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FIRST DEPARTMENT

ADMINISTRATIVE LAW, MUNICIPAL LAW, FREEDOM OF INFORMATION LAW (FOIL).

THE NYC BOARD OF HEALTH PROPERLY REFUSED TO ADD GENEALOGISTS TO THE LIST OF PERSONS WHO CAN ACCESS DEATH CERTIFICATES.

The First Department, reversing Supreme Court, determined the NYC Board of Health did not exceed the scope of its powers when it amended the NYC Health Code to add family members to the list of persons who can access death certificates but refused to add genealogists: "... New York City Board of Health did not 'exceed[] the scope of its delegated powers' in amending 24 RCNY 207.11 ... , by adding to the existing list of family members for whom requests for death certificates would automatically be deemed 'necessary or required for a proper purpose' while declining to add genealogists ... . Instead, it 'balance[ed] costs and benefits according to preexisting guidelines' and did not create 'its own comprehensive set of rules without benefit of legislative guidance' .... The stated goal of the proposal was to allow more family members access to death certificates, and the Board of Health reasonably expressed concern with family privacy issues, due to social security numbers and causes of death being listed on death certificates, when declining to add genealogists to the expanded list ..." ***Matter of Reclaim the Records v. New York City Dept. of Health & Mental Hygiene*, 2023 N.Y. Slip Op. 02395, First Dept 5-4-23**

CIVIL PROCEDURE.

THE MOTION TO STRIKE INFLAMMATORY ALLEGATIONS FROM THE COMPLAINT SHOULD HAVE BEEN GRANTED; WHETHER EVIDENCE ASSOCIATED WITH THE ALLEGATIONS IS DISCOVERABLE OR ADMISSIBLE AT TRIAL IS NOT AFFECTED BY GRANTING THE MOTION TO STRIKE.

The First Department, reversing Supreme Court, determined the motion to strike inflammatory allegations from the complaint should have been granted: "Plaintiff commenced this action against defendant asserting causes of action for defamation, defamation per se, intentional infliction of emotional distress, and gender-motivated violence under the Victims of Gender-Motivated Violence Protection Law (Administrative Code of NYC § 10-111 et seq.). The court should have granted defendant's motion to strike certain inflammatory factual allegations from the first amended complaint. The allegations at issue, which employed rhetoric or detailed defendant's misconduct toward other women and his relationships with notorious third parties, were scandalous and prejudicial, and not necessary to establish any element of plaintiff's causes of action (see CPLR 3024 [b] ...). CPLR 3024 (b) motions do not judge whether matters will be discoverable or admissible at trial ..." ***Ganieva v. Black*, 2023 N.Y. Slip Op. 02380, First Dept 5-4-23**

CIVIL PROCEDURE, ATTORNEYS, JUDGES.

THE MOTION TO VACATE THE DEFAULT ON LAW OFFICE FAILURE GROUNDS SHOULD HAVE BEEN GRANTED; CRITERIA EXPLAINED.

The First Department, reversing Supreme Court, determined that plaintiff's motion to vacate the default on law office failure grounds should have been granted: "Plaintiff established a reasonable excuse for his default in failing to timely file his cross motion and opposition to defendants' motion for summary judgment. Plaintiff's counsel stated that he mistakenly believed that the papers could be filed at any time on the return date of December 15, 2021, and that the e-filing at 10:58 p.m. on that date was timely, despite the fact that the papers were, in fact, due to be filed two days before the return date. Thus, the default resulted from law office failure, which a court may excuse in its discretion (CPLR 2005 ...). Moreover, there was no evidence that the default was deliberate or part of a pattern of dilatory conduct by plaintiff .... Although plaintiff did fail to provide defendants with time to reply to his cross motion, thus causing prejudice to them, this error should have been remedied by granting defendants a brief adjournment, in view of the strong public policy of resolving cases on the merits, rather than by granting a default judgment .... The record also raises issues about defendants' own conduct in connection with their motion, namely their submission of the motion for summary judgment just a few days before the court-imposed deadline for complying with a subpoena issued by plaintiff, and their failure to comply with an order directing production of responsive documents. Furthermore, plaintiff made a prima facie showing of a meritorious claim ..." ***Giordano v. Giordano*, 2023 N.Y. Slip Op. 02381, First Dept 5-4-23**

CRIMINAL LAW.

THE INDICTMENT DID NOT GIVE ADEQUATE NOTICE OF THE PARTICULAR CRIME WITH WHICH DEFENDANT WAS CHARGED.

The First Department, reversing Supreme Court and dismissing the indictment, determined the indictment did not give sufficient notice of the particular crime with which defendant was charged: "The indictment was jurisdictionally defective because it failed to charge defendant with committing a particular crime .... The indictment purported to charge defendant with persistent sexual abuse, a statute that elevates the repeated commission of any of three separately codified misdemeanors to a felony ..., but it failed to 'specify which of the three discrete qualifying offenses defendant was alleged to have committed' ... . *Hardware* [200 AD3d 431] is dispositive of this appeal .... In *Hardware* the indictment alleged that defendant had 'subjected an individual to . . . sexual contact.' We held that this allegation was inadequate because 'sexual contact' is an element of all three of the qualifying offenses. Therefore, the indictment did not give defendant notice 'with sufficient precision to clearly apprise the defendant . . . of the conduct which is the subject of the accusation' (CPL 200.50[7][a] ...). The only additional allegation in the indictment in this case is that defendant acted 'without the [victim's] consent.' That allegation similarly failed to specify the underlying crime, because the absence of consent is also an element shared by all three of the qualifying offenses." ***People v. Lacy*, 2023 N.Y. Slip Op. 02394, First Dept 5-4-23**

CRIMINAL LAW, EVIDENCE, JUDGES.

THE DEFENSE REQUEST FOR THE CIRCUMSTANTIAL-EVIDENCE JURY INSTRUCTION SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED.

The First Department, reversing defendant's conviction, determined the defense request for the circumstantial-evidence jury instruction should have been granted: "The court should have granted defendant's request for a circumstantial evidence charge. There was no direct evidence establishing defendant's participation in the conspiracy ... , and the People do not argue otherwise. The court's standard instructions on reasonable doubt and inferences to be drawn from evidence did not suffice, because they did not make the jury aware of its duty to apply the circumstantial evidence standard to the People's entire case and exclude beyond a reasonable doubt every reasonable hypothesis of innocence ... . The error was not harmless, because the circumstantial evidence of defendant's involvement in the conspiracy was not overwhelming. However, because the verdict was based on legally sufficient evidence and was not against the weight of the evidence, there is no basis for dismissal of the indictment." ***People v. Garcia*, 2023 N.Y. Slip Op. 02392, First Dept 5-4-23**

PERSONAL INJURY, EMPLOYMENT LAW, CONTRACT LAW, WORKERS' COMPENSATION.

DEFENDANT COULD NOT SEEK INDEMNIFICATION FOR PLAINTIFF'S DAMAGES FROM THIRD-PARTY DEFENDANT BECAUSE PLAINTIFF WAS THE THIRD-PARTY DEFENDANT'S SPECIAL EMPLOYEE FOR WHOM WORKERS' COMPENSATION WAS THE EXCLUSIVE REMEDY.

The First Department, reversing (modifying) Supreme Court, determined the defendant, TIA, could not seek indemnification for plaintiff's damages from third-party defendant, Freeman, because plaintiff was Freeman's special employee for whom Workers' Compensation is the exclusive remedy: "Supreme Court should have dismissed TIA's common-law indemnification and contribution claims on the ground that plaintiff was Freeman's special employee when his accident occurred and therefore, the claims are precluded by the Workers' Compensation Law. 'A worker may be deemed a special employee where he or she is 'transferred for a limited time of whatever duration to the service of another' ... . 'While the mere transfer does not compel the conclusion that a special employment relationship exists, a court is most likely to find that it does where the transferee 'controls and directs the manner, details and ultimate result of the employee's work' ...". ***Carey v. Toy Indus. Assn. TM, Inc.*, 2023 N.Y. Slip Op. 02280, First Dept 5-2-23**

SECOND DEPARTMENT

CIVIL PROCEDURE, FORECLOSURE, JUDGES.

THE BANK IN THIS FORECLOSURE ACTION DID NOT HAVE A REASONABLE EXCUSE FOR FAILING TO MOVE FOR A DEFAULT JUDGMENT WITHIN THE ONE-YEAR ALLOWED BY STATUTE; IT WAS AN ABUSE OF DISCRETION TO GRANT THE MOTION.

The Second Department, reversing Supreme Court in this foreclosure action, determined plaintiff did not have a reasonable excuse for failing to move for a default judgment within and year and the motion should not have been granted: "... [T]he one-year period within which the plaintiff had to take proceedings for the entry of a default judgment expired in March 2016 (see CPLR 3215[c]). The plaintiff moved, inter alia, for leave to enter a default judgment against the defendant and for an order of reference in September 2016, 18 months after this matter was released from the foreclosure settlement conference part. Thus, the plaintiff's motion ... for leave to enter a default judgment against the defendant was made beyond the one-year deadline imposed by CPLR 3215(c). One exception to the mandatory language of CPLR 3215(c) is when 'sufficient cause is shown why the complaint should not be dismissed.' 'This requires a showing of a reasonable excuse for the delay in moving for leave to enter a default judgment, and a showing that the cause of action is potentially meritorious' ... . The determination as to whether an excuse is reasonable is committed to the sound discretion of the court, but reversal is warranted if that discretion is improvidently exercised ... . [T]he plaintiff's vague, conclusory, and unsubstantiated assertions that the delay in making its motion was attributable to the time spent in the mandatory foreclosure settlement conference part, and its need to comply with certain administrative orders, were

insufficient to excuse the lengthy 18-month delay in moving for leave to enter a default judgment ... . 'Since the plaintiff failed to proffer a reasonable excuse, this Court need not consider whether the plaintiff had a potentially meritorious cause of action' ..." ***Bank of N.Y. Mellon v. Toscano*, 2023 N.Y. Slip Op. 02294, Second Dept 5-3-23**

CIVIL PROCEDURE, FORECLOSURE, JUDGES.

THE JUDGE DID NOT HAVE THE AUTHORITY TO, SUA SPONTE, DISMISS THE FORECLOSURE COMPLAINT FOR PLAINTIFF'S ALLEGED FAILURE TO APPEAR AT A STATUS CONFERENCE AND COMPLY WITH THE DIRECTIVE TO MOVE FOR AN ORDER OF REFERENCE BY A SPECIFIED DATE; PRECEDENT TO THE CONTRARY SHOULD NO LONGER BE FOLLOWED.

The Second Department, rejecting its own precedent in this foreclosure action, determined the judge did not have the authority to, sua sponte, dismiss the complaint for plaintiff's failure to comply with the directive to appear at a status conference and move for an order of reference by a specified date: "'A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal' ... . The plaintiff's failure to comply with the directive in the order dated September 13, 2017, was not a sufficient ground upon which to direct dismissal of the complaint ... . Moreover, the court was without authority to, sua sponte, direct dismissal of the complaint based upon the plaintiff's failure to comply with its directive to proceed by motion where, as here, the plaintiff was entitled to proceed either by motion or trial ... . 22 NYCRR 202.27 was not a proper basis for directing dismissal of the complaint ... . Where a party appears as scheduled, 22 NYCRR 202.27 'provides no basis for the court to summarily dismiss the action for failure to prosecute' ... . Nothing in the record establishes that the plaintiff did not appear or was not ready to proceed at the final status conference ... . To the extent our cases have held that a failure to comply with a directive in a prior status conference order amounts to a nonappearance at the status conference or a failure to announce readiness to proceed 'immediately or subject to the engagement of counsel' within the meaning of 22 NYCRR 202.27... , such cases should no longer be followed ... . 'In general, [t]he procedural device of dismissing a complaint for undue delay is a legislative creation, and courts do not possess the inherent power to dismiss an action for general delay' ... where, as here, the statutory preconditions to dismissal under CPLR 3216, which is the statutory provision addressing '[w]ant of prosecution,' have not been met...." ***U.S. Bank N.A. v. Bhagwandeen*, 2023 N.Y. Slip Op. 02349, Second Dept 5-3-23**

CRIMINAL LAW.

THE ORDER SUSPENDING THE SPEEDY TRIAL STATUTE DURING COVID APPLIED HERE; DEFENDANT'S SPEEDY TRIAL MOTION TO DISMISS THE INDICTMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing County Court, determined the Executive Order suspending Criminal Procedure Law 30.30 (speedy trial) during the COVID pandemic was applicable and defendant's motion to dismiss the indictment for violation of the speedy trial statute should not have been granted: "Executive Order 202.87, while it was in effect, constituted a toll of the time within which the People must be ready for trial for the period from the date a felony complaint was filed through the date of a defendant's arraignment on the indictment, with no requirement that the People establish necessity in each particular case. We find that the phrase "to the extent necessary" modifies 'suspended' and not 'toll,' as it 'explains how sections 303.30 and 190.80 are suspended—not in their entirety but 'to the extent necessary'.... Therefore, 'Executive Order 202.87 does not require a showing of necessity to toll time periods because it does not explicitly condition the tolling on necessity' ... . Moreover, as the People contend, CPL 30.30(4)(g) permits the exclusion of 'periods of delay occasioned by exceptional circumstances.' Finding that a showing of necessity is required for the exclusion of time under Executive Order 202.87 would render that Executive Order superfluous and unnecessary." ***People v. Taback*, 2023 N.Y. Slip Op. 02334, Second Dept 5-3-23**

FREEDOM OF INFORMATION LAW (FOIL), ADMINISTRATIVE LAW.

THE COUNTY'S FAILURE TO RESPOND TO PETITIONER'S FOIL REQUEST WITHIN FIVE DAYS IS A DENIAL; THE COUNTY'S FAILURE TO NOTIFY PETITIONER OF THE AVAILABILITY OF AN ADMINISTRATIVE REVIEW OF THE DENIAL EXCUSED PETITIONER'S FAILURE TO SEEK ADMINISTRATIVE REVIEW; PETITIONER'S ARTICLE 78 ACTION SHOULD NOT HAVE BEEN DISMISSED FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

The Second Department, reversing Supreme Court, determined the Article 78 petition seeking court review of the denial of a FOIL request should not have been dismissed for failure to exhaust administrative remedies. Here the county did not respond to the FOIL request within five days, which, under the controlling regulations, is a denial. Petitioner, after an additional 30 days, filed the Article 78 petition without pursuing an administrative appeal. The Second Department held that the county's failure to notify petitioner of the availability of administrative review justified petitioner's failure to seek it before going to court, even though petitioner was aware of the availability of the administrative review process: "'The statutory time to respond to a FOIL request for records is 'within five business days of the receipt of a written request,' and the agency should respond by 'mak[ing] such record available to the person requesting it, deny[ing] such request in writing or furnish[ing] a written acknowledgment of the receipt of such request and a statement of the approximate date . . . when such request will be granted or denied' ... . 21 NYCRR 1401.7(b) states, in relevant part, that '[d]enial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body designated to determine appeals, and that person or body shall be identified by name, title, business address[,] and business telephone number' ... . '21 NYCRR 1401.7(c) provides that a FOIL request is deemed denied if there is no response to the request within five business days' ... . '[A]ny administrative appeal of a denial [must] be undertaken within 30 days of the denial' ... . A petitioner who does not 'appeal[ ] the denial in writing' will generally be deemed to have 'failed to exhaust its administrative remedies and, thus, [may] not resort to a judicial forum to gain relief'... . Here, the Supreme Court improperly

determined that dismissal was warranted based on the petitioner's failure to exhaust its administrative remedies. Where, as here, an agency fails to 'inform the person [or entity] making the FOIL request that further administrative review of the determination is available, the requirement of exhaustion is excused' ..." ***Matter of Law Offs. of Cory H. Morris v. Suffolk County*, 2023 N.Y. Slip Op. 02312, Second Dept 5-3-23**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

AN OPEN MANHOLE IS NOT AN ELEVATION-RELATED HAZARD COVERED BY LABOR LAW 240(1).

The Second Department, affirming Supreme Court, determined falling down an open manhole is not an elevation-related hazard covered by Labor Law 240(1): "Labor Law § 240(1) 'imposes upon owners and general contractors, and their agents a nondelegable duty to provide workers proper protection from elevation-related hazards' ... . The statute 'was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person' ... . 'Not every gravity-related injury is within the ambit of Labor Law § 240(1)' ... . 'Whether a plaintiff is entitled to recovery under Labor Law § 240(1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies' ... . [T]he plaintiff's injuries, though the result of a fall, did not result from an elevation-relation hazard encompassed by Labor Law § 240(1) ..." ***Bonkoski v. Condos Bros. Constr. Corp.*, 2023 N.Y. Slip Op. 02296, Second Dept 5-3-23**

MUNICIPAL LAW, PERSONAL INJURY.

CAUSES OF ACTION IN THE COMPLAINT BASED UPON ALLEGATIONS NOT INCLUDED IN THE NOTICE OF CLAIM MUST BE DISMISSED.

The Second Department, reversing (modifying) Supreme Court, determined certain causes of action against the municipality should have been dismissed because the notice of claim did not provide notice of them: "The Supreme Court should have granted that branch of the appellants' motion which was pursuant to CPLR 3211(a)(7) to dismiss the causes of action arising from events allegedly transpiring after January 6, 2019, insofar as asserted against them, because the plaintiff failed to serve an adequate notice of claim with respect to those causes of action. '[C]auses of action or legal theories may not be raised in the complaint that were not directly or indirectly mentioned in the notice of claim and that change the nature of the claim or assert a new one' ... . Here, the notice of claim was limited to the incident that allegedly transpired on January 6, 2019, and thus, the causes of action arising out of events allegedly occurring thereafter, insofar as asserted against the appellants, are foreclosed ..." ***Curry v. Town of Oyster Bay*, 2023 N.Y. Slip Op. 02297, Second Dept 5-3-23**

PERSONAL INJURY.

THERE WAS EVIDENCE DEFENDANTS' EMPLOYEES DIRECTED TRUCKS TO DRIVE OVER THE DEFECTIVE SIDEWALK WHERE PLAINTIFF SLIPPED AND FELL, RAISING A QUESTION OF FACT WHETHER DEFENDANTS CREATED THE SIDEWALK DEFECT.

The Second Department, reversing Supreme Court, determined plaintiff raised a question of fact about whether defendants, whose businesses were across the street from the cracked sidewalk where plaintiff fell, created the defect. There was evidence that truck servicing defendants' businesses drove over the sidewalk to back in to defendants' loading dock: "[T]he plaintiff raised a triable issue of fact as to whether the defendants committed an affirmative act of negligence that resulted in the creation of the dangerous condition on the sidewalk ... . In opposition to the defendants' motion, the plaintiff submitted the deposition testimony of an individual who had resided next door to the defendants' premises for nearly 56 years. The neighbor testified that the street on which he lived was a dead-end street that was mostly residential, and that the drivers of 18-wheel tractor-trailers that made deliveries to the defendants' business, while maneuvering into the driveway of the premises, frequently drove onto the sidewalk across the street, thereby creating the condition that caused the plaintiff to trip and fall. The neighbor had, on numerous occasions, observed [defendants' employees] directing truck drivers onto the sidewalk while assisting them in backing up to the loading dock. This evidence was sufficient to raise a triable issue of fact as to whether the actions of the defendants caused or created the hazardous sidewalk condition that allegedly caused the plaintiff's accident ..." ***Abramson v. Janowski's Hamburgers, Inc.*, 2023 N.Y. Slip Op. 02293, Second Dept 5-3-23**

PERSONAL INJURY.

ALTHOUGH MRNACAJ GESTURED THAT SALIAN COULD PULL OUT OF A DRIVEWAY INTO MRNACAJ'S LANE, MRNACAJ COULD NOT HAVE FORESEEN THAT SALIAN WOULD CONTINUE INTO THE OTHER LANE WHERE SHE WAS STRUCK, MRNACAJ'S MOTION FOR SUMMARY JUDGMENT IN THIS TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court's denial of Mrnacaj's motion for summary judgment in this traffic accident case, determined Mrnacaj, who allegedly motioned for Salian to pull out from a driveway, was not responsible for Salian's failure to see what should have been seen. Salian pulled across the lane Mrnacaj was in into the other lane of traffic where she was struck: "'When one driver chooses to gratuitously signal to another person, indicating that it is safe to proceed or that the signaling driver will yield the right-of-way, the signaling driver assumes a duty to do so reasonably under the circumstances'... . However, even where a party relies on a driver's gesture, a superseding, intervening act may break the causal connection ... . 'Whether an intervening act is a superseding cause is generally a question of fact, but there are circumstances where it may be determined as a matter of law' .... In this particular case, assuming without deciding that Mrnacaj

negligently motioned to Salian before she proceeded from the driveway and attempted to turn left, Salian's unforeseeable failure to see what was there to be seen and yield the right of way to the plaintiff constituted an intervening and superseding cause that established the moving defendants' prima facie entitlement to judgment as a matter of law ... . Under the circumstances of this case, Salian not only pulled her vehicle out of the driveway into the lane occupied by Mrnacaj, but also crossed that lane into a farther lane intended for vehicles traveling in the opposite direction of Mrnacaj, which included the plaintiff's oncoming vehicle that should have been seen ..." ***Dyakiw v. Salian*, 2023 N.Y. Slip Op. 02298, Second Dept 5-3-23**

PERSONAL INJURY, CONTRACT LAW.

IN THIS PARKING LOT ICE SLIP-AND-FALL CASE, THE SNOW REMOVAL CONTRACTOR DID NOT DEMONSTRATE IT DID NOT LAUNCH AN INSTRUMENT OF HARM AND THE PROPERTY OWNERS DID NOT DEMONSTRATE THEY DID NOT HAVE CONSTRUCTIVE NOTICE OF THE DANGEROUS CONDITION; THE DEFENDANTS' SUMMARY JUDGMENT MOTIONS SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the defendant snow-removal company, Landscapes, and the defendant property owners, Nambar, were not entitled to summary judgment in this parking lot ice slip-and-fall case. Landscapes did not show it did not launch an instrument of harm by piling snow which melted and formed ice, and the Nambar defendants did not show they did not have constructive notice of the icy condition: "[S]ince the plaintiff's pleadings alleged that the Landscapes defendants, through their snow removal efforts, created the icy condition in the parking lot, thereby launching a force or instrument of harm that caused the plaintiff's injuries, those defendants, in support of their motion for summary judgment, were required to establish, prima facie, that they did not create the alleged dangerous condition ... . The Landscapes defendants failed to make such a showing, as they did not affirmatively establish that they did not create the icy condition by negligently piling snow in an elevated area in the parking lot, where it allegedly melted and created a stream of water that refroze ... . [T]he Namdar defendants failed to eliminate triable issues of fact as to whether they had constructive notice of the alleged ice condition. The deposition testimony of the Namdar defendants' building engineer raised a triable issue of fact as to whether those defendants had notice of the condition that allegedly caused the ice to form, i.e., the stream of water flowing from the pile of snow in the elevated area of the parking lot ... . In addition, the deposition testimony of [one of the Landscapes defendants] indicated that the building engineer had instructed him to pile snow in certain places, including the elevated area of the parking lot, thus raising a triable issue of fact as to whether the Namdar defendants were responsible for creating the alleged ice condition ..." ***Tomala v. Islandia Expressway Realty, LLC*, 2023 N.Y. Slip Op. 02347, Second Dept 5-3-23**

THIRD DEPARTMENT

ADMINISTRATIVE LAW, CONSTITUTIONAL LAW.

THE DEPARTMENT OF HEALTH REGULATIONS PLACING A CAP ON THE NUMBER OF SERIOUSLY MENTALLY ILL PERSONS WHO CAN BE PLACED IN LARGE (AT LEAST 80-BED) ADULT HOMES DOES NOT CONSTITUTE DISCRIMINATION UNDER THE AMERICANS WITH DISABILITIES ACT.

The Third Department, in a full-fledged opinion by Justice Lynch, reversing Supreme Court, determined the cap on the number of seriously mentally persons who can be placed in large adult homes (at least an 80-bed capacity) did not amount to unconstitutional discrimination under the Americans with Disabilities Act (ADA): "On this record, we conclude that respondent has demonstrated that the admissions cap was implemented to benefit, rather than to discriminate against, persons with serious mental illness ... . [R]espondent [Commissioner of Health] has demonstrated that the challenged regulations are narrowly tailored to implement the integration mandate of Title II of the ADA and that the 'benefit to the [protected class from the subject regulations] . . . clearly outweigh[s] whatever burden may result to them' ... . The admissions cap applies only to people with a serious mental illness — those 'who have a designated diagnosis of mental illness under the Diagnostic and Statistical Manual of Mental Disorders . . . and whose severity and duration of mental illness results in substantial functional disability' (18 NYCRR 487.2 [c] ...). Accordingly, the cap is specifically tailored to the very individuals who are the subject of the integration mandate. Rather than limiting admissions to all adult homes, the regulations apply solely to a subcategory of large adult homes — those certified with at least an 80-bed capacity — where new admissions would increase the population of persons with serious mental illness over the 25% threshold." ***Matter of Oceanview Home for Adults, Inc. v. Zucker*, 2023 N.Y. Slip Op. 02365, Third Dept 5-4-23**

CIVIL PROCEDURE, FAMILY LAW, JUDGES.

SETTING A RETURN DATE LESS THAN 20 DAYS FROM THE DATE OF SERVICE OF THE ARTICLE 78 PETITION WAS NOT, UNDER THE FACTS, A JURISDICTIONAL DEFECT; THE PETITION SHOULD NOT HAVE BEEN DISMISSED.

The Third Department, reversing Supreme Court, determined the failure to provide the requisite 20-day notice in an Article 78 petition, under the facts, was not a jurisdictional defect and the dismissal of the petition was an abuse of discretion. Petitioners sought to contest a ruling of the NYS Office of Children and Family Services which refused to find a maltreatment report unfounded re: one of the petitioners: "Pursuant to CPLR 7804 (c), 'a notice of petition, together with the petition and affidavits specified in the notice, shall be served . . . at least [20] days before the time at which the petition is noticed to be heard.' However, CPLR 2001, which has been held to apply to service defects ... , authorizes a court to ' permit a mistake, omission, defect or irregularity . . . to be corrected, upon such terms as may be just, or, if a

substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded.' In deciding whether a defect in service is a 'technical infirmity' within the scope of CPLR 2001, ' courts must be guided by the principle of notice to the [respondent] — notice that must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections' ... . [I]t is ... wholly undisputed that the subject application was not heard on the return date proposed by petitioners, nor was there any appearance before Supreme Court, either held or calendared, prior to respondents' motion. It is further undisputed that, apart from failing to strictly comply with CPLR 7804 (c), petitioners properly served respondents. Thus, this case is functionally no different than those in which a return date has been omitted from a notice of petition, and such failures have been held to be technical infirmities within the scope of CPLR 2001 ... . Given these facts, although the return date on the notice of petition was defective at the time of service, we find that the service effectuated by petitioners was reasonably calculated to apprise respondents of this proceeding and afford them the opportunity to defend against it ..." ***Matter of Naomi R. v. New York State Off. of Children & Family Servs.*, 2023 N.Y. Slip Op. 02362, Third Dept 5-4-23**

CRIMINAL LAW, EVIDENCE.

PAROLEES DO NOT SURRENDER THEIR CONSTITUTIONAL RIGHTS AGAINST UNREASONABLE SEARCHES AND SEIZURES; HERE THE SEARCH BY PAROLE OFFICERS WAS BASED UPON A TIP FROM DEFENDANT'S MOTHER; THE SEARCH WAS DEEMED SUBSTANTIALLY RELATED TO THE PAROLE OFFICERS' DUTIES; THERE WAS A DISSENT.

The Third Department, over a comprehensive dissent, determined the parole officers' search of defendant-parolee's residence based upon a tip from his mother was proper. Mother, with whom defendant resided, said she saw a picture of defendant with a gun. In the search extended magazines and gun parts were found in defendant's bedroom: "The general rules and conditions of release typically require a parolee to submit to a warrantless search by his or her parole officer ... . The record evinces that defendant executed such a document. However, 'a parolee does not surrender his or her constitutional rights against unreasonable searches and seizures, [and] what may be unreasonable with respect to an individual who is not on parole may be reasonable with respect to one who is. Accordingly, a search of a parolee undertaken by a parole officer is constitutional if the conduct of the parole officer was rationally and reasonably related to the performance of the parole officer's duty and was substantially related to the performance of duty in the particular circumstances' ... . * * * Since the information concerning defendant's possible violation of his parole conditions came from his mother, there existed a legitimate reason for the search undertaken and it was substantially related to the performance of the parole officer's duties ..." ***People v. Spirito*, 2023 N.Y. Slip Op. 02353, Third Dept 5-4-23**

CRIMINAL LAW, EVIDENCE, JUDGES, APPEALS, ATTORNEYS.

THE DEPRAVED INDIFFERENCE MURDER JURY INSTRUCTION DID NOT PROPERLY EXPLAIN THAT DEPRAVED INDIFFERENCE IS THE DEFENDANT'S MENTAL STATE AT THE TIME OF THE CRIME, NOT THE OBJECTIVE CIRCUMSTANCES UNDER WHICH THE HOMICIDE OCCURRED; APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE; WRIT OF CORAM NOBIS GRANTED AND NEW TRIAL ORDERED.

The Third Department (1) granted the writ of coram nobis based upon appellate counsel's failure to raise the issue, and (2) ordered a new trial on the second-degree murder charge because the jury instruction on depraved indifference was defective. Although the issue was not preserved, the Third Department considered it in the interest of justice: "Defendant asserts that County Court's instructions to the jury regarding depraved indifference murder were consistent with the overruled objective standard set forth in *People v. Register* (60 NY2d 270 [1983] ...), and therefore the court's instructions failed to explain the requisite culpable mental state as required by *People v. Feingold* (7 NY3d 288 [2006]). We agree. In discharging its duty to deliver a charge to the jury, '[a] court must instruct the jury regarding both the 'fundamental legal principles applicable to criminal cases in general' and those 'material legal principles applicable to the particular case' (... CPL 300.10 [1], [2]). At the time of defendant's trial, the Court of Appeals had already held that 'depraved indifference to human life is a culpable mental state' ... . As a result, 'under *Feingold*, it is not the circumstances under which the homicide occurred that determines whether [a] defendant is guilty of depraved indifference murder, but rather [the] defendant's mental state at the time the crime occurred' ... . Upon our review of the record, which reflects that County Court had twice instructed the jury with the overruled objective standard, 'the jury charge did not unambiguously state that depraved indifference was the culpable mental state for the crime with which defendant was charged, [and therefore] we cannot conclude that the jury, hearing the whole charge, would gather from its language the correct rules which should be applied in arriving at a decision' ...". ***People v. Weaver*, 2023 N.Y. Slip Op. 02352, Third Dept 5-4-23**

FOURTH DEPARTMENT

CIVIL PROCEDURE, JUDGES, PERSONAL INJURY.

IN THIS CHILD VICTIMS ACT ACTION, THE JUDGE CORRECTLY STRUCK INFLAMMATORY LANGUAGE FROM THE COMPLAINT BUT SHOULD NOT HAVE SEALED THE COMPLAINT WITHOUT MAKING WRITTEN FINDINGS.

The Fourth Department, reversing (modifying) Supreme Court, determined the judge was correct in striking inflammatory language from this Child Victims Act complaint but should not have sealed the complaint: "Pursuant to CPLR 3024 (b), '[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading.' '[I]t is generally held that the test under this section is whether the allegation is relevant, in an evidentiary sense, to the controversy and, therefore, admissible at trial' ... . Although 'factual averments about sexual abuse are necessary in any action where those allegations form the predicate for an award of damages, to state a cause of action generally and

pursuant to the CVA [Child Victims Act] specifically' ... , the language struck by the court does not contain any factual averments necessary to plaintiff's causes of action. Further, the court's decision to strike the inflammatory language does not preclude plaintiff from attempting to prove at the trial stage that defendant committed acts of sexual abuse against her. We thus conclude that 'there is no prejudice to plaintiff as a result of the order, whereas if [the language is] not stricken prejudice may result to defendant' ... . We further conclude, however, that the court erred in granting that part of the cross-motion seeking to seal the complaint without making 'a written finding of good cause, . . . specify[ing] the grounds thereof,' as required by 22 NYCRR 216.1 (a) ...". ***LG 101 Doe v. Wos*, 2023 N.Y. Slip Op. 02404, Fourth Dept 5-5-23**

CONTRACT LAW, REAL ESTATE.

THE TEXTS AND EMAILS WERE NOT SUBSCRIBED; THE BREACH OF CONTRACT ACTION BASED UPON THE EMAILS AND TEXTS WAS BARRED BY THE STATUTE OF FRAUDS.

The Fourth Department, reversing Supreme Court, determined the emails and texts did not meet the criteria for a written contract (here a purported agreement to purchase property). The breach of contract cause of action was therefore barred by the statute of frauds: "Initially, '[a]n e-mail sent by a party, under which the sending party's name is typed, can constitute a [signed] writing for [the] purposes of the statute of frauds' ... . Here, however, not one of the text messages or emails submitted by plaintiff contains a signature block or other electronic signature of defendant. Those communications are therefore 'clearly inadequate, since [they were] not subscribed, even electronically, by the defendant[] who [is] the part[y] to be charged, or by anyone purporting to act in [his] behalf'.... We further agree with defendant that the doctrine of part performance does not apply to defeat the affirmative defense of the statute of frauds (see § 5-703 [4]; CPLR 3211 [a] [5]). Under the circumstances of this case, plaintiff's actions in paying property taxes and related expenses, including making renovations to a sunroom on the property, were not 'unequivocally referable' to an agreement to purchase the property to warrant invoking the doctrine of part performance' ..." ***Preston v. Nichols*, 2023 N.Y. Slip Op. 02408, Fourth Dept 5-5-23**

CRIMINAL LAW.

HERE THE NEW STATUTE REQUIRING THE PEOPLE TO FILE AND SERVE A CERTIFICATE OF COMPLIANCE WITH DISCOVERY OBLIGATIONS WENT INTO EFFECT AFTER THE PEOPLE HAD ANNOUNCED READINESS FOR TRIAL; THE STATUTE RETURNED THE PEOPLE TO A STATE OF UNREADINESS; DEFENDANT'S MOTION TO DISMISS ON SPEEDY-TRIAL GROUNDS SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, over a dissent, determined defendant's motion to dismiss the indictment on speedy trial grounds should have been granted. A new law went into effect during the course of the prosecution requiring the People to serve and file a certificate of compliance with discovery obligations (CPL 245.50(3)). Although the People had already announced they were ready for trial, the statute returned them to a state of unreadiness: "'[T]he procedures outlined in CPL article 245 became applicable to [pending] action[s] as soon as that article became effective' ... . [W]ith respect to the effect of CPL 245.50 (3) on pending prosecutions in which the People had previously announced readiness for trial, we agree with the courts that have concluded that the People ' were placed in a state of nonreadiness on January 1, 2020, the effective date of CPL article 245, as a matter of law, [where] no [certificate of compliance] had been filed as of that date' ..." ***People v. King*, 2023 N.Y. Slip Op. 02409, Fourth Dept 5-5-23**

CRIMINAL LAW, EVIDENCE, JUDGES.

THE DEFENDANT TESTIFIED THE VICTIM WAS ON TOP OF HIM REPEATEDLY STRIKING HIM IN THE HEAD WHEN HE PULLED OUT HIS FIREARM AND SHOT THE VICTIM; EVEN IF DEFENDANT'S VERSION WAS DEEMED UNLIKELY, THE JURY SHOULD HAVE BEEN INSTRUCTED ON THE JUSTIFICATION DEFENSE; NEW TRIAL ORDERED.

The Fourth Department, reversing defendant's murder conviction and ordering a new trial, determined defendant was entitled to a jury instruction on the justification defense. Defendant testified he was on the ground with the victim on top of him, repeatedly striking him in the head, when he drew his weapon and shot the victim: "'Even if [the ... victim] had not already employed deadly physical force against . . . defendant at the time . . . defendant allegedly used deadly physical force against [the ... victim], the question remains whether . . . defendant could reasonably have believed that the use of such force against him was imminent' ... . The ... victim was not armed, but defendant testified that he knew that the ... victim owned at least one gun and that, at the time of the shooting, he did not know whether the ... victim was armed. Further, defendant's testimony that the ... victim pinned him down and was repeatedly punching his face and head could support a finding that defendant reasonably believed that such conduct presented an imminent threat of deadly force inasmuch as '[t]he natural and probable consequences of repeatedly striking a man while he is on the ground defenseless is that he will sustain a serious physical injury within the meaning of Penal Law § 10.00 (10)' ... . Although defendant's version of the incident may be 'dubious, a trial court is required to give the justification charge even where the defendant's version of events is 'extraordinarily unlikely' ..." ***People v. Swanton*, 2023 N.Y. Slip Op. 02433, Fourth Dept 5-5-23**

CRIMINAL LAW, JUDGES.

ONE OF THE GRAND JURORS HAD A FELONY CONVICTION RENDERING THE GRAND JURY ILLEGALLY CONSTITUTED; THE INDICTMENT SHOULD HAVE BEEN DISMISSED; WHETHER THE DEFENDANT WAS PREJUDICED WAS IRRELEVANT.

The Fourth Department, reversing County Court, determined the grand jury was illegally constituted because one of the jurors had a felony conviction. The indictment should have been dismissed without considering whether defendant was prejudiced: "CPL 210.20 (1) (c) authorizes a court to dismiss an indictment on the ground that '[t]he grand jury proceeding was defective, within the meaning of [CPL] 210.35.' As relevant here, CPL 210.35 provides that '[a] grand jury proceeding is defective . . . when . . . [t]he grand jury was illegally constituted' ... . A grand jury is illegally constituted when ... one of its members is not qualified to serve as a juror pursuant to the Judiciary Law .... Here, it is undisputed that the grand jury was illegally constituted because one of the grand jurors had been convicted of a felony, rendering him unqualified to serve as a grand juror (see Judiciary Law §§ 501, 510 [3]). Despite the illegally constituted grand jury, the court nonetheless determined that dismissal of the indictment was unwarranted inasmuch as the alleged defect did not result in any prejudice to defendant. We conclude that it was error for the court to require a showing of prejudice before dismissing the indictment for a violation of CPL 210.35 (1). The Court of Appeals has held that '[t]he clear intention of [the drafters of CPL 210.35] was to establish a rule of automatic dismissal [of an indictment] for a limited number of improprieties that were deemed most serious'—including, inter alia, 'the specific defect[] delineated in' CPL 210.35 (1) ... . With respect to those most serious improprieties, 'judicial inquiries into prejudice to the accused or other forms of actual harm are wholly out of place' ... . Any consideration of prejudice is limited to defects alleged in connection with the catchall provision of CPL 210.35 (5) ... . Here ... there is no dispute that the grand jury proceedings were defective under CPL 210.35 (1) due to the presence of the unqualified grand juror, and therefore the court should have automatically dismissed the indictment without requiring any showing of prejudice by defendant ...". ***People v. Ashley*, 2023 N.Y. Slip Op. 02432, Fourth Dept 5-5-23**

MUNICIPAL LAW, PERSONAL INJURY.

THE FOURTH DEPARTMENT, NOTING A SPLIT OF AUTHORITY, DETERMINED THE PLAINTIFF DID NOT SET FORTH ALLEGATIONS WHICH DEMONSTRATED A SPECIAL RELATIONSHIP BETWEEN HER AND THE COUNTY; THEREFORE THE COUNTY COULD NOT BE HELD LIABLE FOR SEXUAL ABUSE ALLEGEDLY SUFFERED BY THE PLAINTIFF WHILE IN FOSTER CARE.

The Fourth Department, reversing Supreme Court and noting a split of authority, determined plaintiff in this Child Victims Act action alleging sexual abuse while in foster care did not demonstrate a "special relationship" with the county. The decision includes a concise explanation of the complex intertwined issues controlling governmental tort liability: "In Mark G. v. Sabol (93 NY2d 710 [1999]), the Court of Appeals analyzed provisions in the Social Services Law designed to protect foster children and to prevent child abuse generally and concluded that a private right of action was not consistent with the legislative scheme (see id. at 720-722; see also McLean, 12 NY3d at 201). Notably, in McLean, the Court of Appeals cited Mark G. approvingly ... . We therefore conclude that plaintiff cannot establish a special duty based upon the County's alleged violation of its duties under the Social Services Law. We note that, to the extent that there is case law in the First and Second Departments that would support a contrary conclusion, we decline to follow those cases ... . [P]laintiff cannot establish the requisite special relationship between the parties based upon the County's alleged voluntary assumption of a duty that generated justifiable reliance on her part ... . To establish such a special relationship, a plaintiff must show '(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking' (Cuffy v. City of New York, 69 NY2d 255, 260 [1987] ...). '[A]ll four elements must be present for a special duty to attach' .... '[T]he failure to perform a statutory duty, or the negligent performance of that duty, cannot be equated with the breach of a duty voluntarily assumed' ... . Even assuming, arguendo, that plaintiff sufficiently alleged the existence of a duty on the part of the County apart from its statutory obligations, we ... conclude that plaintiff failed to set forth allegations that, if proven, would establish each of the four elements articulated in Cuffy ..." ***Weisbrod-Moore v. Cayuga County*, 2023 N.Y. Slip Op. 02445, Fourth Dept 5-5-23**

PERSONAL INJURY.

WALMART DID NOT OWE A DUTY OF CARE TO PLAINTIFF, AN OFF-DUTY POLICE OFFICER INJURED BY ANOTHER POLICE OFFICER AFTER RESPONDING TO A THEFT AT A WALMART STORE.

The Fourth Department, reversing Supreme Court, determined defendant Walmart did not owe a duty of care to plaintiff, an off-duty police officer who was injured by another police officer after responding to a call about a theft from Walmart: "Walmart contends that it owed no duty to plaintiff and that the court thus erred in denying its motion. We agree. 'Before a defendant may be held liable for negligence, it must be shown that the defendant owes a duty to the plaintiff . . . 'Absent a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm' ... . '[T]he definition of the existence and scope of an alleged tortfeasor's duty is usually a legal, policy-laden declaration reserved for Judges to make prior to submitting anything to fact-finding or jury consideration' ... , and that determination is made 'by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability' ... . [P]rior thefts at the Walmart store do not bear a sufficient relationship to what occurred in this instance—a negligent motor vehicle accident between plaintiff and his coworker—so as to create a duty flowing from Walmart to plaintiff. ... [A]ny alleged violation of Walmart's internal policy did not create a duty flowing from Walmart to plaintiff. The purpose of the internal policy was to protect 'the physical well-being of [s]uspects, customers and Walmart associates.' Plaintiff was an off-duty police officer responding to an alleged criminal event who never entered the store. He was not one of those covered by the goal of the policies ...." ***Brown v. Wal-Mart Stores, Inc.*, 2023 N.Y. Slip Op. 02403, Fourth Dept 5-5-23**

ZONING.

THE ZONING BOARD OF APPEALS' INTERPRETATION OF THE CODE RE: THE PARKING OF A CAMPER TRAILER ON THE PETITIONER'S PROPERTY WAS IRRATIONAL.

The Fourth Department, reversing Supreme Court, determined that the zoning board of appeals' (ZBA's) interpretation of the zoning code was irrational. Petitioner was ordered to remedy the violation which was alleged to be his parking his camper trailer on his property within 250 feet of the property line. But the code provisions did not support the alleged violation: "The interpretation by a zoning board of its governing code is generally entitled to great deference by the courts' .... In the end, '[s]o long as its interpretation is neither 'irrational, unreasonable nor inconsistent with the governing statute,' it will be upheld' ... . 'Where, however, the question is one of pure legal interpretation of [a zoning code's] terms, deference to the zoning board is not required' ... . '[T]he ultimate responsibility of interpreting the law is with the court' ... . [W]e agree with petitioner that respondents' interpretation of the Zoning Code is irrational and unreasonable ... . The 'order to remedy violation' stated that petitioner violated the setback requirement set forth in section 110-3 of the Town's Zoning Code, which limits '[t]he number of tents, trailers, houseboats, recreational vehicles, or other portable shelters in a camp' ... . The Zoning Code, however, defines a '[c]amp' as '[a]ny temporary or portable shelter, such as a tent, recreational vehicle, or trailer' ... . Respondents do not explain how a trailer or recreational vehicle can constitute both a '[c]amp' as defined in section 103-2 as well as a shelter in a camp,' as defined in section 110-3, and the Zoning Code does not have additional provisions that clarify the issue." ***Matter of Lemmon v. Town of Scipio*, 2023 N.Y. Slip Op. 02446, Fourth Dept 5-5-23**

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