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FIRST DEPARTMENT

CRIMINAL LAW, EVIDENCE.

IT WAS ERROR TO ALLOW IN EVIDENCE PHOTOGRAPHS OF A BAYONET WHICH WAS NOT THE WEAPON USED IN THE STABBING; THE MAJORITY FOUND THE ERROR HARMLESS, THE DISSENT DISAGREED.

The First Department, over an extensive dissent, determined admitting in evidence photographs of a bayonet which was not used in the stabbing was harmless error. The dissent argued the error was not harmless in this first degree manslaughter case: "The court should not have permitted the People to introduce photographs taken by the police of an M9 bayonet that was found in a collection of knives in defendant's bedroom, but was concededly not the weapon used in the crime. The photographs were irrelevant as demonstrative evidence ... , because nothing in the record provided a basis for the court to conclude that the bayonet in the photographs resembled the weapon that defendant used to stab the victim ... . Even assuming that defendant's statement supported the inference that the unrecovered weapon used in the crime was also a bayonet, and that it came from defendant's collection, there was no evidence that all of defendant's bayonets, which could have come from different eras and armed forces, looked like M9s. **FROM THE DISSENT**:... [T]he People told the jury in its summation that a bayonet knife is designed to kill people; that killing people is the only use for a bayonet knife; that a bayonet knife is not used to open things; and that the army and military gives out weapons, like bayonet knives, to kill people. None of these statements were elicited during the testimony of any witness or made in response to defense counsel's summation, nor could they have been reasonably inferred from the evidence." ***People v. Guevara*, 2020 N.Y. Slip Op. 07297, First Dept 12-3-20**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

THE "DUAL JURY" PROCEDURE USED TO TRY DEFENDANT, WHO WAS CONVICTED, AND THE CO-DEFENDANT, WHO WAS ACQUITTED, ALLOWED THE CO-DEFENDANT'S ATTORNEY TO ACT AS A SECOND PROSECUTOR; CONVICTIONS REVERSED AND NEW TRIAL ORDERED.

The First Department, reversing defendant's (Feliciano's) murder and robbery convictions, determined the "dual jury" procedure used to try Feliciano and his co-defendant, Roberts, deprived Feliciano of a fair trial. Feliciano's defense was he was with Roberts when Roberts committed the crimes but did not participate. Roberts' defense was he did not participate in the crimes at all. Feliciano was convicted and Roberts was acquitted: "In reviewing Feliciano's claim on appeal that he was entitled to a severance, we are required to consider the entire record, including, retrospectively, the full trial record ... . Feliciano must demonstrate that he was unduly prejudiced by the severance and that a joint trial 'substantially impair[ed defendant's] defense' ... . '[T]he level of prejudice required to override the strong public policy favoring joinder' exists 'where the core of each defense is in irreconcilable conflict with the other and where there is a significant danger, as both defenses are portrayed to the trial court, that the conflict alone would lead the jury to infer defendant's guilt' ... . A trial before dual juries, which constitutes a modified form of severance, is to be used sparingly and is evaluated under standards for reviewing severance motions generally, as set forth above ... . * * * [Damaging] ... testimony and evidence was unsolicited by the People and would never have been presented to Feliciano's jury, but for Roberts' cross examination. Roberts' counsel's pursuit of his client's defense, contemporaneously undermined Feliciano's. Accordingly, he effectively became a 'second prosecutor' and was able to impeach ... witnesses to Feliciano's detriment in a manner that the People were unable to. Under these circumstances, a dual jury trial was improper as it did not prevent Feliciano from being prejudiced by Roberts' antagonistic defense ...". ***People v. Feliciano*, 2020 N.Y. Slip Op. 07145, First Dept 12-1-20**

LABOR LAW-CONSTRUCTION LAW, COURT OF CLAIMS, PERSONAL INJURY.

CLAIMANT FELL OFF AN I-BEAN AND HIS LANYARD DID NOT PREVENT HIM FROM STRIKING THE DECK EIGHT TO TEN FEET BELOW; CLAIMANT'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED.

The First Department, reversing the Court of Claims, determined claimant's motion for summary judgment on his Labor Law § 240(1) cause of action should have been granted. Claimant alleged he fell off an I-beam and his lanyard didn't stop him from striking the deck eight to ten feet below: "The record establishes that the safety devices 'proved inadequate to

shield the injured worker from harm directly flowing from the application of the force of gravity' ... . Specifically, the record shows that the safety cable was set up too low, resulting in claimant's striking the deck before the lanyard could deploy ...". ***Stigall v. State of New York*, 2020 N.Y. Slip Op. 07306, First Dept 12-3-20**

SECOND DEPARTMENT

CIVIL PROCEDURE.

ALTHOUGH DEFENDANT NEVER ANSWERED THE COMPLAINT, HE APPEARED BY MAKING A MOTION TO DISMISS AND PARTICIPATED IN THE LITIGATION, THEREFORE DEFENDANT'S MOTION TO VACATE THE DEFAULT SHOULD HAVE BEEN GRANTED; DISMISSAL OF THE ACTION FOR FAILURE TO INCLUDE A NECESSARY PARTY OR THE FAILURE TO JOIN OR SUBSTITUTE A PARTY WAS NOT WARRANTED.

The Second Department, reversing Supreme Court, determined defendant's motion to vacate the default should have been granted. Although defendant did not submit an answer, he did move to dismiss the complaint, which extended his time to answer, and thereafter participated in the litigation. Supreme Court properly denied defendant's motion to dismiss on the ground a necessary party was not included in the suit, and on the ground a party should have been substituted or joined: "We disagree with the Supreme Court's determination to deny that branch of the defendant's motion which was to vacate his default in answering the complaint. 'CPLR 320(a) provides that a defendant may appear in an action in one of three ways: (1) by serving an answer, (2) by serving a notice of appearance, or (3) making a motion which has the effect of extending the time to answer' ... . Here, the defendant appeared in the action in May 2008, when he, among others, moved pursuant to CPLR 3211(a) to dismiss the complaint, which extended his time to serve an answer (see CPLR 320[a]; 3211[f]). Although the defendant did not serve an answer to the complaint following the denial of his motion, the record demonstrates that the defendant actively participated in the litigation during the ensuing years and that the plaintiffs never moved for leave to enter a default judgment against him. ... 'CPLR 1001(a) provides that '[p]ersons . . . who might be inequitably affected by a judgment in the action' are necessary parties whose joinder is required' ... . 'When a person who should be joined under [CPLR 1001(a)] has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned'.... . However, '[u]pon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action' (CPLR 1018). 'The determination to substitute or join a party pursuant to CPLR 1018 is within the discretion of the trial court' ... . Contrary to the defendant's contention, the Supreme Court did not improvidently exercise its discretion in permitting the plaintiffs to continue this action against the original defendants, despite any alleged changes to the composition of the purported board of trustees ... over the course of this 16-year litigation, in order to avoid any further unnecessary delay ...". ***Kelley v. Garuda*, 2020 N.Y. Slip Op. 07180, Second Dept 12-2-20**

CIVIL PROCEDURE, BANKRUPTCY, JUDGES.

IN THE ABSENCE OF AN ORDER SUBSTITUTING THE BANKRUPTCY TRUSTEE FOR THE PLAINTIFF-DEBTOR, THE DEFENDANTS' MOTION TO DISMISS THE COMPLAINT SHOULD HAVE BEEN GRANTED; SUPREME COURT SHOULD NOT HAVE DENIED DEFENDANTS' MOTION AND DIRECTED PLAINTIFF TO SEEK RELIEF FROM THE BANKRUPTCY COURT.

The Second Department, reversing Supreme Court, noted that, as a matter of comity, based upon an order in bankruptcy court, a New York court will substitute the bankruptcy trustee as a party in a suit involving the plaintiff/debtor. Here there was no such order and the defendants' motion to dismiss the complaint should have been granted: " '[T]he integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets' ... . 'By failing to list causes of action on bankruptcy schedules of assets, the debtor represents that it has no such claims' ... . '[O]nce a bankruptcy proceeding is commenced, all legal or equitable interests of the debtor become part of the bankruptcy estate, including any causes of action (... see 11 USC § 541[a][1]). Accordingly, where a debtor has sought chapter 7 bankruptcy protection, "the causes of action formerly belonging to the debtor . . . [vest] in the trustee for the benefit of the estate . . . [and] [t]he debtor has no standing to pursue such causes of action' ... . In cases where a plaintiff-debtor has successfully petitioned the bankruptcy court to reopen the bankruptcy to include a pending action, this Court has invoked the doctrine of comity to permit substitution of the bankruptcy trustee as a plaintiff ... . Here, however, the Supreme Court went further, directing [plaintiff] to seek such relief from the bankruptcy court and denying the defendants' motion to dismiss the complaint ... . Under these circumstances, the court should have granted that branch of the defendants' motion which was to dismiss the complaint ... . Nevertheless, the trustee, if he or she should chose to re-commence the case in his or her own name, will enjoy the protection offered by CPLR 205 ...". ***Turner v. Owens Funeral Home, Inc.*, 2020 N.Y. Slip Op. 07238, Second Dept 12-2-20**

CIVIL PROCEDURE, JUDGES, FORECLOSURE.

PLAINTIFF'S FORECLOSURE ACTION SHOULD NOT HAVE BEEN DISMISSED, SUA SPONTE, AS ABANDONED PURSUANT TO 22 N.Y.C.R.R. § 202.48; THE 60-DAY TIME LIMIT ONLY APPLIES TO THE DIRECTION TO SUBMIT A JUDGMENT "ON NOTICE."

The Second Department, reversing Supreme Court, determined the court should not have dismissed plaintiff's foreclosure action, sua sponte, as abandoned pursuant to 22 N.Y.C.R.R. § 202.48. Supreme Court, after plaintiff's unopposed motion for a judgment of foreclosure and sale, directed the plaintiff to "submit judgment." When plaintiff submitted a proposed judgment for signature, Supreme Court dismissed the action because the proposed judgment was not submitted within 60 days. The 60-day time limit only applies when a party is directed to submit the judgment "on notice:" "Pursuant to 22 NYCRR 202.48, an order or judgment which is directed to be settled or submitted on notice must be submitted for signature within 60 days after the signing and filing of the decision directing that the order or judgment be settled or submitted. A party who fails to submit the order or judgment within the 60-day time period will be deemed to have abandoned the action or motion, absent good cause shown ... . In this case, when the Supreme Court initially granted the plaintiff's motion, inter alia, for a judgment of foreclosure and sale, it did not direct that the proposed judgment had to be settled or submitted on notice. 22 NYCRR 202.48 does not apply where, as here, the court merely directs a party to submit an order or judgment without expressly directing that the order or judgment be submitted on notice ...". ***James B. Nutter & Co. v. McLaughlin*, 2020 N.Y. Slip Op. 07178, Second Dept 12-2-20**

CRIMINAL LAW.

ASSAULT THIRD IS AN INCLUSORY CONCURRENT COUNT OF ASSAULT SECOND.

The Second Department noted that assault third is an inclusory concurrent count of assault second: "... [T]he defendant's conviction of assault in the third degree must be vacated as an inclusory concurrent count of assault in the second degree (see CPL 300.40[3][b]; Penal Law §§ 120.05[2]; 120.00[1] ...)." ***People v. Cullins*, 2020 N.Y. Slip Op. 07219, Second Dept 12-2-20**

CRIMINAL LAW, ATTORNEYS, APPEALS.

DEFENDANT WAS HOUSED HOURS AWAY FROM HIS BROOKLYN ATTORNEY AND ATTEMPTS TO MOVE DEFENDANT TO NEW YORK CITY WERE UNSUCCESSFUL; UNDER THE CIRCUMSTANCES, DEFENDANT WAS DENIED HIS RIGHT TO CONSULT WITH HIS ATTORNEY BEFORE ENTERING A GUILTY PLEA; THE MOTION TO VACATE THE PLEA SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Miller, considering the appeal in the interest of justice, determined defendant's motion to withdraw his guilty plea should have been granted. Defendant was housed far away from his Brooklyn attorney and the attempts to have him moved to New York City were ignored by the Department of Corrections. The Second Department held defendant had been deprived of his right to counsel: "Under the circumstances here, and particularly in view of the defendant's substantiated and uncontradicted testimony that he was deprived of his constitutional right to consult with his attorney in advance of trial, the Supreme Court improvidently exercised its discretion in denying the defendant's application pursuant to CPL 220.60(3) to withdraw his plea of guilty. Under the circumstances ... we conclude that the interests of justice would have been better served had the defendant been permitted to withdraw his plea of guilty. * * * This Court has recognized that '[s]imple justice . . . mandates that a plea must be knowingly and intelligently given and, if it be to any degree induced by fear or coercion, it will not be permitted to stand' ...". ***People v. Hollmond*, 2020 N.Y. Slip Op. 07222, Second Dept 12-2-20**

CRIMINAL LAW, CONTEMPT.

STATUTORY CRITERIA FOR CRIMINAL CONTEMPT FIRST DEGREE NOT MET; CONVICTION REDUCED TO CRIMINAL CONTEMPT SECOND DEGREE.

The Second Department determined the statutory criteria for criminal contempt first degree were not met and reduced the conviction to criminal contempt second degree: "As the People concede, the evidence was legally insufficient to establish the defendant's guilt of criminal contempt in the first degree in violation of Penal Law § 215.51(c). An essential element of that crime is that the defendant has violated an order of protection issued pursuant to 'sections two hundred forty and two hundred fifty-two of the domestic relations law, articles four, five, six and eight of the family court act and section 530.12 of the criminal procedure law, or an order of protection issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction, which requires the respondent or defendant to stay away from the person or persons on whose behalf the order was issued' ... . Here, the defendant was accused of violating an order of protection issued pursuant to Criminal Procedure Law § 530.13. Criminal Procedure Law § 530.13, which provides protection to victims of crimes other than family offenses, is not one of the authorities enumerated in Penal Law § 215.51(c). Accordingly, the defendant's conviction of criminal contempt in the first degree was legally insufficient because the People could not prove an essential element of the offense ... . However, because the evidence was legally sufficient to support a conviction of the lesser included offense of

criminal contempt in the second degree (see Penal Law § 215.50[3]), the defendant's conviction is reduced accordingly ...". ***People v. Smith*, 2020 N.Y. Slip Op. 07229, Second Dept 12-2-20**

CRIMINAL LAW, EVIDENCE.

THE CHARGES AGAINST DEFENDANT STEMMED FROM HIS STRIKING AND SERIOUSLY INJURING AN EIGHT-POUND DOG; THERE WAS NO NEED TO INSTRUCT THE GRAND JURY ON THE JUSTIFICATION DEFENSE; INDICTMENT REINSTATED OVER A DISSENT.

The Second Department, reversing Supreme Court on the People's appeal, over an extensive dissent, determined the grand jury proceedings were not defective due to the prosecutor's failure to instruct the grand jury on the justification defense. The charges against the defendant stemmed from his striking and severely injuring a dog. The Second Department held a reasonable view of the evidence did not warrant the justification instruction: " '[A] prosecutor should instruct the Grand Jury on any complete defense supported by the evidence which has the potential for eliminating a needless or unfounded prosecution' ... . 'The failure to charge justification constitutes reversible error only when the defense is 'supported by a reasonable view of the evidence—not by any view of the evidence, however artificial or irrational' ... . There is no reasonable view of the evidence that forcefully striking and injuring the approximate eight-pound terrier poodle in the manner undertaken by the defendant, who was approximately 6 feet tall and weighed 200 pounds, was necessary as an emergency measure to avoid, at most, a bite by this small animal through denim pants." ***People v. Jimenez*, 2020 N.Y. Slip Op. 07223, Second Dept 12-2-20**

CRIMINAL LAW, JUDGES, EVIDENCE.

UNDER THE CIRCUMSTANCES, SUPREME COURT SHOULD HAVE GRANTED THE DEFENSE AND PROSECUTION'S JOINT REQUEST TO HAVE THE DEFENDANT'S COMPETENCE TO STAND TRIAL EVALUATED; ONCE A DEFENDANT IS DEEMED COMPETENT TO STAND TRIAL, THE DECISION WHETHER TO PRESENT AN INSANITY DEFENSE IS THE DEFENDANT'S, NOT THE COURT'S, TO MAKE.

The Second Department, reversing the convictions, determined: (1) the trial judge should not have rejected the request by both defense counsel and the prosecutor to have the defendant's mental health and fitness for trial evaluated; and (2) once a defendant is found competent to stand trial the decision whether to present an insanity defense is the defendant's alone. Here defense counsel was ordered by the judge to present an insanity defense, over defendant's objection: "... [W]hen confronted with evidence that the defendant was not taking his required medication and was not able to communicate rationally with his attorney, the Supreme Court should have granted the joint applications of the People and the defense to have the defendant examined pursuant to CPL 730.30(1) to determine his fitness to proceed ... . [A] defendant found competent to stand trial has the ultimate authority, even over counsel's objection, to reject the use of a psychiatric defense ... . Thus, once the Supreme Court determined the defendant to be competent to stand trial, it should not have interfered with that authority by 'order[ing]' defense counsel, over the defendant's objection, to present an insanity defense." ***People v. Bellucci*, 2020 N.Y. Slip Op. 07215, Second Dept 12-2-20**

FORECLOSURE, EVIDENCE.

THE BANK'S DOCUMENTARY EVIDENCE DID NOT DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION.

The Second Department determined plaintiff bank did not demonstrate standing to bring the foreclosure action and the bank's motion for summary judgment was properly denied: " 'Although the foundation for admission of a business record usually is provided by the testimony of the custodian, the author or some other witness familiar with the practices and procedures of the particular business, it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted' ... . '[E]vidence of the contents of business records is admissible only where the records themselves are introduced' ... . Without submission of the business records, a witness's testimony as to the contents of the records is inadmissible hearsay (see CPLR 4518[a] ...). Here, Herberg's [bank's vice president's] assertion, in effect, that the plaintiff was the holder of the note when it commenced the action appears to be based upon unproduced business records or upon confirmation of information from some other unproduced source, and is therefore not probative on the issue of the plaintiff's standing ...". ***Wells Fargo Bank, N.A. v. Atedgi*, 2020 N.Y. Slip Op. 07247, Second Dept 12-2-20**

FORECLOSURE, EVIDENCE.

THE BANK DID NOT DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined the bank (Wilmington) did not demonstrate defendants' default in this foreclosure action and the bank's motion for summary judgment should not have been granted: "Wilmington failed to establish, prima facie, its entitlement to judgment as a matter of law, as it failed to submit evidence demonstrating the defendants' default in payment ... . In support of the motion, Wilmington submitted ... copies of the note and the mortgage, and the affidavit of Angela Farmer, a vice president of Rushmore Loan Management Services, LLC (hereinafter Rush-

more), the servicer of the loan. Based on her review of business records in the possession of Rushmore, including records created by Ditech [the original plaintiff, note was transferred to Wilmington], Farmer averred that the defendants defaulted in payment in June 2013. While Farmer established that she was familiar with Ditech's recordkeeping practices and procedures, no payment records were proffered with the motion. The only business records annexed and incorporated in the affidavit with regard to the default were two notices of default both dated October 24, 2013 ... . '[W]hile a witness may read into the record from the contents of a document which has been admitted into evidence, a witness's description of a document not admitted into evidence is hearsay' ... . '[I]t is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted' ...". ***Wilmington Sav. Fund, FSB v. Peters*, 2020 N.Y. Slip Op. 07248, Second Dept 12-2-20**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), CIVIL PROCEDURE, EVIDENCE.

THE BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF RPAPL 1304 OR THE MORTGAGE AND DID NOT DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION.

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 failed to demonstrate compliance with the notice requirements of RPAPL 1304, the notice of default requirements of the mortgage, and standing to bring the action. Evidence submitted in replay papers should not have been considered: "... [T]he plaintiff submitted the affidavit of DiMario Abrams, a vice president for the plaintiff's loan servicer, as well as copies of the notices and the envelopes in which the notices were allegedly mailed. Abrams did not purport to have personal knowledge of the actual mailing of the notices pursuant to RPAPL 1304, he did not purport to have personal knowledge of the mailing procedures utilized by the plaintiff's loan servicer, and he did not lay a proper foundation under the business records exception to the hearsay rule with respect to the notices and envelopes attached to his affidavit ... . * * * The plaintiff submitted a lost note affidavit prepared by Dereje D. Badada, a vice president for its loan servicer. According to that affidavit, the note had "been inadvertently lost, misplaced or destroyed," and the loan servicer had "not pledged, assigned, transferred, hypothecated or otherwise disposed of the note." There was no allegation in the lost note affidavit that the note had ever been delivered or assigned to the plaintiff, nor were there any details regarding when or how the note was lost, who searched for the note, or when they searched for the note. Therefore, the lost note affidavit did not establish the plaintiff's ownership of the note or the facts preventing it from producing the note (see UCC 3-804 ...)." ***U.S. Bank N.A. v. Kohanov*, 2020 N.Y. Slip Op. 07242, Second Dept 12-2-20**

MALICIOUS PROSECUTION, ATTORNEYS, IMMUNITY, MUNICIPAL LAW.

THE MALICIOUS PROSECUTION CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED; AN INDICTMENT RAISES ONLY A PRESUMPTION OF PROBABLE CAUSE WHICH CAN BE REBUTTED; A PROSECUTOR IS ENTITLED ONLY TO QUALIFIED IMMUNITY AS AN INVESTIGATOR.

The Second Department, reversing Supreme Court, determined plaintiff's malicious prosecution cause of action should not have been dismissed. Plaintiff was arrested and indicted for sex trafficking, held in jail for 10 months, and then the charges were dropped. The court noted that the indictment raised only a presumption of probable cause which can be rebutted. The plaintiff raised a question of fact about whether the prosecution was motivated by malice. A prosecutor is entitled only to qualified immunity when acting as an investigator: " 'The elements of the tort of malicious prosecution are: (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice' ... . Although a grand jury indictment raises a presumption of probable cause, this presumption may be rebutted ... . '[E]ven if the jury at a trial could, or likely would, decline to draw inferences favorable to the plaintiff on issues of probable cause and malice, the court on a summary judgment motion must indulge all available inferences of the absence of probable cause and the existence of malice' ... . '[A] prosecutor is entitled to absolute immunity for actions taken within the scope of his or her official duties in initiating and pursuing a criminal prosecution and in presenting the People's case, but a prosecutor is entitled only to qualified immunity when acting in an investigatory capacity' ...". ***Crooks v. City of New York*, 2020 N.Y. Slip Op. 07161, Second Dept 12-2-20**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

THE JURY WAS PROPERLY INSTRUCTED ON THE RES IPSA LOQUITUR DOCTRINE IN THIS MEDICAL MALPRACTICE ACTION.

The Second Department determined the jury was properly instructed on the res ipsa loquitur doctrine in this medical malpractice case. Here plaintiffs presented evidence nerve damage would not have occurred absent negligence. The plaintiff's verdict was upheld: "We agree with the Supreme Court's determination to charge the jury with respect to res ipsa loquitur. 'Under appropriate circumstances, the evidentiary doctrine of res ipsa loquitur may be invoked to allow the factfinder to infer negligence from the mere happening of an event' ... . 'Where the actual or specific cause of an accident is unknown, under the doctrine of res ipsa loquitur a jury may in certain circumstances infer negligence merely from the happening of an

event and the defendant's relation to it' ... . Res ipsa loquitur "derives from the understanding that some events ordinarily do not occur in the absence of negligence' ... . 'In addition to this first prerequisite, plaintiff must establish, second, that the injury was caused by an agent or instrumentality within the exclusive control of defendant and, third, that no act or negligence on the plaintiff's part contributed to the happening of the event. Once plaintiff satisfies the burden of proof on these three elements, the res ipsa loquitur doctrine permits the jury to infer negligence from the mere fact of the occurrence' ... . 'Moreover, expert testimony may be properly used to help the jury 'bridge the gap' between its own common knowledge, which does not encompass the specialized knowledge and experience necessary to reach a conclusion that the occurrence would not normally take place in the absence of negligence, and the common knowledge of physicians, which does' ... . Here, the plaintiffs presented expert testimony that, in a first time fundoplication procedure like the plaintiff's, injury to the vagus nerves should not occur if the surgeon adheres to the accepted standard of care and follows the proper surgical sequence. While the defendants presented evidence that gastroparesis can be idiopathic, 'a plaintiff need not conclusively eliminate the possibility of all other causes of the injury to rely on res ipsa loquitur' ...". ***Smith v. Sommer*, 2020 N.Y. Slip Op. 07235, Second Dept 12-2-20**

MUNICIPAL LAW, CONTRACT LAW.

THE PROPERTY OWNER SUED THE VILLAGE ALLEGING THE VILLAGE BREACHED A CONTRACT IN FAILING TO RE-ZONE THE PROPERTY TO ALLOW DEVELOPMENT; A MUNICIPALITY DOES NOT HAVE THE AUTHORITY TO ENTER A CONTRACT WHICH CONTROLS ITS LEGISLATIVE POWERS.

The Second Department, reversing Supreme Court, determined the cause of action by plaintiff property owner alleging the defendant village breached a contract to rezone the property to allow development should have been dismissed. A municipality does not have the authority to make contracts which control legislative powers and duties: "Even were we to find that the stipulations contained a provision that required the Village Board to enact zoning, such a provision is unenforceable, as obligating the Village Board to enact certain zoning requiring a legislative act cannot be agreed to by stipulation. 'While a municipality possesses the inherent right to compromise a claim against it, it may not, under the guise of a compromise, impair a public duty owed by it or give validity to a void claim. Municipal corporations have no power to make contracts which will embarrass or control them in the performance of their legislative powers and duties' ... . Moreover, '[t]he term limits rule prohibits one municipal body from contractually binding its successors in areas relating to governance unless specifically authorized by statute or charter provisions to do so. Elected officials must be free to exercise legislative and governmental powers in accordance with their own discretion and ordinarily may not do so in a manner that limits the same discretionary right of their successors to exercise those powers' ...". ***BT Holdings, LLC v. Village of Chester*, 2020 N.Y. Slip Op. 07157, Second Dept 12-2-20**

SEPULCHER.

ALTHOUGH DECEDENT'S BODY WAS DELIVERED TO THE WRONG FUNERAL HOME, PLAINTIFFS DID NOT DEMONSTRATE DEFENDANT INTERFERED WITH PLAINTIFFS' RIGHT OF SEPULCHER.

The Second Department, reversing Supreme Court, determined the plaintiffs did not demonstrate defendant interfered with plaintiffs' right of sepulcher by releasing the decedent's body to the wrong funeral home: " 'The common-law right of sepulcher affords the deceased's next of kin an absolute right to the immediate possession of a decedent's body for preservation and burial . . . , and damages may be awarded against any person who unlawfully interferes with that right or improperly deals with the decedent's body' ... . 'To establish a cause of action for interference with the right of sepulcher, [a] plaintiff must establish that: (1) plaintiff is the decedent's next of kin; (2) plaintiff had a right to possession of the remains; (3) defendant interfered with plaintiff's right to immediate possession of the decedent's body; (4) the interference was unauthorized; (5) plaintiff was aware of the interference; and (6) the interference caused plaintiff mental anguish' ... .[T]he evidence establishes that Cleckley, who was then satisfying a residency to become a licensed funeral director, was directed by his superior to collect and transport the decedent's body to the funeral home. The plaintiffs presented no evidence either that Cleckley was aware that the funeral home was not authorized to take possession of the decedent's body or that he was negligent in failing to verify that his superior was authorized to direct him to collect and transport the decedent's body. Thus, the plaintiffs failed to meet their prima facie burden to show that he wrongfully interfered with the plaintiffs' right to immediate possession of the decedent's body ... . The plaintiffs likewise failed to demonstrate that Cleckley acted wrongfully or negligently such that he may be held liable for their emotional injuries ...". ***Turner v. Owens Funeral Home, Inc.*, 2020 N.Y. Slip Op. 07237, Second Dept 12-2-20**

THIRD DEPARTMENT

CIVIL PROCEDURE, ADMINISTRATIVE LAW.

THE RECEIPT OF THE LETTER BY CERTIFIED MAIL, NOT THE PRIOR RECEIPT OF AN EMAIL WITH THE LETTER ATTACHED, TRIGGERED THE FOUR-MONTH STATUTE OF LIMITATIONS FOR BRINGING AN ARTICLE 78 PROCEEDING; THE OMISSION OF THE REQUIREMENT THAT THE RESPONDENTS BE SERVED WITH THE ORDER TO SHOW CAUSE COULD BE REMEDIED BY AN EXTENSION OF THE TIME TO EFFECT SERVICE PURSUANT TO CPLR 306-B.

The Third Department, reversing Supreme Court, determined the receipt of a letter by certified mail on January 22, not the receipt of the email with the letter attached on January 17, started the four-month statute of limitations for the Article 78 action. The letter was the final determination of the respondent Department of Health, denying petitioner's application to open an assisted living facility. In addition, the Third Department determined a mistake made in the order to show cause, which did not require service upon the respondents, could be remedied. Therefore petitioners should be granted an extension of time to serve respondents pursuant to CPLR 306-b: "There is no dispute that the January 17 letter constituted a final and binding determination. At issue is whether counsel's receipt of the January 17 email or counsel's receipt of the January 17 letter by certified mail on January 22, 2019 provided the notice necessary to trigger the running of the statute of limitations. ... We recognize that there is only one letter, the January 17 letter, a copy of which was attached to the January 17 email and the original was delivered by certified mail on January 22, 2019. That said, even though an email delivery could have sufficed, respondents opted to effect delivery of the January 17 letter through the more formal certified mailing process, by which actual delivery and receipt are confirmed with the recipient's signature. Given that format, it was not necessarily unreasonable for petitioners to have assumed that receipt of the January 17 letter on January 22, 2017 triggered the limitations period or, at least, an ambiguity was created as to whether to measure the time period from that date. As such, we conclude that Supreme Court erred in granting respondents' motion to dismiss the petition as untimely ... . Petitioners submitted, and Supreme Court signed, a proposed order to show cause providing for service upon respondents by service on the Attorney General. Petitioners complied with the terms of that order, but such service was manifestly defective because petitioners were also statutorily required to effect service upon respondents (see CPLR 307, 7804 [c]). In their cross motion, petitioners promptly sought permission to correct this error, and it is evident that respondents were in no way prejudiced. Not to be overlooked is the looming expiration of the statute of limitations. Under such circumstances, rather than dismissing a proceeding, a court is authorized to extend the time for service 'upon good cause shown or in the interest of justice' (CPLR 306-b ...)." ***Matter of Park Beach Assisted Living, LLC v. Zucker*, 2020 N.Y. Slip Op. 07264, Third Dept 12-3-20**

CIVIL PROCEDURE, DEBTOR-CREDITOR, FORECLOSURE.

PURPORTED MORTGAGE PAYMENTS MADE AFTER THE EXPIRATION OF THE STATUTE OF LIMITATIONS FOR A FORECLOSURE ACTION DID NOT REVIVE THE STATUTE OF LIMITATIONS FOR THE PURCHASERS OF THE ENCUMBERED PROPERTY OR THE BANK WHICH ISSUED A MORTGAGE SECURED BY THE ENCUMBERED PROPERTY.

The Third Department, reversing Supreme Court, determined mortgage payments allegedly made after the expiration of the statute of limitations for a foreclosure action did not revive the statute of limitations as against defendants, who purchased the encumbered property, and defendant bank which issued a mortgage secured by the property: "... [T]he tolling or revival effect of partial payments differs as between the payor — the Gureckis — and subsequent purchasers — defendants (see General Obligations Law § 17-107 [2]). [A] qualifying partial payment that is made before the expiration of the statute of limitations will renew the statute of limitations against any subsequent purchaser (see General Obligations Law § 17-107 [2] [2d par] ..). In contrast, a qualifying partial payment that is made after the expiration of the statute of limitations will only revive the statute of limitations as to a subsequent purchaser who did not give value or who had actual notice of the making of the payment ... . Here, ... at the time that [the payments] were made the statute of limitations had expired. Given that the record is clear that defendants are purchasers for value and plaintiff put forth no evidence that defendants had actual notice of the ... payments, the payments did not have the effect of reviving the statute of limitations as to defendants (see General Obligations Law § 17-107 [2] ...)." ***Gurecki v. Gurecki*, 2020 N.Y. Slip Op. 07257, Third Dept 12-3-20**

CRIMINAL LAW, EVIDENCE.

ALL BUT ONE COUNT OF THE INDICTMENT WAS RENDERED DUPLICITOUS BY THE CHILD-VICTIM'S GRAND JURY TESTIMONY IN THIS SEXUAL ABUSE CASE; THE SIMILAR UNCHARGED OFFENSES SHOULD NOT HAVE BEEN ADMITTED UNDER *MOLINEUX* AS BACKGROUND EVIDENCE; NEW TRIAL ORDERED.

The Third Department, reversing defendant's conviction and ordering a new trial determined: (1) the duplicitous counts of the indictment should have been dismissed pre-trial, not post-trial; (2) the evidence of similar uncharged offenses under *Molineux* should not have been admitted as "background evidence." The defendant was charged with sexual abuse of a child. With the exception of one incident (count 1), the child was not able to pinpoint when the abuse happened. All

but count 1 were rendered duplicitous by the grand jury testimony (indicating that more than one offense occurred in the one-month time-frame of the indictment counts). In addition, the similar uncharged allegations were too prejudicial to be allowed under *Molineux*: " '[U]nder . . . Molineux jurisprudence, we begin with the premise that uncharged crimes are inadmissible and, from there, carve out exceptions' ... . The proffered Molineux evidence was not necessary to resolve any ambiguity as to count 1, and thus was beyond the Molineux exception for background information as provided by County Court in its ruling ... . If the court had dismissed counts 2 through 13 as duplicitous prior to the People's presentation of their case-in-chief, that likely would have changed the court's calculus as to the admission of the victim's testimony regarding uncharged crimes — including whether to allow testimony regarding the incidents referred to in those dismissed counts, which would no longer be direct evidence of charged crimes. Even if the testimony regarding the uncharged criminal conduct was permissible for a nonpropensity purpose, its prejudicial nature outweighed the minimal probative value that may be attributed to it as to count 1 ... . While in some circumstances the undue prejudice resulting from Molineux evidence may be mitigated by a limiting instruction, here such an instruction was only provided once in the final charge to the jury, and not at the time of the victim's testimony, despite County Court having indicated that those instructions would be provided at the time that such evidence was admitted ...". ***People v. Holtslander*, 2020 N.Y. Slip Op. 07250, Third Dept 12-3-20**

MALICIOUS PROSECUTION, IMMUNITY, JUDGES, MUNICIPAL LAW.

THE MALICIOUS PROSECUTION CAUSE OF ACTION AGAINST THE TOWN STEMMING FROM THE TOWN JUSTICE'S ISSUANCE OF AN ARREST WARRANT FOR PLAINTIFF SHOULD HAVE BEEN DISMISSED AS BARRED BY THE DOCTRINE OF JUDICIAL IMMUNITY.

The Third Department, reversing (modifying) Supreme Court, determined the malicious prosecution cause of action against the town should have been dismissed. Plaintiff daughter filed a report accusing her mother of withdrawing money from the daughter's account without permission. An arrest warrant was issued. Plaintiff thereafter produced a power of attorney allowing her to withdraw money from her daughter's account and the larceny charge against plaintiff was dropped. Plaintiff then brought a malicious prosecution action against the town and the village: "Under the doctrine of judicial immunity, a judge is immune from civil liability for any acts that he or she performs in the exercise of his or her judicial function ... . Defendants correctly observe that plaintiff's malicious prosecution claim against the Town is premised solely upon the Town Justice signing the warrant authorizing plaintiff's arrest. The record indisputably establishes that the Town Justice signed the arrest warrant in the exercise of his judicial function. Consequently, the doctrine of judicial immunity applies and Supreme Court should have dismissed the malicious prosecution claim against the Town on that basis ...". ***Gagnon v. Village of Cooperstown, N.Y.*, 2020 N.Y. Slip Op. 07256, Third Dept 12-3-20**

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