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COURT OF APPEALS

CRIMINAL LAW, APPEALS.

A VALID WAIVER OF APPEAL PRECLUDES AN APPEAL ALLEGING THE VIOLATION OF DEFENDANT'S RIGHT TO AN OPPORTUNITY TO MAKE A PERSONAL STATEMENT AT SENTENCING.

The Court of Appeals, in a brief memorandum decision, over an extensive two-judge dissent, determined a waiver of appeal precluded an appeal alleging the violation of defendant's right to an opportunity to make a personal statement at sentencing: "... [D]efendant's contention that his CPL 380.50(1) right to an opportunity to make a personal statement at sentencing was violated is not reviewable because such a claim did not survive the valid appeal waiver. Although the statutory right is 'deeply rooted' and 'substantial,' its value is largely personal to defendant ... . Defendant's claim does not fall among the narrow class of nonwaivable defects that undermine 'the integrity of our criminal justice system . . . [or] implicate . . . a public policy consideration that transcends the individual concerns of a particular defendant to obtain appellate review' ... . Moreover, despite defendant's arguments to the contrary, a valid unrestricted waiver of appeal elicited during a plea proceeding can preclude appellate review of claims that have 'not yet reached full maturation,' including those arising during sentencing ... , nor is this challenge to presentence procedures reviewable under the illegal sentence exception ...". ***People v. Brown*, 2021 N.Y. Slip Op. 02867, CtApp 5-6-21**

CRIMINAL LAW, EVIDENCE.

IN AFFIRMING THE MURDER CONVICTION OF A 14-YEAR-OLD, THE COURT OF APPEALS HELD THE TRIAL COURT PROPERLY EXCLUDED EXPERT TESTIMONY ABOUT ADOLESCENT BRAIN DEVELPMENT AND BEHAVIOR.

The Court of Appeals, in a brief memorandum, affirmed the murder conviction of a 14-year-old noting that the trial court properly excluded expert testimony about the brain development and behavior of an adolescent without a *Frye* hearing: "Defendant sought to introduce testimony by an expert witness, concerning the science of adolescent brain development and behavior, to assist the jury in determining whether the People had met their burden of disproving justification. The trial court denied defendant's request, without conducting a *Frye* hearing ... . '[T]he admissibility and limits of expert testimony lie primarily in the sound discretion of the trial court' ... . The criterion to be applied is 'whether the proffered expert testimony would aid a lay jury in reaching a verdict' ... . Under the particular facts of this case, the trial court did not abuse its discretion in denying defendant's request to permit the proposed expert witness testimony." ***People v. Anderson*, 2021 N.Y. Slip Op. 02735, CtApp 5-4-21**

CRIMINAL LAW, EVIDENCE.

THE USE OF TRANSLATORS TO DOCUMENT INFORMATION IN AN ACCUSATORY INSTRUMENT DID NOT RENDER THE INSTRUMENTS FACIALLY INSUFFICIENT BY ADDING A LAYER OF HEARSAY.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a two-judge dissent, determined that the use of translators in documenting information in an accusatory instrument did not create an additional layer of hearsay. The three accusatory instruments at issue, therefore, were deemed facially sufficient. Two of the accusatory instruments did not refer to the use of a translator, and the third did: "... '[I]n evaluating the sufficiency of an accusatory instrument,' a court does 'not look beyond its four corners (including supporting declarations appended thereto)' (... see CPL 100.15 [3]; 100.40 [1] [c] ...). Courts must 'not rely on external factors to create jurisdictional defects not evident from the face of the' accusatory instrument ... . Instead, '[w]hether the allegation of an element of an offense is hearsay, rendering the information defective, is to be determined on a facial reading of the accusatory instrument' ... … Defects that do not appear on the 'the face of the' accusatory instrument are 'latent deficienc[ies]' that do not require dismissal ... . * * * We conclude that, when evaluating the facial sufficiency of an accusatory instrument, no hearsay defect exists where ... the four corners of the instrument indicate only that an accurate, verbatim translation occurred, and the witness or complainant adopted the statement as their own by signing the instrument after the translation ...". ***People v. Slade*, 2021 N.Y. Slip Op. 02866, CtApp 5-6-21**

ENVIRONMENTAL LAW, CONSTITUTIONAL LAW.

THE CONSTRUCTION OF SNOWMOBILE TRAILS IN THE ADIRONDACK PARK IS PROHIBITED BY THE "FOREVER WILD" PROVISION IN THE NEW YORK STATE CONSTITUTION.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over an extensive two-judge dissent, determined the construction of snowmobile trails in the Adirondack Park would violate the "forever wild" provision of the New York State Constitution: "... [W]e must determine whether the state's plan for the construction of approximately 27 miles of Class II community connector trails designed for snowmobile use in the Forest Preserve is permissible under the New York Constitution. The plan requires the cutting and removal of thousands of trees, grading and leveling, and the removal of rocks and other natural components from the Forest Preserve to create snowmobile paths that are nine to 12 feet in width. We conclude that construction of these trails violates the 'forever wild' provision of the New York State Constitution (art XIV, § 1) and therefore cannot be accomplished other than by constitutional amendment. * * * The Forest Preserve is a publicly owned wilderness of incomparable beauty. Located in two regions of the Adirondack and Catskill Mountains, the Forest Preserve—with its trees, rivers, wetlands, mountain landscape, and rugged terrain—is a respite from the demands of daily life and the encroachment of commercial development. It has been this way for over a century because our State Constitution mandates: 'The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.. ... This unique 'forever wild' provision was deemed necessary by its drafters and the people of the State of New York to end the commercial destruction and despoliation of the soil and trees that jeopardized the state's forests and, perhaps most importantly, the state watershed." ***Protect the Adirondacks! Inc. v. New York State Dept. of Envtl. Conservation*, 2021 N.Y. Slip Op. 02734, CtApp 5-4-21**

FIRST DEPARTMENT

CRIMINAL LAW, EVIDENCE.

DEFENDANT, A POLICE OFFICER, WAS PROPERLY CONVICTED OF ASSAULT FOR REPEATEDLY PUNCHING THE VICTIM AFTER THE VICTIM WAS HANDCUFFED AND RESTRAINED FACE DOWN ON THE FLOOR.

The First Department upheld the assault and offering a false instrument for filing convictions of a police officer who unnecessarily repeatedly struck the victim after the victim was handcuffed and restrained: "The evidence supports the court's finding that defendant, an experienced police officer, lacked a reasonable ground to believe that it was necessary to punch the victim repeatedly to prevent the victim from biting him, both when the victim was rear-cuffed and lying face down on the floor of an apartment building lobby and being effectively restrained by defendant and another officer, and after defendant subsequently brought the victim to the building's rear stairwell without seeking the assistance of any of the other officers present (see Penal Law §§ 35.05[1], 35.15[1], 35.30[1][a]). The evidence also supports the conclusion that all of defendant's punches were unjustified, and also supports the alternative conclusion that even if the initial punch were justified, the subsequent punches were unjustified, and these punches caused additional injury ... . The evidence also established that defendant intentionally caused concededly false statements or information to be written on officially filed forms ...". ***People v. Saladeen*, 2021 N.Y. Slip Op. 02760, First Dept 5-4-21**

CRIMINAL LAW, EVIDENCE.

THE AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT PROVIDES NO BROADER SCOPE FOR THE SEARCH THAN WOULD A WARRANT ISSUED BASED ON THE SAME FACTS; HERE THE SMALL AMOUNT OF MARIJUANA ON THE CONSOLE OF DEFENDANT'S CAR DID NOT PROVIDE PROBABLE CAUSE TO SEARCH THE TRUNK WHERE A FIREARM WAS FOUND.

The First Department, in a full-fledged opinion by Justice Kapnick, reversing Supreme Court and holding that decisions to the contrary should no longer be followed, determined the odor of marijuana smoke and the small about of marijuana on the console of the defendant's car did not, pursuant to the automobile exception to the warrant requirement, justify the full search of the trunk of the car. Therefore the firearm found in the trunk should have been suppressed: "... '[T]he automobile exception. . . is an exception only to the warrant requirement; it does not, in contrast to the search-incident-to-arrest exception, dispense with the requirement that there be probable cause to search the vehicle' ... . * * * We are left with the question of whether the presence of a small amount of marijuana consistent with personal use provided the requisite probable cause and nexus to justify a search of the trunk. We find that in this case it did not. The only reasonable conclusion supported by the evidence here was that the de minimis amount of unburnt marijuana was for personal use, not for distribution or trafficking. The officer did not find any drug paraphernalia in the car. Indeed, in this case, there was 'scant evidence of drugs in the car' ... , and there was no probable cause to believe there was contraband in the trunk of the car. Therefore, because a proper search pursuant to the automobile exception 'is no narrower-and no broader-than [sic] the scope of a search authorized by a warrant supported by probable cause, [and] otherwise is as the magistrate could authorize' ... , we find that

here the search of the trunk was not supported by probable cause. Consequently, the gun found therein, and the statements made by defendant thereafter, should have been suppressed." ***People v. Ponder*, 2021 N.Y. Slip Op. 02880, First Dept 5-6-21**

EMPLOYMENT LAW, LABOR LAW, CONTRACT LAW.

IN AN ACTION BY CATERING WAITSTAFF SEEKING TIPS ALLEGEDLY WITHHELD BY THE EMPLOYER IN VIOLATION OF THE LABOR LAW, THE EMPLOYER CANNOT SEEK INDEMNIFICATION FROM A CONTRACTOR WHICH SUPPLIED CATERING STAFF TO THE EMPLOYER.

The First Department, in a full-fledged opinion by Justice Kern, in a matter of first impression, determined that an employer (Great Performances) cannot seek indemnification from a contractor (Kensington) for alleged violations of the Labor Law. The plaintiffs alleged Great Performances kept tips which should have gone to tie waitstaff. Kensington had supplied staff to Great Performances for catered events: "We ... find that Great Performances' third-party complaint was properly dismissed as against Kensington on the ground that an employer has no right to contractual indemnification from a third party for claims brought pursuant to NYLL [New York Labor Law] 196-d because indemnification under that statute, whether contractual or otherwise, is against public policy. * * * The policies behind the statute sought to ensure that employers be held accountable for any wage violations and are not permitted to contract away liability. Indeed, holding that an employer has a right to contractual indemnification from a third party for claims brought pursuant to NYLL 196-d would undermine the employer's willingness to comply with its obligations under the statute." ***Robinson v. Great Performances/Artists as Waitresses, Inc.*, 2021 N.Y. Slip Op. 02769, First Dept 5-4-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY, CONTRACT LAW.

QUESTION OF FACT WHETHER A LADDER WAS INTENDED FOR USE AS A STAGE PROP BY ACTORS AS OPPOSED TO AN OSHA COMPLIANT LADDER; EVEN WHERE A LABOR LAW § 200 ACTION WILL NOT LIE, A COMMON-LAW NEGLIGENCE CAUSE OF ACTION MAY BE VIABLE; HERE IT WAS ALLEGED DEFENDANT LAUNCHED AN INSTRUMENT OF HARM BY ALTERING THE LADDER.

The First Department, reversing (modifying) Supreme Court, determined that the Labor Law § 200 cause of action against Center Line should have been dismissed but the common law negligence cause of action properly survived summary judgment. Although the decision doesn't spell it out, it appears that defendant Center Line altered the ladder in question by gluing on an extra rung. Apparently the ladder was to be used by actors and Center Line argued it was a stage prop and was not intended for use an OSHA compliant ladder. The viable contract-based *Espinal* negligence theory was based upon launching an instrument of harm (altering the ladder): "Even assuming that Center Line is a proper Labor Law § 200 defendant, it cannot be held liable under the statute. This case is a means and methods of work case, and there is no proof that Center Line had authority to supervise and control plaintiff's work ... . A claim for common-law negligence may lie even though there is no Labor Law § 200 liability ... . A triable issue of fact exists as to whether Center Line negligently created or exacerbated a dangerous condition so as to have 'launche[d] a force or instrument of harm' ... . Although Center Line augmented the ladder as directed by Production Core, a triable issue of fact exists as to whether Center Line could have reasonably anticipated that the gluing of the rung to the top of the ladder would pose a hazard and likely to cause injury ... . While plaintiff and the codefendants claim that Center Line dangerously altered the ladder despite knowing that the ladder was structural and climbable, Center Line claims that the ladder was a prop ladder that was not meant to be OSHA compliant, and that it augmented the ladder in reliance on Production Core's assurances that the top portion of the ladder would not be ascended by the actors. Such raises an issue of fact for the jury to decide." ***Mullins v. Center Line Studios, Inc.*, 2021 N.Y. Slip Op. 02756, First Dept 5-4-21**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF, ON A BICYCLE, WAS STRUCK BY A BUS AND SUFFERED TRAUMATIC BRAIN INJURY, A TORN ROTATOR CUFF AND SEVERAL HERNIATED DISCS; THE JURY'S DAMAGES AWARDS, WHICH INCLUDED $0 FOR FUTURE PAIN AND SUFFERING AND PAST AND FUTURE LOST WAGES, WERE DEEMED UNREASONABLE; NEW TRIAL ON DAMAGES ORDERED.

The First Department vacated several of the jury's damages awards and ordered a new trial on damages. Plaintiff was struck by a bus while on a motorized bike resulting in traumatic brain injury, a torn rotator cuff and several herniated discs: "The jury's award of $0 for future pain and suffering is inconsistent with its award of $250,000 for future medical expenses and, in any event, against the weight of the evidence and materially deviates from what would be reasonable compensation ... . Given the jury's finding that plaintiff sustained a 'significant limitation of use,' and its award of future medical costs over a period of 25 years, it is clear that the jury found plaintiff to have suffered injuries that will continue to impair his life into the future, and the award of $0 for future pain and suffering is irreconcilable with this finding and cannot stand ... . The award of $750,000 for past pain and suffering deviates materially from what would be considered reasonable compensation in light of plaintiff's shoulder, spine, and traumatic brain injuries ... . The $0 awards for past and future lost earnings were against the weight of the evidence in light of plaintiff's testimony regarding his prior income and current unemployment. Dr. Cornelius E. Gorman testified that plaintiff's 'career is lost' and that he 'cannot qualify for competitive employment'

given his cognitive deficits. The jury had no reasonable basis for depriving plaintiff of damages for past and future loss of earnings ...". ***Scott v. Posas*, 2021 N.Y. Slip Op. 02885, First Dept 5-6-21**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF TESTIFIED IT HAD RAINED FOR ONLY FIVE MINUTES BEFORE SHE SLIPPED AND FELL ON WATER ON THE FLOOR; THEREFORE HER TESTIMONY ESTABLISHED DEFENDANTS DID NOT HAVE CONSTRUCTIVE NOTICE OF THE CONDITION.

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case should have been granted. Plaintiff testified it had only begun raining five minutes before she slipped and fell on water on the floor, which she did not see until after she fell: "Defendants established prima facie that they did not have actual or constructive notice of the water on their lobby floor that plaintiff alleges caused her to slip and fall ... . Their property manager stated in an affidavit that she conducted a search of defendants' records for complaints about water on the lobby floor between January 1, 2015 and July 14, 2015, the date of plaintiff's accident, and found none except for the complaint made by plaintiff after she fell. That someone fell in the lobby while it was raining after stepping off a mat about a year before plaintiff's accident does not raise an issue of fact as to whether defendants had actual notice of the water that caused plaintiff to fall. Plaintiff's own testimony established prima facie that defendants did not have constructive notice of water on the lobby floor; she testified that it was sunny when she left for lunch, that it did not start raining that day until about five minutes before she reentered the building, and that she did not see the water until after she fell ... . A general awareness that the lobby floor could become wet during inclement weather is insufficient to raise a triable issue of fact as to whether defendants had constructive notice of the specific condition that caused plaintiff's fall ...". ***Barreto v. 750 Third Owner, LLC*, 021 N.Y. Slip Op. 02868, First Dept 5-6-21**

TRUSTS AND ESTATES, PERSONAL INJURY.

WRONGFUL DEATH PROCEEDS BELONG TO THE DISTRIBUTEES, NOT THE ESTATE; THEREFORE, RATHER THAN DIVIDING THE PROCEEDS EQUALLY, SURROGATE'S COURT MUST CONDUCT A HEARING AND DISPURSE THE PROCEEDS BASED UPON PECUNIARY LOSS.

The First Department, reversing Surrogate's Court, noted that the proceeds of a wrongful death action belong to the distributees, not the estate. Therefore the proceeds should not be divided equally among the distributees: "Petitioners commenced this proceeding in Surrogate Court seeking judicial allocation and distribution of the settlement proceeds resulting from a Supreme Court wrongful death action. The proceeds of a wrongful death action belong to the statutory distributees of the decedent and not to the estate; therefore, the law does not presume equal distribution of shares (see EPTL 5—4.3 and 5—4.4[a][1]). Instead, each distributee receives damages in proportion to the pecuniary injuries suffered by him or her, as determined after a hearing in Surrogate's Court (see EPTL 5—4.4[a][1]). Here, Surrogate's Court allocated objectant 50% of the settlement proceeds of the wrongful death action without conducting a hearing on the issue of pecuniary loss." ***Matter of Dixson*, 2021 N.Y. Slip Op. 02870, First Dept 5-6-21**

SECOND DEPARTMENT

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

THE ESTATE WAS A NECESSARY PARTY IN THIS FORECLOSURE ACTION; SUPREME COURT SHOULD HAVE ORDERED THE JOINDER OF THE ESTATE INSTEAD OF DISMISSING THE COMPLAINT.

The Second Department, reversing Supreme Court, determined Supreme Court properly held that the estate was a necessary party in this foreclosure action, but failing to include the estate did not warrant dismissal of the complaint. Rather, the court should directed that the estate be joined as a party: "Supreme Court did not err in finding that the estate was a necessary defendant. 'Pursuant to RPAPL 1311(1), 'necessary defendants' in a mortgage foreclosure action include, among others, '[e]very person having an estate or interest in possession, or otherwise, in the property as tenant in fee, for life, by the courtesy, or for years, and every person entitled to the reversion, remainder, or inheritance of the real property, or of any interest therein or undivided share thereof, after the determination of a particular estate therein' ... '. Particularly where, as here, the plaintiff seeks a deficiency judgment, and alleges a default in payment subsequent to the death of the deceased mortgagor, the estate of the mortgagor is a necessary party to the foreclosure action ... . However, dismissal of the complaint was not the proper remedy; rather, the proper remedy was to direct the joinder of the estate as a defendant (see CPLR 1001[b] ...)." ***BAC Home Loans Servicing, L.P. v. Williams*, 2021 N.Y. Slip Op. 02780, Second Dept 5-5-21**

CRIMINAL LAW.

DEFENDANT COMMITTED CRIMES IN ONE COUNTY AND LED THE POLICE ON A CAR CHASE WHICH ENDED IN ANOTHER COUNTY; SOME OF THE CHARGES STEMMED FROM THE CAR CHASE; THE JUDGE SHOULD NOT HAVE INSTRUCTED THE JURY THAT THE PEOPLE HAD GEOGRAPHIC JURISDICTION OVER ALL THE COUNTS IF THE PEOPLE HAD JURISDICTION OVER ONE COUNT.

The Second Department, ordering a new trial on some of the charges, determined the judge should not have instructed the jury that finding the People had geographic jurisdiction over one count proved the county with jurisdiction over all counts. Defendant had fled the scene of the murder and led the police on a chase which ended in a different county. The counts at issue stemmed from the car chase: " 'The defendant has the right at common law and under the State Constitution to be tried in the county where the crime was committed unless the Legislature has provided otherwise' ... . 'The burden is on the People to prove by a preponderance of the evidence that the county where the crime is prosecuted is the proper venue because either the crime was committed there or one of the statutory exceptions is applicable' ... , insofar as is relevant here, 'an appropriate criminal court of a particular county' has jurisdiction of an offense where '[c]onduct occurred within such county sufficient to establish . . . [a]n element of such offense.' '[G]enerally it is for the jury to decide, as a matter of fact, the place where the crime was committed or any other fact relevant to venue' ... . Here, upon submitting the issue of venue regarding counts three, four, and seven to the jury, the Supreme Court 'incorrectly instructed that a finding of geographic jurisdiction on one count effectively provided the County with jurisdiction over all the other counts' ... . This error cannot be deemed harmless. Because a defendant is entitled to have a jury, not the court, determine factual issues regarding venue, '[i]t is not enough that the record contains evidence' that an element of the offense occurred in the county asserting jurisdiction ... . Rather, 'it must appear from the instructions or by necessary implication from the verdicts that the jury made a finding of proper venue' ...". ***People v. Crumb*, 2021 N.Y. Slip Op. 02816, Second Dept 5-5-21**

CRIMINAL LAW, APPEALS, EVIDENCE.

THE LAW OF THE CASE DOCTRINE PRECLUDED SUPREME COURT'S CONSIDERATION OF ADDITIONAL EVIDENCE TO JUSTIFY SENTENCING DEFENDANT AS A PERSISTENT VIOLENT FELONY OFFENDER; THE APPELLATE COURT HAD SENT THE MATTER BACK FOR RESENTENCING AFTER FINDING PERSISTENT VIOLENT FELONY OFFENDER STATUS WAS NOT SUPPORTED BY THE EVIDENCE.

The Second Department, reversing Supreme Court, determined the law of the case doctrine precluded finding that the incarceration tolling period was not sufficient to permit sentencing defendant as a persistent violent felony offender. The Second Department, on a prior appeal, had found the tolling period insufficient and sent the matter back for resentencing: " 'The doctrine of the law of the case is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned' ... . 'An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court' ... , and 'forecloses reexamination of [an issue previously determined] absent a showing of newly discovered evidence or a change in the law' ... . Here, this Court previously determined, on the merits, that the defendant's incarceration dates did not amount to a sufficient tolling period so as to qualify the March 27, 1987 conviction as a predicate violent felony under Penal Law § 70.04(1)(b)(iv) and (v). The People had a full and fair opportunity to litigate this issue both at the initial hearing before the Supreme Court in 2013, and before this Court on appeal ...". ***People v. Kaval*, 2021 N.Y. Slip Op. 02823, Second Dept 5-5-21**

CRIMINAL LAW, EVIDENCE.

WITHOUT EVIDENCE THE TWO POSSESSION-OF-A-WEAPON CHARGES RELATED TO DISTINCT EVENTS, CONSECUTIVE SENTENCES SHOULD NOT HAVE BEEN IMPOSED.

The Second Department, reversing the convictions and vacating the sentences, determined there was no evidence the two possession-of-a-weapon charges were based upon distinct events. Therefore consecutive sentences should not have been imposed: "County Court should not have imposed consecutive sentences upon the defendant's conviction of the two counts of criminal possession of a weapon in the third degree. Sentences imposed for two or more offenses may not run consecutively where, among other things, 'a single act constitutes two offenses' ... . Here, there was no showing that the defendant's acts underlying the crimes were separate and distinct and consequently, consecutive sentences could not be imposed (see Penal Law § 70.25[2 ...). Under the particular circumstances of this case, we reverse the judgments of convictions, vacate the sentences imposed thereon, and remit the matters ... for further proceedings, at which the People should be given the opportunity to withdraw their consent to the plea agreement, should they be so advised ...". ***People v. Adams*, 2021 N.Y. Slip Op. 02808, Second Dept 5-5-21**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE EVIDENCE OF SERIOUS PHYSICAL INJURY WAS INSUFFICIENT, THE EVIDENCE DEFENDANT INTENDED TO INFLICT SERIOUS PHYSICAL INJURY WAS SUFFICIENT; CONVICTIONS REDUCED TO ATTEMPTED GANG ASSAULT, ASSAULT AND ROBBERY.

The Second Department, reducing defendant's gang assault, assault and robbery convictions to attempted gang assault, assault and robbery, determined the evidence of serious physical injury was insufficient, but the evidence of an intent to inflict serious physical injury was sufficient. The victim was attacked and slashed but no internal organs were injured: "Viewing the evidence in the light most favorable to the prosecution... , we find that the evidence was not legally sufficient to establish the defendant's guilt on these counts. Although the complainant was stabbed multiple times, there was no evidence of serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ ... . However, the evidence at trial also established beyond a reasonable doubt that the defendant acted with the intent to inflict serious physical injury and came 'dangerously near' to committing the completed crimes ... . Accordingly, we modify the judgment by reducing the defendant's convictions of gang assault in the first degree, assault in the first degree, robbery in the first degree under Penal Law § 160.15(1), and assault in the second degree to attempted gang assault in the first degree, attempted assault in the first degree, attempted robbery in the first degree, and attempted assault in the second degree, respectively, and we remit the matter to the Supreme Court, Queens County, for sentencing." ***People v. Aragundi*, 2021 N.Y. Slip Op. 02811, Second Dept 5-5-21**

CRIMINAL LAW, EVIDENCE.

THE EVIDENCE RELIED UPON BY COUNTY COURT TO DENY DEFENDANT'S RESENTENCING PURSUANT TO THE DRUG LAW REFORM ACT (DLRA) WAS NOT SUFFICIENT TO OVERCOME THE STATUTORY PRESUMPTION FAVORING RESENTENCING.

Second Department, reversing County Court, determined the evidence relied upon by County Court was not sufficient to overcome the statutory presumption in favor of resentencing pursuant to the Drug Law Reform Act (DLRA): "Where, as here, a defendant is eligible for resentencing relief pursuant to the 2004 DLRA and CPL 440.46, there is a statutory presumption in favor of resentencing ... . Although resentencing is not mandatory, there is a presumption that the defendant is entitled to benefit from the reforms enacted by the Legislature based upon its judgment that the prior sentencing scheme for drug offenses like those committed by the defendant was excessively harsh ... . Under the circumstances of this case, the factors relied upon by the County Court in denying the motion, including the defendant's criminal history, the quantity of drugs involved in the underlying offenses, and the defendant's disciplinary infractions while incarcerated, were insufficient to overcome the statutory presumption ...". ***People v. Williams*, 2021 N.Y. Slip Op. 02831, Second Dept 5-5-21**

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

THE FAILURE TO REQUEST A DOWNWARD DEPARTURE DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE; THE DISSENT DISAGREED.

The Second Department, over a dissent, determined counsel's failure to ask for a downward departure in the SORA risk level assessment proceeding did not amount to ineffective assistance of counsel: "Assuming arguendo that in hindsight, the defendant's counsel, instead of simply opposing the People's request for an upward departure from the Board's assessment of points, also should have expressly argued for a downward departure from the assessment of points contained in the People's RAI, the omission was not so egregious or prejudicial as to deprive the defendant of the effective assistance of counsel ... . The defendant has neither demonstrated the absence of a strategic or other legitimate explanation for counsel's failure to request a downward departure, nor even addressed that issue in the pro se supplemental brief, as is necessary to sustain an ineffectiveness claim ... . Further, depictions on the defendant's phone included young girls who were toddlers to age seven, including those engaged in sexual intercourse and oral sex with men. Under these circumstances, a downward departure would not have been appropriate given 'the number and nature of the images possessed by the defendant' ...". ***People v. Carman*, 2021 N.Y. Slip Op. 02834, Second Dept 5-5-21**

ELECTION LAW.

THE COUNTY CHARTER PROVISION PROHIBITING SERVICE AS A COUNTY LEGISLATOR "FOR MORE THAN 12 CONSECUTIVE YEARS" DOES NOT PRECLUDE A NEW TERM THAT IS NOT CONSECUTIVE TO THE PRECEDING TERM.

The Second Department, reversing Supreme Court, determined the provision of the Suffolk County Charter which prohibits serving as a county legislature "for more than 12 consecutive years" did not preclude petitioner from running for a new term that was not consecutive to the preceding term: " '[T]he plain language of the statute . . . is the clearest indication of legislative intent' ... .Here, the relevant provision of the Suffolk County Charter states that '[n]o person shall serve as a County Legislator for more than 12 consecutive years' (Suffolk County Charter art II, § C2-5[B]). This provision does not expressly impose any total or lifetime term limit. Further, the plain language of the provision only prohibits a County Legislator from

serving more than 12 consecutive years. In construing a statute, 'words must be 'harmonize[d]' and read together to avoid surplusage' ... . Therefore, the provision should not be interpreted as prohibiting an individual who has previously served as a County Legislator for 12 consecutive years from thereafter seeking a new term in that office, so long as the new term sought is not consecutive to the preceding term ...". ***Matter of Doyle v. Browning*, 2021 N.Y. Slip Op. 02838, Second Dept 5-5-21**

FAMILY LAW, APPEALS, JUDGES, EVIDENCE.

FAMILY COURT, UPON REMITTAL AFTER A PRIOR REVERSAL ON APPEAL, DID NOT MAKE A SUFFICIENT RECORD FOR REVIEW OF ITS ORDER RE: FATHER'S PARENTAL ACCESS.

The Second Department, reversing Family Court, determined Family Court, upon remittal after a prior reversal, did not create a sufficient record to allow review of its order re: father's parental access schedule: " 'In determining custody and [parental access] issues, the most important factor to be considered is the best interests of the child' ... . 'Generally, [parental access] should be determined after a full evidentiary hearing to determine the best interests of the child' ... . 'A trial court must state in its decision 'the facts it deems essential' to its determination' ... . 'Effective appellate review, especially in proceedings involving child custody determinations, 'requires that appropriate factual findings be made by the trial court—the court best able to measure the credibility of the witnesses' ... . Under the circumstances of this case, the record is not sufficient for this Court to conduct an intelligent review of the evidence. Furthermore, the children are of such an age and maturity that information regarding their preferences is necessary to create a sufficient record to determine their best interests ...". ***Matter of Georgiou-Ely v. Ely*, 021 N.Y. Slip Op. 02796, Second Dept 5-5-21**

FAMILY COURT, CIVIL PROCEDURE, JUDGES.

FAMILY COURT SHOULD NOT HAVE FOUND NEW YORK DID NOT HAVE JURISDICTION OVER THIS CUSTODY DISPUTE WITHOUT HOLDING A HEARING PURSUANT TO THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT TO DETERMINE WHETHER NEW YORK OR YEMEN WAS THE CHILDREN'S HOME STATE.

The Second Department, reversing Family Court, determined Family Court should not have found New York did not have jurisdiction over this custody dispute without holding a hearing pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The issue is whether New York or Yemen was the children's home state: "Pursuant to Domestic Relations Law § 70, '[w]here a minor child is residing within this state, either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award . . . custody of such child to either parent.' Here, since the children reside outside of this State, reference must necessarily be made to the Uniform Child Custody Jurisdiction and Enforcement Act (Domestic Relations Law art 5-A; hereinafter UCCJEA), which provides, inter alia, that 'a court of this state has jurisdiction to make an initial child custody determination only if: (a) this state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state' (Domestic Relations Law § 76[1][a] ...). The UCCJEA defines 'home state' as 'the state in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child custody proceeding' (Domestic Relations Law § 75-a[7]). Here, the Family Court was required to hold a hearing as to the issue of whether New York or Yemen was the children's home state, as there are disputed issues of fact regarding the circumstances under which the parties moved with the children from New York to Yemen ...". ***Matter of Kassim v. Al-Maliki*, 2021 N.Y. Slip Op. 02800, Second Dept 5-5-21**

FAMILY LAW, EVIDENCE.

RATHER THAN TERMINATING MOTHER'S PARENTAL RIGHTS, FAMILY COURT SHOULD HAVE SUSPENDED JUDGMENT TO GIVE MOTHER A CHANCE TO PREPARE FOR REUNIFICATION WITH HER CHILD.

The Second Department, reversing Family Court, determined the termination of mother's parental rights was not demonstrated to be in the child's best interests. Judgment should have been suspended so mother could prepare for reunification with the child: "At the dispositional stage of a proceeding to terminate parental rights, the Family Court must make its determination based solely on the best interests of the child (see Family Ct Act § 631). Depending on the best interests of the child, the court has to either dismiss the petition, suspend judgment for up to one year, or terminate parental rights (see Family Ct Act §§ 631, 633[b]; Social Services Law § 384-b[8][f]). A dispositional order suspending judgment provides a brief grace period to give a parent found to have permanently neglected a child a second chance to prepare for reunification with the child (see Family Ct Act § 633 ...). ... [I]t is undisputed that the mother engaged in regular phone conversations with the child at least once a week; that, since March 2019, following a difficult pregnancy with her younger child which impeded her ability to travel from her apartment in upper Manhattan to the agency in Jamaica, Queens, where visitation occurred, she had been regularly visiting the child; that the child continued to refer to the mother as her mother and her foster parent as her auntie; and that there is a strong bond between the mother and the child and between the child and the mother's younger child, who resided with the mother. In addition, the mother had completed a drug treatment program and was drug free, attended a parenting class with intentions to attend additional classes, underwent a mental health evaluation,

and was receiving therapy and preventive services. Further, following the child's placement in foster care, the mother, who, at the time that she gave birth to the child, was 20 years old and living in a group home, having entered foster care herself at the age of 17, obtained an associate's degree and secured an apartment. Moreover, in a related derivative neglect proceeding filed with respect to the mother's younger child, the mother was granted a suspended judgment which expired in July 2020." ***Matter of Grace G. (Gloria G.)*, 2021 N.Y. Slip Op. 02795, Second Dept 5-5-21**

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

PLAINTIFF DID NOT DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION AND DID NOT PROVIDE SUFFICIENT PROOF OF COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304.

The Second Department, reversing Supreme Court, determined the plaintiff did not demonstrate standing to bring the foreclosure action, the defendants properly raised plaintiff's failure to comply with the notice requirements of RPAPL 1304 in opposition to the plaintiff's summary judgment motion, and the plaintiff's proof of compliance with the notice requirements was insufficient: "... [T]he plaintiff failed ... to establish its standing to commence this action. The copy of the note submitted in support of the plaintiff's motion contained two additional pages, the first entitled 'Allonge to Note' and the second entitled 'Note Allonge.' However, as the defendants correctly contend, the plaintiff did not submit any evidence to indicate that the purported allonges were so firmly affixed to the note so as to become a part thereof (see UCC 3-202[2] ...). ... [S]ince the proper service of a RPAPL 1304 notice is a condition precedent to the commencement of a foreclosure action, the defendants could properly raise this defense for the first time in their opposition to the plaintiff's motion for summary judgment, and the burden of establishing prima facie compliance with the requirements of RPAPL 1304 was with the plaintiff ... . [I]n order to establish its compliance with the notice requirements of RPAPL 1304, the plaintiff submitted two affidavits from its 'authorized signer,' Tracy A. Duck. However, contrary to the Supreme Court's determination, neither affidavit was sufficient to establish the plaintiff's strict compliance with the notice requirements of RPAPL 1304. Among other things, Duck did not aver that she was familiar with the mailing practices and procedures of the entity that purportedly sent the notices ... . Moreover, the business records attached to Duck's second affidavit were insufficient to establish compliance with RPAPL 1304 ...". ***LNV Corp. v. Almberg*, 2021 N.Y. Slip Op. 02791, Second Dept 5-5-21**

INSURANCE LAW, EMPLOYMENT LAW.

THE GENERAL OBLIGATIONS LAW PROHIBITION OF SEEKING REIMBURSEMENT OF MEDICAL COSTS FROM A TORT ACTION SETTLEMENT DOES NOT APPLY TO SELF-FUNDED EMPLOYEE BENEFIT PLANS.

The Second Department, reversing Supreme Court, determined the General Obligations Law prohibition of seeking reimbursement of medical costs out of an insured's tort action settlement does not apply to self-funded employee benefit plans. "The infant plaintiff was injured in an automobile accident and, after this personal injury action was commenced, sought the Supreme Court's approval to accept the defendants' offer to settle his claim for the policy limit of the defendants' insurance policy of $300,000. The appellant, which is the administrator of the employee benefit plan for the employer of the infant plaintiff's mother, sought to enforce a subrogation lien in the sum of $108,008.10, for the sums the plan paid for medical bills for the infant plaintiff arising out of the accident, against the settlement proceeds. The appellant contended that New York's anti-subrogation statute, General Obligations Law § 5-335, was preempted because the employee benefit plan at issue was a self-funded plan governed by the Employment Retirement Income Security Act of 1974 (29 USC § 1001 et seq. ; hereinafter ERISA). ... While General Obligations Law § 5-335 precludes health insurers from seeking reimbursement out of an insured's tort action settlement, that statute is preempted by ERISA in the instance of self-funded plans, which are not deemed to be insurers or insurance companies ... . Here, the appellant established that the employee benefit plan at issue was self-funded, in that it does not purchase an insurance policy from an insurance company in order to satisfy its obligations to plan participants. As such, it was error to hold that the subrogation lien was unenforceable against the infant plaintiff's settlement proceeds." ***David v. David*, 2021 N.Y. Slip Op. 02784, Second Dept 5-5-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THERE WAS A QUESTION OF FACT WHETHER PLAINTIFF WAS ENGAGED IN REPAIR AS OPPOSED TO ROUTINE MAINTENANCE OF THE AIR CONDITIONER WHEN HE WAS INJURED; THEREFORE DEFENDANT'S MOTION TO DIMSISS THE LABOR LAW § 240(1) CAUSE OF ACTION WAS PROPERLY DENIED; HOWEVER THE LABOR LAW § 241(6) CAUSE OF ACTION SHOULD HAVE BEEN DISMIISED BECAUSE PLAINTIFF WAS NOT INVOLVED IN CONSTRUCTION.

The Second Department, reversing (modifying) Supreme Court determined defendant's (Chase's) motion for summary judgment on the Labor Law § 240(1) cause of action was properly denied but Chase's motion for summary judgment on the Labor Law § 241(6) cause of action should have been granted. There was a question of fact whether plaintiff was engaged in routine maintenance repair of the air conditioner. But plaintiff was not involved in construction of the building, so Labor Law § 241(6) did not apply: "Chase's own evidentiary submissions, including the injured plaintiff's deposition testimony, raised triable issues of fact as to whether the injured plaintiff was engaged in repairs or routine maintenance at the time the

accident occurred. Although it is undisputed that an outside party was to perform the ultimate repair to the defective division plate, the injured plaintiff testified at his deposition that his supervisor instructed him to perform a temporary repair to the division plate in order to make the air conditioning unit function. Thus, there is a triable issue of fact as to whether the injured plaintiff's activity constituted a repair of the unit within the scope of Labor Law § 240(1) ... . 'Although the applicability of Labor Law § 241(6) is not limited to building sites, the work in which the plaintiff was engaged must have affected the structural integrity of the building or structure or have been an integral part of the construction of a building or structure' ...". ***Cantalupo v. Arco Plumbing & Heating, Inc.*, 2021 N.Y. Slip Op. 02783, Second Dept 5-5-21**

MEDICAL MALPRACTICE, PERSONAL INJURY, EMPLOYMENT LAW.

PLAINTIFF'S DECEDENT WAS TAKEN TO THE DEFENDANT HOSPITAL'S EMERGENCY ROOM AND WAS OPERATED ON BY AN INDEPENDENT SURGEON; PLAINTIFF DEMONSTRATED THE EMERGENCY ROOM EXCEPTION APPLIED AND THE HOSPITAL WAS VICARIOUSLY LIABLE FOR THE SURGEON'S ALLEGED MALPRACTICE.

The Second Department, reversing Supreme Court, determined plaintiff demonstrated the emergency room exception applied and defendant hospital could be held vicariously liable for the alleged malpractice an independent surgeon: "In general, under the doctrine of respondeat superior, a hospital may be held vicariously liable for the negligence or malpractice of its employees acting within the scope of employment, but not for the negligence or malpractice of an independent physician, as when the physician is retained by the patient himself or herself ... . However, as an exception to this rule, a hospital may be held vicariously liable for the acts of independent physicians if the patient enters the hospital through the emergency room and seeks treatment from the hospital, not from a particular physician ... . Here, the plaintiff satisfied her prima facie burden of demonstrating that the emergency room exception applies by producing evidence that the decedent was brought to the Hospital's emergency room by ambulance, did not request treatment by a particular physician, and was assigned to Reichman's care by the Hospital ...". ***Goffredo v. St. Luke's Cornwall Hosp.*, 2021 N.Y. Slip Op. 02788, Second Dept 5-5-21**

PERSONAL INJURY, EVIDENCE.

DEFENDANT FAILED TO PRESENT EVIDENCE THAT THE AREA OF PLAINTIFF'S SLIP AND FALL WAS INSPECTED OR CLEARED OF ICE AND SNOW DURING THE TWO DAYS PRIOR TO THE FALL; THEREFORE DEFENDANT DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE AS A MATTER OF LAW.

The Second Department, reversing Supreme Court, determined defendant UPS did not demonstrate the lack of constructive notice of the snow and ice condition upon which plaintiff allegedly slipped and fell: "UPS failed to demonstrate, prima facie, that it lacked constructive notice of the ice condition on which the plaintiff allegedly slipped and fell in the early morning of January 1, 2011 ... . In support of that branch of its motion which was for summary judgment dismissing the complaint, UPS failed to submit any evidence concerning the condition of the subject area after it had been cleared of snow and ice on December 29, 2010, or within a reasonable time prior to the plaintiff's fall on the morning of January 1, 2011 ... . UPS submitted evidence demonstrating that it ceased all snow removal efforts on December 29, 2010, in relation to a storm that dropped a significant amount of snow, and that the area where the plaintiff fell was free of ice at that time. However, it submitted no evidence as to when the area was inspected again between December 29, 2010, and the time of the plaintiff's accident more than two days later. Under the circumstances, triable issues of fact exist including whether the alleged ice condition that caused the plaintiff to slip and fall was visible and apparent, and whether it had existed for a sufficient length of time before the accident such that UPS could have discovered and corrected it ...". ***Anderson v. United Parcel Serv., Inc.*, 2021 N.Y. Slip Op. 02777, Second Dept 5-5-21**

PERSONAL INJURY, EVIDENCE.

DEFENDANTS DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF LIQUID ON THE DANCE FLOOR IN THE AREA OF PLAINTIFF'S SLIP AND FALL; DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant did not demonstrate it lacked constructive notice of liquid on the dance floor in the area of plaintiff's slip and fall: "The defendants did not submit any evidence regarding specific cleaning or inspection of the area in question, or any other affirmative proof to demonstrate how long the condition had existed. In support of their motion, they submitted the transcript of the deposition testimony of Hercules Sirico, the catering hall owner, who testified that the wood dance floor would be cleaned on an as-needed basis by one of the porters, of whom he was in charge. Sirico also testified that, on the night of the subject party, he entered the ballroom where the party was being held multiple times to make sure that members of his staff were doing things properly, but did not stay in the ballroom during the entire party. Although Sirico testified that, while he was in the ballroom, he always took a look at the dance floor and did not notice any wetness or liquids on it, he also testified that every time he was in the ballroom, the dance floor was always packed, with more than 100 people dancing, that guests would get drinks at the 'constantly busy' mobile bar situated just 'shy' of the dance floor, and bring the drinks onto the dance floor, and that no one stopped or

warned the guests from doing so. Further, the defendants submitted the transcript of the plaintiff's deposition testimony, during which the plaintiff testified that when he went to dance, he was slipping and sliding on the dance floor because it was wet, that there were a lot of people on the dance floor with drinks, and that it was 'very dark' in the ballroom." ***Ellis v. Sirico's Catering, Inc.*, 2021 N.Y. Slip Op. 02785, Second Dept 5-5-21**

PERSONAL INJURY, EVIDENCE.

ALTHOUGH THE CORD WHICH ALLEGEDLY CAUSED PLAINTIFF'S SLIP AND FALL MAY HAVE BEEN OPEN AND OBVIOUS, DEFENDANTS DID NOT DEMONSTRATE IT WAS NOT INHERENTLY DANGEROUS; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants did not establish that the cord or wire over which plaintiff tripped and fell was not inherently dangerous, even if the cord was open and obvious: "The plaintiff allegedly was injured when she tripped and fell over a cord or microphone wire while attending an event at certain property purportedly owned by the defendants … . She commenced this action against the defendants and one other defendant to recover damages for personal injuries. The defendants moved for summary judgment dismissing the complaint insofar as asserted against them. The Supreme Court granted the defendants' motion on the ground that the condition of the wire or cord was open and obvious and not inherently dangerous. The plaintiff appeals. In support of their motion, the defendants failed to establish, prima facie, that the cord or wire was not inherently dangerous ... ". ***Franzo v. Town of Hempstead*, 2021 N.Y. Slip Op. 02787, Second Dept 5-5-21**

THIRD DEPARTMENT

CRIMINAL LAW, EVIDENCE.

THERE WAS INSUFFICIENT EVIDENCE DEFENDANT PARTICIPATED IN THE MUGGING, INSUFFICIENT EVIDENCE THE VICTIM SUFFERED PHYSICAL INJURY, AND INSUFFICENT EVIDENCE DEFENDANT CONSTRUCTIVELY POSSESSED THE VICTIM'S WALLET AND CELL PHONE.

The Third Department, reversing defendant's convictions, determined the convictions were not supported by legally sufficient evidence and were against the weight of the evidence. The victim said he was mugged by three men and his wallet and cell phone were stolen. The police were able to track the cell phone and, based on the tracking device, stopped a car 30 to 40 minutes after the mugging. There were four men, including defendant, in the car. The other three men in the car pled guilty. The wallet and cell phone were found in the car. The evidence that defendant participated in the mugging was insufficient, the evidence the victim suffered physical injury was insufficient, and the evidence defendant constructively possessed the wallet and cell phone was insufficient: "... [W]e find that the People failed to prove, beyond a reasonable doubt, defendant's identity as one of the perpetrators of the robbery and assault. * * * Given the paucity of proof regarding the victim's injuries, we agree with defendant that the evidence fails to establish that the victim suffered a physical injury within the meaning of Penal Law § 10.00 (9) ... . * * * ... [T]he ... circumstantial evidence falls short of proving, beyond a reasonable doubt, that defendant constructively possessed the wallet and the credit and debit cards contained therein or that any such possession was knowing. Although the testimony demonstrated that the wallet was found somewhere in the back seat, there was no other evidence connecting defendant to the stolen property or demonstrating his awareness of its presence inside the vehicle. ... [T]he victim asserted that there were three black males involved in the robbery and assault and there were four black males in the vehicle when it was stopped some 30 to 40 minutes afterward, leaving open the possibility that one of the passengers entered the vehicle after the robbery and assault ...". ***People v. Green*, 2021 N.Y. Slip Op. 02841, Third Dept 5-6-21**

EMPLOYMENT LAW, BATTERY, COURT OF CLAIMS.

CLAIMANT-INMATE'S ACTION AGAINST THE STATE ALLEGING HE WAS BEATEN BY CORRECTIONS OFFICERS SHOULD NOT HAVE BEEN DISMISSED; THERE WERE QUESTIONS OF FACT ABOUT WHETHER THE OFFICERS WERE ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT AT THE TIME OF THE BEATING.

The Third Department, in a full-fledged opinion by Justice Clark, reversing the Court of Claims, over a two-justice dissent, determined the claimant-inmate's action alleging claimant was beaten by corrections officers after lodging a complaint against one of the officers (Poupore) should not have been dismissed. The Court of Claims ruled the state could not be liable for the beating because the officers were not acting within the scope of their employment: "... [T]he undisputed evidence demonstrated that the incident took place at Clinton Correctional Facility, that the correction officers involved were on duty and that claimant's encounter with Poupore by the stairway was occasioned by claimant having been called downstairs for an interview with Wood [Poupore's supervisor] ... . [T]estimony from defendant's witnesses demonstrated that pat frisks are routinely conducted prior to inmate interviews and that Poupore was instructed to pat frisk claimant prior to his interview. Accepting claimant's version of events as true, Poupore struck claimant during the course of that employer-sanctioned pat frisk, which then led to the involvement of additional correction officers. If claimant's account is credited,

Poupore's intentional tortious act of punching claimant in the head was not so divorced from the performance of his pat-frisk duties so as to preclude a finding that he was acting within the scope of employment. Nor can we conclude as a matter of law that the ensuing altercation was wholly outside the scope of the additional correction officers' duties." ***Galloway v. State of N.Y.*, 2021 N.Y. Slip Op. 02855, Third Dept 5-6-21**

ENVIRONMENTAL LAW, ZONING, LAND USE.

OWNERS OF BUSINESSES IN THE VICINITY OF THE PROPOSED CONSTRUCTION ALLEGED DECREASED PARKING SPACES, INCREASED TRAFFIC CONGESTION AND THE BLOCKING OF SCENIC VIEWS AS REASONS FOR OVERTURNING THE SEQRA NEGATIVE DECLARATION ALLOWING THE CONSTRUCTION; THE BUSINESS OWNERS DID NOT HAVE STANDING TO CONTEST THE DECLARATION.

The Third Department upheld the negative SEQRA (State Environmental Quality Review Act) declaration approving the construction of a mixed-use structure which would reduce the number of parking spaces available in Oneonta. The fact that the petitioners owned businesses in the vicinity of the new construction did not confer standing to contest the negative declaration: "Although petitioners have established that their businesses are within close proximity to the project site, that fact alone does not confer automatic standing in the SEQRA context ... . Petitioners' allegations largely hinged on economic business concerns occasioned by an alleged decrease in available parking ... , and their claim relating to traffic impacts 'fail[s] to demonstrate an environmental injury different from that suffered by the public at large' ... . Although the obstruction of a scenic view may constitute an environmental injury within the zone of interests sought to be protected by SEQRA ... , the concerns espoused by certain petitioners regarding potential adverse scenic impacts to their businesses were undeveloped and otherwise too speculative to establish standing in these circumstances ... . We also note that the project site is located in a 'mixed use' district (MU-1) — which permits the type of development contemplated — and, according to the full environmental assessment form, there are no officially designated scenic or aesthetic resources located within five miles ...". ***Matter of Peachin v. City of Oneonta*, 2021 N.Y. Slip Op. 02863, Third Detp 5-6-21**

MENTAL HYGIENE LAW, CRIMINAL LAW, ATTORNEYS.

ALTHOUGH THE RESPONDENT-SEX-OFFENDER WAS PROPERLY ALLOWED TO REPRESENT HIMSELF IN THE CIVIL COMMITMENT PROCEEDING, HE SHOULD NOT BE ALLOWED TO CROSS-EXAMINE THE WITNESSES WHO WERE VICTIMS OF HIS SEX OFFENSES.

The Third Department, in a full-fledged opinion by Justice Clark, reversing Supreme Court, determined the respondent-sex-offender in this civil commitment proceeding, who was properly allowed to represent himself with a Mental Hygiene Legal Service (MHLS) attorney as stand-by counsel, should not be allowed to cross-examine the witnesses who had been victims of the respondent's offenses. The cross-examination should be done by stand-by counsel: "... [A]llowing respondent to personally conduct the cross-examinations of the victim witnesses could thwart or impair petitioner's ability to sustain its burden of proof by causing the witnesses to back out of testifying or by causing a 'chilling effect' on their testimony. Moreover, petitioner has a compelling interest in protecting the victim witnesses from any possible retraumatization resulting from respondent personally conducting cross-examinations of them. Upon balancing the foregoing Mathews factors, we find that, to the extent that respondent has a due process right to self-representation, such right does not entitle him to personally conduct the cross-examinations of the victim witnesses whom he was adjudicated or alleged to have victimized. Thus, notwithstanding respondent's pro se status, the cross-examinations of the victim witnesses must be conducted by respondent's standby counsel (MHLS) or, should respondent prefer, other court-appointed counsel." ***Matter of State of N.Y. v. John T.*, 2021 N.Y. Slip Op. 02862, Third Dept 5-6-21**

FOURTH DEPARTMENT

CIVIL PROCEDURE, ATTORNEYS, MEDICAL MALPRACTICE.

THE LANGUAGE IN THE HIPAA FORM, INDICATING PLAINTIFF'S PHYSICIAN MAY BUT IS NOT OBLIGATED TO SPEAK WITH DEFENDANT'S ATTORNEY, WAS PROPERLY APPROVED BY SUPREME COURT IN THIS MEDICAL MALPRACTICE ACTION.

The Fourth Department, in a full-fledged opinion by Justice Troutman, over a dissent, determined Supreme Court properly approved language in the HIPAA form informing plaintiff's physicians that they may but are not obligated to speak with defendant's attorney: "Defendant offered ... to accept revised authorizations that included the following language: 'the purpose of the requested interview with the physician is solely to assist defense counsel at trial. The physician is not obligated to speak with defense counsel prior to trial. The interview is voluntary.' ... [D]efendant moved ... to compel plaintiff to provide revised authorizations. The court granted the motion ... , directing plaintiff ... to provide revised HIPAA-compliant authorizations containing defendant's proposed language, unemphasized and in the same size font as the rest of the authorization. * * * Here, the wording that was approved by the court is identical to the wording that previously met with the approval of the Second Department in *Porcelli v Northern Westchester Hosp. Ctr.* (65 AD3d 176, 178 [2d Dept 2009]), it is

similar to the language contained in the [Office of Court Administration's] standard form, and there is no dispute that it is consistent with the applicable law." ***Sims v. Reyes*, 2021 N.Y. Slip Op. 02971, Fourth Dept 5-7-21**

CIVIL PROCEDURE, EDUCATION-SCHOOL LAW, PERSONAL INJURY.

PLAINTIFF BROUGHT A PERSONAL INJURY ACTION AGAINST A SCHOOL DISTRICT AND AN INDIVIDUAL UNDER THE CHILD VICTIMS ACT ALLEGING SEXUAL ABUSE BY A GUIDANCE COUNSELOR IN THE 1980'S; SUPREME COURT PROPERLY ALLOWED PLAINTIFF'S SUIT TO GO FORWARD UNDER A PSEUDONYM.

The Fourth Department, in a full-fledged opinion by Justice Smith, determined Supreme Court properly allowed plaintiff to proceed under a pseudonym in her personal injury action against the school district and an individual defendant pursuant to the Child Victims Act (CBA). Plaintiff alleged she was sexually abused in the 1980's by a guidance counselor at her high school: "... [P]laintiff alleged that she was employed by the county in which these allegations arose, that her job may be in jeopardy as a result of the allegations, and that she experienced 'emotional distress, suicidal thoughts, depression, anxiety, feelings of worthlessness, and many other psychological damages, painful feelings, emotions, nightmares, flashbacks, as well as physical manifestations of these problems' that would recur if her name was publicized. ... [T]he record establishes that plaintiff has disclosed her name to defendants, thereby minimizing any prejudice arising from her use of a pseudonym for the purposes of discovery and investigation, and defendants have not asserted any other prejudice that they will sustain therefrom. An additional factor supporting the court's determination is that plaintiff did not seek, nor did the court order, that the records in the case be sealed or that public access be denied. Thus, the public's interest in open court proceedings is preserved ... . Although the School and defendant Amherst Central School District are governmental entities, which supports plaintiff's position, defendant John Koch ... is an individual, which favors defendants' position. Thus, there is no clear advantage to either side with respect to that factor." ***PB-7 Doe v. Amherst Cent. Sch. Dist.*, 2021 N.Y. Slip Op. 02969, Fourth Dept 5-7-21**

CONTRACT LAW, FRAUD, NEGLIGENCE.

PLAINTIFF RAISED GROUNDS TO INVALIDATE A RELEASE IN THIS TRAFFIC ACCIDENT CASE BASED ON FRAUD.

The Fourth Department, reversing Supreme Court, determined plaintiff in this traffic accident case raised grounds to invalidate a release plaintiff had signed based upon fraud: "Defendants met their initial burden of establishing that they were released from any claims by submitting the release executed by plaintiff ... . The burden thus shifted to plaintiff to show that the release was voidable based on fraud ... . Plaintiff submitted an affidavit in which she averred that, in the midst of negotiating a settlement of her personal injury claim for pain and suffering, a representative of Morgan's insurer told her that, 'under New York Law, [plaintiff] would not be able to sue . . . because [she] did not have any major surgeries or life-threatening injuries.' Plaintiff further averred that, based on those representations, she agreed to sign the release in exchange for $1,500. Accepting plaintiff's allegations as true ... , we conclude that plaintiff sufficiently alleged grounds on which to invalidate the release ...". ***Cain-Henry v. Shot*, 2021 N.Y. Slip Op. 02961, Fourth Dept 5-7-21**

CRIMINAL LAW.

CRIMINAL POSSESSION OF A WEAPON SECOND DEGREE IS AN ARMED FELONY FOR SENTENCING PURPOSES IF THE FIREARM IS LOADED AND OPERABLE.

The Fourth Department, in a full-fledged opinion by Justice Centra, diverging from the First Department, determined criminal possession of a weapon second degree can constitute possession of a deadly weapon within the definition of an armed felony if the firearm is loaded and operable: "We disagree with the reasoning in *Ochoa* [182 AD3d 410, 1st Dept 2020] only to the extent that it held that all convictions of criminal possession of a weapon in the second degree for possessing a loaded firearm are not armed felonies. It is apparent that where a defendant possesses a firearm that is actually loaded with ammunition and is capable of being fired, he or she possesses a deadly weapon and is guilty of an armed felony offense. We conclude that it is appropriate to look at the particular facts of each case to determine whether the defendant is guilty of an armed felony. For example, a person is guilty of robbery in the first degree under Penal Law § 160.15 (2) when he or she commits a robbery while armed with a deadly weapon, which, as noted, includes a switchblade knife or a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged (§ 10.00 [12]). To determine if the defendant committed an armed felony, courts look to the definition of deadly weapon as that phrase is used in the definition of armed felony, which excludes knives. Thus, where a defendant is convicted of robbery in the first degree for the use of a knife, that is not an 'armed felony' ... . Where, however, the robbery is committed with a loaded, operable firearm, it is an 'armed felony' (see *People v Jiminez*, 165 AD2d 692, 692-693 [1st Dept 1990] ...). In *Jiminez*, the Court held that '[s]ince defendant pleaded guilty to committing first degree robbery while armed with a pistol he was properly sentenced as an armed felony offender' ... , despite the fact that a first-degree robbery conviction is not always an armed felony. Just as courts look to the definition of deadly weapon as that phrase is used in the definition of armed felony to determine that

knives are excluded therefrom, so too should courts look to whether the firearm fits within that definition, i.e., a firearm that is actually loaded and capable of being fired." ***People v. Meridy*, 2021 N.Y. Slip Op. 02894, Fourth Dept 5-7-21**

CRIMINAL LAW, ATTORNEYS.

THE PROSECUTOR VIOLATED THE CRIMINAL PROCEDURE LAW BY REFUSING TO INFORM THE GRAND JURY THE DEFENDANT REQUESTED THE TESTIMONY OF TWO WITNESSES; HOWEVER THE PROSECUTORIAL MISCONDUCT DID NOT WARRANT DISMISSAL OF TWO COUNTS OF THE INDICTMENT; COUNTY COURT REVERSED.

The Fourth Department, reversing County Court, in a People's appeal, determined the district attorney violated the Criminal Procedure Law by refusing to tell the grand jury defendant had requested that two witnesses give testimony, but the violation did not warrant dismissal of two counts of the indictment. The decision includes a detailed discussion of the district attorneys duties and discretion with respect to a defendant's request for witness testimony before a grand jury: "... [A] prosecutor may not 'suppress[a] defendant's request to call . . . witness[es] nor strip[ ] the grand jury of its discretion to grant or deny that request' ... . Instead, '[a]lthough [a] prosecutor [cannot] avoid presenting [a requested] witness's name for a vote, the prosecutor [is] free, in the role of advisor to the grand jury, to explain that the witness [does] not have relevant information [or] primarily offer[s] inadmissible hearsay testimony, and if unpersuasive in this effort, the prosecutor [may seek] a court order quashing the subpoena or limiting the witness's testimony as provided in CPL 190.50 (3)' ... . [T]he court properly determined that the People, despite their stated concerns about the admissibility of the proposed testimony, violated their statutory obligation by refusing to present to the grand jury defendant's request that two of the vehicle's other occupants be called as witnesses. * * * We ... conclude that 'this was not one of the rare cases of prosecutorial misconduct entitling a defendant to the exceptional remedy of dismissal, because there is no showing that, in the absence of the complained-of misconduct, the grand jury might have decided not to indict the defendant' ... . [T]he People did not engage in an overall pattern of willful and pervasive misconduct; instead, the failure to present defendant's request for witnesses to the grand jury constituted an isolated instance of misconduct involving, at worst, the erroneous handling of an evidentiary matter, which 'do[es] not merit invalidation of the indictment' ...". ***People v. Wilcox*, 2021 N.Y. Slip Op. 02893, Fourth Dept 5-7-21**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE EVIDENCE OF ESCAPE IN THE FIRST DEGREE WAS LEGALLY INSUFFICIENT; DEFENDANT WAS NOT YET IN CUSTODY WHEN HE DROVE AWAY AS A POLICE OFFICER ATTEMPTED TO PULL HIM FROM HIS CAR.

The Fourth Department, reversing defendant's conviction of escape in the first degree, determined defendant was not yet in custody when he drove away as a police officer attempted to pull him from his car: "... [D]efendant contends that the evidence is legally insufficient to support the conviction of escape in the first degree. We agree. Here, a police officer informed defendant that he was under arrest and attempted to pull him from the driver's seat of a vehicle, at which time defendant drove off, dragging officers across a parking lot. Under these circumstances, we conclude that defendant was not in custody at the time of the alleged escape ...". ***People v. Bagley*, 2021 N.Y. Slip Op. 02964, Fourth Dept 5-7-21**

CRIMINAL LAW, EVIDENCE, APPEALS, ATTORNEYS.

THE ARGUMENT THAT THE PROBATION OFFICER'S SEARCH OF DEFENDANT'S RESIDENCE WAS UNLAWFUL AND UNREASONABLE BECAUSE IT WAS BASED SOLELY ON AN UNCORROBORATED ANONYMOUS TIP WAS NOT PRESERVED FOR APPEAL, THE DISSENT DISAGREED; DEFENDANT DID NOT DEMONSTRATE DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE THE ISSUE.

The First Department, over a dissent, determined the issue whether the probation officer's search of defendant's residence was improperly based solely on an anonymous tip was not preserved for appeal. In addition, the defendant did not demonstrate defense counsel was ineffective for failing to preserve the issue. The dissent argued the record did not support the motion court's finding the warrantless search was lawful and reasonable: "Contrary to defendant's contention, he did not preserve that issue for our review through either that part of his omnibus motion seeking to suppress the evidence or his posthearing memorandum. A question of law with respect to a ruling of a suppression court is preserved for appeal when 'a protest thereto was registered, by the party claiming error, at the time of such ruling . . . or at any subsequent time when the court had an opportunity of effectively changing the same . . . , or if in response to a protest by a party, the court expressly decided the question raised on appeal' (CPL 470.05 [2] ...). In his omnibus motion, defendant sought, inter alia, suppression of the evidence seized during the search on the ground that the evidence 'was taken in violation of . . . defendant's constitutional rights' inasmuch as it was done without 'a search warrant or probable cause.' Those 'broad challenges' are insufficient to preserve defendant's present contention ... . In defendant's posthearing memorandum, he argued that the search was invalid because there was no warrant or consent to search, that the search was not rationally related to the duties of the

officer, and that the parole officers were acting as police officers when conducting the search. He did not raise his present contention that the People were required to prove that the information provided to the officer satisfied the Aguilar-Spinelli test in order for the search to be lawful, even though he was then aware of the basis for the search ... . Nor did the court expressly decide that issue ...". ***People v. Murray*, 2021 N.Y. Slip Op. 02896, Fourth Dept 5-7-21**

EDUCATION-SCHOOL LAW, DEFAMATION, CONTRACT LAW.

FORMER STUDENT'S ALLEGATIONS DEFENDANT COLLEGE BREACHED ITS AGREEMENT THAT IT WOULD NOT DISCLOSE ITS DISCIPLINARY PROCEEDINGS AGAINST THE STUDENT TO SCHOOLS TO WHICH THE STUDENT APPLIED FOR ADMISSION PROPERLY SURVIVED THE COLLEGE'S MOTION TO DISMISS; ADOPTING AND APPLYING THE HEIGHTENED STANDARD FOR DEFAMATION BY IMPLICATION, THE DEFAMATION CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED.

The Fourth Department, modifying Supreme Court, determined defendant college breached its agreement with plaintiff-student regarding the disclosure of information about the school's disciplinary proceedings alleging sexual misconduct. After finding the student had violated the code of student conduct the student was expelled. The student was then acquitted of criminal charges stemming from the same allegations. The student and the school entered an agreement prohibiting the school from disclosing information about the disciplinary proceedings to schools to which the student applied for admission. The complaint alleged the school breached that agreement and included a cause of action for defamation by implication. The breach of contract causes of action properly survived the motion to dismiss, but the defamation cause of action should have been dismissed: " 'Defamation by implication' is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements' … . We now join the other Departments in adopting the heightened legal standard for a claim of defamation by implication ... . Under that standard, '[t]o survive a motion to dismiss a claim for defamation by implication where the factual statements at issue are substantially true, the plaintiff must make a rigorous showing that the language of the communication as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference' ... . The disclosure that plaintiff was found responsible in a student disciplinary proceeding for sexual misconduct and assault as defined in a student code of conduct does not imply that there was a criminal proceeding ... . [A]lthough plaintiff may wish that additional information from the College would have provided further context for the truthful information that was conveyed, the disclosure to Buffalo State did not imply anything false about plaintiff ...". ***Bisimwa v. St. John Fisher Coll.*, 2021 N.Y. Slip Op. 02962, Fourth Dept 5-7-21**

EMPLOYMENT LAW, MUNICIPAL LAW, ADMINISTRATIVE LAW.

THE DISCIPLINARY PROCEEDINGS AGAINST A TOWN POLICE OFFICER ARE CONTROLLED BY THE TOWN LAW AND THE TOWN POLICE MANUAL, NOT THE CIVIL SERVICE LAW AND COLLECTIVE BARGAINING AGREEMENT.

The Fourth Department, reversing Supreme Court, determined the disciplinary proceedings against a town police officer are controlled by the Town Law and the town police manual, not by the Civil Service Law and the collective bargaining agreement (CBA): "... [W]e agree with respondents that the disciplinary procedures set forth in the police manual are controlling, we further agree with respondents that the court erred in directing them to resolve petitioner's disciplinary proceedings pursuant to Civil Service Law § 75 and the CBA ... . To the extent that the police manual contains references to Civil Service Law § 75, it is well settled that section 75 did not repeal or modify Town Law § 155 ... . Indeed, 'Civil Service Law § 76 (4) states that '[n]othing contained in section [75] or [76] of this chapter shall be construed to repeal or modify any general, special or local' preexisting laws' ... , and Town Law § 155, which gives towns the power and authority to adopt rules regarding police discipline, was enacted prior to Civil Service Law §§ 75 and 76 ... . Thus, where, as here, a town board has adopted disciplinary rules pursuant to Town Law § 155, those rules are controlling and Civil Service Law § 75 and any collective bargaining agreement are inapplicable ...". ***Matter of Town of Tonawanda Police Club, Inc. v. Town of Tonawanda*, 2021 N.Y. Slip Op. 02959, Fourth Dept 5-7-21**

PERSONAL INJURY, EVIDENCE.

DEFENDANT PROPERTY OWNER DEMONSTRATED IT DID NOT CREATE OR HAVE ACTUAL NOTICE OF THE DANGEROUS CONDITION (A DEFECTIVE RAILING ON A SECOND-STORY BALCONY); HOWEVER, THERE WAS A QUESTION OF FACT WHETHER A LETTER FROM THE VILLAGE CODE ENFORCEMENT OFFICER SHOULD HAVE TRIGGERED AN INSPECTION OF THE PROPERTY.

The Fourth Department, reversing (modifying) Supreme Court, determined defendant's motion for summary judgment dismissing the cause of action alleging defendant created or had actual notice of the dangerous condition should have been granted. The facts are not described, but apparently a railing on plaintiff's second-story balcony gave way and he fell to the ground. However, the cause of action alleging defendant had constructive notice of the dangerous condition properly

survived summary judgment. The defendant received a letter from the village code enforcement officer which did not specifically address the condition of the plaintiff's balcony but was sufficient to trigger an inspection of the property: "Defendant met its initial burden on its motion of establishing that it did not create or have actual or constructive notice of the alleged defect in the second-story balcony ... . In support of the motion, defendant submitted the deposition of plaintiff, who testified that he lived in the apartment for approximately 15 years prior to the accident and was unaware of a problem with the balcony railing. Defendant also submitted evidence establishing that it had received no complaints with respect to the condition of the railing and that it made no repairs to the railing prior to the accident. In opposition to the motion, plaintiff raised an issue of fact whether defendant had constructive notice of the alleged defect in the balcony railing by submitting a letter written by the Village of Springville Code Enforcement Officer and sent to defendant. The letter, dated 10 days before the accident, stated that 'the porch' with respect to the subject property was 'falling apart' and needed 'immediate attention,' and asked defendant to schedule a time for the Officer to inspect the property. Although defendant's reply papers included an affidavit from the Code Enforcement Officer explaining that the letter referred to a first-story porch and not the second-story balcony, a person reading the Officer's letter without any clarification would not have known specifically which porch the Officer had observed in disrepair. "The duty of landowners to inspect their property is measured by a standard of reasonableness under the circumstances' ... , and we conclude that there is an issue of fact whether the information in the letter should have aroused defendant's suspicion so as to trigger such a duty to inspect ...". ***Maracle v. Colin C. Hart Dev. Co., Inc.*, 2021 N.Y. Slip Op. 02939, Fourth Dept 5-7-21**

PRODUCTS LIABILITY, NEGLIGENCE.

THE DEFECTIVE-DESIGN CAUSE OF ACTION AGAINST THE SELLERS OF A TRUCK WHICH DID NOT HAVE A BACK-UP ALARM SHOULD NOT HAVE BEEN DISMISSED; THE PURCHASER OF THE TRUCK TESTIFIED HE WAS NOT AWARE THE OPTION WAS AVAILABLE.

The Fourth Department, reversing Supreme Court, determined the defective-design cause of action against the defendant sellers of a truck should not have been dismissed. The truck was purchased by plaintiff's employer who testified he did not know a back-up alarm was an available option. Plaintiff was run over as the truck backed up: "Where, as here, a plaintiff buyer claims that a product without an optional safety feature is defectively designed because the feature was not included as a standard feature, the product is not defective if '(1) the buyer is thoroughly knowledgeable regarding the product and its use and is actually aware that the safety feature is available; (2) there exist normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment; and (3) the buyer is in a position, given the range of uses of the product, to balance the benefits and the risks of not having the safety device in the specifically contemplated circumstances of the buyer's use of the product' ... . Here, defendants submitted the deposition testimony of plaintiff's employer, who testified that, at the time he bought the truck that was involved in the accident, he 'didn't know' that a backup alarm was available as an option, thereby raising an issue of fact whether he was actually aware of its availability ...". ***Mariani v. Guardian Fences of WNY, Inc.*, 2021 N.Y. Slip Op. 02906, Fourth Dept 5-7-21**

REAL PROPERTY LAW.

PLAINTIFF DEMONSTRATED DEFENDANTS' CONSTRUCTION OF A FENCE VIOLATED A VALID RESTRICTIVE COVENANT IN THE PARTIES' DEEDS.

The Fourth Department, reversing Supreme Court, determined plaintiff's motion for summary judgment should have been granted. Plaintiff alleged defendants violated a restrictive covenant in the parties' deeds by constructing a fence along the property line: "Plaintiff and defendants own adjoining properties in Wayne County with views of Sodus Bay, and those properties can be traced to one original grantor, nonparty Sodus Bay Heights Land Co., Inc. (Land Company). The Land Company created a subdivision and, between the years of 1924 and 1937, it sold numerous parcels in accordance with its planned development. Plaintiff and defendants obtained title to their property through chains of title that date back to owners who purchased their property directly from the Land Company. Both properties are subject to two relevant restrictive covenants that run with the land. The first stated '[t]hat no line fence shall be erected on said lot without the written consent of the [Land Company], or its successors or assigns.' The second stated '[t]hat no unnecessary trees or other obstructions shall be permitted on said lot which shall hide the view of other residents in Sodus Bay Heights.' * * * Generally, '[r]estrictive covenants will be enforced when the intention of the parties is clear and the limitation is reasonable and not offensive to public policy'... , and it is well settled that the party seeking to enforce such a restriction 'must prove, by clear and convincing evidence, the scope, as well as the existence, of the restriction' ... . Here, plaintiff established as a matter of law the scope and the existence of a restriction against fences." ***Dodge v. Baker*, 2021 N.Y. Slip Op. 02891, Fourth Dept 5-7-21**

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