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# FIRST DEPARTMENT

## FAMILY LAW, CONTRACT LAW.

UNDER THE "AGE 29" LAW MEDICAL INSURANCE COVERAGE FOR PLAINTIFF'S CHILD WAS AVAILABLE THROUGH PLAINTIFF'S EMPLOYER'S PLAN UNTIL THE CHILD TURNED 29; THEREFORE THE STIPULATED ORDER IN THE DIVORCE PROCEEDING REQUIRING PLAINTIFF TO COVER THE CHILD UNDER THE PLAN FOR AS LONG AS THE LAW ALLOWS REQUIRED COVERAGE TO AGE 29; THE ARGUMENT THAT THE PARTIES CONTEMPLATED A CUT-OFF AT AGE 26 PURSUANT TO THE AFFORDABLE CARE ACT WAS REJECTED.

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Higgitt, determined the provisions of a stipulated order in a divorce proceeding (section 6.3) providing that plaintiff would pay for medical insurance for a child (T.D.) for as long as coverage was available under the employer's family plan were unambiguous and must be enforced. Because the "Age 29" law allowed the child to remain covered by plaintiff's employer's plan until age 29. plaintiff was obligated to pay for that coverage. The argument that the provision was ambiguous allowing extrinsic evidence that the parties contemplated only the Affordable Care Act's cut-off at age 26 was rejected: The "Age 29" act was passed before the issuance of the stipulated order: "[T]he practical and reasonable interpretation of § 6.3 is that, to the extent plaintiff can maintain health insurance for T.D. through his employer, he is required to do so as long as any relevant law permits coverage for T.D. As he acknowledges in his brief (and as the evidence he submitted in opposition to the motion establishes), T.D. has coverage under the same health insurance plan provided by plaintiff's employer to its employees. Thus, by virtue of the fact that plaintiff has health insurance through his employer, Age 29 Law coverage is available to T.D." ***B.D. v. E.D.*, 2023 N.Y. Slip Op. 03971, First Dept 7-27-23**

# SECOND DEPARTMENT

## APPEALS, CIVIL PROCEDURE, MEDICAL MALPRACTICE, EVIDENCE, PRIVILEGE.

ORDERS COMPELLING ANSWERS TO DEPOSITION QUESTIONS OR PRECLUDING QUESTIONING ARE NOT APPEALABLE AS OF RIGHT; A REQUEST FOR PERMISSION TO APPEAL AFTER THE APPEAL IS PERFECTED IS GENERALLY DENIED; THE HOSPITAL DID NOT DEMONSTRATE THE SUBJECT MEDICAL RECORDS WERE PRIVILEGED AS PART OF A QUALITY ASSURANCE REVIEW.

The Second Department, reversing (modifying) Supreme Court, determined (1) there is no appeal as of right from the denial of a motion to compel a witness to answer deposition questions, (2) there is no appeal as of right from a protective order precluding certain questioning, (3) an appellate court will generally not consider a request for permission to appeal made after the appeal is perfected, (4) the hospital did not demonstrate certain medical records were privileged as part of a quality assurance review: "[T]he plaintiffs sought leave to appeal after their appeal was perfected. As this Court has repeatedly observed under comparable circumstances, 'we are disinclined to grant leave to parties who have taken it upon themselves to perfect an appeal without leave to appeal' ... . * * * Pursuant to Education Law § 6527(3), certain documents generated in connection with the 'performance of a medical or a quality assurance review function,' or reports 'required by the department of health pursuant to [Public Health Law § 2805-l],' are generally not discoverable ... . Nyack Hospital, as the party seeking to invoke the privilege, had the burden of demonstrating that the documents sought were prepared in accordance with the relevant statutes ... . Nyack Hospital merely asserted that a privilege applied to the requested documents without making any showing as to why the privilege attached." ***Martino v. Jae Ho Lee*, 2023 N.Y. Slip Op. 03915, Second Dept 7-26-23**

## CRIMINAL LAW.

THE DISSENT IN THIS PERSISTENT VIOLENT FELONY OFFENDER CASE ARGUED THE 34-YEAR SENTENCE FOR THE 34-YEAR-OLD DEFENDANT WAS HARSH AND EXCESSIVE, NOTING THAT THE BURGLARIES WERE IN THE DAYTIME WHEN NO ONE WAS HOME.

The Second Department, over a dissent, determined the 34-year sentence for four counts of burglary and related offenses was not unduly harsh or excessive. The majority concluded that the schizophrenia and bipolar mood disorder diagnoses were self-reported and unsupported: "We ... disagree with our dissenting colleague that a reduction in the defendant's sentence is warranted due to the defendant's mental health condition. While it is undisputed that the defendant qualified for some level of mental health services, and, as the trial testimony reflected, among other things, that the defendant's former parole officer was assigned to parolees that had a mental health diagnosis, the nature and scope of the defendant's mental health condition was never probed at trial or at sentencing. The diagnoses of schizophrenia and bipolar mood disorder

were self-reported by the defendant to the Department of Probation, but no medical records were introduced to corroborate the defendant's statements. Moreover, at sentencing, the People introduced an audio recording of a phone call made by the defendant ... , while he was incarcerated during the pendency of this matter, in which he admitted to having previously lied about having auditory hallucinations in order to acquire supportive housing. **From the dissent:** The gravity of a defendant's criminal conduct, a defendant's extensive criminal history, and the need for societal protection are already taken into consideration by the Penal Law provisions providing enhanced sentences for persistent violent felony offenders ... . Contrary to the determination of my colleagues, nothing in this record warranted a further enhancement of the already-enhanced minimum aggregate sentence of an indeterminate term of imprisonment of 16 years to life, followed by lifetime parole supervision. The defendant committed daytime burglaries when no one was home, and stole items such as jewelry, fur coats, and electronics. No victim had any encounter with the defendant. Even without considering any other factors, an aggregate term of imprisonment of 34 years to life is grossly disproportionate to the harm caused by the defendant's conduct." ***People v. West*, 2023 N.Y. Slip Op. 03932, Second Dept 7-26-23**

## EMPLOYMENT LAW, HUMAN RIGHTS LAW.

THE PLAINTIFF, A MALE EMT, ALLEGED HE WAS TERMINATED BECAUSE OF HIS INVOLVEMENT IN A TRAFFIC ACCIDENT, AND SEVERAL FEMALE EMTs WERE INVOLVED IN COMPARABLE ACCIDENTS BUT WERE NOT TERMINATED; PLAINTIFF STATED A CAUSE OF ACTION FOR SEX DISCRIMINATION.

The Second Department, reversing Supreme Court, determined plaintiff emergency medical technician (EMT) stated a cause of action for sex discrimination. Plaintiff alleged he was terminated because he was involved in a traffic accident but several female EMTs were involved in comparable accidents but were not terminated: "The NYSHRL [state human rights law] and the NYCHRL [city human rights law], prohibit discrimination in employment on the basis of sex ... . 'A plaintiff alleging discrimination in employment in violation of the NYSHRL must establish that (1) she or he is a member of a protected class, (2) she or he was qualified to hold the position, (3) she or he suffered an adverse employment action, and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination' ... . 'Under the NYCHRL, the plaintiff must establish that she or he was subject to an unfavorable employment change or treated less well than other employees on the basis of a protected characteristic' ... . Here, accepting the facts as alleged in the complaint as true, and according the plaintiff the benefit of every possible favorable inference, the complaint sufficiently alleges circumstances which give rise to an inference of sex discrimination, and adequately states a cause of action pursuant to the NYCHRL and the NYSHRL ...". ***Silvers v. Jamaica Hosp.*, 2023 N.Y. Slip Op. 03938, Second Dept 7-26-23**

## FAMILY LAW, ATTORNEYS.

THE RECORD DOES NOT REFLECT THAT MOTHER IN THIS CHILD-SUPPORT PROCEEDING WAS INFORMED OF HER RIGHT TO COUNSEL, HER RIGHT TO AN ADJOURNMENT TO RETAIN COUNSEL, OR HER WAIVER OF THAT RIGHT; NEW HEARING ORDERED.

The Second Department, reversing Family Court, determined the Support Magistrate erred by not, on the record, informing mother of her right to counsel in this proceeding brought by father seeking child support from mother: "The Support Magistrate erred in failing to advise the mother that she had 'an absolute right to be represented by counsel at the hearing at [her] own expense, and that [s]he was entitled to an adjournment for the purpose of retaining the services of an attorney' ... . The Support Magistrate further erred in proceeding with the hearing without an explicit waiver of the right to counsel from the mother as there is no word or act in the record upon which the Family Court could have concluded that the mother explicitly waived that right ...". ***Matter of Moor v. Moor*, 2023 N.Y. Slip Op. 03918, Second Dept 7-26-23**

## FAMILY LAW, CIVIL PROCEDURE, JUDGES.

DESPITE MOTHER'S DEFAULT, CUSTODY SHOULD NOT HAVE BEEN AWARDED WITHOUT A HEARING AND FINDINGS ON THE BEST INTERESTS OF THE CHILD.

The Second Department, reversing Supreme Court, determined that, although mother defaulted, the court should not have made a custody ruling without a hearing and findings on the best interests of the child: "Courts may generally proceed by default when a party has failed to comply with an order of the court ... . 'This authority, however, in no way diminishes the court's primary responsibility to ensure that an award of custody is predicated on the child's best interests, upon consideration of the totality of the circumstances, after a full and comprehensive hearing and a careful analysis of all relevant factors' ... . 'A custody determination, whether made upon the default of a party or not, must always have a sound and substantial basis in the record' ... . 'Although the determination of whether to relieve a party of an order entered upon his or her default is a matter left to the sound discretion of the Family Court, the law favors resolution on the merits in child custody proceedings' ... . Here, the Supreme Court made a custody determination without a hearing and without making any specific findings of fact regarding the best interests of the child. Under the circumstances, that branch of the mother's motion which was to vacate an order ... awarding custody to the paternal grandmother, should have been granted in the interest of justice ... . Accordingly, we remit the matter ... for a hearing and a new determination thereafter of the paternal grandmother's petition for custody of the child, to be held with all convenient speed ...". ***Matter of Trammell v. Gorham*, 2023 N.Y. Slip Op. 03923, Second Dept 7-26-23**

## FAMILY LAW, CIVIL PROCEDURE, JUDGES.

A MOTION TO MODIFY THE CUSTODY PROVISIONS IN A SETTLEMENT AGREEMENT, WHERE THERE ARE CONTESTED FACTS, SHOULD NOT BE GRANTED WITHOUT A FULL HEARING.

The Second Department, reversing Supreme Court, determined the motion for a modification of custody allowing mother the relocate should not have been granted without a hearing: " 'Since a court has an obligation to make an objective and independent evaluation of the circumstances, a custody determination should be made only after a full and fair hearing at which the record is fully developed' ... . 'This allows the court to fulfill its duty to make an enlightened, objective and independent evaluation of the circumstances' ... . '[A]s a general rule, it is error to make an order respecting custody based upon controverted allegations without the benefit of a full hearing' ...". ***Rizea v. Rizea*, 2023 N.Y. Slip Op. 03935, Second Dept 7-26-23**

## FORECLOSURE, CIVIL PROCEDURE.

PURSUANT TO THE RECENTLY ENACTED FORECLOSURE ABUSE PREVENTION ACT (FAPA) THE BANK COULD NOT TAKE ADVANTAGE OF THE SIX-MONTH EXTENSION OF THE STATUTE OF LIMITATIONS BECAUSE THE FORECLOSURE ACTION WAS DISMISSED AS ABANDONED.

The Second Department, reversing Supreme Court, determined the foreclosure action was dismissed as abandoned and therefore the bank could not take advantage of the six-month extension of the statute of limitations: "The recently enacted Foreclosure Abuse Prevention Act (... hereinafter FAPA) replaced the savings provision of CPLR 205(a) with CPLR 205-a in actions upon instruments described in CPLR 213(4) ... . Under CPLR 205-a(a), '[i]f an action upon an instrument described under [CPLR 213(4)] is timely commenced and is terminated in any manner other than . . . a dismissal of the complaint for any form of neglect, including, but not limited to those specified in . . . [CPLR 3215] . . . , the original plaintiff, or, if the original plaintiff dies and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months following the termination, provided that the new action would have been timely commenced within the applicable limitations period prescribed by law at the time of the commencement of the prior action and that service upon the original defendant is completed within such six-month period.' Here, the complaint in the 2009 action was dismissed insofar as asserted against Santos as abandoned pursuant to CPLR 3215(c) ... . Therefore, the plaintiff is not entitled to the benefit of the savings provision of CPLR 205(a) or 205-a." ***U.S. Bank N.A. v. Santos*, 2023 N.Y. Slip Op. 03942, Second Dept 7-26-23**

## FORECLOSURE, CIVIL PROCEDURE.

PURSUANT TO THE FORECLOSURE ABUSE PREVENTION ACT (FAPA) THE BANK IS ESTOPPED FROM CLAIMING (1) THE VOLUNTARY DISCONTINUANCE STOPPED THE RUNNING OF THE STATUTE OF LIMITATIONS, AND (2) THE DEBT WAS NOT ACCELERATED BECAUSE THE BANK DID NOT HAVE STANDING WHEN THE FORECLOSURE ACTION WAS BROUGHT.

The Second Department, reversing Supreme Court, determined plaintiff bank was estopped pursuant to the Foreclosure Abuse Prevention Act (FAPA) from claiming the voluntary discontinuance of the action stopped the running of the statute of limitations. The bank was also estopped by the FAPA from claiming the mortgage debt was not validly accelerated because the bank did not have standing when the foreclosure action was commenced: "[T]he plaintiff ... contends that it raised a triable issue of fact because the voluntary discontinuance of the 2008 action revoked its acceleration of the mortgage debt in that action and, thus, the instant action is timely. The plaintiff also contends that the instant action is timely because it did not have standing to commence the 2008 action, and, therefore, the mortgage debt was not validly accelerated by the commencement of that action. ... [U]nder the recently enacted Foreclosure Abuse Prevention Act (... hereinafter FAPA), the voluntary discontinuance of the 2008 action did not 'in form or effect, waive, postpone, cancel, toll, extend, revive or reset the limitations period to commence an action and to interpose a claim, unless expressly prescribed by statute' ... . Also, under FAPA, the plaintiff is estopped from asserting that the debt was not validly accelerated by the commencement of the 2008 action based on its lack of standing, and that, therefore, the instant action is timely. CPLR 213(4), as amended by FAPA, added paragraph (a), which provides that '[i]n any action on an instrument described under this subdivision, if the statute of limitations is raised as a defense, and if that defense is based on a claim that the instrument at issue was accelerated prior to, or by way of commencement of a prior action, a plaintiff shall be estopped from asserting that the instrument was not validly accelerated, unless the prior action was dismissed based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated.' Here, since the 2008 action was voluntarily discontinued, and therefore was not 'dismissed based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated,' the plaintiff is estopped under FAPA from asserting that the debt was not validly accelerated by the commencement of the 2008 action based on the plaintiff's lack of standing ...". ***Deutsche Bank Natl. Trust Co. v. Wong*, 2023 N.Y. Slip Op. 03908, Second Dept 7-26-23**

## FORECLOSURE, REAL ESTATE.

CAVEAT EMPTOR (BUYER BEWARE) DOES NOT APPLY TO JUDICIAL FORECLOSURE SALES; HERE THE BANK DID NOT DISCLOSE THE EXISTENCE OF A SENIOR MORTGAGE; SALE SET ASIDE AND DOWN PAYMENT RETURNED.

The Second Department, reversing Supreme Court, determined the foreclosure judicial sale should have been set aside because plaintiff bank failed to disclose the existence of a senior mortgage: " 'The rule that a buyer must protect himself [or herself] against undisclosed defects does

not apply in all strictness to a purchaser at a judicial sale' ... . '[A] sale of land in the haste and confusion of an auction room is not governed by the strict rules applicable to formal contracts made with deliberation after ample opportunity to investigate and inquire' ... . 'As a general rule, a purchaser at a foreclosure sale is entitled to a good, marketable title' ... . '[A] purchaser at a judicial sale should not be compelled by the courts to accept a doubtful title,' and 'if it was bad or doubtful, he [or she] should, on his [or her] application, be relieved from completing the purchase' ... . Accordingly, since the plaintiff failed to disclose the existence of the senior mortgage at the time of sale, or otherwise, the Supreme Court improvidently exercised its discretion in denying those branches of the nonparties' motion which were to set aside the foreclosure sale and to direct the referee to return [the buyer's] down payment." ***Wells Fargo Bank, N.A. v. Schepisi*, 2023 N.Y. Slip Op. 03943, Second Dept 7-26-23**

## FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

MAILING THE NOTICE OF FORECLOSURE TO BOTH BORROWERS IN THE SAME ENVELOPE IS A VIOLATION OF RPAPL 1304 REQUIRING DENIAL OF THE BANK'S SUMMARY JUDGMENT MOTION.

The Second Department, reversing Supreme Court, determined the bank's motion for summary judgment in this foreclosure action should not have been granted. The bank mailed the notice of foreclosure to both borrowers in the same envelope, a violation of RPAPL 1304: "[T]he defendants are both borrowers for purposes of RPAPL 1304 and, thus, were each entitled to RPAPL 1304 notice ... . Although both defendants were entitled to RPAPL 1304 notice, the plaintiff failed to establish that it sent a 90-day notice individually addressed to each defendant in separate envelopes, as required by the statute ... . Rather, as the plaintiff concedes, the notices were mailed in a single envelope jointly to both defendants. Since the plaintiff failed to establish, prima facie, its strict compliance with RPAPL 1304, the Supreme Court should have denied those branches of its motion which were for summary judgment ...". ***Deutsche Bank Natl. Trust Co. v. Hennessy*, 2023 N.Y. Slip Op. 03907, Second Dept 7-23-26**

## PERSONAL INJURY, EVIDENCE.

IN THIS SLIP AND FALL CASE, THE JURY PROPERLY FOUND THE LANDLORD NEGLIGENTLY FAILED TO MAINTAIN A HANDRAIL BUT THE LOOSE HANDRAIL WAS NOT A PROXIMATE CAUSE OF THE FALL.

The Second Department, over a dissent, determined the jury in this slip and fall case properly rejected plaintiff's testimony because it was inconsistent. The jury found that the landlord negligently failed to maintain a handrail which had become loose, but that the loose handrail was not a proximate cause of plaintiff's fall: "Given the nature of the plaintiff's testimony, there is no basis to disturb the jury's determination. 'Where, as here, 'there is a reasonable view of the evidence under which it is not logically impossible to reconcile a finding of negligence but no proximate cause, it will be presumed that, in returning such a verdict, the jury adopted that view' ... . Moreover, the jury was not required to accept the testimony of the plaintiff's expert to the exclusion of the facts and circumstances provided by other testimony and evidence—including the plaintiff's own inconsistent version of the accident ... . Although the plaintiff's expert opined that the proximate cause of the accident was the loose handrail, the expert admitted at trial that the plaintiff's testimony that she was disposing of a bag of garbage prior to the accident was not included in his report. Thus, the jury was free to reject the opinion proffered by the plaintiff's expert despite the absence of a defendant's expert." ***Galeano v. Giambrone*, 2023 N.Y. Slip Op. 03909, Second Dept 7-26-23**

## REAL ESTATE, CONTRACT LAW.

THE BUYER WAS NOTIFIED TIME WAS OF THE ESSENCE IN THIS REAL ESTATE DEAL AND WAS GIVEN A REASONABLE TIME IN WHICH TO CLOSE; THEREFORE THE BUYER WAS NOT ENTITLED TO SPECIFIC PERFORMANCE AND THE SELLERS WERE ENTITLED TO THE DOWN PAYMENT AS LIQUIDATED DAMAGES.

The Second Department, reversing Supreme Court, determined the buyer in this real-estate deal could not demand specific performance because he was notified time was of the essence and was provided with a reasonable time within which to close. The sellers were entitled to keep the down payment as liquidated damages: "[T]he buyer does not have a cause of action for specific performance. Although time was not made of the essence in the contract, the defendants subsequently provided valid notice that time was of the essence insofar as the notice: (1) gave clear, distinct, and unequivocal notice that time was of the essence, (2) gave the buyer a reasonable time in which to act, and (3) informed the buyer that if he did not perform by the designated date, he would be considered in default ... . 'What constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case' ... . Although the determination of reasonableness is usually a question of fact, it may become a question of law where, as here, there is no dispute as to the facts ... . Contrary to the buyer's contention, he had a reasonable amount of time to perform, where, among other things, he had approximately 62 days to close from the initial closing date. Because he failed to close after the notice to cure was sent, the defendants were entitled, pursuant to the contract, to terminate the contract and retain the down payment as liquidated damages ... . Further, the parties' submissions clearly demonstrate that the buyer did not substantially perform his contractual obligations, and was not ready, willing, and able to perform his remaining obligations. His allegations that he remained ready, willing, and able to close and had fulfilled all of his obligations under the contract are bare legal conclusions, which are not presumed to be true ...". ***Herman v. 818 Woodward, LLC*, 2023 N.Y. Slip Op. 03912, Second Dept 7-26-23**

# THIRD DEPARTMENT

## CRIMINAL LAW,

PETITIONER SEX OFFENDER'S ABSCONDING FROM SUPERVISION IS A NON-TECHNICAL VIOLATION OF PAROLE AUTHORIZING REINCARCERATION FOR 30 MONTHS.

The Third Department, reversing Supreme Court, determined petitioner committed a non-technical violation of his parole (absconding from supervision) for which he could be incarcerated for 30 months. Supreme Court had determined petitioner had committed a technical violation for which he could be incarcerated for only 15 days: "[P]etitioner was released to postrelease supervision on August 4, 2020. On August 11, 2020, petitioner was charged with violating various conditions of release, including that he not abscond from supervision, and a parole warrant was issued. In March 2021, the Department of Corrections and Community Supervision (hereinafter DOCCS) was advised that petitioner had been arrested and charged with assault. DOCCS then issued a supplemental parole violation notice that included various new violation charges, including that petitioner had committed an assault while on release. In April 2021, a final parole revocation hearing was held during which petitioner pleaded guilty to the charge of absconding from supervision in satisfaction of all the violations with which he was charged. Pursuant to the terms of the agreement, the Administrative Law Judge (hereinafter ALJ) ordered that petitioner be held for 30 months. * * * ... [P]etitioner's condition of parole prohibiting him from absconding — that he admitted to violating, prescribing petitioner from 'intentionally avoiding supervision by failing to maintain contact with my [p]arole [o]fficer and failing to reside at my approved residence' — is in line with the Legislature's concerns regarding sex offenders released on parole and is also reasonably related to petitioner's sex offense and efforts to protect the public from the commission of a repeat of that offense so as to warrant classifying him as a non-technical offender under Executive Law § 259 (7) (b)." ***People ex rel. Marrero v. Stanford*, 2023 N.Y. Slip Op. 03964, Third Dept 7-27-23**

## CRIMINAL LAW, APPEALS.

THE APPEAL WAIVER WAS INVALID; ALTHOUGH DEFENDANT WAS SUFFERING FROM MENTAL ILLNESS AND WAS APPARENTLY ATTEMPTING TO COMMIT SUICIDE WHEN HE CAUSED THE TRAFFIC ACCIDENT RESULTING IN THE ASSAULT CHARGE, THE MAJORITY CONCLUDED THE SEVEN-YEAR SENTENCE FOR ASSAULT (THE MAXIMUM) SHOULD NOT BE REDUCED; A TWO-JUSTICE DISSENT ARGUED THE SENTENCE SHOULD BE REDUCED; A CONCURRENCE ARGUED THE APPEAL WAIVER WAS VALID.

The Third Department, over a two-justice dissent and a concurrence, determined (1) the waiver of appeal was invalid, and (2) the sentence was not harsh and excessive. The dissenters argued defendant exhibited signs of mental illness and the traffic accident which was the basis of the assault charge was a suicide attempt, warranting a lesser sentence and rehabilitative measures. The concurrence argued the appeal waiver was valid: "The written appeal waiver executed by defendant during the plea allocution is overly broad in several respects, as it purported to create an absolute bar to a direct appeal by indicating that the appeal waiver 'mark[s] the end of [his] case' and precludes him from pursuing collateral relief 'in any state or federal court' ... . Although County Court's brief oral allocution advised defendant that certain appellate rights survive the waiver, this was not sufficient to cure the defects in the written waiver ... and did not establish that he understood that some collateral and federal review survives the waiver ... Consequently, defendant did not knowingly, intelligently and voluntarily waive the right to appeal ... . **From the dissent:** ... [I]t is evident that defendant's criminal conduct was not borne of a malicious intent nor of a conscious choice to act with reckless disregard for the lives of others; rather, the entirety of his conduct appears attributable to his profound mental illness, which was no longer adequately controlled at the time of the incident and casts serious doubt on the level of his culpability. Moreover, the record reveals that, at the time of the incident, defendant was 26 years of age, had no history of prior unlawful conduct and had been a productive member of society, as demonstrated by, among other things, his participation in a reserve officer training corps program while attending college ... . Under these circumstances, we find that the societal benefits of deterrence and punishment achieved through a seven-year term of imprisonment, which is the maximum legal sentence for his conviction, are minimal and, more importantly, they are far outweighed by the rehabilitative considerations that support reducing this specific defendant's sentence ...". ***People v. Appiah*, 2023 N.Y. Slip Op. 03955, Third Dept 7-27-23**

## EMPLOYMENT LAW, ADMINISTRATIVE LAW.

ALTHOUGH PETITIONER USING HIS CELL PHONE WHILE ON DUTY TO SEND EXPLICIT MESSAGES VIOLATED THE EMPLOYEE'S MANUAL AND WARRANTED PUNISHMENT, TERMINATION WAS TOO SEVERE A PENALTY.

The Third Department, modifying Supreme Court, over a dissent, determined that petitioner, a civil service employee, was properly found to have violated the Employee's Manual by using his cell phone while on duty to send explicit messages. However, termination was deemed too severe a penalty, and the matter was remitted. The dissent argued termination was proper: " 'Judicial review of an administrative penalty is limited to whether, in light of all the relevant circumstances, the penalty is so disproportionate to the charged offenses as to shock one's sense of fairness' ... . Petitioner was employed by respondent for 21 years at the time of the hearing and had a generally unremarkable disciplinary history.... Further, there is no indication that the messages were disseminated to any of his colleagues or subordinates or that there was a significant impact on the performance of his duties. To the contrary, the record establishes that petitioner consistently received strong evaluations for his work performance. Further, the record establishes that petitioner expressed remorse to respondent's investigators, noting that he was not proud of his conduct, which he characterized as 'unprofessional and even inappropriate.' Under these circumstances, we find that the penalty of termination 'is so disproportionate to the offense and shockingly unfair as to constitute an abuse of discretion as a matter

of law' and, accordingly, we remit the matter for consideration of a less severe penalty ...". ***Matter of Brooks v. New York State Dept. of Corr. & Community Supervision*, 2023 N.Y. Slip Op. 03962, Third Dept 7-27-23**

## MEDICAL MALPRACTICE, EVIDENCE.

DEFENDANTS' EXPERTS' CLAIMS THAT DEFENDANTS PROVIDED PROPER CARE AND ADVICE IN THIS MEDICAL MALPRACTICE ACTION WERE BELIED BY THE MEDICAL RECORDS AS EXPLAINED BY PLAINTIFF'S EXPERTS; QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS.

The Third Department, reversing Supreme Court, determined plaintiff's experts in this medical malpractice action raised questions of fact about the negligence of each defendant. The decision is fact-specific and far too detailed to fairly summarize, but it provides insight into when expert affidavits are deemed sufficiently substantive to raise questions of fact: "[W]hen viewed in a light most favorable to plaintiff, we find that the record raises several questions of fact as to whether each defendant satisfied the standard of care applicable to him or it ... . Despite that each defendant and their respective experts opined that decedent was not presenting with the signs or symptoms of a stroke, this is belied by the medical record, which establishes that decedent was experiencing a stroke and/or vertebral artery dissection during the relevant time period that they treated decedent and presented with the 'classic' symptoms associated with a stroke. At a minimum, these differing opinions create a question of fact, which plaintiff's experts highlighted in so far that each defendant deviated from the standard of care by failing to refer decedent to a specialist or neurologist ...". ***McCarthy v. Town of Massena, N.Y. (Massena Mem. Hosp.)*, 2023 N.Y. Slip Op. 03959, Third Dept 7-27-23**

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