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COURT OF APPEALS

CIVIL PROCEDURE, MEDICAL MALPRACTICE, NEGLIGENCE.

ALTHOUGH DEFENDANT DOCTOR PRACTICED IN THE BRONX FOR PART OF EACH WEEK, THE PRINCIPAL OFFICE OF HIS BUSINESS AND HIS RESIDENCE WERE IN WESTCHESTER COUNTY, WHERE PLAINTIFF WAS TREATED; SUPREME COURT PROPERLY GRANTED DEFENDANTS' MOTION TO CHANGE THE VENUE FROM BRONX TO WESTCHESTER COUNTY.

The Court of Appeals, reversing the Appellate Division, over an extensive two-judge dissent, determined Supreme Court had properly granted defendants' motion for a change of venue from Bronx County to Westchester County in this medical malpractice action. The defendant doctor (Goldstein) was described by plaintiff as an "individually-owned business" with a "principal office" in Bronx County. Dr. Goldstein treats some patients in Bronx County. But plaintiff was treated by Dr. Goldstein in Westchester County, where defendant business (Westmed) is located and where Dr. Goldstein resides: "Under CPLR 503(d), '[a] partnership or an individually-owned business shall be deemed a resident of any county in which it has its principal office, as well as the county in which the partner or individual owner suing or being sued actually resides.' * * * While ... registration documents confirmed ... that Dr. Goldstein also worked in the Bronx, the venue statute does not deem an individually-owned business a resident of every county where it has an office or transacts business. To conclude otherwise would read the phrase 'principal office' out of the statute." ***Lividini v. Goldstein*, 2021 N.Y. Slip Op. 05618, Ct-App 10-14-21**

CRIMINAL LAW, APPEALS, ATTORNEYS, JUDGES.

DEFENDANT'S WAIVER OF APPEAL WAS UNENFORCEABLE; "DIFFICULTIES" BETWEEN DEFENDANT AND TWO ATTORNEYS ASSIGNED TO REPRESENT HIM DID NOT AMOUNT TO DEFENDANT'S FORFEITURE OF HIS RIGHT TO COUNSEL, AS THE TRIAL JUDGE HAD RULED.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing the Appellate Division, determined defendant's waiver of appeal was not valid and the trial judge had violated defendant's right to counsel by essentially forcing defendant to represent himself after several attorneys had withdrawn. Of all the attorneys who had withdrawn, only two cited difficulties with the defendant. The cited "difficulties" were defendant's "raised voice" and "lack of cooperation." There were no allegations of threats or abusive conduct. The other attorneys had withdrawn citing a conflict of interest, illness and leaving the state: "[D]efendant's waiver in the case before us did not contain 'clarifying language . . . that appellate review remained available for certain issues' ... . Indeed, the written appeal waiver and the colloquy utterly failed to indicate that some rights to appeal would survive the waiver. Moreover, the written waiver implied that defendant was completely waiving his right 'to prosecute [an] appeal as a poor person, and to have an attorney assigned' if indigent. Defendant's appeal waiver thus mischaracterized the nature of the waiver of appeal by suggesting that the waiver included an absolute bar to the taking of a first-tier direct appeal and the loss of attendant rights to counsel and poor person relief ... . * * * There may be circumstances where a defendant who refuses to cooperate with successive assigned attorneys is ultimately deemed to have forfeited the right to assigned counsel, although such an individual must be afforded the opportunity to retain counsel. ... There is record evidence of only two attorneys who asked to be relieved due to difficulties with defendant. ... County Court's own orders relieving Miosek, Taylor, Carlson, and Scott cited conflict of interest, illness, or departure from the state, not attorney-client animosity. Such factors were beyond defendant's control." ***People v. Shanks*, 2021 N.Y. Slip Op. 05450, CtApp 10-12-21**

CRIMINAL LAW, APPEALS, EVIDENCE.

THE TRAFFIC STOP WAS PRETEXTUAL, OSTENSIBLY BASED ON A BURNED-OUT LICENSE-PLATE LIGHT; BUT THERE WAS SUPPORT IN THE RECORD FOR THE CANINE SNIFF BASED UPON A FOUNDED SUSPICION OF CRIMINAL ACTIVITY; THEREFORE, THE MATTER WAS BEYOND REVIEW BY THE COURT OF APPEALS.

The Court of Appeals, over an extensive three-judge dissent, determined there was sufficient evidence in the record to support the finding that the canine sniff was justified by a founded suspicion that criminal activity was afoot. The traffic stop was pretextual, ostensibly based on a burned-out license-plate light: "In the course of a stop predicated on the observation of traffic violations ... defendant consented to a search of the backseat of his vehicle. Instead of conducting that search, the

police officer walked his canine around the exterior of the vehicle and, in mere seconds, the canine alerted to the trunk. Defendant argues that law enforcement lacked founded suspicion that criminal activity was afoot and, thus, unlawfully conducted the exterior canine sniff search. A canine sniff search of a vehicle's exterior is lawful if police possess a founded suspicion that criminal activity is afoot ... . Determinations regarding the existence of a founded suspicion of criminality involve mixed questions of law and fact ... . Therefore, our review is 'limited to whether there is evidence in the record supporting the lower courts' determinations' ... . Based on the evidence presented at the suppression hearing, including the officers' observations prior to and during the stop, there is record support for the determination that a founded suspicion of criminal activity existed here and, thus, the issue is beyond further review ... . **From the dissent:** Mr. Blandford's case illustrates a troubling aspect of police behavior: law enforcement can pursue someone they suspect of criminal behavior without a founded suspicion of criminality, wait for the right moment to stop that person for a minor traffic infraction, and then serve up a stew of flavorless facts to transform a stop in which they have no intrinsic interest into the search they sought before they had any evidentiary basis to suspect wrongdoing. Although this case illustrates that problem, its resolution should be much simpler than resolution of the systemic problem: here, the officers did not possess information sufficient to justify the canine search." ***People v. Blandford*, 2021 N.Y. Slip Op. 05619, CtApp 10-14-21**

CRIMINAL LAW, EVIDENCE.

DEFENDANT WAS A DINNER GUEST IN HIS FRIEND'S APARTMENT WHEN THE POLICE RAIDED IT; OBSERVATIONS MADE DURING THE RAID LED TO A SEARCH WARRANT FOR THE APARTMENT; DEFENDANT ALLEGED HE RECEIVED MAIL AT THE APARTMENT; THE MAJORITY CONCLUDED DEFENDANT'S MOTION TO SUPPRESS DID NOT SUFFICIENTLY ALLEGE STANDING TO CONTEST THE SEARCH AND THE MOTION WAS PROPERLY DENIED WITHOUT A HEARING.

The Court of Appeals, over an extensive, two-judge dissent, determined defendant's suppression motion was properly denied without holding a hearing. The majority concluded defendant did not sufficiently allege standing to contest to search. Defendant was a dinner guest in his friend's apartment at the time it was raided by the police. Evidence observed by the police during the raid was used to procure the search warrant: "CPL 710.60 (1) requires that a motion for suppression of physical evidence must state the ground or grounds of the motion and must contain sworn allegations of fact. CPL 710.60 (3) permits summary denial of a suppression motion where the motion papers do not provide adequate sworn allegations of fact ... . The suppression court did not abuse its discretion in denying, without an evidentiary hearing, that branch of defendant's motion which was to suppress the physical evidence recovered upon the search of the apartment pursuant to a search warrant that had been executed after his arrest, because the allegations in the motion papers were insufficient to warrant a hearing. ... In denying defendant's motion, the suppression court stated that 'defendant has failed to sufficiently allege standing to challenge the search of the subject premises,' which is the gravamen of our holding today. Defendant's remaining arguments addressed by the dissent, including the assertion that dinner guests have an expectation of privacy in the home of their hosts, are academic. **From the dissent:** Mr. Ibarguen's [defendant's] motion papers allege that he was a lawful invitee whose mail was delivered to that apartment and Mr. Ibarguen testified to having been at dinner at his friends' house 'all night.' Those facts support his claim that as a social guest, he held a legitimate expectation of privacy in at least some part of the searched apartment enabling him to challenge the legality of the warrantless search and suppress evidence recovered therein." ***People v. Ibarguen*, 2021 N.Y. Slip Op. 05617, CtApp 10-14-21**

CRIMINAL LAW, MUNICIPAL LAW, CONSTITUTIONAL LAW, NEGLIGENCE, VEHICLE AND TRAFFIC LAW.

NYC'S RIGHT OF WAY LAW CRIMINALIZES ORDINARY NEGLIGENCE WHEN A VEHICLE STRIKES A PEDESTRIAN OR A BICYCLIST WHO HAS THE RIGHT OF WAY; THE LAW IS NOT VOID FOR VAGUENESS, PROPERLY IMPOSES ORDINARY NEGLIGENCE AS THE MENS REA, AND IS NOT PREEMPTED BY OTHER LAWS.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a concurring opinion, determined New York City's "Right of Way Law," which criminalizes ordinary negligence when a vehicle strikes a pedestrian or bicyclist who has the right of way, is constitutional and is not preempted by other laws. Both defendants were convicted under the Right of Way Law (NYC Administrative Code 19-190), a misdemeanor. The defendants unsuccessfully argued (1) the law is void for vagueness; (2) ordinary negligence cannot constitute the mens rea for a criminal act; and (3) the law is preempted by the Penal Law and the Vehicle and Traffic Law: "Article 15 of the Penal Law lists and defines four 'culpable mental states'—'intentionally', 'knowingly,' 'recklessly,' and 'criminal negligence' ... . However, strict liability is also contemplated by article 15: '[t]he minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which [such person] is physically capable of performing,' and, '[i]f such conduct is all that is required for commission of a particular offense, . . . such offense is one of 'strict liability' ... . * * * The provisions of the Penal Law 'govern the construction of and punishment for any offense defined outside' of the Penal Law, '[u]nless otherwise expressly provided, or unless the context otherwise requires' (Penal Law § 5.05 [2]). The two key provisions at issue, Penal Law § 15.00 (Culpability; definitions of terms) and § 15.05 (Culpability; definitions of culpable mental states), expressly provide otherwise by making clear that they are 'applicable to this chapter' only. Further contradicting defen-

dants' interpretation of article 15 is the legislature's own use of an ordinary negligence mens rea for offenses defined outside the Penal Law. For example ... Vehicle and Traffic Law § 1146 and Agriculture and Markets Law § 370—which were enacted after the relevant provisions in article 15 of the Penal Law—both employ an ordinary negligence standard for imposing criminal liability." ***People v. Torres*, 2021 N.Y. Slip Op. 05448, CtApp 10-12-21**

DEBTOR-CREDITOR, USURY, CONTRACT LAW, SECURITIES.

A LOAN AGREEMENT WHICH ALLOWS THE LENDER TO CONVERT THE BALANCE TO SHARES OF STOCK AT A FIXED DISCOUNT CAN VIOLATE THE USURY STATUTE, WHICH WOULD THEREBY RENDER THE AGREEMENT VOID AB INITIO.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a partial dissent. answered two questions posed by the Second Circuit in the affirmative. "1. Whether a stock conversion option that permits a lender, in its sole discretion, to convert any outstanding balance to shares of stock at a fixed discount should be treated as interest for the purpose of determining whether the transaction violates N.Y. Penal Law § 190.40, the criminal usury law. 2. If the interest charged on a loan is determined to be criminally usurious under N.Y. Penal Law § 190.40, whether the contract is void ab initio pursuant to N.Y. Gen. Oblig. Law § 5-511:" "GeneSYS ID, Inc. ('GeneSYS') is a publicly held corporation that produces various types of medical supplies. Adar Bays, LLC is a limited liability company based in Florida. On May 24, 2016, Adar Bays loaned GeneSYS $35,000. In exchange, GeneSYS gave Adar Bays a note with eight percent interest that would mature in one year. The note included an option for Adar Bays to convert some or all of the debt into shares of GeneSYS stock at a discount of 35% from the lowest trading price for GeneSYS stock over the 20 days prior to the date on which Adar Bays requested a conversion. Adar Bays could exercise its option starting 180 days after the note was issued and could do so all at once or in separate partial conversions. ... Six months and four days after the note was issued ... Adar Bays requested conversion of $5,000 of debt into 439,560 shares of stock. GeneSYS refused ... seeking to renegotiate the loan. ... GeneSYS was trading for $0.024 per share, the conversion price was $0.011. Adar Bays ... sued GeneSYS in the ... Southern District of New York for breach of contract. GeneSYS filed a motion to dismiss arguing the contract was void because the loan's rate of interest, including both the stated interest and conversion option, exceeded the criminal usury rate of 25%." ***Adar Bays, LLC v. GeneSYS ID, Inc.*, 2021 N.Y. Slip Op. 05616 CtApp 10-14-21**

EMPLOYMENT LAW, CORRECTION LAW, HUMAN RIGHTS LAW.

PLAINTIFF STATED A CAUSE OF ACTION UNDER THE CORRECTION LAW BY ALLEGING HIS APPLICATION FOR REEMPLOYMENT AFTER COMPLETION OF HIS SENTENCE (60 DAYS INCARCERATION) WAS DENIED SOLELY BECAUSE OF HIS PRIOR CONVICTION.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a concurring opinion, reversing the Appellate Division, determined plaintiff's complaint stated a cause of action for discrimination under the Correction Law, which prohibits discrimination based upon criminal convictions in the context of applications for employment. Plaintiff had kept his employer informed of a criminal charge against him which had not yet gone to trial and was told he would not lose his job if he was sentenced to incarceration. Plaintiff was sentenced to 60 days and his employment was terminated: "The statutes do not categorically preclude consideration of a prospective employee's criminal history and expressly permit the denial of employment or licensing if there is (1) a 'direct relationship' between the previous criminal offense and the specific employment or license, or (2) if granting the request for employment or a license 'would involve an unreasonable risk' to the property, safety, or welfare 'of specific individuals or the general public' (Correction Law § 752). Thus, under the statutory scheme, reliance on a previous criminal offense when denying an application for employment or a license is not necessarily unlawful ... . Whether an exception applies depends on factors identified in Correction Law § 753 such as, among other things, the relationship between the specific employment duties and the criminal offense as well as the amount of time that has elapsed since the offense occurred ... . Under these provisions, when filling positions, public and private employers must treat job applicants with prior convictions equitably 'while also protecting society's interest in assuring performance [of job duties] by reliable and trustworthy persons' ... . * * * ... [P]laintiff alleged that he was terminated for job abandonment soon after he was incarcerated. Applying our liberal standard, the complaint ... may be read to allege that, after he completed his sentence, he applied for reemployment ... and [defendant] denied the application solely because of the prior conviction." ***Sassi v. Mobile Life Support Servs., Inc.*, 2021 N.Y. Slip Op. 05449, CtApp 10-12-21**

FIRST DEPARTMENT

CONTRACT LAW.

DEFENDANT BREACHED THE CONTRACT BY FAILING TO COMPLY WITH THE NOTICE-TO-CURE PROVISION BEFORE TERMINATING IT; THE REASON FOR TERMINATION, FAULTY WORK, WAS NOT EXEMPT FROM THE NOTICE-TO-CURE REQUIREMENT.

The First Department, in a full-fledged opinion by Justice Acosta, determined defendant breached the contract by failing to comply with the notice-to-cure provision before terminating it. Defendant general contractor (Borough) subcontracted with plaintiff to perform steel work at a residential development project. The subcontract required plaintiff to supply and install steel for excavation support and the frame of the building, as well as provide a full-time safety manager and procure permits for a crane: "[P]laintiff alleges that defendant failed to comply with the notice-to-cure provision before terminating the contract, gives us the opportunity to address the strict nature of these types of provisions and the very rare instances when they can be ignored. Defendant general contractor terminated the steel work subcontract it had entered into with plaintiff based on what was essentially a claim that plaintiff provided faulty work. ... [D]efendant was obligated to give plaintiff the 10-day notice to cure provided in the contract ... [.] [F]aulty work does not fall within the very limited and rare circumstances when the provision can be dispensed with, namely, where the other party expressly repudiates the contract or abandons performance or where the breach is impossible to cure. * * * Borough sent plaintiff a written 'notice of termination' stating that the subcontract would be terminated in three days from the date of the letter and that plaintiff was in default by 'failing to provide sufficient manpower [] [and] failing to meet the schedule, safety regulations and qualified workmanship for the Project.' The letter further stated that plaintiff 'failed to respond or delayed response to requests for crane usage' and 'has delayed the performance and completion of the work.' * * * Nothing in the record supports the conclusion that the plaintiff repudiated or abandoned the contract or could not have commenced and continued correction of the steel frame and other alleged safety violations in the 10-day period following receipt of notice to cure. ... [T]he alleged default, faulty steelwork, constitutes nothing more than defective performance, which is 'the very situation to which the cure provision was intended to apply' ...". ***East Empire Constr. Inc. v. Borough Constr. Group LLC*, 2021 N.Y. Slip Op. 05455, First Dept 10-12-21**

CONVERSION.

A CONVERSION CAUSE OF ACTION FOR ITEMS LAWFULLY IN DEFENDANT'S POSSESSION WILL NOT LIE UNLESS PLAINTIFF FIRST DEMANDED THEIR RETURN.

The First Department, reversing (modifying) Supreme Court, determined some of plaintiff's conversion allegations did not state a cause of action. Apparently, plaintiff had created a website for defendant which included photographs, design, and coding. Because the website, photographs, design, and coding were lawfully in the possession of defendant, and plaintiff did not demand their return, conversion will not lie. Also, a conversion action cannot be based upon damages for breach of contract. However unpaid salary may be the subject of a conversion action: "[D]efendants had lawful possession of the website that plaintiff had created for defendant The Front Row, as well as the photographs, design, and coding used on the website. Since plaintiff did not allege that she demanded return of those items, she cannot sustain her claim for conversion of the website, the design and coding for the website, and the photographs ... . Plaintiff also cannot sustain the conversion claim for a $16,000 fee purportedly owed to her, since 'an action for conversion cannot be validly maintained where damages are merely being sought for breach of contract' ... . Nonetheless, plaintiff has standing to assert a claim for conversion of an $8,000 monthly salary payment, because '[c]onversion is concerned with possession, not with title' ...". ***Liegey v. Gadeh*, 2021 N.Y. Slip Op. 05461, First Dept 10-12-21**

CRIMINAL LAW, EVIDENCE.

THE EVIDENCE DEFENDANT SHARED THE CO-DEFENDANT'S INTENT TO STAB THE VICTIM WAS LEGALLY INSUFFICIENT.

The First Department, reversing defendant's assault convictions, determined the evidence defendant shared the co-defendant's intent to stab the victim was insufficient: "Defendant's convictions of attempted assault in the first degree and assault in the second degree, charged under an acting in concert theory, were not supported by legally sufficient evidence ... These charges required proof that when the codefendant stabbed the victim, defendant shared the codefendant's intent to do so; defendant was not convicted of any assault crimes where his liability was based on his intent to commit robbery. During a robbery attempt, the codefendant stabbed the victim from behind several times with a small knife. However, there was no evidence that defendant, who was standing in front of the victim and restraining him, knew that the codefendant had a knife or was planning to use it. '[T]he use of the knife was not open and obvious' ... , and defendant released the victim within seconds of the stabbing. Under these circumstances, the record does not support a conclusion beyond a reasonable doubt that defendant was aware of the use of the knife but continued to participate in the assault ... . Accordingly, the ev-

idence did not establish defendant's accessorial liability (see Penal Law § 20.00) for these crimes." ***People v. Grosso*, 2021 N.Y. Slip Op. 05640, First Dept 10-14-21**

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW, EVIDENCE.

EVEN A UBIQUITOUS "DE MINIMIS" VIOLATION OF THE VEHICLE AND TRAFFIC LAW IS VALID JUSTIFICATION FOR A PRETEXTUAL TRAFFIC STOP; HERE THE LICENSE PLATE FRAME OBSCURED "GARDEN STATE" ON THE NEW JERSEY LICENSE PLATE.

The First Department, reversing Supreme Court, determined the pretextual traffic stop was valid and defendant's suppression motion should not have been granted on that ground. Apparently, the license-plate frame obscured New Jersey's nickname "Garden State" on the plate, which constitutes a violation of Vehicle and Traffic Law § 402(1)(b): "The trial court's concerns of permitting police officers to engage in pretextual traffic stops based on observations of trivial or technical traffic violations, which may lead to impermissible profiling, are noteworthy and merit consideration. However, once the court found that the officers reasonably believed that a traffic violation had been committed, this provided the required probable cause to stop the car ... , regardless of whether the violation could be deemed de minimis, ubiquitous, unintentional, or caused by a third party such as a car dealer ... . 'Probable cause to believe that the Vehicle and Traffic Law has been violated provides an objectively reasonable basis for the police to stop a vehicle and . . . there is no exception for infractions that are subjectively characterized as 'de minimis' ' ...". ***People v. Dula*, 2021 N.Y. Slip Op. 05465, First Dept 10-12-21**

EMPLOYMENT LAW, HUMAN RIGHTS LAW, CIVIL PROCEDURE.

SUPREME COURT DID NOT HAVE SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S HOSTILE WORK ENVIRONMENT CLAIMS; THE CONDUCT OCCURRED WHEN PLAINTIFF WAS NOT PHYSICALLY IN NEW YORK AND DID NOT HAVE ANY IMPACT ON THE TERMS, CONDITIONS OR EXTENT OF HER EMPLOYMENT WITHIN NEW YORK; THE FACTS WERE NOT DESCRIBED.

The First Department, reversing Supreme Court, determined the court did not have subject matter jurisdiction over the hostile work environment claims under the Human Rights Law. The facts were not explained. The conduct occurred when plaintiff was "physically situated outside of New York" and did not have any impact on the "terms, conditions or extent of her employment" within New York: "Supreme Court lacks subject matter jurisdiction over the Human Rights Law claims ... . Defendants' alleged conduct occurred while plaintiff was 'physically situated outside of New York' ... , and did not have 'any impact on the terms, conditions or extent of her employment . . . within the boundaries of New York' ... . 'The fact that the alleged discriminatory acts . . . occurred in New York is insufficient to plead impact in New York' ...". ***Jarusauskaite v. Almod Diamonds, Ltd.*, 2021 N.Y. Slip Op. 05460, First Dept 10-12-21**

LANDLORD-TENANT, CONTRACT LAW.

WHERE (1) THE DISPUTE IS ABOUT WHETHER THE TENANT IS OBLIGATED TO REMOVE PROPERTY FROM THE PREMISES, (2) THE TENANT TIMELY SURRENDERS THE PREMISES, AND (3), THE LEASE IS SILENT ABOUT THE PAYMENT OF RENT AFTER THE TERM OF THE LEASE, USE AND OCCUPANCY DAMAGES ARE NOT AVAILABLE TO THE LANDLORD.

The First Department, reversing (modifying) Supreme Court, determined "use and occupancy" is not an available measure of damages where the tenant timely surrendered the premises and there was nothing in the lease about additional rent after the term of the lease. The dispute here was whether the lease obligated the tenant to remove property from the premises: "[U]se and occupancy is not an available measure of damages on plaintiff landlord's claims. '[T]he measure of damages for a tenant's breach of a covenant to surrender leased premises in a stipulated condition is limited to the reasonable costs of restoring the premises to that condition' ... , absent a stipulation to such damages in the lease itself. Here, nothing in the relevant lease provisions provided for additional rent beyond the term of the lease as part of the damages for restoring the premises to the agreed upon condition. Nor is there a dispute that defendant tenant timely vacated the premises, and surrendered same to plaintiff landlord and that there were no rent arrears outstanding at the time of surrender. Thus, defendants would not be liable for use and occupancy, even if it were ultimately determined that tenant failed to comply with any removal obligations." ***44-45 Broadway Leasing Co., LLC v. 45th St. Hospitality Partners LLC*, 2021 N.Y. Slip Op. 05452, First Dept 10-12-21**

PERSONAL INJURY, EVIDENCE.

DEFENDANT ALLEGED HE DID NOT SEE THE PEDESTRIAN HE STRUCK UNTIL AFTER THE CONTACT OCCURRED; DEFENDANT'S EMERGENCY-DOCTRINE DEFENSE SHOULD HAVE BEEN STRUCK.

The First Department, reversing (modifying Supreme Court) determined defendant's allegations did not support the "emergency" defense in this vehicle-pedestrian accident case: "Defendant maintains that he did not see plaintiff before she was struck by his vehicle and that she was not in the crosswalk when he began turning onto the avenue; it was only after plaintiff was struck that defendant observed her in the crosswalk. 'Without having perceived or reacted to any emergency,

the defendant may not rely on the emergency doctrine to excuse [his] conduct' ...". ***De Diaz v. Klausner*, 2021 N.Y. Slip Op. 05624, First Dept 10-14-21**

PRODUCTS LIABILITY, PERSONAL INJURY, EVIDENCE.

THIS PRODUCTS LIABILITY (DEFECTIVE DESIGN) ACTION AROSE FROM THE ROLLOVER OF A VEHICLE MADE BY DEFENDANT FORD; PLAINTIFF'S EXPERT'S AFFIDAVIT ALLEGING THE VEHICLE WAS UNSAFE AND PRONE TO ROLLOVERS WAS CONCLUSORY AND THEREFORE DID NOT RAISE A QUESTION OF FACT.

The First Department, reversing Supreme Court, determined defendant's expert's conclusory affidavit alleging defendant's vehicle was unsafe did not raise a question of fact in this products liability action stemming from the rollover of a vehicle made by defendant (Ford): "The defective design claim should have been dismissed because plaintiff failed to rebut defendant's prima facie showing that the Ford van was not negligently designed. 'Where a qualified expert opines that a particular product is defective or dangerous, describes why it is dangerous, explains how it can be made safer, and concludes that it is feasible to do so, it is usually for the jury to make the required risk-utility analysis' whether the product was reasonably safe ... . However, an expert cannot raise an issue of fact to defeat a motion for summary judgment when the opinion consists of only bare conclusory allegations of alleged defects or industry wide knowledge ... . Here, plaintiffs' expert's assertions that the vehicle at issue was unsafe and prone to rollovers was unsupported by any data or calculations concerning the testing he purportedly performed, testing he described in the most conclusory of terms and general of statements ...". ***Richards v. Ford Motor Co.*, 2021 N.Y. Slip Op. 05469, First Dept 10-12-21**

SECOND DEPARTMENT

CRIMINAL LAW, EVIDENCE.

IN HIS MOTION TO WITHDRAW HIS PLEA TO CRIMINAL POSSESSION OF WEAPONS, DEFENDANT CLAIMED HE DID NOT KNOW THE WEAPONS, WHICH BELONGED TO SOMEONE ELSE, WERE STORED AT HIS MOTHER'S HOUSE, WHERE HE DID NOT RESIDE; THIS CLAIM OF INNOCENCE (POSSESSION WAS NOT "VOLUNTARY") WAS SUFFICIENTLY SUPPORTED TO WARRANT A HEARING ON THE MOTION TO WITHDRAW THE PLEA.

The Second Department, reversing Supreme Court, determined defendant was entitled to a hearing on his motion to withdraw his guilty plea. Defendant was charged with possession of weapons found in his mother's house. In his motion to withdraw his plea he explained he did not reside in his mother's house and the weapons, which belonged to someone else, were stored in the house without his knowledge or consent: "The defendant contended, in essence, that he did not voluntarily possess the weapons at issue. * * * ... [T]he defendant's claim of innocence was 'supported' by evidentiary submissions ... , which 'raised the possibility of a . . . defense' ... . The defendant's submissions provided 'tenable support' ... for his assertion that he did not voluntarily possess the weapons at issue because he was not 'aware of his physical possession or control thereof for a sufficient period to have been able to terminate it' (Penal Law § 15.00[2]). * * * Regardless of ... the strength of the People's case, the defendant was not required to affirmatively demonstrate his actual innocence in this procedural posture ... . It is clear that 'an arguable claim of innocence' ... may alone provide a basis for granting a presentence motion to withdraw a plea, even where the evidence of innocence is 'far from conclusive' ...". ***People v. Amos*, 2021 N.Y. Slip Op. 05577, Second Dept 10-13-21**

CRIMINAL LAW, EVIDENCE.

THE POLICE OFFICERS DID NOT HAVE AN OBJECTIVE, CREDIBLE REASON TO APPROACH DEFENDANT AND REQUEST INFORMATION; THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, over a two-justice dissent, determined defendant's motion to suppress should have been granted. The police officers' observations of defendant did not justify approaching him and asking whether a bag on the counter in a store belonged to him. There was a gun in the bag: "At the suppression hearing, one of the officers testified that as his vehicle was approaching a red traffic signal at the intersection, the defendant 'tensed up' or 'stiffened up' and, after making eye contact with the officer through the front windshield, the defendant's 'eyes widened' and the defendant walked into the corner store. The officer continued to observe the defendant through the store's window, but did not have a full view of him. The officer saw the defendant do 'a little pacing back and forth' and then come back outside. When the traffic signal turned green, the officer and his partner pulled over and exited their vehicle. * * * ... [T]he officer who testified at the suppression hearing failed to articulate any reason for approaching the defendant, other than that he appeared nervous and the officer wanted to 'see why he went into the store.' This, standing alone, did not provide an objective, credible reason for the officers to approach the defendant and request information ... . [E]ven assuming, arguendo, that the arresting officers had an objective, credible reason for approaching the defendant, they had no basis for immediately engaging the defendant in a pointed inquiry regarding the ownership and contents of the bag inside the store ...". ***People v. Brown*, 2021 N.Y. Slip Op. 05579, Second Dept 10-13-21**

CRIMINAL LAW, EVIDENCE.

THE PEOPLE DID NOT DEMONSTRATE DEFENDANT WAS RESPONSIBLE FOR INTIMIDATING WITNESSES SUCH THAT OUT-OF-COURT STATEMENTS BY THOSE WITNESSES WERE ADMISSIBLE; THE PEOPLE SHOULD NOT HAVE BEEN ALLOWED TO EXERCISE PEREMPTORY CHALLENGES TO JURORS ALREADY ACCEPTED BY THE DEFENSE.

The Second Department, reversing defendant's conviction and ordering a new trial, determined (1) the People did not demonstrate the defendant was responsible for the intimidation of witnesses by others; and (2), the People should not have been allowed to exercise peremptory challenges to jurors after those jurors had been accepted by the defense: " 'The purpose of a Sirois hearing is to determine whether the defendant has procured a witness's absence or unavailability through his own misconduct, and thereby forfeited any hearsay or Confrontation Clause objections to admitting the witness's out-of-court statements' ... . The People must 'present legally sufficient evidence of circumstances and events from which a court may properly infer that the defendant, or those at defendant's direction or acting with defendant's knowing acquiescence, threatened the witness' ... . 'At a Sirois hearing, the People bear the burden of establishing, by clear and convincing evidence, that the defendant has procured the witness's absence or unavailability' ... . [T]he People's evidence did not establish that the defendant controlled the individuals who threatened the witness or that the defendant influenced or persuaded any individual to threaten the witness or his family ... . The Supreme Court committed reversible error when it permitted the People to exercise peremptory challenges to prospective jurors after the defendant and his codefendant exercised peremptory challenges to that same panel of prospective jurors ... . This procedure violated 'the one persistently protected and enunciated rule of jury selection—that the People make peremptory challenges first, and that they never be permitted to go back and challenge a juror accepted by the defense' ...". ***People v. Burgess*, 2021 N.Y. Slip Op. 05580, Second Dept 10-13-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF ALLEGED HE WAS STRUCK BY A BRICK WHICH RICOCHETED OUT OF A CHUTE USED FOR DUMPING DEBRIS FROM THE UPPER FLOORS OF A BUILDING UNDERGOING DEMOLITION; THE CONTRACTOR'S MOTION FOR SUMMARY JUDGMENT ON LABOR LAW §§ 240(1) AND 241(6) CAUSES OF ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing (modifying) Supreme Court, determined defendant general contractor's motion for summary judgment on the Labor Law §§ 240(1) and 241(6) causes of action should not have been granted. During the demolition of a building plaintiff (allegedly) was struck by a brick which ricocheted out of a chute used for dumping debris from the upper floors: "The debris that was being removed from the building was thrown down the elevator chute, and the plaintiff's injuries were caused by materials which descended from a higher floor and ricocheted out of the chute into the area where the plaintiff was working. The protections of Labor Law § 240(1) are implicated because the plaintiff's injuries were caused either by the inadequacy of the chute in protecting him from the elevation-related risk resulting from the disposal of the debris down that chute, or the failure to employ other safety devices for the removal of the debris, which might have provided the necessary protection ... . In support of that branch of its motion which was for summary judgment dismissing the Labor Law § 241(6) cause of action, [the contractor] failed to demonstrate, prima facie, that 12 NYCRR 23-1.7(a)(1), 23-1.20(a), 23-2.5(a), and 23-3.3(e) did not apply to the facts of this case, or that the alleged violations of these provisions were not a proximate cause of the plaintiff's alleged injuries ...". ***Rivas-Pichardo v. 292 Fifth Ave. Holdings, LLC*, 2021 N.Y. Slip Op. 05600, Second Dept 10-13-21**

PERSONAL INJURY, CONTRACT LAW, EVIDENCE.

PLAINTIFF WAS STRUCK BY A PIECE OF A BUILDING FACADE WHICH CAME LOOSE; PLAINTIFF SUED TWO DEFENDANTS WHO HAD DONE WORK IN THE ROADWAY NEAR THE BUILDING, ALLEGING THE EXCAVATION LOOSENED THE FACADE MATERIAL; DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' motions for summary judgment should not have been granted. Plaintiff was struck by a piece of the facade of a brownstone which came loose. Plaintiff sued Keyspan Energy Delivery and Harris Water Main and Sewer Contractors alleging excavation work done by the defendants near the building loosened the facade: "Keyspan established its prima facie entitlement to judgment as a matter of law ... by demonstrating, through the submission of ... an affidavit of a professional engineer, that its work in the roadway did not create the alleged dangerous condition ... . However, in opposition, the plaintiffs raised triable issues of fact by submitting ... an affidavit from a professional engineer that rebutted the opinion of Keyspan's expert. … Harris contracted with the building owners to complete work on a broken pipe connecting the building to the sewer line in the middle of the street. A contractual obligation, standing alone, generally will not give rise to tort liability in favor of a third party (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140). '[A]n exception to this rule applies where the contracting party, in failing to exercise reasonable care in the performance of contractual duties, launches a force or instrument of harm, such as by creating or exacerbating a dangerous condition' ... . The plaintiffs alleged that the vibrations from Harris's work in the roadway created or exacerbated the alleged dangerous condition on the facade of the subject building. Harris's submissions, which did not include an expert

affidavit from a professional engineer, were insufficient to establish, prima facie, that its work in the roadway did not create or exacerbate the dangerous condition ...". ***Payne v. Murray*, 2021 N.Y. Slip Op. 05576, Second Dept 10-13-21**

PERSONAL INJURY, CONTRACT LAW, EVIDENCE.

QUESTIONS OF FACT ABOUT THE LIABILITY OF THE ELEVATOR COMPANY UNDER A NEGLIGENT MAINTENANCE THEORY OR A RES IPSA LOQUITUR THEORY REQUIRED THE DENIAL OF THE COMPANY'S MOTION FOR SUMMARY JUDGMENT; PLAINTIFF ALLEGED THE ELEVATOR SUDDENLY ACCELERATED AND THEN STOPPED.

The Second Department, reversing Supreme Court, determined there were questions of fact whether the elevator company (Otis) was liable for injuries allegedly caused by the sudden acceleration and stop of the elevator under a negligent maintenance theory and a res ipsa loquitur theory: "The plaintiff's expert, Patrick Carrajat, an elevator and escalator consultant, whose affidavit the plaintiff submitted in opposition to Otis's summary judgment motion, concurred with McPartland's [defendant's expert's] opinion that 'the probable cause of the accident was a clipped interlock.' Carrajat disagreed, however, with McPartland's contention that a clipped interlock was something Otis could not reasonably have been expected to prevent. In Carrajat's view, proper inspection and maintenance would have revealed either improper adjustment, loosening or shifting, or excessive wear of certain components. Carrajat also explained why he disagreed with McPartland's opinion that external factors, such as a person making contact with the hallway elevator doors or some sort of debris caught in the elevator's 'door sill,' could have caused the accident. ... The plaintiff also raised a triable issue of fact as to Otis's liability under the doctrine of res ipsa loquitur by submitting proof that the sudden descent and abrupt stop of the elevator was an occurrence that would not ordinarily occur in the absence of negligence, that the maintenance and service of the elevator was in the exclusive control of Otis, and that no act or negligence on the part of the plaintiff contributed to the occurrence of the accident ...". ***Syrnik v. Board of Mgrs. of the Leighton House Condominium*, 2021 N.Y. Slip Op. 05603, Second Dept 10-13-21**

PERSONAL INJURY, MUNICIPAL LAW.

AFTER STOPPING THE CAR OCCUPIED BY TEENAGERS AND ARRESTING THE DRIVER AND A PASSENGER, THE POLICE RELEASED THE CAR TO DEFENDANT WHO WAS NOT AUTHORIZED TO DRIVE A CAR WITH MORE THAN ONE PASSENGER UNDER 21; THE DEFENDANT DRIVER THEN HAD AN ACCIDENT: THERE IS A QUESTION OF FACT WHETHER THE POLICE BREACHED A SPECIAL DUTY OWED THE INJURED PLAINTIFF.

The Second Department determined: (1) the action against the town police department should have been dismissed because the police department cannot be sued as an entity separate from the town; and (2) the action against the town properly survived summary judgment. The police had stopped a car occupied by teenagers and arrested the driver and one passenger for possession of marijuana. The police then released to car to defendant Tatavitto who was not authorized to drive a car with more than one passenger under 21. Tatavitto then had an accident. There was a question of fact whether the town breached a special duty owed to plaintiff by allowing Tatavitto to drive the car: "[A] special duty has four elements: '(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative conduct' ... . Here, there was direct contact between the officers and the occupants of the vehicle. The Town defendants failed to eliminate triable issues of fact as to whether the officers, through their affirmative acts, assumed an affirmative duty to the plaintiff, whether the officers had reason to believe that releasing the vehicle to Tatavitto would permit him to drive the vehicle in violation of law, which increased the risk of an accident, and whether their conduct 'lulled' the plaintiff into a false sense of security and induced him either to relax his own vigilance or forgo other avenues of protection—which was not offered by the officers—and thereby placed him in a worse position than he would have been had the officers never assumed any duty to him ...". ***Stevens v. Town of E. Fishkill Police Dept.*, 2021 N.Y. Slip Op. 05602, Second Dept 10-13-21**

PERSONAL INJURY, MUNICIPAL LAW, WORKERS' COMPENSATION.

PLAINTIFF POLICE OFFICER ALLEGED TWO FELLOW OFFICERS NEGLIGENTLY INJURED HIM WITH A TASER; PLAINTIFF CANNOT SUE HIS FELLOW OFFICERS IN TORT AND HIS EXCLUSIVE REMEDY IS WORKERS' COMPENSATION.

The Second Department, reversing Supreme Court, determine plaintiff police officer's petition for leave to file a late notice of claim should not have been granted and his complaint against two fellow police officers should have been dismissed. Plaintiff alleged the two officers negligently tased him. Plaintiff cannot sue the fellow officers in tort, and his exclusive remedy is Workers' Compensation: "While a police officer can assert a common-law tort cause of action against the general public pursuant to General Obligations Law § 11-106(1), 'liability against a fellow officer or employer can only be based on the statutory right of action in General Municipal Law § 205-e' ... . General Municipal Law § 205-e(1) specifies that 'nothing in this section shall be deemed to expand or restrict any right afforded to or limitation imposed upon an employer, an employee or his or her representative by virtue of any provisions of the workers' compensation law' ... . Under the Work-

ers' Compensation Law, '[t]he right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee . . . when such employee is injured or killed by the negligence or wrong of another in the same employ' ... . Thus, the Workers' Compensation Law 'offers the only remedy for injuries caused by [a] coemployee's negligence' in the course of employment ... . '[A] defendant, to have the protection of the exclusivity provision, must himself [or herself] have been acting within the scope of his [or her] employment and not have been engaged in a willful or intentional tort' ...". ***Walsh v. Knudsen*, 2021 N.Y. Slip Op. 05607, Second Dept 10-13-21**

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