CasePrepPlus

December 3, 2021

An advance sheet service summarizing recent and significant New York appellate cases

Editor: **Bruce Freeman**

NEW YORK STATE BAR ASSOCIATION
Serving the legal profession and the community since 1876

COURT OF APPEALS

CRIMINAL LAW, APPEALS, CORRECTION LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT'S CHALLENGE TO CERTIFICATION AS A SEX OFFENDER WAS FIRST RAISED IN THE APPELLATE DIVISION AND WAS NOT PRESERVED FOR CONSIDERATION BY THE COURT OF APPEALS; THE ILLEGAL SENTENCE EXCEPTION TO THE PRESERVATION REQUIREMENT DOES NOT APPLY BECAUSE SORA CERTIFICATION IS NOT PART OF THE SENTENCE.

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Cannataro, over a two-judge dissent, determined the challenge to the legality of defendant's certification as a sex offender, first raised on appeal to the Appellate Division, was not preserved and the illegal sentence exception to the preservation requirement did not apply: "Defendant thereafter pleaded guilty to ... burglary in the first degree as a sexually motivated felony ... . [T]he court ... advised defendant that he would have to register pursuant to SORA upon his release from prison. * * * On appeal to the Appellate Division, defendant argued for the first time that his certification as a sex offender was unlawful because his crime of conviction is not an enumerated registerable sex offense under Correction Law § 168-a (2) (a). * * * The Appellate Division agreed with defendant that under the 'clear and unambiguous' language of Correction Law § 168-a (2) (a) 'burglary in the first degree as a sexually motivated felony is not a registerable sex offense under SORA' ... . * * * 'We have recognized 'a narrow exception to the preservation rule' where a court exceeds its powers and imposes a sentence that is illegal in a respect that is readily discernible from the trial record' ... . However, 'not all claims arising during a sentencing proceeding fall within the exception' ... . * * * .. [S]ex offender certification is effectuated by the court pursuant to Correction Law § 168-d and is not addressed in either the Criminal Procedure Law or Title E of the Penal Law. ... SORA certification is not part of a sentence and the illegal sentence exception to the preservation requirement does not apply to challenges to certification as a sex offender." ***People v. Buyund*, 2021 N.Y. Slip Op. 06529, CtApp 11-23-21**

CRIMINAL LAW, EVIDENCE.

IF QUESTIONING A DEFENDANT ABOUT WHERE HE/SHE LIVES SERVES AN ADMINISTRATIVE PURPOSE AND IS NOT A DISGUISED ATTEMPT TO OBTAIN INCRIMINATING INFORMATION, DEFENDANT'S ANSWER IS SUBJECT TO THE PEDIGREE EXCEPTION TO THE *MIRANDA* REQUIREMENT; DNA EVIDENCE GATHERED BY THE FORENSIC STATISTICAL TOOL (FST) SHOULD NOT HAVE BEEN ADMITTED WITHOUT HOLDING A *FRYE* HEARING.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing the Appellate Division, over a two-judge dissent, determined: (1) under the facts, the defendant's answer to the police officer's question regarding where he lived fell within the "pedigree exception" to the *Miranda* requirement (and therefore was not suppressible); and (2), the DNA evidence generated by the forensic statistical tool (FST) should not have been admitted without holding a *Frye* hearing: "We hold that the pedigree exception will not apply even if the pedigree question is reasonably related to police administrative concerns where, under the circumstances of the case, a reasonable person would conclude based on an objective analysis that the pedigree question was a 'disguised attempt at investigatory interrogation' ... . [T]he pedigree questions were not a disguised attempt at investigatory interrogation ... . [T]he police asked defendant his name, date of birth, and where he lived immediately after their entry to the apartment, before the apartment had been searched and before any contraband had been found. The detective further testified that it is standard practice for all adults found at a location where a search warrant is executed to be handcuffed and asked these pedigree questions, regardless of whether contraband is found during the search. That defendant's response ultimately turned out to be incriminating does not alter the conclusion that, at the time it was asked, the question was not a disguised attempt at investigatory interrogation by the police ... . * * * Williams [35 NY3d 24] contains our reasoning on the Frye issue with respect to the FST. ... 'FST is a proprietary program exclusively developed and controlled by OCME [New York City Office of Chief Medical Examiner],' and ... the approval of the DNA Subcommittee was 'no substitute for the scrutiny of the relevant scientific community' ...". ***People v. Wortham*, 2021 N.Y. Slip Op. 06530, CtApp 11-23-21**

INSURANCE LAW, CONTRACT LAW, SECURITIES.

THE $140 MILLION PAID BY BEAR STEARNS TO THE SEC TO SETTLE AN ACTION ALLEGING THE FACILITATION OF LATE TRADING WAS NOT A "PENALTY IMPOSED BY LAW" AND THEREFORE WAS A COVERED LOSS UNDER THE TERMS OF THE INSURANCE POLICIES.

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge DiFiore, over an extensive dissent, determined the funds paid to the Security and Exchange Commission (SEC) to settle an action alleging Bear Stearns "facilitated late trading" and "deceptive market timing activity" did not constitute a "penalty imposed by law" and therefore was a covered loss under the insurance policies: "[U]nder relevant New York law, penalties have consistently been distinguished from compensatory remedies, damages, and payments otherwise measured through the harm caused by wrongdoing. Thus, at the time the parties contracted, a reasonable insured would likewise have understood the term 'penalty' to refer to non-compensatory, purely punitive monetary sanctions. In this case, the question therefore distills to whether the disputed $140 million settlement payment meets that standard. ... Bear Stearns demonstrated that the $140 million disgorgement payment was calculated based on wrongfully obtained profits as a measure of the harm or damages caused by the alleged wrongdoing that Bear Stearns was accused of facilitating. This can be contrasted with the $90 million payment denominated a 'penalty,' which was not derived from any estimate of harm or gain flowing from the improper trading practices." ***J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 2021 N.Y. Slip Op. 06528, CtApp 11-23-21**

WORKERS' COMPENSATION.

WORKERS' COMPENSATION DEATH BENEFIT CLAIMS CANNOT BE TRANSFERRED TO THE SPECIAL FUND ON OR AFTER JANUARY 1, 2014, EVEN IF THE DISABILITY CLAIM FOR THE SAME INJURY HAD BEEN TRANSFERRED BEFORE THE CUT-OFF.

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Rivera, over a two-judge dissent, determined Workers' Compensation death benefit claims which accrued on or after January 1, 2014, cannot be transferred to the Special Fund for Reopened Cases (Special Fund) even if the disability claim for the same injury had been transferred prior to the cut-off: "Under Workers' Compensation Law (WCL) § 25-a (1-a), no liability for claims submitted on or after January 1, 2014, may be transferred to the Special Fund for Reopened Cases (the Special Fund). The common issue presented in these appeals is whether WCL § 25-a (1-a) forecloses the transfer of liability for a death benefits claim submitted on or after the cut-off, regardless of the prior transfer of liability for a worker's disability claim arising out of the same injury. Based on the plain statutory language, which broadly applies to all claims submitted after the deadline, and our established precedent that a death benefits claim accrues at the time of death and 'is a separate and distinct legal proceeding' from the worker's original disability claim ... , we conclude that liability for the death benefits claims at issue here could not be transferred to the Special Fund." ***Matter of Verneau v. Consolidated Edison Co. of N.Y., Inc.*, 2021 N.Y. Slip Op. 06531, CtApp 11-23-21**

FIRST DEPARTMENT

CIVIL PROCEDURE, CONTEMPT, ATTORNEYS.

A SUBPOENA ISSUED BY AN ATTORNEY IS A "JUDICIAL" SUBPOENA SUBJECT TO A CONTEMPT PROCEEDING WITHOUT THE NEED TO FIRST SEEK A COURT ORDER COMPELLING COMPLIANCE.

The First Department, reversing Supreme Court, determined a subpoena issued by an attorney was a "judicial" subpoena and defendant Patterson's failure to appear for a deposition and produce documents was punishable by contempt without the need to first obtain a court order compelling compliance: "Critical to the resolution of this appeal is whether this type of subpoena is a 'judicial subpoena, as defined by CPLR 2308(a), or a 'non-judicial' subpoena, as defined by CPLR 2308(b). ... [T]he disobedience of a judicial subpoena is punishable by contempt of court, while a person served with a non-judicial subpoena cannot be held in contempt unless the court first issues an order compelling compliance with the subpoena that is then disobeyed ... . We find that the subpoena is a 'judicial' subpoena, the disobedience of which is punishable by contempt ... . CPLR 2308(a) embraces subpoenas issued by an officer of the court (such as an attorney) at any stage of a judicial proceeding, regardless of whether the subpoena was specifically returnable in court ...". ***Cadlerock Joint Venture, L.P. v. Patterson*, 2021 N.Y. Slip Op. 06535, First Dept 11-23-21**

CRIMINAL LAW, EVIDENCE.

DEFENDANT HAD BEEN TAKEN DOWN TO THE GROUND AND HANDCUFFED AT THE TIME THE BACKPACK HE WAS WEARING WAS SEARCHED; THE PEOPLE PRESENTED NO EVIDENCE OF EXIGENCY; THE SEARCH WAS THEREFORE UNJUSTIFIED.

The First Department, reversing Supreme Court, determined the People did not demonstrate exigent circumstances which justified the search of the backpack he was wearing. The defendant had been taken down to the ground and handcuffed at the time of the search: "At the suppression hearing, when questioned as to why he patted down defendant and the drawstring backpack, the officer merely responded '[f]or our safety.' * * * Exigency justifying the search of a container incident

to arrest is not established in the absence of some reasonable basis for the belief that the contents of the container might pose a danger to the arresting officers or that there is a legitimate concern for the preservation of evidence which might reasonably be thought to reside within the container ... . The record does not contain evidence or testimony supporting a determination that the officer had objective reasonable grounds to believe that the drawstring backpack contained contents that would place his safety at risk or that he was concerned that the bag contained evidence that defendant could destroy. Thus, the circumstances did not suggest that any exigency required an immediate search ...". ***People v. Collins*, 2021 N.Y. Slip Op. 06552, First Dept 11-23-21**

EMPLOYMENT LAW, HUMAN RIGHTS LAW, MUNICIPAL LAW.

ALTHOUGH PLAINTIFF'S HOSTILE WORK ENVIRONMENT ALLEGATIONS DID NOT STATE A CAUSE OF ACTION UNDER THE APPLICABLE NEW YORK STATE HUMAN RIGHTS LAW PROVISIONS, THE ALLEGATIONS DID STATE A CAUSE OF ACTION UNDER THE MORE PROTECTIVE NEW YORK CITY HUMAN RIGHTS LAW.

The First Department, reversing (modifying) Supreme Court, determined the complaint stated a hostile work environment cause of action under the more protective New York City Human Rights Law, but not under the New York State Human Rights Law: "[A]lthough the motion court properly concluded that it does not rise to the level of 'severe and pervasive' under the applicable pre-2019 State HRL, plaintiff has raised triable issues of fact regarding the hostile work environment claims under the more protective City HRL ... . There was evidence that in May and September 2015, several of plaintiff's coworkers referred to him by using the Spanish word for 'monkey,' a racially humiliating and degrading term. Further, the evidence suggested that other coworkers and supervisors, if not everyone at the restaurant, knew that certain employees were using that term to refer to plaintiff ... . Under these circumstances, triable issues exist as to whether this rises above the level of a 'truly insubstantial' case ... . The evidence also raised triable issues as to whether plaintiff was treated differently from other employees of his ethnic background because of his skin color ... . [T]riable issues of fact exist as to whether defendant was liable for the comments of its workers, and whether defendant took 'immediate and appropriate corrective action' to prevent the conduct ...". ***Pichardo v. Carmine's Broadway Feast Inc*, 2021 N.Y. Slip Op. 06565, First Dept 11-23-21**

PERSONAL INJURY, CONTRACT LAW, LANDLORD-TENANT, MUNICIPAL LAW.

THE OUT-OF-POSSESSION LANDLORD IN THIS SLIP-AND-FALL CASE DEMONSTRATED (1) THE LEASE DID NOT REQUIRE IT TO MAINTAIN A DRAIN WHICH PERIODICALLY BECAME CLOGGED CAUSING GARBAGE TO FLOAT TO THE SIDEWALK, AND (2) IT DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF THE PRESENCE OF THE GARBAGE ON THE SIDEWALK WHICH ALLEGEDLY CAUSED PLAINTIFF'S SLIP AND FALL.

The First Department, reversing (modifying) Supreme Court, determined the out-of-possession landlord, SMHS, was not responsible for the fish skin on the sidewalk which allegedly caused plaintiff to slip and fall. The tenant, Lobster, a wholesale seafood company, had contracted with defendant Sanitation to remove garbage, including fish parts, from the tenant's premises. There was a question of fact whether Sanitation was liable under a contract-based *Espinal* theory for launching an instrument of harm. But SMHS demonstrated the lease did not require SMHS to maintain the sidewalk or the drains which at times became clogged with garbage and that it did not have actual or constructive knowledge of the dangerous condition: "SMHS, an out-of-possession landlord, was not contractually obligated to maintain the premises ... .Although its lease with Lobster did not demise to Lobster 'the pipes, ducts, conduits, wires, fixtures and equipment, the structural elements which serve the Demised Premises,' SMHS and Lobster's course of conduct establishes that Lobster was responsible for maintaining and repairing the trench drain ... . Moreover, although the lease afforded SMHS a contractual right of reentry to make needed repairs, liability would not be predicated on 'a significant structural or design defect that is contrary to a specific statutory provision' ... . Nor can SMHS be held liable for plaintiff's injuries under Administrative Code of City of NY § 7-210, which imposes a nondelegable duty on land owners to maintain their sidewalks in a reasonably safe condition … . "SMHS established … that it neither created the hazardous condition nor had actual notice of it or constructive notice of its existence for a sufficient length of time to discover and remedy it ...". ***Arias v. Sanitation Salvage Corp.*, 2021 N.Y. Slip Op. 06534, First Dept 11-23-21**

SECOND DEPARTMENT

CRIMINAL LAW.

THE *BATSON* CHALLENGE TO THE PROSECUTOR'S EXCLUSION OF A JUROR SHOULD HAVE BEEN GRANTED, NEW TRIAL ORDERED.

The Second Department, reversing defendant's conviction and ordering a new trial, determined defendant's Batson challenge to the prosecutor's exclusion of a juror should have been granted: "When providing a race-neutral reason for exercising a peremptory challenge as to S.K., the prosecutor stated that S.K. 'is a school counselor and . . . when talking about how she would . . . settle disputes amongst two parties, indicated that she wanted to hear from both sides.' Defense counsel disputed this reason, and argued that the prosecutor did not exercise a peremptory challenge as to prospective white juror

N.Z., a school counselor who 'indicated that she would need to hear both stories' when working through a conflict between two children at work. The court then acknowledged that the prosecutor did not use a peremptory challenge as to N.Z., and that '[s]he is a white female.' The court denied the defendant's Batson challenge. * * * The defendant correctly contends that the court erred in finding that the prosecutor's race-neutral reason for striking S.K. was not a pretext for discrimination. Here, the record demonstrates that the articulated race-neutral reasons for challenging S.K. were not applied equally to exclude a prospective juror, N.Z., who was not black and could have been challenged by the prosecutor for the same reasons. 'Although the uneven application of race-neutral factors does not indicate pretext where the prosecution can articulate other legitimate reasons to justify the use of its challenges'... , the prosecution here failed to do so. Under these circumstances, we conclude that the nonracial bases advanced by the prosecutor for challenging S.K. were pretextual and 'give[ ] rise to an inference of discriminatory intent' ...". ***People v. Johnson*, 2021 N.Y. Slip Op. 06627, Second Dept 11-24-21**

FAMILY LAW.

THE BIOLOGICAL FATHER'S CONSENT TO THE ADOPTION OF HIS CHILD WAS NOT REQUIRED BECAUSE HE FAILED TO SUPPORT THE CHILD DESPITE THE MEANS TO DO SO.

The Second Department determined father's consent to the adoption of his child is not required where the father has not maintained contact with the child: " 'A biological father's consent to adopt a child over six months old who was born out of wedlock is required only if the father 'maintained substantial and continuous or repeated contact with the child as manifested by' payment of reasonable child support and either monthly visitation or 'regular communication' with the subject child[ ] or custodian' ... . 'Domestic Relations Law § 111(1)(d) imposes a dual requirement upon the biological father, and the father's unexcused failure to satisfy either of these requirements is sufficient to warrant a finding that his consent to the proposed adoption[ ] is not required' ... . Here, the Family Court properly determined that the father, by failing to financially support the child, despite having the means to do so, did not maintain substantial and continuous or repeated contact with the child in accordance with Domestic Relations Law § 111(1)(d) ...". ***Matter of Raniah M. K. (Joma K.)*, 2021 N.Y. Slip Op. 06616, Second Dept 11-24-21**

FORECLOSURE.

WHEN THE BALANCES OF FIRST MORTGAGES ARE INCREASED WITH SECOND MORTGAGE LOANS AND A CONSOLIDATION, EXTENSION, AND MODIFICATION AGREEMENT (CEMA) IS ENTERED CONSOLIDATING THE MORTGAGES INTO SINGLE LIENS, THE FIRST NOTES AND MORTGAGES STILL EXIST; WHEN A MORTGAGE IS ERRONEOUSLY DISCHARGED WITHOUT A SATISFACTION OF THE DEBT, THE MORTGAGE MAY BE REINSTATED IF THERE HAS BEEN NO DETRIMENTAL RELIANCE ON THE ERRONEOUS DISCHARGE.

The Second Department noted that where balances of first mortgage loans are increased with second mortgage loans and a Consolidation, Extension, and Modification Agreement (CEMA) is entered consolidating the mortgages into single liens, the first notes and mortgages still exist. And where, as here, there has been an erroneous discharge of mortgage without a satisfaction of the mortgage debt, the mortgage may be reinstated where there has been no detrimental reliance on erroneous discharge: "[T]he plaintiff demonstrated ... that MERS [Mortgage Electronic Registration Systems, Inc] erred in executing and filing the satisfaction of mortgage dated October 31, 2005, which certified that the first mortgage in the principal sum of $600,000 was paid. ... [T]he satisfaction references the second mortgage, dated April 12, 2005, in the sum of $8,421.28, and acknowledges that the two mortgages were combined and consolidated to form a "single first lien." Accordingly, the defendants failed to raise a triable issue of fact or support their contention that no mortgage existed upon which the plaintiff can foreclose." ***Bank of Am., N.A. v. Schwartz*, 2021 N.Y. Slip Op. 06602, Second Dept 11-24-21**

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

IN THIS FORECLOSURE PROCEEDING, PLAINTIFF BANK FAILED TO DEMONSTRATE STRICT COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304; NO FOUNDATION FOR THE SUBMITTED BUSINESS RECORDS.

The Second Department, reversing Supreme Court, determined plaintiff's summary judgment motion in this foreclosure action should not have been granted. Strict compliance with the notice requirements of RPAPL 1304 was not demonstrated with admissible evidence: "[I]n support of its motion Bayview [plaintiff, successor-in-interest to the original plaintiff, Bank of America (BoA)] submitted the affidavit of Nicole Currey, a supervisor for Bayview, who attached to her affidavit copies of various documents generated by nonparty Walz Group, Inc. (hereinafter Walz), to establish compliance with the mailing requirements of RPAPL 1304. However, Currey failed to address the nature of the relationship between Walz and BoA , and Bayview's submissions were insufficient to establish a foundation for the admission of the business records relied upon by Bayview to establish compliance with RPAPL 1304 ... . Therefore, Bayview failed to demonstrate, prima facie, its strict compliance with the 90-day notice requirement of RPAPL 1304 ...". ***Bank of Am., N.A. v. Evanson*, 2021 N.Y. Slip Op. 06601, Second Dept 11-24-21**

MUNICIPAL LAW, NEGLIGENCE, MEDICAL MALPRACTICE, CIVIL PROCEDURE.

ALTHOUGH THE COURT HAS THE DISCRETION TO ALLOW AMENDMENT OF A NOTICE OF CLAIM BASED UPON EVIDENCE GIVEN AT THE § 50-H HEARING, THE AMENDMENT CANNOT SUBSTANTIALLY CHANGE THE FACTS AND ADD A NEW THEORY OF LIABILITY.

The Second Department, reversing Supreme Court, determined the petitioner's motion to amend the notice of claim in this medical malpractice action against the New York City Health and Hospitals Corporation should not have been granted. Although the court has the power to allow amendment of a notice of claim based upon evidence given at the § 50-h hearing, the amendment cannot substantively change the facts and add a new theory of liability: "After a hearing was conducted pursuant to General Municipal Law § 50-h ... , the petitioner served an amended notice of claim ... expanding the dates of alleged malpractice from January 2, 2014, through September 6, 2018, based on the petitioner's testimony at the hearing that the decedent had stomach pains since 2016, had been diagnosed with paralytic ileus, and had been treated for that condition by a physician affiliated with Coney Island Hospital since approximately 2016. ... 'A notice of claim may be amended only to correct good faith and nonprejudicial technical mistakes, omissions, or defects, not to substantively change the nature of the claim or the theory of liability' ... . '[W]hile a court has the discretion to permit a plaintiff to serve an amended notice of claim, amendment is permitted only where the error in the original notice of claim was made in good faith, the municipality is not prejudiced, and the amendment does not substantively change the nature of the claim' ... . 'A court may consider evidence adduced at a 50-h hearing to correct a good faith and nonprejudicial technical mistake, omission, irregularity, or defect in the notice of claim. However, the evidence adduced at the 50-h hearing cannot be used to substantively change the nature of the claim or the theory of liability' ...". ***Matter of Lesaine v. New York City Health & Hosps. Corp.*, 2021 N.Y. Slip Op. 06617, Second Dept 11-24-21**

PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE.

PLAINTIFF'S MOTION TO SET ASIDE THE DEFENSE VERDICT IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court's denial of plaintiff's motion to set aside the defense verdict and ordering a new trial in this slip and fall case, determined the defense verdict was against the weight of the evidence: " 'A jury verdict should not be set aside as contrary to the weight of the evidence unless 'the jury could not have reached the verdict on any fair interpretation of the evidence' ... . Whether a jury verdict should be set aside as contrary to the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors ... . Where, as here, 'a jury verdict with respect to negligence and proximate causation is irreconcilably inconsistent, that verdict must be set aside as contrary to the weight of the evidence' ... . Under the circumstances of this case, the Supreme Court should have granted that branch of the plaintiffs' motion which was, in effect, to set aside the jury verdict as contrary to the weight of the evidence, as the finding that the defendants' negligence was not a proximate cause of the accident was not supported by a fair interpretation of the evidence ... . The infant plaintiff testified that she slipped on a step that was cracked, sloped down, and uneven. That testimony was consistent with the testimony of the plaintiffs' expert engineer. The defendants failed to adduce any evidence to refute the testimony of the infant plaintiff and the plaintiffs' expert witness." ***Middleton v. New York City Tr. Auth.*, 2021 N.Y. Slip Op. 06613, Second Dept 11-24-21**

PERSONAL INJURY, MUNICIPAL LAW.

THE PLAINTIFF BICYCLIST COULD NOT IDENTIFY THE CAUSE OF HIS FALL AND THE CITY DID NOT HAVE WRITTEN NOTICE OF ANY ROADWAY DEFECTS IN THE AREA; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this bicycle-fall case should have been granted. Plaintiff could not identify the cause of his fall and the city did not have written notice of any roadway defects: " 'In a trip-and-fall case, a defendant may establish its prima facie entitlement to judgement as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall' without resorting to speculation ... . Here, the injured plaintiff acknowledged at the General Municipal Law § 50-h hearing that he had no recollection of what caused his accident. He testified that he remembered riding his bicycle downhill somewhere on Forest Park Drive and waking up in an ambulance—but nothing in between. Given this lack of information, 'it is just as likely that the accident [was] caused by some . . . factor [other than the conditions of the road], such as a . . . loss of balance' or control ... . Accordingly, a finding that the City's negligent maintenance of the roadway, if any, was responsible for the accident would be impermissibly based on speculation ... . [T]he defendants established their ... entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against the City by presenting evidence that the City Department of Transportation had not received prior written notice of the defective roadway condition that allegedly caused the injured plaintiff's accident ...". ***Xin Zheng Zhan v. City of New York*, 2021 N.Y. Slip Op. 06646, Second Dept 11-24-21**

ZONING, LAND USE, ADMINISTRATIVE LAW.

THE PLANNING BOARD DID NOT HAVE THE AUTHORITY TO WAIVE OR IGNORE THE REQUIREMENTS OF THE VILLAGE ZONING CODE; THE SPECIAL USE PERMIT SHOULD NOT HAVE BEEN ISSUED AND THE SITE PLAN SHOULD NOT HAVE BEEN APPROVED.

The Second Department determined the planning board abused its discretion in issuing a special permit and approving a site plan for a plant nursery and arborist business. To issue the special permit, the planning board improperly waived a requirement that the business have frontage and access to two major roads. The approve the site plan, the planning board which violated the village zoning law: "One of the requirements of the special use permit at issue was that the arborist service, landscape services and/or wholesale nursery 'shall have frontage on and practical access to two major roads' (Code of the Village of Wesley Hills [hereinafter Village Code] § 230-26[N][2]). Here, the Planning Board abused its discretion by waiving this requirement and deeming 'practical access' to a second major road unnecessary. ... A local planning board has broad discretion in deciding applications for site plan approvals, and judicial review is limited to determining whether the board's action was illegal, arbitrary and capricious, or an abuse of discretion ... . Village Code § 230-45 states that the Planning Board 'shall not approve a site plan unless it shall find that such plan conforms [with] the requirements of [the Village Zoning Law].' Since the Village Zoning Law requires that a lot in the R—35 zoning district have a maximum gross impervious surface ratio of .25 … the Planning Board abused its discretion in approving the site plan, which had a proposed gross impervious surface ratio of .44." ***Matter of Marcus v. Planning Bd. of the Vil. of Wesley Hills*, 2021 N.Y. Slip Op. 06618, Second Dept 11-24-21**

THIRD DEPARTMENT

CIVIL RIGHTS LAW, CIVIL PROCEDURE, ATTORNEYS.

PLAINTIFF STATED A CAUSE OF ACTION FOR "GENDER-BIASED VERBAL ASSAULT, BATTERY AND HARASSMENT, CIVIL RIGHTS LAW 79-N" AGAINST HER FORMER ATTORNEY; THE THREE-YEAR STATUTE OF LIMITATIONS PURSUANT TO CPLR 214(2) APPLIES.

The Third Department, in a full-fledged opinion by Justice Clark addressing several issues not summarized here, determined the complaint stated a cause of action for "gender-biased verbal assault, battery and harassment, Civil Rights Law 79-n" and the three-year statute of limitations applied to that cause of action. The lawsuit was brought by a former client against her former attorney, Benjamin: "In her third cause of action, labeled 'Gender-Biased Verbal Assault, Battery and Harassment, Civil Rights Law § 79-n,' plaintiff alleges that Benjamin repeatedly subjected her to 'cruel, unprovoked and unjustified verbal abuse, assault, battery and harassment,' that such conduct was 'motivated, at least in part, by' Benjamin's bias toward women, that Benjamin 'regularly and consistently conducts himself in the same or similar manner toward' women and that plaintiff has suffered, among other things, physical harm as a result of Benjamin's bias-related conduct. Although plaintiff does not specifically detail Benjamin's bias-related conduct within the third cause of action, the facts alleged earlier in the complaint, which are incorporated by reference under the third cause of action, are replete with allegations that Benjamin forcibly subjected plaintiff to nonconsensual sexual contact, including one occasion when Benjamin forced plaintiff to perform oral sex on him and at least two occasions when he forcibly touched plaintiff's genitals. In our view, the allegations of forcible, nonconsensual contact, together with plaintiff's allegation that such conduct was motivated by Benjamin's gender bias, could, if proven, demonstrate the bias-related violence or intimidation required to recover under Civil Rights Law § 79-n ... . * * * Given the substantive differences between claims asserted under Civil Rights Law § 79-n and common-law assault and battery claims, we are convinced that Civil Rights Law § 79-n (2) creates liability that would not exist but for the statute and that therefore the three-year statute of limitations period in CPLR 214 (2) applies to plaintiff's third cause of action ...". ***A.M.P. v. Benjamin*, 2021 N.Y. Slip Op. 06589, Third Dept 11-24-21**

CONTRACT LAW, DEBTOR-CREDITOR, UNIFORM COMMERCIAL CODE (UCC).

THE CREDIT BID IN THIS UCC FORECLOSURE WAS SIGNIFICANTLY BELOW WHAT A COMMERCIALLY REASONABLE BID SHOULD HAVE BEEN PURSUANT TO UCC 9-615.

The Third Department, in a full-fledged opinion by Justice Lynch which addresses several issues not summarized here, determined the bid in foreclosure proceedings pursuant to UCC 9-611 was too low: "Taking the position that the business cessation constituted a breach of the security agreement, [plaintiff] terminated the agreement and gave [defendants] notice of its intent to foreclose on the collateral — i.e., the outstanding medical receivables — by holding a public auction pursuant to the Uniform Commercial Code (see UCC 9-611). [Plaintiff] was the only bidder at the public auction and purchased the collateral by way of a $50,000 credit bid, which it then credited against the outstanding balance of the loan. * * * We find that the credit bid was 'significantly below' what a commercially reasonable bid should have been under the standard set forth in UCC 9-615 (f) (2) ... . It follows that Supreme Court erred in awarding plaintiff damages for breach of contract." ***Specifin Mgt. LLC v. Elhadidy*, 2021 N.Y. Slip Op. 06578, Third Dept 11-24-21**

CRIMINAL LAW, EVIDENCE.

THE PEOPLE DID NOT DEMONSTRATE THE MIRANDA WARNINGS WERE READ TO DEFENDANT BEFORE HE WAS QUESTIONED; GUILTY PLEA VACATED; THERE WAS NO PROOF DEFENDANT WOULD HAVE PLED GUILTY EVEN IF SUPPRESSION HAD BEEN GRANTED, THEREFORE THE HARMLESS ERROR ANALYSIS WAS NOT APPLICABLE.

The Third Department, reversing County Court and vacating defendant's guilty plea, determined defendant's statement should have been suppressed: "[T]he People rely on the investigator having talked to the trooper and, apparently, an inference that the trooper told the investigator that he read defendant his rights. However, the trooper did not testify to having read defendant his rights; he instead testified that he had no conversation with defendant. Although hearsay is admissible in suppression hearings ... , this inference based on hearsay is insufficient for the People to prove beyond a reasonable doubt that defendant was advised of his Miranda rights before being questioned. The investigator did not actually testify to what he heard the trooper say during their out-of-court conversation — that is, the investigator did not actually offer hearsay evidence that the trooper read defendant his Miranda warnings. Even if the People had proven that fact, the investigator's conclusory assertion that defendant waived his right to counsel supplied no facts from which County Court could have rationally concluded that defendant's waiver of his right to counsel — or any of his other rights — was knowing, voluntary and intelligent ... . '[A]bsent proof that [the defendant] would have [pleaded guilty] even if his [or her] motion had been granted, harmless error analysis is inapplicable' ...". ***People v. Teixeira-Ingram*, 2021 N.Y. Slip Op. 06575, Third Dept 11-24-21**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE VERDICT FINDING DEFENDANT CONSTRUCTIVELY POSSESSED DRUGS FOUND IN HIS SISTER'S APARTMENT WAS AGAINST THE WEIGHT OF THE EVIDENCE.

The Third Department, reversing defendant's drug-possession conviction, determined the jury's conclusion defendant constructively possessed the drugs was against the weight of the evidence: "[V]iewing the evidence in a neutral light and weighing the relative probative force of the proof, the jury's determination that defendant constructively possessed the crack cocaine was not supported by the weight of the evidence. The crack cocaine was not discovered in the same room as defendant or near him. Indeed, the officer testified on cross-examination that he did not find any drugs near defendant. Rather, the crack cocaine was found in the north bedroom, i.e., his sister's bedroom. There was no proof indicating that any of defendant's personal belongings were in the north bedroom ... . Moreover, the crack cocaine was not seen in open view but instead underneath a pile of female clothes. Even accepting that defendant was a daily visitor to his sister's apartment, the proof does not establish that he resided there or that he exercised any dominion or control over any part of it ...". ***People v. Cota*, 2021 N.Y. Slip Op. 06574, Third Dept 11-24-21**

FAMILY LAW.

THE WIFE'S TEMPORARY MAINTENANCE ARREARS SHOULD HAVE BEEN CALCULATED FROM THE DATE OF THE WIFE'S APPLICATION FOR MAINTENANCE, NOT THE PRIOR DATE WHEN SHE BECAME UNEMPLOYED.

The Third Department, reversing (modifying) Supreme Court, determined the temporary maintenance awarded the wife should have commenced on the date of her application for temporary maintenance, not the prior date when she became unemployed: "We ... agree with the husband that Supreme Court erred in ordering him to pay arrears retroactive to the wife's date of unemployment, rather than the date of her application for temporary maintenance. The submissions demonstrated that the wife lost her job and the court made temporary maintenance retroactive to that date, November 26, 2019, yet the wife did not file her motion seeking temporary maintenance until April 2020. As applications for pendente lite relief are to be calculated from the date of the application ..., the court's calculation of arrears from the date of the wife's unemployment was error." ***Carter v. Fairchild-Carter*, 2021 N.Y. Slip Op. 06594, Third Dept 11-24-21**

FAMILY LAW, CIVIL PROCEDURE.

THE CHILD IN THIS CUSTODY MATTER RESIDED IN ITALY, THEREFORE NEW YORK WAS NOT THE CHILD'S "HOME STATE" AND NEW YORK DID NOT HAVE JURISDICTION; FATHER'S APPLICATION FOR SUBSTITUTE SERVICE IN ITALY SHOULD NOT HAVE BEEN GRANTED.

The Third Department, in a full-fledged opinion by Justice Clark, reversing Supreme Court in this custody matter, determined: (1) New York was not the child's "home state" because the child had resided in Italy for the 10 months before the action was commenced (therefore New York did not have jurisdiction): and (2) father's application for substitute service in Italy should not have been granted because he did not make the required showing of the "impracticality" of the method of service required by the Hague Convention: "Applying the proper standard set forth in Domestic Relations Law § 76 (1) (a), it is incontrovertible that Italy, not New York, is the child's home state. The child moved to Italy with the wife in July 2019 in accordance with the separation and settlement agreement, which clearly demonstrated the parties' intention that the child live with the wife in Italy for a period of roughly three years. The child continued to live in Italy from July 2019 through

this action's commencement in June 2020. Although the child visited the husband in New York twice between July 2019 and February 2020, first for a period of about three weeks and later for a period of about six weeks, those periods merely constituted temporary absences that do not interrupt the six-month residency period required by the UCCJEA [Uniform Child Custody Jurisdiction and Enforcement Act] for home state status ... . * * * In support of his application for substituted service, the husband failed to come forward with sufficient proof demonstrating an actual effort to effectuate service upon the wife at her residence in Italy. The only proof submitted by the husband was an email — dated August 12, 2020, more than two months after commencement of the action — from an associate at a process service company that the husband's counsel often used for service of process. The email estimated that service upon the wife in Italy in accordance with the Hague Convention would take roughly 18 to 20 weeks in total, which included 'a few days' for Italian translation, 10 to 14 weeks for service and an additional two to four weeks for return of the proof of service. Although we are mindful that the COVID-19 pandemic remained an issue at the time of the August 2020 email, there was no indication in the email that the 18 to 20-week estimate was atypical or that the COVID-19 pandemic rendered service of process under the Hague Convention impracticable." ***Joseph II. v. Luisa JJ.*, 2021 N.Y. Slip Op. 06586, Third Dept 11-24-21**

FREEDOM OF INFORMATION LAW (FOIL), ATTORNEYS.

PETITIONER WAS ENTITLED TO ATTORNEY'S FEES AS THE PREVAILING PARTY IN THIS FOIL PROCEEDING; RESPONDENT HAD AGREED TO ALLOW PETITIONER TO VIEW THE ELECTRONIC FILES USING ITS VIEWING PROGRAM, BUT HAD DENIED, FOR NO GOOD REASON, PETITIONER'S REQUEST TO TRANSFER THE FILES TO A FLASH DRIVE.

The Third Department determined petitioner was entitled to attorney's fees because petitioner substantially prevailed on certain requests for documents after commencing an Article 78 proceeding. With respect to one of the requests, although respondent had agreed to allow petitioner to view the requested electronic files using respondent's viewing program, respondent, without good reason, denied petitioner's request to place the files on a flash drive: "We agree with petitioner that Supreme Court erred in denying its request for counsel fees. As relevant here, a court in a FOIL proceeding 'shall assess, against such agency involved, reasonable [counsel] fees and other litigation costs . . . in any case . . . in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access' to the records sought ... . 'A petitioner substantially prevails under Public Officers Law § 89 (4) (c) when it receives all the information that it requested and to which it was entitled in response to the underlying FOIL litigation' ... . Petitioner substantially prevailed in the litigation. Through use of the judicial process, petitioner received documents responsive to demand Nos. 2-5 in the medium it desired and obtained a certification under demand Nos. 6-8 pertaining to multifamily homes ... . Contrary to Supreme Court's finding, the fact that the disclosure under demand Nos. 2-5 stemmed from a mutual accord between the parties does not change the analysis, as 'the voluntariness of an agency's disclosure after the commencement of a CPLR article 78 proceeding will not preclude a finding that a litigant has substantially prevailed' ... . Moreover, respondent did not have a reasonable basis for the precommencement denial of the records responsive to demand Nos. 2-5, as evidenced by its subsequent production of said documents in electronic form." ***Matter of Aron Law PLLC v. Town of Fallsburg*, 2021 N.Y. Slip Op. 06593, Third Dept 11-24-21**

LABOR LAW-CONSTRUCTION LAW.

THE BUILT-IN WATER HEATER WAS A "STRUCTURE" AND PLAINTIFF WAS ENGAGED IN "REPAIR" WITHIN THE MEANING OF LABOR LAW § 240(1); A SHELF ROUTINELY USED AS A PLATFORM TO ACCESS THE BUILT-IN WATER HEATER COULD CONSTITUTE A DANGEROUS CONDITION WITHIN THE MEANING OF LABOR LAW § 200.

The Third Department, reversing Supreme Court, determined (1) the built-in water heater plaintiff was attempting to shut off was a "structure" within the meaning of Labor Law § 240(1); (2) plaintiff (Eherts) was engaged in repair, a covered activity, not routine maintenance; and (3) the Labor Law § 200 cause of action should not have been dismissed. The plaintiff determined it was important to turn off the water heater to prevent damage because of a suspected water main break. To access the built-in water heater it was necessary to step on suspended shelves. The shelf plaintiff stepped on gave way and he fell: "The situation here is not one of a stand-alone hot water heater accessible at floor level. To the contrary, the record shows that the hot water heater is situated above one of the store's refrigerated units. The heater does not directly rest on top of the freezer, but on a platform suspended a few inches above the freezer by cables attached to the ceiling. The heater has a gas turnoff adjacent to it and an electric breaker switch on the actual heater. There is a shelf that runs along the top of the freezer unit that protrudes out about three feet from the freezer, approximately 12 feet above the floor surface. To access the heater, it was necessary to place a ladder against the shelf, and step over the shelf to reach the heater platform. In our view, this configuration constitutes a structure within the embrace of Labor Law § 240 (1) ... . The events here did not occur during a routine scheduled maintenance call. Instead, on New Year's Day, Eherts was responding to an isolated and unexpected event, i.e., to address a low/no water pressure issue at the store caused by a municipal water main break. His direct response was to take preventative measures to, among other things, avoid damage to the hot water heater by shutting the system off." ***Eherts v. Shoprite Supermarkets, Inc.*, 2021 N.Y. Slip Op. 06587, Third Dept 11-24-21**

To view archived issues of CasePrepPlus,
visit www.nysba.org/caseprepplus.