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COURT OF APPEALS

APPEALS, CIVIL PROCEDURE, FAMILY LAW, ATTORNEYS.

THE MAJORITY HELD THE APPELLATE DIVISION PROPERLY REFUSED TO HEAR APPELLANT FATHER'S APPEAL IN THIS TERMINATION OF PARENTAL RIGHTS PROCEEDING BECAUSE FATHER WAS IN DEFAULT (NO APPEAL LIES FROM A DEFAULT); THE DISSENT ARGUED FATHER WAS NOT IN DEFAULT BECAUSE HE APPEARED BY COUNSEL.

The Court of Appeal, affirming the Appellate Division, over a strong dissent, determined the Appellate Division properly concluded it could not hear the appellant father's appeal in this termination-of-parental-rights proceeding because he was in default (no appeal lies from a default judgment). The dissent argued father appeared by counsel and therefore was not in default: "Before this Court, appellant does not dispute the Appellate Division's determination that his failure to appear constituted a default. **From the dissent:** The only reviewable issue before us is whether the Appellate Division properly dismissed appellant father's appeal from a Family Court order terminating his parental rights on the ground that appellant defaulted. That decision was in error because appellant appeared through counsel during the fact-finding and dispositional hearings, as acknowledged by Family Court, and in accordance with the Family Court Act and the CPLR (see Family Ct Act § 165; CPLR 3215 [a])." ***Matter of Irelynn S.*, 2022 N.Y. Slip Op. 01869, Ct App 3-17-22**

CONTRACT LAW, SECURITIES.

THE "SOLE REMEDY REPURCHASE PROTOCOL" IN THIS RESIDENTIAL MORTGAGE-BACKED SECURITIES CASE REQUIRES NOTICE OF EACH INDIVIDUAL DEFECTIVE LOAN BEFORE THE DEFENDANT IS REQUIRED TO REPURCHASE IT; OF THE 783 NONCONFORMING LOANS, 480 WERE NOT SPECIFICALLY IDENTIFIED; THE DEFENDANT WAS NOT OBLIGATED TO REPURCHASE THE UNIDENTIFIED LOANS.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, reversing the Appellate Division, over an extensive partial dissent, determined that the "sole remedy repurchase protocol" contract provision of the residential-mortgage-backed-securities agreements requires notice of each defective loan before the obligation to repurchase is triggered: "Pursuant to the pooling and service agreement (PSA) establishing the trust, [defendant] DLJ made certain representations and warranties, including that each loan was underwritten in accordance with the originators' underwriting standards and applicable law, that certain provided documentation was true and accurate, and that none of the loans were 'high cost' or 'predatory.' ... [T]he PSA contains a 'sole remedy' provision granting U.S. Bank, as trustee, the limited authority to seek a remedy for any breach by DLJ of these representations and warranties through a contractually established 'repurchase protocol' requiring DLJ to cure, repurchase, or substitute a nonconforming mortgage loan within 90 days of notice or independent discovery of such breaching loan. * * * ... [T]he trustee's expert reviewed 1,059 of the loans in the trust—including both previously noticed and unnoticed loans—and identified 783 allegedly nonconforming loans. Only 303 of these loans had been specifically identified by the trustee in its pre-suit letters; the remaining 480 loans were not listed in the schedules of breaching loans provided to DLJ prior to commencement of the action. * * * A simple reading of the [agreement] demonstrates that the trustee's assertion that loan-specific notice is not required is inconsistent with the contractual language of the repurchase protocol. The parties structured the repurchase protocol entirely through the lens of individual 'mortgage loans'—clearly contemplating a loan-by-loan approach to the agreed-upon sole remedy for breach." ***U.S. Bank N.A. v. DLJ Mtge. Capital, Inc.*, 2022 N.Y. Slip Op. 01866, Ct App 3-17-22**

CRIMINAL LAW, ATTORNEYS.

ALTHOUGH DEFENDANT'S ATTORNEY WAS SUSPENDED BY THE SECOND CIRCUIT BEFORE DEFENDANT'S TRIAL AND SUSPENDED IN NEW YORK JUST AFTER DEFENDANT'S TRIAL, DEFENDANT'S DEPRIVATION-OF-HIS-RIGHT-TO-COUNSEL AND INEFFECTIVE-ASSISTANCE ARGUMENTS WERE REJECTED; THE ATTORNEY WAS NOT OBLIGATED TO INFORM DEFENDANT OF HIS SUSPENSION OR THE PENDING SUSPENSION PROCEEDINGS.

The Court of Appeals, in a full-fledged opinion by Judge Troutman, affirmed defendant's conviction. The court noted: (1) defendant's attorney had been suspended by the Second Circuit before defendant's trial; (2) defendant's attorney was still licensed in New York at the time of the defendant's trial and conviction; (3) defendant's attorney was suspended in New

York two weeks after defendant's conviction; (4) the New York suspension was made "retroactive" to the date of the Second Circuit suspension (before defendant's trial); (5) the attorney was not obligated to inform defendant of the suspension by the Second Circuit; and (6) the failure to inform defendant was considered pursuant to defendant's ineffective-assistance argument on appeal. Defendant's motion to vacate his conviction and his appeal were deemed properly rejected by the lower courts: "[T]he imposition of reciprocal discipline is not a foregone conclusion, nor is the nature or length of any reciprocal discipline imposed certain. Defendant's proposed rule would deprive attorneys of the due process to which they are entitled in pending reciprocal disciplinary proceedings. * * * No statute, court order, or New York Rule of Professional Conduct affirmatively required [defendant's attorney] to disclose the Second Circuit's suspension or the pending reciprocal disciplinary proceedings in New York to defendant. * * * We decline to create a bright-line rule invariably requiring attorneys to affirmatively disclose the imposition of foreign discipline or pending reciprocal discipline proceedings to their clients in every case, where no court order or ethical rule requires such disclosure. ... Instead, we conclude that an attorney's failure to disclose the imposition of foreign discipline and pending reciprocal disciplinary proceedings can adequately be assessed in the context of an ineffective assistance of counsel claim … ." ***People v. Burgos*, 2022 N.Y. Slip Op. 01868, Ct App 3-17-22**

FIRST DEPARTMENT

CIVIL PROCEDURE.

ALTHOUGH THE MOTION TO DISMISS ON STATUTE OF LIMITATIONS GROUNDS WAS NOT TIMELY, THE ASSERTION OF THE DEFENSE IN THE REPLY TO THE COUNTERCLAIM WAS TIMELY; THE DEFENSE CAN BE RAISED IN A SUBSEQUENT SUMMARY JUDGMENT MOTION.

The First Department noted that the statute of limitations affirmative defense was timely served in a reply to a counterclaim: "[Defendant] NYCTA did not waive its affirmative defense under CPLR 3211(a)(5) because a defense based upon the statute of limitations is waived only if it is neither asserted in a responsive pleading or in a timely motion ... . Here the affirmative defense was timely asserted in NYCTA's reply to the counterclaim. The motion to dismiss under CPLR 3211(a)(5), however, was not timely made, as required under CPLR 3211(e) ... . We note that NYCTA may pursue relief on its statute of limitations defense by way of a summary judgment motion in the normal course of the litigation ...". ***Han v. New York City Tr. Auth.*, 2022 N.Y. Slip Op. 01737, First Dept 3-15-22**

CIVIL PROCEDURE, PRODUCTS LIABILITY, NEGLIGENCE, EVIDENCE.

ALTHOUGH PLAINTIFF, WHO WAS INJURED WHILE REPAIRING AN ESCALATOR, COULD NOT IDENTIFY THE CAUSE OF THE ESCALATOR'S SUDDEN START-UP, THE MOTION TO COMPEL HIM TO SUPPLEMENT HIS ANSWERS TO INTERROGATORIES WAS PROPERLY DENIED; PRODUCTS LIABILITY ACTIONS CAN BE PROVEN BY CIRCUMSTANTIAL EVIDENCE; AT THIS STAGE PLAINTIFF CAN TESTIFY UNDER OATH THAT HE DOES NOT KNOW THE CAUSE OF THE UNEXPECTED START-UP.

The First Department determined the motion to compel plaintiff to supplement his interrogatories in this products liability case was properly denied. Plaintiff alleged the escalator he was working on started up without warning severely injured his leg. The fact that plaintiff cannot identify the cause of the unexpected start-up did not require supplementing his interrogatories as he can so state "under oath:" " 'It is well settled that a products liability cause of action may be proven by circumstantial evidence, and thus, a plaintiff need not identify a specific product defect' ... . In the absence of evidence identifying a specific defect 'a plaintiff must prove that the product did not perform as intended and exclude all other causes for the product's failure that are not attributable to [the] defendants' ... . If a 'plaintiff is unable to prove both elements, 'a jury may not infer that the harm was caused by a defective product unless [the] plaintiff offers competent evidence identifying a specific flaw' ... . In his interrogatory responses, plaintiff identified several alleged design defects, including the design of the pit, that contributed to his injury. However, he did not identify a cause for the unexpected start up of the escalator. ... Presently, plaintiff asserts that he cannot pinpoint the defective component that allowed the escalator's machinery to begin moving without warning. In an instance where plaintiff 'presently lacks the knowledge' to specifically identify the nature of the defect, plaintiff can testify to that 'under oath' ... . [I]f he acquires the pertinent information he would be under an obligation to promptly supplement his answers to the interrogatories at issue ...". ***Berkovich v. Judlau Contr., Inc.*, 2022 N.Y. Slip Op. 01733, First Dept 3-15-22**

CRIMINAL LAW, EVIDENCE, APPEALS.

IN A RARE REVERSAL OF A BENCH TRIAL ON EVIDENTIARY GROUNDS, THE 1ST DEPT DETERMINED FOUR OUT-OF-COURT STATEMENTS ALLEGEDLY MADE BY THE VICTIM IN THIS SEXUAL-OFFENSE CASE SHOULD NOT HAVE BEEN ADMITTED UNDER THE "EXCITED UTTERANCE" OR "PROMPT OUTCRY" THEORIES; THE COURT NOTED THAT ONLY THE FACT OF THE COMPLAINT, NOT THE ACCOMPANYING DETAILS, ARE ADMISSIBLE AS A "PROMPT OUTCRY."

The First Department, reversing defendant's conviction after a nonjury trial, determined four out-of-court statements made by the alleged victim in this sexual-offense case should not have been admitted a "excited utterances." Although two of the statements were "prompt outcries," under that theory only the fact of a complaint, not the details (as provided here) are admissible: "[T]he trial court admitted four statements made by the alleged victim following the incident, reasoning that they were admissible both as excited utterances and prompt outcries. This was error. The alleged victim's out-of-court statements did not qualify as excited utterances and should not have been admitted for their substance under that hearsay exception ... . Although two of the four statements were correctly admitted under the alternative theory that they constituted prompt outcries, under this exception, 'only the fact of a complaint, not its accompanying details' is admissible ... . It is clear from the record that the trial court considered all four hearsay statements for their substance, and thus, there can be no presumption that the court, as the finder of fact, considered only competent evidence ... . Given the People's strong reliance on the hearsay statements to prove its case, and the court's indication that it intended to review the written statement that was in evidence during deliberation, we cannot say that "the proof of the defendant's guilt, without reference to the error, is overwhelming" and that the error was therefore harmless ...". ***People v. Gideon*, 2022 N.Y. Slip Op. 01746, First Dept 3-15-22**

INSURANCE LAW, NEGLIGENCE.

IN THIS NO-FAULT INSURANCE MATTER, PLAINTIFF INSURER DID NOT DEMONSTRATE COMPLIANCE WITH THE NYCRR SUCH THAT IT WAS ENTITLED TO SUMMARY JUDGMENT BASED UPON THE INSURED'S FAILURE TO APPEAR FOR AN INDEPENDENT MEDICAL EXAMINATION.

The First Department, reversing Supreme Court, determined plaintiff insurer did not demonstrate it was entitled to summary judgment based upon the insured's failure to appear for an independent medical examination (IME): "[Plaintiff insurer's] its motion papers did not demonstrate that it sustained its burden of showing that it complied with New York State no-fault regulations (11 NYCRR § 65-3.5[b], [d]) governing the timeframes for scheduling IMEs ... .. Specifically, plaintiff did not establish that it timely requested the IMEs under the applicable no-fault regulations, since plaintiff's motion papers did not establish the dates of the verification forms that it received from the medical provider defendants; therefore, it is not possible to determine whether plaintiff sent the appropriate notices within 15 business days or 30 calendar days of receiving the forms, as required under (11 NYCRR) § 65-3.5(b) and (d) ..." ***American Tr. Ins. Co. v. Alcantara*, 2022 N.Y. Slip Op. 01871, First Dept 3-17-22**

INSURANCE LAW, SECURITIES.

DEFENDANT COMMODITY FUTURES BROKER IS ENTITLED TO COVERAGE UNDER FIDELITY BONDS FOR LOSSES INCURRED BY THE CRIMINAL ACTIONS OF A BROKER AMOUNTING TO $141 MILLION.

The First Department, in a full-fledged opinion by Justice Kapnick, reversing (modifying) Supreme Court, determined defendant MF Global was entitled to coverage under fidelity bonds for losses incurred by the criminal actions of a broker, Dooley, for which Dooley was ordered to pay restitution to MF Global in the amount of $141 million: "This 2009 declaratory judgment action involves a $141 million insurance coverage dispute between plaintiffs New Hampshire Insurance Company, Liberty Mutual Insurance Company, and Axis Reinsurance Company (Insurers) and defendant, commodity futures broker MF Global Finance USA, Inc. (MF Global). New Hampshire issued the primary bond insurance policy to MF Global's predecessor and Liberty Mutual and Axis Reinsurance each issued excess financial institution bonds, covering the same policy period and incorporating the provisions and terms of the primary bond. Defendant MF Global seeks coverage under those bonds for a trading loss incurred in February 2008 by Evan Brent Dooley, a broker for MF Global, who in 2012 pleaded guilty to exceeding speculative position limits in violation of 7 USC §§ 6a and 13(a)(5). Dooley was sentenced to five years' imprisonment and one year of supervised release and was ordered to pay restitution of over $141 million to MF Global upon release from prison. ... [W]e hold that defendant is covered under the fidelity bonds for its loss and is entitled to summary judgment in its favor....". ***New Hampshire Ins. Co. v. MF Global Fin. USA Inc.*, 2022 N.Y. Slip Op. 01880, First Dept 3-17-22**

JUDGES, ATTORNEYS.

THE JUDGE DID NOT FOLLOW PROPER PROCEDURE FOR IMPOSING SANCTIONS, I.E., PLAINTIFF'S COUNSEL WAS ORDERED TO PAY $10,000 IN COUNSEL FEES TO DEFENDANT'S COUNSEL.

The First Department, reversing Supreme Court, determined the judge did not follow the procedural requirements for imposing sanctions, i.e., $10,000 in attorney's fees to defendant's counsel, to be paid by plaintiff's counsel: "The motion court's sua sponte award of sanctions against plaintiff's counsel did not satisfy the procedural requirements of the Rules of the Chief Administrator of the Court (22 NYCRR) § 130-1. That section provides that a court may award costs or impose sanctions 'upon the court's own initiative, after a reasonable opportunity to be heard' ... and 'only upon a written decision setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate ...". ***DeSouza v. Manhattan RX LLC*, 2022 N.Y. Slip Op. 01875, First Dept 3-17-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS WALKING UP AN EARTHEN RAMP WHEN HE WAS STRUCK BY AN EXCAVATOR AND ROLLED DOWN THE RAMP; THERE WAS NO "SIGNIFICANT ELEVATION DIFFERENTIAL" SUCH THAT LABOR LAW § 240(1) WOULD APPLY.

The First Department, reversing (modifying) Supreme Court, determined the circumstances of plaintiff's injury did not fit the "elevation-related" element of a Labor Law § 240(1) cause of action. Plaintiff was walking up an earthen ramp when he was struck by an excavator and rolled down the ramp: "Labor Law § 240(1) is inapplicable to this case because plaintiff's injuries were not 'the direct consequence of a failure to provide adequate protection against a risk from a physically significant elevation differential' ... . Plaintiff was struck by an excavator; the fact that at the time he was bringing debris up an earthen ramp, or that he rolled down the ramp after being struck, does not give rise to a cause of action pursuant to Labor Law § 240(1) ...". ***Herrera v. Kent Ave. Prop. III LLC*, 2022 N.Y. Slip Op. 01738, First Dept 3-15-22**

PERSONAL INJURY, EMPLOYMENT LAW.

ALTHOUGH THE PERSON WHO ALLEGEDLY ASSAULTED PLAINTIFF AT JFK AIRPORT WAS AN EMPLOYEE OF AMERICAN AIRLINES, HE WAS NOT ON DUTY AT THE TIME OF THE INCIDENT; THE DEFENDANTS MOTION FOR SUMMARY JUDGMENT ON THE VICARIOUS LIABILITY AND NEGLIGENCE CAUSES OF ACTION SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment in this vicarious liability, negligent hiring and supervision and premises liability action should have been granted. Plaintiff was allegedly assaulted by Miles, who worked for American Airlines, at JFK airport. Plaintiff sued under respondeat superior and negligence theories. Miles testified he was not on duty at the time of the incident: "Under the doctrine of respondeat superior, an employer may be held vicariously liable for intentional torts committed by employees acting within the scope of their employment, as long as those acts were 'generally foreseeable and a natural incident of the employment' ... . Where the material facts are not in dispute, the question whether respondeat superior liability attaches is one of law and can be determined on a motion for summary judgment ... . Here the threshold question is whether Miles was even working, or under the direction of American, at the time of the incident. ... [D]efendants attached the deposition transcript of Miles, who testified that he was not working at the time of the incident. This was sufficient to at least satisfy defendants' prima facie burden ... . Because the testimony of Miles, who, notably, is not a party to this action, was that he was not on duty when the altercation occurred, defendants shifted the burden on the issue of respondeat superior. Moreover, Miles's testimony about his job responsibilities — escorting planes in and out, and loading and unloading luggage — established prima facie that the foreseeability element of respondeat superior liability was not present. The alleged assault bore no connection to plaintiff's work duties, and thus was not 'in furtherance of any employer-related goal whatsoever' …". ***Summors v. Port Auth. of N.Y. & N.J.*, 2022 N.Y. Slip Op. 01891, First Dept 3-17-22**

SECOND DEPARTMENT

ARBITRATION, CONTRACT LAW, CIVIL PROCEDURE.

WHETHER THE AGREEMENT TO ARBITRATE IS VALID IS A THRESHOLD ISSUE FOR THE COURT, NOT THE ARBITRATOR.

The Second Department, reversing Supreme Court, noted that the validity of an agreement to arbitrate is a threshold issue which must be determined by the court, not the arbitrator: "[T]he petitioners raised a threshold issue regarding the validity of the purported agreement to arbitrate, as they contended that they did not sign, and that neither Graves nor AMF had the authority to sign, any contract on their behalf concerning the purported transaction involving the respondents. Thus, this

threshold issue was for the Supreme Court, rather than an arbitrator, to determine ...". ***Matter of Northeast & Cent. Contrs., Inc. v. Quanto Capital, LLC*, 2022 N.Y. Slip Op. 01791, Second Dept 3-16-22**

CIVIL PROCEDURE, EVIDENCE.

A COMPUTER PRINTOUT FROM THE NYS DEPARTMENT OF STATE WEBSITE PURPORTING TO SHOW THE LOCATION OF DEFENDANT'S PRINCIPAL PLACE OF BUSINESS FOR VENUE PURPOSES WAS NOT ADMISSIBLE AS A BUSINESS RECORD.

The Second Department, reversing Supreme Court, determined plaintiff's submission of a computer printout from the NYS Department of State website was insufficient to prove defendant's principal place of business was in Kings County. Defendant had submitted its certificate of incorporation designating Richmond County as its principal place of business. Therefore plaintiff did not demonstrate the proper venue for this traffic accident case was Kings County. Plaintiff lived in New Jersey and the accident occurred in Ulster County: "[T]he plaintiff failed to establish that the defendant's certificate of incorporation had been amended to designate a principal office located in Kings County ... or that the venue selected was otherwise proper. Contrary to the Supreme Court's conclusion, a computer printout from the website of the New York State Department of State, Division of Corporations, submitted by the plaintiff, did not conclusively establish that Kings County is a proper venue for this action. The printout was not certified or authenticated, and it was not supported by a factual foundation sufficient to demonstrate its admissibility as a business record ...". ***Faulkner v. Best Trails & Travel Corp.*, 2022 N.Y. Slip Op. 01770, Second Dept 3-16-22**

CRIMINAL LAW.

THE DEFENDANT WAS NOT PRODUCED FOR SENTENCING; HIS RIGHT TO BE PRESENT AT SENTENCING WAS THEREFORE VIOLATED, REQUIRING REMITTAL FOR RESENTENCING.

The Second Department, remitting the matter for resentencing, noted that defendant was deprived of his right to be personally present at his sentencing: "A defendant has a fundamental right to be 'personally present at the time sentence is pronounced' ... . Here, the defendant was not produced at sentencing on the convictions of assault in the first degree and criminal possession of a weapon in the fourth degree, and the record is devoid of any indication that he expressly waived his right to be present (see CPL 380.40[2] ...). ... Supreme Court's failure to have the defendant produced at the sentencing proceeding ... violated the defendant's fundamental right to be present at the time of sentence.". ***People v. Umar*, 2022 N.Y. Slip Op. 01818, Second Dept 3-16-22**

DEFAMATION, PRIVILEGE.

DEFENDANT'S COMPLAINTS TO THE UNITED STATES TENNIS ASSOCIATION (USTA) ABOUT PLAINTIFF'S BULLYING OF HER SON AT JUNIOR TOURNAMENTS WERE PROTECTED BY QUALIFIED PRIVILEGE; ANY STATEMENTS ALLEGED TO HAVE BEEN FALSE WERE NOT MOTIVATED BY MALICE; THE DEFAMATION ACTION SHOULD HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Zayas, determined that the defamation action should have been dismissed. Defendant's son was a tennis player who participated in United State Tennis Association (USTA) junior tournaments. Defendant communicated with the USTA alleging that plaintiff, another tennis player, was bullying defendant's son. The only statements attributed to defendant alleged to have been defamatory were allegations plaintiff had been "kicked out" of tennis programs because of his behavior. The Second Department held that the complaints about bullying were privileged and the statements alleged to have been defamatory were not demonstrated to have been made with malice: "[T]he defendant established ... that her email to [the USTA] was protected by a qualified privilege. The defendant unquestionably had an interest, as a parent, in complying with [USTA's] request that she put her concerns in writing and thus reporting, in a more formal way, serious allegations of bullying—none of which, it bears emphasizing, were alleged to be defamatory—that, in her view, put her son's physical and emotional well-being at risk ... .* * * [Re: malice:]The extensive submissions ... make clear that no factfinder could reasonably conclude that the defendant was not motivated, at least in substantial part, by legitimate concerns for her son's emotional well-being and physical safety." ***Porges v. Weitz*, 2022 N.Y. Slip Op. 01823, Second Dept 3-16-22**

FIDUCIARY DUTY, CIVIL PROCEDURE.

IN THIS CHILD VICTIM'S ACT PROCEEDING PLAINTIFF ALLEGED ABUSE BY A PRIEST AND TEACHER IN ELEMENTARY SCHOOL; PLAINTIFF ALLEGED THE SCHOOL WAS OVERSEEN BY DEFENDANTS PARISH AND DIOCESE; THE 2ND DEPARTMENT HELD THE BREACH OF FIDUCIARY DUTY CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED BECAUSE THERE WAS NOTHING UNIQUE ABOUT THE RELATIONSHIP BETWEEN DEFENDANTS AND PLAINTIFF, AS OPPOSED TO THE RELATIONSHIPS WITH THE OTHER PARISHIONERS.

The Second Department, reversing Supreme Court, determined the parish and diocese defendants' motions to dismiss the breach of fiduciary duty cause of action in this Child Victims Act case should have been granted. Plaintiff alleged he

was sexually abused when he was 10 in 1973 by a priest and teacher in elementary school. Plaintiff alleged the parish and the school were overseen by the diocese: " '[T]he elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendants misconduct' ... . A cause of action to recover damages for breach of fiduciary duty must be pleaded with particularity under CPLR 3016(b) ... . ' 'A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation' ... .Two essential elements of a fiduciary relationship are de facto control and dominance ... . Here, the amended complaint did not allege facts that would give rise to a fiduciary relationship between the plaintiff and the defendants. The amended complaint failed to allege facts that demonstrated that the plaintiff's relationship with the defendants was somehow unique or distinct from the defendants' relationships with other parishioners generally ...". ***J. D. v. Roman Catholic Diocese of Brooklyn*, 2022 N.Y. Slip Op. 01766, Second Dept 3-16-22**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

THE AFFIDAVIT SUBMITTED BY THE BANK TO PROVE (1) STANDING TO FORECLOSE THE REVERSE MORTGAGE, (2) DEFAULT AND (3) NOTICE WAS NOT ACCOMPANIED BY THE RELEVANT BUSINESS RECORDS, RENDERING THE AFFIDAVIT HEARSAY.

The Second Department, reversing Supreme Court, determined the bank's summary judgment motion in this reverse mortgage foreclosure proceeding should not have been granted. The affidavit submitted to prove standing, default and notice was not accompanied by the relevant business records, rendering the affidavit inadmissible hearsay: "CIT Bank [plaintiff] submitted an affidavit of its assistant secretary, Elizabeth Birk, who, upon review of the business records maintained by CIT Bank, averred that CIT Bank was the 'holder of the instrument of indebtedness at the time this action was commenced,' the borrower was 'in default,' the 'mortgage debt remains unpaid,' and a default notice 'was thereafter duly sent.' However, since Birk failed to attach or otherwise incorporate any of CIT Bank's business records to her affidavit, her assertions regarding the contents of such business records constituted inadmissible hearsay ...". ***CIT Bank, N.A. v. Fernandez*, 2022 N.Y. Slip Op. 01764, Second Dept 3-16-22**

Similar issue (no business records attached to the bank's affidavit demonstrating defendant's default) and result in ***JPMorgan Chase Bank, Natl. Assn. v. Newton*, 2022 N.Y. Slip Op. 01777, Second Dept 3-16-22**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

THE AFFIDAVIT FROM THE LOAN SERVICER PURPORTING TO DEMONSTRATE DEFENDANTS' DEFAULT IN THIS FORECLOSURE ACTION DID NOT AVER THAT THE AFFIANT HAD THE AUTHORITY TO ACT FOR THE PLAINTIFF BANK.

The Second Department, reversing Supreme Court, determined the defendants' default was not demonstrate by the complaint, which was not verified, or by the affidavit from the loan servicer, which did not aver that the affiant had the authority to act on behalf of the plaintiff bank in this foreclosure proceeding: "... Supreme Court erred in granting that branch of the plaintiff's motion which was for leave to enter a default judgment and order of reference. 'Where, as here, a foreclosure complaint is not verified, CPLR 3215(f) states, among other things, that upon any application for a judgment by default, proof of the facts constituting the claim, the default, and the amount due are to be set forth in an affidavit 'made by the party' ... Here, the plaintiff submitted an affidavit executed by a contract management coordinator for the plaintiff's purported loan servicer. However, there is no evidence in the record demonstrating that the affiant had the authority to act on behalf of the plaintiff ...". ***U.S. Bank, N.A. v. Stiene*, 2022 N.Y. Slip Op. 01833, Second Dept 3-16-22**

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

THE AFFIDAVITS SUBMITTED BY THE BANK IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304.

The Second Department, reversing Supreme Court, determined the affidavits submitted by the plaintiff bank to demonstrate compliance with the notice requirements of RPAPL 1304 were insufficient: "[N]either counsel in her affirmation, nor a contract management coordinator for the plaintiff's loan servicer in an affidavit submitted in support of the motion, averred that they had personal knowledge of the mailing, or that the mailing was sent by both certified mail and first-class mail. Moreover, neither counsel nor the loan servicer's representative described any standard office procedure designed to ensure that the notices were mailed, and no domestic return receipts for the mailings were submitted in support of the motion ...". ***Deutsche Bank Natl. Trust Co. v. LoPresti*, 2022 N.Y. Slip Op. 01767, Second Dept 3-16-22**

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

THE PLAINTIFF'S COMPLAINT IN THIS FORECLOSURE ACTION DID NOT INCLUDE ALLEGATIONS OF COMPLIANCE WITH RPAPL 1306, WHICH IS A CONDITION PRECEDENT TO SUIT.

The Second Department, reversing Supreme Court, determined the bank did not include in its complaint in this foreclosure action the allegation it had complied with RPAPL 1306, which is a condition precedent to suit: "RPAPL 1304(1) provides

that, 'with regard to a home loan, at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower . . . , including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower.' 'RPAPL 1306 provides, in . . . part, that within three business days of the mailing of the foreclosure notice pursuant to RPAPL 1304(1), every lender or assignee 'shall file' certain information with the superintendent of financial services, including 'at a minimum, the name, address, last known telephone number of the borrower, and the amount claimed as due and owing on the mortgage, and such other information as will enable the superintendent to ascertain the type of loan at issue'' ... . RPAPL 1306(1) further provides that any complaint served in a foreclosure proceeding 'hall contain, as a condition precedent to such proceeding, an affirmative allegation that at the time the proceeding is commenced, the plaintiff has complied with the provisions of this section.' Here ... the complaint did not contain an allegation that the plaintiff complied with RPAPL 1306. Thus, a condition precedent to suit was not satisfied, and the plaintiff failed to establish its entitlement to summary judgment on the complaint ...". ***USA Residential Props., LLC v. Jongebloed*, 2022 N.Y. Slip Op. 01835, Second Dept 3-16-22**

LIEN LAW.

THE TIMELY FILING OF A SECOND MECHANIC'S LIEN TO CORRECT PROBLEMS WITH THE FIRST MECHANIC'S LIEN WHICH HAD BEEN CANCELLED BY THE COURT IS NOT PROHIBITED BY THE LIEN LAW.

The Second Department, reversing Supreme Court, determined the Lien Law does not prohibit a second filing of a mechanic's lien after the cancellation of the first: "Lien Law § 38 requires a lienor, upon demand, to provide a statement in writing setting forth, among other things, 'the items of labor and/or material and the value thereof which make up the amount for which he [or she] claims a lien.' The statute further authorizes the commencement of a special proceeding upon a lienor's failure to comply, and ultimately permits a court to cancel a lien if the lienor does not sufficiently comply with a court order requiring itemization ... . The statute, however, does not prohibit a lienor from filing a new lien on the same claim following such cancellation ... , and the courts have generally recognized that the timely filing of a successive lien on the same claim is permissible to cure an irregularity ...". ***Matter of Red Hook 160, LLC v. 2M Mech., LLC*, 2022 N.Y. Slip Op. 01794, Second Dept 3-16-22**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

THE EXPERT AFFIDAVITS SUBMITTED ON BEHALF OF THE DEFENDANTS IN THIS MEDICAL MALPRACTICE ACTION DID NOT ADDRESS ALL THE ALLEGATIONS OF NEGLIGENCE; DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the expert affidavits in this medical malpractice action did not address all the allegations of negligence and were otherwise deficient. Therefore defendants' motions for summary judgment should not have been granted: "The Koyfman defendants' expert failed to address specific allegations of negligence asserted against the Koyfman defendants ... , failed to address conflicting evidence in the record ... , and failed to eliminate issues of fact as to the cause of the decedent's injuries... . ... [Defendant] ORMC's expert merely summarized the medical records and certain deposition testimony, and opined in a conclusory manner that Solomon did not depart from good and accepted medical practice in rendering treatment to the decedent and did not proximately cause her injuries ... . Moreover, ORMC's expert failed to address specific allegations of negligence asserted against [defendant] Solomon ...". ***Martinez v. Orange Regional Med. Ctr.*, 2022 N.Y. Slip Op. 01780, Second Dept 3-16-22**

PERSONAL INJURY, EVIDENCE.

ALTHOUGH THE INFANT PLAINTIFF COULD NOT IDENTIFY THE CAUSE OF HER SLIP AND FALL; MOTHER, FATHER AND THE DEFENDANTS PROVIDED CIRCUMSTANTIAL EVIDENCE THAT THE FALL WAS CAUSED BY AN IDENTIFIED DEFECT IN THE SIDEWALK, RAISING A QUESTION OF FACT.

The Second Department, reversing Supreme Court, determined that fact that the infant plaintiff, who was four at the time of her slip and fall, could not identify the cause of her fall did not require summary judgment in defendant's favor. The cause of the fall may be established by circumstantial evidence: " 'In a trip-and-fall case, a defendant may establish its prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall' ... . However, '[t]hat does not mean that a plaintiff must have personal knowledge of the cause of his or her fall' ... . A determination 'that a defective or dangerous condition was the proximate cause of an accident can be established in the absence of direct evidence of causation and may be inferred from the facts and circumstances underlying the injury' ... . [T]he plaintiffs submitted, among other things, the affidavit of the mother of the infant plaintiff who averred that she observed the infant plaintiff fall and that the fall was caused by a defective condition of a sidewalk in the park ... . The mother also identified the location of the alleged defective sidewalk in a photograph that was included in the submission of both the plaintiffs and the ... defendants ... . In support of their respective motions, the ... defendants had also submitted, inter alia, transcripts of the deposition testimony of the infant plaintiff, who testified, among other things, that her mother had seen her fall, and of her father, who averred that, at the time of the incident, he ran over to his daughter immediately after

her fall and that, at that time, her body was partly on the sidewalk at issue." ***E. F. v. City of New York*, 2022 N.Y. Slip Op. 01769, Second Dept 3-16-22**

PERSONAL INJURY, EVIDENCE.

AN ENTRY IN A HOSPITAL RECORD INDICATING PLAINTIFF FELL DOWN A FEW STAIRS WAS NOT GERMANE TO TREATMENT OR DIAGNOSIS AND WAS NOT AN ADMISSION BECAUSE THE SOURCE OF THE ENTRY WAS UNKNOWN; NEW TRIAL ORDERED IN THIS SLIP AND FALL CASE.

The Second Department, reversing the defense verdict and ordering a new trial, determined an entry in the plaintiff's medical records indicating she fell down a few stairs was inadmissible. Plaintiff alleged she fell through a broken step. The entre in the hospital record was not germane to diagnosis or treatment and the source of the entry could not be ascertained: "... Supreme Court should have precluded the admission into evidence of an entry in a medical record from ... the Brookdale medical record ... that indicated that the plaintiff sustained a 'mechanical fall down 'a few' stairs.' An entry in a medical record that is not germane to diagnosis or treatment but is inconsistent with a position taken by a party at trial is admissible as an admission by that party only when there is evidence connecting the party to the entry ... .. '[W]here the source of the information on the hospital or doctor's record is unknown, the record is inadmissible' ... . Here, the Brookdale medical record was not germane to the plaintiff's diagnosis or treatment, and thus was not admissible on that basis ... . Moreover, there was no showing that the plaintiff was the source of the information in that record and so it was not admissible as an admission by the plaintiff ...". ***Fraser v. 147 Rockaway Pkw, LLC*, 2022 N.Y. Slip Op. 01772, Second Dept 3-16-22**

PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE, MUNICIPAL LAW.

THE JURY COULD HAVE FOUND PLAINTIFF BUS PASSENGER'S INJURIES WERE CAUSED BY THE NORMAL JERKS AND JOLTS OF BUS TRAVEL AND NOT BY ANY NEGLIGENCE ON DEFENDANTS' PART; THE MOTION TO SET ASIDE THE DEFENSE VERDICT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the motion to set aside the defense verdict in this bus-passenger-injury case should not have been granted. The jury could have found plaintiff was injured by the normal "jerks and jolts" of bus travel without any negligence on defendants' part: "[G]iving due deference to the jury's credibility findings ... , it could have determined, based upon a fair interpretation of the evidence introduced at trial, including the testimony of the bus driver and a surveillance video, that the movement of the bus as it drove over the speed bump was one of the sort of 'jerks and jolts commonly experienced in city bus travel' and not attributable to the negligence of the defendant ...". ***Jones v. Westchester County*, 2022 N.Y. Slip Op. 01774, Second Dept 3-16-22**

PERSONAL INJURY, LANDLORD-TENANT.

DEFENDANT OUT-OF-POSSESSION LANDLORD WAS NOT OBLIGATED BY THE LEASE OR ANY STATUTE TO REPAIR THE FLOOR OF A WALK-IN FREEZER IN THE LEASED PREMISES; PLAINTIFF ALLEGED DENTS IN THE METAL FLOOR CAUSED HIS LADDER TO FALL OVER; THE LANDLORD'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant out-of-possession landlord's motion for summary judgment in this ladder fall case should have been granted. Plaintiff alleged dents in a metal freezer floor caused his A-frame ladder to fall over: " 'An out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a 'duty imposed by statute or assumed by contract or a course of conduct' ... . Here, the defendants established, prima facie, that they were out-of-possession landlords which were not bound by contract or course of conduct to repair the allegedly dangerous condition. The plaintiff did not allege that dents in the floor of the walk-in freezer violated any statutes, and therefore the defendants were not obligated to disprove that they had a duty imposed by statute to repair the complained-of condition as part of their prima facie burden ... . Contrary to the plaintiff's contention, the defendants adequately authenticated that the lease agreement submitted in support of their motion was in effect at the time of the accident ...". ***Lopez v. Mattone Group Raceway, LLC*, 2022 N.Y. Slip Op. 01779, Second Dept 3-16-22**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

SUN GLARE DID NOT CREATE AN EMERGENCY FOR THE BUS DRIVER WHO STRUCK PLAINTIFF PEDESTRIAN.

The Second Department, reversing Supreme Court, noted that the defendant bus driver and bus company did not raise a question of fact on the applicability of the emergency doctrine. Defendants alleged sun glare prevented the driver from seeing plaintiff pedestrian in the crosswalk: "[T]he defendants failed to raise a triable issue of fact as to whether Ruff's foreseeable encounter with sun glare, while driving on a route with which he was familiar, was an emergency not of his own making, which left him with only seconds to react and virtually no opportunity to avoid a collision with the plaintiff ...". ***Morales-Rodriguez v. MTA Bus Co.*, 2022 N.Y. Slip Op. 01781, Second Dept 3-16-22**

THIRD DEPARTMENT

CRIMINAL LAW, APPEALS.

THE CRIMINAL PROCEDURE LAW SPELLS OUT THE ONLY GROUNDS FOR APPEAL IN A CRIMINAL PROCEEDING; NO APPEAL LIES FROM THE DENIAL OF A MOTION TO CORRECT, AMEND OR SETTLE THE SENTENCING TRANSCRIPT; AND NO APPEAL LIES FROM ADDING A MANDATORY SURCHARGE, WHICH IS NOT PART OF A SENTENCE .

The Third Department determined no appeal lies from an order denying defendant's motion to correct, amend or settle the sentencing transcript or from an order adding the mandatory surcharge: "As a general rule, 'no appeal lies from a determination made in a criminal proceeding unless one is provided by the CPL, [which] exclusively provides for rights to appeal in criminal matters' ... .A defendant's right to appeal to this Court in a criminal case is 'strictly limited to those authorized by statute' ... . The ... order denying defendant's motion to correct, amend or settle the sentencing transcript and the uniform sentence and commitment form and adding the mandatory surcharge does not fit within the statutory authorization for appeals by a defendant as of right to this Court (see CPL 450.10 ...). Defendant's reliance on case law involving the correction of trial records on direct appeals from judgments of conviction is misplaced, given that this appeal is not from the judgment of conviction, which was previously affirmed on appeal (303 AD2d at 830). With regard to the mandatory surcharge, although it should be 'levied at sentencing' (Penal Law § 60.35 [1] [a]), it is not part of the sentence that must be pronounced at the sentencing proceeding ... . As such, that part of County Court's order amending the uniform sentence and commitment form by adding the mandatory surcharge did not constitute the imposition of a sentence or a modification of the sentence so as to authorize defendant's appeal therefrom (see CPL 450.10)." ***People v. Johnson*, 2022 N.Y. Slip Op. 01844, Third Dept 3-17-22**

CRIMINAL LAW, APPEALS.

DEFENDANT'S WAIVER OF APPEAL WAS NOT VALID; THE COURT'S TERSE INQUIRY WAS NOT CURED BY THE DEFENDANT'S SIGNING A MORE DETAILED WRITTEN WAIVER AFTER SHE WAS SENTENCED AND MORE THAN A YEAR AFTER THE PLEA.

The Third Department affirmed defendant's conviction but noted that the waiver of appeal was not valid: "The record reflects that County Court failed to explain the separate and distinct nature of the appeal waiver to defendant, and the court's terse inquiry, wherein defendant was asked, 'Do you understand that as part of this disposition, you're agreeing to waive your right to appeal' and that 'normally . . . you have the right to appeal your plea and your sentence,' was insufficient to ensure that defendant appreciated the nature and consequences of the rights that she was relinquishing ... . Further, despite defendant's execution of a more detailed written waiver, such was executed after she was sentenced and more than a year after the plea was entered ... . Under these circumstances, we find that defendant did not knowingly and intelligently waive her right to appeal ...". ***People v. Crispell*, 2022 N.Y. Slip Op. 01843, Third Dept 3-17-22**

PERSONAL INJURY, EVIDENCE.

CONFLICTING EVIDENCE ABOUT THE ABILITY TO SEE ICE ON THE PARKING LOT RAISED A TRIABLE QUESTION OF FACT WHETHER DEFENDANTS HAD CONSTRUCTIVE NOTICE OF THE CONDITION WHICH ALLEGEDLY CAUSED PLAINTIFF'S SLIP AND FALL.

The Third Department, reversing (modifying) Supreme Court, determined defendants in this ice slip and fall case did not eliminate questions of fact about whether they had constructive notice of the icy condition: "Supreme Court found that plaintiffs' testimony, submitted by defendants, showed that the allegedly dangerous condition 'was neither visible nor had it existed for a significant period of time,' and 'plaintiffs have not submitted any evidence to prove . . . constructive notice.' Although [plaintiff] testified that the parking lot appeared wet, not icy, when viewed from her husband's truck, she also stated that she saw the ice once she had fallen; further, the affidavit of a witness states that '[t]he ice in the parking lot that morning was clearly visible.' Thus, the record contains conflicting accounts as to the visibility of the ice. 'When considering a summary judgment motion, courts must view the evidence in a light most favorable to the nonmoving party and accord that party the benefit of every reasonable inference from the record proof, without making any credibility determinations' ... . Applying this standard, we find a triable issue of fact as to constructive notice." ***Carpenter v. Nigro Cos., Inc.*, 2022 N.Y. Slip Op. 01857, Third Dept 3-17-22**

FOURTH DEPARTMENT

CIVIL PROCEDURE, FAMILY LAW, JUDGES, ATTORNEYS.

A LOCAL ONLINE NEWS OUTLET SHOULD NOT HAVE BEEN EXCLUDED FROM A FAMILY COURT HEARING REGARDING WHETHER A DEPUTY COUNTY ATTORNEY SHOULD BE DISQUALIFIED FROM A NEGLECT PROCEEDING ON CONFLICT OF INTEREST GROUNDS; THE OUTLET IS ENTITLED TO A TRANSCRIPT OF THE HEARING.

The Fourth Department, reversing Family Court, determined appellant, an online local news outlet, should not have been excluded from an attorney disqualification hearing and was entitled to a transcript of the hearing. The respondent in a neglect proceeding had moved to disqualify the deputy county attorney in that case on conflict of interest grounds. Appellant's owner deemed the motion newsworthy because the deputy county attorney had just been elected City-Court Judge. When appellant's owner attempted to attend the disqualification hearing he was denied entry ... " '[T]he general public may be excluded from any hearing under [Family Court Act] article [10] and only such persons and the representatives of authorized agencies admitted thereto as have an interest in the case' (§ 1043). In making that determination, however, '[a]ny exclusion of courtroom observers must . . . be accomplished in accordance with 22 NYCRR 205.4 (b)' ... . That rule provides that '[t]he general public or any person may be excluded from a courtroom [in Family Court] only if the judge presiding in the courtroom determines, on a case-by-case basis based upon supporting evidence, that such exclusion is warranted in that case' ... . The rule further provides certain nonexclusive factors that a Family Court judge may consider in exercising his or her discretion, and requires that the judge make findings prior to ordering any exclusion ... ... [T]he court abused its discretion in excluding appellant from the hearing on the underlying disqualification motion. ... [T]he court violated 22 NYCRR 205.4 (b) by failing to make findings prior to ordering the exclusion, and ... there is no indication ... that the court rendered its determination based on ... evidence or considered any of the relevant factors in exercising its discretion. Moreover, ... the court lacked an adequate basis to exclude appellant from the hearing on the disqualification motion ... . * * * ... [T]he release of the transcript is consistent with Family Court Act § 166 and 22 NYCRR 205.5. ... [T]he statute provides in relevant part that although '[t]he records of any proceeding in the family court shall not be open to indiscriminate public inspection[,] . . . the court in its discretion in any case may permit the inspection of any papers or records' ... . The statute thus 'does not render Family Court records confidential, but merely provides that they are not open to indiscriminate public inspection' ... . The statute makes clear that Family Court 'has the discretionary statutory authority to permit the inspection of any record by anyone at any time ...'." ***Matter of Rajea T. (Niasia J.)*, 2022 N.Y. Slip Op. 01940, Fourth Dept 3-18-22**

CONVERSION.

DEFENDANTS' OWN SUBMISSIONS DEMONSTRATED (1) PLAINTIFF OWNED THE PROPERTY LEFT IN THE HOUSE PURCHASED BY DEFENDANTS, (2) PLAINTIFF HAD REMOVED SOME OF THE PROPERTY, AND (3) PLAINTIFF ASKED FOR MORE TIME TO REMOVE MORE PROPERTY; THOSE FACTS NEGATED DEFENDANTS' ALLEGATION PLAINTIFF HAD ABANDONED THE PROPERTY; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSING THE CONVERSION CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined defendants' motion for summary judgment dismissing the conversion cause of action should not have been granted. Defendants' own submissions demonstrated plaintiff's ownership of the property, his removal of some of the property, and his request for more time to remove the rest. The property was in a house where plaintiff used to live, but which was purchased by the defendants. Defendants disposed of the remaining property, arguing plaintiff had abandoned it. Plaintiff then sued for conversion: "If the property can be deemed abandoned, then plaintiff's possessory interest was forfeited and defendants' actions were authorized, i.e., there can be no cause of action for conversion ... . 'The abandonment of property is the relinquishing of all title, possession or claim to or of it—a virtual intentional throwing away of it. It is not presumed. Proof supporting it must be direct or affirmative or reasonably beget the exclusive inference of the throwing away' ... . [D]efendants' ... own submissions establish that plaintiff was the owner of the personal property left on the premises, that he attempted to remove some of the property during the 30-day period, and that he made requests for additional time to retrieve his property....". ***Cretaro v. Huntington*, 2022 N.Y. Slip Op. 01935, Fourth Dept 3-18-22**

CRIMINAL LAW, ATTORNEYS.

IN RESPONSE TO A *BATSON* INQUIRY, THE PROSECUTOR'S REASON FOR STRIKING THE PROSPECTIVE JUROR IN FACT RELATED TO ANOTHER PROSPECTIVE JUROR FOR WHOM DEFENDANT HAD EXERCISED A PEREMPTORY CHALLENGE; NEW TRIAL ORDERED.

The Fourth Department, reversing defendant's convictions and ordering a new trial, determined that, in response to a *Batson* inquiry, the prosecutor's reason for striking the prospective juror did not, in fact, relate to the correct prospective juror.

Rather, the prosecutor's reason related to another prospective juror for whom the defendant had exercised a peremptory challenge: "[T]he prosecutor stated that the reason that he exercised a peremptory challenge on the prospective juror at issue was due to 'her answer as to why she wanted to sit on the jury.' Specifically, the prosecutor explained that the prospective juror expressed an 'odd interest in the defendant's right to remain silent, right to testify,' and that '[t]he way she answered the question . . . was very strange.' However, ... the statements the prosecutor attributed to the prospective juror at issue were, in fact, made by a prospective juror upon whom defendant exercised a peremptory strike. Because 'a proffered race-neutral reason cannot withstand a Batson objection where it is based on a statement that the prospective juror did not in fact make' ... , 'an equal protection violation was established' ...". ***People v. Douglas*, 2022 N.Y. Slip Op. 01919, Fourth Dept 3-18-22**

CRIMINAL LAW, EVIDENCE.

THE POLICE MISTAKENLY BELIEVED THE MAN IN A MOTEL ROOM (DEFENDANT) WAS A SUSPECT IN A SHOOTING; AN INFORMANT HAD TOLD THE POLICE THE MAN IN THE ROOM WAS FROM ROCHESTER, HIS NICKNAME WAS "JAY" AND HE "HAD A WARRANT;" WHEN THE MAN LEFT THE ROOM, THE POLICE STOPPED HIS TAXI; THE PEOPLE DID NOT DEMONSTRATE THE LEGALITY OF THE STOP.

The Fourth Department, reversing the denial of defendant's suppression motion and dismissing the indictment, determined the People did not demonstrate the legality of the defective's order to stop the taxi in which defendant was a passenger. An informant told the police a man in a motel room was from Rochester, his nickname was "Jay," and he "had a warrant." The detective believed the man in the motel room was a suspect in a shooting which occurred a month before. Surveillance was set up and the detective was told a man had left the room and gotten into a taxi. The defective, who did not see the man leave the room, ordered the stop of the taxi: It turned out that defendant was not the shooting suspect. He was charged with possession of a controlled substance: "At the suppression hearing, a police detective testified that he directed the stop of the taxi based on a belief that defendant was in fact a different man whom authorities had identified as a suspect in a shooting that had occurred over a month earlier. ... The detective conceded that he had never seen a still photo of the suspect, that the video of the shooting that he did view lacked detail, and that he was unaware of whether the suspect's actual height, weight, skin tone, or other specific discernable characteristic were on the arrest warrant for the shooting suspect. Further, the informant never identified the man in the motel room as the shooter, and the vague description given, i.e., that the man was from Rochester, that his nickname was the ubiquitous 'Jay,' and that he 'had a warrant', is too generalized to support the reasonable suspicion required for the officers' stop of the taxi ... . This is also not a case in which the 'proximity of the defendant to the site of the crime[and] the brief period of time between the crime and the discovery of the defendant near the location of the crime' added to the totality of circumstances supporting the detective's reasonable suspicion ...". ***People v. Singleton*, 2022 N.Y. Slip Op. 01893, Fourth Dept 3-18-22**

CRIMINAL LAW, EVIDENCE.

THERE WAS NO PROOF DEFENDANT EXERCISED DOMINION AND CONTROL OVER THE AREA WHERE THE DRUGS WERE FOUND; DEFENDANT'S MERE PRESENCE IN THE VICINITY OF THE DRUGS DID NOT PROVE HIS POSSESSION OF THE DRUGS.

The Fourth Department, reversing defendant's possession of a controlled substance conviction and dismissing the indictment, determined defendant's constructive possession of the drugs was not demonstrated. There was no proof defendant exercised dominion and control over the area in which the drugs are found, as opposed to merely being present in the vicinity of the drugs: "Where there is no evidence that the defendant actually possessed the controlled substance, the People are required to establish that the defendant 'exercised 'dominion or control' over the property by a sufficient level of control over the area in which the contraband is found or over the person from whom the contraband is seized' ... . The People may establish constructive possession by circumstantial evidence ... , but a defendant's mere presence in the area in which contraband is discovered is insufficient to establish constructive possession ...". ***People v. Mighty*, 2022 N.Y. Slip Op. 01923, Fourth Dept 3-18-18**

CRIMINAL LAW, EVIDENCE.

AFTER A VALID TRAFFIC STOP BASED ON THE LICENSE PLATES NOT MATCHING THE VEHICLE, DEFENDANT PRESENTED HIS TEMPORARY REGISTRATION AND EXPLAINED THE PLATES HAD BEEN TRANSFERRED FROM A DIFFERENT VEHICLE; AT THAT POINT THE AUTHORIZATION TO DETAIN DEFENDANT CEASED; THE SEIZED DRUGS SHOULD HAVE BEEN SUPPRESSED.

The Fourth Department, reversing defendant possession of a controlled substance conviction and dismissing the indictment, determined the police, after making a valid traffic stop of defendant's vehicle, did not have the authority to detain him after he presented his temporary registration and explained that the license plates had been transferred from another vehicle: "[T]he justification for the officer's initial detention ceased once defendant showed the officer the temporary registration that had been issued for the vehicle and explained that the license plates on the vehicle had recently been transferred from another vehicle ... .. We further conclude that the record does not support the court's determination that the circumstances

following the initial stop provided the officer with probable cause to believe that defendant was violating Vehicle and Traffic Law § 507 (2) ... . Indeed, the record does not support the court's finding that, when defendant produced a learner's permit upon being asked to produce his driver's license, the officer asked defendant to exit the vehicle due to the lack of a valid driver's license. Thus, inasmuch as 'the initial justification for seizing and detaining defendant . . . was exhausted' at the time of defendant's removal from the vehicle, the evidence seized during the ensuing search of defendant's person, as well as the statements that he made to the police thereafter, should have been suppressed ...". ***People v. Betsey-Jones*, 2022 N.Y. Slip Op. 01924, Fourth Dept 3-18-22**

CRIMINAL LAW, JUDGES, APPEALS.

THE CRITERIA FOR IMPOSING THE MAXIMUM RESTITUTION SURCHARGE OF 10% WERE NOT MET.

The Fourth Department, reversing (modifying) County Court, determined the criteria for imposing the maximum restitution surcharge of 10% were not met: "[T]he judgment ... is ... modified as a matter of discretion in the interest of justice by reducing the surcharge to 5% of the amount of restitution ... . * * * ... [T]he court erred in imposing the 10% surcharge because there was no 'filing of an affidavit of the official or organization designated pursuant to [CPL 420.10 (8)] demonstrating that the actual cost of the collection and administration of restitution . . . in [this] particular case exceeds five percent of the entire amount of the payment or the amount actually collected' ...". ***People v. Webber*, 2022 N.Y. Slip Op. 01904, Fourth Dept 3-18-22**

CRIMINAL LAW, JUDGES, APPEALS.

THE JUDGE'S FAILURE TO PRONOUNCE THE DEFINITE TERM COMPONENT OF DEFENDANT'S SENTENCE REQUIRED VACATION OF THE SENTENCE AND REMITTAL FOR RESENTENCING; THE ISSUE SURVIVES A WAIVER OF APPEAL.

The Fourth Department, vacating defendant's sentence and remitting for resentencing, determined the definite term component of the sentence was not pronounced by the court: "CPL 380.20 provides that a court 'must pronounce sentence in every case where a conviction is entered.' That statutory requirement is 'unyielding' ... . A violation of CPL 380.20 'may be addressed on direct appeal notwithstanding [any] valid waiver of the right to appeal or the defendant's failure to preserve the issue for appellate review' ... . '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' ... . Here, although the certificate of conviction states that defendant was sentenced to a split sentence of a definite term of time served in jail and five years of probation, which is consistent with the sentencing promise made during the plea proceeding, the court failed to orally pronounce during the sentencing proceeding the definite term component of defendant's sentence as required by CPL 380.20 ...". ***People v. Adams*, 2022 N.Y. Slip Op. 01921, Fourth Dept 3-18-22**

FAMILY LAW.

THE SUPPORT MAGISTRATE SHOULD NOT HAVE DEVIATED FROM THE PRESUMPTIVE SUPPORT OBLIGATION CALCULATED PURSUANT TO THE CHILD SUPPORT STANDARDS ACT (CSSA) BASED UPON THE EXPENSES INCURRED BY MOTHER WHEN THE CHILDREN WERE WITH HER; THE EXPENSES DID NOT QUALIFY AS "EXTRAORDINARY EXPENSES."

The Fourth Department, reversing Family Court, determined the support magistrate should not have deviated from the presumptive support obligation calculated pursuant to the Child Support Standards Act (CSSA): "[T]he Support Magistrate determined that, because the children spent approximately 50% of the parenting time with the mother and because the mother incurred expenses for the children's 'food, clothing, shelter, utilities, cell phones, transportation[,] and extracurricular activities' during the times they were with her, she should be granted a variance from the presumptive support obligation. That was error. Although 'extraordinary expenses incurred by the non-custodial parent in exercising visitation' with a child not on public assistance may support a finding that the presumptive support obligation is unjust or inappropriate ... , '[t]he costs of providing suitable housing, clothing and food for [a child] during custodial periods do not qualify as extraordinary expenses so as to justify a deviation from the presumptive amount' ... , 'nor is the cost of entertainment, including sports, an extraordinary visitation expense for purposes of calculating child support' ...". ***Matter of Livingston County Support Collection Unit v. Sansocie*, 2022 N.Y. Slip Op. 01914, Fourth Dept 3-18-22**

FAMILY LAW, CIVIL PROCEDURE, JUDGES.

WHERE AN ORDER CONFLICTS WITH A DECISION, THE DECISION CONTROLS.

The Fourth Department, modifying Supreme Court in this post-judgment matrimonial case, determined the decision controls the discrepancy between the order and the decision: "[B]oth parties expressly agreed in the oral stipulation that plaintiff's benefits would be distributed '[i]n accordance with the *Majauskas* formula.' That oral stipulation was an unambiguous

expression of the parties' intent to follow *Majauskas*, ... [T]he amended order conflicts with the court's written decision insofar as the ... amended order purports to award defendant 23.86% of a former spouse survivor annuity under 5 USC § 8341 (h) (1). The stated percentage represents defendant's share of plaintiff's gross monthly annuity, as calculated by the court pursuant to the *Majauskas* formula, but the court in its decision made no award to defendant of a former spouse survivor annuity, which, had it been awarded, would have expressly conflicted with the parties' agreement. Where, as here, there is a conflict between the decision and the order, the decision controls, and we therefore modify the amended order accordingly ...". ***Reukauf v. Kraft*, 2022 N.Y. Slip Op. 01898, Fourth Dept 3-18-22**

FAMILY LAW, EVIDENCE.

THE NEGLECT FINDING WAS NOT SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE, CRITERIA EXPLAINED.

The Fourth Department, reversing Family Court's neglect finding, determined the finding was not supported by the preponderance of the evidence: " '[A] party seeking to establish neglect must show, by a preponderance of the evidence ... , first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship' ... .. In considering whether the requisite minimum degree of care was provided, '[c]ourts must evaluate parental behavior objectively: would a reasonable and prudent parent have so acted, or failed to act, under the circumstances then and there existing' ... . Here, the evidence at the fact-finding hearing establishes that the mother acknowledged her mental health issues and had been compliant with treatment following her discovery that she was pregnant ... ; and that she was engaged in a supportive housing program that would allow her to care for the child, thereby limiting any extended need for foster care ...". ***Matter of Isabella S. (Nicole S.)*, 2022 N.Y. Slip Op. 01897, Fourth Dept 3-18-22**

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