CasePrepPlus

December 31, 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

FIRST DEPARTMENT

EDUCATION-SCHOOL LAW, PERSONAL INJURY, IMMUNITY, MUNICIPAL LAW.

PLAINTIFF-STUDENT ALLEGED INJURY IN AN AFTERSCHOOL PROGRAM RUN BY TWO TEACHERS; THE DEPARTMENT OF EDUCATION IS IMMUNE FROM SUIT UNDER THE DOCTRINE OF GOVERNMENTAL IMMUNITY; THE PRINCIPAL'S APPROVAL OF THE AFTERSCHOOL PROGRAM WAS DISCRETIONARY AND NO SPECIAL DUTY WAS OWED PLAINTIFF.

The First Department determined the NYC Department of Education (DOE) was immune from suit by a student who alleged injury in an afterschool program run two teachers (Polanish and Gallagher) called "Mind, Body & Sport" (MBS). The school principal's approval of the program was a discretionary act and no special duty was owned plaintiff: "The school principal's granting of a permit for MBS to operate on school grounds was a discretionary action taken during the performance of a governmental function, and thus, the DOE was shielded from liability by the doctrine of governmental immunity ... . Plaintiffs have failed to establish that the DOE owed the infant plaintiff a special duty that would render the DOE liable to plaintiffs for negligent acts ... . Likewise, as to the MBS flyer, the DOE cannot be held liable through the doctrine of apparent authority for issuance of the flyer without the required disclaimer. As with the approval of the permit, the school principal's approval of the MBS flyer involved the exercise of her reasoned judgment and discretionary authority, thus entitling DOE to governmental function immunity ... . The DOE also cannot be held liable for negligently supervising Polanish and Gallagher's conduct during the MBS program. That the DOE permitted MBS to run as an afterschool program on school grounds does not provide a basis for holding the DOE liable, since '[a] defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter defendant can exercise such control' ...". ***R.K. v. City of New York*, 2021 N.Y. Slip Op. 07092, First Dept 12-21-21**

PRIVILEGE, CIVIL PROCEDURE, ATTORNEYS.

SILENCE DOES NOT CONSTITUTE WAIVER; HERE THE NONPARTY DID NOT EXPRESSLY WAIVE THE COMMON INTEREST, WORK PRODUCT OR TRIAL PREPARATION PRIVILEGES WITH RESPECT TO SUBPOENAED DOCUMENTS.

The First Department, reversing Supreme Court, determined silence did not constitute waiver of common interest, work product or trial preparation privileges with respect to subpoenaed documents: " 'Waiver is an intentional relinquishment of a known right and should not be lightly presumed' ... . Accordingly, waiver should not be found absent 'evidence from which a clear manifestation of intent . . . to relinquish [the right in question] could be reasonably inferred' ... . Waiver 'will . . . [not] be implied unless the opposite party is misled to his or her prejudice into the belief that a waiver was intended' ... ; hence, a finding of waiver cannot be based upon 'mere silence or oversight,' or upon 'mistake, negligence or thoughtlessness' ... . The burden of proving waiver rests with the party asserting it ... . * * * ... [I]t is not alleged that appellant or his counsel expressly orally waived the privilege claims at issue, nor does the record reflect that appellant engaged in any gamesmanship with respect to his privilege claims or that he ever 'misled [defendants-respondents] to [their] prejudice into the belief that a waiver was intended' ...". ***Homapour v. Harounian*, 2021 N.Y. Slip Op. 07080, First Dept 12-21-21**

REAL PROPERTY LAW, CIVIL PROCEDURE, MUNICIPAL LAW.

THE OWNER OF THE OLD BRONX COURTHOUSE HAS A VALID CAUSE OF ACTION SEEKING AN EASEMENT BY NECESSITY OVER THE SIDEWALK/STREET ABUTTING THE COURTHOUSE, DESPITE THE "DEMAPPING" OF THE ABUTTING STREET AND THE CONVEYANCE OF THE "DEMAPPED" STREET TO THE DEFENDANT; THE ACTION IS NOT PRECLUDED BY THE STATUTE OF LIMITATIONS BECAUSE IT SEEKS TO QUIET TITLE TO THE OWNER'S LAND.

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Renwick, determined the plaintiff's action claiming ownership of, or an easement over, the sidewalk/street area abutting plaintiff's property (the old Bronx courthouse) was properly dismissed, with exception of the claim of an easement by necessity. The street abutting the courthouse had been "demapped" by the city and conveyed to defendants before plaintiff purchased the courthouse property. The deed description of the courthouse property was unambiguous and was not altered by a hand-drawn circle

around the property on the recorded tax map. The action was not precluded by the statute of limitations because it is an action to quiet title to the plaintiff's land: "[W]here, like here, the owner is in possession, the right of action to remove a cloud on title is a continuous one accruing from day to day, and this right is not barred by the statute of limitations until the cloud is continued without interruption for a length of time sufficient to effect a change of title as a matter of law ... . 'The reason for this rule is that while the owner in fee continues subject to an action, proceeding, or suit on the adverse claim, he or she has a continuing right to the aid of a court of equity to ascertain and determine the nature of such claim and its effect on his or her title, or to assert any superior equity in his or her favor'... . Accordingly, the owner may wait until his or her possession is disturbed, or his or her title is attacked, before taking steps to vindicate his or her right ... . 'The requirement of prompt action is imposed as a policy matter upon persons who would challenge title to property rather than those persons who seek to quiet title to their land' ... . * * * ... [T]he deed contains no reference to the altered Tax Map, with the hand-drawn circle, purportedly intended to change the boundaries of the property. Nor is there any indication on the altered Tax Map of the circle's purpose. If the parties wanted to change the boundaries of the property described in the deed and Current Tax Map to include a surrounding demapped street, they could easily have done so by making such notation on the deed and altered Tax Map." ***Liberty Sq. Realty Corp. v. The Doe Fund, Inc.*, 2021 N.Y. Slip Op. 07082, First Dept 12-21-21**

SECOND DEPARTMENT

CIVIL PROCEDURE, CRIMINAL LAW.

THE EXTENSION OF THE STATUTE OF LIMITATIONS IN CPLR 213-B(1) WHICH ALLOWS A VICTIM OF A CRIME TO SUE THE PERPETRATOR WITHIN SEVEN YEARS OF THE DATE OF CRIME APPLIES ONLY WHERE THE PERPETRATOR HAS BEEN "CONVICTED OF [THE] CRIME;" A PERPETRATOR WHO HAS BEEN ADJUDICATED A YOUTHFUL OFFENDER HAS NOT BEEN "CONVICTED OF A CRIME" WITHIN THE MEANING OF CPLR 213-b(1).

The Second Department, in a full-fledged opinion by Justice Connelly, in a matter of first impression, determined CPLR 213-b(1) does not extend the statute of limitations for civil actions against someone "convicted of a crime" where that person has been adjudicated a youthful offender. Here plaintiff, Anthony Pitt, was accused of rape by Ericka Feagles. The charges against Pitt were resolved in his favor in October 2011. Although Feagles was subsequently charged with falsely reporting an incident and making a false written statement, she was adjudicated a youthful offender in connection with those charges in April 2012. Plaintiff's August 2016 suit against Feagles would only be timely if the seven-year extension of the statute of limitations in CPLR 213-b(1) applied. The Second Department determined being adjudicated a youthful offender does not equate to being "convicted of a crime." Therefore the extension in CPLR 213-b(1) did not apply and plaintiff's suit was time-barred. The court noted the plaintiff could have brought an intentional tort action within the applicable one-year statute of limitations: "CPLR 213-b, entitled 'Action by a victim of a criminal offense,' provides, as relevant, that 'an action by a crime victim . . . may be commenced to recover damages from a defendant: (1) convicted of a crime which is the subject of such action, for any injury or loss resulting therefrom within seven years of the date of the crime' ... . * * * ... [W]e ... must consider the competing legislative purpose of the youthful offender statute. In enacting the youthful offender statute, the legislature sought to relieve youthful offenders of the consequences of a criminal conviction and give them a 'second chance' ... . It would be inconsistent with that legislative purpose to allow plaintiffs to commence civil actions against youthful offenders long after the conduct underlying the adjudication occurred ... . Our determination does not prohibit civil actions against defendants for the conduct underlying youthful offender adjudications. We simply hold that plaintiffs must commence such actions within the applicable statutes of limitations, without the benefit of the seven-year extension provided in CPLR 213-b(1). We note that here, the plaintiffs commenced the prior action within the applicable one-year statute of limitations for intentional torts and would have had a timely action against Feagles had they properly served her. The plaintiffs did not do so." ***Pitt v. Feagles*, 2021 N.Y. Slip Op. 07299, Second Dept 12-22-21**

CRIMINAL LAW.

A SENTENCE CANNOT BE SET ASIDE AS EXCESSIVE PURSUANT TO A CPL § 440.20 MOTION.

The Second Department, reversing Supreme Court, determined defendant's motion to set aside the sentence should not have been granted. A sentence may not be set aside as excessive pursuant to a Criminal Procedure Law (CPL) § 440.20 motion: "The defendant moved, inter alia, pursuant to CPL 440.20 to set aside the sentence. The Supreme Court granted that branch of the motion, and resentenced the ... . To the extent that the Supreme Court set aside the sentence as excessive, such determination was in error, as a 'claim that [a] sentence is excessive may not be raised on a CPL 440.20 motion' ... . [T]he defendant did not show that the sentence should be set aside as illegal or unauthorized (see CPL 440.20). The sentence did not violate the prohibition against cruel and unusual punishment, as there existed no exceptional circumstances warranting modification of the terms of imprisonment, which were within the statutory limits ...". ***People v. Chambers*, 2021 N.Y. Slip Op. 07267, Second Dept 12-22-21**

CRIMINAL LAW.

FOR CAUSE CHALLENGES TO TWO JURORS WHO WERE UNABLE TO UNDERSTAND THE PEOPLE'S BURDEN OF PROOF SHOULD HAVE BEEN GRANTED.

The Second Department, reversing defendant's conviction and ordering a new trial, determined for cause challenges to three jurors should have been granted: "One of the three prospective jurors demonstrated that he would give more credence to a police officer testifying than to a civilian witness, and the court failed to elicit an unequivocal assurance that the prospective juror could render an impartial verdict based on the evidence ... . The other two prospective jurors provided answers that demonstrated an inability to comprehend the People's burden of proof even after the court provided a straightforward explanation of this principle during voir dire ...". ***People v. Wilson*, 2021 N.Y. Slip Op. 07305, Second Dept 12-22-21**

CRIMINAL LAW, ATTORNEYS, APPEALS.

DEFENDANT'S FORMER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE DEFENDANT'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE TO DISMISS THE TIME-BARRED ENDANGERING-THE-WELFARE-OF-A-CHILD COUNTS; WRIT OF CORAM NOBIS GRANTED.

The Second Department determined defendant's former appellate counsel was ineffective for not arguing defendant's trial counsel was ineffective for failing to move to dismiss the misdemeanor endangering-the-welfare-of-child charges were time-barred. Therefore the writ of coram nobis was granted and the relevant counts were vacated: "The misdemeanors of which the defendant was convicted, two counts of endangering the welfare of a child, were barred by the statute of limitations. The defendant demonstrated that trial counsel was not seeking a compromise verdict from the jury and thus did not have a strategic reason for failing to move to dismiss the misdemeanor counts as time-barred. The two counts of endangering the welfare of a child were not lesser included offenses of the rape and burglary counts of which the defendant was also convicted. Further, when the Supreme Court told counsel that it was 'not going to charge everything,' trial counsel did not request that the misdemeanors be submitted to the jury, and replied that the jury would 'either believe that my client is a rapist, or not.' Then, during his summation, trial counsel's sole argument was that the defendant was misidentified. There was no reasonable explanation for trial counsel's 'failure to raise a defense as clear-cut and completely dispositive as a statute of limitations' ...". ***People v. Louis*, 2021 N.Y. Slip Op. 07307, Second Dept 12-22-21**

CRIMINAL LAW, EVIDENCE.

WITH RESPECT TO THE IDENTIFICATION OF THE DEFENDANT BY A WITNESS TO THE CRIME: NO HEARING ON THE SUGGESTIVENESS OF COMMENTS MADE TO THE WITNESS BY THE POLICE WAS NECESSARY BECAUSE THE WITNESS WAS A LONG-TIME ACQUAINTANCE OF THE DEFENDANT.

The Second Department noted that where a witness to the crime is a long-time acquaintance of the defendant, a hearing about the suggestiveness of comments made to the witness by the police is not necessary. In addition, any identification of the defendant by the witness from a photo array was "merely confirmatory:" " 'When a crime has been committed by a . . . long-time acquaintance of a witness there is little or no risk that comments by the police, however suggestive, will lead the witness to identify the wrong person' ... . Thus, when 'the protagonists are known to one another, suggestiveness is not a concern' and a hearing regarding suggestiveness is not required ... . Here, the detective's testimony at the suppression hearing and the complainant's testimony at trial demonstrated that the complainant knew the defendant for approximately three years through mutual friends, the complainant knew the defendant by his alias 'Kilo,' and the defendant admitted to knowing the complainant. The Supreme Court therefore properly determined that the complainant was impervious to suggestion due to his familiarity with the defendant ...". ***People v. Richardson*, 2021 N.Y. Slip Op. 07287, Second Dept 12-22-21**

FAMILY LAW, CIVIL PROCEDURE.

THE FACT THAT COMPLAINANT TURNED 21 DURING THE FAMILY OFFENSE HEARING DID NOT DEPRIVE FAMILY COURT OF JURISDICTION; NOR DID THE INCAPACITY OF THE COMPLAINANT.

The Second Department, reversing Family Court and remitting the matter, determined Family Court did lose jurisdiction over the family offense proceeding when complainant turned 21. The court noted that even if the complainant is incapacitated (but not judicially declared incompetent) Family Court has jurisdiction: "In the context of a family offense proceeding, the question of subject matter jurisdiction is generally confined to whether a qualifying offense has been committed between parties in a qualifying relationship (see Family Ct Act §§ 115[e]; 812[1] ...), irrespective of the complainant's age. Thus, the fact that the complainant attained the age of 21 during the hearing did not deprive the court of jurisdiction to hear and determine this matter. To the extent the respondent's motion may be construed as challenging the petitioner's ability to prosecute this matter in a representative capacity for the complainant, this does not amount to a jurisdictional defect requiring dismissal of the proceeding ... . Indeed, '[a]n incapacitated individual who has not been judicially declared incompetent may sue or be sued in the same manner as any other person' ... , and courts must not "shut their eyes to the special need of protection of a litigant actually incompetent but not yet judicially declared such" ... . Rather, insofar as the record raises questions of fact as to whether the complainant may require the assistance of a guardian ad litem to protect her interests,

the Family Court should have granted the petitioner's request to appoint a guardian to the extent of conducting a hearing to determine whether such an appointment was necessary pursuant to CPLR 1201...". ***Matter of Vellios v. Vellios*, 2021 N.Y. Slip Op. 07276, Second Dept 12-22-21**

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

THE AFFIDAVIT SUPPORTING THE ADMISSIBILITY OF THE BUSINESS RECORDS OFFERED BY THE BANK IN THIS FORECLOSURE PROCEEDING DID NOT LAY A SUFFICIENT EVIDENTIARY FOUNDATION FOR THE RECORDS, RENDERING THE AFFIDAVIT INADMISSIBLE HEARSAY.

The Second Department, reversing Supreme Court, determine the evidentiary foundation for the business records submitted by plaintiff bank (JPMorgan) in this foreclosure action was inadequate: "JPMorgan submitted, among other things, the affidavit of Nathan Abelin, a document management specialist for FNMA's loan servicer, Seturus, Inc. (hereinafter Seturus), who, based upon his review of business records, attested to the defendant's default in payment, JPMorgan's standing to commence the action, and JPMorgan's compliance with RPAPL 1304. Although Abelin averred that he was personally familiar with Seturus's record-keeping practices and procedures, the business records he relied upon and attached to the affidavit were created by JPMorgan and another entity. Abelin failed to lay a proper foundation for these records because he did not aver either that he had personal knowledge of those entities' business practices and procedures, or that the records 'were incorporated into [Seturus's] own records and routinely relied upon by [Seturus] in its own business'... . Accordingly, Abelin's affidavit constituted inadmissible hearsay and lacked probative value ...". ***Federal Natl. Mtge. Assn. v. Allanah*, 2021 N.Y. Slip Op. 07269, Second Dept 12-22-21**

MEDICAL MALPRACTICE, CIVIL PROCEDURE, PRIVILEGE, EDUCATION-SCHOOL LAW, PUBLIC HEALTH LAW.

WHERE THE MINUTES OF A "QUALITY ASSURANCE" PEER-REVIEW COMMITTEE MEETING ASSESSING THE MEDICAL TREATMENT AFFORDED A PATIENT DO NOT IDENTIFY THE SPEAKERS, THE PARTY-STATEMENT EXCEPTION TO THE PUBLIC HEALTH LAW AND EDUCATION LAW PRIVILEGE APPLIES, MAKING ALL THE STATEMENTS BY UNIDENTIFIED SPEAKERS SUBJECT TO DISCOVERY BY THE PLAINTIFF IN THIS MEDICAL MALPRACTICE ACTION.

The Second Department, in a full-fledged opinion by Justice Christopher, determined the party-statement exception to the privilege afforded statements made in a peer-review "quality assurance" committee's review of the medical treatment afforded a patient applied to all of the statements made by speakers who were not identified in the meeting minutes. The defendants, who were asserting the privilege, were unable to demonstrate the statements attributed in the minutes to the "committee" were not made by a party and therefore not subject to the party-statement exception to the privilege. In other words, the statements made at the meeting by unidentified speakers were discoverable by the plaintiff in this medical malpractice action: "Requiring a defendant who is asserting the quality-assurance privilege to identify who made the statements at a medical or quality assurance review meeting, so as to demonstrate that no party statements subject to disclosure are being withheld, will further the goals of the quality-assurance privilege ... . By identifying the maker of the statements at the medical or quality-assurance review meetings, only those statements that are made by a party will be subject to disclosure, and only those statements entitled to protection from disclosure will be protected. ... [I]n order to avail itself of the privilege afforded by Education Law § 6527(3) and Public Health Law § 2805-m(2), the party asserting the privilege must demonstrate that no party statements subject to disclosure are being withheld, and thus must identify who said what at the meeting. ... [T]he party-statement exception applied to those statements in the peer-review committee meeting minutes that were attributed to the committee, and for which there was no indication as to who specifically made the statements, as they were not entitled to the quality-assurance privilege set forth in Education Law § 6527(3) and Public Health Law § 2805-m(2)." ***Siegel v. Snyder*, 2021 N.Y. Slip Op. 07264, Second Dept 12-22-21**

PERSONAL INJURY.

PLAINTIFF WAS STRUCK BY A TRAIN; THE "OPEN RUN" DEFENSE ALLOWS A TRAIN OPERATOR TO PROCEED NORMALLY AND ASSUME A PERSON SEEN AHEAD ON THE TRACKS WILL GET OUT OF THE WAY; THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT THE "OPEN RUN" DEFENSE APPLIES WHETHER THE ACCIDENT HAPPENS IN DAYLIGHT OR, AS HERE, AT NIGHT.

The Second Department, in a full-fledged opinion by Justice Wooten, determined the jury instruction for the "open run" defense was proper. Plaintiff was lying near train tracks with one leg over the rails when he was struck by the defendant's train at night. The "open run" defense allows the train operator to proceed normally when someone is seen ahead on the tracks and assume he or she will get out of the way. The question raised by this case is whether the "open run" defense applies only in the daylight hours. The Second Department held the trial judge properly concluded the defense applied at night because the sound of the train would be heard by, and the light from the train would be seen to, anyone on the tracks. Although the jury was instructed on the "open run" defense, the uncontested evidence at trial demonstrated the train per-

sonnel sounded the horn and initiated an emergency stop when plaintiff was first spotted on the tracks. Any error in the jury instruction, therefore, would have been harmless: "[W]e hold that the open run defense is not exclusively limited to cases involving daytime train accidents, but rather may be applicable under any circumstances in which an oncoming train would be readily observable to a person on or near the tracks making reasonable use of his or her senses." ***Kunnemeyer v. Long Is. R.R.*, 2021 N.Y. Slip Op. 07281, Second Dept 12-22-21**

PERSONAL INJURY.

PLAINTIFF ALLEGED A CRACKED WINDOWPANE BROKE AND FELL, INJURING HER HAND; THERE WAS EVIDENCE OF AT LEAST 33 INSTANCES WHERE A WINDOW IN DEFENDANT'S BUILDING WAS IN NEED OF REPAIR (A RECURRING DANGEROUS CONDITION), RAISING A QUESTION OF FACT WHETHER DEFENDANT HAD A DUTY TO INSPECT THE WINDOWS.

The Second Department, reversing Supreme Court, determined there was a question of fact whether defendant had constructive notice of a recurring condition, i.e., windows in need repair in defendant's (Luna's) building. Plaintiff alleged a cracked window shattered, injuring her hand: "Luna's submissions, which included a transcript of the deposition testimony of its building superintendent, failed to eliminate all triable issues of fact as to whether it had constructive notice of a recurrent dangerous condition. The superintendent testified that in the period of approximately two years preceding the accident, Luna was made aware of 33 instances in which a window in the building needed to be repaired ... . Moreover, the superintendent testified that it was "normal" for windows in the building to break. While '[a] general awareness of a recurring problem is insufficient, without more, to establish constructive notice of the particular condition that caused the accident" ... , . the superintendent's testimony regarding the frequency of specific complaints of window damage in the building raised triable issues of fact as to whether Luna had an obligation to inspect the windows …". ***Butnik v. Luna Park Hous. Corp.*, 2021 N.Y. Slip Op. 07314, Second Dept 12-22-21**

PISTOL PERMITS, ADMINISTRATIVE LAW.

THE PISTOL LICENSING SERVICE'S DENIAL OF PETITIONER'S APPLICATION FOR A PISTOL LICENSE HAD A RATIONAL BASIS AND SHOULD NOT HAVE BEEN ANNULLED.

The Second Department, reversing Supreme Court, determined the Pistol License Section's (PLS's) denial of petitioner's application for a pistol license had a rational basis and should not have been annulled: "[T]he denial of the petitioner's application for a pistol license had a rational basis and was not arbitrary and capricious. The PLS's investigation of the petitioner's application revealed a lengthy history of domestic incidents that involved, at various points, the petitioner, the petitioner's wife, a close family member of the petitioner, and the close family member's domestic partner. These incidents included heated verbal disputes, arguments where property was damaged, shoving matches, and a situation where the close family member wielded a loaded shotgun in the presence of police officers. During many of these incidents, the close family member was intoxicated; in several others, the close family member threatened suicide. These incidents provided a rational basis for denying the petitioner's application ... . Moreover, the petitioner's rationale for not disclosing these incidents to the PLS—that the close family member was not a member of the petitioner's 'household' because the close family member lived in an allegedly private basement apartment in the petitioner's home—was misleading and provided a 'rational basis for the [PLS] to conclude that [the] petitioner did not meet the good moral character standard' ...". ***Matter of Franzese v. Ryder*, 2021 N.Y. Slip Op. 07285, Second Dept 12-22-21**

THIRD DEPARTMENT

CIVIL PROCEDURE, JUDGES, FAMILY LAW.

FAMILY COURT DID NOT HAVE THE AUTHORITY TO, SUA SPONTE, AMEND A DISMISSAL ORDER FROM "WITHOUT PREJUDICE" TO "WITH PREJUDICE."

The Third Department noted that Family Court did not have the authority to, sua sponte, amend a dismissal order from "without prejudice" to "with prejudice:" "... Family Court erred in sua sponte amending its October 13, 2020 dismissal order from 'without prejudice' to 'with prejudice.' Family Court may, in its discretion, correct or amend an order, so as to cure mistakes, defects or irregularities in the order that do not affect a substantial right of a party (see CPLR 5019 [a] ...) or to resolve any ambiguity in the order to make it comport with what the court's holding clearly intended ... . However, in the absence of a motion pursuant to CPLR 2221 (d) or 5015 (a), Family Court lacks the authority to issue an amended or corrected order that alters its dismissal of a petition from 'without prejudice' to 'with prejudice,' as such alteration is one of substance ...". ***Matter of Brian W. v. Mary X.*, 2021 N.Y. Slip Op. 07332, Third Dept 12-23-21**

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

THE REQUIREMENTS FOR AN APPEALABLE ORDER IN A SORA RISK-LEVEL PROCEEDING EXPLAINED.

The Third Department, withholding a decision on the merits of the SORA risk-level determination by County Court until the People enter and serve an appealable order, in a full-fledged opinion by Justice Garry, explained the "appealable order" requirements for SORA proceedings: "Despite the statutory requirement that the court render a written SORA 'order setting forth its determinations and the findings of fact and conclusions of law on which the determinations are based' (Correction Law § 168-n [3]), the lack of such orders is a recurring problem ... . In some cases, as here, the court states during a bench decision that a so-ordered provision will be provided on the transcript but that does not occur ... . In others, the court signs a standard form designating the defendant's risk level classification without 'so-ordered' language or specific findings and conclusions ... . In each of these situations, this Court generally dismisses the appeal, as we must, because it is not properly before us due to the lack of an appealable order ... . This creates a confusing situation in which no proper order exists regarding the defendant's status under SORA (see Correction Law § 168-n [3]). ... Generally, in any civil case, upon a clerk's entry of a written order, the prevailing party should serve a copy of the order, together with notice of entry, upon the losing party (see CPLR 2220 [b]; 5513 [a] ...). The losing party, once served with a copy of that entered order and notice of entry, has 30 days to take an appeal as of right (see CPLR 5513 [a]; see also Correction Law § 168-n [3]). Pursuant to SORA, 'the district attorney, or his or her designee,' is statutorily required to appear at the SORA hearing on behalf of the state and bears the burden of proving the facts supporting the risk level determination being sought (Correction Law § 168-n [3]). Thus, the People bear the responsibility of ensuring that a written SORA order is entered and that notice of entry, along with a copy of that written order, is served on the defendant." ***People v. Lane*, 2021 N.Y. Slip Op. 07324, Third Dept 12-23-21**

FAMILY LAW, JUDGES.

FAMILY COURT SHOULD NOT HAVE DELEGATED ITS AUTHORITY TO SET UP A VISITATION SCHEDULE TO THE CHILD AND MOTHER.

The Third Department, reversing (modifying) Family Court and remitting the matter for a visitation schedule, determined Family Court should not have delegated its authority by allowing the child and mother to agree to a visitation schedule: "Family Court improperly delegated its authority to the younger child when it ordered that the mother's visitation would be only as she and the younger child could agree. 'Generally, the best interests of a child lie in having healthy and meaningful relationships with both the custodial and noncustodial parent' ... . Thus, '[u]nless [visitation] is inimical to the child[]'s welfare, the court is required to structure a schedule which results in frequent and regular access by the noncustodial parent' ... . The court cannot delegate to anyone, including a child, its authority to do so ... , as such delegation can have 'the practical effect of denying [a parent] his [or her] right to visitation with his [or her] child indefinitely without the requisite showing that visitation would be detrimental to the child's welfare' ...". ***Matter of Cecelia BB. v. Frank CC.*, 2021 N.Y. Slip Op. 07323, Third Dept 12-23-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

DEFENDANT HOMEOWNER DID NOT DIRECT OR EXERCISE SUPERVISORY CONTROL OVER PLAINTIFF'S WORK; THE LABOR LAW §§ 240(1) AND 241(6) CAUSES OF ACTION SHOULD HAVE BEEN DISMISSED PURSUANT TO THE STATUTORY HOMEOWNER'S EXEMPTION; THE LABOR LAW § 200 AND COMMON LAW NEGLIGENCE CAUSES OF ACTION, TO WHICH THE HOMEOWNER'S EXEMPTION DOES NOT APPLY, SHOULD ALSO HAVE BEEN DISMISSED BECAUSE THE DEFENDANT DID NOT CONTROL PLAINTIFF'S WORK.

The Third Department, reversing Supreme Court determined the Labor Law §§ 240(1), 241(6), 200 and common law negligence causes of action against the homeowner should have been dismissed. Plaintiff alleged he fell 14 feet attempting to install floor joists across the foundation. The Labor Law §§ 240(1) and 241(6) causes of action should have been dismissed pursuant to the statutory homeowner's exemption, which was deemed applicable because defendant did not direct the plaintiff's installation of the joists. The Labor Law § 200 and common law negligence causes of action should have been dismissed for essentially the same reason (there is no statutory homeowner's exemption for those causes of action): "[P]laintiff averred that he and defendant had discussions about work orders, logistics, materials and the architectural drawings, that defendant checked in with him on a daily basis, that defendant told him where to park during work hours and to lock a gate at the conclusion of the workday, that defendant changed the stairs and windows to be used for the house and changed the placement of a fireplace and that defendant moved rocks and applied tape to plywood at the construction site. Even when viewed in the light most favorable to plaintiff, however, this evidence does not indicate that defendant directed or controlled the manner of plaintiff's work ...". ***Capuzzi v. Fuller*, 2021 N.Y. Slip Op. 07335, Third Dept 12-23-21**

PERSONAL INJURY.

PLAINTIFF, A NOVICE SKIER, WAS INJURED DURING A LESSON; THERE WAS A QUESTION OF FACT WHETHER THE INSTRUCTOR UNREASONABLY INCREASED THE RISK BY HAVING PLAINTIFF SKI DOWN AN INTERMEDIATE HILL WITHOUT ADEQUATE TRAINING.

The Third Department, reversing Supreme Court, determined plaintiff-skier's (Bodden's) negligence complaint should not have been dismissed on the ground she assumed the risks inherent in skiing. Plaintiff was a novice and was taking a lesson at the time she was injured. The instructor had plaintiff go down the "bunny hill" a few times and then took plaintiff to an intermediate hill. Plaintiff lost control, was unable to stop and struck a fence: "A factual dispute remains as to whether Bodden [plaintiff] expressed reservations to the instructor about whether she was ready to progress to Benson's Glade and whether the instructor encouraged her in a manner that was overzealous under the circumstances. It is also unclear whether the instructor taught Bodden, before going on the trail, how to safely fall if she could not remain in the pizza wedge formation, and whether she yelled out to Bodden to do so after she lost control. Although Bodden conceded that she knew the risks associated with skiing and had successfully completed several runs down the bunny hill, she had limited opportunity to practice the technique that she had been taught for slowing down and stopping under real life circumstances, as the bunny hill was primarily flat and, according to Bodden, 'skiers stop[ped] on their own there.' Not to be overlooked is the fact that Bodden was a novice skier and was taken on a trail designated as intermediate on the trail map. We recognize that defendants proffered an affidavit from the instructor explaining that, although Benson's Glade is formally designated an intermediate trail, it is more akin to a beginner's trail. Notably, however, the instructor revealed that she was aware of an area of Benson's Glade that had a "sharper turn" and had 'witnessed multiple people coming straight down and ending up in the trees' near that area. Such testimony creates a question of fact as to whether Benson's Glade was appropriate for a novice skier such as Bodden. Viewing the evidence in the light most favorable to plaintiffs, we conclude that triable issues of fact exist as to whether the instructor unreasonably increased the risk of injury and whether Bodden voluntarily assumed such risk ...". ***Bodden v. Holiday Mtn. Fun Park Inc.*, 2021 N.Y. Slip Op. 07330, Third Dept 12-23-21**

PUBLIC HEALTH LAW, NEGLIGENCE, TRUSTS AND ESTATES.

THE DAMAGES FOR PAIN AND SUFFERING AND DEATH UNDER THE PUBLIC HEALTH LAW PRIVATE RIGHT OF ACTION AGAINST RESIDENTIAL HEALTH CARE FACILITIES ARE NOT LIMITED TO THOSE AVAILABLE FOR WRONGFUL DEATH UNDER THE ESTATES, POWERS AND TRUSTS LAW (EPTL).

The Third Department, in a full-fledged opinion by Justice Garry, explained the differences between damages available for the private right of action against residential health care facilities under the Public Health Law, and the damages available for wrongful death under the Estates, Powers and Trusts Law (EPTL). (1) Public Health Law § 2801-d encompasses compensatory and punitive damages for death; (2) the Public Health Law "death" damages are not limited to the pecuniary loss suffered by surviving family members as they are under the EPTL; and (3) damages under the Public Health Law are not the same as pain and suffering under the EPTL and do not require proof the decedent experienced cognitive awareness of the injury: "The express language of Public Health Law § 2801-d (1) provides that a nursing home facility is liable to a 'patient' for 'injuries suffered as a result of' the deprivation of a right or benefit conferred by any contract, statute or regulation, expressly defining 'injury' to include 'death of a patient.' ... [T]he wrongful death and survivorship statutes do not permit damages to a person for his or her own death. Hence, imposing here [these] limits ... would render meaningless a nursing home's potential statutory liability to a patient for his or her death. ... Although, at common law, damages for loss of enjoyment of life cannot be awarded to a person whose injuries preclude awareness of the loss as such damages serve no compensatory purpose ... , the Legislature chose to allow such damages through the [Public Health Law] statute at issue here to serve a purpose beyond simply compensating the victim, i.e., to deter violations of patient rights. "It is precisely because of the inadequacy of the existing common-law causes of action to redress the abuse of patients in nursing homes that Public Health Law § 2801-d was enacted ...". ***Hauser v. Fort Hudson Nursing Ctr., Inc.*, 2021 N.Y. Slip Op. 07325, Third Dept 12-23-21**

TRUSTS AND ESTATES, FAMILY LAW.

THE "PRECAUTIONARY ADDENDUM," ALTHOUGH REPEALED, STILL MAY BE APPLIED TO WILLS OF PERSONS WHO DIED BEFORE MARCH 1, 1964, TO PRECLUDE INHERITANCE BY ADOPTED CHILDREN IF THE ACT OF ADOPTION WAS DESIGNED TO CUT OFF OTHER BENEFICIARIES; HERE THE SHARES OF THE OTHER BENEFICIARIES WERE DIMINISHED BUT NOT CUT OFF BY THE INCLUSION OF THE ADOPTED CHILDREN; THEREFORE, THE PRECAUTIONARY ADDENDUM DID NOT APPLY.

The Third Department determined the statutory (former Domestic Relations Law § 117) "cautionary addendum" did not apply to exclude the adopted children of the decedent's daughter as beneficiaries of a trust. The cautionary addendum (which, although repealed, can apply to the will of a person who died before March 1, 1964) applies only where the act of adoption cuts off a remainder interest that would have existed but for the adoption. Here the adopted children merely expanded the pool of beneficiaries, which diminished the shares of the other beneficiaries, but did not cut anyone off anyone's

interest: " '[T]he precautionary addendum was . . . designed to prevent the perpetration of fraud on the rights of remaindermen through an adoption for the very purpose of cutting out a remainder' ... . '[T]he precautionary addendum has not precluded an adopted child's inheritance in cases where the adoption simply has brought a child within an existing class.' That said, the reduction of a beneficiary's respective interest is necessarily reduced when the existing class of beneficiaries is expanded— i.e., a situation to which the precautionary addendum does not apply ... . Accordingly, contrary to respondents' view, a diminished share of an interest does not mean that the interest has been cut off so as to make the precautionary addendum applicable ...". ***Matter of Falck*, 2021 N.Y. Slip Op. 07342, Third Dept 12-23-21**

WORKERS' COMPENSATION.

CLAIMANT FIREFIGHTER DEMONSTRATED HIS PTSD IS RELATED TO THE HORRIFIC INJURIES AND DEATHS HE WITNESSED DOING HIS JOB; WORKERS' COMPENSATION BOARD REVERSED.

The Third Department, reversing the Workers' Compensation Board, determined claimant firefighter demonstrated his PTSD is related to the horrific injuries and deaths he witnessed doing his job: "[W]here a firefighter 'files a claim for mental injury premised upon extraordinary work-related stress incurred in a work-related emergency, the [B]oard may not disallow the claim, upon a factual finding that the stress was not greater than that which usually occurs in the normal work environment' (Workers' Compensation Law § 10 [3] [b] ...). ... The record includes a ... letter from claimant's treating psychologist — Raymond Angelini — who opined that claimant was suffering from PTSD 'as a result of responding to countless horrific, work-related emergency situations over the course of his career as a firefighter . . ., including but not limited to exposure to death, dismemberment, disfigurement[] and CPR regurgitation.' ... [W]e conclude that claimant demonstrated, through competent medical evidence, a reasonable probability that his PTSD was causally related to his employment ...". ***Matter of Reith v. City of Albany*, 2021 N.Y. Slip Op. 07339, Third Dept 12-23-21**

WORKERS' COMPENSATION, INSURANCE LAW, FRAUD, APPEALS.

THE INSURER PRESENTED EVIDENCE THE BOARD'S RULING THAT THE INSURER WAS THE RESPONSIBLE CARRIER WAS BASED UPON FRAUDULENT DOCUMENTATION; IT WAS ABUSE OF DISCRETION TO DENY THE INSURER'S APPLICATION FOR REVIEW.

The Third Department, reversing the Workers' Compensation Board, determined the Board abused its discretion when denying an insurer's (Everest's) application for a review of a ruling that the insurer was the responsible carrier. That ruling was plausibly argued to have been based upon fraudulent documentation: "[T]he proof submitted by Everest in support of its administrative appeal strongly suggests that the certificate of insurance provided to the Board was not authentic, and, based upon the limited record before us, the certificate appears to have been an important, if not the only, factor in the WCLJ's [Workers' Compensation Law Judge's] decision as to Everest. In other words, Everest has brought to the Board's attention the strong possibility that it has issued a decision based perhaps entirely upon fraudulent documentation. ... Under these facts, '[i]t is not an adequate answer to say that this kind of determination is usually discretionary' ... , and, in our view, the very purpose of the discretion afforded to the Board is to grant relief in circumstances such as these ... . [W]e find that the Board abused its discretion in denying Everest's application for review ...". ***Matter of Salinas v. Power Servs. Solutions LLC*, 2021 N.Y. Slip Op. 07321, Third Dept 12-23-21**

FOURTH DEPARTMENT

ATTORNEYS, CONTRACT LAW.

DEFENDANT-ATTORNEY DEMONSTRATED THE RETAINER AGREEMENT IN THE DRUNK-DRIVING AND VEHICULAR HOMICIDE CASE WAS NOT PROCEDURALLY UNCONSCIONABLE.

The Fourth Department, reversing Supreme Court, determined defendant-attorney's motion for summary judgment on the "unconscionable retainer agreement" cause of action should have been granted: "[D]efendant met his initial burden on the motion by establishing that the retainer agreement is not procedurally unconscionable. Plaintiff's deposition testimony, which defendant submitted in support of the motion, demonstrated that plaintiff had ample opportunity to become fully informed about the retainer agreement and to make a meaningful choice about representation. Plaintiff did not dispute in his deposition that, as defendant averred, defendant previously represented plaintiff in relation to a charge of driving while intoxicated for which a similar fixed-fee retainer agreement was used. Indeed, plaintiff admitted that defendant previously represented him at least once. Defendant's submissions on the motion also established that the retainer agreement here was not presented to plaintiff until nine days after the drunk-driving incident giving rise to the criminal charges against him and several days after plaintiff had been released from the hospital. By that time, plaintiff had been arraigned on the felony complaint, and therefore was aware of the charges of aggravated vehicular homicide against him for the deaths of two persons. Before signing the retainer agreement, plaintiff's family had contacted at least one other attorney on plaintiff's behalf, and plaintiff negotiated terms of the agreement with defendant. Furthermore, although defendant submitted plaintiff's interrogatory answers in which plaintiff stated that he relied on defendant's statements that defendant had never had a client go to prison and that he would work on plaintiff's case '24/7,' plaintiff conceded during his deposition that

defendant never guaranteed that he would avoid prison and that plaintiff understood defendant's statements regarding the amount of time defendant would spend on plaintiff's case to be hyperbole." ***Divito v. Fiandach*, 2021 N.Y. Slip Op. 07350, Fourth Dept 12-23-21**

CIVIL PROCEDURE, ADMINISTRATIVE LAW, APPEALS, CONSTITUTIONAL LAW, PUBLIC HEALTH LAW.

AN APPELLATE COURT HAS THE POWER TO CONSIDER A REQUEST FOR A DECLARATORY JUDGMENT WHICH WAS NOT BEFORE THE MOTION COURT; THE REGULATION MANDATING CERTAIN VACCINES DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE OR EXCEED THE REGULATORY POWERS OF THE NYS DEPARTMENT OF HEALTH.

The Fourth Department, in a full-fledged, comprehensive opinion by justice NeMoyer which cannot be fairly summarized here, held the appellate court had the power to determine a request for a declaratory judgment which was not raised in the motion court, and the regulation mandating certain vaccines, 10 N.Y.C.R.R. § 66-1.1(1) , does not violate the separation of powers doctrine or exceed the regulatory powers of the NYS Department of Health: "The legislature has determined that vaccines save lives. It has therefore established a mandatory 'program of immunization . . . to raise to the highest reasonable level the immunity of the children of the state against communicable diseases' (Public Health Law § 613 [1] [a]). And by promulgating 10 NYCRR 66-1.1 (l), respondents-defendants-appellants (defendants) merely implemented the legislature's policy in a manner entirely consistent with the legislative design. We therefore hold that 10 NYCRR 66-1.1 (l) is valid, does not violate the separation of powers doctrine, and does not exceed the authority of its promulgator." ***Matter of Kerri W.S. v. Zucker*, 2021 N.Y. Slip Op. 07349, Fourth Dept 12-23-21**

CIVIL PROCEDURE, CRIMINAL LAW, CONTRACT LAW, CONVERSION, FIDUCIARY DUTY, FRAUD.

PLAINTIFF WAS ACQUITTED OF CHARGES STEMMING FROM THE ALLEGED APPROPRIATION OF INSURANCE PROCEEDS DUE OTHER BENEFICIARIES AND THEN SUED TWO INSURANCE COMPANIES; THE CAUSES OF ACTION FOR BREACH OF CONTRACT, CONVERSION AND BREACH OF FIDUCIARY DUTY DID NOT ACCRUE UPON ACQUITTAL AND WERE THEREFORE TIME-BARRED.

The Fourth Department, reversing (modifying) Supreme Court, determined the causes of action that did not require plaintiff's innocence in a criminal matter were time barred. Plaintiff was acquitted of charges stemming from the allegation she appropriated life insurance proceeds which were due to other beneficiaries. Plaintiff then sued two insurance companies alleging breach of contract, breach of fiduciary duty, conversion, and aiding and abetting breach of a fiduciary duty. None of those causes of action accrued upon plaintiff's acquittal. All were therefore time-barred: "Contrary to ... the court's conclusion, those causes of action did not accrue at the time the criminal proceeding terminated. The termination of a criminal proceeding is relevant for claims for malicious prosecution and legal malpractice arising out of a criminal proceeding ... . For those claims, a plaintiff is required to make a showing of innocence, and thus the claims do not accrue until the plaintiff can assert the element of his or her innocence on the criminal charges ... . Plaintiff here does not need to assert her innocence on the criminal charges as an element of the causes of action for breach of contract, conversion, and breach of fiduciary duty ...". ***Morrow v. Brighthouse Life Ins. Co. of NY*, 2021 N.Y. Slip Op. 07373, Fourth Dept 12-23-21**

CIVIL PROCEDURE, INSURANCE LAW, CONTRACT LAW, PERSONAL INJURY.

THE SUBROGATION ACTION BY THE INSURER OF THE PROPERTY OWNER IN THIS SLIP AND FALL CASE WAS NOT PRECLUDED BY THE RES JUDICATA DOCTRINE AFTER A GLOBAL SETTLEMENT WITH THE INJURED PARTY.

The Fourth Department, reversing Supreme Court, determined the subrogation action by plaintiff-insurer of the property owner, 60 LBC, in this slip and fall case was not precluded by the res judicata doctrine: "The court determined that plaintiff is barred by res judicata from pursuing 60 LBC's [the property owner's] coverage claim against defendant [the insurer of the landscaping business hired by 60 LBC to remove ice and snow] because it was resolved in the global settlement [with the injured party] reached during mediation. We disagree. Defendant [insurer of the landscaping company] was not a party to the underlying personal injury action or the third-party action, and the release resulting from the settlement of those actions makes no mention of any claims directly against defendant by 60 LBC or anyone else. Nor does the stipulation of discontinuance. The breach of contract claim asserted by 60 LBC against Red Cedar [the landscaping company] in the third-party action is separate and distinct from plaintiff's breach of contract cause of action against defendant [insurer of the landscaping company] here." ***Cincinnati Ins. Co. v. Acadia Ins. Co.*, 2021 N.Y. Slip Op. 07351, Fourth Dept 12-23-21**

CIVIL PROCEDURE. JUDGES.

ALTHOUGH THE PRE-ANSWER MOTION TO DISMISS THE ARTICLE 78 PETITION WAS PROPERLY DENIED, THE COURT SHOULD NOT HAVE GRANTED THE PETITION WITHOUT AFFORDING THE RESPONDENTS THE OPPORTUNITY TO ANSWER IT.

The Fourth Department, reversing (modifying) Supreme Court. determined the granting of the Article 78 petition after denying a pre-answer motion to dismiss was not proper: "In a CPLR article 78 proceeding, once such a 'motion is denied, the court shall permit respondent to answer, upon such terms as may be just' (CPLR 7804 [f]). Here, in denying the motion, the court essentially treated respondents' motion as one for summary judgment, searched the record, and granted summary judgment against respondents. It is well settled, however, that 'if the court intends to treat the motion as one for summary judgment, it must give adequate notice to the parties that it so intends' ... , and the court gave no such notice here. Additionally, only where 'the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer' should a court grant the petition without permitting respondents to answer ...". ***Mintz v. City of Rochester*, 2021 N.Y. Slip Op. 07389, Fourth Dept 12-23-21**

CONTRACT LAW.

RESCISSION IS NOT APPROPRIATE WHERE THE PARTIES CANNOT BE RETURNED TO THE STATUS QUO; A BREACH OF CONTRACT CAUSE OF ACTION MUST BE DISMISSED IF DAMAGES ARE NOT ESTABLISHED.

The Fourth Department, reversing (modifying) Supreme Court, determined defendant's motion for summary judgment on the counterclaims for rescission and breach of contract should not have been granted. Rescission is only appropriate when the parties to a contract can be returned to the status quo, not the case here. And a breach of contract action must be supported by damages, which were not established here: "A claim for rescission, as opposed to a claim for breach of contract, seeks to ' "restore the parties to status quo," ' as if the parties had never entered into the contract ... . Rescission sounds in equity ... , and is appropriate only where, among other things, the status quo can be ' "substantially restored" ' ... . In this case, rescission is unavailable because the status quo cannot be substantially restored. Here, 'the assimilation of plaintiff's company [into defendant's business is] complete,' and events have rendered the status quo practically impossible to recreate ... . [T]he court erred in granting judgment to defendant on his two counterclaims for breach of contract. Damages are an element of a claim for breach of contract ... and, here, defendant's counterclaims for breach of contract should have been dismissed upon the court's determination that defendant failed to establish damages ...". ***Unger v. Ganci*, 2021 N.Y. Slip Op. 07366, Fourth Dept 12-23-21**

COURT OF CLAIMS, CRIMINAL LAW.

FOR PURPOSES OF CLAIMANT'S ACTION FOR WRONGFUL CONVICTION AND IMPRISONMENT, THE TRIAL ORDER OF DISMISSAL IN THE CRIMINAL TRIAL WAS THE EQUIVALENT OF AN ACQUITTAL.

The Fourth Department, reversing the Court of Claims, determined the claimant was retried and acquitted on criminal charges within the meaning of the Court of Claims Act in this action seeking damages for wrongful conviction and imprisonment: "[T]he court erred in determining that claimant 'was not retried.' To the contrary, the record establishes that 'a new trial was ordered' and held inasmuch as the jury was sworn, the parties made opening statements, the prosecution called various witnesses and, following the close of the prosecution's case, the criminal court granted claimant's motion for a trial order of dismissal ... . [T]he court erred in determining that a trial order of dismissal pursuant to CPL 290.10 was not the equivalent of a finding of not guilty, i.e., an acquittal, for purposes of Court of Claims Act § 8-b (3) (b) (ii). Considering the remedial purpose of the statute (see § 8-b [1]) and the fact that an acquittal is a 'useful and relevant indicator of innocence' ... , ... [T]here is no meaningful distinction for purposes of a claimant's threshold showing between an acquittal by a trier of fact due to failure to prove guilt beyond a reasonable doubt ... and a trial order of dismissal due to legally insufficient evidence ...". ***Owens v. State of New York*, 2021 N.Y. Slip Op. 07374, Fourth Dept 12-23-21**

CRIMINAL LAW.

THE MAJORITY CONCLUDED JUROR 15 WAS ONE OF TWO JURORS WHO GAVE A NON-VERBAL ASSURANCE HE WOULD NOT HOLD IT AGAINST THE DEFENDANT IF HE DID NOT TESTIFY; THE DISSENT ARGUED THE RECORD DOES NOT IDENTIFY JUROR 15 AS ONE OF THE TWO JURORS AND DID NOT DESCRIBE THE NATURE OF THE NON-VERBAL ASSURANCE.

The Fourth Department, over a dissent, determined that a juror gave a non-verbal assurance that he would not hold it against the defendant if he did not testify. The dissent argued the record did not clearly indicate which jurors gave the non-verbal assurance: "We disagree with the dissent that '[t]here is no indication in the record that prospective juror number 15 was one of the two prospective jurors who were acknowledged by the court as having given some form of nonverbal assurance that they could follow its instructions.' Only three prospective jurors were questioned by defense counsel regarding their desire to hear from defendant. In response to the court's follow-up questions, one prospective juror unequivocally indicated that

he could not follow the court's instructions regarding defendant's failure to testify, and the court went on to ask, '[o]kay, anyone else? Can you follow that instruction whether you believe in it or not? I mean, obviously we talked about this. You both can? Okay. All right, thanks' ... . Having already spoken to one of the three prospective jurors, it is clear that the court was addressing the remaining two prospective jurors who had expressed a desire to hear from defendant—including prospective juror number 15. Furthermore, in denying defense counsel's for-cause challenge, the court stated on the record that both prospective juror number 15 and prospective juror number 16 'said they could follow [its] instructions. I asked them exactly on that . . . but they said no, they could follow it.' **From the dissent:** There is no indication in the record that prospective juror number 15 was one of the two prospective jurors who were acknowledged by the court as having given some form of a nonverbal assurance that they could follow its instruction, and the nature of the nonverbal assurance provided by those prospective jurors is not identified in the record." ***People v. Smith*, 2021 N.Y. Slip Op. 07406, Fourth Dept 12-23-21**

CRIMINAL LAW.

THE FOR CAUSE CHALLENGE TO A PROSPECTIVE JUROR WHO SAID HE WOULD BE INCLINED TO BELIEVE THE TESTIMONY OF POLICE OFFICERS SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing defendant's conviction, determined the for cause challenge to a juror who said he would tend to believe the testimony of police officers should have been granted, despite the assurances elicited by the judge: "[T]he statement of the prospective juror during voir dire with respect to the credibility of the testimony of police officers or bias in favor of the police cast serious doubt on his ability to render an impartial verdict, and the prospective juror failed to provide 'unequivocal assurance that [he could] set aside any bias and render an impartial verdict based on the evidence' ... . Specifically, after the prospective juror stated that he was a former correction officer and had 'a lot of friends and family members' in law enforcement, he agreed that he would 'be inclined to give more credibility to an officer than [he] would a lay person,' explained that, based on his experiences, he found police to be 'honest people,' and specifically described one of the officers who would later testify for the People as 'an honest person.' Although the court inquired further of the prospective juror, we conclude that the prospective juror's answers to the questions asked by the court were 'insufficient to constitute . . . an unequivocal declaration' that he could set aside any bias and render an impartial verdict ...". ***People v. Harrison*, 2021 N.Y. Slip Op. 07445, Fourth Dept 12-23-21**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE MAJORITY AFFIRMED DEFENDANT'S CONVICTION, THE TWO DISSENTERS WOULD HAVE DISMISSED THE INDICTMENT BECAUSE THE TESTIMONY OF THE POLICE OFFICERS AT THE SUPPRESSION HEARING DESCRIBING THE TRAFFIC STOP WAS NOT CREDIBLE.

The Fourth Department, affirming defendant's conviction, rejected the argument that the police officer's testimony at the suppression hearing describing the traffic stop was incredible. The two-justice dissent disagreed: **From the dissent:** "[W]e conclude that 'the significant inconsistencies and gaps in memory . . . [in] the testimony of the police officers who testified at the hearing bear negatively on their overall credibility' ... . Neither of the two officers who testified could recall with clarity any of the details of their stop of the vehicle in which defendant was a passenger, with one officer acknowledging that the only thing that he could recall was that he 'smelled mari[h]uana.' The officers disagreed whether that smell was of burnt or burning marihuana. Inasmuch as both officers testified that they each had conducted innumerable traffic stops where marihuana was involved, their inability to recall further details regarding this particular stop undermines the reliability of the officers' testimony. We therefore conclude that, because the lapses in the officers' memory of the stop render their testimony unworthy of belief, the People failed to meet their burden of coming forward with sufficient evidence to establish the legality of the police conduct in the first instance ...". ***People v. Stroud*, 2021 N.Y. Slip Op. 07375, Fourth Dept 12-23-21**

CRIMINAL LAW, EVIDENCE.

THE WARRANTLESS SEARCH OF THE RESIDENCE WAS NOT JUSTIFIED BY THE EMERGENCY EXCEPTION TO THE WARRANT REQUIREMENT.

The Fourth Department, reversing defendant's conviction and dismissing the indictment, determined the warrantless search of defendant's residence by an evidence technician was not justified under the emergency exception to the warrant requirement. A woman called 911 and reported she had found her roommate unconscious in the residence. When the evidence technician arrived she was told the roommate was dead. The technician then went through the residence taking pictures. She discovered what appeared to be illegal drugs. A search warrant was issued and drugs and a handgun were seized: "The court held that the initial search of the residence by the evidence technician was justified under the emergency exception to the warrant requirement, which permits a warrantless search in the presence of three elements: '(1) the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property and this belief must be grounded in empirical facts; (2) the search must not be primarily motivated by an intent to arrest and seize evidence; and (3) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched' ... . Prior to engaging in her initial search, ... the evidence technician had observed the body in the bathroom, and her suppression hearing testimony did not include any observation suggesting

that a crime had occurred, much less that an assailant was still in the home or that there was an ongoing risk of harm ... . [N]othing in the 911 call or in the testimony of the officers who initially arrived at the residence suggested that the woman had been the victim of an attack ... . [T]he evidence technician lacked a 'reasonable basis, approximating probable cause' to associate any emergency that might have once existed, i.e., an unresponsive woman lying in the bathroom, to the search of the bedrooms of the residence ...". ***People v. Hidalgo-Hernandez*, 2021 N.Y. Slip Op. 07404, Fourth Dept 12-23-21**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE JURY'S FINDING THAT THE VICTIM SUFFERED "SERIOUS INJURY" WITHIN THE MEANING OF THE ASSAULT SECOND STATUTE WAS AGAINST THE WEIGHT OF THE EVIDENCE.

The Fourth Department, reversing defendant's assault second conviction, determined the jury's conclusion that the victim suffered "serious injury" was against the weight of the evidence: "Although the victim testified that he sustained a skull fracture ... , the People also introduced expert medical testimony establishing that he did not have a skull fracture. In addition, although the victim testified to ongoing memory issues, there is evidence in the record establishing that he had several other concussions that could also have caused those issues, including one that occurred when he was struck by a metal bat only a few months after this incident. Consequently, we cannot conclude that 'the jury was justified in finding . . . defendant guilty beyond a reasonable doubt' ...". ***People v. Defio*, 2021 N.Y. Slip Op. 07400, Fourth Dept 12-23-21**

CRIMINAL LAW, JUDGES, APPEALS.

ALTHOUGH THE JUDGE IN THIS BENCH TRIAL DID NOT EXPLICITLY RULE ON DEFENDANT'S MOTION FOR A TRIAL ORDER OF DISMISSAL, THE MAJORITY DETERMINED THE DENIAL OF THE MOTION WAS IMPLICIT IN THE VERDICT AND THEREFORE THE LEGAL INSUFFICIENCY ARGUMENT COULD BE CONSIDERED ON APPEAL; THE DISSENT DISAGREED.

The Fourth Department, over a dissent, determined the judge in this bench trial implicitly ruled on defendant's motion for a trial order of dismissal when rendering the verdict. The dissent argued an explicit ruling on the motion was a necessary prerequisite to an appeal: **From the dissent:** "[D]uring the nonjury trial, the court expressly reserved decision on defendant's motion for a trial order of dismissal. Although the Criminal Procedure Law requires a court to determine a motion on which it has reserved decision (see CPL 290.10 [1]; 320.20 [4]), the court here never again addressed that motion by name on the record. Rather, in rendering its verdict, the court stated merely that, 'based upon the credible trial evidence, this [c]ourt finds the defendant guilty of . . . attempted assault in the second degree [because] there was legally sufficient proof that the defendant intended to cause the victim serious physical injury based upon his conduct, and [in] consideration of all the surrounding circumstances.' In reaching the merits of defendant's legal sufficiency contention, the majority tacitly concludes that the court implicitly denied defendant's motion when it rendered its guilty verdict, likely due to the court's reference to the 'legally sufficient proof' supporting its finding of guilt. I respectfully disagree with this approach ...". ***People v. Dubois*, 2021 N.Y. Slip Op. 07364, Third Dept 12-23-21**

CRIMINAL LAW, JUDGES, APPEALS.

THE JUDGE'S THREAT TO IMPOSE A MUCH HARSHER SENTENCE SHOULD THE DEFENDANT BE CONVICTED AT TRIAL AMOUNTED TO COERCION RENDERING THE PLEA INVOLUNTARY; ALTHOUGH THE ISSUE WAS NOT PRESERVED FOR APPEAL, THE PLEA WAS VACATED IN THE INTEREST OF JUSTICE.

The Fourth Department, vacating defendant's guilty plea in the interest of justice, determined the judge's threat to impose a much harsher sentence if the defendant were to be convicted at trial amounted to coercion: "During a court appearance at which County Court extended a plea offer that called for an aggregate sentence of 15 years to life imprisonment, the court informed defendant that 'my policy is if a defendant gets convicted at trial, that means that individual has not accepted responsibility for the conduct that they've been convicted of, and . . . [i]n all likelihood the sentence [after trial] would not even be close to the 20 years [to life sought by the People], it would be much more — — many more years and you are looking at a potential [of] 100 years to life.' The court issued a virtually identical admonition at the next appearance, and defendant subsequently accepted the court's offer of 15 years to life imprisonment. ... [T]he court's statements during plea negotiations did 'not amount to a description of the range of the potential sentences but, rather, they constitute[d] impermissible coercion, 'rendering the plea involuntary and requiring its vacatur' ...". ***People v. Goodwin*, 2021 N.Y. Slip Op. 07418, Fourth Dept 12-23-21**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

THE SORA COURT SHOULD HAVE CONSIDERED THAT THE DEFENDANT DID NOT REOFFEND DURING AN EXTENDED TIME WHEN HE WAS NOT SUPERVISED AS A MITIGATING FACTOR WHICH MAY WARRANT A DOWNWARD DEPARTURE IN THIS SORA RISK-LEVEL PROCEEDING.

The Fourth Department, reversing (modifying) County Court, determined County Court should have considered whether a downward department from the risk-level guidelines was warranted. Defendant, through and oversight, with respect to a previous conviction, was not registered as a sex offender and did not reoffend despite the absence of supervision: "[T]he fact that defendant was at liberty while unsupervised for an extended period of time without any reoffending conduct is a mitigating factor not adequately taken into account by the guidelines ... , and it is undisputed that defendant established the existence of that mitigating factor by a preponderance of the evidence ... . In view of the [SORA] court's conclusion, it did not exercise its discretion to determine whether the totality of the circumstances warrants a departure to avoid an over-assessment of defendant's dangerousness and risk of sexual recidivism. ... [W]e reverse the order and remit the matter to County Court to make that determination ...". ***People v. Edwards*, 2021 N.Y. Slip Op. 07359, Fourth Dept 12-23-21**

EDUCATION-SCHOOL LAW, PERSONAL INJURY.

PLAINTIFF'S SON SUFFERED A BROKEN JAW IN A COLLISION WITH ANOTHER STUDENT DURING A GYM-CLASS TOUCH FOOTBALL GAME; THERE WERE QUESTIONS OF FACT WHETHER SUCH A COLLISION WAS FORESEEABLE AND WHETHER INADEQUATE SUPERVISION WAS THE PROXIMATE CAUSE.

The Fourth Department, reversing Supreme Court, determined the school's motion for summary judgment in this negligent supervision action should not have been granted. Plaintiff's son, a high school freshman, suffered a broken jaw during a touch football game during gym class when a taller student collided with him. The students were to call their own penalties and, according to plaintiff's son, there were four games going on at once: "The testimony of the physical education teacher raised an issue of fact with respect to notice inasmuch as it established that, on the day before the collision, there was a 'very similar' incident involving a collision between two boys during a touch football game in physical education class, resulting in injury. Nonetheless, the students in his game were, according to the testimony of plaintiff's son, expected to call their own penalties. In addition, although the substitute teacher who was supervising the class that day testified that the class was divided into three separate games and that he was able to supervise them all simultaneously, plaintiff's son further testified that the class was divided into four games, and the substitute teacher acknowledged that he did not see the collision that caused the injury to plaintiff's son. ... Plaintiff's son testified that he believed the collision was intentional because he "was nowhere near the ball handler" at the time he was hit from behind and 'the only way' that the other student, who was six inches taller, could have hit plaintiff's son's jaw was if he had lowered his shoulder. Thus, considering that testimony together with the testimony that the students were expected to call their own penalties, we conclude that there exists a question of fact whether this was a 'foreseeable consequence of the situation created by the school's negligence' ...". ***Ismahan A. v. Williamsville Bd. of Educ.*, 2021 N.Y. Slip Op. 07396, Fourth Dept 12-23-21**

FALSE ARREST, FALSE IMPRISONMENT, CRIMINAL LAW.

FALSE ARREST AND FALSE IMPRISONMENT COMPLAINT PROPERLY DISMISSED AFTER A DEFENSE VERDICT; TWO JUSTICE DISSENT.

The Fourth Department, over an extensive two-justice dissent, determined the false arrest and false imprisonment action was properly dismissed after a defense verdict at trial. The police were informed that plaintiff, who was walking away, was involved in an altercation. The officer stood in front of plaintiff to inquire. The plaintiff did not respond and walked into the officer. The officer then made a warrantless arrest for obstruction of justice: "We conclude that the officer's act of 'stepping in front of [plaintiff] in an attempt to engage him was a continuation of the officer's own common-law right to inquire, not a seizure' ... . [W]hile '[a]n individual to whom a police officer addresses a question has a constitutional right not to respond' ... , that person does not have the right to attempt to 'walk through'—and thereby make physical contact with—the officer ... . * * * **From the dissent:** ... [T]he officer was not authorized to forcibly stop plaintiff and lacked probable cause to arrest plaintiff for obstructing governmental administration in the second degree for plaintiff's purported obstruction of such an unauthorized forcible stop." ***Shaw v. City of Rochester*, 2021 N.Y. Slip Op. 07346, Fourth Dept 12-23-21**

FAMILY LAW, CONTRACT LAW, CIVIL PROCEDURE.

PLAINTIFF SOUGHT ARREARAGES FOR A PORTION OF DEFENDANT'S PENSION UNDER THE TERMS OF THE STIPULATION OF SETTLEMENT WHICH WAS INCORPORATED BUT NOT MERGED INTO THE JUDGMENT OF DIVORCE; THE ACTION WAS THEREFORE IN THE NATURE OF A BREACH OF CONTRACT AND WAS LIMITED BY THE SIX-YEAR STATUTE OF LIMITATIONS.

The Fourth Department, reversing (modifying) Supreme Court, determined the calculation of the arrearages for plaintiff's potion of defendant's pension was restricted by the six-year statute of limitations for contact actions. The stipulation of settlement, which is the basis for plaintiff's right to a portion of the pension, was incorporated, but not merged, into the judgment of divorce such that a breach of the stipulation is a breach of contract: "It is well settled that '[a] stipulation of settlement that is incorporated, but not merged, into the judgment of divorce is a contract subject to the principles of contract construction and interpretation' ... , and an action seeking money damages for violation of a separation agreement is subject to the six-year statute of limitations for breach of contract actions ... . Contrary to the court's determination, it is irrelevant that plaintiff sought the arrearages by way of motion rather than by commencement of a plenary action. Although motions to enforce the terms of a stipulation are not subject to the statute of limitations ... , in this case plaintiff was seeking arrearages, or money damages, for the amounts that she did not receive because the QDRO was never received by Niagara Mohawk. When a party is seeking arrearages or a money judgment, the statute of limitations applies whether a party commences a plenary action ... or, as here, simply moves for that relief ... . Thus, we conclude that plaintiff's claim is timely only to the extent that she seeks her share of pension payments made within six years prior to her motion filed on July 29, 2019." ***Mussmacher v. Mussmacher*, 2021 N.Y. Slip Op. 07413, Fourth Dept 12-23-21**

TRUSTS AND ESTATES, FIDUCIARY DUTY, CIVIL PROCEDURE.

ALTHOUGH THE TRUSTEE DID NOT PROVIDE AN ACCOUNTING, HE NEVER REPUDIATED HIS FIDUCIARY DUTIES; THEREFORE, THE SIX-YEAR STATUTE OF LIMITATIONS FOR AN ACCOUNTING WAS NOT TRIGGERED.

The Fourth Department, reversing (modifying) Supreme Court, determined the cause of action for an accounting of a trust should not have been limited to the six years before the filing of the complaint. Although the trustee did not provide a requested accounting. the trustee did not openly repudiate his fiduciary duties, so the six-year statute of limitations was never triggered: "The statute of limitations for a cause of action seeking an accounting is six years (see CPLR 213 [1] ...). It is well settled that the limitations period begins to run only when 'the trustee openly repudiates his [or her] fiduciary obligations' and 'a mere lapse of time is insufficient without proof of an open repudiation' ... . 'The party seeking the benefit of the statute of limitations defense bears the burden of proof on the issue of open repudiation' ... . Here, defendants 'failed to sustain their burden of establishing that [defendant] had openly repudiated [his] fiduciary obligations to [plaintiffs] so as to start the statute of limitations clock' ... . Although defendant failed to provide plaintiffs with an accounting, he never outright refused to do so. Further, defendant continued to conduct his duties as trustee by handling the taxes and expenses for the trust, and making the necessary disbursements to plaintiffs as beneficiaries. Thus, the cause of action for an accounting had not accrued at the time plaintiffs commenced this action." ***Massey-Hughes v. Massey*, 2021 N.Y. Slip Op. 07405, Fourth Dept 12-23-21**

ZONING, MUNICIPAL LAW, ADMINISTRATIVE LAW, LAND USE.

A ZONING BOARD OF APPEALS IS WITHOUT JURISDICTION ABSENT AN APPEAL FROM AN ORDER OR OTHER DETERMINATION BY AN ADMINISTRATIVE OFFICIAL CHARGED WITH ENFORCING THE ZONING CODE.

The Fourth Department, reversing Supreme Court, noted that a Zoning Board of Appeals has no jurisdiction unless there is an appeal from an order or decision or determination made by an administrative official charged with enforcement of zoning ordinances: "Pursuant to the Code of the Town of Webster, absent an 'order, requirement, decision or determination by any administrative official of the Town' charged with the enforcement of the Town's local zoning ordinance, the ZBA is without jurisdiction to hear an appeal ... . * * * ... [W]e conclude on this record that there was no determination ... affording jurisdiction to the ZBA to hear petitioner's appeal ...". ***Matter of Webster Citizens for Appropriate Land Use, Inc. v. Town of Webster*, 2021 N.Y. Slip Op. 07370, Fourth Dept 12-23-21**

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