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FIRST DEPARTMENT

CRIMINAL LAW.

THE SENTENCING COURT CAN LOOK BEYORD THE WORDING OF A FOREIGN STATUTE TO THE CONTENTS OF THE FOREIGN ACCUSATORY INSTRUMENT TO DETERMINE WHETHER A FOREIGN FELONY IS THE EQUIVALENT OF A NEW YORK FELONY RE: SECOND FELONY OFFENDER STATUS.

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, determined defendant was properly sentenced as a second felony offender even though the Pennsylvania statute at issue did not require knowledge of the precise controlled substance which was possessed. The First Department looked beyond the wording of the statute to the allegations in the accusatory instrument: "The knowledge requirement of the Pennsylvania statute at issue here is satisfied when it is established that the defendant knew he or she possessed an illegal substance, without the necessity of a showing that he or she knew which illegal substance was possessed ... . In contrast, the knowledge requirement under the New York Penal Law sections relevant here 'demands proof of 'knowledge that the item at issue was, in fact, the controlled substance the defendant is charged with selling or possessing' ... . This presents the possibility that defendant could have been convicted of a felony under the Pennsylvania statute without being guilty of a felony in New York. However, a sentencing court may go beyond the statute and examine the underlying accusatory instrument when the foreign statute under which the defendant was convicted renders criminal several different acts, some of which would constitute felonies and others of which would constitute only misdemeanors in New York ... . An examination of the underlying accusatory instrument revealed that defendant had 'knowingly manufacture[d], deliver[ed] or possess[ed] with intent to manufacture or deliver (crack/cocaine and powder cocaine), a controlled substance.' Accordingly, defendant's Pennsylvania conviction was the equivalent of a felony in New York, and defendant was properly adjudicated a second felony offender." ***People v. Simmons*, 2021 N.Y. Slip Op. 03924, First Dept 6-17-2**

CRIMINAL LAW, EVIDENCE.

THE COMPLAINT CHARGING FORCIBLE TOUCHING DID NOT ALLEGE THE APPLICATION OF PRESSURE AS AN ELEMENT OF THE TOUCHING RENDERING THE COMPLAINT LEGALLY INSFUFFICIENT.

The First Department, vacating the defendant's forcible touching conviction, determined the complaint was legally insufficient because it did not allege the application of pressure as an element of the touching: "The complaint was legally insufficient to support the forcible touching charge; therefore, with respect to that charge only, the prosecutor's information was jurisdictionally defective ... . The actus reus of forcible touching (Penal Law § 130.52) is 'any bodily contact involving the application of some level of pressure to the victim's sexual or intimate parts' ... . Here, the complaint alleged that defendant touched the victim's thighs and genitals by reaching under her skirt, but it failed to allege any facts consistent with the application of pressure ...". ***People v. Zaragoza*, 2021 N.Y. Slip Op. 03915, First Dept 6-17-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS PROPERLY AWARDED SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION STEMMING FROM A FALL FROM A SIDEWALK BRIDGE PLAINTIFF WAS DISMANTLING; ALTHOUGH PLAINTIFF WAS SUPPLIED WITH A HARNESS, THERE WAS NO PLACE TO ATTACH THE SAFETY LINE.

The First Department determined plaintiff was properly awarded summary judgment on his Labor Law § 240(1) cause of action based on his fall from a sidewalk bridge he was dismantling. Although plaintiff had a harness, there was no place to attach the safety line: "Plaintiff testified that he was wearing a harness but that the sidewalk bridge did not have a lifeline to which he could attach the safety line, which was seven to nine feet long. The task at hand involved his breaking down the structure's components and carrying them to the end of the sidewalk bridge run, which covered nearly a city block. The expert stated that if plaintiff's movement was limited to nine feet with his lanyard attached to the sidewalk bridge, he could still have performed his job 'as described.' However, he failed to explain further or indicate where on the bridge a tie-off would have been either practicable or safe, given the maximum range of the harness line." ***Gomez v. Trinity Ctr. LLC*, 2021 N.Y. Slip Op. 03810, First Dept 6-15-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS STANDING AT THE TOP OF A LADDER WHEN IT WOBBLED AND HE FELL; COMPARATIVE NEGLIGENCE IS NOT A DEFENSE TO A LABOR LAW § 240(1) ACTION; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action, Plaintiff was standing at the top of a ladder when it wobbled and he fell: "Plaintiff established prima facie entitlement to summary judgment on the Labor Law § 240(1) claim through his testimony that while installing a cover on a sprinkler in a ceiling, he fell to the ground and sustained injury when the unsecured ladder on which he was standing with one foot on the ladder's top, and the other foot one rung below began to wobble and he lost his equilibrium ... . [T]here is no requirement that plaintiff identify exactly what caused the ladder to move, or his fall ... . While defendants argue that different versions as to why the ladder wobbled preclude summary judgment, under any of the scenarios, plaintiff is entitled to partial summary judgment because he was not supplied with adequate protection under the statute, which was the proximate cause of the accident ... . Given plaintiff's undisputed testimony, any alleged misuse by him constitutes at most comparative negligence, which is not a defense to a Labor Law § 240(1) claim ...". ***Hoxhaj v. West 30th HL LLC*, 2021 N.Y. Slip Op. 03811, First Dept 6-15-21**

MEDICAL MALPRACTICE, EVIDENCE. PUBLIC HEALTH LAW, PERSONAL INJURY.

THE JURY WAS INSTRUCTED ON THE CRITERIA FOR CONSCIOUS PAIN AND SUFFERING IN THIS NURSING-HOME MALPRACTICE CASE, BUT THE JUDGE DID NOT FIRST DETERMINE PLAINTIFF HAD SOME LEVEL OF COGNITIVE AWARENESS; THE CONSCIOUS PAIN AND SUFFERING CRITERIA ARE THE SAME FOR MALPRACTICE AND FOR VIOLATION OF PUBLIC HEALTH LAW 2801-D; NEW DAMAGES TRIAL ORDERED.

The First Department vacated the $2.5 million pain and suffering award in this nursing malpractice case because the jury was instructed on the elements of "conscious" pain and suffering but the judge did not first determine plaintiff had some level of cognitive awareness. The suit alleged the nursing home's failure to monitor plaintiff-resident's blood sugar level led to brain injury and death. A new trial on damages was ordered. The First Department noted that the criteria for "conscious pain and suffering" damages is the same for malpractice and violation of Public Health Law § 2801-d: "The court should not have allowed the jury to award damages for pain and suffering without first determining that the decedent ‚experienced some level of cognitive awareness following the injury'... . There is no legal basis for applying this rule in the general negligence/malpractice context but not in the context of a violation of PHL 2801-d. Although PHL 2801-d(4) provides that '[t]he remedies provided in this section are in addition to and cumulative with any other remedies available to a patient, . . . including tort causes of action, and may be granted regardless of whether such other remedies are available or are sought,' this language has been interpreted as authorizing a separate cause of action, not a separate category of damages ...". ***Smith v. Northern Manhattan Nursing Home, Inc.*, 2021 N.Y. Slip Op. 03818, First Dept 6-15-21**

SECOND DEPARTMENT

CIVIL PROCEDURE, WORKERS' COMPENSATION.

SUPREME COURT HAD JURISDICTION TO ISSUE A DECLARATORY JUDGMENT RE: WHETHER PLAINTIFF PHARMACY COULD SEEK PAYMENT OF PRESCRIPTIONS UNDER THE WORKERS' COMPENSATION LAW, EVEN THOUGH THE WORKERS' COMPENSATION BOARD (WCB) HAD JURISDICTION OVER THE ISSUES RAISED IN THE COMPLAINT.

The Second Department, reversing Supreme Court, determined Supreme Court had jurisdiction over a declaratory judgment action, even though the case involved whether plaintiff pharmacy was entitled to payment for prescriptions under the Workers' Compensation Law, a matter within the jurisdiction of the Workers' Compensation Board (WCB): "No party accepted responsibility for the payment of the outstanding prescription bills and the plaintiff commenced this action seeking ... a judgment declaring that the Workers' Compensation Law does not prohibit a pharmacy from seeking payment of a prescription bill from the responsible party in a plenary proceeding in a court of appropriate jurisdiction ... . * * * Pursuant to CPLR 3001, the Supreme Court 'may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds.' The Court of Appeals has ruled that 'primary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board' [WCB]... . Thus, while the Supreme Court properly determined that the appropriate forum to resolve the issues raised in the complaint is the WCB, the WCB's jurisdiction is primary and not exclusive. ... [S]ince this is a declaratory judgment action, the Supreme Court should have denied the WCB defendants' motion to dismiss the complaint for lack of subject matter jurisdiction ...". ***21st Century Pharmacy v. American Intl. Group*, 2021 N.Y. Slip Op. 03820, Second Dept 6-16-21**

CONTRACT LAW, CIVIL PROCEDURE.

PLAINTIFF RECEIVED THE FULL BENEFIT OF A LOAN AGREEMENT; THE DOCTRINE OF EQUITABLE ESTOPPEL PRECLUDED PLAINTIFF'S CLAIM THE LOAN AGREEMENT IS UNENFORCEABLE BECAUSE THE UNDERLYING RECORDED MORTGAGE DID NOT BEAR HIS SIGNATURE.

The Second Department determined the defendants' motion to dismiss was properly granted. Plaintiff contended the underlying mortgage which was part of a loan agreement was void because it was not signed, rendering the loan agreement unenforceable. Plaintiff had however accepted the proceeds of the loan and therefore was precluded from contesting the agreement by the doctrine of equitable estoppel: "... [T]he plaintiff does not ... deny that he executed a copy of the mortgage in accordance with the loan agreement, he merely contends that the copy that was recorded ... , did not bear his signature. The plaintiff contends that this defect rendered the recorded mortgage void ab initio and therefore unenforceable ... . * * * ... [T]he defendants' uncontradicted submissions demonstrated that the plaintiff 'had the full benefit' of the loan agreement ... . [T]he plaintiff does not seek to rescind the loan agreement, but he nevertheless seeks to recoup 'all closing costs paid to Defendants with any payments to [Citibank] since June 22, 2007,' the date the loan agreement was executed ... . Under the circumstances, the doctrine of equitable estoppel precludes the plaintiff from asserting that the recorded mortgage was void ...". ***Bernard v. Citibank*, N.A., 2021 N.Y. Slip Op. 03822, Second Dept 6-16-21**

CRIMINAL LAW, CONSTITUTIONAL LAW.

BECAUSE THE COURT WAS NOT AUTHORIZED TO PLACE PETITIONER IN CUSTODY, THE COURT COULD NOT ORDER PETITIONER TO BE REMANDED TO RIKER'S ISLAND FOR A CPL ARTICLE 730 EXAMINATION; THE HABEAS CORPUS PETITION SHOULD HAVE BEEN GRANTED.

The Second Department determined Supreme Court was not authorized to remand the petitioner, Wei Li, to Riker's Island for a CPL article 730 examination because defendant was charged with a misdemeanor and was not in custody. Therefore the habeas corpus petition should have been granted: "... [T]he references in CPL 730.20(2) and (3) to the defendant either having been theretofore released on bail or on his or her own recognizance, or being in custody, respectively, at the time a court issues an order of examination presuppose that a securing order has been issued upon arraignment as required by law (see CPL 170.10[7]; 210.15[6]; 510.10[1]). As such, a defendant's previously determined, or statutorily mandated, liberty status—either release or in custody—cannot be changed because a CPL article 730 examination is ordered: if the defendant has been ordered released (or, as in the case of non-qualifying offenses, is required to be released), then the court is authorized ('may ') only to direct that the examination be conducted on an outpatient basis or, under certain circumstances, that the defendant be confined in a hospital until the examination is completed (see CPL 730.20[2]); if the defendant has been committed to custody, then he or she must remain in custody for the examination, even if he or she must be taken to a hospital for purposes of conducting same (see id. § 730.20[3]). A defendant who has been ordered released, or, as in Wei Li's case, was statutorily entitled to release (see CPL 510.10[3]; 530.20[1]), cannot be jailed because the court ordered a CPL article 730 examination." ***People v. Warden*, 2021 N.Y. Slip Op. 03867, Second Dept 6-16-21**

CRIMINAL LAW, EVIDENCE.

THE COURT SHOULD HAVE HELD A *FRYE* HEARING ON THE ADMISSIBILITY OF DNA-RELATED EVIDENCE GENERATED BY THE FORENSIC STATISTICAL TOOL (FST); CONVICTION REVERSED.

The Second Department, reversing defendant's conviction, determined the court should have held a *Frye* hearing on the admissibility of DNA-related evidence generated by the Forensic Statistical Tool (FST): "Prior to trial, the Supreme Court denied the defendant's motion to preclude the People from introducing at trial DNA testing results and testimony concerning the Forensic Statistical Tool (hereinafter FST) or, in the alternative, for a hearing pursuant to *Frye v United States* (293 F 1013 [DC Cir]) to determine the admissibility of the evidence generated by the FST. The Supreme Court improvidently exercised its discretion in admitting FST evidence without first holding a *Frye* hearing ... . As proof of the defendant's guilt was not overwhelming without the FST evidence ... , the error was not harmless ... . Accordingly, the judgment of conviction must be reversed and a new trial ordered." ***People v. Applewhite*, 2021 N.Y. Slip Op. 03847, Second Dept 6-16-21**

CRIMINAL LAW, EVIDENCE.

DEFENDANT DID NOT USE ANY PHYSICAL FORCE IN REFUSING TO COOPERATE AFTER A TRAFFIC STOP; OBSTRUCTION OF GOVERNMENTAL ADMINISTRATION CONVICTION REVERSED.

The Second Department, reversing defendant's conviction of obstructing governmental administration second degree, determined there was no evidence the defendant used physical force. Passive refusal to cooperate after a traffic stop is not enough: "... [T]he defendant was argumentative throughout the traffic stop and arrest-booking process, repeatedly refused to answer the officers' questions, and refused to participate physically in any way in the arrest-booking process, including refusing to stand for a photograph, to provide his fingerprints, or to sign a Miranda form ... . The People concede that the defendant did not physically resist the officers, but argue that his conduct constituted physical interference because he refused to cooperate physically in the arrest-booking process. However, neither the defendant's conduct during the traffic

stop nor his conduct during the arrest-booking process constituted a knowing, physical interference with, and disruption of, the official function being performed by the officers. The defendant did not struggle, physically resist, or do anything to interfere with the officers, and he did not intrude into, or get in the way of, any ongoing police activity ... . The defendant's passive unwillingness to cooperate with the officers during the traffic stop and arrest-booking process lacked the requisite intentional physical component ...". ***People v. Johnson*, 2021 N.Y. Slip Op. 03851, Second Dept 6-16-21**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT WAS ENTITLED TO A DOWNWARD DEPARTURE (LEVEL TWO TO ONE) IN THIS CHILD PORNOGRAPHY CASE.

The Second Department, reversing Supreme Court, determined defendant's motion for a downward departure in this child pornography case should have been granted: "At a hearing pursuant to the Sex Offender Registration Act (Correction Law art 6-C) to determine the defendant's risk level, defense counsel requested that, despite the defendant's score on the risk assessment instrument, which placed him at the lower end of the presumptive level two risk category, the Supreme Court should exercise its discretion to grant a downward departure and designate the defendant a level one sex offender ... . Under the circumstances of this case—including, among other things, the small number of images found on the defendant's cell phone and the absence of any evidence of child pornography on his laptop, the brief period of time during which the defendant is alleged to have collected child pornography, the defendant's lack of criminal history, and a psychosexual evaluation report finding that the defendant's risk of reoffense was low—we find that a preponderance of the evidence established that the risk assessment instrument overassessed the defendant's risk of reoffense, and that his request for a downward departure should be granted in the exercise of discretion ...". ***People v. Sestito*, 2021 N.Y. Slip Op. 03859, Second Dept 6-15-21**

DEBTOR-CREDITOR, REAL PROPERTY LAW. CIVIL PROCEDURE.

CONVEYANCES OF REAL PROPERTY SHOULD HAVE BEEN SET ASIDE AS FRAUDULENT PURSUANT TO THE DEBTOR-CREDITOR LAW; RELATED AFFIRMATIVE DEFENSES BASED UPON UNSUPPORTED CONCLUSIONS OF LAW SHOULD HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined conveyances of property should have been set aside as fraudulent and the related affirmative defenses based upon unsupported conclusions of law should have been dismissed: "... [T]he plaintiff submitted ... a copy of the deed and transfer documents regarding the properties at issue, which demonstrated that conveyances of the properties were made after the underlying action was commenced and without fair consideration. The plaintiff also submitted evidence that a judgment was docketed against [defendants] and that they failed to satisfy the judgment. With respect to the element of fair consideration, the deed and transfer documents reflect that no money or a nominal fee of ten dollars was paid for the defendants' properties. Therefore, the plaintiff established her prima facie entitlement to summary judgment on the first cause of action to the extent that it seeks to set aside the conveyances of the properties pursuant to former section 273-a of the Debtor and Creditor Law ... . The Supreme Court ... should have granted that branch of the plaintiff's motion which was pursuant to CPLR 3211(b) to dismiss the affirmative defenses insofar as the affirmative defenses pertain to Debtor and Creditor Law former § 273-a. CPLR 3211(b) authorizes a plaintiff to move to dismiss a defendant's affirmative defense on the ground that it is without merit ... [T]he affirmative defenses ... proffered no supporting facts and merely pleaded conclusions of law." ***Diaz v. 297 Schaefer St. Realty Corp.*, 2021 N.Y. Slip Op. 03825, Second Dept 6-16-21**

ELECTION LAW, FRAUD.

THE DESIGNATING PETITIONS INCLUDED THE NAMES OF CANDIDATES WHO DID NOT AGREE TO BE LISTED; THE PETITIONS WERE THEREFORE PROPERLY INVALIDATED ON THE GROUND OF FRAUD.

The Second Department determined Supreme Court properly invalidated appellants' designating petitions because they included the names of candidates who did not consent to be listed on the petitions: "... [A] designating petition will be invalidated upon a showing that the entire petition is permeated with fraud ... . Here, the petitioners demonstrated by clear and convincing evidence that the designating petitions of the appellants ... were permeated with fraud, as it is undisputed that those designating petitions included the names of several candidates who never affirmatively agreed to be listed thereon, and the hearing evidence amply supported the Supreme Court's determination that their inclusion was intentional and designed to mislead others. Thus, these designating petitions were properly invalidated on the ground of fraud …". ***Matter of Ariola v. Maio*, 2021 N.Y. Slip Op. 03988, Second Dept 6-17-21**

FAMILY LAW, ATTORNEYS, CONTEMPT.

ALTHOUGH THE CHILD-SUPPORT CONTEMPT PROCEEDING WAS IN SUPREME COURT, NOT FAMILY COURT, PLAINTIFF HAD A RIGHT TO COUNSEL UNDER THE JUDICIARY LAW; PLAINTIFF'S COUNSEL WAS INEFFECTIVE BECAUSE NO MEDICAL EVIDENCE WAS PRESENTED TO SUPPORT PLAINTIFF'S TESTIMONY HE WAS UNABLE TO WORK.

The Second Department, after noting plaintiff was entitled to counsel under Judiciary Law § 35(8) in this child-support contempt proceeding in Supreme Court, determined plaintiff's counsel was ineffective. Plaintiff testified he could not meet his child-support obligations because of medical problems, but counsel did not present any medical evidence: "The plaintiff was denied effective assistance of counsel in connection with that branch of the defendant's cross motion which was to hold him in contempt for wilful violation of the 2013 order. Under Judiciary Law § 35(8), a person has the right to the assistance of counsel in any matter before the Supreme Court, under circumstances whereby, if such proceeding was pending in the Family Court, such court would be required, by section 262 of the Family Court Act, to appoint counsel, such as the matter here in which the defendant sought to hold the plaintiff in contempt for wilful violation of the 2013 [child-support] order and sought his incarceration (see Judiciary Law § 35[8]; Family Ct Act § 262). The standard for effective assistance of counsel in such cases is whether, viewed in its totality, there was meaningful representation ... . Here, the plaintiff's attorney failed to present any medical evidence, whether in the form of admissible medical records or testimony of medical witnesses, to support the plaintiff's defense that his failure to pay child support in accordance with the 2013 order was not wilful, but rather due to his medical condition which rendered him unable to work." ***Winter v. Winter*, 2021 N.Y. Slip Op. 03865, Second Dept 6-16-21**

MALICIOUS PROSECUTION, CRIMINAL LAW, CIVIL PROCEDURE, NAVIGATION LAW, WATER LAW, MUNICIPAL LAW.

BECAUSE THE STATE, NOT THE TOWN, OWNS THE LAND BENEATH THE LAKE, THE TOWN DID NOT HAVE JURISDICTION TO BRING CRIMINAL CHARGES BASED UPON THE CONSTRUCTION OF DOCKS; THE CRIMINAL MATTER WAS DISMISSED ON THAT GROUND AND PLAINTIFFS BROUGHT A MALICIOUS PROSECUTION ACTION; BECAUSE THE CRIMINAL MATTER WAS TERMINATED IN PLAINTIFFS' FAVOR THE MALICIOUS PROSECUTION ACTION SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined the underlying criminal matter brought against the plaintiffs (the Melchers) by the town had been terminated in favor of the plaintiffs. Therefore the plaintiffs' malicious prosecution action against the town should not have been dismissed. The town brought criminal charges based upon plaintiffs' construction of docks in a marina. Pursuant to the Navigation Law, the state owns the land beneath the lake and the town, therefore, did not have jurisdiction to bring the criminal charges. The criminal charges had been dismissed on that ground: "In order to maintain a civil action to recover damages for malicious prosecution, a plaintiff must show '(1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding, and (4) actual malice' ... . A criminal proceeding terminates favorably to the accused where the disposition is final, 'such that the proceeding cannot be brought again' ... , and the disposition is not 'inconsistent with a plaintiff's innocence' ... . Whether a disposition was inconsistent with innocence is a case-specific determination that considers the circumstances of the particular case ... . Here, the 2008 criminal proceeding was dismissed for lack of jurisdiction pursuant to CPL 170.30(1)(f) because the Town lacked legal authority to regulate the activity upon which the criminal charges were based. In the dismissal order, the Supreme Court found that 'jurisdiction over the [Melchners] ha[d] never been properly obtained and accordingly the [Melchners] [could] not be prosecuted for the offenses alleged.' Under the circumstances, the disposition was not inconsistent with the Melchners' innocence ...". ***Melchner v. Town of Carmel*, 2021 N.Y. Slip Op. 03830, Second Dept 6-16-21**

PARTNERSHIP LAW, CIVIL PROCEDURE.

ALTHOUGH PLAINTIFF SOUGHT DISSOLUTION OF THE PARTNERSHIP AND COULD NOT COMPEL PARTITION IF THE PARTNERSHIP EXISTS, PLAINTIFF SHOULD HAVE BEEN ALLOWED TO AMEND THE COMPLAINT TO ADD A CAUSE OF ACTION FOR PARTITION IN THE ALTERNATIVE.

The Second Department, reversing (modifying) Supreme Court, determine plaintiff should have been allowed to amend the complaint to allege a cause of action for partition in this partnership dispute. Although plaintiff sought dissolution of the partnership, and could not compel partition if the partnership exists, partition would be available if the existence of the partnership is not proven: " 'Absent prejudice or surprise resulting from the delay in making the motion, leave to amend should be granted unless the proposed amendment is patently without merit or palpably improper' ... . Here, the plaintiff has alleged the existence of a general partnership and has sought, inter alia, to dissolve it, while the defendant has consistently denied the existence of such partnership. If the plaintiff prevails in establishing the existence of the partnership, then he cannot compel partition of the partnership property ... . However, since the existence of the partnership is disputed by the

defendant, we see no reason why the plaintiff should not be permitted to plead, in the alternative (see CPLR 3014, 3017[a]), a cause of action to compel partition of the jointly held properties in the event no partnership is found to exist ...". ***Ratto v. Oliva*, 2021 N.Y. Slip Op. 03860, Second Dept 6-16-21**

PERSONAL INJURY, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

IN A TRAFFIC ACCIDENT INVOLVING A FIRE TRUCK DRIVEN BY A VOLUNTEER FIREFIGHTER, THE FIRE DISTRICT CAN BE HELD TO A NEGLIGENCE, AS OPPOSED TO A RECKLESS DISREGARD, STANDARD PURSUANT TO GENERAL MUNICIPAL LAW § 205-B.

The Second Department, over a dissent, determined the defendant volunteer fire district could be held liable for a traffic accident under a negligence, as opposed to reckless disregard, standard, pursuant General Municipal Law § 205-b. The dissent argued the reckless disregard standard applies because General Municipal Law 205-b does not specify a particular standard of care: "Pursuant to General Municipal Law § 205-b, 'fire districts created pursuant to law shall be liable for the negligence of volunteer firefighters duly appointed to serve therein in the operation of vehicles owned by the fire district upon the public streets and highways of the fire district, provided such volunteer firefighters, at the time of any accident or injury, were acting in the discharge of their duties.' Thus, contrary to the Fire District's contention, it was not limited to liability for conduct rising to the level of 'reckless disregard' under Vehicle and Traffic Law § 1104(e), and could be held liable for the ordinary negligence of a volunteer firefighter operating the Fire District's vehicle ...". ***Anderson v. Commack Fire Dist.*, 2021 N.Y. Slip Op. 03821, Second Dept 6-16-21**

THIRD DEPARTMENT

MEDICAL MALPRACTICE, PERSONAL INJURY.

THE DOCTOR ORDERED A CERTAIN DOSAGE OF MEDICATION BE ADMINISTERED FOR "1" MINUTE TO ADDRESS SYMPTOMS OF A STROKE, BUT A NURSE MISTAKENLY PROGRAMMED THE MACHINE TO ADMINISTER THE MEDICATION FOR "11" MINUTES; THE ACTION SOUNDS IN MEDICAL MALPRACTICE, NOT ORDINARY NEGLIGENCE.

The Third Department determined Supreme Court properly ruled this case sounded in medical malpractice, not ordinary negligence, and explained the difference. Plaintiff had been given the wrong dosage of tPA upon arrival at the hospital to address symptoms of a stroke. Due to a mistake, the machine was programmed to administer a quantity of the drug for "11" minutes, instead of the "1" minute ordered by the doctor. The mistake was noticed after three minutes: "... [T]he case is one of medical malpractice only. 'Conduct may be deemed malpractice, rather than negligence, when it constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician' ... . 'The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of the facts ' ... . As relevant here, plaintiffs' claims are based upon allegations that defendants acted negligently in their medical care and treatment of plaintiff — i.e., defendants' actions or omissions with respect to the proper dosing of tPA, the progression of the stroke with or without the proper administration of tPA, the medical benefits and risks of tPA based on the proper or improper administration of the medication, and the potential loss of the opportunity to attain tPA's benefits based on its improper administration. Although it is undisputed that a nurse inadvertently mis-administered the tPA by erroneously programming the pump, she was assisting the physician by administering the prescribed medication and was an integral part of the process of rendering medical treatment to the patient. The nurse's error does not transform this case to one of simple negligence rather than medical malpractice ...". ***Holland v. Cayuga Med. Ctr. at Ithaca, Inc.*, 2021 N.Y. Slip Op. 03896, Third Dept 6-17-21**

RETIREMENT AND SOCIAL SECURITY LAW, EMPLOYMENT LAW, PERSONAL INJURY.

PETITIONER, A POLICE OFFICER, WAS ASKED BY HER SUPERVISOR TO PICK UP A LARGE BREAKFAST ORDER FOR THE PRECINCT; PETITIONER SLIPPED AND FELL ON ICE IN THE PARKING LOT WHEN RETURNING WITH THE ORDER; PETITIONER WAS "IN SERVICE" WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW WHEN SHE FELL.

The Third Department determined the petitioner, a police officer, was in service when she slipped on ice and her application for accidental disability benefits should not have been denied on that ground. The matter was sent back for a determination when the fall was an "accident" within the meaning of the Retirement and Social Security Law: "Respondent's determination that petitioner was not in service because she was performing 'a personal activity' at the time of her 2011 injury is not supported by substantial evidence. Petitioner testified that, on the day of the incident, her supervisor asked if the desk duty officers were going to get breakfast. According to petitioner, the supervisor then requested that someone contact a patrol officer that was on the road and have him or her pick up breakfast for the precinct. ... A fellow officer that was in the precinct at the time volunteered to go and asked petitioner to accompany him to help carry the large order. According to petitioner,

her supervisor then gave her permission to go and he paid for the breakfast order. Upon her return to the precinct with the breakfast order, she slipped on ice while walking in the parking lot. In our view, by going out to pick up a breakfast order for the precinct at the behest of her supervisor, petitioner was performing a work duty rather than engaged in a personal activity ...". ***Matter of Arroyo v. DiNapoli*, 2021 N.Y. Slip Op. 03895, Third Dept 6-17-21**

WORKERS' COMPENSATION, PERSONAL INJURY.

CLAIMANT, A POLICE OFFICER WHO WORKED AT A VEHICLE CHECKPOINT FOR TRAFFIC TO AND FROM GROUND ZERO AFTER THE WORLD TRADE CENTER WAS DESTROYED, PARTICIPATED IN THE CLEANUP WITHIN THE MEANING OF WORKERS' COMPENSATION LAW § 28; THEREFORE HIS CLAIM (BASED UPON TOXIN-RELATED INJURY) SHOULD NOT HAVE BEEN DISMISSED AS UNTIMELY.

The Third Department, reversing the Workers' Compensation Board, determined claimant police officer did participate in the cleanup operations at ground zero and his claim should not have been disallowed as untimely pursuant to Workers' Compensation Law § 28. Claimant worked at a vehicle checkpoint for traffic to and from ground zero and alleged injury from toxins in the environment: "... [C]laimant worked at a vehicle checkpoint and he testified that he was assigned to control traffic at the intersection of West and Canal Streets from January 31, 2002 to February 6, 2002. Claimant further testified that his duties at the checkpoint included stopping traffic and clearing routes for emergency and construction vehicles travelling to and from ground zero. According to claimant, he assisted getting vehicles through the checkpoint, '[w]hether it was construction, whether it was [f]ire department [or] family members.' By providing such assistance, we find that claimant's activities had a tangible connection to the rescue, recovery and cleanup operations at the WTC [World Trade Center] site ... . As such, and in light of the liberal construction afforded this remedial statute, we conclude that the Board's determination that Workers' Compensation Law article 8-A does not apply because claimant did not participate in the rescue, recovery and cleanup operations at ground zero is not supported by substantial evidence and, therefore, the claim should not have been disallowed as untimely under Workers' Compensation Law § 28 ...". ***Matter of Bodisch v. New York State Police*, 2021 N.Y. Slip Op. 03889, Third Dept 6-17-21**

FOURTH DEPARTMENT

APPEALS, CONSTITUTIONAL LAW.

SUPREME COURT HAD FOUND COVID-19 RESTRICTIONS ON LIVE MUSIC PERFORMANCE UNCONSTITUTIONAL; THE APPEAL WAS DEEMED MOOT AND THE MERITS WERE NOT REACHED.

The Fourth Department determined the New York State Liquor Authority's (SLA's) appeal of Supreme Court's ruling that the SLA's COVID-19 guidance imposed upon a tavern (Sportsmen's) were unconstitutional was moot. Neither party had argued the appeal should be dismissed as moot: "[SLA's] guidance, which Sportsmen's was required to abide by pursuant to certain executive orders, prohibited advertised and ticketed main-draw music shows at licensed bars or restaurants and restricted live music at such establishments to only that which was incidental to the dining experience and not the draw itself. ... [A]lthough the issue of the lawfulness of the prior challenged guidance implemented as part of the extraordinary response to the COVID-19 pandemic is substantial and novel, that issue is not likely to recur ... . Moreover, 'the issue is not of the type that typically evades review' ... . Indeed, as the parties have acknowledged, the guidance at issue here prohibiting advertised and ticketed main-draw music shows has been reviewed on the merits by at least two other courts ...". ***Matter of Sportsmen's Tavern LLC v. New York State Liq. Auth.*, 2021 N.Y. Slip Op. 03957, Fourth Dept 6-17-21**

CRIMINAL LAW.

SENTENCE MUST BE PRONOUNCED ON EACH COUNT OF THE CONVICTION; SENTENCE VACATED AND REMITTED FOR RESENTENCING.

The Fourth Department, vacating defendant's sentence and remitting for resentencing, noted that sentence must be pronounced for each count of the conviction: "... County Court erred in failing to 'pronounce sentence on each count' of the conviction (CPL 380.20). Although the certificate of conviction states that defendant was sentenced on each count to concurrent terms of incarceration of nine years with five years of postrelease supervision, the court, at sentencing, 'failed to impose a sentence for each count of which defendant was convicted' ...". ***People v. Brady*, 2021 N.Y. Slip Op. 03951, Fourth Dept 6-17-21**

CRIMINAL LAW, ATTORNEYS.

IN THE FACE OF DEFENDANT'S AND DEFENSE COUNSEL'S REQUEST FOR NEW COUNSEL, COUNTY COURT COMMITTED REVERSIBLE ERROR BY DENYING THE REQUEST WITHOUT MAKING A MINIMAL INQUIRY.

The Fourth Department, reversing defendant's conviction, determined the court should have conducted in inquiry to evaluate defendant's complaints about his attorney and his request for new counsel: "... [T]he court committed reversible error by failing to conduct an inquiry following defense counsel's submission of a letter seeking to be relieved from the case

and in light of defendant's responses to that letter. In particular, the record establishes that defense counsel—prompted by defendant's prior specific complaints about her failure to file motions, seek relevant evidence through discovery such as surveillance video of the incident, investigate specified witnesses, and engage in meaningful consultation and preparation—expressed a breakdown in trust and communication based on her interactions and appearances with defendant and sought to be relieved from representing defendant on the ground that she was unable to handle his case ... . '[D]efendant's request on its face suggested a serious possibility of irreconcilable conflict with his lawyer, as evidenced by the [acknowledgment] of counsel that a complete breakdown of communication and lack of trust had developed in their relationship' ... . '[W]here[, as here,] potential conflict is acknowledged by counsel's admission of a breakdown in trust and communication, the trial court is obligated to make a minimal inquiry' ...". ***People v. Darwish*, 2021 N.Y. Slip Op. 03936, Fourth Dept 6-17-21**

CRIMINAL LAW, ATTORNEYS.

COUNTY COURT DID NOT CONDUCT AN ADEQUATE INQUIRY INTO DEFENDANT'S COMPLAINTS ABOUT DEFENSE COUNSEL, CONVICTION REVERSED; TWO-JUSTICE DISSENT.

The Fourth Department, reversing defendant's conviction, over a two-justice dissent, determined County Court should have conducted a minimal inquiry to address defendant's complaints about defense counsel. The dissenters argued County Court had, in fact, conducted an adequate inquiry: "... [W]e conclude that defendant's complaints were sufficiently serious to trigger the court's duty to inquire ... . Indeed, the complaints suggested on their face the possibility of a complete breakdown of communication with defense counsel, either owing to or exacerbated by defense counsel's alleged unwillingness to respond to any of defendant's repeated inquiries over nearly 12 months of representation; were evidenced by defendant's apparent confusion over the status of the separate indictments; and were never refuted by defense counsel, who remained silent in response to defendant's repeated in-court complaints ... . Further, the court itself appeared to acknowledge that defendant's complaints, if true, established that there was 'a problem' with the representation. Thus, the court had a duty to conduct a minimal inquiry, which the court failed to do ... . **From the dissent:** ... [T]his is not a case where the court 'erred by failing to ask even a single question about the nature of the disagreement or its potential for resolution' ... . Instead, because the court 'repeatedly allowed defendant to air his concerns about defense counsel' and reasonably concluded after listening to those concerns that they 'were insufficient to demonstrate good cause for substitution of counsel' ... , we would affirm." ***People v. Robinson*, 2021 N.Y. Slip Op. 03939, Fourth Dept 6-17-21**

CRIMINAL LAW, EVIDENCE.

THE STAIRWAY TO THE ATTIC, WHERE DRUGS WERE FOUND, WAS NOT PART OF THE APARTMENT DESCRIBED IN THE SEARCH WARRANT AND THE PEOPLE DID NOT DEMONSTRATE THE STAIRWAY WAS A COMMON AREA; DEFENDANT'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

The Fourth Department determined defendant's motion to suppress evidence found in a stairway leading to the attic should have been granted because the warrant did not authorize the search of that area and the People did not demonstrate the stairway was a common area: "... [T]he warrant at issue authorized a search of '865 woodlawn upper apt. buffalo, n.y. 2 ½ story wood frame house white with white trim. attached garage and common areas,' and drugs and drug packaging materials were found by the police behind a doorway on stairs leading to the attic. The doorway to the attic was in a hallway outside of the upper apartment and, as a result, the attic cannot be considered a part of the upper apartment itself ... . The question thus becomes whether the area where the drugs and packaging materials were found constitutes a common area. Common areas of multi-unit buildings are those areas 'accessible to all tenants and their invitees' ... . Here, the contraband was found by the police on the stairs leading to the attic, and a police officer testified at the suppression hearing that there was a closed door leading to the attic from the second floor common area. The officer in question was not present when the door was opened by other officers who executed the warrant, and he did not know whether the door had been locked. When asked whether 'the door could have been locked and needed to be breached,' the officer answered, 'That is entirely possible.' The People did not call any of the officers who were present when the door to the attic was opened, forcibly or otherwise, nor did they call the landlord or anyone who resided at the property. Defendant testified that the door to the attic was closed and locked, and that, during the execution of the warrant, the door was broken down by the police. If the door was indeed locked, it cannot be said that the attic was accessible to all tenants and their invitees." ***People v. Moore*, 2021 N.Y. Slip Op. 03975, Fourth Dept 6-17-21**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE ERRORS WERE DEEMED HARMLESS, A POLICE OFFICER SHOULD NOT HAVE BEEN ALLOWED TO IDENTIFY DEFENDANT IN A SURVEILLANCE VIDEO AND POLICE OFFICERS SHOULD NOT HAVE BEEN ALLOWED TO PROVIDE HEARSAY EVIDENCE AS *MOLINEUX* "BACKGROUND INFORMATION."

The Fourth Department determined it was error to allow a police officer to identify the defendant in a surveillance video, and it was error to allow police officers to testify about what they learned from others (hearsay) about defendant's involvement in the shooting. Although the errors were deemed harmless because of the overwhelming evidence, these two rulings are significant. The court noted there is no *Molineux* exception for hearsay for so-called background information: " 'A lay

witness may give an opinion concerning the identity of a person depicted in a surveillance [video] if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the [video] than is the jury' ... . Here, 'there was no basis for concluding that the [officer] was more likely than the jury to correctly determine whether . . . defendant was depicted in the video' ... . The officer was not familiar with defendant, and there was no evidence showing that defendant had changed his appearance before trial ... . … [T]he court erred in permitting the People to elicit testimony from police officers regarding what they learned from others about defendant's involvement in the shooting. The challenged testimony was hearsay that was not admissible under any cognizable exception to the hearsay rule. The People essentially argue that this testimony was admissible under *People v Molineux* (168 NY 264 [1901]) to complete the narrative with background information. We reject that argument and reiterate that 'there is no *Molineux* exception to the rule against hearsay' ... . There is also no general exception to the hearsay rule for testimony relating to background conduct, information, or explanation of a subject matter or event ...". ***People v. Harlow*, 2021 N.Y. Slip Op. 03933, Fourth De[t 6-17-21**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

WHERE A MOTION TO VACATE A CONVICTION IS BASED UPON EVIDENCE OUTSIDE THE RECORD AND EVIDENCE IN THE RECORD, ALL OF THE EVIDENCE IS ADMISSIBLE IN THE HEARING ON THE MOTION; COUNTY COURT SHOULD NOT HAVE RESTRICTED THE PRESENTATIOIN OF DEFENDANT'S ALLEGATIONS OF INEFFECTIVE ASSISTANCE TO ONLY THOSE WHICH WERE OUTSIDE THE RECORD.

The Fourth Department, reversing the denial of defendant's motion to vacate his conviction, determined County Court should not have restricted the hearing to only the allegations of ineffective assistance that could not have been raised on direct appeal. Where a motion to vacate a conviction is based on evidence outside the record, as well as evidence on the record, all the evidence is admissible: "A 'claim of ineffective assistance of counsel constitutes a single ground or issue upon which relief is requested . . . [Such] a claim . . . 'is ultimately concerned with the fairness of the process as a whole' ... and must be ' 'viewed in totality' ... . Although ' [a] single error may qualify as ineffective assistance . . . when the error is sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial' ... , a defendant may also establish that he or she received ineffective assistance of counsel by arguing that the cumulative effect of multiple errors rendered defense counsel's performance ineffective, even if those errors, 'considered separately, may not have constituted ineffective assistance'... . Where, as here, a defendant alleges errors of defense counsel based on both matters appearing in the record and matters dehors the record, i.e., a 'mixed claim,' a 'CPL 440.10 proceeding is the appropriate forum for reviewing the claim of ineffectiveness in its entirety' ...". ***People v. Mack*, 2021 N.Y. Slip Op. 03982, Fourth Dept 6-17-21**

FAMILY LAW.

HUSBAND'S PROCEEDS FROM THE SALE OF STOCK DID NOT LOSE THEIR SEPARATE-PROPERTY CHARACTER WHEN THEY WERE BRIEFLY PLACED IN THE PARTIES' JOINT BANK ACCOUNT BEFORE BEING USED FOR THE DOWN PAYMENT FOR THE MARITAL RESIDENCE.

The Fourth Department, reversing (modifying) Supreme Court, determined funds from the husband's sale of stock were his separate property, even though the funds were briefly placed in a joint account before using them for the down payment on the marital residence: "... [D]efendant offered uncontroverted testimony, supported by documentary evidence, that he placed funds acquired from the sale of stocks he had purchased prior to the marriage into the parties' joint bank account because it was his only checking account and he could not access the funds directly from the platform from which he sold the stock ... . The funds remained in the account for only a matter of weeks before defendant withdrew a majority of them to pay a portion of the down payment for the marital home ... . Thus, defendant established that the account was used 'only as a conduit' for the sale of his stock ... . The funds therefore maintained their character as separate property, and defendant is entitled to a credit for his portion of the down payment ...". ***LaPoint v. Claypoole*, 2021 N.Y. Slip Op. 03947, Fourth Dept 6-17-21**

INSURANCE LAW, CONTRACT LAW.

THE AMBIGUITY IN THE HOME INSURANCE POLICY WAS NOT CLEARED UP BY EXTRINSIC EVIDENCE AND MUST BE RESOLVED AGAINST THE INSURER; THE INSURER SHOULD NOT HAVE DISCLAIMED COVERAGE FOR WATER DAMAGE CAUSED BY FROZEN PIPES.

The Fourth Department, reversing Supreme Court, determined the insurer should not have disclaimed coverage for water damage caused by frozen pipes in plaintiffs' seasonal home. The case turned on the whether the plaintiffs took "reasonable care" (within the meaning of the policy) to maintain the heat in the house: "... [P]laintiffs established as follows: the home's heating system was recently installed, was regularly maintained, and had never required repairs; Robert P. McAleavey (plaintiff) winterized the property by setting the internal temperature to approximately 50 degrees in the late fall of 2017; plaintiff checked on the home approximately 15 times during the winter of 2017-2018; during those visits, plaintiff ensured that the temperature was appropriate, that no windows were broken, that the toilets flushed, and that the water ran; and plaintiff last visited the house on January 11 or 12, 2018, at which point the interior temperature was 'comfortable.' Although plaintiff was unable to visit the property between mid-January and late February 2018 due to a broken leg and

his resulting hospitalization, plaintiffs' submissions established that, during such period, they had no notice or reason to suspect that anything was wrong with the premises or the heating system. Moreover, plaintiffs' neighbors and realtor periodically checked on the property's exterior. … '[U]nder [these] circumstances, the ambiguity must be resolved against the insurer which drafted the contract' ... . We thus conclude that plaintiff's loss is specifically covered under the policy and that the exclusion relied on by defendant does not unambiguously apply in this case ...". ***McAleavey v. Chautauqua Patrons Ins. Co.*, 2021 N.Y. Slip Op. 03954, Fourth Dept 6-17-21**

PERSONAL INJURY, EVIDENCE.

THE MAJORITY CONCLUDED PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT IN THIS FATAL VEHICLE-PEDESTRIAN ACCIDENT CASE BECAUSE DECEDENT'S ALLEGED CONTRIBUTORY NEGLIGENCE DOES NOT BAR SUMMARY JUDGMENT; THE DISSENT ARGUED THERE WAS A QUESTION OF FACT WHETHER DECEDENT'S NEGLIGENCE WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT.

The Fourth Department, over a dissent, determined plaintiff was entitled to summary judgment in this fatal vehicle-pedestrian accident case. The majority held that any negligence on the part of plaintiff's decedent constituted comparative negligence which is no longer a bar to summary judgment. The dissent argued there was a question of fact whether decedent's actions constituted the sole proximate cause of the accident, which would preclude summary judgment: "We respectfully disagree with the dissent that the evidence submitted by plaintiff failed to establish proximate causation. The only facts that defendants cite for the proposition that plaintiff failed to meet his burden arise from decedent's actions, i.e., crossing outside a marked crosswalk and wearing dark clothing as daylight faded. The Court of Appeals has made clear, however, 'that a plaintiff's comparative negligence is no longer a complete defense and its absence need not be pleaded and proved by the plaintiff, but rather is only relevant to the mitigation of plaintiff's damages' ... . Thus, 'to obtain partial summary judgment on defendant's liability[, a plaintiff] does not have to demonstrate the absence of his [or her] own comparative fault' ... . [P]laintiff was therefore not required to establish that decedent was not negligent, rather he was required to demonstrate that defendant was negligent and that such negligence was a proximate cause of decedent's injuries ... . **From the dissent:** Even assuming ... the majority is correct that the issue of proximate cause was raised by plaintiff and that plaintiff met his burden with respect to that element, I conclude that defendants raised a triable issue of fact in opposition. Defendants presented evidence that plaintiff's decedent was crossing ... outside of a designated crosswalk, at dusk, with headphones and dark clothing on and without looking for oncoming traffic. ... [D]efendants contend that decedent violated Vehicle and Traffic Law § 1152 (a). Consequently, even though defendants were negligent as a matter of law based on an unexcused violation of Vehicle and Traffic Law § 1146 (a), on this record, a jury could find that decedent's actions were the sole proximate cause of the accident ...". ***Lowes v. Anas*, 2021 N.Y. Slip Op. 03973, Fourth Dept 6-17-21**

PERSONAL INJURY, MUNICIPAL LAW, EMPLOYMENT LAW.

THE ERIE COUNTY SHERIFF'S OFFICE (ECSO) IS NOT A SEPARATE ENTITY APART FROM THE COUNTY; THE COUNTY MAY BE SUED FOR THE ACTIONS OF CIVILIAN EMPLOYEES OF THE SHERIFF'S OFFICE PURSUANT TO RESPONDEAT SUPERIOR; HERE PLAINTIFF ALLEGED PLAINTIFF'S DECEDENT DIED IN HIS CAR AWAITING RESCUE DURING A SNOWSTORM.

The Fourth Department determined the Erie County Sheriff's Office (ECSO) is not a separate entity apart from the county, and the county may be liable for the acts of the sheriff's office's civilian employees pursuant to respondeat superior. The lawsuit alleged the defendants failed to timely rescue plaintiff's decedent who died in his car during a snowstorm: "A sheriff's office has no legal identity separate from its corresponding county, 'and thus an 'action against the Sheriff's [Office] is, in effect, an action against the [corresponding] County itself' ... . Although a 'county may not be held responsible for the negligent acts of the Sheriff and his [or her] deputies on the theory of respondeat superior' ... , we conclude that a county may be vicariously liable for the negligent acts of the sheriff's civilian employees given the general rule that a sheriff's office does not exist separately from its corresponding county ... . Moreover, and contrary to defendants' further contention, the County is not entitled to immunity under Executive Law § 25 because that statute was not pleaded as an affirmative defense in the answer (see CPLR 3018 [b] ...)." ***Abate v. County of Erie*, 2021 N.Y. Slip Op. 03940, Fourth Dept 6-17-21**

TRUSTS AND ESTATES.

DECEDENT, WHO DIED TESTATE IN 2004, WAS AWARDED COMPENSATION BY CONGRESS IN 2015 BECAUSE HER HUSBAND HAD BEEN HELD IN IRAN AS A HOSTAGE FROM 1979 TO 1981; BECAUSE THE COMPENSATION WAS AWARDED AFTER HER DEATH, IT DOES NOT PASS BY WILL, BUT RATHER BY THE LAWS OF INTESTACY.

The Fourth Department, reversing Surrogate's Court, in a full-fledged opinion by Justice Centra, determined the funds awarded by Congress to the decedent, after the decedent's death, do not pass by decedent's will, but rather by the laws of intestacy. Decedent, who died in 2004, was the wife of a man held hostage in Iran from 1979 to 1981. In 2015 Congress awarded compensation to the hostages' families: "Regarding property acquired by an estate after the death of the testator, case law is sparse, but is consistent with the language in EPTL 3-3.1 providing that only property that a testator is entitled

to devise "at the time of his [or her] death" may be distributed pursuant to the terms of the will ... . We are particularly persuaded by the decision in Shaw Family Archives Ltd. , which involved a dispute over ownership interest in Marilyn Monroe's right of publicity after her death. The court determined that New York law did not permit a testator to dispose by will of property that she did not own at the time of her death ... . The court cited to EPTL 3-3.1 and held that '[t]he corollary principle recognized by the courts is that property not owned by the testator at the time of his [or her] death is not subject to disposition by will' ... . We agree with the reasoning in Shaw Family Archives Ltd. that the New York rule is grounded in the testator's lack of capacity to devise property he or she does not own at the time of death ...". ***Matter of Keough*, 2021 N.Y. Slip Op. 03948, Fourth Dept 6-17-21**

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