action, and by appearing informally in this manner, the defendant confers in personam jurisdiction on the court' ... . '[A]n appearance of the defendant is equivalent to personal service of the summons upon him [or her], unless an objection to jurisdiction under [CPLR 3211(a)(8)] is asserted by motion or in the answer as provided in rule 3211' (CPLR 320[b]). 'The occasion for [an informal] appearance [is] an infrequent thing' ... . However, an informal appearance may occur even where the defendant is not served with process , where an individual defendant affirmatively states that he or she is only acting in his or her capacity as an officer of a corporate defendant ...". ***Travelon, Inc. v. Maekitan*, 2023 N.Y. Slip Op. 01816, Second Dept 4-5-23**

FORECLOSURE, ATTORNEYS, CIVIL PROCEDURE, EVIDENCE.

PLAINTIFF FAILED TO SHOW UP FOR THE SETTLEMENT CONFERENCE IN THIS FORECLOSURE ACTION AND A DEFAULT JUDGMENT WAS GRANTED; IN MOVING TO VACATE THE DEFAULT, PLAINTIFF DID NOT PRESENT SUFFICIENT PROOF OF LAW OFFICE FAILURE AND DID NOT EXPLAIN ITS DELAY IN SEEKING TO VACATE THE DEFAULT JUDGMENT.

The Second Department, reversing Supreme Court in this foreclosure action, determined plaintiff did not demonstrate an adequate excuse (law office failure) for not attending the settlement conference and plaintiff's motion to vacate the default judgment should not have been granted: "[T]he plaintiff's allegation of law office failure was conclusory and unsubstantiated. In an affirmation in support of the motion ... to vacate the order of dismissal, the plaintiff's counsel described her office's standard practices and procedures for receiving and processing notices and orders, and posited that her office had not received notice of the scheduled conference because there were 'no notes, scanned images, or calendar steps' in the files that she reviewed. The plaintiff ... failed to provide an affidavit from anyone with personal knowledge of the purported law office failure, provide any details regarding such failure, or provide any other evidence of the system's purported breakdown that led to counsel's nonappearance at the conference ... . Moreover, the plaintiff failed to provide a reasonable excuse for its delay in moving to vacate the order of dismissal ... . Since the plaintiff failed to proffer a reasonable excuse its default, it is unnecessary to determine whether the plaintiff demonstrated the existence of a potentially meritorious cause of action (see CPLR 5015[a][1] ...)." ***HSBC Bank USA, N.A. v. Hutchinson*, 2023 N.Y. Slip Op. 01782, Second Dept 4-5-23**

PERSONAL INJURY, EVIDENCE.

THE DEFENDANT RESTAURANT DID NOT DEMONSTRATE WHEN THE AREA WHERE PLAINTIFF SLIPPED AND FELL HAD LAST BEEN INSPECTED PRIOR TO THE FALL; THEREFORE THE RESTAURANT DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE ALLEGED WET CONDITION.

The Second Department, reversing (modifying) Supreme Court, determined defendant restaurant (ABB) did not demonstrated when the area where plaintiff slipped and fell had been last inspected prior to the fall. Therefore ABB did not demonstrate it did not have constructive notice of the wet condition: "ABB ... failed to demonstrate ... that it lacked constructive notice of the alleged dangerous condition. Although ABB's witness testified that the accident occurred five minutes after the witness had entered the restaurant and observed the floor to be dry, the plaintiff testified that the accident occurred at least one hour later, and ABB did not submit any evidence as to when it last inspected the area prior to the time when the plaintiff asserted the accident occurred ...". ***Carey v. Walt Whitman Mall, LLC*, 2023 N.Y. Slip Op. 01773, Second Dept 4-5-23**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF'S INABILITY TO IDENTIFY THE WET SUBSTANCE ON THE STEP WHERE SHE ALLEGEDLY FELL WAS NOT AN INABILITY TO IDENTIFY THE CAUSE OF THE FALL.

The Second Department, reversing Supreme Court, determined the slip and fall complaint should not have been dismissed because plaintiff did not know what the wet substance on the step was: "[T]he defendant failed to establish, prima facie, that the plaintiff did not know what caused her to fall. In support of its motion, the defendant submitted the deposition testimony of the plaintiff, who testified that she slipped

and fell on a wet step ... . Contrary to the defendant's contention, the plaintiff's alleged inability to identify the 'precise nature of the wet substance upon which she allegedly slipped and fell cannot be equated with a failure to identify the cause of her fall' ...". ***Diaz v. SCG 502, LLC*, 2023 N.Y. Slip Op. 01779, Second Dept 4-5-23**

PERSONAL INJURY, MUNICIPAL LAW, EVIDENCE.

ALTHOUGH THE VILLAGE ENGINEER SENT A LETTER TO THE ABUTTING PROPERTY OWNERS REQUIRING REPAIR OF THE SIDEWALK DEFECT WHERE PLAINTIFF SLIPPED AND FELL, THE MAJORITY CONCLUDED PLAINTIFF DID NOT DEMONSTRATE THE VILLAGE HAD WRITTEN NOTICE OF THE DEFECT; THE DISSENT DISAGREED.

The Second Department, over a dissent, determined the village demonstrated it did not have written notice of the sidewalk defect where plaintiff allegedly slipped and fell. The village code requires that the board of trustees be given written notice of the defect in order to hold the village liable. Here there was a letter from the town engineer to the abutting homeowners notifying them of the sidewalk defect and requiring repair within 30 days. The majority held that letter did not meet the written notice requirements in the code, which must be strictly construed. the dissent disagreed: "Where ... a municipality has enacted a prior written notice law, neither actual nor constructive notice of a condition satisfies the prior written notice requirement ... . Records generated by other agencies of the Village, outside of the strict construction of Code of the Village of Garden City § 132-2, fail to satisfy the requirements of the relevant prior written notice law ... . On this record, the plaintiffs failed to raise a triable issue of fact as to whether any documents to or from other municipal employees found their way to the Village Board of Trustees so as to cognizably qualify as prior written notice under the terms of the Village Code. Our learned dissenting colleague concludes that the plaintiffs, through the submission of a letter on the Village's letterhead dated May 11, 2015, from the Village Engineer to the defendant homeowners, raised a triable issue of fact as to whether the Village Board of Trustees had prior written notice of the alleged sidewalk defects. ... The letter ... states ... that a recent inspection of the sidewalk and/or driveway apron adjacent to the defendant homeowners' property indicated that concrete was in need of repair or replacement. The letter continues, stating that it was necessary to repair or replace a defective sidewalk and/or driveway apron for safety reasons and to reduce the likelihood of lawsuits against the property owners and the Village. For these reasons ... the Village Board of Trustees had adopted a resolution ... providing that property owners are required to repair or replace defective or damaged sidewalks and/or driveway aprons fronting their property within 30 days of receiving notice of such defects. Strictly construing the terms of the Village's prior written notice law, as we must ... that letter from the Village Engineer to the defendant homeowners does not constitute the giving of prior written notice to the Village Board of Trustees. ...". ***Kolenda v. Incorporated Vil. of Garden City*, 2023 N.Y. Slip Op. 01783, Second Dept 4-5-23**

REAL PROPERTY LAW.

THE BOUNDARY BETWEEN PLAINTIFFS' AND DEFENDANTS' PROPERTIES RUNS THROUGH A DRIVEWAY, 10 FEET ON DEFENDANTS' PROPERTY AND SEVEN FEET ON PLAINTIFFS' PROPERTY; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DECLARING PLAINTIFFS DID NOT HAVE A PRESCRIPTIVE EASEMENT OVER THE DRIVEWAY SHOULD HAVE BEEN GRANTED.

The Second Department, reversing (modifying) Supreme Court, determined defendants' motion for summary judgment declaring plaintiffs did not have a prescriptive easement over a driveway located on both parties' properties (10 feet on defendants' side and seven feet on plaintiffs' side) should have been granted. Supreme Court should have considered the state of the property when the two lots were created from a single parcel in the 1920s, not the driving habits of plaintiffs and defendants since they purchased the properties in the 1990s: " 'The party asserting an easement by necessity bears the burden of establishing by clear and convincing evidence that there was a unity and subsequent separation of title, . . . and that at the time of severance an easement over [the servient estate's] property was absolutely necessary. Significantly, the necessity must exist in fact and not as a mere convenience and must be indispensable to the reasonable use for the adjacent property' ... . The court determined that the defendants did not meet their prima facie burden because, in the court's view, the record reflects that the plaintiffs could not drive their vehicles into and out of their garage without traversing the defendants' property. ... [T]he court erroneously focused on the claimed necessity as it is alleged to exist now. ... [T]he relevant inquiry is whether the necessity existed at the time of severance ... . [T]he parties' respective properties were created from one parcel of land in 1925 and 1926. Hence, the plaintiffs' testimony as to their driving habits from when they first acquired the property in 1991 is irrelevant. In any event, in contrast to situations where severance of title renders a claimant's property landlocked, courts have repeatedly rejected claims to an easement by necessity over a driveway where the 'sole claimed 'necessity' for the easement is the 'need' to access off-street parking,' as '[t]hat purported need is nothing more than a mere convenience' ...". ***Bolognese v. Bantis*, 2023 N.Y. Slip Op. 01771, Second Dept 4-5-23**

THIRD DEPARTMENT

ARBITRATION, MUNICIPAL LAW, EMPLOYMENT LAW, CONTRACT LAW, CIVIL PROCEDURE.

COURTS HAVE ONLY A LIMITED POWER TO REVIEW AN ARBITRATOR'S RULING; HERE SUPREME COURT SHOULD NOT HAVE FOUND THE ARBITRATOR EXCEEDED HER AUTHORITY BY ORDERING BACK PAY FOR A REINSTATED COUNTY EMPLOYEE.

The Third Department, reversing (modifying) Supreme Court, determined the arbitrator in this employment dispute did not exceed her authority when she ordered that the employee be reinstated with back pay. The employee had been absent from work and the employer (the

county) the absence a voluntary resignation. Supreme Court had affirmed the employee's reinstatement but found the arbitrator had exceeded her authority by ordering the back pay: "... '[J]udicial review of arbitral awards is extremely limited. Pursuant to CPLR 7511 (b) (1), a court may vacate an award when it violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on an arbitrator's power' ... . 'Outside of these narrowly circumscribed exceptions, courts lack authority to review arbitral decisions, even where an arbitrator has made an error of law or fact' ... . '[I]t is well settled that an arbitrator has broad discretion to determine a dispute and fix a remedy, and that any contractual limitation on that discretion must be contained, either explicitly or incorporated by reference, in the arbitration clause itself' ... . We discern no basis to vacate the arbitrator's award as to back pay and benefits. Notably, the CBA [collective bargaining agreement] does not contain 'a specifically enumerated limitation on the arbitrator's power' ... . In fact, it does not explicitly limit the arbitrator's authority in any way other than stating that the arbitrator does not have the power to 'amend, modify or delete any provision of the CBA,' which does not set any limitations on the arbitrator's power to order the remedy that he or she sees fit ...". ***Matter of County of Albany (Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO, Albany County Local 801)*, 2023 N.Y. Slip Op. 01828, Third Dept 4-6-23**

CIVIL PROCEDURE, CONTRACT LAW, ACCOUNT STATED, DEBTOR-CREDITOR, ATTORNEYS.

THE AWARD OF PREJUDGMENT INTEREST IN A BREACH OF CONTRACT ACTION IS REQUIRED BY CPLR 5001; THE REQUEST FOR PREJUDGMENT INTEREST SHOULD NOT HAVE BEEN DENIED BASED ON A FIVE-YEAR DELAY IN BRINGING SUIT.

The Third Department, reversing (modifying) Supreme Court, determined plaintiff attorney was entitled to prejudgment interest in this breach of contract action against defendant, a former client, seeking payment of plaintiff's fee for legal services: "[W]e agree with plaintiff that her motion seeking an award of prejudgment interest should have been granted. Supreme Court faulted plaintiff for waiting until 2020 to commence this action to recover monies owed as a result of a legal representation that ended in 2015 but, as prejudgment interest only compensates the judgment creditor for the loss of use of money he or she was owed and is not a penalty, the 'responsibility for the delay [in bringing suit] should not be the controlling factor in deciding whether interest is to be computed' ... . Rather, prejudgment interest in a breach of contract action is required by CPLR 5001, running 'from the earliest ascertainable date on which the prevailing party's cause of action existed '[or,] if that date cannot be ascertained with precision, . . . from the earliest time at which it may be said the cause of action accrued' ... . Supreme Court determined in the April 2022 order that plaintiff's claim for breach of contract accrued when she completed her legal services on May 23, 2015. Thus, plaintiff was entitled to prejudgment interest running from that date..." ***O'Keefe v. Barra*, 2023 N.Y. Slip Op. 01829, Third Dept 4-6-23**

CIVIL PROCEDURE, FRAUD, DEBTOR-CREDITOR.

WHEN PURELY ECONOMIC INJURY IS ALLEGED, THE CAUSE OF ACTION ACCRUES WHERE THE PLAINTIFF RESIDES; HERE PLAINTIFF RESIDED IN FLORIDA AND, PURSUANT TO NEW YORK'S BORROWING STATUTE, THE FLORIDA STATUTE OF LIMITATIONS APPLIED, RENDERING THE FRAUDULENT-TRANSFER ACTION UNTIMELY.

The Third Department, reversing Supreme Court, determined the borrowing statute required that the Florida statute of limitations for an action alleging the fraudulent transfer of property be applied, rendering the action time-barred. Plaintiff, a Florida resident, alleged the transfer of property in New York, by defendant, a New York resident, was fraudulent in that it rendered the defendant judgment proof. The Third Department determined the injury occurred in Florida, not New York: "[T]he parties dispute the applicability of CPLR 202, New York's 'borrowing' statute, which ... provides that '[w]hen a nonresident sues on a claim that accrued outside of New York, the cause of action must be commenced within the time period provided by New York's statute of limitations, as well as the statute of limitations in effect in the jurisdiction where the cause of action in fact accrued' ... . '[A] cause of action accrues at the time and in the place of the injury . . . in tort cases involving the interpretation of CPLR 202' ... . Relevant here, '[w]hen an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss' ... . While plaintiff asks that we draw a distinction between tort and contract matters as it pertains to the principle that locates his economic harm — and thus accrual of his various causes of action — in his state of residence, we find little support for that premise. Although the tortious act may have occurred when the property was transferred in this state, that does not establish that the accompanying injury to plaintiff was also felt in this state or that the cause of action accrued here ...". ***Erdely v. Estate of Airday*, 2023 N.Y. Slip Op. 01827, Third Dept 4-6-23**

CRIMINAL LAW.

CONSECUTIVE SENTENCES SHOULD NOT HAVE BEEN IMPOSED RE: CERTAIN WEAPONS-POSSESSION COUNTS.

The Third Department concluded that the sentences on certain weapons-possession counts should not have been imposed consecutively: "The conviction on count 2 stemmed from defendant's possession and intent to use an operable, loaded .357 caliber revolver in violation of Penal Law § 265.03 (1) (b) and his conviction on count 3 was based upon his mere unlawful possession of that same firearm in violation of Penal Law § 265.03 (3), regardless of any intent to use the weapon. Insofar as defendant's possession of the weapon was a material element of both weapon possession counts, was part of the same act resulting in the murder, and there was no evidence that defendant possessed the weapon with purposes unrelated to his intent to shoot the victim, the sentence imposed on count 3 is modified to run concurrently with the sentence imposed on count 2 ... . County Court also erred in running the sentences on counts 1 and 3 consecutively to one another. '[W]here a defendant is charged with criminal possession of a weapon pursuant to Penal Law § 265.03 (3), as well as a crime involving use of that weapon . . . consecutive sentencing' is allowed 'so long as the defendant knowingly unlawfully possesses a loaded firearm before forming the intent

to cause a crime with that weapon' ... . Here, however, the People's theory of the case, which the jury ultimately believed, was that defendant had already formed the specific intent to kill the victim when he procured the revolver ...". ***People v. Graham*, 2023 N.Y. Slip Op. 01819, Third Dept 4-6-23**

CRIMINAL LAW.

THE RECORD DID NOT DEMONSTRATE THE WAIVER OF INDICTMENT WAS SIGNED IN OPEN COURT, A JURISDICTIONAL DEFECT.

The Third Department, dismissing the superior court information, noted the record did not indicate the waiver of indictment was signed in open court, which is a jurisdictional defect: "A defendant 'may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney' provided that 'such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his or her counsel' ... . Although the record reflects that defendant orally agreed to waive indictment in open court and contains a written waiver of indictment bearing the date of that appearance, which defendant and defense counsel acknowledged signing, the minutes do not demonstrate that defendant signed the waiver in open court, as constitutionally mandated. 'Compliance with this unequivocal dictate is indispensable to a knowing and intelligent waiver and the failure to adhere to this strict procedure is a jurisdictional defect which survives a guilty plea and appeal waiver and need not be preserved for review by a motion to withdraw the plea' ... . Moreover, neither the written waiver of indictment, to which the District Attorney executed consent ... , nor County Court's undated order approving the waiver, indicates that the waiver was signed in open court ... . In light of this jurisdictional defect, defendant's guilty plea must be vacated and the superior court information must be dismissed ...". ***People v. Camlin*, 2023 N.Y. Slip Op. 01821, Third Dept 4-6-23**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), APPEALS.

BURGLARY AS A SEXUALLY MOTIVATED FELONY IS NOT AN ENUMERATED OFFENSE UNDER SORA, THEREFORE DEFENDANT WAS NOT REQUIRED TO REGISTER AS A SEX OFFENDER; THE WAIVER OF APPEAL WAS INVALID.

The Third Department determined defendant was not required to register as a sex offender because the offense to which he pled guilty, burglary as a sexually motivated felony, is not one of offenses to which SORA applies. In addition, the Third Department held defendant's waiver of appeal was invalid: "[W]e agree with the analysis of our colleagues in the First and Second Departments concluding that registerable offenses subject to SORA are, by application of the clear statutory text, limited to those crimes expressly identified as '[s]ex offense[s]' pursuant to Correction Law § 168-a (2) ... . As burglary in the third degree as a sexually motivated felony is not among the offenses enumerated therein, we agree that defendant was improperly required to register as a sex offender pursuant to SORA ... . During the plea colloquy, County Court did not explain that certain appellate rights would survive the waiver of appeal and instead improperly described the rights to be waived as encompassing 'any argument' that defendant might take to a higher court ... . The written waiver, in turn, states that '[i]t is [defendant's] understanding and intention that [his] plea agreement and sentence will be a complete and final disposition of this case.' Although the written appeal waiver also includes qualifying language limiting its application 'to all legal issues that can be waived under the law[,]' and the court confirmed that defendant had discussed the waiver with counsel ... , we find that the 'totality of the circumstances' presented here fails to confirm that defendant understood that some appellate review would survive the waiver ...". ***People v. Winter*, 2023 N.Y. Slip Op. 01820, Third Dept 4-6-23**

FAMILY LAW, CIVIL PROCEDURE.

THE ORIGINAL CUSTODY ORDER WAS ISSUED IN NEW JERSEY, WHERE FATHER RESIDES; THE NEW YORK CUSTODY ORDER MUST BE REVERSED BECAUSE FAMILY COURT DID NOT COMMUNICATE WITH THE NEW JERSEY COURT AND NO FINDING WAS MADE ON WHETHER NEW JERSEY HAD RELINQUISHED EXCLUSIVE JURISDICTION OR WHETHER NEW YORK WAS A MORE CONVENIENT FORUM; MATTER REMITTED.

The Third Department, reversing Family Court, determined Family Court lacked jurisdiction to issue the custody order on appeal because the court failed to communicate with the court in New Jersey, where father resides, which issued the original custody order: "[P]rior to modifying a custody determination from another state, a court of this state must have jurisdiction to make the initial determination pursuant to Domestic Relations Law § 76, and '[t]he court of the other state [must] determine[that] it no longer has exclusive, continuing jurisdiction under [Domestic Relations Law § 76-a] or that a court of this state would be a more convenient forum under [Domestic Relations Law § 76-f]' ... . Inasmuch as the child has resided in this state since 2018, Family Court had jurisdiction to make an initial determination of custody (see Domestic Relations Law §§ 76 [1] [a]; 75-a [7]). However, the record is devoid of any indication that the New Jersey court relinquished its jurisdiction or that it determined that this state was a more convenient forum, and Family Court failed to communicate with the New Jersey court to make such inquiry. ... Family Court lacked jurisdiction to issue the order on appeal ... , and we must vacate said order and remit this matter to Family Court to conduct the required inquiry...". ***Matter of Alda X. v. Aurel X.*, 2023 N.Y. Slip Op. 01826, Third Dept 4-6-23**

FAMILY LAW, EVIDENCE, APPEALS.

THE THIRD DEPARTMENT, REVERSING THE NEGLECT FINDINGS AGAINST MOTHER, DETERMINED THE SYSTEM FAILED MOTHER WHO WAS DEALING WITH EXTREMELY DIFFICULT CIRCUMSTANCES AND WHO WAS UNSUCCESSFULLY SEEKING HELP FROM PETITIONER FROM THE OUTSET; EVEN THE APPEALS PROCESS FAILED HER BECAUSE IT TOOK TOO LONG.

The Third Department, reversing Family Court's neglect findings, noted that mother was dealing with extremely difficult circumstances, including an abusive and violent father, and, from the outset, was desperately seeking assistance from the petitioner (the county department of social services) which was not provided. The Third Department noted that the appeal should have been brought much sooner, and the failure to do so may have resulted in the unjustified separation of mother from her children for years. In the words of the court: "it ... appears that we have failed to address the pressing needs of this family, and the children, at each step": "An adjudication of neglect based upon emotional impairment must include a determination 'that the actual or threatened harm to the child is a consequence of the failure of the parent . . . to exercise a minimum degree of care' ... . As the oldest child's emotional difficulties are, at least to some great extent, properly attributed to the trauma he experienced [father beating mother], rather than any failing of the mother, his condition does not support the neglect finding. Family Court further concluded that the other two children were neglected because the oldest child's behaviors presented a risk to his siblings' physical well-being. However, at no point did petitioner proffer evidence that either of the younger siblings had been injured by the oldest child, nor is there any evidence that such physical harm was imminent; at most, this conclusion is premised upon possible future harm, which is insufficient to support an adjudication of neglect ... . [W]hile leaving children unattended, even for a brief period, can constitute a failure to exercise a minimum degree of parental care under certain circumstances ... , it does not amount to neglect in all cases, even in certain circumstances where the unattended child is accidentally injured ... . Here, considering the surrounding circumstances, we do not find that the evidence revealed such a failure. Nor will we fault the mother for her inability to control all three young children while attending to their various needs — as was the case in the incidents where the youngest child was left in a foam infant seat on a table and where the two older children ran outside of the shelter — or while taking care of necessary chores — as was the case in the incident where the youngest child fell out of a baby carriage. In our view, the mother's conduct during these alleged incidents of neglect did not fall below a minimum degree of parental care; nor were the children physically impaired, and it was not demonstrated that any sort of impairment was imminent ...". ***Matter of Alachi I. (Shelby J.)*, 2023 N.Y. Slip Op. 01822, Third Dept 4-6-23**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

THE BANK DID NOT DEMONSTRATE IT HAD STANDING TO FORECLOSE BECAUSE IT DID NOT ADEQUATELY EXPLAIN HOW IT CAME INTO POSSESSION OF THE NOTE.

The Third Department, reversing Supreme Court, determined that plaintiff did not demonstrate it had standing to bring the foreclosure action and its summary judgment motion should not have been granted: "A plaintiff demonstrates standing in a mortgage foreclosure action by establishing that 'it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced' ... . 'With respect to the note, either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation' ... . Other than alleging that he reviewed the electronic records that were kept in the normal course of business, [the affiant] failed to provide details with regard to how plaintiff came into possession of the note ...". ***Wilmington Sav. Fund Socy., FSB v. LaFrate*, 2023 N.Y. Slip Op. 01824, Third Dept 4-6-23**

PERSONAL INJURY, CIVIL PROCEDURE, CIVIL RIGHTS LAW, FAMILY LAW.

THE EXTENDED STATUTE OF LIMITATIONS IN THE CHILD VICTIMS ACT DOES NOT APPLY TO CIVIL RIGHTS CAUSES OF ACTION PURSUANT TO 42 U.S.C. § 1983; THE DUTY TO REPORT CHILD ABUSE UNDER THE SOCIAL SERVICES LAW APPLIES ONLY TO "PERSONS LEGALLY RESPONSIBLE" FOR THE CARE OF THE CHILD, WHICH DOES NOT INCLUDE TEACHERS.

The Third Department, in a full-fledged opinion by Justice Aarons, reversing (modifying) Supreme Court, determined the negligence and civil rights causes of action against the school district in this Child Victims Act suit were properly dismissed, and the Social Services Law causes of action should have been dismissed. The complaints alleged sexual abuse by a teacher. The Third Department followed the Fourth Department holding that the extended statute of limitations in the Child Victims Act did not apply to the 42 USC 1983 civil rights causes of action. The Third Department also determined the teacher was not a "person legally responsible" for the plaintiffs such that the abuse-reporting requirement in the Social Services Law applied to the school district: "It is true that CPLR 214-g contains broad language. The statute nonetheless limits the types of causes of action — i.e., claims involving child sexual abuse — that are revived and then given a new limitations period. ... 42 USC § 1983 does not create any independent, substantive rights but merely provides a vehicle to enforce such rights ... . As the Fourth Department reasoned, to determine whether CPLR 214-g was a related revival statute would require a court to impermissibly consider the particular facts or particular legal theory advanced by a plaintiff in a section 1983 claim (see BL Doe 3 v Female Academy of the Sacred Heart, 199 AD3d at 1422). Accordingly, we decline plaintiffs' invitation to reject the Fourth Department's approach as articulated in BL Doe 3 v Female Academy of the Sacred Heart ... . * * * ... [C]ertain individuals must report cases of suspected abuse when reasonable cause exists that a child coming before them is an abused child (see Social Services Law § 413). Civil liability may be imposed upon these individuals who knowingly and willfully fail to make the requisite report (see Social Services Law § 420 [2]). ... [F]or purposes of Social Services Law § 413, an 'abused child' is one who is abused by a 'parent or other person legally responsible for [a child's] care' (Family Ct Act § 1012 [e]; see Social

Services Law § 412 [1]). The School District maintains that plaintiffs' statutory claim should have been dismissed because Wales [defendant teacher] was not a 'person legally responsible' for plaintiffs' care at the time of the alleged abuse. ... [W]hether an individual constitutes a 'person legally responsible' for a child within the meaning of Family Ct Act § 1012 (e) entails the examination of various factors ... . The Court of Appeals cautioned ... that 'persons who assume fleeting or temporary care of a child . . . or those persons who provide extended daily care of children in institutional settings, such as teachers,' should not be interpreted as a 'person legally responsible' for a child's care ... . [T]he School District cannot be liable for any alleged failure to report any abuse by Wales ...". ***Dolgas v. Wales*, 2023 N.Y. Slip Op. 01830, Third Dept 4-6-23**

PERSONAL INJURY, MUNICIPAL LAW, EVIDENCE.

ALTHOUGH PLAINTIFF SIGNED A RELEASE AND WAIVER OF LIABILITY BEFORE ATTENDING THE DEMOLITION DERBY, PLAINTIFF RAISED A QUESTION OF FACT WHETHER DEFENDANT UNREASONABLY INCREASED THE RISK BY FAILING TO INSTALL SUFFICIENT BARRIERS TO PROTECT SPECTATORS FROM THE VEHICLES IN THE DERBY.

The Third Department, reversing Supreme Court, determined defendant raised a question of fact whether defendant unreasonably increased the risk of injury at a demolition derby by failing to install sufficient barriers to protect the public from injury. Here one of the cars in the derby pushed through the concrete barriers and injured the plaintiff: "The issue ... distills to whether plaintiff's submissions 'demonstrate[d] facts from which it could be concluded that defendant unreasonably enhanced the danger or created conditions which were unique or above those inherent in the activity' ... . To that end, in his opposition to the motion, plaintiff submitted an affidavit averring that he was not warned that there was a risk that participating vehicles could break through the barricade and strike spectators. Plaintiff also proffered the expert affidavit of Russell E. Darnell, a licensed engineering contractor and certified National Institute of Automotive Service Excellence master technician who holds several racing licenses. ... Darnell opined, among other things, that these barriers 'were not up to the standard of the industry and are not generally accepted within the demolition derby community which requires sturdy, immovable barricades in a protective ring.' " ***Waite v. County of Clinton, N.Y.*, 2023 N.Y. Slip Op. 01831, Third Dept 4-6-23**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW, EVIDENCE.

THE DRIVER OF THE CAR IN WHICH PLAINTIFF WAS A PASSENGER MADE A LEFT TURN INTO TO THE PATH OF DEFENDANT'S ONCOMING CAR WITHOUT CHECKING FOR ONCOMING TRAFFIC; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Third Department, reversing Supreme Court, determined defendant driver's motion for summary judgment in this traffic accident case should have been granted. The driver of the car in which plaintiff was a passenger attempted a left turn in front of defendant's vehicle without checking for oncoming traffic: "On this record, defendant established his prima facie entitlement to judgment as a matter of law dismissing the complaint by submitting evidence that Ryan failed to yield the right-of-way and turned directly into the path of his vehicle ... . Thus, the burden shifted to plaintiff to demonstrate a triable issue of fact on the issue of defendant's comparative fault." Plaintiff failed to do so. ***Ohl v. Smith*, 2023 N.Y. Slip Op. 01823, Third Dept 4-6-23**

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