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COURT OF APPEALS

CIVIL PROCEDURE.

PUBLIC HEALTH LAW § 18(2)(e) DOES NOT CREATE A PRIVATE RIGHT OF ACTION FOR THE VIOLATION OF THE REQUIREMENT THAT NO MORE THAN $0.75 PER PAGE CAN BE CHARGED FOR MEDICAL RECORDS.

The Court of Appeals, in a full-fledged opinion by Judge Singas, over a concurrence, determined there is no private right of action for a violation of Public Health Law § 18(2)(e), which limits the charge for copies of medical records to $0.75 per page. Defendant charged plaintiff $1.50 per page: "Applying the *Sheehy* factors here, we conclude that no private cause of action exists for violations of Public Health Law § 18 (2) (e). The first factor is satisfied. Ortiz [plaintiff] is clearly part of a class that section 18 was designed to protect. The original law and its subsequent amendment were intended to increase patient access to medical records, and prevent medical providers from overcharging patients for copies of their medical records ... . Turning to the second factor, it is unclear whether a private right of action would promote the legislative purpose. * * * ... [G]iven the substantial fines the Commissioner and the Attorney General can impose, the additional deterrent effect of a private right of action is difficult to ascertain. Even assuming the second factor is satisfied, though, the final factor—consistency with the legislative scheme—is clearly not. ... [E]nforcement mechanisms already exist for section 18. First, the Commissioner and Attorney General's ability to impose substantial fines against providers that overcharge for copies of records acts as a deterrent ... . Second, the Attorney General's duty to seek injunctive relief upon the request of the Commissioner provides a legal mechanism for ending any widespread practices violating section 18. Finally, an individual patient's ability to commence an article 78 proceeding to enforce the law's provisions provides recourse for individual patients who are unable to access their records due to illegally high costs." ***Ortiz v. Ciox Health LLC*, 2021 N.Y. Slip Op. 06425, Ct App 11-18-21**

CRIMINAL LAW, APPEALS, EVIDENCE.

THE SECOND DEPARTMENT HAD REVERSED DEFENDANT'S MURDER CONVICTION, STATING IT WAS REVERSING ON WEIGHT OF THE EVIDENCE GROUNDS FOR THE SAME REASONS IT WAS REVERSING ON LEGAL SUFFICIENCY GROUNDS; THAT CONSTITUTED AN ERROR OF LAW REVIEWABLE BY THE COURT OF APPEALS; THE COURT OF APPEALS DETERMINED THERE WAS LEGALLY SUFFICIENT EVIDENCE TO SUPPORT CONVICTION; THE MATTER WAS REMITTED FOR PROPER ASSESSMENT OF THE WEIGHT OF THE EVIDENCE.

The Court of Appeals, reversing *People v. Romualdo*, 2020 N.Y. Slip Op. 06559 [188 A.D.3d 928], Second Dept 11-12-20, remitted the matter for a proper assessment of the weight of the evidence. The Court of Appeals has the authority to review a weight of the evidence determination when the appellate court failed to consider the issue or did so using an incorrect legal principle. "The Appellate Division's statement that it was reversing on weight of the evidence grounds for the 'same reasons' that it was reversing on legal sufficiency grounds constituted an error of law ...": "The Appellate Division reversed defendant's [murder] conviction, describing its holding as 'on the law and on the facts,' and dismissed the indictment on both legal sufficiency and weight of the evidence grounds ... . Both of those determinations were based upon the Appellate Division's conclusion that 'the People presented no evidence placing the defendant at or near the scene of the crime, or linking him in any way to the victim, during the critical time frame in which the murder was believed to have occurred'... . Both holdings were erroneous as a matter of law. * * * ... [A] rational jury could have inferred from the medical evidence presented at trial that the victim was sexually assaulted immediately prior to her death. Inasmuch as defendant's semen was found on the victim's genitalia, the semen had not transferred to the victim's clothing, which was still in a state of disarray when her body was found, defendant lived in close proximity to the crime scene, and defendant falsely denied knowing or having sex with the victim, a rational jury could conclude that defendant was present at the time of the victim's death and killed the victim during the course of, or immediately after, sexually assaulting her ... . Therefore, the evidence was legally sufficient to support defendant's conviction." ***People v. Romualdo*, 2021 N.Y. Slip Op. 06430, Ct App 11-18-21**

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE VERDICT AS REPUGNANT.

The Court of Appeals reversed *People v. Jennings*, 2021 N.Y. Slip Op. 00944 [191 A.D.3d 1429], Fourth Dept 2-11-21. The facts were not described: "On review of submissions pursuant to section 500.11 of the Rules, order reversed, and case remitted

to the Appellate Division, Fourth Department, for consideration of the facts and issues raised but not determined on the appeal to that Court. Counsel's failure to challenge the verdict as repugnant did not render the representation ineffective because the issue was not clear-cut and dispositive given the jury charge ...". ***People v. Jennings*, 2021 N.Y. Slip Op. 06428, Ct App 11-18-21**

CRIMINAL LAW, EVIDENCE.

EXPERT TESTIMONY ON FALSE CONFESSION AND CROSS-RACIAL IDENDITIFICATION/MISIDENTIFICATION PROPERLY PRECLUDED; THREE-JUDGE DISSENT.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a three-judge dissent, determined the trial judge, after a Frye hearing, properly precluded expert testimony of Dr. Redlich on false confessions. In addition, the trial court properly precluded expert testimony on cross-racial identification/misidentification: "On this record, the trial court did not abuse its discretion in finding that the proffered testimony would not have aided the jury. Although Dr. Redlich is an impressively credentialed researcher, properly qualified by the trial court as an expert in her field, the trial court found that her testimony at the *Frye* hearing revealed her difficulty in linking her research on the possible causes of false confessions to the case at hand. Despite her review of the witnesses' testimony at the Huntley hearing, she did not explain how her testimony was at all relevant to the circumstances presented by defendant's interrogation, even by crediting defendant's account of the events ... . For instance, defendant flatly denied ever making the second, more detailed, confession—so, expert testimony regarding dispositional and situational factors that create a risk of a false confession has no relevance to the oral or written version of that statement. Moreover, defendant maintained that the first handwritten statement was the product of outright coercion—including a physical assault the night before and the deprivation of food and medicine—rather than resulting from psychological coercion of police interrogation that creates the risk of false confession, consistent with a recondite theory of which Dr. Redlich would have testified. There is a difference between the classically, inherently coercive interrogation that produces an involuntary confession—an issue that the jury is well-equipped to understand ... —and the phenomenon of false confessions involving the interplay of situational and dispositional factors that produce a coercive compliant false confession from an innocent suspect, an occurrence that the jury may find counterintuitive." ***People v. Powell*, 2021 N.Y. Slip Op. 06424, CtApp 11-18-21**

CRIMINAL LAW, JUDGES.

THE CONSENT OF BOTH PARTIES IS NOT REQUIRED FOR THE DISPLAY OF STATUTORY TEXT ON A VISUALIZER WHEN A JUDGE RESPONDS TO A JURY'S REQUEST FOR SUPPLEMENTAL INSTRUCTION.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined the consent of the parties is not required for the display of the relevant statutory text on a visualizer during the judge's response to a jury's request for supplemental instruction. Consent of the parties is required for allowing the jury to be provided with copies of the statutory text, but not for the display of the text during the supplemental instruction: "When a deliberating jury requests supplemental instruction, Criminal Procedure Law § 310.30 requires the court to provide a meaningful response. When the jury's request concerns a relevant criminal statute, the law also permits the court to provide the jury with copies of the statutory text, but only with the consent of both parties. This case asks us to decide whether consent of the parties is required before the court, during a readback of the requested law and relevant definitions, may simultaneously display the corresponding text using a visualizer ... . We conclude that consent is not required ... . During deliberations, the jury sent a note asking for "definitions of the law" and later clarified that they were requesting the elements and relevant definitions of the charged crimes. The jury also asked that this information be displayed on the visualizer. The judge informed counsel that he would comply with this request and project the relevant statutory text so the jury could see it while the judge read the text aloud. Although defense counsel did not object to the material selected for the readback, he did object to the process of displaying the text for the jury, arguing that 'placing [the text] on the visualizer is really [no] different from handing them a written copy.' He asserted that once jurors are handed 'instructions in written form, whether it is visually or physically, that they then start having the ability to interpret based on how they see the words, [and] what punctuation may or may not be there . . . .' The judge overruled the objection and proceeded as he had described to the parties. A short time later, the jury convicted defendant on two counts and acquitted him on one count of criminal possession of a weapon." ***People v. Williams*, 2021 N.Y. Slip Op. 06426, Ct App 11-18-21**

CRIMINAL LAW, JUDGES.

ALTHOUGH DEFENDANT WAS CONVICTED OF AN ARMED FELONY, THE JUDGE SHOULD HAVE CONSIDERED WHETHER DEFENDANT IS ELIGIBLE FOR YOUTHFUL OFFENDER TREATMENT.

The Court of Appeals, reversing the Appellate Division, determined the judge should have determined whether defendant, who had been convicted of an armed felony, was eligible for youthful offender treatment: " '[W]hen a defendant has been convicted of an armed felony . . . and the only barrier to his or her youthful offender eligibility is that conviction, the court is required to determine on the record whether the defendant is an eligible youth by considering the presence or absence of the factors set forth in CPL 720.10 (3)' ... . Here, the People concede that the sentencing court failed to make any appropriate

on-the-record determination. We accept the People's concession and, accordingly, the case should be remitted for consideration of youthful offender treatment." ***People v. Hargrove*, 2021 N.Y. Slip Op. 06427, Ct App 11-18-21**

FIRST DEPARTMNT

CORPORATION LAW, FIDUCIARY DUTY, CIVIL PROCEDURE.

PLAINTIFFS DEMONSTRATED A DEMAND ON THE BOARD OF DIRECTORS TO PURSUE A DERIVATIVE ACTION WAS FUTILE; THE COMPLAINT ADEQUATELY ALLEGED BREACH OF FIDUCIARY DUTY, A CLAIM FOR WHICH NO DAMAGES NEED BE ALLEGED.

The First Department, reversing Supreme Court, determined the requirement that a demand on the board of directors to pursue a derivative action was futile and therefore is excused. In addition, the complaint adequately alleged a breach of fiduciary duty: "Plaintiffs properly alleged demand futility as required under Business Corporation Law § 626 (c) by asserting that at least four out of seven of the members of derivative plaintiff/nominal defendant Xerox Holdings Corporation's board of directors were controlled by Icahn, Xerox's largest single shareholder, and thus lacked the independence to make an impartial decision on bringing suit ... . * * * ... [T]he claim for breach of fiduciary duty was pleaded with the particularity required by CPLR 3016(b), as the complaint states that the Icahn defendants used confidential information about Xerox's planned acquisition of HP Inc. to buy HP common shares before news of the acquisition became public and before HP's stock price increased ... . [P]laintiffs' claims do not fail for lack of damages, as damages 'have never been considered to be an essential requirement for a cause of action founded on a breach of fiduciary duty' ... . The function of an action for breach of fiduciary duty 'is not merely to compensate the plaintiff for wrongs committed by the defendant but . . . to prevent them, by removing from . . . trustees all inducement to attempt dealing for their own benefit in matters . . . to which their . . . trust relates' ...". ***Miami Firefighters' Relief & Pension Fund v. Icahn*, 2021 N.Y. Slip Op. 06446, First Dept 11-18-21**

CRIMINAL LAW.

THE JURORS IN THIS ATTEMPTED ROBBERY CASE SAW AN INTERNET VIDEO OF DEFENDANT'S CODEFENDANT VIOLENTLY CAUSING A MAN'S DEATH; THE VIDEO HAD NOT BE INTRODUCED OR MENTIONED AT TRIAL; SUPREME COURT SHOULD HAVE GRANTED THE MOTION TO SET ASIDE THE VERDICT.

The First Department, reversing Supreme Court, determined the defense motion to set aside the verdict based upon juror misconduct should have been granted. The trial court denied the motion after' an extensive hearing. The jurors had seen an Internet video of defendant's codefendant, Lopez, violently causing a man's death: "CPL 330.30 (2) authorizes a court to set aside a verdict on the ground of juror misconduct that 'may have affected a substantial right of the defendant' and 'was not known to the defendant prior to the rendition of the verdict.' If juror misconduct of the kind outlined in CPL 330.30 (2) is found, the court is not to engage in a separate harmless error analysis. However, '[a]bsent a showing of prejudice to a substantial right,' CPL 330.30 (2) is not implicated in the first place. As such, '[e]ach case must be examined on its unique facts to determine the nature of the misconduct and the likelihood that prejudice was engendered' ... . Here, the jurors observed an Internet video of defendant's codefendant, Lopez, violently causing a man's death. The video did not appear in evidence and there was no testimony or mention of the video at trial. The video created a substantial risk of prejudicing the verdict as it permitted jurors to perceive the codefendant as having a propensity for violence, and then to perceive that same propensity to apply to defendant through a guilt-by-association chain of reasoning." ***People v. Santana*, 2021 N.Y. Slip Op. 06329, First Dept 11-16-21**

EMPLOYMENT LAW, LABOR LAW, JUDGES.

PLAINTIFFS WERE ENTITLED TO SUMMARY JUDGMENT ON THEIR MINIMUM WAGE, OVERTIME PAY, SPREAD-OF-HOURS PAY AND WAGE THEFT PREVENTION ACT CAUSES OF ACTION, INCLUDING LIQUIDATED DAMAGES, PREJUDGMENT INTEREST AND ATTORNEYS' FEES.

The First Department, reversing Supreme Court, determined the motion court should not have denied plaintiff's summary judgment motion and, sua sponte, dismissed the complaint in this action alleging "violations of minimum wage, overtime pay and spread-of-hours pay under the Labor Law and violations of the Wage Theft Prevention Act (WTPA) ...". The First Department granted plaintiffs' summary judgment motion, finding them entitled to liquidated damages, prejudgment interest and attorneys' fees: "Plaintiffs established prima facie that defendants violated Labor Law §§ 190-199, 650, and 652 and 12 NYCRR 142 and 146-1.6 by failing to pay them minimum wage, overtime pay, and spread-of-hours pay. Although 12 NYCRR 142-2.2 requires an employer to pay an employee for overtime, i.e., working time over 40 hours, at a wage rate of 1½ times the employee's regular rate, defendant Georgios Liristis, owner of defendant GE & LO Corp. d/b/a Burger Hut, testified that plaintiffs each worked 8- to 10-hour shifts, six days a week, and were paid a fixed salary. Although 12 NYCRR 142-2.4(a) requires that, for any day in which an employee's spread of hours exceeds 10 hours, the employee receive one hour's pay at the minimum wage rate in addition to the minimum wage, the record shows that plaintiff Galindo Tezoco, who regularly worked shifts over 10 hours, did not receive the additional hours' pay. Defendant Liristis' testimony estab-

lishes that defendants failed to pay three of the five plaintiffs the prevailing minimum wage during the relevant periods. Defendants cannot avail themselves of the 'tip credit,' since they undisputedly failed to provide notice of the tip credit in writing ... . Plaintiffs established that defendants violated the WTPA by failing to provide them with wage statements (see Labor Law § 195[3]) and by failing to provide wage notices to plaintiff Silverio Tezoco ... . It is undisputed that defendants failed to provide any wage notices or wage statements during the course of plaintiffs' employment." ***Tezoco v. GE & LO Corp.*, 2021 N.Y. Slip Op. 06463, First Dept 11-18-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF ALLEGEDLY SLIPPED AND FELL AFTER STEPPING ON A BOTTLE CAP; PLAINTIFF'S LABOR LAW §§ 241(6) AND 200 CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, determined the Labor Law §§ 241(6) and 200 causes of action should not have been dismissed. Plaintiff alleged he stepped on a bottle cap which caused him to slip and fall: "The record presents an issue of fact as to whether the bottle cap that caused the injured plaintiff's slip-and-fall accident on the construction site was part of an accumulation of debris within the meaning of Industrial Code (12 NYCRR) § 23-1.7(e), on which the Labor Law § 241(6) claim is predicated ... . [Defendant] failed to demonstrate, by submitting evidence of when the area was last cleaned or inspected before the injured plaintiff's accident, that the Labor Law § 200 and negligence claims should be dismissed as against it ... . Plaza presented only general testimony by its employees that the area was inspected daily and that debris was removed by laborers." ***Deleo v. JPMorgan Chase & Co.*, 2021 N.Y. Slip Op. 06320, First Dept 11-16-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THE FACT THAT OSHA REQUIRES PROTECTION ONLY FOR FALLS MORE THAN SIX FEET WAS IRRELEVANT; PLAINTIFF, WHO FELL FROM AN ELEVATED PLANK, WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION.

The First Department determined plaintiff's fall from a plank, even if the fall was less than six feet, entitled him to summary judgment on the Labor Law § 240(1) cause of action: "Even if, as [defendant] contends, plaintiff fell less than six feet, that does not render the statute inapplicable ... , [Defendant's] claimed compliance with OSHA regulations requiring fall protection only for falls of six feet or more is irrelevant ... . The wooden plank from which plaintiff fell did not constitute a 'passageway,' but 'served, conceptually and functionally, as an elevated platform or scaffold' ...". ***DaSilva v. Toll First Ave., LLC*, 2021 N.Y. Slip Op. 06438 First Dept 11-18-21**

MUNICIPAL LAW, NEGLIGENCE, FALSE ARREST, FALSE IMPRISONMENT.

THE FIRST DEPARTMENT, OVERRULING PRECEDENT AND JOINING THE OTHER DEPARTMENTS, DETERMINED INDIVIDUAL MUNICIPAL EMPLOYEES NEED NOT BE NAMED IN A NOTICE OF CLAIM.

The First Department, reversing Supreme Court and overruling precedent, in a full-fledged opinion by Justice Scarpulla, determined municipal employees need not be named in a notice of claim. Plaintiff brought negligence, false arrest and false imprisonment causes of action against NYC alleging inhumane treatment by officers at Rikers Island: "The City moved to dismiss plaintiff's complaint against the NYPD defendants, arguing that plaintiff failed to satisfy General Municipal Law § 50-e because he did not serve a notice of claim that named the NYPD defendants or John/Jane Doe placeholders ... . * * * Upon additional review of the reasoning of our own precedents, the reasoning of ... relevant decisions of our sister departments, and reexamination of General Municipal Law § 50-e (2), we now join our sister departments in holding that § 50-e does not mandate the naming of individual municipal employees in a notice of claim. … [I]t is well settled that a notice of claim is sufficient so long as it includes enough information to enable the municipal defendant to investigate a plaintiff's allegations, and '[n]othing more may be required' ... . Providing the municipal defendant with the statutorily required elements of the nature of the claim, the time, place and manner in which the claim arose, and the alleged injury, without additionally naming the individual municipal employees involved, does not prevent the municipal defendant from adequately investigating the claim. Armed with the statutorily required information, the municipal defendant is in at least as good a position as the plaintiff to identify and interview the individual municipal employees involved in the claim." ***Wiggins v. City of New York*, 2021 N.Y. Slip Op. 06335, First Dept 11-16-21**

PERSONAL INJURY. EDUCATION-SCHOOL LAW, CIVIL PROCEDURE.

PURSUANT TO THE DOCTRINE OF LACHES, THE DEFENDANT CITY WAS NOT ENTITLED TO THE LOWER 5.76% INTEREST RATE ON THE MULTIMILLION DOLLAR JUDGMENT; THE TRIAL JUDGE PROPERLY IMPOSED THE 9% INTEREST RATE PURSUANT TO CPLR 5004.

The First Department reduced the multimillion dollar damages award in this lawsuit by a student severely burned during a chemistry demonstration at his public high school. The trial judge properly imposed a 9% interest rate on the judgment because the defendant city was late (laches) in seeking the lower interest rate (5.75%) authorized by law: "[The judgment] awarding the principal sums of $29,585,000 million for past pain and suffering and $29,585,000 for future pain and suffering

over 54 years, plus 9% interest, unanimously modified, on the facts, to vacate the awards ... , and remand for a new trial of those issues, unless plaintiff stipulates ... to reduce the awards for past pain and suffering to $12,000,000 and for future pain and suffering to $17,000,000 ... . * * * ... [D]efendants ... should have formally moved to compute interest on the verdict at a lower rate than 9% ... . This way, plaintiff would have had the opportunity to submit proof to the contrary, and the court could have ordered a hearing if necessary ... . Given defendants' laches in seeking to avail themselves of a lower interest rate authorized by law, Supreme Court providently declined to depart from CPLR 5004's presumptive 9% interest rate ...". ***Yvonne Y. v. City of New York*, 2021 N.Y. Slip Op. 06468, First Dept 11-18-21**

PRODUCTS LIABILITY, PERSONAL INJURY.

PROOF THE ELEVATOR DOOR MALFUNCTIONED WHEN PLAINTIFF ATTEMPTED TO ENTER THE ELEVATOR DID NOT SUPPORT A PRODUCTS LIABILITY CAUSE OF ACTION.

The First Department, reversing Supreme Court, determined plaintiff's proof demonstrated that the elevator door malfunctioned at the time plaintiff attempted to enter the elevator. A malfunction is not enough to support a products liability cause of action: "Plaintiff Patricia Booth was injured when she was knocked to the ground when the doors to an elevator closed as she was attempting to enter the elevator; Otis had modernized the elevator eight years earlier. Otis established prima facie entitlement to summary judgment dismissing the strict products liability claim by submitting evidence that the elevator door at issue was not defective ... . Crediting the testimony of plaintiff's daughter that she was holding the door open button and that plaintiff had crossed the elevator threshold when the doors began to close, this establishes nothing more than a malfunction at the time of the accident, which is insufficient to maintain a strict products liability cause of action ... . The fact that Otis 'both supplied the elevator and serviced it after installation would not impose upon [it] strict liability for a defect which developed after installation was completed' ...". ***Booth v. Otis El. Co.*, 2021 N.Y. Slip Op. 06433, First Dept 11-18-21**

SECOND DEPARTMENT

CRIMINAL LAW, APPEALS, IMMIGRATION LAW.

DEFENDANT WAS NOT INFORMED HIS GUILTY PLEA COULD RESULT IN DEPORTATION; THE ISSUE NEED NOT BE PRESERVED FOR APPEAL; MATTER REMITTED TO GIVE DEFENDANT THE OPPORTUNITY TO MOVE TO WITHDRAW HIS GUILTY PLEA.

The Second Department, remitting the matter to Supreme Court, determined defendant should be given the opportunity to withdraw his guilty plea because he was not informed of the possibility of deportation. The issue was not subject to the preservation requirement for appeal: "[T]he defendant's contention that his due process rights were violated due to the Supreme Court's failure to warn him that his pleas could subject him to deportation is excepted from the requirement of preservation because the record does not demonstrate that the defendant was aware that he could be deported as a consequence of his pleas of guilty ... . Indeed, here, the record shows that the court failed to address the possibility of deportation as a consequence of the defendant's pleas of guilty ... . Inasmuch as there is no indication in the record that the defendant was aware that he could be deported as a result of his pleas ... , the defendant had no 'practical ability' to object to the court's comment about immigration consequences or to otherwise tell the court, if he chose, that he would not have pleaded guilty if he had known about the possibility of deportation ... . [W]e remit the matters to the Supreme Court, Kings County, to afford the defendant an opportunity to move to vacate his pleas of guilty and for a report by the Supreme Court thereafter ... . Any such motion shall be made by the defendant within 60 days after the date of this decision and order ... . Upon such motion, the defendant will have the burden of establishing that there is a "reasonable probability" that he would not have pleaded guilty had the court warned him of the possibility of deportation ... . ***People v. Bamugo*, 2021 N.Y. Slip Op. 06363, Second Dept 11-17,21**

FREEDOM OF INFORMATION LAW (FOIL), ADMINISTRATIVE LAW.

THE DENIAL OF THE FOIL REQUEST DID NOT ADVISE PETITIONER OF THE AVAILABILITY OF AN ADMINSTRATIVE APPEAL; THEREFORE SUPREME COURT SHOULD NOT HAVE DISMISSED THE ARTICLE 78 PETITION FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

The Second Department, reversing Supreme Court, determined the Article 78 petition seeking the production of documents should not have been dismissed on the ground petitioner failed to exhaust administrative remedies. When the FOIL request was denied the denial did not advise petitioner of the availability of an administrative appeal: "Public Officers Law § 89(3)(a) and (4)(a) requires that FOIL requests be granted or denied by an agency within five business days, and that any administrative appeal of a denial, as required for exhausting administrative remedies, be undertaken within 30 days of the denial. 21 NYCRR 1401.7(b) further requires, however, that '[d]enial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body designated to determine appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access

officer shall not be the appeals officer.' Since there is no dispute that the subject denial of the petitioner's FOIL request failed to advise the petitioner of the availability of an administrative appeal and the person to whom the appeal should be directed as required by 21 NYCRR 1401.7(b), the Supreme Court erred in dismissing the petition for failure to exhaust administrative remedies ...". ***Matter of Snyder v. Nassau County*, 2021 N.Y. Slip Op. 06359, Second Dept 11-17-21**

INSURANCE LAW, CONTRACT LAW, CIVIL PROCEDURE, EDUCATION-SCHOOL LAW, ATTORNEYS.

THE COMPLAINT SUFFICIENTTLY ALLEGED A BREACH OF THE COVENANT OF GOOD FAITH CAUSE OF ACTION IN THIS INSURANCE COVERAGE DISPUTE; THE "IMPLIED COVENANT" CAUSE OF ACTION ALLEGED CONDUCT DIFFERENT FROM THE BREACH OF CONTRACT CAUSE OF ACTION AND WAS THEREFORE NOT DUPLICATIVE; SUPREME COURT IMPROPERLY REDUCED THE ATTORNEYS' FEES AWARDS.

The Second Department, reversing Supreme Court, determined the breach of the implied covenant of good faith and fair dealing cause of action in this insurance coverage dispute should not have been granted. The court noted that the "breach of the implied covenant" cause of action was not based on the same conduct as the breach of the insurance policy cause of action and therefore was not "duplicative." The court also found Supreme Court improperly reduced the attorneys' fees awards: "This appeal arises out of an insurance coverage dispute between the plaintiff and its insurer, the defendant, in connection with a School Board Legal Liability Policy ... (hereinafter the policy). While the policy was in effect, a putative class action entitled *Montesa v Schwartz* (hereinafter the underlying action) was commenced ... in ... the Southern District of New York against ... the plaintiff and its current and former school board members, alleging various constitutional violations, school segregation, breach of fiduciary duty, and fraud. ... [P]laintiff timely submitted a notice of claim to the defendant regarding the underlying action and requested coverage under the policy, and the defendant denied coverage to the plaintiff and its board members. * * * The plain language of the complaint reflects the plaintiff's allegation that the defendant breached the implied covenant of good faith and fair dealing. The complaint alleged ... that the defendant failed to investigate in good faith the claims in the underlying action, denied coverage to the plaintiff based upon a manufactured and/or 'nonexistent' assertion, deviated from industry practices by denying coverage to the plaintiff where '[n]o reasonable insurer would have denied [such] coverage,' and '[disclaimed] coverage with gross disregard for the facts and applicable law' ... . In determining the defendant's motion to dismiss, the court was required to accept as true the facts alleged in the complaint, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged by the plaintiff fit within any cognizable legal theory ... . [W]here, as here, the cause of action to recover damages for breach of the policy and the cause of action to recover damages for breach of the implied covenant of good faith and fair dealing allege different conduct on the part of the defendant and seek different categories and/or types of damages, the cause of action seeking damages for breach of the implied covenant of good faith and fair dealing should not be dismissed as 'duplicative' of the cause of action alleging breach of contract ...". ***East Ramapo Cent. Sch. Dist. v. New York Schs. Ins. Reciprocal*, 2021 N.Y. Slip Op. 06341, Second Dept 11-17-21**

PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE.

PLAINTIFF HAD NO MEMORY OF EVENTS BEYOND WALKING TOWARD THE BUS AT A BUS STOP; SHE SUFFERED A CRUSHED FOOT; THE MOTION TO SET ASIDE THE PLAINTIFF'S VERDICT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the motion to set aside the plaintiff's verdict in this pedestrian/bus accident case should have been granted. Plaintiff had no memory of the incident beyond walking a couple of feet toward the bus at a bus stop. She suffered a crushed foot, but there was simply no evidence of negligence on the part of the bus driver: " 'A motion pursuant to CPLR 4404(a) to set aside a jury verdict and for judgment as a matter of law will be granted where there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusions reached by the jury on the basis of the evidence presented at trial' ... . In determining such a motion, a court must accept the plaintiff's evidence as true and accord the plaintiff the benefit of every favorable inference which can reasonably be drawn from the evidence presented at trial ... . However, '[a] jury verdict must be based on more than mere speculation or guesswork' ... . Here, there was no rational process by which the jury could find in favor of the plaintiff and against the defendants on the issue of liability. Even if the circumstantial evidence sufficiently supported a conclusion that the plaintiff was injured due to an impact with a bus, the mere fact that the plaintiff was struck by a bus did not prove the defendants' negligence ... . In addition to establishing the fact of the accident, it was the plaintiff's burden to demonstrate what actually happened at the time of the accident so as to enable the jury to find that the defendants were negligent and that their negligence was a proximate cause of the accident ...". ***Kirwan v. New York City Tr. Auth.*, 2021 N.Y. Slip Op. 06350, Second Dept 11-17-21**

PERSONAL INJURY, CONTRACT LAW.

DEFENDANTS DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE WET LOADING DOCK WHERE PLAINTIFF SLIPPED AND FELL; GENERAL OBLIGATIONS LAW § 5-322.1(1) APPLIES ONLY TO NEGLIGENT MAINTENANCE ASSOCIATED WITH THE INTEGRITY OF A BUILDING, NOT TO CLEANING SERVICES.

The Second Department, reversing Supreme Court, determined defendants in this slip and fall case did not demonstrate a lack of constructive notice of the wet loading dock. Therefore defendants' motion for summary judgment should not have been granted. As to the action against the maintenance company charged with keeping the loading dock clean (ABM), General Obligations Law § 5-322.1 (1), which imposes liability for negligent maintenance, applies only to maintenance associated with the integrity of a building, not cleaning services: "The defendants failed to establish, prima facie, that they did not have constructive notice of the allegedly dangerous condition in that they failed to offer evidence as to when the loading dock was last cleaned or inspected before the plaintiff's fall. A security guard hired by the defendants testified that, while he would typically perform a 'security walk around' twice every 30 to 60 minutes, on the day of the accident, he did not pay attention to the area where the plaintiff later fell. Further, the testimony of witnesses employed by the defendants and ABM as to general cleaning and inspection procedures for the loading dock area was insufficient to establish lack of constructive notice ...". ***Skerrett v. LIC Site B2 Owner, LLC*, 2021 N.Y. Slip Op. 06386, Second Dept 11-17-21**

THIRD DEPARTMENT

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

THERE WAS NO PROOF IN THE RECORD SUPPORTING THE FINDING THAT THE MISSOURI CONVICTION WAS THE EQUIVALENT OF A NEW YORK FELONY; THEREFORE THE RISK-LEVEL ASSESSMENT WAS REDUCED BY 10 POINTS.

The Third Department, reversing County Court and remitting the matter, determined there was no proof in the record to support the finding that a Missouri conviction was the equivalent of a New York felony. The 15 points assessed for the foreign conviction was reduced to 5 points: "The Missouri statute under which defendant was convicted requires that a person 'knowingly possesses a controlled substance' (Mo Ann Stat § 579.015 [1] ...), with no minimum drug quantity required ... . Although criminal possession of a controlled substance is, most often, a felony in New York (see Penal Law §§ 220.21, 220.18, 220.16, 220.09, 220.06), the felony provisions all contain a weight element or require an intent to sell or a predicate conviction, whereas possession of a quantity of a controlled substance below the felony threshold constitutes a class A misdemeanor (see Penal Law § 220.03). Here, the facts and conduct underlying the Missouri conviction of criminal possession of a controlled substance are not in the record and, thus, it is unclear if the conduct underlying that conviction would constitute a felony in New York ... . Accordingly, we are constrained to conclude that the record only supports the assessment of 5 points, not 15 points, under risk factor 9. Deducting 10 points from the total score of 110 results in a score of 100, placing defendant in the classification of a presumptive risk level two sex offender. However, the People expressly argued that, if defendant were found to be a risk level two sex offender, an upward departure would be warranted. In light of our holding that defendant is a presumptive risk level two sex offender, the matter must be remitted for County Court to consider whether an upward departure is warranted ...". ***People v. Smith*, 2021 N.Y. Slip Op. 06403, Third Dept 11-18-21**

UNEMPLOYMENT INSURANCE, LABOR LAW.

CLAIMANT'S UNEMPLOYMENT INSURANCE BENEFITS PROPERLY REDUCED TO ZERO BECAUSE CLAIMANT'S PENSION EXCEEDED THE AMOUNT OF THE BENEFITS.

The Third Department determined the amount of unemployment insurance benefits for claimant, a professional violinist, was properly reduced to zero based upon claimant's pension: "Consistent with the provisions of Labor Law § 600 (1) (a), the benefit rate of a claimant who is receiving a governmental or other pension 'shall be reduced . . . if such [pension] payment is made under a plan maintained or contributed to by [the] base period employer and . . . the claimant's employment with, or remuneration from, such employer after the beginning of the base period . . . increased the amount of . . . such pension' ... . 'Under the plain language of the statute, the specified reduction shall be made where a claimant's base period employer made a pension fund contribution during the base period which increased the claimant's pension' ... . [T]he record establishes that, during the relevant base period, claimant received a pension benefit that, in turn, was fully funded by the contributing employers. The record further makes clear — and claimant does not dispute — that the work performed by her during the base period and the corresponding contributions made by her employers increased the monetary value of her pension. Under these circumstances, and given that the prorated weekly amount of claimant's pension benefit exceeded her weekly unemployment insurance benefit (see Labor Law § 600 [1] [b]), the statutory reduction was triggered, and claimant's unemployment insurance benefit rate was properly reduced to zero ...". ***Matter of Morganstern (Commissioner of Labor)*, 2021 N.Y. Slip Op. 06416, Third Dept 11-18-21**

WORKERS' COMPENSATION.

CLAIMANT'S REQUEST FOR RECLASSIFICATION BASED UPON A CHANGE IN CONDITION FILED AFTER THE EXPIRATION OF CLAIMANT'S CAPPED INDEMNITY BENEFITS WAS NOT UNTIMELY.

The Third Department, reversing the Workers' Compensation Board, determined claimant's request for reclassification based upon a change in condition was not untimely: " 'The Board's unilateral position that a permanently partially disabled claimant must seek reclassification prior to the exhaustion of his or her permanent partial disability award runs in direct contravention to the plain language of Workers' Compensation Law § 15 (6-a), which provides that, subject to limitations not relevant here, 'the [B]oard may, at any time, without regard to the date of accident, upon its own motion, or on application of any party in interest, reclassify a disability upon proof that there has been a change in condition' ... . Thus, the Board improperly refused to consider the three C-27 forms that were submitted by claimant's physicians because they were filed shortly after the expiration of claimant's capped indemnity benefits. Accordingly, claimant must be provided with an opportunity to seek reclassification based upon each and every one of the C-27 forms that were submitted by his physicians, irrespective of whether they were filed after the expiration of his indemnity benefits, as well as any additional, current medical evidence and/or testimony in support of his request for reclassification ... . 'If, after further development of the record, claimant is reclassified, there would at that time be no bar to him receiving, for example, retroactive permanent total disability benefits from the date when he was found to have been totally disabled' ...". ***Matter of Phillips v. Milbrook Distrib. Servs.*, 2021 N.Y. Slip Op. 06402, Third Dept 11-18-21**

FOURTH DEPARTMENT

ATTORNEYS, CONTRACT LAW, EMPLOYMENT LAW.

THE PROFESSIONAL EMPLOYEE AGREEMENT, WHICH PROVIDED FOR THE SHARING OF CONTINGENCY FEES FOR CASES RETAINED BY AN ATTORNEY WHO LEAVES THE FIRM, DID NOT VIOLATE ETHICS RULES AND SHOULD HAVE BEEN ENFORCED.

The Fourth Department, reversing (modifying) Supreme Court, determined the Professional Employee Agreement (Agreement), which provided for sharing contingency fees for cases retained by an attorney leaving the firm, did not violate ethics rules and should have been enforced: "[T]he Agreement did not violate rule 1.5 (g) of the Rules of Professional Conduct (22 NYCRR 1200.0) inasmuch as that rule 'does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement' (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.5 [h] ...) . Here, the Agreement at issue is not a fee-splitting agreement under Rule 1.5 (g) but, rather, an employment or separation agreement under Rule 1.5 (h). Such employment or separation agreements 'should be construed, wherever possible, in favor of [their] legality' ... and where, as here, they are clear and unambiguous on their face, they must be 'enforced according to the plain meaning of [their] terms' ... . [T]he Agreement did not violate rule 5.6 (a) of the Rules of Professional Conduct (22 NYCRR 1200.0 ...). Although the Agreement did have some financial disincentives for respondents to continue working on the cases that were transferred from petitioner, 'agreements involving financial disincentives are not per se illegal' ... [W]e conclude that the terms of the Agreement relating to the division of contingency fee awards did not have the effect of 'improperly deter[ring] competition' ...". ***Matter of Mattar v. Hall*, 2021 N.Y. Slip Op. 06477, Fourth Dept 11-19-21**

CIVIL PROCEDURE, APPEALS.

IN THIS CHILD VICTIMS ACT ACTION ALLEGING SEXUAL ABUSE BY THE DEFAULTING DEFENDANT WHO ALLEGEDLY WAS AN EMPLOYEE OF THE NON-DEFAULTING DEFENDANT, IT WAS AN IMPROVIDENT EXERCISE OF DISCRETION TO DELAY THE DAMAGES ASPECT OF THE SUIT AGAINST THE DEFAULTING DEFENDANT UNTIL THE TRIAL OR DISPOSITION OF THE SUIT AGAINST THE NON-DEFAULTING DEFENDANT.

The Fourth Department, reversing Supreme Court, determined delaying the damages aspect of the action against a defaulting defendant until the trial or disposition of the action against a non-defaulting defendant was improper under the facts. The Fourth Department noted that it can substitute its discretion for the lower court's, even where there has been no abuse of discretion by the lower court. The defaulting defendant was an employee of the non-defaulting defendant, YMCA Buffalo Niagara, when he allegedly sexually abused plaintiff. The lawsuit was brought pursuant to the Child Victims Act: "[Although] a court may, under appropriate circumstances, defer entry of judgment and a determination of damages against a defaulting defendant until resolution of a separately-commenced companion action against non-defaulting defendants, we ... agree with plaintiff's ... contention that the court's decision to do so here constitutes an improvident exercise of its discretion ... . We therefore substitute our own discretion 'even in the absence of abuse [of discretion]' ... . [W]e agree with plaintiff that 'further delay undermines the purpose of the Child Victims Act, which is to 'finally allow justice for past and future survivors of child sexual abuse, help the public identify hidden child predators through civil litigation discovery, and shift the significant and lasting costs of child sexual abuse to the responsible parties' ... . Given the schedule of the separate action and the accompanying 'uncertainty as to when plaintiff's claims may be resolved against [YMCA Buffalo Niagara], additional delay may hinder [plaintiff's] efforts to prove damages against defendant and secure a final judgment, particu-

larly considering defendant's age and the prospect that defendant's assets may be dissipated in the interim' ... . By contrast, we note that the court did not identify any prejudice to YMCA Buffalo Niagara ... . 'Although judicial economy, which is an important consideration under CPLR 3215 (d) . . . , may favor a single damages proceeding involving both the defaulting and non-defaulting defendants,' we conclude here that 'such consideration does not outweigh the significant prejudice that may inure to plaintiff' ...". ***LG 46 DOE v. Jackson*, 2021 N.Y. Slip Op. 06507, Fourth Dept 11-19-21**

CIVIL PROCEDURE, CIVIL RIGHTS LAW, EDUCATION-SCHOOL LAW.

PLAINTIFF'S TITLE IX AND 42 U.S.C. § 1983 CAUSES OF ACTION, BASED ON ALLEGATIONS OF SEXUAL ABUSE BY A TEACHER IN 1972 AND 1973, ARE TIME-BARRED.

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiff's Title IX and 42 U.S.C. § 1983 causes action, based upon allegations plaintiff was sexually abused by a teacher in 1972–1973, were time barred: " 'The federal civil rights statutes do not provide for a specific statute of limitations, establish rules regarding the tolling of the limitations period, or prescribe the effect of tolling' ... . Thus, 'courts entertaining claims brought under 42 U.S.C. § 1983 [and Title IX] should borrow the state statute of limitations for personal injury actions' ... . Where a state 'has one or more statutes of limitations for certain enumerated intentional torts, and a residual statute for all other personal injury actions[,] . . . the residual or general personal injury statute of limitations applies'... . Here, defendant correctly contends, and plaintiff does not dispute, that New York's three-year statute of limitations for non-specified personal injury claims applies to the federal causes of action asserted here (see CPLR 214 [5] ...). ... Plaintiff contends that CPLR 214-g, which revives certain civil claims and causes of action for damages suffered as a result of childhood sexual abuse that would otherwise be barred by a statute of limitations, must be borrowed along with CPLR 214 (5) in determining whether her federal causes of action are timely. ... We … conclude that CPLR 214-g is not a revival statute related to the residual personal injury statute of limitations applicable to plaintiff's section 1983 cause of action ... . * * * ... [W]e conclude that plaintiff's Title IX cause of action should also have been dismissed as time-barred." ***BL DOE 3 v. Female Academy of the Sacred Heart*, 2021 N.Y. Slip Op. 06480, Fourth Dept 11-19-21**

CRIMINAL LAW, APPEALS, EVIDENCE.

A CHALLENGE TO THE VOLUNTARINESS OF A GUILTY PLEA SURVIVES A VALID WAIVER OF APPEAL; COUNTY COURT SHOULD HAVE HELD A HEARING ON DEFENDANT'S MOTION TO WITHDRAW THE GUILTY PLEA, MATTER REMITTED.

The Fourth Department, remitting the matter for a hearing, determined (1) a challenge to the voluntariness of a guilty survives a valid waiver of appeal, and (2) a hearing should have been held on defendant's motion to withdraw the plea: "Because defendant's challenge to the voluntariness of her plea would survive even a valid waiver of the right to appeal, we need not address the validity of that waiver ... . We agree with defendant that County Court erred in denying her motion to withdraw her plea without a hearing because the record—specifically, defense counsel's affidavit swearing that defendant's plea was coerced—'raises a legitimate question as to the voluntariness of the plea' ... . We therefore hold the case, reserve decision, and remit the matter to County Court to appoint new defense counsel and to rule on defendant's motion to withdraw her plea following an evidentiary hearing." ***People v. Gumpton*, 2021 N.Y. Slip Op. 06519, Fourth Dept 11-19-21**

CRIMINAL LAW, EVIDENCE.

THE FACTS THAT THE PARKED CAR IN WHICH DEFENDANT WAS SITTING WITH TWO OTHERS WAS IN A HIGH CRIME AREA AND WAS NOT RUNNING DID NOT PROVIDE THE POLICE WITH AN ARTICULABLE, CREDIBLE REASON TO APPROACH THE CAR; THE EVIDENCE SUBSEQUENTLY SEIZED AND THE STATEMENTS SUBSEQUENTLY MADE SHOULD HAVE BEEN SUPPRESSED.

The Fourth Department, vacating defendant's guilty plea and dismissing the indictment, determined the police did not have an articulable. credible reason for approaching the parked car defendant was sitting in. Therefore the evidence subsequently seized and the statements subsequently made should have been suppressed: "Where ... 'police officers approach a vehicle that is already parked and stationary, the only level of suspicion necessary to justify that approach is an articulable, credible reason for doing so, not necessarily indicative of criminality' ... . The approach, however, 'must be predicated on more than a hunch, whim, caprice or idle curiosity' ... . Here, the officer testified at the suppression hearing that he and his partner approached the vehicle because the apartment complex at which it was parked was in a high crime area and because the vehicle was not running and had three occupants. The hearing record is devoid, however, of evidence that the officer was 'aware of or observed conduct which provided a particularized reason to request information' from the occupants of the vehicle ...". ***People v. King*, 2021 N.Y. Slip Op. 06499, Fourth Dept 11-19-21**

CRIMINAL LAW, EVIDENCE.

THE REMARKS MADE BY THE POLICE DURING THE INTERROGATION OF DEFENDANT SERVED TO NEGATE THE MIRANDA WARNINGS; INTERROGATION CONTINUED AFTER DEFENDANT ASSERTED HIS RIGHT TO COUNSEL; THE ERRORS WERE DEEMED HARMLESS BECAUSE DEFENDANT WOULD HAVE BEEN CONVICTED EVEN IF THE STATEMENTS HAD BEEN SUPPRESSED.

The Fourth Department determined questioning by the police effectively negated the Miranda warnings and questioning continued after defendant invoked his right to counsel. The errors were deemed harmless because the defendant would have been convicted even if the statements had been suppressed: " 'Properly administered Miranda rights can be rendered inadequate and ineffective when they are contradicted by statements suggesting that there is a price for asserting the rights to remain silent or to counsel, such as foregoing 'a valuable opportunity to speak with an assistant district attorney, to have [the] case[ ] investigated or to assert alibi defenses' ... . The police officer's statement here improperly implied to defendant that the interrogation would be his 'only opportunity to speak' ... , and his advice that providing an explanation would benefit defendant effectively 'implied that . . . defendant['s] words would be used to help [him], thus undoing the heart of the warning that anything [he] said could and would be used against [him]' ...'. * * * ... [A]bout 20 minutes into the interrogation, defendant expressly stated that he did not 'want to talk about more of this[, i.e., the shooting]. That's it.' ... [D]efendant thereby unequivocally invoked his right to remain silent ... inasmuch as '[n]o reasonable police officer could have interpreted that statement as anything other than a desire not to talk to the police' ... . Defendant's responses to the police officers when they resumed the interrogation did not negate his prior unequivocal invocation of his right to remain silent because the police officers failed to reread the Miranda warnings to defendant before resuming the interrogation and therefore failed to scrupulously honor his right to remain silent ...". ***People v. Marrero*, 2021 N.Y. Slip Op. 06510, Fourth Dept 11-19-21**

CRIMINAL LAW, EVIDENCE.

ITEMS SEIZED PURSUANT TO THE OVERBROAD SECTION OF THE SEARCH WARRANT, IF ANY, SHOULD HAVE BEEN SUPPRESSED, MATTER REMITTED FOR A RULING; THE SEARCH WARRANT APPLICATION PROVIDED PROBABLE CAUSE FOR THE SEARCH, NOTWITHSTANDING THE INCLUSION OF INFORMATION PROVIDED BY AN ANONYMOUS INFORMANT WHICH DID NOT SATISFY THE *AGUILAR-SPINELLI* TEST.

The Fourth Department determined a portion of the search warrant was overbroad and remitted the case for a ruling on what evidence, if any, should be suppressed because it was seized based on the overbroad language. The Fourth Department also determined information provided by an anonymous informant, which was included in the search warrant application, did not satisfy the "*Aguilar-Spinelli*" test, but that the remaining information in the application provided probable cause. The search warrant was seeking stolen property alleged to have been located in defendant's residence: "[I]nsofar as the search warrant application was based on information provided by an anonymous informant, that information was insufficient to establish probable cause. The information in the application concerning the informant failed to 'satisf[y] the two-part *Aguilar-Spinelli* test requiring a showing that the informant is reliable and has a basis of knowledge for the information imparted' ... . Nevertheless, we conclude that the remaining information in the warrant application provided probable cause for the warrant ... . [P]art of the warrant is overbroad. 'The Fourth Amendment to the Constitution provides that no warrants shall issue except those 'particularly describing the place to be searched, and the . . . things to be seized' (US Const 4th Amend). To meet the particularity requirement, the warrant's directive must be 'specific enough to leave no discretion to the executing officer' ... . Here, the warrant permitted the Troopers to search for, inter alia, 'personal papers, . . . alcohol, . . . safes, . . . any communication and computers that are related to criminal activity, any . . . telephone records, cell phones that [may] contain evidence of a crime or illegal activity and any associated documentation related to any criminal activity.' Those parts of the warrant were overbroad and any evidence seized pursuant to them should have been suppressed ...". ***People v. Herron*, 2021 N.Y. Slip Op. 06512, Fourth Dept 11-19-21**

FAMILY LAW, JUDGES.

IN THIS POST-DIVORCE ACTION, THE PROCEEDS OF THE SALE OF THE PARTIES' REAL PROPERTY SHOULD NOT HAVE BEEN DISTRIBUTED WITHOUT A FULL EVIDENTIARY HEARING.

The Fourth Department, reversing (modifying) Supreme Court, determined the court should have conducted a hearing before distributing the proceeds of the sale of the parties' farm in this post-divorce action: "[T]he court erred in deciding the value of plaintiff's credits without a full evidentiary hearing permitting the parties to offer proof of valuation ... . Plaintiff offered no direct proof of the value of the relevant assets, and defendant was not afforded an opportunity to cross-examine the court-appointed appraiser or review the appraisals ... . The court's decision also failed to articulate the factors it considered or the reasons for its determination to partially grant certain credits to plaintiff and deny others ... . [W]e remit the matter to Supreme Court for a hearing and appropriate findings of fact and conclusions of law with respect to the parties' entitlement to credits." ***Edwards v. Edwards*, 2021 N.Y. Slip Op. 06504, Fourth Dept 11-19-21**

MEDICAL MALPRACTICE, NEGLIGENCE, EVIDENCE.

EVEN IF PLAINTIFF'S EXPERT'S AFFIDAVIT ARGUABLY RAISED A QUESTION OF FACT ABOUT A POTENTIALLY ACTIONABLE DELAY IN TREATMENT, THE AFFIDAVIT PRESENTED ONLY CONCLUSORY AND SPECULATIVE ASSERTIONS THAT EARLIER DETECTION AND TREATMENT WOULD HAVE HAD A DIFFERENT OUTCOME (PROXIMATE CAUSE).

The Fourth Department, over a strong dissent, determined the expert affidavit submitted by plaintiff was conclusory on the issue of proximate cause and therefore could not overcome defendants' motion for summary judgment. Karen S. Simko (plaintiff) suffered from Guillain-Barré Syndrome (GBS) and alleged defendants failed to timely diagnose and treat the condition: "[P]laintiffs' theory of causation is predicated on the allegation that defendants' failure or delay in diagnosing plaintiff's GBS 'diminished [her] chance of a better outcome' ... . Nothing in our decision herein calls into question the viability of such a theory. The Court of Appeals, however, has instructed that when an expert 'states his [or her] conclusion unencumbered by any trace of facts or data, [the] testimony should be given no probative force whatsoever' ... , and, in this case, ... the opinion of plaintiffs' expert that treatment should have been started sooner was contrary to what the expert agreed was appropriate. We therefore conclude that plaintiffs' expert offered only conclusory and speculative assertions that earlier detection and treatment would have produced a different outcome ... . **From the dissent:** ... [T]his appeal implicates the 'loss of chance' theory of proximate causation that applies in delayed-diagnosis medical malpractice actions where the allegations are predicated on an 'omission' theory of negligence ... . In such cases, proximate cause is not analyzed under the ordinary 'substantial factor' approach ... , but rather according to whether the alleged delay in diagnosis diminished the plaintiff's 'chance of a better outcome or increased the injury' ... . Although I have expressed concern 'that a loss of chance concept reduces a plaintiff's burden of proof on the element of proximate cause' ... this Court has nonetheless adopted that causation standard in this type of medical malpractice action." ***Simko v. Rochester Gen. Hosp.*, 2021 N.Y. Slip Op. 06470, Fourth Dept 11-19-21**

PERSONAL INJURY.

QUESTIONS OF FACT ABOUT DEFENDANT'S KNOWLEDGE THE ICE AND SNOW WHERE PLAINTIFF SLIPPED AND FELL WAS A RECURRING CONDITION (CONSTRUCTIVE NOTICE), AS WELL AS DEFENDANT'S ROLE IN CREATING THE CONDITION.

The Fourth Department, reversing (modifying) Supreme Court, determined there were questions of fact about defendant's (Ryco's) "constructive notice" and "creation" of the snow and ice condition in the are where plaintiff slipped and fell: "With respect to constructive notice, it is well settled that a 'defendant who has actual knowledge of a recurring dangerous condition can be charged with constructive notice of each specific recurrence of the condition' ... . Here, the Ryco defendants' own submissions raise a triable issue of fact whether they had actual knowledge of a recurring dangerous condition in the parking lot in front of the entrance where plaintiff fell, thereby placing them on constructive notice ... . [T]he Ryco defendants' own submissions 'failed to eliminate the existence of a triable issue of fact as to whether the ice on which . . . plaintiff allegedly slipped and fell was formed when snow piles created by the [Ryco] defendant[s'] snow removal efforts melted and refroze' ...". ***Britt v. Northern Dev. II, LLC*, 2021 N.Y. Slip Op. 06486, Fourth Dept 11-19-21**

TRUSTS AND ESTATES, CRIMINAL LAW.

THE CO-GUARDIAN SHOULD NOT HAVE BEEN REMOVED WITHOUT A HEARING; ALTHOUGH THE CO-GUARDIAN HAS A FELONY CONVICTION, SHE OBTAINED A CERTIFICATE OF RELIEF FROM DISABILITIES; THEREFORE, ALTHOUGH SURROGATE'S COURT CAN REMOVE THE CO-GUARDIAN IN THE EXERCISE OF DISCRETION, REMOVAL IS NOT AUTOMATIC.

The Fourth Department, reversing Surrogate's Court, determined the co-guardians' petition to remove co-guardian respondent Suzette Bonerb should not have been granted without a hearing. Petitioner and Suzette Bonerb were previously appointed co-guardians of their adult child, Whitney Bonerb, and co-trustees of the Whitney Bonerb Credit Shelter Supplemental Needs Trust. Although respondent Suzette had been convicted of a felony, which would allow removal by Surrogate's Court sua sponte, Suzette had been granted a certificate of relief from disabilities. Therefore a hearing was required: "[T]he certificate does not prevent the Surrogate 'from revoking [respondent's appointments] in the exercise of its discretion (see Correction Law § 701 [3]); it merely preclude[s] the automatic revocation of' those appointments ... . * * * ... [R]espondent conceded that she had been convicted of a felony, but established that she disclosed that fact in the applications for appointments and that she later obtained a certificate of relief from disabilities with respect to that felony (see Correction Law § 701). ... [S]he contended that she had been advised by counsel that she was eligible to be appointed a fiduciary at the time when she signed the statement to that effect. Consequently, the Surrogate must make a credibility determination concerning those issues, and then exercise her discretion concerning whether respondent should be removed from her appointments ...". ***Matter of Bonerb*, 2021 N.Y. Slip Op. 06487, Fourth Dept 11-19-21**

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