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COURT OF APPEALS

CRIMINAL LAW, EVIDENCE, APPEALS.

THE TRAFFIC STOP WAS BASED ON A COMPUTER-GENERATED "SIMILARITY HIT;" AT THE SUPPRESSION HEARING THE PEOPLE DID NOT MEET THEIR BURDEN OF GOING FORWARD BECAUSE THE BASIS OF THE "SIMILARITY HIT" WAS NOT DEMONSTRATED; THIS PRESENTED A QUESTION OF LAW REVIEWABLE BY THE COURT OF APPEALS.

The Court of Appeals, in a full-fledged opinion by Judge Feinman, reversing the Appellate Division, determined the People did not meet their burden of going forward at the suppression hearing because they did not make a minimum showing of reasonable suspicion for the traffic stop. Whether the People meet that burden has been deemed a question of law which the Court of Appeals can address. Whether a stop was justified by reasonable suspicion is usually a mixed law and fact question which the Court of Appeals cannot review. Here the traffic stop was based on a so-called "similarity hit" generated by the Department of Motor Vehicles database. A "similarity hit" apparently indicates some possible connection between the registered owner of a vehicle and an outstanding warrant. But, at the suppression hearing, the People did not present any evidence of the basis for the "similarity hit:" "According to the officer, a 'similarity hit' is generated 'based on the name of the registered owner, the date of birth[,] and other aliases.' He testified that the system considers 'certain parameters' when identifying 'similarity hits,' but he did not know how the Department of Motor Vehicles set those parameters. Nor did he testify as to any specifics of this match. ... [T]he officer did not think that the driver was the subject of the "similarity hit" because the driver was female and the registered owner was male. As the officer stepped around the vehicle to look at the registration and inspection stickers, he spotted a handgun on the floor under the front passenger seat, in which defendant was sitting. After defendant was arrested, the officer checked the MDT [mobile data terminal] information and discovered that the person with the warrant did not, in fact, match the vehicle's registered owner or anyone else in the vehicle. The officer did not testify as to the name, date of birth, or address of the registered owner, or provide the specific identifying facts of the person set forth in the arrest warrant. ... While information generated by running a license-plate number through a government database may provide police with reasonable suspicion to stop a vehicle ..., the information's sufficiency to establish reasonable suspicion is not presumed ... . Thus, when police stop a vehicle based solely on such information, and the defendant, as here, challenges its sufficiency, the People must present evidence of the content of the information ...".

***People v. Balkman*, 2020 N.Y. Slip Op. 06838, CtApp 11-19-20**

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW, EVIDENCE.

EVEN IF THE OFFICER WERE WRONG ABOUT WHETHER A NON-FUNCTIONING CENTER BRAKE LIGHT VIOLATES THE VEHICLE AND TRAFFIC LAW, THE OFFICER'S INTERPRETATION OF THE LAW WAS OBJECTIVELY REASONABLE; THEREFORE THE STOP WAS VALID AND THE SUPPRESSION MOTION SHOULD NOT HAVE BEEN GRANTED.

The Court of Appeals, reversing the Appellate Term, over a concurring memorandum, a concurring opinion, and two dissenting opinions, determined the police officer who stopped defendant reasonably believed the non-functioning center brake light violated the Vehicle and Traffic Law. Therefore the stop was valid and the DWI evidence should not have been suppressed. The Vehicle and Traffic Law requires at least two functioning brake lights. Here there were two functioning lights but the center brake light was not working: "We conclude that the officer's interpretation of the Vehicle and Traffic Law was objectively reasonable. Vehicle and Traffic Law § 375 (40) (b) mandates that motor vehicles manufactured after a certain date be 'equipped with at least two stop lamps, one on each side, each of which shall display a red to amber light visible at least five hundred feet from the rear of the vehicle when the brake of such vehicle is applied.' Vehicle and Traffic Law § 376 (1) (a) prohibits, in relevant part, (1) operating a vehicle 'during the period from one-half hour after sunset to one-half hour before sunrise, unless such vehicle is equipped with lamps of a type approved by the commissioner which are lighted and in good working condition'; and (2) operating a vehicle at any time 'unless such vehicle is equipped with signaling devices and reflectors of a type approved by the commissioner which are in good working condition.' Vehicle and Traffic Law § 375 (19), in turn, prohibits the operation of a motor vehicle on highways or streets if the vehicle 'is defectively equipped and lighted.' Taken together, these provisions could reasonably be read to require that all lamps and signaling

devices be in good working condition, and that all equipment and lighting be non-defective, regardless of whether a vehicle is actually required to be equipped with those lamps, signaling devices, equipment, or lights. Even assuming the officer was in fact mistaken on the law, it was nevertheless objectively reasonable to conclude that defendant's non-functioning center brake light violated the Vehicle and Traffic Law ... . Because any error of law by the officer was reasonable, there was probable cause justifying the stop ...". ***People v. Pena*, 2020 N.Y. Slip Op. 06836, CtApp 11-19-20**

FIRST DEPARTMENT

ASSOCIATIONS, CONDOMINIUMS, ATTORNEYS. REAL PROPERTY LAW, CORPORATION LAW.

IN THE CONTEXT OF A LAWSUIT BY THE BOARD MEMBERS OF AN UNINCORPORATED CONDOMINIUM ASSOCIATION AGAINST THE FORMER PRESIDENT OF THE BOARD, NEITHER THE REAL PROPERTY LAW (RPL) NOR THE BUSINESS CORPORATION LAW (BCL) APPLIES TO THE FORMER PRESIDENT'S DEMAND FOR ATTORNEY'S FEES ASSOCIATED WITH DEFENDING THE ACTION; THE BY-LAWS AND THE COMMON LAW RULE THAT THE PARTIES ARE RESPONSIBLE FOR THEIR OWN ATTORNEY'S FEES CONTROL.

The First Department, in a full-fledged opinion by Justice Gische, reversing Supreme Court, in a matter of first impression, determined the defendant, the former president of the condominium board, is not entitled to indemnification (attorney's fees) for her costs in defending a lawsuit brought by the board of managers of the unincorporated condominium association. The lawsuit alleged defendant misappropriated the insurance proceeds paid after a fire in the condominium building. The First Department held the by-laws and the common law rule that the parties are responsible for their own attorney's fees control. The court rejected the application of provisions of the Real Property Law (RPL) and the Business Corporation Law (BCL) with respect to indemnification in the context of an unincorporated condominium association: "Neither the common law, nor BCL § 624(e) by analogy, provide the right to recoup attorney's fees to a board member successfully defending against a derivative action. BCL § 626(e) is not an indemnification provision. Rather, it permits legal fees to be paid to an owner who successfully asserts the interest of an entity 'when the management of the entity fails to act to protect that interest' ... . Consequently, 'an award of attorneys' fees in a shareholders' derivative suit is to reimburse the plaintiff for expenses incurred on the corporation's behalf' ... . The corporation is responsible for paying the legal fees, but only where the corporation benefits from the litigation ... . Neither the BCL nor the common law provide a board member with a reciprocal right to recover legal fees for defending against an unsuccessful derivative action, at least not in the absence of such authorization in the bylaws or some other statutory authority. In this respect, ... In the absence of any authority permitting [defendant] to recoup her legal fees, the general common law rule applies, that 'attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule' ... . [Defendant], alone, is responsible for her legal fees." ***Board of Mgrs. of the 28 Cliff St. Condominium v. Maguire*, 2020 N.Y. Slip Op. 06844, First Dept 11-19-20**

ATTORNEYS, PRIVILEGE, REAL ESTATE.

"AT ISSUE" WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE EXPLAINED; AS LONG AS THE PRIVILEGED MATERIAL IS NOT USED AS PROOF, IT IS NOT "AT ISSUE."

The First Department, reversing Supreme Court, determined the attorney-client privilege was not waived by the appellants' affirmative defense because the privileged material will not be used to prove the defense. The facts are not described but the lawsuit concerns the purchase of a building and the rent and regulatory status of plaintiffs' apartments: "An 'at issue' waiver of privilege occurs where a party affirmatively places the subject matter of its own privileged communication at issue in the litigation so that invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege and application of the privilege would deprive the adversary of vital information. However, the fact that a privileged communication contains information relevant to the issues the parties are litigating does not, without more, place the contents of the privileged communication "at issue" in the lawsuit ... . An 'at issue' waiver occurs when a party has asserted a claim or defense that it intends to prove by the use of the privileged material ... . Here, appellants represent that they will not use the due diligence report to prove their claim of lack of willfulness and/or knowledge of the rent regulatory status of plaintiffs' apartments. In this situation, appellants' willfulness is presumed; and plaintiffs and seller defendants have adequate other sources of evidence to demonstrate whether or not appellants' affirmative defense and cross claims have merit." ***Alekna v. 207-217 W. 110 Portfolio Owner LLC*, 2020 N.Y. Slip Op. 06841, First Dept 11-19-20**

INSURANCE LAW, NEGLIGENCE.

PLAINTIFF ALLEGED A VALID NEGLIGENCE CAUSE OF ACTION AGAINST DEFENDANT INSURANCE BROKER FOR FAILURE TO NOTIFY THE EXCESS CARRIER OF A CLAIM AGAINST PLAINTIFF; IT WAS ALLEGED THAT PLAINTIFF ROUTINELY NOTIFIED DEFENDANT BROKER OF ANY CLAIMS AND DEFENDANT BROKER ROUTINELY NOTIFIED THE AFFECTED CARRIERS, GIVING RISE TO A DUTY TO DO SO.

The First Department, reversing Supreme Court, determined the complaint against the insurance broker, T & H, stated a cause of action in negligence based on T & H's failure to notify the excess carrier of its potential exposure to a claim: "Under ordinary circumstances, it is understood that 'insurance brokers have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so' ... . Nevertheless, if an insured asks the broker to take on additional responsibilities above and beyond procuring specifically requested coverage, and the broker agrees to do so, a duty is created that the broker must execute with reasonable care ... . Thus, we have held that a duty was imposed on a broker to notify the appropriate primary and excess carriers of a potential claim where there was 'evidence that as a matter of routine [the insured] referred all questions regarding its insurance claims to [the broker] and [the broker] handled all [the insured]'s insurance needs, including referring its claims to insurers' ... . Here, plaintiff alleged that it and T&H had established a course of conduct whereby plaintiff would notify the latter of claims against it and T&H would inform the carriers, and that T&H acknowledged that plaintiff relied on it to carry out this function. Indeed, plaintiff alleges, in this case T&H affirmatively represented that it had placed both the primary and the excess carrier on notice. Accordingly, plaintiff has stated a cause of action for negligence predicated on T&H's alleged failure to advise the excess carrier of its potential exposure." ***Martin Assoc., Inc. v. Illinois Natl. Ins. Co.*, 2020 N.Y. Slip Op. 06860, First Dept 11-19-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

EVIDENCE THE LADDER SLIPPED OUT FROM UNDER PLAINTIFF WAS SUFFICIENT TO WARRANT SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION; PLAINTIFF WAS NOT REQUIRED TO SHOW THE LADDER WAS DEFECTIVE.

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on the Labor Law § 240(1) cause of action should have been granted. Plaintiff was injured when his ladder slipped out from under him. Plaintiff did not have to show the ladder was defective: "Plaintiff's testimony that the unsecured ladder slipped out from under him established prima facie his entitlement to summary judgment on the Labor Law § 240(1) claim ..., and defendants failed to raise an issue of fact in opposition. Their contention that an issue of fact exists as to whether the ladder was appropriate to perform the work is unavailing. Plaintiff was not required to show that the ladder was defective ...". ***Cabrera v. 65 Park W. Realty, LLC*, 2020 N.Y. Slip Op. 06702, First Dept 11-17-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

A HEAVY STONE SLAB SLIPPED OUT OF A SLING AS IT WAS BEING HOISTED AND FELL ON PLAINTIFF; PLAINTIFF DID NOT HAVE TO SHOW THE EQUIPMENT WAS DEFECTIVE AND DID NOT HAVE TO SHOW HE AND A CO-WORKER WERE NOT NEGLIGENT; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law § 240(1) claim in this falling object case should have been granted. A heavy stone slab which was being hoisted slipped out of a sling and fell on plaintiff. Plaintiff did not have to show the equipment was defective and did not have to show freedom from comparative fault: "Labor Law § 240(1) imposes on owners, general contractors, and their agents a nondelegable duty to provide safety devices to protect against elevation-related hazards inherent in construction, and they will be absolutely liable for any violation that proximately causes injury regardless whether they supervised or controlled the work ... . The statute is violated when an object that is improperly hoisted or inadequately secured falls ... . Because the sling proved inadequate to secure the slab against falling, the statute was violated ... . Defendants' contention that because the hoist and slings had sufficient load capacity to hoist the slab and were not broken or defective, plaintiff was required to demonstrate how the slab became unsecured, is unavailing. Either the sling itself or the manner in which it was used to secure the slab was inadequate and failed to provide proper protection, and plaintiff was not required to demonstrate how or why it failed to support the slab ... . Any failure by plaintiff to properly secure the slab with the straps would at most be comparative negligence which is not a defense to Labor Law § 240(1) ... . Furthermore, any failure by his coworker to properly secure the slab with the straps was not so extraordinary or removed from defendants' duty to provide an adequate safety device so as to constitute a superseding, intervening event breaking the chain of causation ...". ***Gallegos v. Bridge Land Vestry, LLC*, 2020 N.Y. Slip Op. 06854, First Dept 11-19-20**

MENTAL HYGIENE LAW, EVIDENCE, JUDGES.

A FINDING DEFENDANT SUFFERS FROM A MENTAL ABNORMALITY CANNOT BE BASED SOLELY ON A FINDING DEFENDANT SUFFERS FROM ANTI-SOCIAL PERSONALITY DISORDER (ASPD); REFUSAL OF DEFENDANT'S REQUEST FOR A JURY INSTRUCTION TO THAT EFFECT WAS REVERSIBLE ERROR; DEFENDANT'S MOTION TO SET ASIDE THE VERDICT ADJUDICATING HIM A SEX OFFENDER REQUIRING CIVIL MANAGEMENT SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined the jury in this Mental Hygiene Law sex-offender civil-commitment trial should have been instructed that the anti-social personality disorder (ASPD) diagnosis cannot, standing alone, support a finding defendant has a mental abnormality as defined in the Mental Hygiene Law. The fact that the Pattern Jury Instructions do not include an instruction on this issue is not a justification for failing to give the instruction: "Mental Hygiene Law 10.03 defines 'Mental abnormality' as a 'congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct.' In Matter of State of New York v. Donald DD (24 NY3d 174 [2014]), the Court of Appeals expressly held: 'evidence that a respondent suffers from antisocial personality disorder cannot be used to support a finding that he has a mental abnormality as defined by Mental Hygiene Law § 10.03(i), when it is not accompanied by any other diagnosis of mental abnormality' ... . Where [as here] the jury is asked to parse through multiple psychological diagnoses, which include ASPD, the jury should be instructed that ASPD cannot be the sole basis for its finding that someone suffers from a mental abnormality. This is to ensure that the jury's finding conforms to the applicable law. Absent such an instruction, the jury may mistakenly find mental abnormality based solely on ASPD without the requisite finding of an additional diagnosis of a condition or disorder that, combined with ASPD, may predispose one to commit a sex offense." ***Matter of State of New York v. David S.*, 2020 N.Y. Slip Op. 06876, First Dept 11-19-20**

PERSONAL INJURY.

PLAINTIFF, WHO HAD PASSED OUT AT A CONCERT, REFUSED ASSISTANCE IN WALKING TO THE BACK OF THE THEATER SO THE EMERGENCY MEDICAL TECHNICIAN COULD CHECK HIS BLOOD PRESSURE AND PULSE; WHEN HE ATTEMPTED TO WALK TO THE BACK OF THE THEATER HE PASSED OUT AGAIN AND FELL, HIS FACE HITTING THE FLOOR; THE DEFENDANTS DID NOT HAVE A DUTY TO ASSIST PLAINTIFF AFTER HE REFUSED THEIR HELP AND THEIR MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined the causes of action against the security company, Beacon, and the EMT provider, Transcare, should have been dismissed. Plaintiff passed out in his seat at a concert and defendants responded. The medical technician found that plaintiff was fully conscious and alert. Because the music was so loud the medical technician asked plaintiff to go to the back of the theater to check his blood pressure and pulse. Plaintiff was offered assistance in walking but he refused. He passed out again and fell with his face hitting the floor: "Any duty Beacon or Transcare owed to plaintiff to assist him in exiting the theater terminated when he refused such assistance. It is well settled that a competent adult has the right to determine the course of his or her own medical treatment, including declining treatment ... . Plaintiff does not dispute that he refused assistance in standing or ambulating. Further, the testimony was that the EMT technician assessed plaintiff as alert and oriented as he left his seat to exit the theater. Given this, the complaint should have been dismissed in its entirety as to defendants Beacon and Transcare ...". ***Fornabaio v. Beacon Broadway Co., LLC*, 2020 N.Y. Slip Op. 06853, First Dept 11-19-20**

PERSONAL INJURY, EMPLOYMENT LAW.

SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED TO THE CLUB AND THE SECURITY COMPANY IN THIS THIRD PARTY ASSAULT CASE; THERE WERE QUESTIONS OF FACT ABOUT WHETHER THE CLUB COULD BE HELD RESPONSIBLE FOR CRIMINAL ACTIVITY IN THE STREET IN FRONT OF THE CLUB, WHETHER THE CLUB WAS THE SPECIAL EMPLOYER OF THE BOUNCERS AND THEREFORE SUBJECT TO VICARIOUS LIABILITY, AND WHETHER THERE WAS DRAM SHOP ACT LIABILITY.

The First Department, reversing Supreme Court, determined the defendant club (Sin City) and security company (Emissary) were not entitled to summary judgment in this third-party assault case. The facts are not described, but apparently plaintiffs were assaulted on the street in front of the club. There was a question of fact whether Sin City was a special employer and therefore vicariously liable for the actions of Emissary's bouncers. The court noted, with respect to the Dram Shop Act (General Obligations Law § 11-101) cause of action, the defendants did not demonstrate the assailants were not served alcohol while visibly intoxicated and did not demonstrate the sale of alcohol to the assailants had not connection to the assault: "Issues of fact remain as to defendants' control of the street in front of the club, where plaintiffs' assault occurred ... ; whether defendants could or should have foreseen plaintiffs' assault, given not only the events that transpired in the club prior to the assault ... , but also the acts of violent or criminal conduct at the club predating plaintiffs' assault ... and, whether Sin City was the special employer, and is therefore vicariously liable for the acts and omissions, of Emissary's

bouncers, who provided security for Sin City on the night in question and allegedly assaulted the plaintiffs ...". ***Ballard v. Sin City Entertainment Corp.*, 2020 N.Y. Slip Op. 06842, First Dept 11-19-20**

SECOND DEPARTMENT

ACCOUNT STATED, CONTRACT LAW, BANKING LAW, EVIDENCE.

THE BANK DID NOT PRESENT EVIDENCE THE CREDIT CARD BILLING STATEMENTS AND THE AMENDMENTS TO THE CREDIT CARD AGREEMENT WERE MAILED TO THE DEFENDANT; THE BANK'S MOTION FOR SUMMARY JUDGMENT ON THE BREACH OF CONTRACT AND ACCOUNT STATED CAUSES OF ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff bank's motion for summary judgment on the breach of contract and account stated causes of action should not have been granted. The bank alleged plaintiff had not paid sums due on her credit card account. But the bank failed to demonstrate the billings statements and the amendments to the credit care agreement were mailed to the defendant: "... [T]he Stephenson affidavit laid a proper foundation for admission as business records of the amendments to the credit card agreement and the monthly billing statements (see CPLR 4518[a] ...). However, no evidence that those documents were mailed to the defendant was provided. Stephenson did not attest to personal knowledge of the mailings or of a standard office practice and procedure designed to ensure that items were properly addressed and mailed, and the business records did not evince the mailing of the account documents ... . Absent evidence that the billing statements were mailed to the defendant, the plaintiff failed to establish its prima facie entitlement to judgment as a matter of law on the cause of action to recover on an account stated ... . Similarly, absent evidence that the amendments to the credit card agreement were mailed to the defendant, the plaintiff failed to establish its prima facie entitlement to judgment as a matter of law on the breach of contract cause of action ...". ***Bank of Am., N.A. v. Ball*, 2020 N.Y. Slip Op. 06740, Second Dept 11-18-20**

ARBITRATION, EMPLOYMENT LAW, MEDICAID.

THE ARBITRATOR'S AWARD, REINSTATING NURSING HOME EMPLOYEES WHO WERE FIRED AND INDICTED FOR ALLEGEDLY IGNORING A RESIDENT IN RESPIRATORY DISTRESS, VIOLATED PUBLIC POLICY.

The Second Department, reversing Supreme Court, determined the arbitrator's award, reinstating the employees to their former positions as care providers at a nursing home, violated public policy. The employees were fired and indicted for allegedly ignoring an alarm indicating a resident on a ventilator was in distress: "... [T]he record reflects that after the employees were indicted, inter alia, on felony charges, OMIG [Office of Medicaid Inspector General] notified the employees that they were excluded 'from participation in the New York State Medicaid program based on New York State regulations authorizing the immediate exclusion of a person who has been charged with committing an act which would be a felony under the laws of New York and which relates to or results from,' among other things, 'the furnishing of or billing for medical care, services or supplies.' Pursuant to 18 NYCRR 515.5(c), '[a] person who is excluded from the program cannot be involved in any activity relating to furnishing medical care, services or supplies to recipients of medical assistance for which claims are submitted to the program, or relating to claiming or receiving payment for medical care, services or supplies during the period.' The regulations also preclude reimbursement for medical care, services, or supplies provided by an excluded person (see 18 NYCRR 515.5[b]), and the Department of Health's published Medicaid Update instructs Medicaid providers 'to ensure that they do not employ, or are affiliated with, any individual who has been excluded from either the Medicare or the Medicaid program' ... . There is no evidence in the record that the exclusion was vacated. Therefore, the final result of the arbitrator's award, reinstating the employees to their former positions, creates an explicit conflict with the subject regulations and their attendant policy concerns ...". ***Civil Serv. Employees Assn., A.F.S.C.M.E. Local 1000, A.F.L.-C.I.O. by its Local 830 v. Nassau Healthcare Corp.*, 2020 N.Y. Slip Op. 06777, Second Dept 11-18-20**

CIVIL PROCEDURE, PERSONAL INJURY.

THE 2019 MOTION TO RESTORE THE ACTION TO ACTIVE STATUS AFTER THE NOTE OF ISSUE WAS VACATED IN 2012 SHOULD HAVE BEEN GRANTED; LACHES DOES NOT APPLY WHERE THERE HAS BEEN NO SERVICE OF A 90-DAY DEMAND PURSUANT TO CPLR 3216.

The Second Department, reversing Supreme Court, determined plaintiff's motion to restore the traffic accident action to active status in 2019 after the note of issue had been vacated in 2012 should have been granted. The doctrine of laches does not apply where there has been not service of a 90-day demand pursuant to CPLR 3216: "CPLR 3404 does not apply to this pre-note of issue action ... . Further, there was neither a 90-day demand pursuant to CPLR 3216 ... , nor an order dismissing the complaint pursuant 22 NYCRR 202.27 ... . Moreover, '[t]he doctrine of laches does not provide [a] basis to dismiss a complaint where there has been no service of a 90-day demand pursuant to CPLR 3216(b), and where the case management devices of CPLR 3404 and 22 NYCRR 202.27 are inapplicable' ... . 'The procedural device of dismissing a complaint for un-

due delay is a legislative creation, and courts do not possess the inherent power to dismiss an action for general delay where the plaintiff has not been served with a 90-day demand to serve and file a note of issue pursuant to CPLR 3216(b)' ... . In the absence of a 90-day demand pursuant to CPLR 3216, the plaintiff's motion to restore the action to active status should have been granted ...". ***Guillebeaux v. Parrott*, 2020 N.Y. Slip Op. 06762, Second Dept 11-18-20**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

DEFENDANT SHOULD HAVE BEEN GRANTED A HEARING ON HIS MOTION TO VACATE HIS CONVICTION BY GUILTY PLEA ON INEFFECTIVE ASSISTANCE GROUNDS; DEFENDANT RAISED A QUESTION WHETHER DEFENSE COUNSEL SHOULD HAVE INFORMED HIM OF AN AFFIRMATIVE DEFENSE TO THE ROBBERY FIRST CHARGE.

The Second Department, reversing County Court, determined defendant was entitled to a hearing on his motion to vacate his conviction by guilty plea based on ineffective assistance of counsel. Defendant raised a question whether he should have been informed about an affirmative defense to robbery first degree, i.e., that the object displayed during the crime was not a loaded, operable weapon: "A defendant has the right to the effective assistance of counsel before deciding whether to plead guilty ... . That requirement is met under the New York State Constitution when defense counsel provides 'meaningful representation' ... . In cases asserting ineffective assistance of counsel in the context of a guilty plea, 'the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial, or that the outcome of the proceedings would have been different' ... . It is an affirmative defense to a charge of robbery in the first degree under Penal Law § 160.15(4) that the object displayed during the course of the crime 'was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged' ... . The defendant's averments in his affidavit in support of his motion, along with the PSR, were sufficient to warrant a hearing on the issue of whether his counsel was ineffective for failing to advise him of this potential affirmative defense to the charges to which he pleaded guilty ...". ***People v. Flinn*, 2020 N.Y. Slip Op. 06809, Second Dept 11-18-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE CONVICTION FOR GRAND LARCENY BY FALSE REPRESENTATION WAS NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE; THERE WAS NO EVIDENCE DEFENDANT RECEIVED ADDITIONAL FUNDS AFTER MAKING THE ALLEGED FALSE REPRESENTATION AND NO EVIDENCE DEFENDANT INTENDED TO APPROPRIATE THE FUNDS AT THE TIME THE ALLEGED FALSE REPRESENTATION WAS MADE.

The Second Department, reversing defendant's grand-larceny-by-false-representation conviction was against the weight of the evidence. There was no evidence defendant received any additional money after making the alleged false representation and no evidence defendant intended to appropriate the funds at the time the alleged false representation was made: "... [T]he complainant testified that she was unable to send large amounts of money to Peru and had asked the defendant to assist her with sending money to her family in Peru. She testified that on November 3, 2014, she gave the defendant $11,000 to $12,000 to transfer to her family in Peru and approximately $40 for his assistance. She testified that she accompanied the defendant to four different money transfer agencies. However, according to the complainant's testimony, she learned on November 4, 2014, that the money transfers did not go through due to an error she had made in the recipient's name. The complainant testified that the defendant was able to fix two of the transactions over the phone and agreed to meet her the next day, November 5, 2014, to go to the other two money transfer agencies (hereinafter the subject money transfer agencies) to correct the mistake in the recipient's name. She testified that the defendant did not meet her on November 5, 2014, she subsequently learned that her family never received the funds from the subject money transfer agencies, and the defendant had withdrawn the money without her permission. Business records from the subject money transfer agencies indicated that the transactions had been cancelled with the money refunded. Representatives from the subject money transfer agencies testified that their policies required cancellations to be done in person by the person who initiated the transaction. On appeal, the defendant contends that the evidence was legally insufficient to establish that he obtained the subject funds by means of a false representation and that he had the requisite intent not to perform at the time he made the representation that he would meet the complainant and help her fix the recipient's name on the transactions at the subject money transfer agencies." ***People v. Bravo*, 2020 N.Y. Slip Op. 06804, Second Dept 11-18-20**

FAMILY LAW, CIVIL PROCEDURE.

THE MATERNAL GRANDMOTHER HAD STANDING TO PETITION FOR VISITATION AFTER MOTHER'S DEATH; FAMILY COURT SHOULD NOT HAVE DENIED THE PETITION WITHOUT HOLDING A "BEST INTERESTS" HEARING.

The Second Department, reversing Family Court, determined the maternal grandparent had standing to petition for visitation after mother died. Because the grandparent had standing, Family Court should have held a "best interests" hearing rather than precluding the presentation of evidence and granting father's petition to deny the petition: "... [I]t is undisputed that the maternal grandparents have standing based upon the death of the child's mother. Since the maternal grandparents have standing, the Family Court should have proceeded to conduct a best interests determination based upon admissible evidence ... . Instead, the maternal grandparents were not permitted to present any evidence, no testimony was taken from

any of the parties, and no in camera interview with the child was conducted. We disagree with the court's determination to grant the father's application, in effect, to deny the petition and dismiss the proceeding without first conducting a hearing ...". ***Matter of Jafer v. Marasa*, 2020 N.Y. Slip Op. 06789, Second Dept 11-18-20**

FAMILY LAW, EVIDENCE, CONTRACT LAW.

THE CUSTODY ARRANGEMENTS SET FORTH IN A SETTLEMENT AGREEMENT SHOULD NOT HAVE BEEN MODIFIED IN THE ABSENCE OF A HEARING AND FAMILY COURT SHOULD NOT HAVE RELIED ON INADMISSIBLE EVIDENCE UNTESTED BY THE PARTIES.

The Second Department, reversing Family Court, determined the custody arrangements set forth in the settlement agreement should not have been modified in the absence of a hearing and the modification should not have been based upon inadmissible evidence not tested by either party: "... [T]he Supreme Court should not have granted, without a hearing, that branch of the defendant's motion which was to modify the terms of the parties' stipulation of settlement. Custody determinations should generally be made only after a full and plenary hearing ... . While the general right to a hearing in custody and visitation cases is not absolute, where 'facts material to the best interest analysis, and the circumstances surrounding such facts, remain in dispute,' a hearing is required … . Here, the record shows that there were disputed factual issues regarding the child's best interests, such that a hearing on the defendant's petition was necessary ... . In addition, decisions regarding child custody and parental access should be based on admissible evidence ... . Here, in making its determination, the Supreme Court improperly relied solely on statements and conclusions of witnesses whose opinions and credibility were untested by either party ...". ***Palazzola v. Palazzola*, 2020 N.Y. Slip Op. 06801, Second Dept 11-18-20**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

THE BANK'S EVIDENCE OF STANDING TO BRING THE FORECLOSURE ACTION WAS NOT SUPPORTED BY THE RECORDS ALLEGEDLY REVIEWED BY THE AFFIANT; THEREFORE THE EVIDENCE WAS HEARSAY AND THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff bank's motion for summary judgment in this foreclosure action should not have been granted because the evidence of standing to bring the action was deficient: "... [T]he plaintiff failed to meet its prima facie burden of establishing that it had standing to commence the action. In support of its motion, the plaintiff relied on the affidavit of Elizabeth Gonzales, an employee of the loan servicer. Gonzales averred that the plaintiff had been in possession of the note, which was endorsed in blank, since July 1, 2007, prior to the commencement of the action. Gonzales indicated that she had personal knowledge of the assertions set forth in her affidavit based upon, inter alia, her review of various business records. However, since the plaintiff failed to attach the business records upon which Gonzales relied in her affidavit, her assertions based upon those records constituted inadmissible hearsay ... . Moreover, the plaintiff did not attach a copy of the note to the complaint when commencing the action ...". ***Deutsche Bank Natl. Trust Co. v. Gulati*, 2020 N.Y. Slip Op. 06754, Second Dept 11-18-20**

Similar issues and result in ***JPMorgan Chase Bank, N.A. v. Tumelty*, 2020 N.Y. Slip Op. 06766, Second Dept 11-18-20**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

THE DISCONTINUANCE OF THE 2008 FORECLOSURE ACTION DID NOT DE-ACCELERATE THE DEBT SO THE STATUTE OF LIMITATIONS KEPT RUNNING, RENDERING THE INSTANT ACTION UNTIMELY.

The Second Department, reversing Supreme Court, determined the foreclosure action should have been dismissed as untimely. The debt was accelerated with the first foreclosure action was commenced in 2008, starting the running of the six-year statute of limitations. The discontinuing of the that action did not revoke the acceleration: " '[A] lender's mere act of discontinuing an action, without more, does not constitute, in and of itself, an affirmative act revoking an earlier acceleration of the debt' ... . None of the other facts relied upon by the plaintiff establish that the 2008 acceleration of the loan balance was affirmatively revoked. '[D]e-acceleration notices must . . . be clear and unambiguous to be valid and enforceable' ... . While the plaintiff points to the fact that the defendant purportedly received billing statements after the first action was discontinued and that the second complaint alleged a different date of default, these facts do not establish that a clear and unambiguous notice of revocation of the acceleration was given to the defendant." ***Wells Fargo Bank, N.A. v. Islam*, 2020 N.Y. Slip Op. 06823, Second Dept 11-18-20**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW, EVIDENCE.

PROOF OF COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 WAS INSUFFICIENT; THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the Bank's motion for summary judgment in this foreclosure action should not have been granted. The proof of the notice required by RPAPL 1304 was insufficient: "Notice must be sent both 'by registered or certified mail and also by first-class mail' (RPAPL 1304[2]). '[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition' ... . 'Proof of the requisite mailing is established with proof of the actual

mailings, such as affidavits of mailing or domestic return receipts with attendant signatures, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure' ... . [The plaintiff failed to submit an affidavit from a witness who attested to having personal knowledge of either the actual mailing or 'a standard office mailing procedure designed to ensure that items are properly addressed and mailed' ... . Moreover, the records submitted with the plaintiff's motion did not establish as a matter of law that the requisite RPAPL 1304 mailings were completed. A copy of a letter and envelope addressed to the defendant, each bearing a 20-digit number, was insufficient to eliminate all triable issues of fact as to whether the certified mailing actually occurred ... . Moreover, the plaintiff failed to submit any evidence substantiating the assertions that a second copy of the notice was mailed to the defendant by regular first-class mail, as required by the statute ...". ***Deutsche Bank Natl. Trust Co. v. Feeney*, 2020 N.Y. Slip Op. 06753, Second Dept 11-18-20**

Similar issues and result in ***JPMorgan Chase Bank, N.A. v. Gold*, 2020 N.Y. Slip Op. 06765, Second Dept 11-18-20**

LANDLORD-TENANT, NEGLIGENCE.

THE LANDLORD DID NOT HAVE NOTICE OF ANY PRIOR ROBBERIES OCCURRING IN THE BUILDING, THEREFORE THE TENANT-ROBBERY-VICTIM'S COMPLAINT WAS PROPERLY DISMISSED.

The Second Department determined the landlord defendants were entitled to summary judgment dismissing the complaint by a tenant stemming from a robbery by another tenant and others. Defendant landlord demonstrate it did not have notice of any prior similar criminal activity in the building: "A landlord is not required to insure the safety of tenants or visitors ... . However, '[l]andlords have a common-law duty to take minimal precautions to protect tenants from foreseeable harm, including foreseeable criminal conduct by a third person' ... . 'To establish that criminal acts were foreseeable, the criminal conduct at issue must be shown to be reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location' ... . In the absence of evidentiary proof of notice of prior criminal activity, the owner's duty reasonably to protect those using the premises from such activity never arises ... . 'The question of the scope of an alleged tort-feasor's duty is, in the first instance, a legal issue for the court to resolve' ... . Here, the defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that they lacked notice of the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject premises ...". ***Markov v. Grecian Gardens Co.*, 2020 N.Y. Slip Op. 06771, Second Dept 11-18-20**

MEDICAL MALPRACTICE, PERSONAL INJURY.

PLAINTIFF'S KNEE BECAME STIFF AND IMPOSSIBLE TO BEND AFTER SURGERY; PLAINTIFF SUED THE DEFENDANT DOCTOR WHO TREATED HER AT THE POST-SURGERY REHABILITATION CENTER; THE DEFENDANT DOCTOR, WHO DID NOT PERFORM THE SURGERY, HAD CERTIFIED AND RECOMMENDED PHYSICAL AND OCCUPATIONAL THERAPY FOR PLAINTIFF AT THE REHABILITATION CENTER; BECAUSE THE DEFENDANT DOCTOR PLAYED NO ROLE IN THE THERAPY ITSELF, HIS MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant doctor's (Raber's) motion for summary judgment should have been granted. Dr. Raber treated plaintiff at a nursing and rehabilitation center, Glen Cove, where, after knee surgery, plaintiff voluntarily transferred. After about a month at Glen Cove, plaintiff was seen by her orthopedic surgeon who found plaintiff's knee had become stiff and impossible to bend. Dr. Raber had certified and recommended physical and occupational therapy at Glen Cove, for which Dr. Raber was not responsible. Dr. Raber moved for summary judgment on the ground that any regimen of physical therapy was the responsibility of Glen Cove: " 'Although physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied on by the patient' ... . Here, Raber testified at his deposition that he is trained only in internal medicine, and was the plaintiff's internist while she was at Glen Cove. Raber established that he was not the plaintiff's physical or occupational therapist and was not involved in the plaintiff's physical therapy plan of care. Physical therapists (see Education Law §§ 6731, 6732) must be educated and licensed in that specific field (see Education Law § 6734), and Raber had no such training. Occupational therapists must similarly be educated and licensed in their field (see Education Law § 7904). Raber's medical expert opined that Raber's training as an internal medicine specialist did not encompass the skills and knowledge required to assess a patient's physical therapy needs, create a physical therapy plan of care, or supervise a physical therapy plan of care. ... Raber established that he did not depart from good and accepted medical practice by deferring to the physical and occupational therapy specialists at Glen Cove for the assessment and treatment of the plaintiff's right knee, and had no duty to evaluate the efficacy of that treatment, since he was not involved in that aspect of the plaintiff's care ...". ***Aaron v. Raber*, 2020 N.Y. Slip Op. 06738, Second Dept 11-18-20**

MUNICIPAL LAW, EMPLOYMENT LAW.

THE FIRE DEPARTMENT BOARD OF WARDENS SHOULD NOT HAVE REMOVED A FIREFIGHTER FROM MEMBERSHIP IN THE VOLUNTEER FIRE DEPARTMENT WITHOUT HOLDING A HEARING PURSUANT TO GENERAL MUNICIPAL LAW § 209-L.

The Second Department, reversing the Blue Point Fire Department Board of Wardens' removal from membership of a volunteer firefighter, determined the firefighter should have been afforded a hearing pursuant to General Municipal Law § 209-L: " 'Pursuant to General Municipal Law § 209-l, volunteer firefighters cannot be removed from office or membership for incompetence or misconduct, except for absenteeism at fires or meetings, unless they are afforded a hearing' ... . However, '[t]hat section, by its own terms, does not affect the right of members of any fire company to remove a volunteer officer or voluntary member of such company for failure to comply with the constitution and by-laws of such company' ... . Here, after a meeting at which the petitioner appeared, the Board of Wardens found that he had violated Article V, Section 1(C), of the bylaws, by donating department property in contravention of an order from the chief of the department. That provision of the bylaws authorized the chief of the department to suspend members of the department for insubordination, refusal to follow orders, and for conduct unbecoming or detrimental to the department, and required the Board of Wardens to review such suspensions. The bylaws did not empower the Board of Wardens to dismiss a member based on a violation of Article V, Section 1(C). Thus, a hearing pursuant to General Municipal Law § 209-l was required ...". ***Matter of McDowell v. Blue Point Fire Dept.*, 2020 N.Y. Slip Op. 06793, Second Dept 11-18-20**

PERSONAL INJURY, CONTRACT LAW.

QUESTIONS OF FACT WHETHER THE CONTRACTOR HIRED TO WORK ON A SIDEWALK WAS RESPONSIBLE FOR MAKING SURE PEDESTRIANS HAD A SAFE PASSAGEWAY; PLAINTIFFS WERE STRUCK BY A CAR WHEN THEY WALKED IN THE PUBLIC STREET BECAUSE THE SIDEWALK WAS BLOCKED; THE THEORY OF LIABILITY APPEARS TO STEM FROM THE CONTRACTOR'S ALLEGED CREATION OF A DANGEROUS CONDITION UPON A PUBLIC STREET OR SIDEWALK.

The Second Department, reversing Supreme Court, determined there were questions of fact about whether defendant contractor, CSI, was responsible for providing a safe alternative passageway while construction work blocked the sidewalk. Plaintiffs were struck by a car when they attempted to walk in the street. The CSI was hired by the general construction manager hired by Taco Bell, the owner of the premises: " 'A contractor may be liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk' ... . Here, CSI failed to demonstrate its prima facie entitlement to judgment as a matter of law, as its submissions failed to eliminate all triable issues of fact as to whether it created the dangerous condition alleged to have caused the accident." ***Byrd v. Hughes*, 2020 N.Y. Slip Op. 06741, Second Dept 11-18-20**

PERSONAL INJURY, EVIDENCE.

THE CRACK OVER WHICH INFANT PLAINTIFF ALLEGEDLY TRIPPED WAS DEEMED TRIVIAL AS A MATTER OF LAW.

The Second Department determined the crack in the concrete schoolyard where infant plaintiff allegedly tripped and fell was trivial as a matter of law. Infant plaintiff was running a sprint in an after-school program when he fell. The court noted that plaintiffs raised a "feigned issue of fact" in opposition to the defendants' motion for summary judgment which tried to avoid the consequences of deposition testimony: "... [T]he defendants established, prima facie, that the alleged defective condition was trivial as a matter of law and therefore nonactionable ... . The defendants' expert inspected the crack and determined that it was "from 1/8 of an inch to 7/16 of an inch in width," and the pavement 'on each side of the crack[ ] . . . contained no vertical height differential.' Further, the infant plaintiff's General Municipal Law § 50-h hearing and deposition testimony established that the accident occurred during daylight hours on a clear day with nothing obstructing his view. In opposition to the defendants' prima facie showing that the defect was trivial, the plaintiffs failed to raise a triable issue of fact. The affidavit of the infant plaintiff stating that '[t]he crack was wide enough that part of [his] right foot was able [to] go into it' 'presented what appears to be a feigned issue of fact, designed to avoid the consequences of [his] earlier deposition testimony' ... that his right 'heel' stepped 'on' the crack, and his General Municipal Law § 50-h hearing testimony that his right 'toes' 'stopped really hard' on the crack and the crack 'wasn't wide.' Moreover, the affidavit of the plaintiffs' expert was speculative, unsubstantiated, and conclusory, as the expert neither provided a description of the crack nor took any measurements of it ...". ***K.A. v. City of New York*, 2020 N.Y. Slip Op. 06737, Second Dept 11-18-20**

PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

DEFENDANTS' MEDICAL EXPERT SHOULD HAVE BEEN ALLOWED TO TESTIFY BASED UPON THE MEDICAL RECORDS AND MATERIAL IN EVIDENCE DESPITE NOT HAVING PERSONAL KNOWLEDGE OF THE INJURIES; THE EXPERT SHOULD HAVE BEEN ALLOWED TO TESTIFY ABOUT CAUSATION EVEN THOUGH THE ISSUE WAS NOT ADDRESSED IN THE EXPERT REPORT.

The Second Department, reversing Supreme Court, determined defendants' motion to set aside the verdict in this rear-end collision case should have been granted because defendants' expert was precluded from testifying: " '[T]o be admissible, opinion evidence must be based on,' inter alia, (1) 'personal knowledge of the facts upon which the opinion rests,' or, (2) 'where the expert does not have personal knowledge of the facts upon which the opinion rests, the opinion may be based upon facts and material in evidence, real or testimonial' ... . Here, we disagree with the Supreme Court's determination to preclude the defendants' medical expert, Edward Weiland, from testifying regarding records and testimony that were in evidence and from testifying on the issue of causation. Contrary to the plaintiff's contention, Weiland should have been permitted to testify regarding the records and testimony in evidence even if he lacked personal knowledge as to the specific injuries addressed therein ... . Furthermore, Weiland should have been permitted to testify on the issue of causation, despite not having addressed this issue in his expert report, because 'the issue of causation was implicit on the question of damages' ... . The court's errors in limiting Weiland's testimony were not harmless ... . Therefore, the court should have granted the defendants' motion, in effect, to set aside the jury verdict, to vacate the judgment entered thereon, and for a new trial on the issue of damages." ***Gubitosi v. Hyppolite*, 2020 N.Y. Slip Op. 06761, Second Dept 11-18-20**

PERSONAL INJURY, MUNICIPAL LAW.

THE REQUEST FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS SIDEWALK SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED; THE EXCUSE WAS INADEQUATE BUT THE CITY HAD TIMELY NOTICE OF THE NATURE OF THE CLAIM AND WAS NOT PREJUDICED BY THE DELAY.

The Second Department, reversing Supreme Court, determined plaintiff's request for leave to file a late notice of claim in this sidewalk slip and fall case should have been granted. Although the excuse for filing late was not adequate, the city had timely knowledge of the nature of the claim: "The unusual occurrence report prepared and filed shortly after the petitioner's accident provided the City with timely actual knowledge of the essential facts constituting the claim, since its specificity regarding the location and circumstances of the incident permitted the City to readily infer that a potentially actionable wrong had been committed ... . Moreover, the City's acquisition of timely actual knowledge of the facts constituting the claim, along with the petitioner's submission of evidence indicating that the conditions at the accident scene remained unchanged, satisfied the petitioner's burden of presenting some evidence or plausible argument to support a finding of no substantial prejudice to the City in defending against the claim ...". ***Matter of Catania v. City of New York*, 2020 N.Y. Slip Op. 06776, Second Dept 11-18-20**

PERSONAL INJURY, TRUSTS AND ESTATES.

THE DRAM SHOP ACT DOES NOT CREATE A CAUSE OF ACTION IN FAVOR OF THE INTOXICATED PERSON.

The Second Department, in this wrongful death case, determined the Dram Shop Act cause of action was properly dismissed because the act does not create a cause of action in favor of the intoxicated person. Here the complaint alleged defendant Bombace Wine & Spirits, Inc. was liable for selling alcohol to plaintiff's decedent, who died of alcohol poisoning and was referred to as a habitual drunkard. Although plaintiff's decedent's family members could sue under the Dram Shop Act for "means of support" damages, there no were allegations of "means of support" damages in the complaint: "The Dram Shop Act "creates a cause of action in favor of a third party injured or killed by an intoxicated person, but it does not create a cause of action in favor of the intoxicated person" ... or his or her estate ... . Thus, the first cause of action to recover damages under the Dram Shop Act fails to state a cause of action insofar as it is asserted on behalf of the decedent's estate, notwithstanding the addition in the amended complaint of the allegation that the decedent's intoxication at the time of the alleged illegal alcohol sale was 'involuntary' ... . Further, because the decedent, were she alive, would not possess a viable cause of action against the Bombace defendants to recover damages for injuries sustained as a result of her own intoxication, her estate possesses no viable cause of action to recover damages for wrongful death (see EPTL 5-4.1 ...)." ***Estate of Tammy Colleen Feenin v. Bombace Wine & Spirits, Inc.*, 2020 N.Y. Slip Op. 06755, Second Dept 11-18-20**

FOURTH DEPARTMENT

ADMINISTRATIVE LAW, MUNICIPAL LAW, APPEALS.

TOWN PROCEEDINGS ABOUT WHETHER THE TOWN WAS OBLIGATED TO PLOW THE ROAD LEADING TO PETITIONER'S PROPERTY WAS NOT A "QUASI-JUDICIAL" PROCEEDING AND THEREFORE THE STANDARD OF REVIEW WAS NOT "SUBSTANTIAL EVIDENCE;" THE STANDARD IS WHETHER THE DETERMINATION WAS ARBITRARY AND CAPRICIOUS OR AFFECTED BY AN ERROR OF LAW.

The Fourth Department determined the town was obligated to plow the road leading to the petitioner's property. The decision has a discussion of the evidentiary standards for review of an Article 78 proceeding: "With respect to this proceeding, ... 'the substantial evidence standard of review does not apply to the administrative decision at issue, since it was made after [an] informational public hearing[], as opposed to a quasi-judicial evidentiary hearing' ... . 'Evidentiary hearings that are constitutionally required and have some of the characteristics of adversary trials, including cross-examination, result in 'quasi-judicial' determinations that are subject to article 78 review in the nature of certiorari, where the 'substantial evidence' inquiry is applicable' (... see CPLR 7803 [4]). 'In a mandamus to review proceeding, however, no quasi-judicial hearing is required; the petitioner need only be given an opportunity 'to be heard' and to submit whatever evidence he or she chooses and the agency [or body] may consider whatever evidence is at hand, whether obtained through a hearing or otherwise. The standard of review in such a proceeding is whether the agency [or body] determination was arbitrary and capricious or affected by an error of law' ...". ***Matter of Weikel v. Town of W. Turin*, 2020 N.Y. Slip Op. 06890, Fourth Dept 11-20-20**

CIVIL PROCEDURE, PERSONAL INJURY, EVIDENCE.

THE PLAINTIFF SHOULD NOT HAVE BEEN ALLOWED TO CROSS EXAMINE THE DEFENSE EXPERT USING DECEDENT'S HUSBAND'S DEPOSITION IN THIS NEGLIGENCE AND PUBLIC-HEALTH-LAW VIOLATION CASE; THE DECEDENT'S HUSBAND, A NONPARTY, WAS AVAILABLE TO TESTIFY; THE PLAINTIFF'S VERDICT SHOULD HAVE BEEN SET ASIDE.

The Fourth Department, reversing Supreme Court, determined plaintiff should not have been allowed to cross-examine the defense expert using the deposition of decedent's husband, who was available to testify. The defense motion to set aside the verdict in this negligence and Public-Health-Law violation case should have been granted: "Supreme Court erred in allowing plaintiff to cross-examine a defense expert using the deposition of decedent's husband, a nonparty. CPLR 3117 limits the use of a nonparty's deposition at trial to either the impeachment of that nonparty as a witness ... , or for 'any purpose against any other party' in case of the nonparty's unavailability at trial ... . Here, plaintiff was not using the husband's deposition testimony to impeach the husband's own trial testimony, and the husband was available and testified at trial. Contrary to plaintiff's assertion, CPLR 4515 does not permit a party to cross-examine an expert with all the materials that the expert reviewed in formulating his or her opinion, regardless of the independent admissibility of those materials ... . 'That statute provides only that an expert witness may on cross-examination 'be required to specify the data and other criteria supporting the opinion' ... . Because the testimony pertained directly to the central issue to be resolved by the jury, i.e., the quality of care that decedent received, the error was not harmless ...". ***Williams v. Ridge View Manor, LLC*, 2020 N.Y. Slip Op. 06894, Fourth Dept 11-20-20**

CONSUMER LAW, FRAUD, DEBTOR-CREDITOR.

THE DEFENDANTS IN THIS USURY, FRAUD AND DECEPTIVE BUSINESS PRACTICES ACTION FINANCED THE SALE OF JEWELRY OVER MANY MONTHS, MARKETING THE SALES AS A WAY FOR CONSUMERS TO IMPROVE THEIR CREDIT; THE MAJORITY HELD THE BUSINESS MET THE DEFINITION OF A "CREDIT SERVICES BUSINESS" WITHIN THE MEANING OF GENERAL BUSINESS LAW 458-H.

The Fourth Department, over a dissent, determined the cause of action which alleged defendants operated a "credit services business" within the meaning of General Business Law 458-h. The defendants financed the purchase of jewelry, claiming that such financing was a means of improving consumers' credit record: "Plaintiff commenced this action alleging various claims for usury, common-law and statutory fraud, and deceptive business practices. ... A 'credit services business' is defined as 'any person who sells, provides, or performs, or represents that he can or will sell, provide or perform, a service for the express or implied purpose of improving a consumer's credit record, history, or rating or providing advice or assistance to a consumer with regard to the consumer's credit record history or rating in return for the payment of a fee' (§ 458-b [1]). According to the complaint, defendants "represent[]" that they 'provide' a 'service' to consumers—specifically, financing the purchase of jewelry—and defendants market such financing as a means 'of improving [the] consumer's credit record.' Put simply, defendants allegedly offer consumers the option of paying for jewelry over many months, and defendants allegedly advertise that financing option as a mechanism to improve the consumer's credit. In exchange for that financing—i.e., the 'service' contemplated by section 458-b (1)—defendants allegedly charge interest. Such interest, we conclude, constitutes a "fee" within the meaning of section 458-b (1). Thus, contrary to the court's determination and the view of our

dissenting colleague, the complaint sufficiently alleges that defendants' business satisfies the statutory definition of a 'credit services business' ...". ***People v. Harris Originals of Ny, Inc.*, 2020 N.Y. Slip Op. 06883, Fourth Dept 11-20-20**

CRIMINAL LAW.

DEFENDANT SHOULD HAVE BEEN SENTENCED AS A SECOND FELONY OFFENDER RE TWO COUNTS OF CRIMINAL POSSESSION OF A WEAPON THIRD DEGREE, WHICH ARE NOT VIOLENT FELONIES.

The Fourth Department determined the sentences for two counts of criminal possession of a weapon third degree, D felonies, were illegal: "... [T]he determinate terms of incarceration of seven years imposed on counts 2 and 10 of the indictment, for criminal possession of a weapon in the third degree, class D felonies, are illegal. Those crimes are not violent felonies (see generally Penal Law § 70.02 [1] [c]), and therefore, the court should have sentenced defendant as a second felony offender on those counts and imposed indeterminate terms of incarceration (see § 70.06 [3] [d]; [4] [b]). Furthermore, inasmuch as defendant must be sentenced to indeterminate terms of incarceration, he is not subject to a period of postrelease supervision on those counts (see § 70.45 [1 ...]." ***People v. Lovette*, 2020 N.Y. Slip Op. 06892, Fourth Dept 11-20-20**

CRIMINAL LAW, EVIDENCE.

THE PEOPLE DEMONSTRATE THE EXERCISE OF DUE DILIGENCE IN ATTEMPTING TO LOCATE THE DEFENDANT; DEFENDANT'S MOTION TO DISMISS THE INDICTMENT ON SPEEDY TRIAL GROUNDS SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing County Court on the People's appeal, determined the indictment should not have been dismissed on speedy trial grounds because the People demonstrated the exercise of due diligence in attempting to locate the absent defendant: "In computing the time within which the People must be ready for trial, the court must exclude, inter alia, the period of delay resulting from defendant's absence (see CPL 30.30 [4] [c] [i]). 'A defendant must be considered absent whenever his location is unknown and he is attempting to avoid apprehension or prosecution, or his location cannot be determined by due diligence' (id.). ... [W]e conclude that the People established that they exercised due diligence in attempting to locate defendant during the time period at issue at the hearing. Law enforcement officers routinely checked computer databases, social media outlets, criminal history reports and information from other government agencies to attempt to identify locations where defendant might be located. In addition, officers investigated all of the addresses associated with defendant to varying degrees, speaking with maintenance workers, neighbors, tenants, and defendant's mother. In attempting to conduct subsequent interviews with defendant's mother, law enforcement officers learned that she no longer resided at the same address. Law enforcement officers also contacted and spoke with all of defendant's known employers. Although law enforcement officers did not conduct a full investigation of one address that appeared on one credit agency report, one of the officers testified at the hearing that credit reports were not reliable because 'anyone . . . could go apply for a credit card online today and write [any address] on the application."'Without any corroboration of defendant's affiliation with that address, the officer did not investigate beyond driving to the address and verifying that it was a commercial and retail building. Ultimately ... the officers' periodic database searches yielded a potential address in Georgia. '[N]otwithstanding the fact that greater efforts could have been undertaken'... , we conclude that the People established that they exercised the requisite due diligence in attempting to locate defendant during the time period at issue ...". ***People v. Anderson*, 2020 N.Y. Slip Op. 06881, Fourth Dept 11-20-20**

CRIMINAL LAW, EVIDENCE.

THE PEOPLE SHOULD NOT HAVE BEEN ALLOWED TO PRESENT EVIDENCE OF A PRIOR UNCHARGED SHOOTING; DEFENSE COUNSEL DID NOT OPEN THE DOOR FOR THAT EVIDENCE; THE PROSECUTOR SHOULD NOT HAVE BEEN ALLOWED TO TREAT THE PEOPLE'S WITNESSES AS HOSTILE WITNESSES; NEW TRIAL ORDERED.

The Fourth Department, reversing defendant's conviction of attempted murder and ordering a new trial, determined evidence of a prior uncharged shooting should not have been admitted and the prosecutor should not have been allowed to cross-examine the People's witnesses as hostile witnesses: "County Court erred by permitting the prosecutor to present evidence of a prior uncharged shooting under the theory that defense counsel opened the door to such evidence ... . [T]he 'opening the door' theory does not provide an independent basis for introducing new evidence on redirect; nor does it afford a party the opportunity to place evidence before the jury that should have been brought out on direct examination" ... . Instead that 'principle merely allows a party to explain or clarify on redirect matters that have been put in issue for the first time on cross-examination, and the trial court should normally exclude all evidence which has not been made necessary by the opponent's case in reply' ... . * * * The prosecutor ... assumed the risk of the adverse testimony by 'calling the witness[es] . . . in the face of the forewarning' [about what they would say]. ... [A]t the time of the relevant questioning, the court had not granted the prosecutor permission to treat either witness as hostile ... . [T]he prosecutor improperly 'use[d the] prior

statement[s] for the purpose of refreshing the recollection of the witness[es] in a manner that disclose[d their] contents to the trier of the facts' (CPL 60.35 [3])." ***People v. Sylvester*, 2020 N.Y. Slip Op. 06891, Fourth Dept 11-20-20**

CRIMINAL LAW, EVIDENCE.

THE UNIQUE PROOF REQUIREMENTS FOR CRIMINAL CONTEMPT FIRST DEGREE FOR VIOLATION OF AN ORDER OF PROTECTION WERE NOT MET; THE FACT THAT DEFENDANT STIPULATED TO THE ACCURACY OF AN INACCURATE SPECIAL INFORMATION ABOUT A PRIOR CRIMINAL CONTEMPT CONVICTION DOES NOT REQUIRE A DIFFERENT RESULT.

The Fourth Department reduced the criminal contempt first degree convictions to criminal contempt second degree for violation of an order of protection, explaining the proof requirements for criminal contempt first were not met and noting that defendant's stipulation to an inaccurate special information re a predicate offense does not require a different result: "The People were required to establish as an element of the offense of criminal contempt in the first degree that defendant had been previously convicted, within the preceding five years, of the crime of aggravated criminal contempt or criminal contempt in the first or second degree 'for violating an order of protection' that 'require[d] the . . . defendant to stay away from the person or persons on whose behalf the order was issued' (Penal Law § 215.51 [c]). Thus, this is a situation where the enhancing element of an offense is not merely the existence of a prior conviction, but also the existence of additional facts related to that prior conviction ... . The special information filed by the People to assert the existence of the predicate conviction (see CPL 200.60 [1], [2]) alleges only that defendant previously had been convicted of the crime of criminal contempt in the second degree, without specifying whether that previous conviction involved the violation of an order of protection or of any stay-away provision therein ... . The fact that defendant stipulated to the accuracy of the imprecise special information did not relieve the People of their burden of establishing the predicate conviction and related facts as part of their case-in-chief ...". ***People v. Barrett*, 2020 N.Y. Slip Op. 06899, Fourth Dept 11-20-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

ALTHOUGH THE DEFENDANT VIOLATED THE ORDER OF PROTECTION BY GOING INSIDE THE PROTECTED PERSON'S HOUSE, THERE WAS INSUFFICIENT EVIDENCE OF ANY CONTACT WITH THE PROTECTED PERSON; CRIMINAL CONTEMPT FIRST CONVICTION REDUCED TO CRIMINAL CONTEMPT SECOND.

The Fourth Department, reducing the criminal contempt first conviction to criminal contempt second, determined the evidence was legally insufficient. The defendant violated the order of protection by going inside the protected person's house but there was insufficient evidence of any contact between the defendant and the protected person: "... [T]he People adduced legally insufficient evidence that defendant intentionally violated "that part" of the protective order that required him to 'stay away from the [protected] person,' as required for a conviction for criminal contempt in the first degree under Penal Law § 215.51 (c) ... . Rather, the evidence proves only that defendant committed the lesser included offense of criminal contempt in the second degree under section 215.50 (3) by going to the protected person's house, and we therefore modify the judgment accordingly ...". ***People v. Crittenden*, 2020 N.Y. Slip Op. 06901, Fourth Dept 11-20-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

A WHEEL CAME OFF DEFENDANT'S TRUCK RESULTING A FREAK ACCIDENT INVOLVING TWO OTHER VEHICLES RESULTING IN THE DEATH OF A DRIVER; THE CRIMINALLY NEGLIGENT HOMICIDE CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE; AT MOST, DEFENDANT FAILED TO PERCEIVE THE RISK CREATED BY A NOISY WHEEL.

The Fourth Department, reversing defendant's criminally negligent homicide conviction, determined the evidence was against the weight of the evidence. Apparently, a wheel came of defendant's truck, another truck hit the wheel and overturned on a car, killing the driver: "The testimony at trial established that defendant came into possession of the pickup truck several weeks before the accident, but that its last valid inspection was three years before the accident. Although the People established that the pickup truck had a forged inspection sticker, there was no evidence that defendant knew it was forged. Several witnesses testified that, in the three days preceding the accident, the pickup truck was making loud grinding noises and that, either the day before the accident or the day of the accident, defendant asked a person with mechanical experience what that person thought might be the issue. That person opined that the noise was likely being caused by a wheel or the brakes. An inspection of the driver's side wheel and truck after the accident established some significant problems with the wheel, and witnesses testified that the existence of problems would have been noticeable and would have created issues with steering. The testimony also established, however, that the severity of the problems could not have been known to the operator unless the wheel was removed from the truck. * * * At most, the evidence established that defendant failed to perceive a risk, which does establish criminal negligence beyond a reasonable doubt ...". ***People v. Pinnock*, 2020 N.Y. Slip Op. 06884, Fourth Dept 11-20-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

POLICE OFFICER'S OPINION A HOMICIDE HAD BEEN COMMITTED AND THE VICTIM'S MOTHER'S TESTIMONY ABOUT THE VICTIM'S PERSONAL BACKGROUND SHOULD NOT HAVE BEEN ADMITTED; OPINION ISSUE REVIEWED IN THE INTEREST OF JUSTICE; MANSLAUGHTER CONVICTION REVERSED.

The Fourth Department, reversing defendant's manslaughter conviction, determined the investigating officer's opinion that the death was a homicide and the victim's mother's testimony about the personal background of the victim should not have been admitted: "Defendant's contention that County Court erred in allowing an investigating police officer to testify regarding his opinion that a homicide was committed in this case is preserved for our review only in part ... . To the extent that defendant's contention is unpreserved, we exercise our power to review it as a matter of discretion in the interest of justice ... , and we conclude that the court erred in admitting that testimony because it 'usurp[ed] the jury's fact-finding function' ... . We further agree with defendant that the court erred in permitting the victim's mother to testify regarding the victim's personal background, including various aspects of the victim's life and his family relationships. It is well settled that 'testimony about [a] victim['s] personal background[] that is immaterial to any issue at trial should be excluded' ... and, here, the testimony of the victim's mother regarding the victim's personal background was not relevant to a material issue at trial." ***People v. Salone*, 2020 N.Y. Slip Op. 06903, Fourth Dept 11-20-20**

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

ORDER ADJUDICATING DEFENDANT A LEVEL TWO SEX OFFENDER WAS DEFECTIVE; MATTER REMITTED.

The Fourth Department, reversing County Court, determined the order adjudicating defendant a level two sex offender was defective: "County Court failed to comply with Correction Law § 168-n (3), pursuant to which the court was required to set forth the findings of fact and conclusions of law upon which it based its determination. The standardized form order—which the court merely read into the record when rendering its oral decision—indicated without elaboration that the court was entirely adopting the case summary and risk assessment instrument prepared by the Board of Examiners of Sex Offenders, listed the risk factor point assessments contained therein, and denied in conclusory fashion defendant's request for a downward departure. That was inadequate to fulfill the statutory mandate ... . We therefore hold the case, reserve decision, and remit the matter to County Court for compliance with Correction Law § 168-n (3)." ***People v. Gatling*, 2020 N.Y. Slip Op. 06921, Fourth Dept 11-20-20**

FAMILY LAW, EVIDENCE.

MOTHER'S PETITION FOR A MODIFICATION OF CUSTODY TO ALLOW RELOCATION SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING.

The Fourth Department, reversing Family Court, determined mother's petition for a modification of custody to accommodate relocation should not have been dismissed without holding a hearing: "... [T]he mother alleged that she had specific employment advancement opportunities at her job in Monroe County, and "economic necessity . . . may present a particularly persuasive ground for permitting the proposed move" ... . In addition, the mother alleged that the relocation would enhance the child's extracurricular activities, a factor that may support a relocation ... . In addition, the Attorney for the Child indicated that the child favored the relocation, another factor that may support a relocation petition ... . Consequently, the petition sufficiently alleged that the relocation would be in the child's best interests ... , and the court erred in dismissing it on the ground that it did not. Finally, to the extent that the decision indicates that the court dismissed the petition on the ground that the mother failed to allege a sufficient change in circumstances, that was error ...". ***Matter of Betts v. Moore*, 2020 N.Y. Slip Op. 06907, Fourth Dept 11-20-20**

FAMILY LAW, EVIDENCE.

FATHER'S PETITION TO MODIFY CUSTODY TO ALLOW HIS RELOCATION TO NORTH CAROLINA SHOULD NOT HAVE BEEN GRANTED; CRITERIA EXPLAINED.

The Fourth Department, reversing Family Court, determined father's petition to modify custody to allow his relocation to North Carolina should not have been granted: "In its decision, the court considered the relevant Tropea factors but erred in applying those factors to the facts and circumstances in the case at bar. Contrary to the court's determination, the father "failed to establish that the child's life would be enhanced economically, emotionally and educationally by the proposed relocation" ... . While the father established that he will enjoy greater economic job opportunities in North Carolina, those nominal financial gains will be negated by the greater cost of living in the area of North Carolina where he will be relocating. Additionally, as noted by the court, the father had unrealistic goals for housing in North Carolina. Notably, the father testified that he was presently paying monthly rent of $900 for a home in Olean, New York, but wanted to purchase a home in North Carolina for between $200,000 and $250,000. He acknowledged that he could not afford a home within that price range on his own and would need the financial assistance of family, his employer, and his fiancée. There is no evidence in

the record, however, that anyone had committed to providing that needed assistance or had the financial ability to do so. The father also failed to establish that the child would receive a better education in North Carolina inasmuch as there is no evidence in the record comparing the schools in North Carolina to those in Olean, New York ... . Furthermore, the father admitted that he had 'zero' family living in North Carolina. On the other hand, the father's mother currently lives in Olean, New York, and the father's aunt lives nearby in Wellsville, New York. The maternal grandmother, great-grandmother and great-grandfather all live in Olean, New York. The father therefore failed to establish that he and the child would receive similar support residing in North Carolina ... . In our view, the only factor that fully supported the father's request for relocation was a 'fresh start,' away from Olean, New York, where he and the mother struggled with an opiate addiction. That factor, standing alone, is insufficient to warrant relocation ...". ***Gasdik v. Winiarz*, 2020 N.Y. Slip Op. 06918, Fourth Dept 11-20-20**

FAMILY LAW, EVIDENCE, CIVIL PROCEDURE.

FATHER AND MOTHER SUBMITTED INADMISSIBLE EVIDENCE TO SUPPORT THEIR SUMMARY JUDGMENT MOTIONS ON THE ISSUE WHETHER THE CHILDREN WERE CONSTRUCTIVELY EMANCIPATED; FATHER'S MOTION FOR SUMMARY JUDGMENT ON HIS PETITION TO TERMINATE HIS CHILD SUPPORT OBLIGATIONS WAS PROPERLY DENIED BUT MOTHER'S PETITION FOR SUMMARY JUDGMENT DISMISSING FATHER'S PETITION SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Family Court, determined father's motion for summary judgment on his petition to terminate his child support obligations based on the children's constructive emancipation was properly denied, and mother's motion for summary judgment dismissing father's petition should not have been granted. The basis for both ruling was the inadmissble evidence submitted by father and mother: "... [W]e conclude that the father did not meet his initial burden on his motion of establishing that their refusal to visit with him was unjustified ... . Inasmuch as the father's own submissions suggest that the subject children did not want to visit him due to their purported knowledge of the sex abuse allegations, his submissions failed to eliminate all material issues of fact ... . Indeed, the father failed to establish that his behavior 'was not a primary cause of the deterioration in his relationship with [the subject] children' ... . Thus, we conclude that the court properly denied his motion. We also conclude that the court should not have granted that part of the mother's motion seeking summary judgment dismissing the petition. The court erred in relying on the unsworn letters from the subject children's psychologist because they were not in admissible form ... . Without the letters from the children's psychologist, we conclude that the mother failed to meet her initial burden on her motion of establishing that the children were justified in abandoning the father by refusing to attend visitation. Like the father, the mother did not submit any admissible evidence establishing the reasons for the children's decision not to visit the father. We therefore modify the amended order accordingly." ***Matter of Timothy M.M. v. Doreen R.*, 2020 N.Y. Slip Op. 06886, Fourth Dept 11-20-20**

FAMILY LAW, JUDGES.

MOTHER'S REQUEST FOR AN ADJOURNMENT SHOULD HAVE BEEN GRANTED; FAMILY COURT REVERSED.

The Fourth Department, reversing Family Court, determined mother's request for an adjournment: "... [T]he court abused its discretion in failing to grant her attorney's request for an adjournment ... . Under the unique circumstances of this case, i.e., that the court was aware of the mother's history of mental illness, that this was the first request for an adjournment on the mother's behalf, and that the child's situation would remain unaltered if the adjournment had been granted, the court improperly denied the request for an adjournment ... . In addition, we conclude that the court abused its discretion in failing to grant an adjournment because of the serious concerns about the mother's competency to assist in her own defense, which raised an issue whether it was necessary for the court to continue the appointment of a guardian ad litem ... . We therefore reverse the corrected order and remit the matter to Family Court for further proceedings on the petition." ***Matter of Hayden A. (Karen A.)*, 2020 N.Y. Slip Op. 06917, Fourth Dept 11-20-20**

FAMILY LAW, JUDGES.

FAMILY COURT DID NOT HAVE THE AUTHORITY TO CONDITION VISITATION UPON FATHER'S PARTICIPATION IN MENTAL HEALTH COUNSELING; THEREFORE FATHER'S PETITION TO MODIFY CUSTODY AND VISITATION SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND THAT ORDER HAD BEEN VIOLATED.

The Fourth Department, reversing Family Court, determined the motion to dismiss father's petition to modify custody and visitation should not have been granted. The motion to dismiss argued father had not complied with the court's order conditioning visitation on participation in mental health counseling. The court did not have the authority to issue that order: "... [A]lthough a court may include a directive to obtain counseling as a component of a custody or visitation order, the court does not have the authority to order such counseling as a prerequisite to custody or visitation" ... . Family Court therefore

'lacked the authority to condition any future application for modification of [the father's] visitation on [his] participation in mental health counseling' ...". ***Matter of Lane v. Rawleigh*, 2020 N.Y. Slip Op. 06926, Fourth Dept 11-20-20**

PERSONAL INJURY, EMPLOYMENT LAW.

THE DEFENDANT EMPLOYEE WAS ON HIS WAY HOME FROM A CORPORATE MEETING HELD BY HIS EMPLOYER WHEN THE CAR ACCIDENT HAPPENED; THE EMPLOYER'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE COMPLAINT BECAUSE THE DRIVER WAS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, over a dissent, determined defendant driver, Brownlee, was not acting within the scope of his employment, when the car accident occurred. Brownlee was on his way home from a meeting held by his employer, Stellar: "... [I]t is undisputed that the collision occurred while Brownlee was driving home from a corporate meeting held by Stellar at its headquarters in Canada. Evidence submitted by Stellar on its motion established that the corporate meeting had ended and that Brownlee had been released for the day at the time of the collision. Although Brownlee testified at his deposition that he believed that he had intended to stop at Stellar's facility in Pennsylvania before returning home, once he received permission to leave the corporate meeting, he was no longer acting in furtherance of any duty that he owed to Stellar and was no longer under Stellar's control ... . Indeed, Brownlee did not testify that Stellar had directed him to stop at the Pennsylvania facility or that Stellar had ordered him to perform any other act once the meeting had ended. The fact that the corporate meeting was held at a location other than Brownlee's typical place of work does not alter our analysis, nor does the fact that Brownlee was reimbursed for travel expenses ...". ***Wood v. Brownlee*, 2020 N.Y. Slip Op. 06887, Fourth Dept 11-20-20**

PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

DEFENDANT CLAIMED IN HIS DEPOSITION HE COULDN'T STOP AT THE RED LIGHT BECAUSE THE FLOOR MAT HAD ROLLED UP UNDER THE BRAKE PEDAL; PLAINTIFF SUBMITTED THE DEPOSITION AS PART OF PLAINTIFF'S SUMMARY JUDGMENT MOTION; THE MAJORITY HELD THE DEPOSITION WAS HEARSAY AND THEREFORE COULD NOT DEFEAT SUMMARY JUDGMENT; TWO DISSENTERS ARGUED THE USUAL HEARSAY RULES DID NOT APPLY BECAUSE THE DEPOSITION WAS SUBMITTED BY PLAINTIFF.

The Fourth Department, over a two-justice dissent, determined the plaintiff's motion for summary judgment in this intersection traffic accident was properly granted. The defendant, in his deposition, claimed he was unable to stop at the red light because the floor mat had rolled up under the brake pedal. The plaintiff submitted defendant's deposition testimony as part of plaintiff's summary judgment motion. The majority considered defendant's testimony hearsay and therefore insufficient to defeat summary judgment. The dissenters argued the hearsay rule did not apply because plaintiff submitted the deposition and thereby raised triable issues of fact, or, in the alternative, waived any objection to the hearsay: "Plaintiff met his initial burden on the motion of establishing as a matter of law that defendant was negligent in his operation of the vehicle inasmuch as defendant failed to stop at a red light ... . Contrary to defendant's contention, he failed to raise an issue of fact whether the emergency doctrine applies here ... . The emergency doctrine provides that, 'when [a driver] is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the [driver] to be reasonably so disturbed that [he or she] must make a speedy decision without weighing alternative courses of conduct, the [driver] may not be negligent if the actions taken are reasonable and prudent in the emergency context' ... . However, '[t]he emergency doctrine is only applicable when a party is confronted by [a] sudden, unforeseeable occurrence not of their own making' ... . Stated differently, 'it is settled law that the emergency doctrine has no application where . . . the party seeking to invoke it has created or contributed to the emergency' ... . Further, although hearsay evidence may be considered in opposition to a motion for summary judgment, it is not by itself sufficient to defeat such a motion ... . Here, defendant testified at his deposition that, at the time of the accident, he was not sure why he could not apply his brakes. He learned after the accident from a body shop mechanic that '[t]he floor pad was rolled up underneath the brake pedal.' He also testified that the floor mat sliding underneath his brakes was 'the only reason [he could] think of' for his inability to brake. In view of that deposition testimony, we conclude that defendant's reliance on the emergency doctrine was based solely on hearsay and speculation and thus did not raise a triable issue of fact whether that doctrine applies. The record includes no affidavit or deposition testimony from defendant's mechanic." ***Watson v. Peschel*, 2020 N.Y. Slip Op. 06880, Fourth Dept 11-20-20**

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