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FIRST DEPARTMENT

CIVIL PROCEDURE, DEBTOR-CREDITOR, FRAUD, EVIDENCE.

COMPLAINT ALLEGATIONS OF A FRAUDULENT CONVEYANCE MADE "UPON INFORMATION AND BELIEF" DO NOT STATE A CAUSE OF ACTION.

The First Department, reversing Supreme Court, determined "upon information and belief" complaint allegations of a fraudulent conveyance did not state a cause of action: "The complaint fails to state a cause of action for constructive fraudulent conveyance under former Debtor and Creditor Law §§ 273 and 274 ... . Defendants are members of S. Land Development LLC (S. Land), which previously held title to real property and against which plaintiff obtained a money judgment in 2019 in a related action. Plaintiff alleges that defendants transferred or otherwise encumbered S. Land's assets, rendering it insolvent and precluding plaintiff from being able to collect on the judgment. However, since the allegations are made 'upon information and belief,' the complaint does not sufficiently allege that any transfers were made without fair consideration or rendered S. Land insolvent ...". ***L&M 353 Franklyn Ave. LLC v. Steinman*, 2022 N.Y. Slip Op. 00724, First Dept 2-3-22**

CRIMINAL LAW, ATTORNEYS, IMMIGRATION LAW.

DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL; COUNSEL SAID A GUILTY PLEA MAY RESULT IN DEPORTATION WHEN DEPORTATION WAS MANDATORY.

The First Department determined defendant did not receive effective assistance of counsel because he was told pleading guilty may result in deportation when deportation was mandatory: "The existing record sufficiently demonstrates that defendant was deprived of effective assistance of counsel (*see Padilla v Kentucky*, 559 US 356, 369, 374 [2010]) when his attorney failed to advise him that his guilty plea to a drug-related felony would result in mandatory deportation, and merely stated that 'this may and probably will affect his immigration status' ... . The appeal is held in abeyance to afford defendant the opportunity to move to vacate his plea upon a showing that there is a reasonable probability that he would not have pleaded guilty had he been made aware of the deportation consequences of his plea." ***People v. Acosta*, 2022 N.Y. Slip Op. 00737, First Dept 2-3-22**

FAMILY LAW, MENTAL HYGIENE LAW, EVIDENCE, JUDGES.

IN THIS SEXUAL ABUSE CASE, THE CHILD'S MENTAL HEALTH RECORDS SHOULD BE REVIEWED BY THE JUDGE IN CAMERA TO DETERMINE WHETHER ANY RECORDS ARE RELEVANT TO THE RESPONDENT'S CLAIM THE CHILD FABRICATED THE SEXUAL ABUSE ALLEGATIONS; FAMILY COURT PROPERLY DENIED RESPONDENT'S REQUEST FOR DISCOVERY OF THE RECORDS.

The First Department, reversing (modifying) Family Court, held the judge properly denied discovery of the child's mental health records in this sexual abuse proceeding, but the judge should review the records in camera to determine if any records support respondent's position that the child fabricated the sexual abuse allegations: "Confidential mental health records may only be disclosed upon a finding by a court that 'the interests of justice significantly outweigh the need for confidentiality' (Mental Hygiene Law § 33.13[c][1]). Pursuant to Family Court Act § 1038(d), the court must conduct a balancing test to weigh 'the need of the [moving] party for the discovery to assist in the preparation of the case' against 'any potential harm to the child [arising] from the discovery' ... . [G]iven respondent's need to prepare his defense, his right to impeach the child's credibility as she is likely to be a witness, and the child's diminished interest in the confidentiality of older records from an institution that is not currently providing services to her, we find that an in camera review of the ... records is warranted ... . [W]e find that the Family Court properly denied his request for those records ... . Were a court to grant such a request on the sparse showing in this case, virtually every child's therapy records would be subject to exposure." ***Matter of Briany T. (Justino G.)*, 2022 N.Y. Slip Op. 00629, First Dept 2-1-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY, EVIDENCE.

THE WRENCH WHICH FELL AND STRUCK PLAINTIFF COULD HAVE BEEN TETHERED TO THE WORKER WHO DROPPED IT; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION; PLAINTIFF NEED NOT SUBMIT AN EXPERT AFFIDAVIT.

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on the Labor Law § 240(1) cause of action should have been granted. A wrench slipped out of a co-worker's hand and fell 10 or 15 feet striking plaintiff. Defendant's expert opinion that the wrench could not be tethered to a wall missed the point that the wrench could be tethered to the worker. Plaintiff was not required to submit an expert opinion: "Plaintiff is entitled to summary judgment on the Labor Law § 240(1) claim based on [defendant] NYCHA's failure to provide an adequate safety device to protect him from falling objects that were required to be secured ... . Third-party defendant Vestar, Inc.'s expert opinion that the wrench could not have been functionally employed if it was secured/tethered on the parapet wall' completely misses the point, since the wrench could have been tethered to the worker. ... [T]he accident report ... made the recommendation 'to use tethering devices while working from heights,' to prevent reoccurrence of such an accident ... . Contrary to NYCHA's and Vestar's contention, plaintiff was not required to proffer an expert affidavit ...". ***Rincon v. New York City Hous. Auth.*, 2022 N.Y. Slip Op. 00639, First Dept 2-1-22**

PERSONAL INJURY, PUBLIC HEALTH LAW, EVIDENCE.

THE WRONGFUL DEATH CAUSE OF ACTION AGAINST DEFENDANT NURSING HOME SHOULD NOT HAVE BEEN DISMISSED; CONFLICTING EXPERT OPINIONS RAISED A QUESTION OF FACT.

The First Department, reversing (modifying) Supreme Court, determined the wrongful death cause of action against defendant nursing home should not have been dismissed. Conflicting expert opinions raised a question of fact: "Defendant made a prima facie showing that it was not liable for the decedent's injuries and death under Public Health Law § 2801-d(1) through the affirmation of its nursing expert, who opined that defendant did not violate the various federal and state regulations set forth in plaintiff's bill of particulars. In opposition, plaintiff failed to raise an issue of fact, because her expert did not address any rules or regulations that were violated ... . As for the wrongful death cause of action, the parties' nursing experts had similar credentials in gerontology and nursing, and both were qualified to opine on the applicable standard of care for residential nursing facilities ... . Thus, the experts' conflicting opinions present an issue of fact as to whether defendant was liable for the decedent's injuries." ***Jackson v. Northern Manhattan Nursing Home, Inc.*, 2022 N.Y. Slip Op. 00723, First Dept 2-3-22**

SECOND DEPARTMENT

APPEALS, JUDGES.

NO APPEAL LIES FROM DICTA.

The Second Department noted that no appeal lies from dicta. Here the plaintiff acknowledged her slip and fall complaint was properly dismissed against two defendants, but attempted to appeal the motion court's statement that "the plaintiff is unable to establish where she fell:" "The plaintiff commenced this action to recover damages for personal injuries she allegedly sustained in a trip and fall accident. On her appeal from an order which granted the motion of the defendants ... for summary judgment dismissing the complaint ... , she concedes that those motions were properly granted. ... [S]he challenges the statement of the Supreme Court that 'the plaintiff is unable to establish where she fell.' However, no appeal lies from dicta ... . Accordingly, the appeal must be dismissed." ***Kelly v. City of New York*, 2022 N.Y. Slip Op. 00654, Second Dept 2-2-22**

CIVIL PROCEDURE, FORECLOSURE.

THE PROCESS SERVER IN THIS FORECLOSURE ACTION WAS TOLD BY DEFENDANT'S DAUGHTER THAT HE HAD THE RIGHT ADDRESS; BUT, IN FACT, DEFENDANT DID NOT RESIDE AT THAT ADDRESS; SERVICE WAS INVALID.

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Dillon, in a matter of first impression, determined the service of process in this foreclosure action was invalid. A relative of a defendant (daughter) told the process service that the address where service was made was proper, but, in fact, the defendant did not reside at that address: "This appeal presents a simple question that has not previously arisen: whether an affirmative misrepresentation by a relative of a defendant at a residential address that the address is proper, which is relied upon by a process server, may establish that service was valid, if evidence establishes that the address is not, in fact, the defendant's actual dwelling place or usual place of abode. We hold that, under the circumstances of this action, service of process upon the defendant at an address that was not actually his dwelling place or usual place of abode was defective, notwithstanding information provided to the process server at the doorstep. * * * For a defendant to be estopped from raising a claim of defective service, the conduct misleading the process server must be the defendant's conduct, as distinguished from conduct of a third party ...". ***Everbank v. Kelly*, 2022 N.Y. Slip Op. 00651, Second Dept 2-2-22**

CRIMINAL LAW, FAMILY LAW.

DEFENDANT WAS ENTITLED TO A HEARING ON HER MOTION FOR RESENTENCING WHICH ALLEGED SHE WAS THE VICTIM OF DOMESTIC VIOLENCE AT THE TIME OF THE COMMISSION OF THE CRIME.

The Second Department, reversing Supreme Court, determined defendant was entitled to a hearing on her motion for resentencing which alleged she was a victim of domestic violence at the time of the commission of the crime: "Provided that the defendant meets certain threshold eligibility requirements pertaining to, inter alia, the length of incarceration and the type of offense ... , a defendant may move for resentencing in accordance with Penal Law § 60.12 (see CPL 440.47[1][c]). The motion itself ... must make a preliminary evidentiary showing consisting of 'at least two pieces of evidence corroborating the applicant's claim that he or she was, at the time of the offense, a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the applicant as such term is defined in' CPL 530.11(1) (CPL 440.47[2][c]). Furthermore, '[a]t least one piece of evidence must be either a court record, presentence report, social services record, hospital record, sworn statement from a witness to the domestic violence, law enforcement record, domestic incident report, or order of protection' ... . Here, the defendant's evidence in support of her motion included affidavits of her sister and mother, as well as a purported transcription of her interrogation by the police. Together, this evidence corroborated her allegations that she was subjected to domestic violence by the codefendant at the time of the offense ... , and that the defendant and the codefendant were 'member[s] of the same family or household ...". ***People v. Coles*, 2022 N.Y. Slip Op. 00678, Second Dept 2-2-22**

FAMILY LAW.

MOTHER'S MOTION TO VACATE THE NEGLECT FINDING SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Family Court, determined mother's motion to vacate the neglect finding should have been granted: "[T]he mother demonstrated good cause to modify the order of disposition and to vacate the order of fact-finding, which found that she neglected the children. The mother demonstrated her lack of a prior child protective history, her remorse and insight into how her actions affected the children, and her commitment to ameliorating the issues that led to the finding of neglect, including her compliance with court-ordered services and treatment ... . In addition, she demonstrated that the requested relief was in the best interests of the children ...". ***Matter of Nila S. (Priscilla S.)*, 2022 N.Y. Slip Op. 00670, Second Dept 2-2-22**

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

PLAINTIFF IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304, INCLUDING THE "SINGLE ENVELOPE" RULE.

The Second Department, reversing Supreme Court, determined plaintiff in the foreclosure action did not demonstrate compliance with the notice and "one envelope" requirements of RPAPL 1304: "[P]laintiff failed to demonstrate ... that it strictly complied with the mailing requirements of RPAPL 1304. The affidavit of Kyle Lucas, a senior loan analyst employed by the plaintiff, did not make the requisite showing that Lucas was familiar with the plaintiff's mailing practices and procedures, and 'therefore did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed' ... . The plaintiff also failed to establish that it complied with the 'separate envelope' requirement of RPAPL 1304(2). '[I]nclusion of any material in the separate envelope sent to the borrower under RPAPL 1304 that is not expressly delineated in these provisions constitutes a violation of the separate envelope requirement of RPAPL 1304(2)' ... . [T]he plaintiff acknowledged that the envelope ... , which contained the requisite notice under RPAPL 1304, also included other information in two notices pertaining to the Federal Fair Debt Collection Practices Act and bankruptcy." ***Ocwen Loan Servicing, LLC v. Sirianni*, 2022 N.Y. Slip Op. 00677, Second Dept 2-2-22**

MEDICAL MALPRACTICE, NEGLIGENCE, CIVIL PROCEDURE, CONTRACT LAW.

QUESTION OF FACT WHETHER THE CONTINUOUS TREATMENT DOCTRINE RENDERED THIS DENTAL MALPRACTICE ACTION TIMELY; PLAINTIFF STATED A CAUSE OF ACTION FOR BREACH OF CONTRACT BASED ON THE PROMISED OUTCOME OF THE DENTAL WORK.

The Second Department, reversing (modifying) Supreme Court, determined: (1) there was a question of fact whether the continuous treatment doctrine applied making this dental malpractice action timely; and (2) plaintiff's breach of contract action against defendant dentist (Irlin) should not have been dismissed: "[T]he plaintiff submitted an affirmation of her current treating dentist, who opined that the plaintiff initially sought treatment from Irlin in order to obtain a permanent prosthetic replacement for the missing teeth in her upper jaw. The plaintiff's dentist further opined that the numerous surgeries that the plaintiff underwent on her upper jaw to repair and replace implants and prostheses were related to Irlin's initial alleged malpractice in failing to diagnose the bone condition that caused the implants and prostheses to become loose and need replacement. The record otherwise presents questions of fact as to whether the plaintiff timely initiated return visits to complain and seek corrective treatment from Irlin ... . [T]he individual defendants' own submissions, which included the transcript of the plaintiff's deposition testimony and numerous signed consent forms written in English, demonstrated that

the plaintiff has a cause of action to recover damages for breach of contract against Irlin. The plaintiff testified at her deposition that she agreed to the installation of dental implants and a permanent prosthetic device in her upper jaw because Irlin verbally promised her that it would 'last a lifetime,' that she would 'treat [the prosthesis] as if' it was her 'own teeth,' and that she would only need follow-up appointments for cleanings once every 6 to 12 months, among other things. The individual defendants' evidence could support the conclusion that the treatment Irlin rendered did not achieve these allegedly promised results." ***Chvetsova v. Family Smile Dental*, 2022 N.Y. Slip Op. 00650, Second Dept 2-2-22**

MUNICIPAL LAW, EMPLOYMENT LAW, CONTRACT LAW.

THE TOWN HAD THE AUTHORITY TO BRING DISCIPLINARY CHARGES AGAINST THE PLAINTIFF POLICE OFFICER AND THE PLAINTIFF WAS NOT ENTITLED TO RETIREE BENEFITS SET FORTH IN THE COLLECTIVE BARGAINING AGREEMENT.

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Miller which is far too comprehensive to fairly summarize here. determined plaintiff police officer was properly subjected to disciplinary charges brought by the town and was not entitled to all the retiree benefits set forth in the collective bargaining agreement: "We are called upon in this case to navigate the interplay between various forms of equitable relief grounded in common law doctrine, principles of modern practice under CPLR article 78 and the Municipal Home Rule Law, and certain state-level policies regarding the right to collective bargaining and the authority of public officials over law enforcement. These issues have been raised as a result of the plaintiff's complaint, the central aim of which is to prevent the plaintiff's employer from holding him accountable for the serious disciplinary infractions that he allegedly committed in the course of his official duties as a police officer. Contrary to the plaintiff's contentions, the equitable powers and legal doctrines that he seeks to invoke in this litigation do not shield him from the consequences of his actions." ***Murray v. Town of N. Castle*, 2022 N.Y. Slip Op. 00675, Second Dept 2-2-22**

TRUSTS AND ESTATES.

PETITION TO REMOVE A TRUSTEE SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED.

The Second Department, reversing Supreme Court, determined the petition by one of decedent's daughter, Eckhouse, to remove the other daughter, Taormina, as trustee of the generation skipping transfer (GST) trusts should have been granted. The decision includes a comprehensive discussion of the criteria for removing a trustee: "[T]he record clearly demonstrates that, in contrast with the high duty of loyalty owed by a fiduciary, Taormina placed her own interest in a greater share of the estate above her fiduciary duty to act in the best interests of the GST trusts and their beneficiaries. Even accepting Taormina's rather strained protestations that her only goal was to 'fund these trusts properly and pay the proper taxes' in accordance with the decedent's will, as a fiduciary, she was required to pursue those goals in a manner consistent with the protection of the beneficiaries' interests." ***Matter of Epstein*, 2022 N.Y. Slip Op. 00658, Second Dept 2-2-22**

THIRD DEPARTMENT

CRIMINAL LAW.

THE LENGTH OF THE SENTENCE WAS NOT PRONOUNCED; RESENTENCING IS REQUIRED.

The Third Department, reversing County Court, determined the failure to pronounce the length of sentence required resentencing: " 'CPL 380.20 requires that courts must pronounce sentence in every case where a conviction is entered. When the sentencing court fails to orally pronounce a component of the sentence, the sentence must be vacated and the matter remitted for resentencing in compliance with the statutory scheme' ... . This statutory requirement is 'unyielding' ... . Here, although the term of imprisonment was recited — on the record and more than once — at the time of sentencing, County Court 'did not pronounce the length of the term of [imprisonment] in open court' ...". ***People v. Belcher-Cumba*, 2022 N.Y. Slip Op. 00691, Third Dept 2-3-22**

FAMILY LAW.

PETITIONER-MOTHER'S APPLICATION TO HAVE THE MALTREATMENT FINDING DEEMED UNFOUNDED AND EXPUNGED PROPERLY DENIED; MOTHER WOULD NOT ALLOW HER 16-YEAR-OLD DAUGHTER INTO THE HOME; TWO-JUSTICE DISSENT.

The Third Department, over a two-justice dissent, affirmed the NYS Office of Children and Family Services' (OCFS's) denial of petitioner-mother's application to have reports by the Central Register of Child Abuse and Maltreatment amended to be unfounded and expunged. Petitioner allegedly refused to allow her 16-year-old daughter into the home, which caused her daughter to find other places to stay. The dissent agreed with the majority's conclusion that mother's failure to exercise adequate care and supervision constituted maltreatment, but disagreed with the majority's finding that the daughter was placed in imminent risk of danger: **From the dissent:** "OCFS's decision recited a plethora of facts relative to petitioner's fail-

ure to exercise the requisite degree of care or supervision. The same cannot be said regarding whether such failure harmed the child or imminently harmed the child. Rather, only in a conclusory fashion did OCFS find that petitioner's failure to exercise a minimum degree of care caused the child's physical, mental or emotional condition to be impaired or to be in imminent danger of being impaired. Indeed, OCFS's decision noted, and the record confirms, that, when the child stayed with the neighbor, the neighbor's residence was 'safe' and posed 'no concerns.' OCFS also noted that the neighbor was approached about potentially obtaining custody of the child. Based on what OCFS found, substantial evidence, in our view, does not support the determination that the child was harmed or was in imminent risk of harm ...". ***Matter of Tammy OO. v. New York State Off. of Children & Family Servs.*, 2022 N.Y. Slip Op. 00706, Third Dept 2-3-22**

PERSONAL INJURY, MUNICIPAL LAW.

PLAINTIFF RAISED A QUESTION OF FACT WHETHER THE STEPS ON WHICH SHE SLIPPED AND FELL, ALTHOUGH ON A PUBLIC RIGHT-OF-WAY, WERE SUBJECT TO A SPECIAL USE BY THE ABUTTING PROPERTY OWNER (POTENTIALLY RENDERING THE ABUTTING PROPERTY OWNER LIABLE).

The Third Department, reversing Supreme Court, determined plaintiff in this slip and fall case should have been allowed to present evidence of defendant synagogue's special use of steps which were part of the public right-of-way but which led to the synagogue entrance. Plaintiff slipped on ice on the "public right-of-way" portion of the steps and broke her ankle: "[D]efendant proffered evidence in support of its motion for summary judgment that plaintiff's fall occurred on public property, thereby shifting the burden to plaintiff to raise an issue of fact as to defendant's liability as an abutter ... . With respect to its special use theory of recovery, plaintiff points to the deposition testimony of defendant's secretary and bookkeeper, who testified that she was unaware of who initially built the subject set of steps, or when, but that defendant rebuilt them prior to plaintiff's fall. Photographs submitted by both parties make clear that the subject steps are not only directly in line with the synagogue's main entrance, but match that entrance's width with near exactitude, the entrance notably being wide enough to encompass two sets of double doors. There is proof that congregants attending Sabbath services and holiday services would access the synagogue via this entrance only. In addition, photographic evidence reveals that the portion of the raised sidewalk between the two sets of steps is constructed of more decorative pavers or cobblestones, laid by defendant, setting that area apart from the otherwise concrete sidewalk, arguably improving the overall appearance of the main entrance and visually linking the two sets of steps up to the synagogue. Viewing the evidence in the light most favorable to plaintiff and affording her the benefit of every available inference, as we must, the foregoing was adequate to raise a triable issue of fact as to whether the subject steps were constructed or altered for defendant's benefit." ***Podhurst v. Village of Monticello*, 2022 N.Y. Slip Op. 00707, Third Dept 2-3-22**

WORKERS' COMPENSATION, ATTORNEYS, ADMINISTRATIVE LAW.

ALTHOUGH CLAIMANT DID NOT SUCCEED IN DEMONSTRATING HER CONDITION HAD WORSENED SUCH THAT SHE WAS ENTITLED TO INCREASED BENEFITS, HER COUNSEL'S FEES SHOULD NOT HAVE BEEN RESCINDED BY THE WORKERS' COMPENSATION BOARD.

The Third Department, reversing (modifying) the Workers' Compensation Board, determined the rescission of the award of claimant's counsel's fee on the ground that the claim was unsuccessful was arbitrary and capricious. Claimant was unable to show her condition had worsened entitling her to increased benefits: "The initial application submitted by claimant's counsel, which sets forth in detail the services rendered and the time spent in connection therewith, reflects that counsel represented claimant for a number of years, engaged in extensive correspondence with, among others, claimant, Petroski [claimant's treating physician] and the carrier, reviewed various reports, attended hearings and successfully sought and obtained a reopening of this matter. Although counsel ultimately did not succeed in obtaining an increase in claimant's loss of wage-earning capacity, the Board rescinded the fee award solely upon counsel's unsuccessful efforts in this regard. Notwithstanding the Board's broad discretion, this single-factor reasoning strikes us as arbitrary and capricious — particularly in view of the fact that claimant clearly received an economic benefit from counsel's overall representation of her." ***Matter of Simmons v. Glens Falls Hosp.*, 2022 N.Y. Slip Op. 00712, Third Dept 2-3-22**

WORKERS' COMPENSATION, CIVIL PROCEDURE.

ALTHOUGH THE DOCTOR WAS AT WORK AT THE HOSPITAL WHEN HE WAS SHOT DURING A MASS SHOOTING, HIS INJURY WAS NOT WORK-RELATED WITHIN THE MEANING OF THE WORKERS' COMPENSATION LAW.

The Third Department, reversing the Workers' Compensation Board, in a full-fledged opinion by Justice Reynolds Fitzgerald, determined the shooting of a doctor, Justin Timperio, although it occurred while Timperio was working at the hospital, was not a work-related injury within the meaning of the Workers' Compensation Law. Timperio had brought a negligence lawsuit against the hospital in federal court and, in the context of the hospital's motion for summary judgment, the federal court ruled the injuries did not arise from Timperio's employment. The federal ruling did not collaterally estop the Workers' Compensation Board from considering the claim in the first place (because it was not a final ruling), but the Board's ultimate conclusion the injury was work-related was reversed by the Third Department: "The undisputed facts in the record demon-

strate that the attack was perpetrated by an individual who was not employed by the hospital at the time of the attack (and had not worked there for over two years), was not and never was Timperio's coworker, did not know Timperio and provided no reason for the attack prior to taking his own life. Nor did Timperio know the attacker, and there is no evidence that the attack was based upon an employment-related animus between the two individuals or that the attack had any nexus to Timperio's employment or 'performance of h[is] job duties' ... . Such proof was sufficient to rebut the presumption articulated in Workers' Compensation Law § 21 (1) and to establish that the assault on Timperio resulted exclusively from arbitrary, broad-sweeping and gravely maligned personal animosity and not from work-related differences with Timperio ...". ***Matter of Timperio v. Bronx-Lebanon Hosp.*, 2022 N.Y. Slip Op. 00711, Third Dept 2-3-22**

WORKERS' COMPENSATION, EVIDENCE.

THE BOARD SHOULD NOT HAVE RELIED ON THE OPINION OF AN EXPERT WHO DID NOT FOLLOW THE IMPAIRMENT GUIDELINES BY REVIEWING THE UPDATED X-RAYS OF CLAIMANT'S HIP.

The Third Department, reversing the Workers' Compensation Board, determined the board relied on the opinion of an expert, Petroski, who did not follow the impairment guidelines by consulting the updated x-rays of claimant's hip: "Nowhere in his ... report ... does Petroski ... indicate that he had obtained and considered and reviewed updated X rays, as required by Special Consideration No. 8 of the impairment guidelines ... , in arriving at his conclusion that claimant had sustained a 0% SLU [schedule loss of use] of her left leg. ... [T]he deposition testimony of Petroski also does not reflect that had he obtained and considered updated X rays in rendering his opinion about the appropriate SLU of claimant's left leg. Although Petroski stated that no new history was given at the time of or during his examination of claimant, he acknowledged that he did not recall declining to review X rays that claimant brought with her to the examination for him to review. ... Inasmuch as Petroski did not obtain and consider updated X rays consistent with the impairment guidelines, the Board's determination to credit Petroski's finding that claimant sustained a 0% SLU was not supported by substantial evidence and must be reversed ...". ***Matter of Strack v. Plattsburgh City Sch. Dist.*, 2022 N.Y. Slip Op. 00710, Third Dept 2-3-22**

FOURTH DEPARTMENT

CIVIL PROCEDURE, CONTRACT LAW.

ALTHOUGH THE PRELIMINARY INJUNCTION IN THIS BREACH OF CONTRACT ACTION WAS PROPERLY IMPOSED, SUPREME COURT SHOULD HAVE REQUIRED THE POSTING OF AN UNDERTAKING.

The Fourth Department, modifying Supreme Court, determined that, although the preliminary injunction in this breach of contract action was properly imposed, Supreme Court should have provided for an undertaking: "[T]he court erred in granting the preliminary injunction without providing for an undertaking. With certain exceptions that are not applicable here, prior to the court granting a preliminary injunction, a plaintiff must post an undertaking in an amount fixed by the court (see CPLR 6312 [b] ...), and that requirement may not be waived ...". ***TDA, LLC v. Lacey*, 2022 N.Y. Slip Op. 00779. Fourth Dept 2-4-22**

CRIMINAL LAW.

CONSECUTIVE SENTENCES WHICH AMOUNTED TO A LIFE SENTENCE WITHOUT PAROLE WERE NOT WARRANTED.

The Fourth Department, ordering the consecutive sentences to run concurrently, determined a de facto life sentence without parole was not warranted: "Defendant's conviction stems from his conduct in firing a shotgun at police officers while inside his girlfriend's home and not allowing the girlfriend's daughter to leave the home. * * * ... [T]he sentence is unduly harsh and severe. Although defendant's crimes were undoubtedly serious and could easily have resulted in death or injury to the officers, no one was injured or killed during the shootout. We conclude that the de facto life sentence without parole is not warranted here. We therefore modify the judgment as a matter of discretion in the interest of justice by directing that the sentences on the counts of attempted aggravated murder shall run concurrently with each other ...". ***People v. Youngblood*, 2022 N.Y. Slip Op. 00751, Fourth Dept 2-4-22**

CRIMINAL LAW, APPEALS, JUDGES.

MANSLAUGHTER FIRST DEGREE IS NOT AN "ARMED FELONY" WITHIN THE MEANING OF CRIMINAL PROCEDURE LAW § 720.10; COUNTY COURT WAS REQUIRED TO DETERMINE WHETHER DEFENDANT SHOULD BE AFFORDED YOUTHFUL OFFENDER STATUS; MATTER REMITTED.

The Fourth Department, remitting the matter to County Court, determined County Court was required to decide whether defendant in this Manslaughter First Degree case should be afforded youthful offender status: "[W]e note that defendant's 'waiver of his right to appeal was invalid . . . and, in any event, [would] not bar his contention that [County] Court failed to properly consider youthful offender treatment' ... . On the merits, ... the court erred in determining that he was ineligible for youthful offender status. ... [M]anslaughter in the first degree is not an 'armed felony' for purposes of CPL 720.10 (2) (a) (ii)

... . Thus, defendant's eligibility for youthful offender status did not turn ... on the existence of a statutory mitigating factor enumerated in CPL 720.10 (3) ... . Inasmuch as defendant is otherwise eligible for youthful offender status on this conviction (see CPL 720.10 [1], [2]), the court was obligated to make a discretionary youthful offender determination before imposing sentence (see CPL 720.20 [1] ...). We therefore hold the case, reserve decision, and remit the matter to County Court to make and state for the record a determination whether defendant should be afforded youthful offender status ...". ***People v. Graham*, 2022 N.Y. Slip Op. 00784, Fourth Dept 2-4-22**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

DEFENSE COUNSEL INEFFECTIVE; IN THIS MURDER CASE IN WHICH THE EXTREME EMOTIONAL DISTURBANCE (EED) DEFENSE WAS RAISED, DEFENDANT'S MILITARY SERVICE RECORDS, SOCIAL SECURITY DISABILITY RECORDS AND PTSD DIAGNOSIS SHOULD HAVE BEEN PRESENTED AND A PSYCHIATRIC EXPERT SHOULD HAVE BEEN CONSULTED; NEW TRIAL ORDERED.

The Fourth Department, reversing County Court and ordering a new trial, determined defendant's motion to vacate his conviction on ineffective assistance grounds should have been granted. Defendant presented an extreme emotional disturbance (EED) defense in this murder case. But the defense consisted only of his and his girlfriend's testimony. Defense counsel did not request defendant's Social Security disability records which showed a post-traumatic-stress-disorder (PTSD) diagnosis related to three tours of duty in Iraq and did not consult an expert about defendant's PTSD: "Defense counsel testified at the CPL article 440 hearing that, in preparing for trial, she requested and received defendant's military records, which indicated that defendant had been diagnosed with PTSD, but she did not request or review records relating to defendant's Social Security disability benefits, even though defendant informed her that he received such benefits. She also accompanied defendant to an interview conducted by the People's expert, who concluded that defendant was not 'suffering from active PTSD symptoms during the shooting,' but she did not seek an independent expert opinion. Rather than introducing expert or medical evidence, defense counsel attempted to establish an EED defense through the testimony of defendant and his girlfriend. Although defense counsel did not clearly recall the details of the case, and her file had been destroyed, she thought that she might have opted not to introduce defendant's military records at trial because she was uncertain how to lay a foundation for their admissibility. We conclude on this record that defendant met his burden of establishing that he received less than meaningful representation." ***People v. Jackson*, 2022 N.Y. Slip Op. 00785, Fourth Dept 2-4-22**

CRIMINAL LAW, EVIDENCE.

THE PRESENCE OF DEFENDANT'S VEHICLE IN A HIGH CRIME AREA AND FURTIVE MOVEMENTS INSIDE THE VEHICLE DID NOT JUSTIFY THE SEIZURE OF DEFENDANT'S VEHICLE BY BLOCKING IT WITH THE POLICE CAR.

The Fourth Department, reversing County Court, determined the police did not have the requisite "reasonable suspicion" to justify the seizure of defendant's vehicle by blocking it with the police car: "[T]he police lacked reasonable suspicion to justify the seizure of the vehicle, and therefore County Court erred in refusing to suppress both the physical property seized from defendant and the vehicle, as well as inculpatory statements made by defendant during booking following his arrest. ... [W]e conclude that the police officers effectively seized defendant's vehicle when they parked their patrol vehicle in such a manner that, for all practical purposes, prevented defendant from driving his vehicle away ... . Furthermore, we conclude that the People did not have 'reasonable suspicion that defendant had committed, was committing, or was about to commit a crime' to justify their seizure of the vehicle inasmuch as the seizure was based only on defendant's presence in a vehicle parked in a high crime area, and on the police officers' observation of furtive movements inside the vehicle ...". ***People v. Jennings*, 2022 N.Y. Slip Op. 00755, Fourth Dept 2-4-22**

CRIMINAL LAW, EVIDENCE.

THE SEARCH OF DEFENDANT'S VEHICLE BY PAROLE OFFICERS WAS NOT COMPLETELY UNRELATED TO AN ILLEGAL FRISK BY A POLICE OFFICER WHICH REVEALED THE CAR KEYS; COCAINE FOUND IN THE VEHICLE SHOULD HAVE BEEN SUPPRESSED; INDICTMENT DISMISSED.

The Fourth Department, reversing County Court's denial of a suppression motion and dismissing the indictment, determined the search of defendant parolee's vehicle after an illegal frisk revealed the keys was not justified. Parole officers accompanied a police investigator to a health facility where defendant was known to be as part of a police, not a parole, investigation. The illegal frisk occurred when defendant left the health facility and before the parole officers learned defendant had driven there in violation of his parole terms. Therefore the search of defendant's vehicle could not be justified as a distinct and completely unrelated "parole" investigation: "The testimony further establishes that the parole officers' suspicion of a parole violation and their investigation thereof arose only after defendant's parole officer requested that the police investigator hand over the fruit of the unlawful search and seizure, i.e., the keys, and the police investigator left the scene. The parole officers began their investigation—pressing the fob, questioning defendant, waiting for the purported owner of the vehicle to emerge from the building, and viewing surveillance footage—as a direct result of the unlawful seizure of the keys from defendant's person. Indeed, defendant's parole officer did not learn of defendant's possible connection to the vehicle until he pressed the fob, which activated the lights of the vehicle. Inasmuch as the investigation by the parole officers

was precipitated by the police investigator's unlawful seizure of the keys from defendant, the subsequent discovery of the contraband in the vehicle was not 'based solely on information obtained prior to and independent of the illegal [search and seizure]' ... . Thus, the court's determination that the parole officers' investigation was independent of the unlawful seizure of the keys is not supported by the record." ***People v. Smith*, 2022 N.Y. Slip Op. 00790, Fourth Dept 2-4-22**

CRIMINAL LAW, JUDGES.

COUNTY COURT COULD NOT CORRECT AN ILLEGAL SENTENCE WITHOUT FORMALLY RESENTENCING THE DEFENDANT.

The Fourth Department, vacating the sentence on one count of the indictment, determined County Court should not have corrected a sentencing mistake without formally resentencing the defendant: "[T]he sentence originally imposed on the count of criminal possession of a weapon in the third degree was illegal and the court erred in attempting to correct it without formally resentencing defendant at a proceeding at which he was present or securing defendant's waiver of the right to be present at such a proceeding ... . We therefore modify the judgment by vacating the sentence imposed on count two of the indictment, and we remit the matter to County Court for resentencing on that count, at which time defendant must be permitted to appear." ***People v. Abergut*, 2022 N.Y. Slip Op. 00791, Fourth Dept 2-4-22**

EDUCATION-SCHOOL LAW, MUNICIPAL LAW, EMPLOYMENT LAW, ATTORNEYS.

THE SCHOOL BOARD DID NOT VIOLATE THE OPEN MEETINGS LAW WHEN IT CONSULTED WITH ITS ATTORNEY IN A CLOSED SESSION BEFORE DECIDING NOT TO RENEW PLAINTIFF FOOTBALL COACH'S EMPLOYMENT; THERE IS AN EXCEPTION TO THE OPEN MEETINGS LAW FOR LEGAL ADVICE.

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiff high school football coach was not entitled to summary judgment on the cause of action alleging the school board violated the Open Meetings Law by deciding not to renew plaintiff's employment after a closed meeting. The Open Meetings Law did not apply to the board's closed-door consultation with its attorney: "It is well settled that '[e]very meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with [section 105]' (Public Officers Law § 103 [a] ...). While an executive session may be called to discuss, inter alia, 'matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person' (§ 105 [1] [f]), the public body may do so only upon a majority vote of its membership and after 'identifying the general area or areas of the subject or subjects to be considered' (§ 105 [1]). However, section 108 (3) clarifies that '[n]othing contained in [the Open Meetings Law] shall be construed as extending the provisions hereof to . . . any matter made confidential by federal or state law.' Because 'communications made pursuant to an attorney-client relationship are considered confidential under the [CPLR] . . . , communications between a . . . board . . . and its counsel, in which counsel advises the board of the legal issues involved in [a] determination . . . , are exempt from the provisions of the Open Meetings Law' ... . There is no dispute that, during the closed session ... , the Board and the District superintendent met with the District's counsel seeking legal advice 'regarding the [p]laintiff's legal employment status, employment rights, [and] the process for appointing school employees.' We thus agree with defendants that the attorney-client exemption applies and that the court erred in determining that there was a violation of the Open Meetings Law ...". ***Sindoni v. Board of Educ. of Skaneateles Cent. Sch. Dist.*, 2022 N.Y. Slip Op. 00772, Fourth Dept 2-4-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

DEFENDANT WAS A PRIME, NOT A GENERAL, CONTRACTOR AND DEMONSTRATED HE DID NOT EXERCISE SUPERVISION OR CONTROL OVER PLAINTIFF'S WORK; THEREFORE DEFENDANT WAS NOT LIABLE UNDER LABOR LAW §§ 240(1) AND 241(6); HOWEVER, DEFENDANT DID EXERCISE SOME CONTROL OVER WORK-SITE SAFETY AND THEREFORE MAY BE LIABLE UNDER LABOR LAW 200.

The Fourth Department, reversing (modifying) Supreme Court, determined defendant prime contractor, Kilian, did not supervise or control plaintiff's work and therefore was not liable on the Labor Law §§ 240(1) and 241(6) causes of action stemming from plaintiff's fall down an open stairway at a house under construction. The Fourth Department noted the difference between a general contractor and a prime contractor. Here, Kilian (the prime contractor) demonstrated he did not exercise supervision or control over plaintiff's work. However, Kilian did exercise some control over work-site safety and therefore may be liable under Labor Law § 200 for the dangerous condition (open stairwell): " 'A general contractor will be held liable under [Labor Law §§ 240 (1) and 241 (6)] if it was responsible for coordinating and supervising the entire construction project and was invested with a concomitant power to enforce safety standards and to hire responsible contractors' ... . Here, Collins, not Kilian, hired plaintiff's employer to perform work on the project, and Kilian established through the documentary evidence and deposition testimony that he exercised no control or supervision over plaintiff's work and had no authority to enforce safety standards against plaintiff ... . Thus, Kilian established as a matter of law that he was not a general contractor subject to liability pursuant to Labor Law §§ 240 (1) or 241 (6), and plaintiff failed to raise a triable issue of fact ... . [T]o the extent that the section 200 claim against Kilian is based on the theory that he was negligent with respect to the dangerous condition of the stairwell, we conclude that Kilian failed to establish as a matter of law that

he did not have control over the work site or that he lacked actual or constructive notice of the dangerous condition, i.e., the unguarded, open stairwell ...". ***Clifton* v. *Collins*, 2022 N.Y. Slip Op. 00780, Fourth Dept 2-4-22**

PERSONAL INJURY, MUNICIPAL LAW.

CLAIMANTS' APPLICATION TO FILE A LATE NOTICE OF CLAIM AGAINST THE COUNTY IN THIS TRAFFIC ACCIDENT CASE SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined claimants' application to file a late notice of claim against the county in this traffic accident case should not have been granted. Claimants alleged ice and snow had been allowed to accumulate on the road causing the driver to lose control and strike a tree. Claimants' eight-year-old son was injured. The Fourth Department, in a comprehensive discussion, went through each "late-notice-of-claim" factor and found only one (county not prejudiced by the delay) favored the claimants: "[O]f all the relevant circumstances evaluated—infancy, reasonable excuse, actual knowledge, and substantial prejudice—only one, lack of substantial prejudice, favored granting claimants' application. Despite the well-settled principle that 'actual knowledge of the claim is the factor that is accorded 'great weight' in determining whether to grant leave to serve a late notice of claim' ... and instead 'weigh[ed] heavily' the lack of substantial prejudice, even though claimants' showing in that regard, while adequate, was not particularly strong. Under these circumstances—which include the nearly 22-month period between the accident and claimants' application for leave to serve a late notice of claim, the improper weighing of the substantial prejudice factor at the expense of the actual knowledge factor, and claimants' failure to demonstrate a nexus between the son's infancy and the delay or to otherwise proffer a reasonable excuse for the delay—we conclude that the court abused its discretion in granting that part of the application seeking leave to serve a late notice of claim on the County ...". ***Matter of Antoinette C. v. County of Erie*, 2022 N.Y. Slip Op. 00776, Fourth Dept 2-4-22**

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