CasePrepPlus

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Editor: **Bruce Freeman**

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COURT OF APPEALS

APPEALS, CIVIL PROCEDURE, DISCIPLINARY HEARINGS (INMATES).

THE NOTICE OF APPEAL WAS TIMELY SERVED BUT WAS NOT TIMELY FILED WITH THE CLERK OF THE COURT; THE 3RD DEPARTMENT DISMISSED THE APPEAL; THE APPELLATE COURT HAS THE DISCRETION TO ALLOW A LATE FILING; MATTER REMITTED.

The Court of Appeals, reversing the Appellate Division, determined that, although the pro se inmate-petitioner did not timely file the notice of appeal, the notice was timely served and the Third Department could have exercised discretion to allow a late filing. The matter was remitted because the Third Department's decision was silent about the reasons for dismissing the appeal: "[P]etitioner argues that the Appellate Division should have applied a pro se inmate 'mailbox rule' to deem the notice of appeal timely filed upon delivery to prison authorities for forwarding to the appropriate court. CPLR 5515 (1) provides that an appeal is taken when, in addition to being duly served, the notice of appeal is 'fil[ed] . . . in the office where the judgment or order of the court of original instance is entered.' The CPLR further clarifies that 'papers required to be filed shall be filed with the clerk of the court in which the action is triable' (CPLR 2102 [a]). Thus, by its express terms, the CPLR indicates that filing occurs when the clerk's office receives the notice of appeal. Indeed, 'filing' has long been understood to occur only upon actual receipt by the appropriate court clerk ... . A 'mailbox rule' for filing would also contravene the clear distinctions between filing and service drawn by the legislature inasmuch as the CPLR directs that, unlike filing, 'service by mail shall be complete upon mailing' (CPLR 2103 [b] [2]). ... * * * ... [T]he legislature has given courts the authority to excuse untimely filing under certain circumstances. CPLR 5520 provides that, '[i]f an appellant either serves or files a timely notice of appeal . . . , but neglects through mistake or excusable neglect to do another required act within the time limited, the court from or to which the appeal is taken . . . may grant an extension of time for curing the omission' (CPLR 5520 [a])." ***Matter of Miller v. Annucci*, 2021 N.Y. Slip Op. 04954, CtApp 9-9-21**

CRIMINAL LAW, ATTORNEYS, APPEALS.

A PSYCHIATRIC EXAM IS A CRITICAL STAGE OF A PROSECUTION AT WHICH DEFENDANT HAS THE RIGHT TO COUNSEL; THE EXCLUSION OF DEFENSE COUNSEL FROM THE EXAM WAS NOT HARMLESS ERROR; CONVICTION REVERSED.

The Court of Appeals, reversing defendant's manslaughter conviction, determined the exclusion of defense counsel from the psychiatric exam by the People's expert was not harmless error: "After defendant provided timely notice that he intended to present psychiatric evidence at trial, he was twice interviewed by a clinical psychologist engaged by the People (see CPL 250.10 [2], [3]). Although defense counsel was present at the first examination, the expert denied defense counsel admittance to the second examination. Over defense counsel's objection that defendant's right to counsel had been violated, the expert's testimony was admitted at trial. On defendant's appeal, the Appellate Division affirmed, holding that defendant's constitutional right to counsel had been violated but that the error was harmless ... . In Matter of Lee v County Ct. of Erie County (27 NY2d 432 [1971]), we held that defendants' Sixth Amendment right to counsel applies at pre-trial psychiatric examinations 'to make more effective [a defendant's] basic right of cross-examination' ... In Lee, we cited to United States v Wade's (388 US 218 [1967]) definition of a critical stage of the prosecution as 'any stage of the prosecution, formal or informal, in court or out, where' 'the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself' ... . We thus held that pretrial psychiatric examinations are a critical stage of the prosecution. ... The People—not the defendant—bear the burden of showing that 'there was no reasonable possibility that the trial court's admission" of that part of the expert's testimony based on the uncounseled examination "affected the jury's verdict' ... . Under the circumstances of this case, the expert's testimony at trial was based in part on the examination undertaken in violation of defendant's constitutional right to counsel, and we cannot say that the error was harmless ...". ***People v. Guevara*, 2021 N.Y. Slip Op. 04955, CtApp 9-9-21**

FROM THE CASEPREPPLUS 2021 ARCHIVES:

COURT OF APPEALS—JANUARY–SEPTEMBER, 2021

CONSTITUTIONAL LAW, CRIMINAL LAW.

EXECUTIVE LAW § 552 (PART OF THE PROTECTION OF PEOPLE WITH SPECIAL NEEDS ACT), WHICH CREATED A SPECIAL PROSECUTOR TO PROSECUTE CRIMES OF ABUSE AND NEGLECT OF VULNERABLE PERSONS IN STATE FACILITIES, IS UNCONSTITUTIONAL TO THE EXTENT IT ALLOWS THE PROSECUTION OF CRIMES BY AN UNELECTED APPOINTEE OF THE GOVERNOR.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over two concurring opinions, determined Executive Law § 552 (part of the Protection of People with Special Needs Act), which created a special prosecutor to prosecute crimes of abuse or neglect of vulnerable persons in facilities operated by the state, is unconstitutional to the extent it allows an unelected appointee of the governor to prosecute crimes. The portions of the statute which do not relate to the prosecution of crimes, however, remain viable: "Given that the purpose of enacting the Special Needs Act was to 'bolster the ability of the state to respond more effectively to abuse and neglect of vulnerable persons' … , it is apparent that the Legislature would wish that as much of Executive Law § 552 aimed at protecting that class of victims as can be preserved remain in effect. Nor would excising the offending provisions leave the remainder without any beneficial impact. Therefore, while the subdivisions of the statute that provide the special prosecutor with the discretionary authority to bring criminal cases … must be struck as unconstitutional … , the portion of Executive Law § 552 (1) that provides the special prosecutor with non-prosecutorial functions should remain in force. Likewise, we leave intact Executive Law § 552 (2) (a) (ii), which empowers the special prosecutor 'to cooperate with and assist district attorneys and other local law enforcement officials in their efforts against . . . abuse or neglect of vulnerable persons,' without interfering with those efforts (emphasis added). Cooperation with the local District Attorney furthers the overarching goal of the Legislature—providing resources to address crimes of abuse and neglect committed against vulnerable persons—without infringing on that constitutional officer's essential authority." ***People v. Viviani***, 2021 N.Y. Slip Op. 01934, CtApp 3-30-21

CONSUMER LAW.

PLAINTIFFS, ATTORNEYS PRACTICING LANDLORD-TENANT LAW, ALLEGED DEFENDANT PUBLISHER OF "NEW YORK LANDLORD-TENANT LAW" OMITTED OR INACCURATELY PRESENTED SOME OF THE RELEVANT STATUTES AND REGULATIONS AND THEREFORE VIOLATED GENERAL BUSINESS LAW § 349 (DECEPTIVE BUSINESS PRACTICES); THE COMPLAINT FAILED TO ADEQUATELY ALLEGE DEFENDANT'S ACT OR PRACTICE WAS MATERIALLY MISLEADING.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a dissent, determined plaintiffs did not state a cause of action for deceptive business practices (General Business Law (GBL) § 349) against the defendant-publisher of a legal resource book, "New York Landlord-Tenant Law" (commonly called the "Tanbook"). Plaintiffs, attorneys who practice landlord-tenant law, alleged the Tanbook, which is published annually, purported to include all the relevant statutes and regulations but, in fact, omitted or inaccurately presented some statutes and regulations. The Court of Appeals found that the complaint adequately alleged a cause of action that was consumer-oriented, but did not adequately allege defendant's act or practice was misleading in a material way: "… [P]laintiffs' cause of action is based on purchases of yearly editions of the Tanbook, under a sales agreement that charged extra for any updates of the year's materials contained in the corresponding edition. Plaintiffs' allegations are limited to omissions and inaccuracies in a section of the Tanbook they knew was subject to legislative amendment, which they concede were corrected in the 2017 edition after the errors were brought to defendant's attention, and which were specifically contemplated by defendant's express disclaimer of the currentness of the Tanbook's contents. Under the circumstances, plaintiffs, or any reasonable consumer, could not have been materially misled to believe that defendant guaranteed Part III of the Tanbook was complete and accurate at any given time. Thus, because plaintiffs failed to adequately plead this element, their GBL § 349 cause of action was properly dismissed." ***Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc.*, 2021 N.Y. Slip Op. 03485, CtApp 6-3-21**

CRIMINAL LAW, ACCUSATORY INSTRUMENTS.

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

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a two-judge dissent, determined that the use of translators in documenting information in an accusatory instrument did not create an additional layer of hearsay. The three accusatory instruments at issue, therefore, were deemed facially sufficient. Two of the accusatory instruments did not refer to the use of a translator, and the third did: "… '[I]n evaluating the sufficiency of an accusatory instrument,' a court does 'not look beyond its four corners (including supporting declarations appended thereto)' (… see CPL 100.15 [3]; 100.40 [1] [c] …).

Courts must 'not rely on external factors to create jurisdictional defects not evident from the face of the' accusatory instrument … . Instead, '[w]hether the allegation of an element of an offense is hearsay, rendering the information defective, is to be determined on a facial reading of the accusatory instrument' … . Defects that do not appear on the 'the face of the' accusatory instrument are 'latent deficienc[ies]' that do not require dismissal … . * * * We conclude that, when evaluating the facial sufficiency of an accusatory instrument, no hearsay defect exists where … the four corners of the instrument indicate only that an accurate, verbatim translation occurred, and the witness or complainant adopted the statement as their own by signing the instrument after the translation …". ***People v. Slade*, 2021 N.Y. Slip Op. 02866, CtApp 5-6-21**

CRIMINAL LAW, APPEALS.

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

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

CRIMINAL LAW, ATTORNEYS.

2016 REGULATIONS RESTRICTING ATTORNEY'S FEES FOR CLAIMS MADE TO THE OFFICE OF VICTIM SERVICES (OVS) ARE CONSISTENT WITH THE STATUTORY LANGUAGE (EXECUTIVE LAW) AND RATIONAL.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a two-judge dissent and a concurrence, reversing the Appellate Division, determined that the Office of Victim Services (OVS) regulations limiting attorney's fees for crime victim claimants were consistent with the statutory language and rational: "OVS regulations formerly provided that claimants had a 'right to be represented . . . at all stages of a claim' … and, '[w]henever an award [was] made to a claimant who [was] represented by an attorney, [OVS was required to] approve a reasonable fee commensurate with the services rendered, up to $1,000,' unless the request for attorneys' fees was premised on a claim 'submitted without legal or factual basis' … . OVS acknowledges that this meant that attorneys' fees, if reasonable, were available at all stages of a claim. However, effective January 13, 2016, OVS amended 9 NYCRR § 525.9 to provide that '[a]ny claimant . . . may choose to be represented before [OVS], at any stages of a claim, by an attorney-at-law . . . and/or before the Appellate Division upon judicial review of the office's final determination,' but 'only those fees incurred by a claimant during: (1) the administrative review for reconsideration of such decision . . . ; and/or (2) the judicial review of the final decision of [OVS] . . . may be considered for reimbursement' … . OVS issued a regulatory impact statement indicating that the 'purpose of th[e] rule change [wa]s to limit attorneys' fees pursuant to article 22 of the Executive Law.' OVS stated that the amendments were 'designed to conform the regulations to the enacting statute,' explaining that the prior regulations permitted claimants to recover attorneys' fees that 'far exceed[ed]' the 'reasonable expenses' specified under Executive Law § 626 (1). OVS indicates that Victim Assistance Programs (VAPs) are federally funded with a state match, and it emphasized in its regulatory impact statement that it 'fund[ed] 228 [VAPs] across New York State, distributing in excess of $35 million to these programs to assist and advocate on behalf of victims and claimants.' The required services provided by the VAPs include, among other things, 'assist[ing] victims and/or claimants in completing and submitting OVS applications and assist[ing] claimants through the claim process.' OVS determined that the legislature did not intend that attorneys' fees incurred in relation to assistance within the scope of services provided by VAPs would be considered reasonable under the statute." ***Matter of Juarez v. New York State Off. of Victim Servs.*, 2021 N.Y. Slip Op. 01091, CtApp 2-18-21**

CRIMINAL LAW, CREDIT CARDS.

USING ANOTHER'S CREDIT CARD ACCOUNT NUMBER TO MAKE PURCHASES, WITHOUT PHYSICAL POSSESSION OF THE CARD, SUPPORTS A GRAND LARCENY CONVICTION.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a two-judge dissent, determined that using a credit card number without physically possessing the credit card itself supported the grand larceny conviction: "The primary question presented by this appeal is whether the definition of credit card for purposes of Penal Law § 155.00 (7) includes the credit card account number, such that the People need not prove that a defendant physically possessed the tangible credit card in order to support a conviction of grand larceny based upon credit card theft. Here, defendant's conviction of grand larceny in the fourth degree was based on defendant's theft of the victim's credit card account number to purchase goods,

although there was no evidence that defendant possessed the physical card itself. We conclude that the definition of credit card in General Business Law § 511 (1), as supplemented by General Business Law § 511-a, is the controlling definition as designated by Penal Law § 155.00 (7) and, as a result, the evidence is legally sufficient to support defendant's conviction of grand larceny for stealing an intangible credit card account number." ***People v. Badji*, 2021 N.Y. Slip Op. 00897, CtApp 2-11-21**

CRIMINAL LAW, EAVESDROPPING.

KINGS COUNTY SUPREME COURT HAD JURISDICTION TO ISSUE EAVESDROPPING WARRANTS FOR DEFENDANT'S CELL PHONES BASED UPON WHERE THE INTERCEPTION WAS TO BE MADE (NEW YORK); THE CELL PHONES NEED NOT BE (AND WERE NOT) LOCATED IN NEW YORK.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a two-judge dissent, determined that Kings County Supreme Court had jurisdiction to issue eavesdropping warrants for defendant's cell phones based up where the interception was to be made (New York). The cell phones need not be (and were not) located in New York: "The issue raised on defendant's appeal is whether a Kings County Supreme Court Justice had jurisdiction to issue eavesdropping warrants for defendant's cell phones, which were not physically present in New York, for the purpose of gathering evidence in an investigation of enterprise corruption and gambling offenses committed in Kings County. To resolve defendant's jurisdictional challenge, we must decide whether the eavesdropping warrants were 'executed' in Kings County within the meaning of Criminal Procedure Law § 700.05 (4). We hold that eavesdropping warrants are executed in the geographical jurisdiction where the communications are intentionally intercepted by authorized law enforcement officers within the meaning of CPL article 700." ***People v. Schneider*, 2021 N.Y. Slip Op. 03486, CtApp 6-3-21**

CRIMINAL LAW, EVIDENCE.

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

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

CRIMINAL LAW, EVIDENCE.

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

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

CRIMINAL LAW, MENTAL HYGIENE LAW.

BASED UPON JUROR MISCONDUCT, THE TRIAL JUDGE SET ASIDE THE JURY VERDICT FINDING DEFENDANT SEX OFFENDER DID NOT SUFFER FROM A MENTAL ABNORMALITY AND ORDERED A NEW TRIAL; THE APPELLATE DIVISION REVERSED; THE COURT OF APPEALS REINSTATED THE TRIAL JUDGE'S RULING.

The Court of Appeals, without any discussion of the facts or the law, reversed the Appellate Division (***Matter of State of New York v Donald G.*, 2020 NY Slip Op 04716, Fourth Dept 8-20-20**) and reinstated the trial court's setting aside the verdict based on juror misconduct. The jury had decided defendant, a sex offender, did not suffer from a mental abnormality requiring civil commitment and should be released. The trial judge set aside that verdict and ordered a new trial. The trial judge's ruling was here reinstated by the Court of Appeals: "Under these circumstances, Supreme Court did not abuse its discretion as a matter of law in ordering a new trial in the interest of justice on the ground of juror misconduct. Respondent's remaining contentions have been considered and are without merit." ***Matter of State of New York v. Donald G.*, 2021 N.Y. Slip Op. 01935, CtApp 3-30-21**

CRIMINAL LAW, SEARCH AND SEIZURE.

NO PROOF DEFENDANT'S BACKPACK WAS WITHIN DEFENDANT'S REACH WHEN IT WAS SEIZED AND SEARCHED; THEREFORE THE SEARCH WAS NOT A VALID SEARCH INCIDENT TO ARREST.

The Court of Appeals, reversing the Appellate Division, in a brief memorandum decision, determined the search of defendant's backpack could not be justified as a search incident to arrest because there was no evidence the backpack was within defendant's reach when it was seized and searched: "The People failed to establish that the warrantless search of defendant's backpack was a valid search incident to arrest … . The record does not contain evidence supporting a determination that the backpack was in defendant's 'immediate control or 'grabbable area' … . There is a lack of testimony in the record indicating where the bag was in relation to defendant immediately prior to the search. Because Supreme Court denied defendant's suppression motion without reaching the People's alternative argument raised in opposition, we remit the matter to Supreme Court …". ***People v. Mabry*, 2021 N.Y. Slip Op. 03348, CtApp 5-27-21**

CRIMINAL LAW, SEARCH AND SEIZURE.

THE SEARCH WARRANT DID NOT AUTHORIZE THE SEARCH OF DEFENDANT'S VEHICLES; SEIZED ITEMS PROPERLY SUPPRESSED.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a three-judge dissent, determined that the search warrant did not authorize the search of defendant's vehicles and the items seized were properly suppressed: "The requirement that warrants must describe with particularity the places, vehicles, and persons to be searched is vital to judicial supervision of the warrant process … . Warrants 'interpose the detached and independent judgment of a neutral Magistrate between the interested viewpoint of those engaged in ferreting out crime and potential encroachments on the sanctity and privacy of the individual' … . To further that role, our constitution assigns to the magistrate the tasks of evaluating whether probable cause exists to initiate a search and defining the subjects to be searched … . The particularity requirement protects the magistrate's determination regarding the permissible scope of the search. Thus, to be valid, a search warrant must be 'specific enough to leave no discretion to the executing officer' … . So important is the role of the neutral and detached magistrate that we have in the past parted ways from federal constitutional jurisprudence when we believed that an emerging rule of federal constitutional law 'dilute[s] . . . the requirements of judicial supervision in the warrant process' . … The application contained no mention of the existence of the vehicles ultimately searched, much less evidence connecting them to any criminality. Indeed, the observed pattern, as described in the affidavit, was for Mr. Gordon [defendant] to proceed from the residence to the street and back, without detouring to any vehicles parked at the residence. … '[N]o observation was reported as to any movement of persons between the house and the [vehicles]' … that would substantiate a belief that the vehicles searched were utilized in the alleged criminal activity. Nor do we believe that the warrant for Mr. Gordon's 'person' or 'premises'—in the context of the factual allegations averred by the detectives—authorized a search of the vehicles. … [T]he mere presence of a vehicle seen at the sight of premises wherein the police suspect criminal activity to be occurring does not by itself provide probable cause to search the vehicle …". ***People v. Gordon*, 2021 N.Y. Slip Op. 01093, CtApp 2-18-21**

CRIMINAL LAW, SEARCH AND SEIZURE.

THE WARRANT CORRECTLY DESCRIBED THE PREMISES TO BE SEARCHED AS A SINGLE-FAMILY RESIDENCE BASED UPON THE INFORMATION AVAILABLE TO THE POLICE; DEFENDANT'S ALLEGATION THE RESIDENCE WAS ACTUALLY THREE SEPARATE APARTMENTS WAS NOT SUPPORTED BY SWORN AFFIDAVITS; THE MOTION TO SUPPRESS WAS PROPERLY DENIED WITHOUT A HEARING.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, determined the defendant's motion to suppress, alleging the premises to be searched was not adequately described in the warrant, was properly denied without a hearing. The war-

rant described a single-family residence. Defendant alleged each of the three floors was a separate apartment. The Court of Appeals looked only at the evidence supporting the warrant and held the evidence available to the police established the building was a single residence. The defendant did not submit any sworn affidavits in support of the "three apartments" argument, so the motion court properly denied the motion without holding a hearing: "The warrant's description of the place to be searched as 'a private residence,' located at a unique, specified street address, was not facially deficient; given a commonsense reading, the warrant clearly commanded a search of 'a' single residence, not a multi-unit building, at the marked street address. Because the warrant was facially sufficient, the case does not implicate the U.S. Supreme Court's ruling in Groh v Ramirez that courts may not rely on documents not incorporated and attached to the warrant in order to provide particularity that the warrant, on its face, lacks (see 540 US at 557-558). The motion court did not rely on the unincorporated warrant application materials to cure a facial deficiency in the warrant, which Groh forbids. Rather, the court considered those materials for a different purpose—to determine whether the warrant's description of the place to be searched as a single private residence was supported by the information available to the detective who applied for the warrant and the court that issued the warrant. * * * In People v Mendoza, we held that a suppression motion's 'factual sufficiency should be determined with reference to the face of the pleadings, the context of the motion and defendant's access to information' (82 NY2d at 422; see also People v Jones, 95 NY2d 721, 729 [2001]). Although [defendant] lacked access to the materials that were before the warrant court, he had ready access to information about the actual conditions of the premises at the time of the search, but failed to provide it in support of his suppression motion. For example, he, his mother, or any other resident of the premises could have provided sworn affidavits or other evidence as to the separateness of the alleged residences on the three floors; the existence of unrelated tenants on the second floor; the obviousness to a visitor that the building contained separate residences—such as allegations that each unit had separate locking entry doors—or a variety of other types of evidence plainly known to residents of the house." ***People v. Duval*, 2021 N.Y. Slip Op. 00896, CtApp 2-11-21**

CRIMINAL LAW, TRAFFIC STOPS, EVIDENCE.

THE PEOPLE DID NOT DEMONSTRATE PROBABLE CAUSE FOR THE TRAFFIC STOP; THE 911 CALL WAS NOT PUT IN EVIDENCE AND THE RELIABILITY OF THE CALLER AND THE BASIS FOR THE CALLER'S KNOWLEDGE WERE NOT DEMONSTRATED; THE FACT THAT THE RELEVANT EVIDENCE WAS PRESENTED AT TRIAL WAS IRRELEVANT.

The Court of Appeals, reversing the Appellate Division, determined the People did not present sufficient evidence at the suppression hearing. Probable cause for the traffic stop was based on a 911 call. But no evidence was presented to demonstrate the reliability of the caller or the basis for the caller's knowledge. The fact that the relevant evidence was presented at trial did not matter. The appeal focuses on the evidence presented at the suppression hearing: "… [T]he officer's only justification for the stop was the dispatcher's report that a 911 caller had asserted that one of the vehicle's occupants possessed a 'long gun.' Initially, defendant claims that the stop was invalid because possession of a 'long gun' is lawful in New York. We reject that claim as meritless (see Penal Law 265.00 [22]). However, the People failed to introduce the 911 recording, failed to introduce any evidence indicating whether the 911 caller was an identified citizen informant or an anonymous tipster, and failed to offer any explanation of the basis of the caller's knowledge. In sum, the People put forward no relevant information concerning the circumstances surrounding the call at the hearing. Contrary to the People's suggestion that an appellate court can consider evidence subsequently admitted at trial to justify affirmance of an order denying suppression, 'the propriety of the denial must be judged on the evidence before the suppression court' … . Therefore, on the record of the suppression hearing, 'whether evaluated in light of the totality of the circumstances or under the Aguilar-Spinelli framework, the reliability of the tip was not established' …". ***People v. Walls*, 2021 N.Y. Slip Op. 04949, CtApp 9-2-21**

CRIMINAL LAW. APPEALS.

ARGUING FOR LENIENCY IN SENTENCING DOES NOT PRESERVE THE ARGUMENT THAT THE SENTENCING WAS VINDICTIVE.

The Court of Appeals determined the argument that the sentence to imprisonment was vindictive was not preserved. Defendant had successfully appealed his conviction after a nonjury verdict and then pled guilty to a different offense before a different judge. Although defendant argued for leniency, that did not preserve the "vindictive sentencing" argument: "The claim that the sentence imposed upon defendant's guilty plea was presumptively vindictive and imposed without State Due Process protections … is unpreserved. Defendant's arguments against imposition of the term of imprisonment, registered before the court imposed sentence, were consistent with arguments for leniency and made no specific reference to the principle of vindictiveness or any potential constitutional violation. Defendant also failed to either object to the sentence actually imposed or move to withdraw his guilty plea. Nor does this record support a claim that the sentence, which was within the ambit of the range of sentences for a class A misdemeanor, was illegal in a respect that 'can readily be discerned from the . . . record' … . As a result, defendant's arguments are unreviewable." ***People v. Olds*, 2021 N.Y. Slip Op. 02019, CtApp 4-1-21**

EMPLOYMENT LAW, HUMAN RIGHTS LAW.

WHERE PLAINTIFF'S EMPLOYER IS A BUSINESS ENTITY, HERE BLOOMBERG L.P., AN OWNER OR OFFICER OF THE COMPANY, HERE MICHAEL BLOOMBERG, IS NOT AN EMPLOYER WITHIN THE MEANING OF THE NYC HUMAN RIGHTS LAW; THE EMPLOYMENT DISCRIMINATION ACTION AGAINST MICHAEL BLOOMBERG WAS PROPERLY DISMISSED.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over an extensive dissent, determined Michael Bloomberg, in his status as "owner" and officer of the company, Bloomberg L.P., is not an "employer" within the meaning of the NYC Human Rights Law, and therefore cannot be liable for harassment of the plaintiff (Doe) by her supervisor, Ferris. Bloomberg L.P. can be vicariously liable as the employer, but Michael Bloomberg cannot: "Plaintiff, an employee of Bloomberg L.P. using the pseudonym "Margaret Doe," brought suit against defendants Bloomberg L.P., her supervisor Nicholas Ferris, and Michael Bloomberg, asserting several causes of action arising from alleged discrimination, sexual harassment, and sexual abuse. The question before us is whether Bloomberg, in addition to Bloomberg L.P., may be held vicariously liable as an employer under the New York City Human Rights Law (Administrative Code of City of NY, title 8 [City HRL]) based on his status as 'owner' and officer of the company. We hold that Bloomberg is not an 'employer' within the meaning of the City HRL and accordingly, we affirm the dismissal of plaintiff's claims that seek to hold Bloomberg vicariously liable for Ferris's offending conduct. * * * The language in the City HRL … requires no external limiting principle exempting employees from individual suit as employers. … [W]here a plaintiff's employer is a business entity, the shareholders, agents, limited partners, and employees of that entity are not employers within the meaning of the City HRL. … [T]hose individuals may incur liability only for their own discriminatory conduct, for aiding and abetting such conduct by others, or for retaliation against protected conduct (Administrative Code of City of NY § 8-107 [1], [6], [7]). This rule [is] consistent with the principles of vicarious and limited liability governing certain business structures (see e.g. Partnership Law §§ 26, 121-303; Limited Liability Company Law § 609; Business Corporation Law § 719)." ***Doe v. Bloomberg, L.P.*, 2021 N.Y. Slip Op. 00898, CtApp, 2-11-21**

ENVIRONMENTAL LAW.

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

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

FORECLOSURE, CIVIL PROCEDURE.

A MORTGAGE DEBT CAN BE ACCELERATED ONLY BY AN UNEQUIVOCAL OVERT ACT, I.E., COMMENCING A FORECLOSURE ACTION OR A DOCUMENT MAKING IT CLEAR THE ENTIRE DEBT IS IMMEDIATELY DUE (NOT THAT IT WILL BE DUE IN THE FUTURE); A MORTGAGE DEBT CAN BE DE-ACCELERATED BY A VOLUNTARY DISCONTINUANCE, EVEN IF ITS PURPOSE IS TO STOP THE STATUTE OF LIMITATIONS FROM RUNNING.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a partial dissent and a concurrence, clarified how courts should handle two recurring issues in the sea of foreclosures which have inundated the courts: (1) how is the mortgage debt accelerated such that the entire amount becomes due and the six-year statute of limitations for a foreclosure action starts running; and (2) how is the debt de-accelerated such that the statute of limitations for a foreclosure action stops running and the borrower can resume monthly installment payments? The Court of Appeals held that acceleration of the debt must be done by an unequivocal overt act. In the Vargas case, the foreclosure action did not refer to the correct loan, which had been modified and did not therefore accelerate the debt. In the Wells Fargo case, the letter did not ask for immediate payment of the entire debt and therefore did not accelerate the debt. As for de-acceleration, that can be accomplished

by voluntarily discontinuing the foreclosure action: "There are sound policy reasons to require that an acceleration be accomplished by an 'unequivocal overt act.' * * * [Re: Acceleration, the Vargas case] … [W]here the deficiencies in the [foreclosure] complaints were not merely technical or de minimis and rendered it unclear what debt was being accelerated—the commencement of these [foreclosure] actions did not validly accelerate the modified loan … . * * * [Re: Acceleration, the Wells Fargo case] … [T]he letter did not seek immediate payment of the entire, outstanding loan, but referred to acceleration only as a future event, indicating the debt was not accelerated at the time the letter was written. * * * [Re: De-acceleration or Revocation of the Acceleration] … [W]hen a bank effectuated an acceleration via the commencement of a foreclosure action, a voluntary discontinuance of that action—i.e., the withdrawal of the complaint—constitutes a revocation of that acceleration. In such a circumstance, the noteholder's withdrawal of its only demand for immediate payment of the full outstanding debt, made by the "unequivocal overt act" of filing a foreclosure complaint, 'destroy[s] the effect' of the election … . … We reject the theory … that a lender should be barred from revoking acceleration if the motive of the revocation was to avoid the expiration of the statute of limitations on the accelerated debt. A noteholder's motivation for exercising a contractual right is generally irrelevant." ***Freedom Mtge. Corp. v. Engel*, 2021 N.Y. Slip Op. 01090, CtApp 2-18-21**

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

WHERE THE BANK ATTEMPTS TO DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIRMENTS OF RPAPL 1304 WITH PROOF OF THE STANDARD OFFICE MAILING PROCEDURE, A DEFENDANT BORROWER MAY REBUT THE PRESUMPTION OF PROPER MAILING AND RECEIPT WITH PROOF OF A MATERIAL DEVIATION FROM THE BANK'S MAILING PROCEDURE; WHERE THERE ARE MULTIPLE BORROWERS, THE BANK NEED ONLY NAME ONE IN THE ELECTRONIC FILING REQUIRED BY RPAPL 1306.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a concurring opinion, answering two certified questions from the Second Circuit, determined: (1) where, in an action for foreclosure, the bank attempts to demonstrate compliance with the mailing and notice requirements of RPAPL 1304 with proof of the standard office mailing procedure, a defendant borrower can rebut the presumption of proper mailing and receipt with proof of a material deviation from the bank's mailing procedure; and (2) where there are multiple borrowers, the bank need only provide information about one borrower in the bank's electronic filing required by RPAL 1306. Here the defendants alleged there was a material deviation from the bank's mailing procedure because the bank averred the envelopes for the RPAPL 1304 notice are "created upon default," but the notices were dated almost a year after the initial payment default. The Court of Appeals expressed no opinion whether the "nearly one-year gap" was a material deviation from the bank's mailing procedure such that the presumption of proper mailing and receipt was rebutted. The court noted the borrowers' claim they never received the notice is not, standing alone, sufficient to rebut the presumption: "What is necessary to rebut the presumption that a RPAPL 1304 notice was mailed will depend, in part, on the nature of the practices detailed in the affidavit. Moreover, contextual considerations may also factor into the analysis. For example, here, [the bank] points out that residential notes and mortgages are negotiable instruments that often change hands at various points during their duration, which may impact the timing of the creation and mailing of RPAPL 1304 notices—a contextual factor a court could consider in assessing whether a purported deviation from routine procedure was material. We reject defendants' argument that a single deviation from any aspect of the routine office procedure necessarily rebuts the presumption of mailing. Such a standard would undermine the purpose of the presumption because, in practice, it would require entities to retain actual proof of mailing for every document that could be potentially relevant in a future lawsuit." ***CIT Bank N.A. v. Schiffman*, 2021 N.Y. Slip Op. 01933, CtApp 3-30-21**

MUNICIPAL LAW, ADMINISTRATIVE LAW.

ONCE THE APPELLATE DIVISION DECIDED THE NYC DEPARTMENT OF BUILDINGS ACTED RATIONALLY IN APPROVING THE USE OF A BUILDING AS A HOMELESS SHELTER ITS JUDICIAL REVIEW WAS DONE; THE APPELLATE DIVISION SHOULD NOT HAVE REMITTED THE MATTER FOR A HEARING ON THE SAFETY OF THE BUILDING.

The Court of Appeals, reversing the Appellate Division, determined the Appellate Division did not have the authority to send the matter back for a hearing after finding the NYC Department of Buildings (DOB) acted rationally when it approved the use of a building as a homeless shelter: "The Appellate Division erred in remitting to Supreme Court for a hearing on whether the building's use as a homeless shelter was 'consistent with general safety and welfare standards.' In this CPLR article 78 proceeding, the scope of judicial review does not extend past the question of whether the challenged determinations were irrational, which is a question of law (see CPLR 7803[3] …). Upon concluding that an authorized agency has reviewed a matter applying the proper legal standard and that its determination has a rational basis, a court cannot second guess that determination by granting a hearing to find additional facts or consider evidence not before the agency when it made its determination … . Accordingly, it was improper for the Appellate Division to remit for plenary judicial proceedings to address "general safety and welfare" issues, thereby contravening the applicable standard of judicial review in this context and inviting inconsistent enforcement of the Building Code." ***Matter of West 58th St. Coalition, Inc. v. City of New York*, 2021 N.Y. Slip Op. 03346, CtApp 5-27-21**

MUNICIPAL LAW, CIVIL PROCEDURE.

PURSUANT TO NEW YORK CITY CIVIL COURT ACT § 1808, COLLATERAL ESTOPPEL OR ISSUE PRECLUSION DOES NOT APPLY TO SMALL CLAIMS ACTIONS, BUT RES JUDICATA OR CLAIM PRECLUSION DOES APPLY TO SMALL CLAIMS ACTIONS.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over an extensive dissent, interpreting New York Civil Court Act section 1808, determined a judgment in a small claims action is subject to the transactional approach to claim preclusion. Plaintiff won a small claims case seeking overtime wages. Then plaintiff brought another action in federal court seeking additional damages for the failure to pay overtime wages under federal and state law. The Second Circuit asked for clarification of the meaning of section 1808, which could be interpreted to prohibit the application of both issue preclusion and claim preclusion to small claims actions. Under the statute, collateral estoppel or issue preclusion does not apply to small claims actions, but res judicata or claim preclusion does: "We now conclude that, under NY City Civ Ct Act § 1808, small claims judgments do not have collateral estoppel or issue preclusive effect (with one exception), but such judgments may have the traditional res judicata or claim preclusive effect in a subsequent action involving a claim between the same adversaries arising out of the same transaction or series of transactions at issue in a prior small claims court action. * * * … [T]he claim preclusion rule extends beyond attempts to relitigate identical claims. We have consistently applied a 'transactional analysis approach' in determining whether an earlier judgment has claim preclusive effect, such that 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy' … . * * * Collateral estoppel, or issue preclusion, is related to, but distinct from, the doctrine of res judicata. Collateral estoppel prevents 'a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . . whether or not the . . . causes of action are the same' …". ***Simmons v. Trans Express Inc.*, 2021 N.Y. Slip Op. 03484, CtApp 6-3-21**

MUNICIPAL LAW, LANDLORD-TENANT.

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

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

MUNICIPAL LAW, MEDICAID.

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

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

NEGLIGENCE, ZONE OF DANGER.

GRANDMOTHER WHO WITNESSED DEBRIS FROM THE FACADE OF A BUILDING INJURE HER TWO-YEAR-OLD GRANDDAUGHTER IS "IMMEDIATE FAMILY" WITHIN THE MEANING OF "ZONE OF DANGER" JURISPRUDENCE; GRANDMOTHER CAN THEREFORE MAINTAIN AN ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over two concurrences, reversing the Appellate Division, determined that a grandmother who witnessed the death of her grandchild is "immediate family" such that she may recover damages for emotional distress under the "zone of danger" theory (negligent infliction of emotional distress): "This case begins with the heart-breaking death of a child. Our responsibility is to determine whether plaintiff-grandparent Susan

Frierson, who was in close proximity to the decedent-grandchild at the time of the death-producing accident, may pursue a claim for bystander recovery under a 'zone of danger' theory. We have applied the settled 'zone of danger' rule to 'allow[] one who is . . . threatened with bodily harm in consequence of the defendant's negligence to recover for emotional distress' flowing only from the 'viewing [of] the death or serious physical injury of a member of [that person's] immediate family' … . Unsettled at this juncture, however, are "the outer limits" of the phrase 'immediate family' … . Once again, we are not asked to fix permanent boundaries of the 'immediate family.' Instead, our task simply is to determine whether a grandchild may come within the limits of her grandparent's 'immediate family,' as that phrase is used in zone of danger jurisprudence. We conclude that the grandchild comes within those limits. Consistent with our historically circumspect approach expanding liability for emotional damages within our zone of danger jurisprudence, our increasing legal recognition of the special status of grandparents, shifting societal norms, and common sense, we conclude that plaintiff's grandchild is 'immediate family' for the purpose of applying the zone of danger rule. On May 17, 2015, plaintiff Susan Frierson and her two-year-old granddaughter, decedent Greta Devere Greene, were in front of a building when they were suddenly struck by debris that fell from the facade of that edifice. Emergency measures taken to save Greta's life failed, and she died the next day." ***Greene v. Esplanade Venture Partnership*, 2021 N.Y. Slip Op. 01092, CtApp 2-18-21**

VEHICLE AND TRAFFIC LAW, CRIMINAL LAW.

THE CRIMINAL PROCEDURE LAW DOES NOT PROHIBIT REPROSECUTION BY A SIMPLIFIED TRAFFIC INFORMATION AFTER THE ORIGINAL IS DISMISSED FOR FAILURE TO PROVIDE A SUPPORTING DEPOSITION; THE CONTRARY RULE IN THE APPELLATE TERM FOR THE NINTH AND TENTH JUDICIAL DISTRICTS SHOULD NO LONGER BE FOLLOWED.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over an extensive dissenting opinion, determined the Appellate Term's prohibiting the filing of a new simplified traffic information after the original was dismissed for failure to provide a supporting deposition was not supported by the Criminal Procedure Law and conflicted with a prior Court of Appeals decision: "The Appellate Term for the Ninth and Tenth Judicial Districts has adopted a rule of criminal procedure under which, absent special circumstances, the People cannot reprosecute a defendant by filing a new simplified traffic information after the original simplified traffic information was dismissed for facial insufficiency under CPL 100.40 (2) for failure to provide a requested supporting deposition in a timely manner. Because that rule has no basis in the Criminal Procedure Law and contravenes our holding in People v Nuccio (78 NY2d 102 [1991]), we reverse. * * * … [A]lthough the Criminal Procedure Law requires a prosecutor to seek permission from the court to resubmit evidence and charges to a grand jury after dismissal of a defective or legally insufficient indictment, there is no similar statutory requirement for filing a new accusatory instrument after dismissal of a facially insufficient simplified information. In Nuccio, we concluded that 'the different treatment accorded indictments and informations in the statute manifests the Legislature's intention to permit reprosecution for nonfelony charges when the information is dismissed for legal insufficiency' (Nuccio, 78 NY2d at 105). … The Criminal Procedure Law does not prohibit reprosecution upon a facially sufficient accusatory instrument after such a dismissal, whether by information or by simplified traffic information with a supporting deposition. Accordingly, the People were entitled to reprosecute the traffic violation after dismissal of the first simplified traffic information." ***People v. Epakchi*, 2021 N.Y. Slip Op. 02018, CtApp 4-1-21**

VEHICLE AND TRAFFIC LAW. CIVIL PROCEDURE.

THE TRAFFIC AND PARKING VIOLATIONS BUREAU (TPVA) IS A CRIMINAL COURT WHICH CANNOT ISSUE A DEFAULT JUDGMENT WHEN A DEFENDANT FAILS TO APPEAR FOR A TRAFFIC-INFRACTION TRIAL; IN CONTRAST, A TRAFFIC VIOLATIONS BUREAU (TVB) IS AN ADMINISTRATIVE AGENCY, NOT A CRIMINAL COURT, AND MAY ISSUE A DEFAULT JUDGMENT.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined the Suffolk County Traffic and Parking Violations Bureau (TPVA) is a criminal court which cannot issue a default judgment when a defendant who has pled not guilty does not show up for a traffic-infraction trial. On the other hand, a Traffic Violations Bureau (TVA) is not a criminal court and may issue a default judgment: "Defendants in these cases were prosecuted in district court … . Each defendant timely appeared before the TPVA, pleaded not guilty, and requested a trial. They were each given a document indicating the date and time of the trial with a warning of the repercussions for failure to appear: 'THE COURT MAY ISSUE A WARRANT FOR YOUR ARREST OR PROCEED IN YOUR ABSENCE AND YOU WILL BE LIABLE FOR ANY SENTENCE AND/OR FEES IMPOSED, INCLUDING INCARCERATION, AND other penalties permitted by law.' Despite the warning notice, defendants failed to timely appear on their respective trial dates. No attempt was made by the People to try defendants in absentia. Rather, a judicial hearing officer of the TPVA rendered default judgments against them and imposed fines. … The issue before us is whether a TPVA judicial hearing officer is authorized under the Vehicle and Traffic Law to render a default judgment against a defendant charged with a traffic infraction who first enters a timely not guilty plea but then fails to appear for trial. We answer that question in the negative. … Unlike TPVAs, … the TVB is not a criminal court … . It is … an administrative tribunal where, in cities having a population of one million or more, traffic infractions may be disposed of

in an administrative hearing held before a hearing officer appointed by the Commissioner of Motor Vehicles … . In contrast to trials conducted before TPVAs, hearings before the TVB are not governed by the CPL …". ***People v. Iverson*, 2021 N.Y. Slip Op. 03347, CtApp 5-27-21**

WORKERS' COMPENSATION.

THE 2009 AMENDMENTS TO THE WORKERS' COMPENSATION LAW ALLOWED LUMP SUM PAYMENTS OF SCHEDULE LOSS OF USE (SLU) AWARDS; CLAIMANT DIED BEFORE THE SLU AWARD WAS MADE; CLAIMANT'S ESTATE IS NOT ENTITLED TO THE LUMP SUM AWARD.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a concurring opinion, determined that the 2009 amendments allowing lump sum schedule loss of use (SLU) awards did not entitle claimant's estate to the lump sum award. The estate was entitled only to the portion of the award that would have been due to the claimant for the period prior to his death: "In December 2014, decedent claimant Norman Youngjohn sustained injuries when he slipped on ice and fell in a parking lot at work while employed by Berry Plastics Corporation. After decedent sought workers' compensation benefits, a claim was established for injuries to his right shoulder and left elbow, and he was awarded temporary benefits. In September 2016, decedent notified the Workers' Compensation Board that his injuries had become permanent, and the workers' compensation insurance carrier (the Carrier) subsequently notified the Board that decedent's injuries were amenable to a schedule loss of use (SLU) award (see generally Workers' Compensation Law § 15 [3]). However, in March 2017, before resolution of his claim for permanent partial disability benefits, decedent suffered a fatal heart attack unassociated with his work-related injuries. * * * The legislature's 2009 amendments to Workers' Compensation Law §§ 15 (3) (u) and 25 (1) (b)—which provide that SLU awards may be 'payable' in a lump sum upon request of the injured employee … —changed the allowable methods of payment for SLU awards. However, the Estate's contention that these amendments implicitly provide a claimant's estate a new entitlement to the value of an SLU award upon a claimant's death, or otherwise direct that an SLU award 'accrues' at that time for purposes of an estate's recovery—issues that are distinct from the permissible methods of payment for such awards …—cannot be reconciled with the fact that the legislature did not amend Workers' Compensation Law § 15 (4) (d) when it authorized lump sum payments. An estate's entitlement to an SLU award upon a claimant's death remains governed by Workers' Compensation Law § 15 (4) (d), which was left untouched by the 2009 amendments." ***Matter of Estate of Youngjohn v. Berry Plastics Corp.*, 2021 N.Y. Slip Op. 02017, CtApp 4-1-21**

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