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FIRST DEPARTMENT

CONTRACT LAW.

IN THE CONTEXT OF A CONTRACT IMPOSING CAPS FOR "NONWILLFUL" AND "WILLFUL" BREACHES, THE FACT THAT THE BREACH MAY HAVE BEEN DELIBERATE DID NOT RENDER THE BREACH "WILLFUL," WHICH SHOULD BE INTERPRETED TO REFER TO "TRULY HARMFUL, CULPABLE CONDUCT;" SUPREME COURT REVERSED.

The First Department, reversing Supreme Court, determined the term "willful" in the context of the damages provision of the contract should not be interpreted simply to mean "deliberate," but rather to refer to "truly culpable, harmful conduct." Therefore, the damages cap for nonwillful breaches applied: "In the context of this contract, the term 'willful' must be understood to be 'truly culpable, harmful conduct' ... and not ... 'merely intentional nonperformance' ... . As the Court of Appeals noted ... , '[g]enerally in the law of contract damages, as contrasted with damages in tort, whether the breaching party deliberately rather than inadvertently failed to perform contractual obligations should not affect the measure of damages' and '[t]he policy which runs through the fabric of the law of contracts is to bind a party by what he agrees to do whether or not he intends to do what he agrees' ... . The last clause in the limitation-of-liability provision refers to special damages in the context of breaches caused willfully or by gross negligence. Thus,'[u]nder the interpretation tool of ejusdem generis applicable to contracts as well as statutes, the phrase 'willful acts' [or 'caused willfully' ...] should be interpreted here as referring to conduct similar in nature to the . . . 'gross negligence' with which it was joined . . .' ...". ***MUFG Union Bank, N.A. v. Axos Bank*, 2021 N.Y. Slip Op. 04414, First Dept 7-15-21**

MUNICIPAL LAW.

PETITION SEEKING A SUMMARY INQUIRY PURSUANT TO THE NYC CHARTER INTO THE CIRCUMSTANCES SURROUNDING ERIC GARNER'S ARREST AND DEATH PROPERLY GRANTED.

The First Department, in a full-fledged opinion by Justice Singh, determined Supreme Court properly granted the petition seeking a "summary inquiry pursuant to NYC Charter section 1109" into the circumstances surrounding the arrest and death of Eric Garner. The opinion is too detailed and comprehensive to fairly summarize here: "This appeal from the grant of a petition for summary inquiry pursuant to New York City Charter § 1109 has its genesis in the fatal arrest of Eric Garner and the subsequent investigations and actions that this tragedy prompted. We find that this is the rare case in which allegations of significant violations of duty, coupled with a serious lack of substantial investigation and public explanation, warrant a summary inquiry to bring transparency to a matter of profound public importance: the death of an unarmed civilian during the course of an arrest. * * * ... Petitioners seek an order convening a summary inquiry into 'violations and neglect of duties' by respondents in seven areas: (1) the stop and arrest of Garner and the force used by officers on him; (2) the failure, after Garner's death, to train NYPD officers adequately as to appropriate guidelines for the use of force and the prohibition on the use of chokeholds; (3) filing false official NYPD documents concerning the arrest and making false statements in connection with NYPD's internal investigation of Garner's death; (4) unlawfully leaking Garner's alleged arrest and medical histories; (5) incomplete and inaccurate statements to the media by the City concerning Garner's arrest; (6) the medical care provided to Garner; and (7) the City's investigation and adjudication of, and imposition of discipline for the foregoing, including false statements by NYPD officers concerning the arrest." ***Matter of Carr v. De Blasio*, 2021 N.Y. Slip Op. 04412, First Dept 7-15-21**

SECURITIES. FRAUD.

IN THIS "RESIDENTIAL MORTGAGE BACKED SECURITIES" AND "COLLATERALIZED DEBT OBLIGATION" ACTION, PLAINTIFF RAISED QUESTIONS OF FACT ABOUT WHETHER DEFENDANTS' FRAUD, AS OPPOSED TO THE 2008-2009 FINANCIAL CRISIS, CAUSED PLAINTIFF'S LOSS, AND WHETHER AN OMISSION ON DEFENDANTS' PART WAS AN ACTIONABLE MISREPRESENTATION; SUPREME COURT REVERSED.

The First Department, reversing Supreme Court, over an extensive dissent, determined defendants' motion for summary judgment in this "residential mortgage backed securities (RMBS)" and "collateralized debt obligation (CDO)" fraud action should not have been granted. The plaintiff raised questions of fact whether defendants' fraud, as opposed to the 2008-2009

financial crisis, caused plaintiff's loss, and whether an omission on defendants' part constituted an actionable misrepresentation: " 'The empirical evidence shows that Magnetar deals in general, and Auriga in particular, performed worse than other mezzanine CDOs issued during the same period.' For example, the [plaintiff's] expert noted, 'Magnetar deals experienced events of default ['EODs'] on average approximately four months faster than other mezzanine CDO bonds issued in 2006 and 2007' and Auriga 'failed 175 days earlier than the average mezzanine non-Magnetar deal.' The expert further explained, '[a]ll 26 mezzanine Constellation deals experienced an [EOD.] This 100 percent EOD rate contrasts with an EOD rate of 82 percent . . . among non-Magnetar subprime CDOs issued in 2006 and 2007. The difference between these two EOD rates . . . is statistically significant.' * * * With regard to lack of justifiable reliance on misrepresentations, the other ground on which the motion court granted summary judgment, plaintiff's fraud claim depends both on an affirmative representation (that Auriga's collateral manager would independently select the collateral) and an omission or concealment (that defendants structured Auriga to facilitate Magnetar's net-short strategy). * * * ... [T]o the extent plaintiff relies on an omission, its claim is not barred. ... [T]he omission in the instant action came from defendants ...". ***Loreley Fin. (Jersey) No. 28, Ltd. v. Merrill Lynch, Pierce, Fenner & Smith Inc.***, 2021 N.Y. Slip Op. 04413, First Dept 7-15-21

SECOND DEPARTMENT

CIVIL PROCEDURE, JUDGES.

THE JUDGE SHOULD NOT HAVE DISMISSED DEFENDANTS' AFFIRMATIVE DEFENSES BECAUSE PLAINTIFF DID NOT REQUEST THAT RELIEF.

The Second Department noted that the judge should not have ordered relief not requested by the plaintiff: "... [T]he Supreme Court erred by, in effect, sua sponte, directing dismissal of all of [defendants'] affirmative defenses to the complaint ... . The plaintiff did not move for summary judgment dismissing any of [defendant's] affirmative defenses, and the court erred in awarding this unrequested relief ....". ***MacKay v. Paliotta*, 2021 N.Y. Slip Op. 04348, Second Dept 7-15-21**

CRIMINAL LAW, APPEALS.

THE TRIAL JUDGE SHOULD HAVE PROCEEDED WITH *BATSON* INQUIRIES FOR THREE BLACK PROSPECTIVE JURORS; BASED ON THE JUDGE'S REMARKS THE MATTER WAS REMITTED FOR A HEARING AND REPORT BEFORE A DIFFERENT JUDGE.

The Second Department determined Supreme Court should have conducted a *Batson* inquiry with respect to the prosecutor's exercise of peremptory challenges to three black prospective jurors. The appeal was held in abeyance and the matter was sent back for a hearing and report before a different judge. The trial judge's remarks about the number of black jurors being representative of the community ("this is not the Bronx") and the fact that three black jurors served were deemed irrelevant: "Contrary to the trial court's finding that the number of black prospective jurors to actually serve on the jury (three in total) was fairly representative of the community, as represented by the court's remark that '[t]his is not the Bronx,' such consideration is 'irrelevant' to the issue of whether the People's exercise of peremptory challenges was discriminatory ... . Similarly, to the extent the People emphasize that three black prospective jurors served on the jury, that fact does not obviate the defendant's prima facie showing of discrimination ... . Accordingly, we find that the defendant satisfied the first step of the Batson inquiry with respect to the prosecution's exercise of peremptory challenges to each of the three black prospective jurors at issue. Thus, the trial court should have proceeded with the second step and, if applicable, the third step with respect to each of the Batson challenges ...". ***People v. Brissett*, 2021 N.Y. Slip Op. 04366, Second Dept 7-15-21**

CRIMINAL LAW, SOCIAL SERVICES LAW, EVIDENCE.

IN A MATTER OF FIRST IMPRESSION, THE APPELLATE COURT DETERMINED COUNTY COURT DID NOT CORRECTLY APPLY THE DOMESTIC-VIOLENCE-SURVIVOR'S-ACT CRITERIA IN SENTENCING DEFENDANT FOR THE MURDER OF HER ABUSIVE HUSBAND; SENTENCES SIGNIFICANTLY REDUCED.

The Second Department, in a full-fledged opinion by Justice Rivera, reversed County Court's application of the Domestic Violence Survivor's Act (Social Services Law § 459-a) and significantly reduced the sentences for murder and possession of a weapon. Defendant shot and killed her husband. The jury rejected defendant's "battered women's syndrome" defense. But the Second Department found that the criteria for sentence reduction under the DV Survivor's Act had been met by the evidence: "... [W]e hold that the County Court did not properly apply the DV Survivor's Act when sentencing the defendant. Upon considering the plain language of the DV Survivor's Act, the legislative history of the statute, and the particular circumstances of this case, we modify the judgment, on the facts and as a matter of discretion in the interest of justice, by reducing (1) the term of imprisonment imposed on the conviction of murder in the second degree from an indeterminate term of imprisonment of 19 years to life to a determinate term of imprisonment of 7½ years to be followed by 5 years of postrelease supervision, and (2) the term of imprisonment imposed on the conviction of criminal possession of a weapon in the second degree from a determinate term of imprisonment of 15 years to be followed by 5 years of postrelease supervision to a determinate term of imprisonment of 3½ years to be followed by 5 years of postrelease supervision, which terms

shall run concurrently with each other. * * * Upon consideration of the nature and circumstances of the crime, as well as the history, character, and condition of the defendant, we conclude that a sentence in accordance with the DV Survivor's Act is warranted. The defendant is a 32-year-old mother of two young children, and has no known prior arrests or convictions. The defendant testified that she was repeatedly physically and sexually abused by Grover, as well as by other men in her past, and reportedly was sexually assaulted at the age of five. However, our examination under this factor does not end there. We also consider, among other things, the details of the crimes, including that the defendant shot Grover in the head as he was lying on the couch. Grover's fatal injury was described as a hard contact wound in which the gun fired by the defendant was pressed against Grover's skin, leaving a muzzle imprint." ***People v. Addimando*, 2021 N.Y. Slip Op. 04364, Second Dept 7-15-21**

FORECLOSURE, EVIDENCE.

THE BANK'S EVIDENCE OF STANDING DID NOT INCLUDE THE BUSINESS RECORDS REFERRED IN TO THE LOAN SERVICER'S AFFIDAVIT, RENDERING THE AFFIDAVIT HEARSAY; THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the evidence purporting to demonstrate the bank's standing in this foreclosure action was insufficient. Therefore, the bank's motion for summary judgment should not have been granted: "... [T]he plaintiff submitted an affidavit of possession from Nichole Renee Williams, an employee of its loan servicer, who averred, inter alia, that, based upon her review of business records purportedly attached to the motion papers, the plaintiff was in physical possession of the note on the date of commencement of the action. However, the plaintiff failed to identify and produce those business records referred to by Williams in her affidavit. '[E]vidence of the contents of business records is admissible only where the records themselves are introduced' ... . '[I]t is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted' ... . Since Williams' purported knowledge of the date that the plaintiff received the original note was based upon her review of unidentified and unproduced business records, her affidavit constituted inadmissible hearsay and lacked probative value ...". ***Wells Fargo Bank, NA v. Oziel*, 2021 N.Y. Slip Op. 04388, Second Dept 7-15-21**

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

THE NOTICE REQUIREMENTS OF RPAPL 1304 WERE NOT COMPLIED WITH BY THE BANK; THEREFORE, THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the criteria for the notice required by RPAPL 1304 in this foreclosure action were not met. The bank's motion for summary judgment should not have been granted: "RPAPL 1304(1), which applies to residential foreclosure actions, provides, among other things, that, 'at least [90] days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower . . . including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower.' The version of RPAPL 1304 which existed at the time this action was commenced provided that notices required to be sent pursuant to this section 'shall contain a list of at least five housing counseling agencies . . . that serve the region where the borrower resides,' with their 'last known addresses and telephone numbers' (RPAPL former 1304[2]). Here, the RPAPL notices submitted by the plaintiff in support of its motion for summary judgment failed to demonstrate that the notices contained five housing agencies that served the region where the defendant resided. As a result, the plaintiff did not meet its prima facie burden of establishing that it strictly complied with RPAPL 1304 ...". ***US Bank N.A. v. Gurung*, 2021 N.Y. Slip Op. 04387, Second Dept 7-15-21**

MEDICAID.

THE DEPARTMENT OF HEALTH'S DETERMINATION THE 91-YEAR-OLD PETITIONER WAS NOT ENTITLED TO CONTINUOUS CARE WAS NOT SUPPORTED BY THE EVIDENCE.

The Second Department, reversing Supreme Court, determined the Department of Health's (DOH's) finding that the 91-year-old petitioner was not entitled to continuous care was not supported by the evidence: " 'In reviewing a Medicaid eligibility determination made after a fair hearing, the court must review the record as a whole to determine if the agency's decisions are supported by substantial evidence and are not affected by an error of law'... . Substantial evidence 'means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact' ... . Here, since the subject determination was made after a quasi-judicial fair hearing, the substantial evidence standard applies, and not the arbitrary and capricious standard ... . The DOH's determination that the petitioner failed to establish that she met the criteria for continuous personal care services was not supported by substantial evidence (see 18 NYCRR 505.14[a][2]). 'Continuous personal care services means the provision of uninterrupted care, by more than one personal care aide, for more than 16 hours in a calendar day for a patient who, because of the patient's medical condition, needs assistance during such calendar day with toileting, walking, transferring, turning and positioning, or feeding and needs assistance with such frequency that a live-in 24-hour personal care aide would be unlikely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide's eight hour period of sleep' ...". ***Matter of Gurariy v. Zucker*, 2021 N.Y. Slip Op. 04356, Second Dept 7-15-21**

THIRD DEPARTMENT

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S STATEMENTS WERE ADMISSIBLE PURSUANT TO THE PUBLIC SAFETY EXCEPTION TO THE *MIRANDA* REQUIREMENT.

The Third Department determined the statements defendant made while handcuffed were admissible because the statements were made in response to questions posed for safety reasons and not to elicit an incriminating response: "County Court also properly denied defendant's motion to suppress the statement that he made to law enforcement while being patted down. Although defendant was handcuffed, in custody and had not been advised of his *Miranda* rights when he was asked by Haven whether the handgun that was retrieved from his back pocket was loaded, said inquiry was not made to elicit an incriminating response, but was made for the purpose of alleviating the inherent risk of securing a potentially loaded weapon and protecting the safety of defendant, responding officers and those other individuals present during the execution of the warrant ... . Accordingly, [the] question fell squarely within the public safety exception to the *Miranda* requirement and, therefore, suppression of defendant's statement was appropriately denied ...". ***People v. Rashid*, 2021 N.Y. Slip Op. 04390, Second Dept 7-15-21**

TAX LAW, CRIMINAL LAW, INDIAN LAW.

THE OPENING OF A CARTON OF CIGARETTES AS PART OF A SEARCH OF THE CARGO IN PETITIONER'S TRUCK WAS NOT SUPPORTED BY PROBABLE CAUSE; THE TAX TRIBUNAL'S ASSESSMENT OF A $1,259,250 PENALTY FOR POSSESSION OF CIGARETTES WITHOUT TAX STAMPS ANNULLED.

The Third Department, reversing the Tax Appeals Tribunal, determined the search of petitioner's truck which led to the discovery of cigarettes with no tax stamp was not supported by probable cause. Therefore, the determination that petitioner owed a $1,259, 250 penalty was annulled: "Petitioner is a member of the Seneca Nation of Indians, a Native American tribe recognized by the US Bureau of Indian Affairs. ERW Wholesale is petitioner's tobacco wholesale business, licensed by the Seneca Nation of Indians operating on the Cattaraugus Reservation. In December 2012, ERW sold 150 cases (9,000 cartons) of Native American brand cigarettes to Oien'Kwa Trading, a Native American-owned business located on the St. Regis Mohawk Reservation. Oien'Kwa Trading immediately sold the cigarettes to Saihwahenteh, a Native American-owned business located on the Ganienkeh territory. Oien'Kwa Trading hired ERW to deliver the cigarettes directly to Saihwahenteh. Sean Snyder, an ERW employee, was employed as the truck driver. * * * ... [T]he validity of a search is subject to a two-prong test — arrest and probable cause — neither of which is satisfied here. As to the first prong, the record reveals that Snyder, the driver and sole occupant of the truck that was searched, was never arrested. With respect to probable cause, the record demonstrates a complete lack thereof. When Snyder was stopped, he was completely cooperative with the trooper and forthrightly explained that he was transporting cigarettes from a Native American reservation to a Native American territory, and he immediately gave the trooper an envelope containing the pertinent documents, namely the registration, invoices and bill of lading. Although the trooper testified that Snyder appeared nervous when he was initially pulled over, this conduct in and of itself is insufficient to justify a search ... . Once back at the vehicle inspection checkpoint, Snyder readily exited his vehicle and turned his keys over to the trooper; he was never asked if the cigarettes were stamped. When the trooper employed the bolt cutters and the investigator entered the cargo area, the investigator found that the cargo was exactly as Snyder had told them — cases of cigarettes. The investigator's search of the cargo area, including opening a case and then a carton, in order to inspect a single pack of cigarettes for a tax stamp was not precipitated by a complaint, tip, investigation or statements from Snyder, any of which might have provided probable cause. On the contrary, the investigator testified that the search proceeded only after he conferred with the trooper who believed that the cigarettes were Native American brand and, as such, were not stamped. The transportation of cigarettes from a Native American reservation to a Native American territory does not, in and of itself, give rise to a reasonable inference of criminality ...". ***Matter of White v. State of N.Y. Tax Appeals Trib.*, 2021 N.Y. Slip Op. 04394, Third Dept 7-15-21**

FOURTH DEPARTMENT

ATTORNEYS, APPEALS, FAMILY LAW, CIVIL PROCEDURE.

MOTHER'S ATTORNEY SHOULD NOT HAVE BEEN ALLOWED TO WITHDRAW WITHOUT NOTICE TO MOTHER WHO DID NOT ATTEND THE TERMINATION-OF-PARENTAL-RIGHTS HEARING; THE DEFAULT ORDER TERMINATING MOTHER'S PARENTAL RIGHTS WAS THEREFORE IMPROPER AND APPEAL IS NOT PRECLUDED.

The Fourth Department, reversing Family Court, determined the default order terminating mother's parental rights was improper because mother's attorney was allowed to withdraw without notice to mother. Because the default order was improper, mother's appeal is not precluded (default orders are not appealable): "In this proceeding pursuant to Social Services Law § 384-b,respondent mother contends that Family Court erred in allowing the mother's attorney to withdraw as

counsel and in proceeding with the hearing in the mother's absence. We agree. 'An attorney may withdraw as counsel of record only upon a showing of good and sufficient cause and upon reasonable notice to the client . . . [, and a] purported withdrawal without proof that reasonable notice was given is ineffective' ... . Because there is no indication in the record that the mother's attorney informed her that he was seeking to withdraw as counsel, the court should not have relieved him as counsel ... . Although, generally, no appeal lies from an order entered on default (see CPLR 5511 ...), here, the absence of evidence that the mother was put on notice of her attorney's motion to withdraw renders the finding of default improper, and thus the mother's appeal is not precluded ... . We therefore reverse the order and remit the matter to Family Court for the assignment of new counsel and a new hearing ...". ***Matter of Calvin L.W. (Dominique H.)*, 2021 N.Y. Slip Op. 04470, Fourth Dept 7-15-21**

CIVIL PROCEDURE.

THE REFUSAL OF DEFENDANT'S REQUEST TO POLL THE JURY REQUIRED A NEW TRIAL.

The Fourth Department, reversing the judgment, determined defendant's request to poll the jury should not have been denied: "Plaintiff commenced this action seeking damages for, inter alia, assault and battery, and in his amended answer defendant asserted counterclaims for, inter alia, defamation. The matter proceeded to trial, and now plaintiff appeals and defendant cross-appeals from an order and judgment of Supreme Court that denied the parties' respective motions to set aside portions of the jury verdict and, upon the jury verdict, awarded damages both to plaintiff and to defendant. We reverse. We agree with defendant on his cross appeal that the court erred in denying his request to poll the jury. 'A party has an absolute right to poll the jury, and a court's denial of that right mandates reversal and a new trial' ... . We therefore reverse the order and judgment and remit the matter to Supreme Court for a new trial ...". ***Fitzgerald v. Kula*, 2021 N.Y. Slip Op. 04452, Fourth Dept 7-16-21**

CIVIL PROCEDURE, NEGLIGENCE, APPEALS.

DISCOVERY REQUESTS AIMED AT AN ISSUE WHICH WAS ADMITTED BY DEFENDANTS SHOULD NOT HAVE BEEN GRANTED; BECAUSE THE ALTERNATIVE ARGUMENT FOR THE DISCOVERY REQUESTS WAS NOT SUPPORTED BY A MEMO IN THE RECORD DEMONSTRATING THE ISSUE WAS PRESERVED, THE ARGUMENT WAS REJECTED.

The Fourth Department, reversing Supreme Court, determined defendants' discovery requests in this traffic accident case should not have been granted. The requests for defendants' cell phone records and receipts for food and beverages on the day of the accident were aimed at demonstrating the identity of the driver of defendants' vehicle. But the identity of the driver had been admitted by the defendants. Plaintiff's alternative argument was rejected because there was no memorandum of law in the record to demonstrate the issue had been raised below: "Given the prior admission establishing that [defendant] Vladyslav was the operator of the pickup truck, plaintiff 'failed to meet the threshold for disclosure by showing that [his] request for [defendants'] cell phone [records and records for food and beverage purchases] was reasonably calculated to yield information material and necessary to [his action]' ... . Plaintiff ... contends, as an alternative ground for affirmance, that there is a different reason supporting disclosure that was not included in his discovery requests or motion papers in the record on appeal, i.e., the requested records are potentially relevant to identifying witnesses who could testify about Vladyslav's physical condition on the night of the accident and to determining whether Vladyslav was intoxicated or impaired. On the record before us, which does not include any memoranda of law despite our repeated and longstanding advisements that such memoranda may properly be included in the record on appeal for the limited purpose of determining preservation ... , we conclude that plaintiff's contention is not properly before us inasmuch as it is raised for the first time on appeal ...". ***Brennan v. Demydyuk*, 2021 N.Y. Slip Op. 04425, Fourth Dept 7-16-21**

CONTRACT LAW, ATTORNEYS.

PLAINTIFF'S ATTORNEY'S EMAIL WAS AN ENFORCEABLE STIPULATION OF SETTLEMENT; PLAINTIFF'S SUBSEQUENT REFUSAL TO EXECUTE THE DOCUMENTS WAS A BREACH OF THE SETTLEMENT AGREEMENT.

The Fourth Department, reversing Supreme Court, determined an email sent by plaintiff's attorney constituted an enforceable stipulation of settlement, despite the fact that plaintiff subsequently refused to execute the documents: "... [T]he requirements for a valid and enforceable settlement agreement are satisfied here. The email from plaintiff's lawyer to defendant's lawyer contained the only two material terms of the agreement, i.e., defendant's payment of $32,500 to plaintiff in exchange for plaintiff's release of defendant from further liability; the email plainly manifested the parties' mutual accord, i.e., '[plaintiff] has informed me that he would like to accept the $32,500 settlement [offered by defendant]'; and the lawyer representing the party to be bound, i.e., plaintiff, explicitly typed his name at the end of the email in a manner akin to a hand-signed letter. Nothing more was required, and plaintiff's 'subsequent refusal to execute form releases and a stipulation of discontinuance did not invalidate the agreement' ... . To the contrary, plaintiff's subsequent refusal to execute the necessary releases and stipulation constituted a breach of the parties' valid settlement agreement. The court thus erred in denying defendant's cross motion to enforce the settlement agreement ...". ***Field v. Pet Haven, Inc.*, 2021 N.Y. Slip Op. 04450, Fourth Dept 7-16-21**

CRIMINAL LAW.

PROBATION CONDITIONS PROHIBITING POSSESSION OF A COMPUTER AND A CELL PHONE WERE NOT ENFORCEABLE UNDER THE FACTS OF THE CASE; DEFENDANT HAD PLED GUILTY TO ATTEMPTED SEXUAL ABUSE FIRST DEGREE.

The Fourth Department, reversing (modifying) Supreme Court, determined some of the conditions of probation prohibiting defendant from possessing a computer and cell phone were not warranted. Defendant pled guilty to attempted sexual abuse first degree: "In addition to prohibiting defendant from maintaining an account on a social networking site, condition 34 also prohibits defendant from purchasing, possessing, controlling, or having access to any computer or device with internet capabilities and from maintaining any 'internet account,' including email, without permission from his probation officer. Condition 35 prohibits defendant from owning, renting, or possessing a cell phone with picture taking capabilities or cameras or video recorders for capturing images. In light of defendant's lack of a prior criminal history and the lack of evidence in the record linking defendant's use of technology to the underlying offense, we conclude that those parts of condition 34 and the entirety of condition 35 do not relate to the goals of probation and thus are not enforceable on that ground ...". ***People v. Blanco-Ortiz*, 2021 N.Y. Slip Op. 04447, Fourth Dept 7-16-21**

CRIMINAL LAW, APPEALS.

ALTHOUGH THE ARGUMENT THAT THE INDICTMENT WAS DUPLICITOUS WAS PRESERVED FOR APPEAL, THE ISSUE WAS NOT RULED ON BY COUNTY COURT AND THEREFORE CAN NOT BE CONSIDERED ON APPEAL; MATTER REMITTED FOR A RULING.

The Fourth Department noted that it cannot consider an issue which was preserved for appeal but was not ruled upon by County Court. The matter was remitted: "Although defendant did preserve his contention concerning facial duplicity by seeking dismissal of the indictment on that ground in the pretrial omnibus motion ... , we are unable to address that contention because County Court failed to rule on that part of defendant's omnibus motion (see CPL 470.15 [1] ...). The Court of Appeals 'has construed CPL 470.15 (1) as a legislative restriction on the Appellate Division's power to review issues either decided in an appellant's favor, or not ruled upon, by the trial court' ... , 'and thus the court's failure to rule on the motion cannot be deemed a denial thereof' ... . We therefore hold the case, reserve decision and remit the matter to County Court for a ruling on that part of defendant's omnibus motion." ***People v. Baek*, 2021 N.Y. Slip Op. 04424, Fourth Dept 7-16-21**

CRIMINAL, EVIDENCE.

THE DEFENDANT'S STATEMENTS MADE TO A CHILD PROTECTIVE SERVICES CASEWORKER SHOULD HAVE BEEN SUPPRESSED; THE CASEWORKER, UNDER THE FACTS, ACTED AS AN AGENT OF LAW ENFORCEMENT DURING THE INTERVIEW.

The Fourth Department, reversing Supreme Court, determined the statements made by defendant to a Child Protective Services (CPS) caseworker should have been suppressed because, under the facts, she was acting as an agent of law enforcement at the time of the interview: "... [T]he CPS caseworker testified at the Huntley hearing that, at the time she interviewed defendant, she was aware that defendant was being held on criminal charges and that he was represented by counsel. She further testified that she worked on a multidisciplinary task force composed of social services and law enforcement agencies, through which she received training on interviewing individuals accused of committing sexual offenses. Additionally, in keeping with task force protocol directing her to report to law enforcement any inculpatory statements made during CPS interviews, the CPS caseworker called the investigating officer immediately following the interview with defendant and promptly went to his office to report defendant's statements. Under the circumstances of this case as reflected at the hearing, although the police did not specifically direct the CPS caseworker to conduct the interview on a specific date or time or accompany her to the interview ... , we conclude that the CPS caseworker here had a 'cooperative working arrangement' with police such that she was acting as an agent of the police when she interviewed defendant and relayed his incriminatory statements ... . The statements were thus obtained in violation of defendant's right to counsel, and the court erred in refusing to suppress them ... . Further, because defendant's statements to the CPS caseworker were the only statements in which he admitted to having sexual contact with the victim, we cannot say that there is 'no reasonable possibility that the error contributed to the plea' ...". ***People v. Desjardins*, 2021 N.Y. Slip Op. 04465, Fourth Dept 7-16-21**

EDUCATION-SCHOOL LAW, PERSONAL INJURY, EVIDENCE.

IN THIS NEGLIGENT SUPERVISION ACTION AGAINST A SCHOOL DISTICT, THE DISTRICT DEMONSTRATED A STUDENT'S SEXUAL ASSAULT OF PLANTIFF WAS NOT FORESEEABLE.

The Fourth Department, reversing Supreme Court, over a dissent, determined the defendant school district demonstrated a student's sexual assault of plaintiff was not foreseeable: "... [D]efendant met its ... burden on the motion by establishing that the 'sexual assault against [plaintiff by the student] was an unforeseeable act that, without sufficiently specific knowledge or notice, could not have been reasonably anticipated' … , and plaintiff failed to raise a triable issue of fact ... . Defendant's submissions, including plaintiff's testimony, established the undisputed fact that plaintiff and the student did not know

each other and did not have any prior interactions before the sexual assault ... . Although the student had an extensive and troubling disciplinary history that resulted in several detentions and suspensions, such history did not contain any infractions for physically aggressive conduct directed at other people, sexually inappropriate behavior, or threats of physical or sexual violence ... . [W]hile the student's history involved attendance issues, insubordination toward school staff, inappropriate verbal outbursts, being under the influence of drugs or alcohol, possession and sale of drugs, and academic problems, that history did not raise a triable issue of fact whether defendant had sufficiently specific knowledge or notice of the injury-causing conduct inasmuch as it was not similar to the student's physically and sexually aggressive behavior that injured plaintiff ... . 'More significantly, [the student's] prior history did not include any sexually aggressive behavior' ... . We also agree with defendant that the court impermissibly drew an unsubstantiated and speculative inference that the student's disclosure to a school social worker about being a victim of sexual abuse during his childhood, coupled with his substance abuse, should have provided defendant with notice of the student's propensity to commit sexual assault ...". ***Knaszak v. Hamburg Cent. Sch. Dist.*, 2021 N.Y. Slip Op. 04441, Fourth Dept 7-16-21**

EDUCATION-SCHOOL LAW, PERSONAL INJURY, MUNICIPAL LAW.

PLAINTIFF'S CHILD ALLEGEDLY WAS INJURED DURING SCHOOL RECESS; PLAINTIFF'S FAILURE TO PRODUCE THE CHILD FOR THE GENERAL MUNICIPAL LAW § 50-H HEARING REQUIRED DISMISSAL OF THE COMPLAINT.

The Fourth Department, reversing Supreme Court, determined the failure to produce the child (who allegedly was injured at school recess) for the General Municipal Law § 50-h hearing required dismissal of the complaint: " 'As General Municipal Law § 50-h (5) makes clear on its face, compliance with a municipality's demand for a section 50-h examination is a condition precedent to commencing an action against that municipality' ... . 'A claimant's failure to comply with such a demand generally warrants dismissal of the action' ... . 'Requiring claimants to comply with section 50-h before commencing an action augments the statute's purpose, which 'is to afford the [municipality] an opportunity to early investigate the circumstances surrounding the accident and to explore the merits of the claim, while information is readily available, with a view towards settlement' ... . 'The failure to submit to . . . an examination [pursuant to section 50-h], however, may be excused in exceptional circumstances, such as extreme physical or psychological incapacity' ... . Here, '[b]y refusing to produce for an examination under General Municipal Law § 50-h the minor child on whose behalf they are suing, plaintiffs failed to comply with a condition precedent to commencing the action . . . Nor did they demonstrate exceptional circumstances so as to excuse their noncompliance' ...". ***Jeffrey T.C. v. Grand Is. Cent. Sch. Dist.*, 2021 N.Y. Slip Op. 04427, Fourth Dept 7-16-21**

FAMILY LAW, EVIDENCE.

FAMILY COURT'S FAILURE TO CONSIDER THE PSYCHOLOGICAL EVALUATIONS OF THE PARENTS BEFORE AWARDING SOLE CUSTODY TO FATHER REQUIRED REMITTAL.

The Fourth Department, reversing Family Court, determined the psychological evaluations should have been made before awarding sole custody of the child to father: "The mother's mental and emotional health was the central issue contested in this proceeding, and we conclude that the court abused its discretion in making its determination and awarding the father sole custody of the child without first considering the results of the psychological evaluations that it ordered ... . Although a psychological expert testified at the fact-finding hearing on behalf of the father, that expert interviewed the parties and the subject child to assess whether the child had been sexually abused, and therefore he did not provide much information on the mother's emotional functioning, the impact her mental health issues had on her ability to parent the child, or the fitness of either parent. Thus, on this record, we cannot say that there was sufficient evidence for the court to resolve the custody dispute without considering the court-ordered psychological examinations of the parents ...". ***Matter of Pontillo v. Johnson-Kosiorek*, 2021 N.Y. Slip Op. 04455, Fourth Dept 7-16-21**

FORECLOSURE, CONTRACT LAW.

ONCE PLAINTIFF ACCELERATED THE DEBT BY COMMENCING FORECLOSURE DEFENDANTS COULD EXERCISE THE RIGHT TO REDEEM THE MORTGAGE WITHOUT TRIGGERING A CONTRACTUAL PREPAYMENT PENALTY.

The Fourth Department determined Supreme Court properly ruled defendants could exercise their right of redemption in this foreclosure action without triggering the plaintiff's contractual right to withhold consent to prepayment: "... [D]efendants were not seeking to prepay the amount due under the note, rather plaintiff accelerated the remaining amount due by instituting a foreclosure action and sending the demand letter. We ... reject plaintiff's contention that he is entitled to the remaining amount due on the note, including all unaccrued interest payments. It is well settled that, once a foreclosure proceeding is commenced, '[a] mortgagor or other owner of the equity of redemption of a property subject to a judgment of foreclosure and sale may redeem the mortgage at any time prior to the foreclosure sale' ... . 'An unconditional tender of the full amount due is all that is required' to exercise the right of redemption ... . Thus, defendants' tender of payment of the entire mortgage principal and the accrued interest was all that was required 'in response to [plaintiff's] acceleration of the debt upon default [and, as noted,] did not constitute a 'prepayment' of the debt within the meaning of the prepayment clause set forth in the mortgage' ... . Inasmuch as 'the accelerated payment here is the result of plaintiff[-]

mortgagee[] having elected to bring this foreclosure action, [he] may not exact a prepayment penalty' ...". ***Virkler v. V.S. Virkler & Son, Inc.*, 2021 N.Y. Slip Op. 04434, Fourth Dept 7-16-21**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

PLAINTIFF'S EXPERT'S AFFIDAVIT WAS CONCLUSORY AND DID NOT RAISE A QUESTION OF FACT ABOUT WHETHER DEFENDANTS PROXIMATELY CAUSED PLAINTIFF'S PARALYSIS, THE DISSENT DISAGREED.

The Fourth Department, reversing Supreme Court, over an extensive dissent, determined plaintiff's expert failed to raise a question of fact in opposition to defendants' motion for summary judgment in this medical malpractice case: "... [P]laintiff alleged that if [defendants] Lougee and King had made an appropriate referral to an orthopedic specialist and monitored her condition after the referral was made, plaintiff would have received necessary surgery before she became paralyzed. ... [Defendants] appeal from an order denying their motion for summary judgment dismissing the complaint against them. * * * The affidavit of plaintiff's medical expert failed to raise a triable issue of fact in opposition inasmuch as the conclusory opinion of plaintiff's expert that defendants' 'multiple deviations from the standard of care were a substantial contributing factor in causing [plaintiff's injuries]' is insufficient to raise an issue of fact concerning proximate cause ... . It is undisputed that treatment of a condition arising out of an issue with plaintiff's spinal hardware is outside the scope of defendants' practice and that referral to an orthopedic specialist ... was appropriate, and plaintiff's expert failed to identify what treatments or interventions were necessary, how defendants' monitoring of [the orthopedic specialist] would have necessarily resulted in those treatments or interventions being performed by the specialist, and whether the timing of any such interventions would have prevented plaintiff's injuries." ***Humbolt v. Parmeter*, 2021 N.Y. Slip Op. 04472, Fourth Dept 7-16-21**

MEDICAL MALPRACTICE, NEGLIGENCE, MENTAL HYGIENE LAW, CRIMINAL LAW.

PLAINTIFF WAS BROUGHT TO THE HOSPITAL PURSUANT TO THE MENTAL HYGIENE LAW AFTER THREATENING FAMILY MEMBERS AND KILLING A DOG; DEFENDANTS RELEASED PLAINTIFF THE SAME DAY AND PLAINTIFF KILLED THE FAMILY MEMBERS; PLAINTIFF ENTERED A PLEA OF NOT RESPONSIBLE BY REASON OF MENTAL ILLNESS; THE RULE PROHIBITING A PLAINTIFF FROM TAKING ADVANTAGE OF HIS OWN WRONG DID NOT APPLY AND DEFENDANTS' MOTION TO DISMISS THIS MEDICAL MALPRACTICE ACTION WAS PROPERLY DENIED.

The Fourth Department determined plaintiff's medical (psychiatric) malpractice action properly survived a motion to dismiss. Plaintiff was treated by defendants after he was brought to the hospital by the police pursuant to Mental Hygiene Law § 9.41. Plaintiff had threatened family members and killed a dog. Plaintiff was released the same day and shortly thereafter killed the three family members he had threatened. Ultimately plaintiff entered a plea of not responsible by reason of mental illness or defect. The courts refused to apply the rule prohibiting a plaintiff from taking advantage of his own wrong because plaintiff was not responsible for his conduct: "With respect to the ground for dismissal asserted here, 'as a matter of public policy, . . . where a plaintiff has engaged in unlawful conduct, the courts will not entertain suit if the plaintiff's conduct constitutes a serious violation of the law and the injuries for which the plaintiff seeks recovery are the direct result of that violation' ... . The rule derives from the maxim that '[n]o one shall be permitted to profit by his [or her] own fraud, or to take advantage of his [or her] own wrong, or to found any claim upon his [or her] own iniquity, or to acquire property by his [or her] own crime' ... . In cases in which the doctrine applies, 'recovery is precluded 'at the very threshold of the plaintiff's application for judicial relief' ... . Notably, the Court of Appeals has applied the doctrine with caution to avoid overextending it inasmuch as the rule 'embodies a narrow application of public policy imperatives under limited circumstances' ... . * * * ... [A]ccepting the facts as alleged in the complaint as true, we conclude that the criminal court's acceptance of plaintiff's plea of not responsible by reason of mental disease or defect demonstrates that, at the time of his conduct constituting a serious violation of the law, plaintiff lacked substantial capacity to know or appreciate either the nature and consequences of his conduct or that such conduct was wrong ... . Thus, unlike cases applying the rule to preclude recovery, the record here establishes that plaintiff's illegal conduct was not knowing, willful, intentional, or otherwise sufficiently culpable to warrant application of the rule ...". ***Bumbolo v. Faxton St. Luke's Healthcare*, 2021 N.Y. Slip Op. 04429, Fourth Dept 7-16-21**

MENTAL HYGIENE LAW, EVIDENCE, CRIMINAL LAW.

SUPREME COURT DID NOT WEIGH THE CONFLICTING EXPERT TESTIMONY ABOUT WHETHER PETITIONER SEX-OFFENDER SUFFERED FROM A MENTAL ABNORMALITY REQUIRING CONFINEMENT PURSUANT TO THE MENTAL HYGIENE LAW; MATTER SENT BACK FOR A NEW HEARING BEFORE A DIFFERENT JUDGE.

The Fourth Department, reversing Supreme Court in this sex-offender Mental Hygiene Law proceeding, determined the court did not base its decision to discharge and release the petitioner on the expert evidence presented at the hearing. The matter was sent back for a new hearing before a different judge: "The State's expert here diagnosed petitioner with ASPD [antisocial personality disorder] with narcissistic features and the condition of psychopathy, and the expert testified that those diagnoses, together with petitioner's enduring hostility towards women, collectively constitute a mental abnormality within the meaning of Mental Hygiene Law § 10.03 (i). She acknowledged that the scientific community has been debating for decades whether psychopathy is a distinct condition from ASPD, but she opined that they were indeed separate con-

ditions. Petitioner's expert, on the other hand, diagnosed petitioner with ASPD but testified that petitioner had no other conditions in addition to that diagnosis that would render him a sex offender within the meaning of Mental Hygiene Law article 10. He further testified that psychopathy was simply an extreme variant of ASPD and should not be considered a condition separate from ASPD. The court determined that a diagnosis of psychopathy or psychopathic features is still only a diagnosis of ASPD alone and thus, under Donald DD. (24 NY3d at 190), could not constitute an 'other condition' to provide a basis for a finding of a mental abnormality. ... [I] so holding, the court did not resolve the conflict between the experts regarding ASPD and psychopathy by weighing their testimony but rather made a determination that, generally speaking and without regard to petitioner's specific case, a finding of ASPD and psychopathy can never provide a basis for a finding of mental abnormality. Contrary to the court's apparent conclusion, 'the Court of Appeals in Donald DD. did not state that diagnosis of ASPD with psychopathy is insufficient to support a finding of mental abnormality' ... . When supported by expert testimony, a diagnosis of ASPD and psychopathy is legally sufficient to provide a basis for a finding of mental abnormality Inasmuch as there was conflicting expert opinion on the matter, the court should have weighed the testimony of the experts in rendering its determination whether petitioner suffers from a mental abnormality ...". ***Matter of Application for Discharge of Doy S. v. State of New York,*** **2021 N.Y. Slip Op. 04456, Fourth Dept 7-16-21**

PERSONAL INJURY.

PLAINTIFF RAISED A QUESTION OF FACT WHETHER PLAINTIFF'S DECEDENT'S FALL FROM HER BED IN A NURSING HOME WAS CAUSED BY DEFENDANTS' NEGLIGENCE.

The Fourth Department, reversing Supreme Court, determined plaintiff raised a question of fact about whether defendants' negligence was a proximate cause of plaintiff's decedent's fall from her bed in defendants' nursing home: "Plaintiff submitted an expert affidavit from a physician with extensive experience in the treatment of geriatric patients and who is familiar with the standards of care applicable for skilled nursing facilities, including those in New York as they existed during the relevant time period ... .. The expert opined that, based on decedent's history of over 30 falls while at defendants' facility, decedent was a 'high fall risk.' Plaintiff's expert set forth the interventions that defendants failed to implement to reduce decedent's known and documented risk of falling. Moreover, he opined that, in this case, defendants failed to meet the relevant standard of care because they failed to use bed restraints, which were appropriate and would have prevented decedent's fall, and failed to use side rails, alarms and motion detectors, which also would have prevented decedent's fall. Thus, his affidavit raises a question of fact whether defendants were negligent by failing to implement available precautions to protect decedent from a foreseeable risk of falling ...". ***Rosado v. Rosa Coplon Jewish Home,*** **2021 N.Y. Slip Op. 04432, Fourth Dept 7-16-21**

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