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COURT OF APPEALS

CRIMINAL LAW, EVIDENCE.

THE BRADY MATERIAL, A WITNESS STATEMENT REVEALED AFTER TRIAL, WOULD NOT HAVE ALTERED THE RESULT OF THE TRIAL; DEFENDANT'S CONVICTION SHOULD NOT HAVE BEEN REVERSED.

The Court of Appeals, reversing the Appellate Division, determined the Brady material, a witness statement, revealed after trial would not have altered the result of the trial and therefore reversal of the conviction was not warranted: " 'To make out a successful Brady claim, 'a defendant must show that (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material' ... . Where, as here, the defendant made a specific request for the evidence in question, '[w]e must examine the trial record, evaluat[e] the withheld evidence in the context of the entire record, and determine in light of that examination whether there is a reasonable possibility that the result of the trial would have been different if the evidence had been disclosed' ... . The undisclosed witness's description of the shooter and his flight path did not differ in any material respect from that of the eyewitness who identified defendant in court as the perpetrator. Moreover, the jury's verdict was supported by considerable other evidence, including the testimony of a cooperating witness who planned the crime with defendant, provided a weapon and cellphone for defendant's use, observed defendant approach and leave the site of the shooting at the time it occurred, and described the manner in which the weapon was destroyed after the shooting; testimony by the spouse of the cooperating witness confirming defendant's involvement; the testimony of additional witnesses who described the perpetrator's clothing and his movements following the shooting; telephone records; and surveillance videos showing defendant's proximity, clothing, and behavior immediately after the crime." ***People v. McGhee*, 2021 N.Y. Slip Op. 01836, CtApp 3-25-21**

MEDICAID, MUNICIPAL LAW.

FUNDS FOR PERSONAL CARE SERVICES ARE MEDICAID FUNDS SUBJECT TO THE AUDIT AND RECOUPMENT AUTHORITY OF THE CITY OF NEW YORK HUMAN RESOURCES ADMINISTRATION; APPELLATE DIVISION REVERSED.

The Court of Appeals, reversing the Appellate Division, determined funds paid for personal care were Medicaid funds which were subject to the audit and recoupment authority of the City of New York Human Resources Administration (HRA). The facts are explained in the Appellate Division decision: "For the reasons stated in the dissenting opinion below (*Matter of People Care Inc. v. City of New York*, 175 AD3d 134, 147-152 [1st Dept 2020] [Richter, J.P., dissenting]), we conclude that the funds for personal care services paid to petitioner People Care, Inc. under the Health Care Reform Act (Public Health Law §§ 2807-v [1] [bb] [i], [iii]) are Medicaid funds subject to the audit and recoupment authority of the City of New York Human Resources Administration (HRA) in accordance with the parties' 2001 contract." ***Matter of People Care Inc. v. City of N.Y. Human Resources Admin.*, 2021 N.Y. Slip Op. 01834, CtApp 3-25-21**

MUNICIPAL LAW.

PLAINTIFF LANDLORD, PURSUANT TO THE VILLAGE WATER DEPARTMENT'S RULES, CAN NOT BE HELD PERSONALLY LIABLE FOR THE TENANT'S UNPAID WATER BILLS.

The Court of Appeals, reversing Supreme Court, determined plaintiff landlord was not personally responsible for the tenant's unpaid water bills. The village water department's rules provided only a lien on the property and cutting off water as remedies: "The Water Department Rules and Regulations of the Village of Herkimer, on which the Village relies, do not authorize a claim against plaintiff for personal liability upon nonpayment of water rents. To the extent the Rules and Regulations determine the Village's remedies for unpaid water bills, they refer to 'a lien on the premises where the water is used' (Rule No. 8; see also Village Law § 11-1118 [providing that unpaid water rents constitute a lien on real property]) and to shutting off water supply, upon notice (see Rule No. 9; see also Village Law § 11-1116 [providing that a village may enforce observance of its water use rules and regulations by cutting off water supply])." ***Herkimer County Indus. Dev. Agency v. Village of Herkimer*, 2021 N.Y. Slip Op. 01835, CtApp 3-25-21**

FIRST DEPARTMENT

ACCOUNTANT MALPRACTICE.

PLAINTIFF DID NOT DEMONSTRATE DEFENDANT ACCOUNTANT DEPARTED FROM THE PROFESSIONAL STANDARD FOR TAX PREPARATION SERVICES.

The First Department, reversing Supreme Court, determined plaintiff did not demonstrate defendant accountant departed from the professional standard for tax preparation: " 'A party alleging a claim of accountant malpractice must show that there was a departure from the accepted standards of practice' ... . Plaintiff does not identify any applicable professional standard which would have required defendants to inquire whether the transactions at issue were approved in accordance with the procedures contained in the operating agreement. To the contrary, the standards proffered by plaintiff's expert permit an accountant engaged for tax preparation services to rely on information furnished by the taxpayer unless it appears to be incorrect, incomplete or inconsistent. There is no allegation here that the information provided to defendants was incorrect, incomplete or inconsistent." ***Deane v. Brodman*, 2021 N.Y. Slip Op. 01842, First Dept 3-25-21**

ATTORNEYS, WORKERS' COMPENSATION.

AN EMAIL INFORMING PLAINTIFF THAT DEFENDANT LAW FIRM WOULD NOT APPEAL THE RULING OF THE WORKERS' COMPENSATION APPELLATE PANEL DID NOT UNEQUIVOCALLY TERMINATE THE FIRM'S REPRESENTATION OF PLAINTIFF IN THE WORKERS' COMPENSATION MATTER.

The First Department, reversing Supreme Court, determined an email from the attorney defendants to the plaintiff did not unequivocally terminate the firm's representation of plaintiff before the Workers' Compensation Board: "Where, as here, defendants were retained in writing to represent plaintiff in all proceedings before the Workers' Compensation Board related to his claim, plaintiff made a sufficient showing of a continuing relationship with regard to that proceeding to support his contention of continuous representation ... . Defendants' statement in an email that they would not pursue an appeal to the Third Department after having lost before the Workers' Compensation appellate panel on the issue of whether plaintiff was an employee, did not 'unequivocally' terminate the representation in the workers' compensation matter, which remained pending following the administrative review ... . This is particularly true in light of the terms of the retainer agreement." ***Schwenger v. Weitz, Kleinick & Weitz, LLP*, 2021 N.Y. Slip Op. 01869, First Dept 3-25-21**

CIVIL PROCEDURE, DEBTOR-CREDITOR, CONTRACT LAW, MUNICIPAL LAW, LANDLORD-TENANT, REAL PROPERTY LAW.

THE COMMERCIAL LEASE GUARANTEE MET THE DEFINITION OF AN INSTRUMENT FOR THE PAYMENT OF MONEY; THE COVID-19 RESTRICTIONS ON ENFORCEMENT OF COMMERCIAL LEASE GUARANTEES DO NOT APPLY; THE WARRANTY OF HABITABILITY DEFENSE IS NOT AVAILABLE.

The First Department, reversing Supreme Court, determined; (1) although guarantees generally are not instruments for the payment of money within the meaning of CPLR 3213, the language of the guarantee was unconditional and therefore met the criteria of such an instrument; (2) the COVID-19-related provision of the NYC Administrative Code and executive orders, prohibiting enforcement of commercial lease guarantees, do not apply where the business were not required to cease operations; (3) the warranty of habitability was not available as a defense because of the language of the guarantee; and (4) a commercial tenant cannot assert the warranty of habitability: "While a guarantee of both payment and performance does not qualify as an instrument for the payment of money only under CPLR 3213 ... , paragraph 1 of the guaranty signed by defendants includes an unconditional obligation to pay all rent and additional rent owed under the sublease, and therefore does so qualify ... ; 'it required no additional performance by plaintiff[] as a condition precedent to payment or otherwise made defendant[s'] promise to pay something other than unconditional' ... . While the prohibition on the enforcement of commercial lease guaranties against natural persons under Administrative Code of City of NY § 22-1005 applies to businesses that were required to 'cease operation' or 'close to members of the public' under executive orders 202.3, 202.6, or 202.7, issued in connection with the COVID-19 pandemic, defendants never asserted that the nonparty subtenant ceased operations or closed to the public as a result of those orders. Defendants' claim that they properly raised warranty of habitability defenses under the sublease is without merit. Such defenses are not available to defendants because all defenses under the guaranty, with the exception of prior payment, were waived. Moreover, a commercial tenant cannot avail itself of the statutory warranty of habitability (see Real Property Law § 235-b ...)." ***iPayment, Inc. v. Silverman*, 2021 N.Y. Slip Op. 01846, First Dept 3-25-21**

CIVIL PROCEDURE, FORECLOSURE.

THE ORDER DISMISSING THE COMPLAINT FOR FAILURE TO SEEK A DEFAULT JUDGMENT WITHIN ONE YEAR DID NOT INLCUDE SPECIFIC FINDINGS OF A PATTERN OF DELAY; THEREFORE THE "FAILURE TO PROSECUTE" EXCEPTION IN CPLR 205(a) DID NOT APPLY; PLAINTIFF'S ACTION BROUGHT WITHIN SIX MONTHS OF DISMISSAL WAS NOT TIME-BARRED.

The First Department, reversing Supreme Court, determined the complaint was timely pursuant to the six-month extension afforded by CPLR 205(a). The dismissal of the complaint did not include any specific findings of a general pattern of delay. Therefore the six-month extension was not precluded: "In 2018, Supreme Court granted defendant's motion pursuant to CPLR 3215(c) to dismiss the complaint in the prior, 2010 foreclosure action for plaintiff's failure to seek a default judgment within one year of defendant's default. The dismissal order did not include any findings of specific conduct demonstrating a general pattern of delay in proceeding with the litigation, as required to preclude the application of CPLR 205(a) for failure to prosecute ... . Under the circumstances, the court should not have granted defendant's motion to dismiss the complaint in the present action as time-barred, as this action was timely brought within six months after the motion court dismissed plaintiff's first foreclosure action ...". ***U.S. Bank N.A. v. Kim*, 2021 N.Y. Slip Op. 01876, First Dept 3-25-21**

CIVIL PROCEDURE, FRAUD, EVIDENCE.

ALTHOUGH THE COMPLAINT WAS DEFECTIVE, AFFIDAVITS AND OTHER EVIDENCE DEMONSTRATE A POTENTIALLY MERITORIOUS CLAIM; THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, noted that a defective complaint will survive a motion to dismiss if affidavits or other evidence demonstrate a potentially meritorious claim: "The amended complaint is defective because it merely alleges that the Bluestone defendants participated in fraudulent transfers, without alleging that they were a transferee of the assets or benefited in any way from the transfers ... . However, a defective complaint will not be dismissed where affidavits and other evidence amplify inartfully pleaded but potentially meritorious claims ... . Plaintiffs rely on evidence submitted by the Goldman defendants in opposition to the Bluestone defendants' motion to dismiss which suggests that the Bluestone defendants may have participated in and benefitted from the alleged fraudulent transfers. This evidence indicates that plaintiffs have potentially meritorious fraudulent conveyance claims against the Bluestone defendants." ***Ninth Space LLC v. Goldman*, 2021 N.Y. Slip Op. 01853, First Dept 3-25-21**

CIVIL PROCEDURE, JUDGES.

JUDGE SHOULD NOT HAVE, SUA SPONTE, AFTER A COMPLIANCE CONFERENCE, ISSUED A PRECLUSION ORDER BECAUSE THERE WAS NO MOTION PENDING.

The First Department, reversing Supreme Court, determined the judge should not have, sua sponte, issued a preclusion order after a compliance conference because no motion was pending: "Order ... which, upon granting plaintiff's motion to reargue, reinstated his lost earnings claim but precluded the claim for years which tax returns are not produced to defendants, unanimously reversed, without costs, and the claim reinstated without limitation. The underlying preclusion order should not have been issued sua sponte at a compliance conference, with no motion pending ...". ***Sullivan v. Snow*, 2021 N.Y. Slip Op. 01873, First Dept 3-25-21**

CIVIL PROCEDURE, PERSONAL INJURY.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS PEDESTRIAN-VEHICLE ACCIDENT CASE WAS PREMATURE; PLAINTIFF HAD NOT YET BEEN DEPOSED.

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this pedestrian-vehicle accident case was premature because plaintiff had not been deposed: "Plaintiff alleges that after crossing Pearl Street at the intersection with Whitehall Street he was struck from behind by defendants' box truck, while he was on the curb/lip of the sidewalk. According to the affidavit of the driver, defendant Rosado, plaintiff was distracted by talking on a cell phone, and walked into the side of the truck while it was already making a right turn. While plaintiff was not required to demonstrate the absence of comparative negligence on his part, his motion was premature in that defendants did not have the opportunity to depose him ...". ***Bey v. Rosado*, 2021 N.Y. Slip Op. 01840, First Dept 3-25-21**

CIVIL PROCEDURE, TRUSTS AND ESTATES, NEGLIGENCE, BATTERY.

THE INFANCY TOLL OF THE STATUTE OF LIMITATIONS IN CPLR 208 APPLIES TO A WRONGFUL DEATH ACTION WHERE THE SOLE DISTUBUTEES ARE INFANTS; THE TOLL, HOWEVER, DOES NOT APPLY TO A RELATED ASSAULT AND BATTERY ACTION WHICH IS PERSONAL TO THE DECEDENT.

The First Department, in a full-fledged opinion by Justice Kapnick, determined the infancy toll of the statute of limitations in CPLR 208 applies where the unmarried father of two children dies intestate. The statute of limitations for the ensuing wrongful death action is tolled until the appointment of a guardian of the children's property. Father was involved in an altercation with a defendant, suffered fatal injuries and died later that day, September 6, 2012. Plaintiffs, the mothers of the

two children, were each appointed guardians of the property of their children in 2015. That is when the statute began running on the wrongful death action, rendering the 2016 complaint timely. A wrongful death action directly compensates the distributees, here the children. The assault and battery action, by contrast is personal to the decedent. Therefore the infancy toll does not apply to the assault and battery cause of action. The First Department explicitly overruled a decision relied upon by the defendants, *Ortiz v. Hertz Corp*., 212 AD2d 374 (1st Dept 1995). (The opinion is comprehensive and cannot be fairly summarized here.): "Today we clarify that Ortiz is not good law, because it was based on an incorrect application and interpretation of Hernandez. Therefore, pursuant to the precedent established in *Hernandez* [78 NY2d 687] ... we hold that when the sole distributees of a decedent's estate are infants, the toll of CPLR 208 applies to a wrongful death claim 'until the earliest moment there is a personal representative or potential personal representative who can bring the action whether by appointment of a guardian [of the property of the infant distributee] or majority of [a] distributee, whichever occurs first' ...". ***Machado v. Gulf Oil, L.P.*, 2021 N.Y. Slip Op. 01849, First Dept 3-25-21**

CONTRACT LAW, WORKERS' COMPENSATION.

IN THE CONTEXT OF AN INDEMNIFICATION CLAUSE REQUIRED BY THE WORKERS' COMPENSATION LAW, THE 1ST DEPARTMENT NOTED THAT, UNDER THE COMMON LAW, UNSIGNED DOCUMENTS ARE ENFORCEABLE AS LONG AS THE PARTIES INTENDED TO BE BOUND.

The First Department noted that the written-indemnification-clause requirement in Workers' Compensation Law section 11 does not require that the document be signed to be enforceable: "Plaintiff was injured while engaged in renovation of an apartment in Park Regis's cooperative building. The motion court correctly concluded that ASA, plaintiff's employer, was bound by the provisions of the alteration agreement between Park Regis and the nonparty cooperative shareholder lessees requiring the lessees' general contractor to indemnify and procure insurance in favor of Park Regis (see Workers' Compensation Law § 11 ...). ... Even if the alteration agreement were not signed by ASA, ASA would still be bound by it, because the record shows that it intended to be bound by it (*see Flores v. Lower E. Side Serv. Ctr., Inc*., 4 NY3d 363, 369 [2005] ['nothing in the language of (Workers' Compensation Law § 11) or its legislative history (suggests) that, in addition to requiring a written indemnification clause, the Legislature intended to deviate from the common-law rule that written documents can be enforced even if they are not signed']). ASA's field supervisor and project manager testified that ASA 'signs every alteration agreement[]' before commencing work, that he believed ASA had done so in connection with this project, that he understood ASA to be bound by the terms of the alteration agreement requiring it to procure insurance for and indemnify Park Regis, and that ASA had indeed procured insurance for Park Regis as required by the alteration agreement." ***Shala v. Park Regis Apt. Corp*., 2021 N.Y. Slip Op. 01870, First Dept 3-25-21**

EMPLOYMENT LAW, MUNICIPAL LAW, ADMINISTRATIVE LAW.

THE NYPD OFFICER WHO EMPLOYED A PROHIBITED CHOKEHOLD ON ERIC GARNER, WHICH CONTRIBUTED TO ERIC'S DEATH, WAS PROPERLY DISMISSED FROM THE NYPD.

The First Department determined the police officer who employed a prohibited chokehold on Eric Garner, which contributed to Eric's death, was properly dismissed from employment by the New York Police Department (NYPD): "Substantial evidence supports respondents' conclusion that petitioner recklessly caused injury to Eric Garner by maintaining a prohibited chokehold for 9 to 10 seconds after exigent circumstances were no longer present, thereby disregarding the risk of injury (Penal Law §§ 15.05[3]; 120.00[2] ...). We do not find the penalty 'so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness' ... . Conduct far less serious than petitioner's has been found by the Court of Appeals to have a 'destructive impact . . . on the confidence which it is so important for the public to have in its police officers' ...". ***Matter of Pantaleo v. O'Neill*, 2021 N.Y. Slip Op. 01857, First Dept 3-25-21**

FIDUCIARY DUTY, FRAUD, CIVIL PROCEDURE.

WHERE FRAUD IS THE BASIS OF A CLAIM FOR BREACH OF FIDUCIARY DUTY, THE STATUTE OF LIMITATIONS IS SIX YEARS.

The First Department determined that where the basis of a claim for aiding and abetting breach of fiduciary duty is fraud, the statute of limitations is six years: "[Defendant] Katten contends that even if the claim for aiding and abetting breach of fiduciary duty is taken at face value, the statute of limitations is three years because plaintiff seeks damages, not equitable relief ... . However, 'a cause of action for breach of fiduciary duty based on allegations of actual fraud is subject to a six-year limitations period' ... . Plaintiff's claim against defendant Albert Hallac for breach of fiduciary duty is based on allegations of actual fraud; hence, the statute of limitations for the claim against Katten for aiding and abetting Hallac's breach of fiduciary duty is six years." ***Wimbledon Fin. Master Fund, Ltd. v. Hallac*, 2021 N.Y. Slip Op. 01881, First Dept 3-25-21**

INSURANCE LAW, ATTORNEYS.

FAILURE TO SHOW UP FOR AN INDEPENDENT MEDICAL EXAMINATION (IME) IS A "POLICY ISSUE" WARRANTING DENIAL OF NO-FAULT BENEFITS AND THE AWARD OF ATTORNEY'S FEES TO PLAINTIFF.

The First Department, reversing the Appellate Term and disagreeing with other courts, determined the failure to show up for an independent medical exam (IME) is a "policy issue" warranting the denial of no-fault benefits and the award of attorney's fees to plaintiff: "... [A]n insurer who denies a claim for first-party No-Fault benefits on the basis of the injured person's failure to attend an IME properly does so by checking box 4 on the denial of claim form, and therefore an injured person's failure to attend an IME is a 'policy issue' both according to the denial of claim form and for purposes of awarding attorneys' fees under 11 NYCRR 65-4.6(c)." ***Kamara Supplies v. GEICO Gen. Ins. Co.*, 2021 N.Y. Slip Op. 01848, First Dept 3-25-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF, WHO WAS STRUCK BY A FALLING REBAR, WAS NOT REQUIRED TO DEMONSTRATE THE EXACT CIRCUMSTANCES WHICH LED TO THE REBAR FALLING; IT IS ENOUGH THAT THE REBAR SHOULD HAVE BEEN SECURED SUCH THAT IT WOULD NOT FALL; 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) cause of action in this falling object case should have been granted. Plaintiff was struck by a falling rebar: "Plaintiff, a journeyman ironworker at the Hudson Yards project, was injured when a piece of rebar fell from 30 feet above, striking him. In moving for summary judgment on his Labor Law § 240(1) claim, plaintiff was not required to show the exact circumstances of how the rebar came to strike him, as his testimony, that a coworker was working with rebar 30 feet above him on the same column immediately before the accident, was sufficient evidence that the rebar, whether it was dropped or fell in some other manner, was material requiring securing ... . In that plaintiff made a prima facie showing of entitlement to summary judgment on his testimony alone, the admissibility of his coworker's unsigned deposition transcript is a moot point. Defendants failed to adduce any evidence raising a question of fact to warrant denial of plaintiff's motion." ***Pados v. City of New York*, 2021 N.Y. Slip Op. 01855, First Dept 3-25-21**

PERSONAL INJURY.

PLAINTIFF ALLEGED HE STUMBLED WHEN HIS FOOT HIT ROLLED UP CARPETS AND THEN HE TRIPPED ON A RAISED SIDEWALK FLAG IN THIS SLIP AND FALL CASE; DEFENDANT DEMONSTRATED IT DID NOT HAVE NOTICE OF THE CARPETS, BUT THERE WERE QUESTIONS OF FACT ABOUT DEFENDANT'S NOTICE OF THE RAISED FLAG AND WHETHER THE FLAG WAS TRIVIAL; THE COURT NOTED THERE CAN BE MORE THAN ONE PROXIMATE CAUSE.

The First Department, reversing Supreme Court, determined defendant in this slip and fall case did not eliminate issues of fact re: notice and nature of the raised sidewalk flag. There were rolled up carpets on the sidewalk, of which defendant had no notice. Plaintiff alleged he stumbled when his foot hit the carpet and then he tripped on the raised flag. The court noted there can be more than one proximate cause of an accident: "... [T]here are issues of fact as to whether defendant had constructive notice of the sidewalk defect, whether the defect was trivial, and whether it proximately caused plaintiff's fall. Defendant failed to offer specific evidence as to when the sidewalk was last inspected, relying only on vague testimony concerning the manager's occasional visits to the shopping center ... . Plaintiff's submission of photographs depicting the height differential in the raised sidewalk flag to be about one inch also raised an issue of fact as to whether the defect was nontrivial ... . While plaintiff testified that he first tripped on the rolled-up carpets before coming into contact with the sidewalk defect, 'there can be more than one proximate cause of an accident' ...". ***Abraham v. Dutch Broadway Assoc. L.L.C.*, 2021 N.Y. Slip Op. 01711, First Dept 3-23-21**

PERSONAL INJURY, MUNICIPAL LAW.

THE COMPLAINT STATED A CAUSE OF ACTION AGAINST PORT AUTHORITY FOR FAILING TO INSTALL FENCING TO PREVENT PLAINTIFFS' DECEDENTS FROM COMMITTING SUICIDE BY JUMPING FROM THE GEORGE WASHINGTON BRIDGE.

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Webber, determined the complaint alleging defendant Port Authority was negligent in failing to install fencing to prevent plaintiffs' decedents from jumping from the George Washington Bridge (GWB) to commit suicide should not have been dismissed: "... [P]laintiffs allege that the GWB was unreasonably dangerous because the low four-foot railing on the south walkway facilitated suicides and that the Port Authority had long been aware that the bridge had become a 'suicide magnet' based upon hundreds of deaths that had occurred at the bridge over the decades preceding these cases. The complaints allege that suicide attempts at the GWB have occurred at the rate of approximately 1 every 3 1/2 days, and that about 93 deaths occurred from 2009 up to 2016. The

complaints assert that the Port Authority, as the owner of the GWB, 'owed a duty to the public,' including to 'protect the public from foreseeable harm,' 'take reasonable steps to protect public safety,' 'take reasonable steps to prevent suicide,' 'not increase the risk of suicide by inaction,' and 'protect human life.' Additionally, plaintiffs allege that the Port Authority 'failed to exercise reasonable care in constructing, operating, and maintaining the [GWB]' and were negligent 'in falling to provide for the safety and protection for vulnerable or impulsive individuals.' ... Viewing the allegations of the complaint in the light most favorable to plaintiff, we find that plaintiffs have set forth sufficient facts which, if true, show that the Port Authority, as owner of the GWB, was acting in a proprietary capacity in the design and maintenance of the bridge, and, therefore was subject to suit under the ordinary rules of negligence applicable to nongovernmental parties. ... We find that the complaints sufficiently allege that the low railing of the bridge, and Port Authority's awareness of the frequent suicide attempts on the bridge over previous decades, give rise to a duty to install fencing to protect against foreseeable harm to withstand a motion to dismiss ...". ***Feldman v. Port Auth. of N.Y. & N.J.*, 2021 N.Y. Slip Op. 01719, First Dept 3-23-21**

SECOND DEPARTMENT

CIVIL RIGHTS LAW, MUNICIPAL LAW, CIVIL PROCEDURE, NEGLIGENCE, BATTERY, FALSE ARREST, FALSE IMPRISONMENT.

THE NYPD IS A DEPARTMENT OF THE CITY AND CANNOT BE SEPARATELY SUED; THE 42 U.S.C. § 1983 CIVIL RIGHTS VIOLATION CAUSE OF ACTION WAS NOT SUPPORTED BY SUFFICIENT ALLEGATIONS OF AN UNCONSTITUTIONAL CITY CUSTOM OR POLICY; THE OTHER CAUSES OF ACTION AGAINST THE CITY FALL BECAUSE THERE WAS PROBABLE CAUSE FOR PLAINTIFF'S ARREST AND THE FORCE USED BY THE POLICE WAS NOT EXCESSIVE UNDER THE CIRCUMSTANCES.

The Second Department, reversing Supreme Court, determined the 42 U.S.C. § 1983 violation-of-civil rights, negligence, assault and battery, excessive force, false arrest and false imprisonment causes of action against the New York Police Department (NYPD) and New York City (City) should have been dismissed. Plaintiff was shot when, in the midst of a psychotic episode, she approached the police with a knife. She was indicted, tried and found not responsible by reason of mental disease or defect. The court noted that the NYPD is a department of the City and cannot be sued separately. The court also noted the 1983 action against the City failed to state a cause action because no city policy or custom was identified as violating plaintiff's constitutional rights: "To hold a municipality liable under 42 USC § 1983 for the conduct of employees below the policymaking level, a plaintiff must show that the violation of his or her constitutional rights resulted from a municipal custom or policy ... . Here, '[a]lthough the complaint alleged as a legal conclusion that the defendants engaged in conduct pursuant to a policy or custom which deprived the plaintiff of certain constitutional rights, it was wholly unsupported by any allegations of fact identifying the nature of that conduct or the policy or custom which the conduct purportedly advanced' ... . * * * The Supreme Court also should have granted that branch of the defendants' motion which was for summary judgment dismissing the false arrest and false imprisonment causes of action insofar as asserted against the City. The existence of probable cause constitutes a complete defense to a cause of action alleging false arrest and false imprisonment ... , including causes of action asserted pursuant to 42 USC § 1983 to recover damages for the deprivation of Fourth Amendment rights under color of state law ...". ***Brown v. City of New York*, 2021 N.Y. Slip Op. 01743, Second Dept 3-24-21**

CONTRACT LAW, UNIFORM COMMERCIAL CODE (UCC), CONSUMER LAW, CIVIL PROCEDURE.

EVEN THOUGH PLAINTIFF MAY HAVE ACCEPTED DEFECTIVE GOODS WITHIN THE MEANING OF THE UCC, THE UCC PROVIDES REMEDIES, INCLUDING THE RIGHT TO BE MADE WHOLE AND THE RIGHT TO REVOKE THE ACCEPTANCE; PLAINTIFF'S VERDICT SHOULD NOT HAVE BEEN SET ASIDE.

The Second Department, in a full-fledged opinion by Justice Christopher, reversing Supreme Court, determined the verdict should not have been set aside in this consumer law case. Plaintiff ordered kitchen cabinets. When they arrived one box was opened by defendant-seller's representative to confirm the color. Plaintiff then signed a "Completion Certificate" which indicated the cabinets had been found satisfactory. In fact the cabinets were not satisfactory as revealed when they were installed. The Second Department noted that, although under the UCC plaintiff, based on the "Completion Certificate," could not reject the goods, the UCC provides that she could be made whole, and, in fact, could revoke her acceptance, in addition to other available remedies. Therefore plaintiff's verdict awarding $30,000 should not have been set aside: " 'Acceptance of goods by the buyer precludes rejection of the goods accepted' (UCC 2-607[2]; see Comment 2). However, 'acceptance does not of itself impair any other remedy provided by [article 2 of the UCC] for non-conformity' (UCC 2-607[2] ...). 'Thus, 'acceptance leaves unimpaired the buyer's right to be made whole, and that right can be exercised by the buyer not only by way of cross-claim for damages, but also by way of recoupment in diminution or extinction of the [purchase] price' ... . Moreover, after the buyer has accepted allegedly non-conforming goods, the buyer may revoke acceptance of the goods under certain limited circumstances and 'obtain the same remedies as are available upon rejection' ... . [E]ven if the jury found that the plaintiff did not properly revoke her acceptance of the cabinets, the jury could have found that the plaintiff was entitled to other remedies pursuant to UCC 2-607 ... . [T]he jury's verdict that ... the defendant breached their contract

with the plaintiff, breached the implied warranty of fitness, and that the plaintiff was entitled to damages in the amount of $30,000 was supported by a valid line of reasoning and permissible inferences from the evidence at trial ...". ***Campbell v. Bradco Supply Co.*, 2021 N.Y. Slip Op. 01745, Second Dept 3-24-21**

CRIMINAL LAW.

THE FEDERAL CONSPIRACY-TO-DEAL-IN-FIREARMS STATUTE HAS DIFFERENT ELEMENTS THAN ITS NEW YORK EQUIVALENT AND THEREFORE CAN NOT BE THE BASIS OF A SECOND FELONY OFFENDER ADJUDICATION.

The Second Department vacated defendant's second felony offender adjudication because the predicate federal felony did not have the same elements as the New York equivalent: "... [T]he defendant's federal conviction of conspiracy to deal in firearms under section 371 of title 18 of the United States Code is not a 'predicate felony conviction' .. , because the federal conspiracy statute contains different elements than its equivalent in New York such that it is possible to violate the federal statute without engaging in conduct that is a felony in New York ...". ***People v. Mohabir*, 2021 N.Y. Slip Op. 01789, Second Dept 3-24-21**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE PEOPLE USED DEFENDANT'S PRETRIAL SILENCE AGAINST HIM IN THEIR DIRECT CASE; ALTHOUGH THE ERROR WAS NOT PRESERVED, THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE; NEW TRIAL ORDERED.

The Second Department reversed defendant's conviction and ordered a new trial because the People "improperly used [defendant's] pretrial silence against him in their direct case." The decision does not explain the facts. Although the error was not preserved, the appeal was considered in the interest of justice: " …'[I]t is a well-established principle of state evidentiary law that evidence of a defendant's pretrial silence is generally inadmissible' ... . Here, as the defendant correctly contends, the People improperly used his pretrial silence against him on their direct case ... . Since this evidence was used by the People on their direct case, their reliance upon cases in which 'conspicuous omissions from the defendants' statements to police' had properly been used during cross-examination of the defendants to impeach the credibility of their exculpatory trial testimony is misplaced ... . Contrary to the People's contention, the error in admitting evidence of the defendant's pretrial silence during their direct case was not harmless ... . Although this issue is unpreserved for appellate review ... , we reach it in the exercise of our interest of justice jurisdiction, and on that basis, reverse the judgment and remit the matter ... for a new trial." ***People v. DeLaCruz*, 2021 N.Y. Slip Op. 01785, Second Dept 3-24-21**

FORECLOSURE, EVIDENCE.

SUPREME COURT SHOULD NOT HAVE CONFIRMED THE REFEREE'S REPORT; THE REPORT WAS BASED UPON BUSINESS RECORDS WHIDH WERE NOT PRODUCED OR IDENTIFIED.

The Second Department, reversing Supreme Court, determined the referee's report should not have been confirmed because it was based on business records which were not produced: "... Supreme Court should have denied Wilmington's motion to confirm the referee's report and for a judgment of foreclosure and sale. '[T]he referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record inasmuch as the computation was premised upon unproduced business records' ... . 'Moreover, the referee's report also failed to identify the documents or other sources upon which the referee based his finding that the mortgaged premises should be sold in one parcel, and failed to answer the court's specific question of whether the mortgaged premises could be sold in parcels' ... . Thus, in confirming the report, the court should not have relied on the referee's inadequately supported findings ...". ***Wilmington Sav. Fund Socy., FSB v. Mehraban*, 2021 N.Y. Slip Op. 01802, Second Dept, 3-24-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF, AN HVAC WORKER, LEANED ON A PIPE RAILING AS HE WAITED FOR AN ELEVATOR TO TAKE HIM TO THE FLOOR WHERE HIS WORK SITE WAS; THE PIPE RAILING GAVE WAY AND PLAINTFF FELL FOUR OR FIVE FEET TO A CONCRETE SLAB; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action. Plaintiff was at the construction site waiting for an elevator to take him to the floor where he was working (HVAC work) when he leaned back on a pipe railing which gave way and he fell four or five feet to a concrete slab: "... [T]he safety devices prescribed by Labor Law § 240(1) 'are for the use or protection of persons in gaining access to or working at sites where elevation poses a risk' ... . [T]he plaintiff established that he needed to use the elevator, one of two at opposite ends of the construction site, to gain access to the various floors where he would be working throughout the day. Thus, accessing and waiting at the loading dock for the elevator, even before working hours began, was necessary to the plaintiff's work. We therefore conclude that the loading dock from which the plaintiff fell is included under 'those parts, which must be accessed by a worker to do his or her job' ... . Under the circumstances of this case, the fact that the plaintiff

was not engaged in HVAC work at the moment of his accident does not preclude the application of Labor Law § 240(1)." ***Crutch v. 421 Kent Dev., LLC*, 2021 N.Y. Slip Op. 01751, Second Dept 3-24-21**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

GALLBLADDER SURGERY WAS PERFORMED ON PLAINTIFF, BUT HER GALLBLADDER HAD BEEN REMOVED YEARS BEFORE; THE DOCTORS APPARENTLY DID NOT REVIEW THE AVAIABLE MEDICAL RECORDS; THE RADIOLOGIST DID NOT DISCOVER THAT THE GALLBLADDER WAS ABSENT; THE DOCTORS' MOTIONS FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined questions of fact precluded summary judgment which had been awarded to an internist (Patil), a surgeon (Jung), and a radiologist (Opsha). Plaintiff underwent gallbladder surgery, but her gallbladder had already been removed. The medical record reflected the prior removal: "The plaintiff's expert opined that Patil departed from the accepted standard of care and contributed to the plaintiff's injuries by failing to review the plaintiff's medical records maintained by SIPP, which indicated that the plaintiff previously had her gallbladder removed. ... At his deposition, Jung testified that, before the surgery, he was not aware that the plaintiff had a previous cholecystectomy and became aware that '[t]here was no gallbladder' ... surgery. He admitted that he 'looked at' Patil's notes and reviewed the ultrasound report. Further, although he had access to [the] medical records, he did not recall if he reviewed the plaintiff's medical chart prior to the surgery, but 'might have looked at something.' Jung admitted that, other than the primary care physician's report and the radiological report, it was 'not routine' for him to 'look into other documents and charts for a patient.' ... Opsha's expert failed to explain the basis for his conclusion as to how Opsha detected a gallbladder in his review of the ultrasound and made findings in his report regarding the plaintiff's gallbladder when that organ had been removed years earlier ...". ***Ruiz v. Opsha*, 2021 N.Y. Slip Op. 01796, Second Dept 3-24-21**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

PLAINTIFFS' MEDICAL MALPRACTICE ACTION SEEKING RECOVERY OF THE COSTS OF CARING FOR A SEVERELY DISABLED CHILD SHOULD NOT HAVE BEEN DISMISSED; PROOF REQUIREMENTS EXPLAINED.

The Second Department determined plaintiffs' medical malpractice action seeking recovery of the expenses of caring for their severely disable child should not have been dismissed. The plaintiffs alleged defendants failed to properly diagnose the child's conditions in utero and failed to advise plaintiffs of their options: "Parents may maintain a cause of action on their own behalf for the extraordinary costs incurred in raising a child with a disability ... . 'To succeed on such a cause of action, which 'sound[s] essentially in negligence or medical malpractice,' [a plaintiff] 'must demonstrate the existence of a duty, the breach of which may be considered the proximate cause of the damages suffered by' [the injured party]' ... . 'Specifically, the parents must establish that malpractice by a defendant physician deprived them of the opportunity to terminate the pregnancy within the legally permissible time period, or that the child would not have been conceived but for the defendant's malpractice' ... . '[T]he claimed damages cannot be based on mere speculation, conjecture, or surmise, and, when sought in the form of extraordinary expenses related to caring for a disabled child, must be necessitated by and causally connected to the child's condition' ... . 'Since the plaintiffs' recovery is limited to their personal pecuniary loss, expenses covered by other sources such as private insurance or public programs are not recoverable' ...". ***Vasiu v. Berg*, 2021 N.Y. Slip Op. 01798, Second Dept 3-24-21**

PRIMA FACIE TORT, DEFAMATION.

THE FAILURE TO ALLEGE SPECIAL DAMAGES WITH PARTICULARITY REQUIRED THE DISMISSAL OF THE PRIMA FACIE TORT AND DEFAMATION CAUSES OF ACTION.

The Second Department, reversing (modifying) Supreme Court, determined defendant's motion to dismiss the prima facie tort and slander causes of action should have been dismissed because the allegations of special damages were not stated with particularity: "... [I]n a cause of action to recover damages for slander, where the defamation alleged does not fall into one of the per se categories, a plaintiff suing in slander must plead special damages ... . Similarly, a plaintiff seeking to recover damages for prima facie tort must allege special damages ... . Here, as to both causes of action, the plaintiff's nonspecific conclusory allegations failed to allege special damages with specific particularity ...". ***Mable Assets, LLC v. Rachmanov*, 2021 N.Y. Slip Op. 01759, Second Dept 3-24-21**

TRUSTS AND ESTATES.

BECAUSE PETITIONER-WIFE DID NOT COMPLY WITH THE RELEVANT PROVISIONS OF THE EPTL, SHE WAS NOT ENTITLED TO HER ELECTIVE SHARE OF HER DECEASED HUSBAND'S DEATH BENEFIT.

The Second Department, reversing Supreme Court, determined petitioner-wife was not entitled to her elective share of her deceased husband's death benefit from the New York City Employees' Retirement System (NYCERS). Her husband's father was the named beneficiary. Because petitioner did not comply with the relevant provisions of the Estate, Powers and Trusts Law (EPTL), NYCERS was justified in distributing the funds to her husband's father: "A surviving spouse's election to take a share of the decedent's estate 'must be made within six months from the date of issuance of letters testamentary or of ad-

ministration, as the case may be, but in no event later than two years after the date of decedent's death' (EPTL 5-1.1-A[d][1]). A surviving spouse must file written notice of such election in the Surrogate's Court that issued the letters testamentary or of administration (see EPTL 5-1.1-A[d][1]). The provisions of EPTL 5-1.1-A(b) 'shall not prevent a corporation or other person from paying or transferring any funds or property to a person otherwise entitled thereto, unless there has been served personally upon such corporation or other person a certified copy of an order enjoining such payment or transfer made by the surrogate's court having jurisdiction of the decedent's estate or by another court of competent jurisdiction' (EPTL 5-1.1-A[b][4] ...]). EPTL 5-1.1-A(b)(4) further provides that a 'corporation or other person paying or transferring any funds or property described in clause (G) of subparagraph one of this paragraph,' which includes death benefits, 'to a person otherwise entitled thereto, shall be held harmless and free from any liability for making such payment or transfer, in any action or proceeding which involves such funds or property.' Here, it is undisputed that the petitioner did not serve NYCERS with an order enjoining it from paying the entirety of the decedent's death benefit to the named beneficiary … . Accordingly, pursuant to EPTL 5-1.1-A(b)(4), NYCERS 'shall be held harmless and free from any liability for making such payment' in the instant proceeding." ***Matter of Baig*, 2021 N.Y. Slip Op. 01763, Second Dept 3-24-21**

THIRD DEPARTMENT

FAMILY LAW, ATTORNEYS.

FAMILY COURT SHOULD NOT HAVE REFUSED FATHER'S COUNSEL'S OFFER TO REMAIN AS STANDBY COUNSEL AND SHOULD NOT HAVE ALLOWED FATHER TO REPRESENT HIMSELF WITHOUT WARNING FATHER OF THE DANGERS OF SELF-REPRESENTATION.

The Third Department determined Family Court did not abuse its discretion in refusing to assign counsel to father in this child support proceeding, but Family Court should have conducted a right-to-counsel inquiry before allowing father to represent himself, especially in light of father's counsel's offer to remain on standby: "English is not the father's first language. Although he had appeared in Family Court many times, he had been chastised for failing to appreciate the role of counsel, and the court had noted that his prior pro se submissions were inappropriate or inadequate ... . Moreover, there was a critical error in holding that the discharged counsel could not be allowed to remain as standby counsel ... . For these reasons, although the father's request to represent himself was unequivocal, we cannot find that the waiver of his right to counsel at the confirmation hearing was voluntary, knowing and intelligent, based upon the court's failure to make an appropriate warning of the dangers of so proceeding, coupled with the refusal to allow counsel to remain on standby ...". ***Matter of Saber v. Saccone*, 2021 N.Y. Slip Op. 01811, Third Dept 3-25-21**

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), CIVIL PROCEDURE, LANDLORD-TENANT, MUNICIPAL LAW, APPEALS.

THERE IS NO NEED TO FILE AN AFFIDAVIT OF SERVICE AFTER SERVICE OF A WARRANT AND NOTICE OF EVICTION; THE MATTER WAS CONSIDERED AS AN EXCEPTION TO THE MOOTNESS DOCTRINE.

The Third Department, reversing Supreme Court, over a two-justice dissent, determined that the failure file an affidavit of service after serving the warrant and notice of eviction did not affect the validity of the service of the warrant of eviction which triggers the 14-day waiting period before execution of the warrant. The court noted that the matter was moot because the petitioner was subsequently evicted based on a different warrant, but the matter should be heard on appeal because the circumstance is likely to recur. The two dissenters argued the mootness of the matter precluded appeal: "... [T]he issuance of a warrant is the court's last act in a summary proceeding, as denoted by the phrase, 'Upon rendering a final judgment for [the owner], the court shall issue a warrant' (RPAPL 749 [1]). The execution of the warrant terminates the lease ... . Likewise, the execution of the warrant terminates the summary proceeding and the jurisdiction of the court ... Because the court no longer has jurisdiction, the filing of the affidavit of service is superfluous. This stands in stark contrast to the purpose of the affidavit of service at the commencement of the summary proceeding, where it suffices as proof that the party was properly served pursuant to law, as proper service is required to bring a respondent within the jurisdiction of the court ... . [W]e find that filing the affidavit of service at the conclusion of service of a warrant of eviction is not required, and the 14-day notice begins the day following the date of service, posting or mailing, whichever is later ...". ***Matter of Dixon v. County of Albany*, 2021 N.Y. Slip Op. 01819, Third Dept 3-25-21**

FOURTH DEPARTMENT

ADMINISTRATIVE LAW, CIVIL PROCEDURE.

ALTHOUGH THE ARTICLE 78 PROCEEDING WAS PROPERLY TRANSFERRED TO THE APPELLATE DIVISION, THE RELATED DECLARATORY JUDGMENT ACTION WAS NOT TRANSFERABLE.

The Fourth Department determined Supreme Court properly transferred the Article 78 proceeding to the appellate division because there was a quasi-judicial hearing before an administrative law judge at which evidence was taken. The court not-

ed that the aspect of the underlying action which sought a declaratory judgment could not be transferred to the appellate division: "... [A]lthough petitioner also contends that she is entitled to declaratory relief, we do not 'have jurisdiction to consider the declaratory judgment action as part of this otherwise properly transferred CPLR article 78 proceeding' ... . The transfer of a declaratory judgment action to this Court is not authorized by CPLR 7804 (g) ... and we 'lack[] jurisdiction to consider a declaratory judgment action in the absence of a proper appeal from a court order or judgment' ... . We therefore vacate the order insofar as it transferred the declaratory judgment action, sever the declaratory judgment action and CPLR article 78 proceeding, and remit the declaratory judgment action to Supreme Court for further proceedings ...". ***Matter of Blue v. Zucker*, 2021 N.Y. Slip Op. 01924, Fourth Dept 3-26-21**

ATTORNEYS, FAMILY LAW.

SUPREME COURT ABUSED ITS DISCRETION IN AWARDING ATTORNEY'S FEES IN THIS DIVORCE PROCEEDING IN THE ABSENCE OF ANY EVIDENCE OF THE PARTIES' FINANCIAL CIRCUMSTANCES.

The Fourth Department, reversing Supreme Court, determined defendant's attorney's request for attorney's fees in this divorce proceeding, unsupported by any evidence of the parties' financial circumstances, should not have been granted: "Defendant moved by order to show cause for enforcement of an order requiring plaintiff to, inter alia, reimburse defendant for missed mortgage payments and maintain a policy of life insurance pursuant to the parties' judgment of divorce. The resolution of that motion is not apparent from the record and there is no resulting order. Nevertheless, defendant's attorney submitted a quantum meruit application seeking an award of counsel fees with respect to the motion. Plaintiff opposed the application. Without having any of the parties' financial information or holding a hearing on the application, Supreme Court granted the application to the extent of awarding $2,750.00 in counsel fees, which it considered 'fair and reasonable.' Viewing all of the circumstances in this case, including the procedural irregularities of the application, the lack of evidence regarding the parties' financial circumstances, and the uncontested allegations in the record regarding misrepresentations made by defendant's attorney, we agree with plaintiff that the court abused its discretion in awarding counsel fees to defendant's attorney ...". ***Elibol v. Mellon-Elibol*, 2021 N.Y. Slip Op. 01926, First Dept 3-26-21**

CRIMINAL LAW.

THE WAIVER OF INDICTMENT WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT DID NOT PRECISELY IDENTIFY WHICH OF TWO UNDERLYING OFFENSES IT DESCRIBED AND DID NOT PROTECT AGAINST DOUBLE JEOPARDY.

The Fourth Department, vacating defendant's guilty plea and the waiver of indictment, determined the waiver of indictment was jurisdictionally defective because it was not clear which of two charged rapes it referred to and there was no language that the plea would be in full satisfaction of all charges: "... [T]he underlying felony complaint alleged four offenses predicated on defendant's purported violation of three Penal Law provisions: two separate acts of rape in the first degree that occurred in September and October 2016, respectively (Penal Law § 130.35 [4]), an act of criminal sexual act in the first degree that occurred in November 2016 (§ 130.50 [4]), and acts that constituted endangering the welfare of a child (§ 260.10 [1]). In contrast, the waiver of indictment listed only a single count to be charged in the SCI [superior court information]: a count of rape in the first degree that allegedly occurred sometime between July and November 2016. Inasmuch as the sole charge in the waiver of indictment and SCI could plausibly refer to either of the acts of rape in the first degree alleged in the felony complaint, the waiver of indictment failed to put defendant on notice of the precise crime for which he was waiving prosecution by indictment and was thus jurisdictionally defective. ... In addition to impeding defendant's ability to prepare a defense ... , the defect in the waiver of indictment—i.e., the indeterminancy of the precise rape offense for which defendant was agreeing to waive indictment—implicates double jeopardy concerns because there was no language in the waiver form, SCI, or at the plea colloquy informing defendant that his plea to one count of rape in the first degree would be in full satisfaction of the offenses alleged in the felony complaint. Consequently, defendant could potentially be subjected to a subsequent prosecution for the offenses not identified in the waiver of indictment or charged in the SCI ...". ***People v. Meeks*, 2021 N.Y. Slip Op. 01925, Fourth Dept 3-26-21**

CRIMINAL LAW.

HERE THE ASSAULT SECOND DEGREE COUNT WAS AN INCLUSORY CONCURRENT COUNT OF ASSAULT ON A POLICE OFFICER; THE ASSAULT SECOND CONVICTION WAS REVERSED AND THE COUNT DISMISSED; THE TERM "INCLUSORY CONCURRENT COUNT" WAS EXPLAINED.

The Fourth Department noted that assault in the second degree is an inclusory concurrent count of assault on a police officer and the assault second conviction must therefore be reversed and the count dismissed: "Counts are concurrent when 'concurrent sentences only may be imposed in case of conviction thereon,' and such counts 'are 'inclusory' when the offense charged in one is greater than any of those charged in the others and when the latter are all lesser offenses included within the greater' (CPL 300.30 [3], [4]). Here, concurrent sentencing was required inasmuch as the same conduct formed the basis of each count ... and, as charged here, assault in the second degree is a lesser included offense of assault on a police officer ...". ***People v. Felong*, 2021 N.Y. Slip Op. 01901, Fourth Dept 3-26-21**

CRIMINAL LAW, EVIDENCE.

THE POLICE DID NOT HAVE PROBABLE CAUSE TO SEARCH THE VEHICLE IN WHICH DEFENDANT WAS A PASSENGER WHEN AN OFFICER ENTERED THE VEHICLE TO RETRIEVE THE REGISTRATION AND SAW A HANDGUN; THE DEFENDANT HAD STANDING TO CONTEST THE SEIZURE BECAUSE OF THE PEOPLE'S RELIANCE ON THE STATUTORY AUTOMOBILE PRESUMPTION; THE HANDGUN SHOULD HAVE BEEN SUPPRESSED.

The Fourth Department, reversing County Court, determined the handgun seized from the vehicle in which defendant was a passenger should have been suppressed. The police arrived after an accident and defendant was standing outside the car. When an officer asked for the vehicle registration, defendant offered to retrieve it, but a police officer standing near the car said he would retrieve it. The officer then saw a handgun that had been hidden from view by the deployed air bag. The court noted defendant had standing to contest the search and seizure because of the People's reliance on the statutory automobile presumption: "As an initial matter, there is no dispute that defendant has standing as a passenger of the vehicle to challenge its search by virtue of the People's reliance on the statutory automobile presumption ... . [U]nder the circumstances of this case, we agree with defendant that the officer who conducted the search lacked probable cause to do so ... . In reaching that conclusion, we reject the People's assertion that, based on the holdings of *People v. Branigan* (67 NY2d 860 [1986]) and *People v. Philbert* (270 AD2d 210 [1st Dept 2000] ...), the officer was entitled to enter the vehicle for the purpose of obtaining the vehicle's registration certificate. Unlike in *Branigan*, there were no 'safety reasons' in this case preventing the officer from allowing defendant to retrieve the registration himself (67 NY2d at 861) and, here, defendant did not initially fail to produce the registration when prompted to do so by law enforcement … . Unlike in *Philbert* ... , the officer here, as he confirmed at the suppression hearing, lacked probable cause to search the vehicle and had no reason to believe that the vehicle contained evidence of a crime." ***People v. Lawrence*, 2021 N.Y. Slip Op. 01921, Fourth Dept 3-26-21**

CRIMINAL LAW, EVIDENCE.

THERE WAS NO EVIDENCE DEFENDANT POSSESSED THE FIREARM BEFORE FORMING THE INTENT TO SHOOT; THE POSSESSION OF A WEAPON SENTENCE MUST RUN CONCURRENTLY WITH THE SENTENCES FOR THE SHOOTING-RELATED OFFENSES.

The Fourth Department, directing that the sentences run concurrently, noted there was no evidence defendant possessed the loaded firearm before he formed the intent to shoot the victim: "Defendant appeals from a judgment convicting him upon his plea of guilty of three counts of robbery in the first degree (Penal Law § 160.15 [1], [4]), two counts each of burglary in the first degree (§ 140.30 [2], [4]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), and one count each of assault in the first degree (§ 120.10 [4]), attempted murder in the second degree (§§ 110.00, 125.25 [1]), and criminal possession of stolen property in the fourth degree (§ 165.45 [5]). ... . * * * Where a defendant is charged with both criminal possession of a weapon in violation of Penal Law § 265.03 (3) and a different crime that has an element involving the use of that weapon, consecutive sentencing is permissible if '[the] defendant knowingly unlawfully possesses a loaded firearm before forming the intent to cause a crime with that weapon' such that the possessory crime has already been completed ... . The People have the burden of establishing that consecutive sentences are legal, i.e., that the two crimes were committed through separate and distinct acts ... . The People failed to meet their burden inasmuch as there are no facts alleged in the counts of the indictment to which defendant pleaded guilty or in the plea allocution that would establish that defendant possessed the loaded firearm prior to forming his intent to shoot the victim ... or that the act of possessing the loaded firearm 'was separate and distinct from' his act of shooting the victim ...". ***People v. Boyd*, 2021 N.Y. Slip Op. 01897, Fourth Dept 3-26-21**

CRIMINAL LAW, EVIDENCE, APPEALS.

DEFENDANT'S CONVICTIONS RELATING TO THE CODEFENDANT'S POSSESSION AND FIRING OF A WEAPON DURING A ROBBERY AT WHICH DEFENDANT WAS NOT PRESENT WERE BASED UPON LEGALLY INSUFFICIENT EVIDENCE; DEFENDANT'S CONVICTION OF POSSESSION OF A WEAPON BASED UPON THE CODEFENDANT'S GETTING INTO DEFENDANT'S CAR WITH THE WEAPON WAS AGAINST THE WEIGHT OF THE EVIDENCE.

The Fourth Department, reversing defendant's convictions and dismissing the indictment, determined the evidence of possession of a weapon and reckless endangerment (stemming from a robbery by the codefendant) was legally insufficient, and the conviction of another possession of a weapon charge (stemming from the codefendant's getting into defendant's car after the robbery) was against the weight of the evidence. Shots were fired by the codefendant during the robbery. The defendant was not with the codefendant during the robbery. Then the codefendant, still in possession of the firearm, got into defendant's car which was parked a couple of blocks away from the robbery scene and defendant drove away with the codefendant. There was no evidence the defendant shared the codefendant's intent to commit the robbery: "... [T]here is no evidence that defendant and the codefendant were together earlier on the day of the robbery and shooting, no evidence that defendant had prior knowledge either that the codefendant would be armed that day or that he was intending to rob someone, and no evidence that defendant and the codefendant had an ongoing relationship ... . * * * ... [T]he evidence is legally insufficient to establish that defendant had any knowledge of the codefendant's possession of a firearm prior to the

shooting or that defendant somehow 'solicited, requested, commanded, importuned or intentionally aided [the codefendant] to engage in' the reckless shooting at the vehicle in which the victim was riding ... . * * * ... [A]lthough the evidence that defendant knew who the codefendant was prior to the robbery provides a rational basis for questioning defendant's credibility, we conclude ... that the People failed to prove beyond a reasonable doubt that defendant, finding himself in the presence of a man with a loaded weapon, willingly 'solicited, requested, commanded, importuned or intentionally aided' the codefendant's possession of that weapon ... , or that defendant 'shared a 'community of purpose' with [the codefendant]' ...". ***People v. Hawkins*, 2021 N.Y. Slip Op. 01882, Fourth Dept 3-26-21**

CRIMINAL LAW, EVIDENCE, ATTORNEYS, APPEALS.

DEFENDANT WAS CONVICTED OF FELONY MURDER, TWO COUNTS OF ROBBERY AND CRIMINAL POSSESSION OF A WEAPON BASED PRIMARILY ON HIS CONFESSION; THE ROBBERY CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE; THE JUDGE DID NOT MAKE THE REQUIRED MINIMAL INQUIRY WHEN DEFENDANT REQUESTED NEW COUNSEL; COUNSEL WERE INEFFECTIVE FOR FAILING TO REQUEST THE REDACTION OF DEFENDANT'S VIDEO STATEMENT; NEW TRIAL ORDERED ON THE FELONY MURDER AND CRIMINAL POSSESSION OF A WEAPON COUNTS.

The Fourth Department, reversing defendant's convictions, dismissing the robbery counts, and ordering a new trial on the murder and criminal possession of a weapon counts, in a full-fledged opinion by Justice Troutman, determined: (1) conviction of felony murder based upon a confession requires only corroboration of the murder, not the underlying felony (robbery here); (2) the convictions on the two robbery counts were against the weight of the evidence; (3) the judge did not conduct the required "minimal inquiry" when defendant made specific factual complaints about his counsel and asked for new counsel--the error was not cured by the appointment of new counsel right before trial; and (4) defendant's counsel were ineffective because defendant's video statement was not redacted to remove reference to defendant's history of incarceration. The legal discussions are too detailed to fairly summarize here. The facts are: "On October 14, 2013, the victim stumbled home, a fatal knife wound in his back. He was pronounced dead that evening. Two days later, the police interviewed defendant, who provided a video-recorded statement. Defendant admitted that, on the evening of the crime, he was on South Salina Street in the City of Syracuse with three other young men—a cousin of his, a juvenile, and Tony Comer, Jr.—when the victim approached them for the purpose of buying drugs. Comer used the promise of drugs to lure the victim into a cut in the roadway and steal his wallet. When Comer and the victim came out of the cut, the victim was shirtless. Comer was smiling, holding the victim's torn, white T-shirt. The victim left, shouting that he would come back with a gun and start shooting. Comer told the others that the victim still had $10 on his person, and the juvenile stated that he wanted the victim's last $10. About 10 or 15 minutes later, the victim returned wearing a sweatshirt, looking for his wallet. Defendant, his cousin, and the juvenile fought the victim. Defendant admitted that, by fighting the victim, he was helping the juvenile to acquire the victim's last $10 and that, during the fight, defendant stabbed the victim once in the back using a knife that he had concealed in his sleeve." ***People v. Stackhouse*, 2021 N.Y. Slip Op. 01883, Fourth Dept 3-26-21**

CRIMINAL LAW, JUDGES.

THE JUDGE'S REFUSAL TO HOLD A PRE-TRIAL HUNTLEY HEARING ON THE VOLUNTARINESS OF DEFENDANT'S STATEMENTS WAS REVERSIBLE ERROR.

The Fourth Department, reversing defendant's conviction, determined the judge's refusal to hold a Huntley hearing to determine the voluntariness of defendant's statements until several witnesses testified at trial was reversible error: " 'When [a] motion [to suppress evidence] is made before trial, the trial may not be commenced until determination of the motion' (CPL 710.40 [3] ...). Here, defendant moved to suppress his statements to the police on the ground that they were involuntarily made (see CPL 710.20 [3]), but the court did not rule on the motion prior to trial and repeatedly refused to conduct a pretrial Huntley hearing, even after the People requested a Huntley hearing at the outset of the trial. Instead, the court granted the People's request for a Huntley hearing over defendant's objection after nine of the ten prosecution witnesses had already testified. Following that hearing, the court found the statements to be voluntary and thus admissible. The error is not harmless. It is well established that, 'unless the proof of the defendant's guilt, without reference to the error, is overwhelming, there is no occasion for consideration of any doctrine of harmless error' ... . Here, the evidence was not overwhelming ... . The central factual question in this case was identity. The evidence of identity was that defendant was apprehended coming out of a building located on the block towards which the culprit had been seen running, he fit the description of the culprit, and he was identified by three eyewitnesses after a showup procedure. On the other hand, defendant did not have in his possession the fruits of the crime or the firearm used in the crime, nor was he dressed like the culprit. Moreover, showup identification procedures are inherently suggestive ... , and the culprit had been wearing a partial face covering at the time of the crime, which further undermined the reliability of the identifications ...". ***People v. Coffie*, 2021 N.Y. Slip Op. 01884, Fourth Dept 3-26-21**

FAMILY LAW, EVIDENCE.

EVIDENCE THE CHILD WAS OFTEN ABSENT FROM SCHOOL WARRANTED A HEARING ON FATHER'S PETITION FOR A MODIFICATION OF CUSTODY.

The Fourth Department, reversing Family Court, determined father's petition for modification of custody should not have been dismissed without holding a hearing. There was evidence the child, now in third grade, was often absent from school: "In seeking to modify the stipulated custody order, the father was required to show 'a change in circumstances 'since the time of the stipulation' ... . Here, the father and respondent mother entered into the stipulated order shortly after the child's fifth birthday, before she would have entered kindergarten. At the hearing on the petition, the court received the child's third-grade school attendance records in evidence. Although we cannot discern the precise number of absences from our review of the appellate record, the court expressed that it was 'concerned' with the number of absences up to that point in the school year, of which there were approximately 30. Thus, we conclude that the father established a change in circumstances sufficient to warrant an inquiry into whether a change in custody is in the best interests of the child because the child's school records demonstrate that she had excessive school absences in the third grade ... . Therefore, we reverse the order, reinstate the petition, and remit the matter to Family Court for a hearing on the best interests of the child ...". ***Matter of Myers v. Myers*, 2021 N.Y. Slip Op. 01916, Fourth Dept 3-26-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THE APPLICABLE INDUSTRIAL CODE PROVISION APPLIES TO MORE THAN JUST THE OBSTRUCTION OF PASSAGEWAYS; IT ALSO APPLIES TO BUILDING MATERIAL WHICH IS NOT PROPERLY STORED AND SECURED (AND FALLS); PLAINTIFF'S LABOR LAW § 241(6) CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED.

The Fourth Department, reversing Supreme Court, determined plaintiff's Labor Law § 241(6) cause of action should not have been dismissed in this falling object case. Plaintiff was struck by a component of an unbuilt mailbox which fell: "Plaintiff's Labor Law § 241 (6) claim is predicated on 12 NYCRR 23-2.1 (a) (1), which provides in relevant part that '[a]ll building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare' ... . Contrary to defendants' assertion, the scope of 12 NYCRR 23-2.1 (a) (1) is not limited exclusively to obstructed thoroughfares ... . Rather, the plain text of the regulation creates three distinct obligations and potential sources of liability: first, '[a]ll building materials shall be stored in a safe and orderly manner'; second, '[m]aterial piles shall be stable under all conditions'; and third, '[m]aterial piles shall be . . . so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare' ... . [W]e agree with plaintiff that the mailbox component at issue qualifies as a 'building material[]' within the meaning of 12 NYCRR 23-2.1 (a) (1), and we further agree with plaintiff that triable issues of fact exist regarding the 'safe[ty] and orderl[iness]' of the 'manner' in which defendants 'stored' that 'building material[].' " ***Slowe v. Lecesse Constr. Servs., LLC*, 2021 N.Y. Slip Op. 01887, Fourth Dept 3-26-21**

MUNICIPAL LAW, CIVIL PROCEDURE, PERSONAL INJURY.

THE COURT LACKED AUTHORITY TO DEEM A NOTICE OF CLAIM TIMELY FILED MORE THAN ONE YEAR AND 90 DAYS AFTER THE CAUSE OF ACTION (SLIP AND FALL) ACCRUED, EVEN THOUGH THE SUMMONS AND COMPLAINT WAS SERVED WITHIN THAT TIME PERIOD; A NOTICE OF CLAIM FILED MORE THAN 90 DAYS AFTER THE CAUSE OF ACTION ACCRUES WITHOUT LEAVE OF COURT IS A NULLITY.

The Fourth Department, reversing Supreme Court, determined the notice of claim served more than 90 after the slip and fall without leave of court was a nullity. The court further determined that the request for an order deeming the notice of claim timely served made more than one year and 90 days after the slip and fall could not be authorized by the court, even where the summons and complaint was served within that time period: "It is well settled that an 'application for the extension [of time within which to serve a notice of claim] may be made before or after the commencement of the action but not more than one year and 90 days after the cause of action accrued, unless the statute has been tolled' .. . Where that time expires before the application for an extension is made, 'the court lack[s] the power to authorize late filing of the notice [of claim]' ... . Here, we conclude that '[p]laintiff's service of the summons and complaint within the limitations period does not excuse the failure to serve a notice of claim within that period,' and we further conclude that 'plaintiff's earlier service of a notice of claim is a nullity inasmuch as the notice of claim was served more than 90 days after the accident but before leave to serve a late notice of claim was granted' ... . Thus, because plaintiff's cross motion seeking an order deeming her notice of claim to be timely filed 'was made after the expiration of the maximum period permitted' for seeking such relief, i.e., one year and 90 days, Supreme Court should have denied plaintiff's cross motion, granted defendant's motion, and dismissed the complaint ...". ***Bennett v. City of Buffalo Parks & Recreation*, 2021 N.Y. Slip Op. 01920, Fourth Dept 3-26-21**

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