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Editor: **Bruce Freeman**

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FIRST DEPARTMENT

CRIMINAL LAW, CONSTITUTIONAL LAW.

THE SIX-YEAR DELAY, DURING WHICH DEFENDANT WAS INCARCERATED, DEPRIVED DEFENDANT OF HIS RIGHT TO A SPEEDY TRIAL; THE MURDER AND ASSAULT CONVICTIONS AFTER TRIAL REVERSED.

The First Department, reversing defendant's murder and assault convictions after trial, determined defendant have been deprived of his right to a speedy. It was presumed that the delay of six years, during which defendant was incarcerated, prejudiced the defense. The prosecution failed to demonstrate good cause for the delay: " 'Where there has been extended delay, it is the People's burden to establish good cause' ... . Following defendant's January 2011 arraignment, this case was reassigned to successive Assistant District Attorneys. After the case was assigned to the third and final prosecutor in mid-2014, he waited about one year before seeking to obtain a DNA sample from defendant to be compared with DNA recovered from a plastic cup found outside the garage in which the shootings occurred during a party. That motion was denied because there was no nexus between the cup and the shootings, and because defendant's admitted attendance at the party was undisputed. The People argue that their delay was justified by the reluctance of a retired detective to testify; they cite a note from the detective's doctor stating that he was medically unfit to be cross-examined and argue that the detective was a necessary witness because he conducted the lineup in which the surviving victim identified defendant as the assailant. However, this detective ultimately did not testify at the suppression hearing or trial, and the suppression court credited the hearing testimony of the surviving victim, who knew defendant, and denied the motion to suppress the identification based on that testimony. Moreover, it is undisputed that the retired detective was not needed to introduce defendant's statements, which were introduced through another detective at trial." ***People v. McDonald*, 2022 N.Y. Slip Op. 02099, First Dept 3-29-22**

CRIMINAL LAW, EVIDENCE.

THE HOSPITAL FROM WHICH LAPTOPS WERE STOLEN WAS NOT A "DWELLING" WITHIN THE MEANING OF THE BURGLARY STATUTE.

The First Department, reversing two of defendant's burglary convictions, determined the hospital from which laptops were stolen was not a "dwelling" as that term is used in the burglary statutes: "Defendant's convictions under counts three and four of the indictment, regarding the 2017 thefts of laptop computers from the Physicians & Surgeons Building at Columbia University Medical Center, were not supported by legally sufficient evidence of the 'dwelling' element of burglary in the second degree (see Penal Law § 140.00[3]). There was no evidence that patients stayed overnight in this building. The People's reliance on Penal Law § 140.00(2) is unavailing, because no 'unit' within the building is a dwelling. Although the building was part of a large campus covering several blocks, there was insufficient evidence that this building provided defendant with ready access via connecting elevators, stairwells, or corridors to other buildings, where hospital patients stayed overnight and which was, in any event, at a considerable distance ...". ***People v. Brown*, 2022 N.Y. Slip Op. 02205, First Dept 3-31-22**

CRIMINAL LAW, JUDGES.

THE JUDGE SHOULD HAVE INQUIRED FURTHER WHEN A PROSPECTIVE JUROR SAID TRAVEL PLANS PROHIBITED HER FROM SERVING BEYOND THE PROJECTED LAST DAY OF THE TRIAL, CONVICTION REVERSED.

The First Department, reversing defendant's conviction, determined the judge should have inquired further when a prospective juror said travel plans prohibited her from serving beyond the projected last day of the trial: "During jury selection, the court advised the panel that the trial could last until April 17, 2018. The panelist at issue stated that she 'absolutely' could not serve on April 18, because she had irrevocable travel plans for that day. When defense counsel said that 'we are starting to get closer to the 16th, 17th,' and asked whether she 'may not be able to give [her] best attention" if "we started moving in that direction,' the panelist said, 'Yes.' Counsel challenged this panelist for cause because of the concern that she would have difficulty focusing on the trial due to her travel constraints. In the alternative, counsel sought to question this panelist further. The court denied the challenge because it believed that the trial 'should never even get that close.' Defendant was compelled to exercise his final peremptory challenge against this panelist. The court should have granted

defendant's request for further inquiry to determine her ability to serve ... . Given that her travel plans precluded her from serving a single day beyond the court's estimated outer limit for the trial, the panelist gave the impression that she would have difficulty focusing on the trial, as she stated, and that, if selected, she might have been biased in favor of reaching a verdict quickly ...". ***People v. Bowman*, 2022 N.Y. Slip Op. 02208, First Dept 3-31-22**

DEBTOR-CREDITOR, FRAUD, CIVIL PROCEDURE.

IF PLAINTIFFS IN A FRAUDULENT-CONVEYANCE AND ENFORCEMENT-OF-MONEY JUDGMENT PROCEEDING CAN BE FULLY COMPENSATED BY MONEY DAMAGES, IT IS ERROR TO ISSUE A PRELIMINARY INJUNCTION.

The First Department, reversing Supreme Court, determined plaintiffs in this fraudulent conveyance action can be fully compensated by money damages. Therefore the preliminary injunction was not available relief: "In this action to set aside alleged fraudulent conveyances and other relief in aid of enforcement of money judgments, plaintiffs can be fully compensated by a monetary award, and thus an injunction will not issue because no irreparable harm will be sustained in the absence of such relief ...". ***Medallion Fin. Corp. v. Tsitiridis*, 2022 N.Y. Slip Op. 02090, First Dept 3-29-22**

FAMILY LAW, CIVIL PROCEDURE, MENTAL HYGIENE LAW.

SUPREME COURT SHOULD NOT HAVE ENTERED A DEFAULT JUDGMENT OF DIVORCE AGAINST THE HUSBAND, WHO WAS REPRESENTING HIMSELF, WHEN HE DID NOT APPEAR AT THE INQUEST; BOTH THE COURT AND THE WIFE WERE AWARE THE HUSBAND HAD BEEN DIAGNOSED WITH A SIGNIFICANT MENTAL HEALTH CONDITION.

The First Department, reversing Supreme Court, determined the judgment of divorce should not have been entered after the husband, who was representing himself, failed to appear at an inquest. Both the court and his wife were aware he had been diagnosed with a mental health condition, resulting in episodes when he could not care for himself or protect his interests: "[A]t the conclusion of the inquest, the court explicitly acknowledged that the husband's absence was likely attributable to his mental health. Thus, before entering judgment upon the husband's default, there should have been an inquiry into whether a guardian ad litem was necessary (see CPLR 1201, 1203 ...). Because there was no inquiry, the judgment must be vacated and the matter remanded for further proceedings, including, if necessary, an inquiry into the husband's current capacity ...". ***Richard v. Buck*, 2022 N.Y. Slip Op. 02101, First Dept 3-29-22**

FIDUCIARY DUTY, PARTNERSHIP LAW, CIVIL PROCEDURE.

THERE WAS A FIDUCIARY RELATIONSHIP BETWEEN THE PARTIES AS PARTNERS AND CO-OWNERS OF A BUSINESS, GIVING RISE TO AN ABSOLUTE RIGHT TO AN ACCOUNTING, NOTWITHSTANDING THE EXISTENCE OF AN ADEQUATE REMEDY AT LAW.

The First Department, reversing (modifying) Supreme Court determined the petitioners were entitled to an accounting for a business, Ocinomled, Ltd., because there was a fiduciary relationship between the parties as partners and co-owners of Ocinomled: "This Court has held 'whenever there is a fiduciary relationship between the parties . . . there is an absolute right to an accounting notwithstanding the existence of an adequate remedy at law' ... . It is undisputed that there is a fiduciary relationship between the parties as partners and co-owners of Ocinomled. An equitable accounting is 'designed to require a person in possession of financial records to produce them, demonstrate how money was expended and return pilfered funds in his or her possession' ... . While it is clear that respondents produced the full books and records, and the Special Referee went through thousands of documents and reviewed numerous expert reports, this is insufficient ..., particularly because respondents' bookkeeping was described as inadequate, and sometimes nonexistent, and there was evidence respondents intentionally destroyed key financial data during the litigation." ***Matter of Grgurev v. Licul*, 2022 N.Y. Slip Op. 02088, First Dept 3-29-22**

FRAUD, FIDUCIARY DUTY, CIVIL PROCEDURE, EMPLOYMENT LAW, AGENCY.

EACH TIME PLAINTIFF'S MARKETING DIRECTOR ENTERED A CONTRACT WITH A COMPANY IN WHICH THE DIRECTOR HAD AN OWNERSHIP INTEREST CONSTITUTED A SEPARATE WRONG UNDER THE CONTINUING WRONG DOCTRINE; THE COMPLAINT STATED CAUSES OF ACTION FOR FRAUD AND BREACH OF FIDUCIARY DUTY.

The First Department, reversing (modifying) Supreme Court, determined the continuing wrong doctrine applied to each time defendant hired Exit for video editing services within six years of filing the complaint. In addition, the complaint stated a cause of action for breach of a fiduciary duty: "This action arises from the conduct of plaintiff's former director of marketing, Taufiq, in repeatedly contracting with Exit Editorial, Inc. (Exit), owned by Tristan Kneschke (together with Exit, the Exit defendants), for video editing services. Plaintiff claims that Taufiq falsely represented to it that he negotiated with Exit at arms length and that Exit's prices were reasonable, when in fact its prices were well above market rate, he had an ownership interest in Exit, and he received a cash finder's fee for each contract with Exit. Plaintiff's allegations and supporting affidavits were sufficient to permit an inference that a separate exercise of judgment, and thus a separate wrong, was committed each time Exit was hired, thereby enabling application of the continuing wrong doctrine ... . * * * The breach

of fiduciary duty claim against Taufiq should be reinstated, as an agent has a duty to make full disclosure to its principal of any conflicts of interest and there is no requirement of justifiable reliance for such a claim ...". ***Manipal Educ. Ams., LLC v. Taufiq*, 2022 N.Y. Slip Op. 02200, First Dept 3-31-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF SLIPPED AND FELL ON A PLASTIC SHEET PLACED OVER AN ESCALATOR TO PROTECT IT FROM DRIPPING PAINT; PLAINTIFF'S LABOR LAW § 241(6) ACTION DISMISSED; THE PLASTIC COVER WAS NOT A FOREIGN SUBSTANCE; AND THE PLASTIC COVER WAS AN INTEGRAL PART OF THE WORK; TWO-JUSTICE DISSENT.

The First Department, reversing Supreme Court, over an extensive two-justice dissent, determined two provisions of the Industrial Code did not apply to this slip and fall on a plastic covering used to protect an escalator from dripping paint. The code provision requiring areas to be kept free of slippery "foreign substances" did not apply. And both code provisions were inapplicable because the condition was an integral part of the work being performed: "Sensibly interpreted, the heavy-duty plastic covering is not similar in nature to the foreign substances listed in the regulation, i.e., ice, snow, water or grease ... . [T]he covering was part of the staging conditions of the area plaintiff was tasked with painting, making it integral to his work. Therefore, even if the regulation arguably contemplates plastic sheeting to be a slipping hazard, under the factual circumstances here, the integral to the work defense bars plaintiff's reliance on 12 NYCRR 23-1.7(d). ... [T]he Supreme Court and the dissent incorrectly find liability pursuant to Industrial Code Section 23-1.7(e)(1). This section is inapplicable for the same reasons stated above with respect to Industrial Code Section 23-1.7 (d), namely that the plastic covering was an integral part of the work being performed ...". ***Bazdaric v. Almah Partners LLC*, 2022 N.Y. Slip Op. 02189. First Dept 3-31-22**

MEDICAL MALPRACTICE, PERSONAL INJURY, CIVIL PROCEDURE, APPEALS.

PLAINTIFFS STATED A CAUSE OF ACTION FOR MEDICAL MALPRACTICE BY ALLEGING THE TREATMENT OF PLAINTIFF'S DECEDENT AGAINST THE WISHES OF DECEDENT AND DECEDENT'S HEALTH-CARE AGENTS PROLONGED DECEDENT'S PAIN AND SUFFERING; THE "WRONGFUL LIFE" LINE OF CASES DOES NOT APPLY.

The First Department, in a full-fledged opinion by Justice Gesmer, reversing Supreme Court, determined plaintiff stated a cause of action sounding in medical malpractice by alleging the treatment of plaintiff's decedent against decedent's wishes and the wishes of his health-care agents prolonged his pain and suffering. This action was distinguished from the "wrongful life" line of case which held that being born alive with disabilities does not constitute an injury in New York [therefore a medical malpractice lawsuit alleging the parents should have been advised to terminate the pregnancy does not state a cause of action]. Supreme Court had based its dismissal of the complaint on a Second Department case (Cronin) which followed the "wrongful life" line of reasoning. The First Department refused to follow the Second Department: "[In] Cronin, it appears that plaintiff sought damages based on a claim 'that the defendant wrongfully prolonged the decedent's life by resuscitating him against the express instructions of the decedent and his family' (Cronin, 60 AD3d at 804). In contrast, here, plaintiff seeks damages for decedent's pain and suffering, which the complaint alleges was the result of medical malpractice in that defendants breached the standard of care by administering treatments without consent and in direct contravention of decedent's wishes expressed in his advance directives as reaffirmed by his health care agents ...". ***Greenberg v. Montefiore New Rochelle Hosp.*, 2022 N.Y. Slip Op. 02194, First Dept 3-31-22**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

PLAINTIFFS' EXPERT DID NOT ADDRESS THE OPINION OF DEFENDANTS' EXPERT; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE CASE SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court and dismissing the complaint in this medical malpractice case, determined the defendants' motion for summary judgment should have been granted because plaintiffs' expert did not address the defendants' expert's opinion. The defense expert averred plaintiff's problems were caused by cancer. Plaintiffs' expert took the position plaintiff never had cancer, a position contradicted by the record: "Defendants made a prima facie showing of entitlement to summary judgment through their expert, who averred that defendants' treatment of plaintiff was within the standard of care and any difficulties with the treatment were caused by plaintiff's underlying cancer. Plaintiffs' expert failed to address that opinion, and thus failed to rebut defendants' showing of entitlement to summary judgment ... . Instead, the expert took the position that plaintiff never had cancer, a fact contradicted by the record ... . While plaintiff's cancer had an unusual presentation, and pathologists initially disagreed as to whether she had an invasive jaw cancer, she was ultimately successfully treated by oncologists with surgery, radiation, and gene therapy. Plaintiffs' expert entirely ignored plaintiff's treatment from 2016 to 2017 for a rare variant of squamous cell carcinoma, as well as her 2018 treatment for a reoccurrence ... . Given those omissions, plaintiffs did not rebut defendants' prima facie showing of entitlement to summary dismissal of the negligence and medical malpractice claims against them....". ***Mulroe v. New York-Presbyt. Hosp.*, 2022 N.Y. Slip Op. 02204, First Dept 3-31-22**

SECOND DEPARTMENT

FAMILY LAW, EVIDENCE.

EVIDENCE OF MOTHER'S MENTAL ILLNESS AND HER FAILURE TO PROPERLY TREAT IT WAS SUFFICIENT TO SUPPORT A FINDING OF NEGLECT, EVEN IN THE ABSENCE OF PROOF OF A SPECIFIC INSTANCE OF CHILD NEGLECT.

The Second Department, reversing Family Court, determined the Administration for Children's Services (ACS) presented sufficient proof to support a finding of neglect based upon mother's mental illness (schizophrenia) which mother failed to properly treat. Evidence of an actual instance of child neglect is not necessary: " 'Even though evidence of a parent's mental illness, alone, is insufficient to support a finding of neglect of a child, such evidence may be part of a neglect determination when the proof further demonstrates that the parent's condition creates an imminent risk of physical, mental, or emotional harm to the child' ... . 'Indeed, even when a child has not been actually impaired, a finding of neglect is appropriate to prevent imminent impairment, which is an independent and separate ground on which a neglect finding may be based' ... . In such cases, the court is not required to wait until a child has already been harmed before it enters a neglect finding ... . Proof of a parent's 'ongoing mental illness and the failure to follow through with aftercare medication is a sufficient basis for a finding of neglect where such failure results in a parent's inability to care for [his or] her child in the foreseeable future' ...". ***Matter of Khaleef M. S.-P. (Khaleeda M. S.)*, 2022 N.Y. Slip Op. 02124, Second Dept 3-30-22**

FORECLOSURE, CIVIL PROCEDURE, ATTORNEYS.

ALTHOUGH DEFENDANTS WERE NOT PROPERLY SERVED IN THIS FORECLOSURE ACTION AND THEIR MOTION TO VACATE THE JUDGMENT WAS GRANTED ON THAT GROUND, THE DEFENDANTS' ATTORNEY'S "LIMITED APPEARANCE" AT A SETTLEMENT CONFERENCE PROVIDED THE COURT WITH JURISDICTION OVER THE MATTER; THE MOTION TO VACATE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined an attorneys "limited appearance" at a foreclosure settlement conference provided the court with jurisdiction over matter despite the fact defendants demonstrated they were not properly served with the summons and complaint: "[A]n attorney appeared in the action on behalf of the defendants by filing notices of appearance that represented that counsel was making 'a limited appearance for the settlement conference pursuant to CPLR Rule 3408.' However, neither the defendants nor counsel for the defendants raised any objection to personal jurisdiction at that time by either a timely motion to dismiss on that ground or by interposing a timely answer asserting lack of personal jurisdiction ... . Although the notices of appearance purported to limit counsel's appearance to the foreclosure settlement conferences, 'such language 'is not a talisman to protect the defendant[s] from [their] failure to take timely and appropriate action to preserve [their] defense of lack of personal jurisdiction' ... . Since the defendants had waived the defense of lack of personal jurisdiction by failing to timely assert it, that defense was not a proper basis on which to vacate the order and judgment of foreclosure and sale ...". ***US Bank N.A. v. Chkifati*, 2022 N.Y. Slip Op. 02151, Second Dept 3-30-22**

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

AT THE TIME THIS FORECLOSURE ACTION WAS COMMENCED, RPAPL 1304 REQUIRED THAT THE NOTICE OF DEFAULT INCLUDE THE NUMBER OF DAYS THE BORROWER HAD BEEN IN DEFAULT; A DISCREPANCY BETWEEN THE DATE OF THE DEFAULT IN THE 90-DAY NOTICE (JULY 2009) AND THE DATE IN THE NOTICE REQUIRED BY THE MORTGAGE AND IN THE COMPLAINT (MAY 2011) CREATED A QUESTION OF FACT WHETHER THE NOTICE WAS DEFECTIVE ON ITS FACE.

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action was not entitled to summary judgment because it failed to demonstrate compliance with the notice requirements of RPAPL 1304. At the time the action was commenced, RPAPL 1304 required the notice to state the number of days the borrower had been in default. The 90-day notice stated defendant had been in default 2330 days, which put the default in July 2009. But the notice required by the mortgage and the complaint stated defendant was in default since May 2011: "The 90-day notice sent to the defendant stated that, as of November 18, 2015, her loan was 2330 days in default—indicating a default date in July 2009. However, both the notice of default required by the mortgage agreement and the complaint alleged that the plaintiff had defaulted on the loan in May 2011. At least one of these three documents, then, contained an error concerning information that was required under RPAPL 1304. Notably, the plaintiff's response to the defendant's cross motion for summary judgment did not attempt to clarify this discrepancy; it only addressed the service of the 90-day notice. The plaintiff's appellate brief likewise does not address this issue. Accordingly, the plaintiff did not eliminate the existence of a triable issue of fact as to whether the RPAPL 1304 notice was defective on its face ...". ***U.S. Bank N.A. v. Cox*, 2022 N.Y. Slip Op. 02149, Second Dept 3-30-22**

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

THE BANK IN THIS FORECLOSURE ACTION DID NOT SEND DEFENDANT THE NOTICE OF DEFAULT IN A SEPARATE ENVELOPE AS REQUIRED BY RPAPL 1304; DEFENDANT'S MOTION TO DISMISS THE COMPLAINT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant in this foreclosure action was entitled to summary judgment because the bank did not send the notice of default in a separate envelope as required by RPAPL 1304: "RPAPL 1304(1) provides that '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.' 'Strict compliance with RPAPL 1304 notice to the borrower or borrowers is a condition precedent to the commencement of a foreclosure action' ... . RPAPL 1304(2) states that '[t]he notices required by this section shall be sent by the lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice.' The defendant established that the plaintiff failed to strictly comply with RPAPL 1304, on the ground that additional material was sent in the same envelope as the 90-day notice required by RPAPL 1304 ...". ***U.S. Bank N.A. v. Hinds*, 2022 N.Y. Slip Op. 02150, Second Dept 3-30-22**

PERSONAL INJURY, MUNICIPAL LAW.

ALTHOUGH THE MUNICIPALITY PROVED IT DID NOT HAVE WRITTEN NOTICE OF THE ICY SIDEWALK WHERE PLAINTIFF SLIPPED AND FELL, IT DID NOT PROVE THAT PILING SNOW ALONG THE EDGE OF THE SIDEWALK DID NOT CREATE THE ICY CONDITION; THE MUNICIPALITY WAS NOT ENTITLED TO SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined the municipality did not demonstrate it did not create the icy condition on the sidewalk where plaintiff slipped and fell by piling snow along the sidewalk which melted and froze: " 'While the mere failure to remove all snow or ice from a sidewalk is an act of omission, rather than an affirmative act of negligence, a municipality's act in piling snow as part of its snow removal efforts, which snow pile then melts and refreezes to create a dangerous icy condition, constitutes an affirmative act excepting the dangerous condition from the prior written notice requirement' ...". ***Pirrone v. Metro N. Commuter R.R.*, 2022 N.Y. Slip Op. 02144, Second Dept 3-30-22**

THIRD DEPARTMENT

ADMINISTRATIVE LAW, CIVIL PROCEDURE, ATTORNEYS.

ALTHOUGH THE VAPING ASSOCIATION PREVAILED IN ITS ACTION FOR A PRELIMINARY INJUNCTION STAYING THE ENFORCEMENT OF THE DEPARTMENT OF HEALTH'S REGULATIONS BANNING FLAVORED VAPING LIQUIDS, THE DEPARTMENT'S ACTION WAS "SUBSTANTIALLY JUSTIFIED;" THEREFORE THE VAPING ASSOCIATION WAS NOT ENTITLED TO ATTORNEY'S FEES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT.

The Third Department, reversing Supreme Court, determined the respondent Public Health and Planning Council (within the NYS Department of Health) (the council) should not have been ordered to pay attorney's fees to petitioner Vapor Technology Association (the vaping association) pursuant to the State Equal Access to Justice Act. The respondent council had adopted emergency regulations prohibiting flavored vaping liquids targeting young people. The petitioner vaping association brought a combined Article 78 and declaratory judgment action challenging the emergency regulations as exceeding the council's regulatory authority. The Third Department granted the vaping association's request for a temporary restraining order and Supreme Court granted a preliminary injunction. The matter was rendered moot when the legislature banned the sale of the flavored electronic cigarette products. Because the vaping association had prevailed prior to the legislature's prohibition, it sought and was awarded attorney's fees: "CPLR 8601 (a) 'mandates an award of fees and other expenses to a prevailing party in any civil action brought against the state, unless the position of the state was determined to be substantially justified or that special circumstances render an award unjust' ... . * * * Petitioners capably disputed respondents' arguments and obtained a temporary restraining order and a preliminary injunction barring enforcement of the emergency regulations, but a grant of temporary injunctive relief is not 'an adjudication on the merits,' and we need not decide who would have prevailed had this matter proceeded to a final judgment ... . Upon our review, we are satisfied that respondents articulated a reasonable factual and legal basis for their arguments that the Council and the Commissioner acted within their rule-making authority by adopting the emergency regulations ... . Thus, Supreme Court abused its discretion in finding that those arguments were not 'substantially justified' within the meaning of CPLR 8601 (a), and petitioners were not entitled to an award of counsel fees and expenses as a result ...". ***Matter of Vapor Tech. Assn. v. Cuomo*, 2022 N.Y. Slip Op. 02171, Third Dept 3-31-22**

ADMINISTRATIVE LAW, CONSTITUTIONAL LAW.

THE USE OF ELECTRONIC LOGGING DEVICES (ELM'S) TO MONITOR THE HOURS AND PLACES OF OPERATION OF COMMERCIAL MOTOR VEHICLES (CMV'S) AND THE INSPECTION OF ELM'S BY LAW ENFORCEMENT PERSONNEL DURING ROADSIDE SAFETY INSPECTIONS CONSTITUTE VALID ADMINISTRATIVE SEARCHES.

The Third Department, in a full-fledged opinion by Justice McShan (too comprehensive to fairly summarize here), determined the use of electronic logging devices (ELD's) to monitor the hours and places of operation of commercial motor vehicles (CMV's), such that the data collected by the ELM's can be inspected by law enforcement personnel, does not constitute unreasonable search and seizure: "ELDs integrate with a vehicle's engine and use GPS technology to automatically record the date, time and approximate geographic location of CMVs, as well as the number of engine hours and vehicle mileage (see 49 CFR 395.26 [b]). Drivers are required to manually input identifying information and any changes in their duty status, the categories of which include, among others, on-duty, off-duty and authorized personal use (see 49 CFR 395.24 [b]; 395.26 [b]; 395.28). Upon request, information recorded by ELDs must be made available to law enforcement personnel during roadside safety inspections ... .* * * ... "[O]ne would be hard-pressed to find an industry more pervasively regulated than the trucking industry." ... [W]e ... find that commercial trucking is a pervasively regulated industry pursuant to which an administrative search may be justified. ... [T]he regulatory scheme at issue here provides adequate assurances that the inspection of ELDs will be reasonable. ... The ELD rule likewise provides the requisite "meaningful limitation" on the discretion of officials performing the inspection so as to ensure 'that the search is limited in scope to that necessary to meet the interest that legitimized the search in the first place' ...". ***Matter of Owner Operator Ind. Drivers Assn., Inc. v. New York State Dept. of Transp.*, 2022 N.Y. Slip Op. 02166, Third Dept 3-31-22**

ADMINISTRATIVE LAW, CORRECTION LAW, EMPLOYMENT LAW, CRIMINAL LAW.

THE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION (DOCCS) DID NOT ADEQUATELY EXPLAIN THE STATUTORY FACTORS SUPPORTING ITS DENIAL OF PETITIONER'S REQUEST FOR A CERTIFICATE OF GOOD STANDING, WHICH WOULD ALLOW THE FORMER INMATE TO WORK AS A SCHOOL BUS DRIVER; THEREFORE THE DENIAL WAS ARBITRARY; MATTER REMITTED FOR FURTHER PROCEEDINGS.

The Third Department, reversing Supreme Court, determined the Department of Corrections and Community Supervision's (DOCCS's) denial of petitioner's application for a certificate of good conduct (CGC) was not supported by the agency's cursory rulings, rendering the denial arbitrary and requiring remittal for further proceedings. Petitioner, a former inmate with a sexual-offense conviction, sought the certificate of good standing in order to work as a school bus driver: "[T]he challenged determination is a form letter with blanks to be filled in, and the Assistant Commissioner made no effort to explain his reasoning beyond checking a box next to a sentence stating that petitioner's application was being denied because '[t]he relief to be granted by the [CGC] is inconsistent with public interest.' There is no question that such a 'cursory letter decision,' which mentions only one of the statutory factors set forth in Correction Law § 703-b and offers no discussion of the 'grounds for the denial[,] precludes meaningful review of the rationality of the decision' ... . Correction Law article 23 requires more than a naked reliance on the crime of conviction, and the Assistant Commissioner's affidavit ... reflects that DOCCS 'failed to comply with the statute and acted in an arbitrary manner' ... . Although the record contains other information regarding the circumstances of petitioner's conviction and his subsequent history that might render the denial of his application rational, a 'court is powerless to sanction the determination by substituting what it deems a more appropriate or proper basis' ...". ***Matter of Streety v. Annucci*, 2022 N.Y. Slip Op. 02170, Third Dept 3-31-22**

ARBITRATION, CONDOMINIUMS, CIVIL PROCEDURE.

RESPONDENTS' PARTICIPATION IN THE PORTION OF THE ARBITRATION WHICH DEALT WITH THE USE OF ESCROW FUNDS TO REPAIR CONDOMINIUM SWIMMING POOLS WAIVED ANY CHALLENGE TO THE ARBITRABILITY OF THE ISSUE.

The Third Department, reversing (modifying) Supreme Court, determined respondents waived the ability to challenge the arbitrability of damage to swimming pools in this action seeking to use escrow funds for condominium repairs. The swimming pools were not on the "punch list" of items to be repaired using the escrow funds. But respondent Katz participated in the portion of the arbitration which focused on the repair of the pools: "It is well settled that '[a] party who actively participates in arbitration without seeking a stay pursuant to CPLR 7503 (b) waives the right to a judicial determination of the arbitrability of the dispute' ... . There is no dispute that Katz participated in the first three arbitration hearings, at the second of which he attempted to submit Fuller's report to address the issue regarding the swimming pools and, after the rejection of the report, he orally argued his position. The record is devoid of any request for a stay of any kind. Thus, Katz's participation foreclosed respondents' attack on the arbitrability of the pool repairs ...". ***Matter of Kohn (Waverly Homes Dev. LLC)*, 2022 N.Y. Slip Op. 02177, Third Dept 3-31-22**

ARBITRATION, MUNICIPAL LAW, EMPLOYMENT LAW, CONTRACT LAW.

THE CITY FIREFIGHTERS WHO, AS ESSENTIAL EMPLOYEES, WERE REQUIRED BY EXECUTIVE ORDER TO WORK DURING THE PANDEMIC, SOUGHT TIME-OFF OR MONETARY COMPENSATION EQUIVALENT TO THE TIME-OFF AFFORDED THE NONESSENTIAL CIVILIAN EMPLOYEES WHO WERE SENT HOME DURING THE PANDEMIC PURSUANT TO THE SAME THE EXECUTIVE ORDER; THE THIRD DEPARTMENT DETERMINED ARBITRATION OF THE ISSUE WAS PRECLUDED BY PUBLIC POLICY.

The Third Department, reversing Supreme Court, determined the city firefighters' claim to entitlement to time off from work or monetary compensation equivalent to the time-off afforded the civilian employees ordered to stay home (due to COVID) was prohibited by public policy. The firefighters were deemed essential employees and were required to report to work by Executive Order. The "nonessential" civilian employees were ordered to stay home by the same Executive Order: "[W]e cannot agree that petitioner breached the CBA [collective bargaining agreement] by responsibly implementing the Governor's directives. To hold otherwise would create an untenable result — i.e., it would sanction a finding that petitioner breached the CBA based upon its required compliance with state public policy. Based on the very nature of the pandemic, requiring extreme public health measures as implemented through the executive orders, we conclude that arbitration of the resulting impact on respondent's members is precluded as a matter of public policy." ***Matter of City of Troy (Troy Uniformed Firefighters Assn., Local 86 IAFF, AFL-CIO)*, 2022 N.Y. Slip Op. 02174, Third Dept 3-31-22**

CONTRACT LAW.

PLAINTIFF AGREED TO PROVIDE POURED, NOT PUMPED, CONCRETE AND SPECIFICALLY EXCLUDED THE INSTALLATION OF TACTILE STRIPS FROM THE SUBCONTRACT; DEFENDANT SUBSEQUENTLY REQUESTED THAT PLAINTIFF PROVIDE PUMPED CONCRETE AND INSTALL TACTILE STRIPS; THESE CHANGES WERE MATERIAL BUT NOT "CARDINAL" SUCH THAT PLAINTIFF'S PERFORMANCE WAS EXCUSED.

The Third Department, reversing Supreme Court, determined that defendant's (Banton's) requested changes to the contract were not "cardinal changes" such that Banton breached the contract. The plaintiff, pursuant the subcontract, provided concrete for the construction project. The original subcontract indicated plaintiff would "pour" not "pump" the concrete and would not install "tactile strips." Subsequently, Banton requested that the concrete be pumped and that tactile strips be installed. The parties essentially agreed to proceed with the changes: "Supreme Court found that Banton's request to modify the concrete delivery method from pouring to pumping, in light of the express subcontract exclusion, was a material change to the scope of plaintiff's work under the agreement. Although we agree with the court that this was a material change, we do not find it to be a cardinal change such that Banton can be found to have breached the contract ... . A cardinal change is one that affects 'the essential identity or main purpose of the contract,' such that it 'constitutes a new undertaking' ... . The main purpose of this subcontract was to complete the concrete work for the project, and we do not find that the changes in the work requested by Banton fundamentally changed this purpose so as to constitute a cardinal change that would relieve plaintiff of its obligation to perform under the subcontract ... . This conclusion is further supported by the fact that plaintiff was ready, willing and able to implement these changes and continue to perform under the subcontract, but only if its price was met." ***McCarthy Concrete, Inc. v. Banton Constr. Co.*, 2022 N.Y. Slip Op. 02168, Third Dept 3-31-22**

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

THE CORRECTION LAW DOES NOT REQUIRE AN INMATE RESIDENTIAL TREATMENT FACILITY (RTF) TO PROVIDE SEX OFFENDERS WHO ARE ABOUT TO BE RELEASED WITH REINTEGRATION PROGRAMS IN THE OUTSIDE COMMUNITY, AS OPPOSED TO WITHIN THE PRISON.

The Third Department, reversing (modifying) Supreme Court, determined the "residential treatment facility" (RTF) within the Fishkill Correctional Facility complied with the Correction Law. Plaintiffs alleged Fishkill did not provide sufficient opportunities outside the prison facility for reintegrating inmates into the community. Supreme Court agreed. The Third Department held that the Correction Law does not indicate the programs for reintegrating inmates must be offered outside the facility: "A resident in an RTF 'may be permitted to leave such facility in accordance with the provisions of [Correction Law § 73]' .... To that end, DOCCS [Department of Corrections and Community Services] 'shall be responsible for securing appropriate education, on-the-job training and employment for RTF residents (Correction Law § 73 [2]). Furthermore, '[p]rograms directed toward the rehabilitation and total reintegration into the community of persons transferred to a residential treatment facility shall be established' (Correction Law § 73 [3]). That said, nothing in Correction Law § 73 (2) or (3) states specifically where the opportunities provided in a rehabilitative program established by DOCCS or where the education, training or employment to be secured by DOCCS must be located. In other words, there is no statutory mandate providing that DOCCS's obligations under Correction Law § 73 be outside the confines of Fishkill." ***Alcantara v. Annucci*, 2022 N.Y. Slip Op. 02163, Third Dept 3-31-22**

CRIMINAL LAW.

COUNTY COURT SHOULD NOT HAVE ACCORDED ANY WEIGHT TO AN OFF-THE-RECORD "CONDITION" THAT THE PEOPLE WOULD WITHDRAW THEIR CONSENT TO THE PLEA OFFER IF YOUTHFUL OFFENDER STATUS WERE GRANTED; ALTHOUGH THE PEOPLE CAN BARGAIN FOR SUCH A CONDITION, THERE WAS NOTHING ON THE RECORD ABOUT IT; SENTENCE VACATED AND MATTER REMITTED FOR CONSIDERATION OF THE FACTORS FOR A YOUTHFUL OFFENDER ADJUDICATION (THIRD DEPT).

The Third Department, vacating the sentence and remitting the matter, determined County Court failed to consider the relevant factors for adjudicating defendant a youthful offender. Instead the court did not consider the issue at all based on its understanding the People would withdraw their consent to the plea offer if youthful offender status were granted. Although the People may bargain for the right to withdraw consent to the plea agreement is youthful offender treatment is granted, there was no such condition on the record here: "[I]t is a settled rule of law in this [s]tate that off-the-record promises made in the plea bargaining process will not be recognized where they are flatly contradicted by the record, either by the existence of some on-the-record promise whose terms are inconsistent with those later urged or by the placement on the record of a statement by the pleading defendant that no other promises have been made to induce his [or her] guilty plea' ... . The plea proceedings here were devoid of any indication that the People conditioned their consent to the plea agreement upon defendant not receiving youthful offender treatment or that defendant understood such a condition to be part of the agreement, and defendant stated during the plea colloquy that no off-the-record promises had been made to induce his guilty plea. The People further failed to reference their purported right to withdraw consent to the plea agreement when they addressed the question of youthful offender treatment at sentencing. The alleged off-the-record arrangement was unenforceable given those circumstances and, as such, 'County Court should not have accorded any weight to' it ... . County Court found that defendant was an 'eligible youth' for purposes of youthful offender status (CPL 720.10 [2], [3]), the court was obliged to consider the relevant factors and determine whether it would, as a discretionary matter, adjudicate him to be a youthful offender ...". ***People v. Irizarry*, 2022 N.Y. Slip Op. 02159, Third Dept 3-31-22**

CRIMINAL LAW.

BOTH THE INDICTMENT AND THE SUPERIOR COURT INFORMATION CHARGED CRIMES WITH THE ELEMENT THAT THE VICTIM WAS LESS THAN 17; BOTH HAD THE WRONG BIRTH DATE FOR THE VICTIM WHICH THEREBY ALLEGED THE VICTIM WAS MORE THAN 17; THAT IS A JURISDICTIONAL DEFECT WHICH CANNOT BE CORRECTED BY AMENDMENT.

The Third Department, reversing the conviction and dismissing the superior court information, determined that both the indictment, and the subsequent superior court information were jurisdictionally defective. Both charged sexual offenses with the victim being less than 17 years old as an element. Both had the wrong birth date for the victim, which placed the victim's age at more than 17 years old. The Third Department noted that the indictment, which was replaced by the superior court information, was improperly amended to reflect the correct birth date: "[T]he superior court information specifically cited and charged defendant with endangering the welfare of a child under Penal Law § 260.10 (1), which provides that '[a] person is guilty of endangering the welfare of a child when . . . [h]e or she knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old' (Penal Law § 260.10 [1]). However, the superior court information also alleged that, '[o]n or about November 13, 2016, . . . the defendant . . . did knowingly act in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old, . . . having a date of birth of 6/2/1999, by engaging in oral sexual conduct with' the victim. Inasmuch as the offense of endangering the welfare of a child requires that the victim be less than 17 years old, we find that the superior court information was jurisdictionally defective because it failed to effectively charge defendant with the commission of a crime where the date of birth indicated that the victim was 17 at the time of the offense ... . Although a trial court may permit an indictment to be amended 'with respect to defects, errors or variances from the proof relating to the matters of form, time, place, names of persons and the like' (CPL 200.70 [1]), an indictment may not 'be amended for the purpose of curing . . . [a] failure thereof to charge or state an offense[] or . . . [l]egal insufficiency of the factual allegations' (CPL 200.70 [2] [a], [b] ...). Here, inasmuch as the first five counts of the indictment charged defendant with offenses that required the victim to be less than 17 years old, such counts suffered from the same jurisdictional defect as the superior court information in that they failed to allege a crime by stating that the victim's date of birth was June 2, 1999 — making the victim 17 years old at the time of the alleged offense on November 13, 2016. As such, County Court had no authority to grant the People's application to amend those counts, 'regardless of any consistency with the People's theory before the grand jury' or lack of prejudice to defendant ...". ***People v. Solomon*, 2022 N.Y. Slip Op. 02158, Third Dept 3-31-22**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

A JAIL PHONE CALL IN WHICH DEFENDANT SAID HE MIGHT PLEAD GUILTY SHOULD NOT HAVE BEEN ADMITTED BECAUSE ITS PREJUDICIAL EFFECT OUTWEIGHED ANY PROBATIVE VALUE; THE PROSECUTOR'S SUMMATION REFERENCE TO THE PORTION OF THE PHONE CALL IN WHICH DEFENDANT SAID HE NEEDED A "PAID LAWYER" WAS AN IMPROPER USE OF THE RIGHT TO COUNSEL AGAINST THE DEFENDANT; NEW TRIAL ORDERED.

The Third Department, reversing defendant's conviction and ordering a new trial, determined a jail phone call in which defendant said he might plead guilty was inadmissible. In addition the prosecutor's comment on summation that defendant said (in that jail phone call) he needed a "paid lawyer" was an improper reference to defendant's right to counsel: "[Defendant] was deprived of a fair trial based upon the admission of a jail phone call wherein he stated that he might as well 'cop out to . . . the five years or whatever.' The People portrayed this evidence as relevant to show defendant's consciousness of guilt. Even if relevant, evidence of consciousness of guilt is generally considered weak ... . That said, defendant's statement that he contemplated taking a plea had little probative value but had a prejudicial effect on him. In this regard, '[s]ince it is widely assumed that only the guilty would consider entering a guilty plea, the knowledge that defendant wanted to plead guilty would make it difficult for the jury to accept the presumption of innocence and to evaluate the evidence fairly' ... . We also agree with defendant's argument that he was prejudiced by the prosecutor's comment on summation that defendant, in the jail phone call, stated that '[h]e need[ed] to get a paid lawyer to see if he can get lesser time.' The prosecutor argued to the jury that this statement went to defendant's consciousness of guilt. A prosecutor, however, cannot use a defendant's invocation of his or her constitutional right to counsel against such defendant ... . It follows that any commentary to this effect is improper. Accordingly, defendant was prejudiced by the prosecutor's summation ...". ***People v. Roberts*, 2022 N.Y. Slip Op. 02157, Third Dept 3-31-22**

FAMILY LAW, APPEALS, CIVIL PROCEDURE, JUDGES.

THE WIFE'S REQUEST FOR MAINTENANCE WAS REJECTED WITHOUT EXPLANATION AND THE HUSBAND'S FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE WHOLLY ADOPTED BY SUPREME COURT; THE THIRD DEPARTMENT AWARDED MAINTENANCE ON APPEAL.

The Third Department, reversing (modifying) Supreme Court, determined the wife was entitled to maintenance in this divorce proceeding. The parties had been married for 44 years. The wife's income was around $31,000 and the husband's income was around $117,000. Both were retired. The Third Department noted that Supreme Court did not give any indication of its rationale for rejecting the wife's application and adopted the husband's findings of fact and conclusions of law: " 'The amount and duration of a maintenance award are addressed to the sound discretion of the trial court, and will not be disturbed provided that the statutory factors and the parties' predivorce standard of living are considered' ... .. 'The court need not articulate every factor it considers, but it must provide a reasoned analysis of the factors it ultimately relies upon in awarding or declining to award maintenance' ... . Supreme Court wholly adopted verbatim the husband's proposed findings of fact and conclusions of law, without articulating the factors it considered or providing a reasoned analysis for its rulings on the proposed findings of fact and conclusions of law. '[F]indings of fact submitted pursuant to CPLR 4213 (a) cannot constitute the decision of the court [as] mandated by Domestic Relations Law § 236 (B) (5) (g)' ... . Although Supreme Court failed to set forth its rationale for rejecting the wife's request for maintenance, 'because our authority is as broad as that of the Supreme Court, we need not remit this issue' ...". ***Louie v. Louie*, 2022 N.Y. Slip Op. 02172, Third Dept 3-31-22**

FAMILY LAW, CIVIL PROCEDURE, APPEALS, JUDGES.

IN THIS TERMINATION OF PARENTAL RIGHTS PROCEEDING, ALTHOUGH FAMILY COURT THREATENED TO FIND RESPONDENT IN DEFAULT WHEN HE DID NOT PROVIDE PROOF HE FAILED TO APPEAR BECAUSE HE WAS HOSPITALIZED, FAMILY COURT DID NOT ULTIMATELY GIVE RESPONDENT A "DEFAULT WARNING;" RESPONDENT AND HIS COUNSEL WERE PRESENT AT THE FACT-FINDING BUT WERE PRECLUDED BY THE COURT FROM PARTICIPATING; RESPONDENT HAS A RIGHT TO BE HEARD ON WHETHER HE ABANDONED THE CHILD; REVERSED AND REMITTED.

The Third Department, reversing Family Court, determined respondent father in this termination of parental rights proceeding was not in default and that he was entitled to present a defense. To explain his failure to appear, respondent said he was hospitalized but he did not provide any proof of hospitalization when the court requested it. The court then found respondent to be in default and precluded respondent and his counsel from participating in the termination hearing: "Petitioner and the attorney for the child argue that the appeal must be dismissed because the challenged order was entered upon respondent's default. We disagree. In its written decision, Family Court stated that it had advised respondent's counsel at the December 18, 2019 appearance that, if the requested medical documentation was not timely provided, it 'would find [respondent] in default' and 'the trial would be an [i]nquest.' Our review of the record, however, confirms that no such warning was given. Instead, the court cautioned that if respondent failed to comply, it would 'proceed with the proceeding with regard to the termination of his parental rights.' This is not a default warning but notice that the hearing would go forward on January 15, 2020. However frustrating respondent's noncompliance with the court's reasonable directive to

provide documentation of his hospitalization may have been, the key point here is that respondent and his counsel were in attendance at the fact-finding hearing. We fully appreciate that trial courts are vested with broad authority to maintain the integrity of their calendars. Under the circumstances presented, however, we conclude that Family Court abused its discretion in holding respondent to be in default and precluding any participation at the hearing ...". ***Matter of Makayla NN. (Charles NN.)*, 2022 N.Y. Slip Op. 02165, Third Dept 3-31-22**

FAMILY LAW, EVIDENCE.

THE "SPECIAL CIRCUMSTANCES" WHICH MAY HAVE JUSTIFIED AWARDING CUSTODY OF THE CHILD TO THE GRANDPARENTS APPLIED ONLY TO FATHER AND NOT AT ALL TO MOTHER; FOR THAT REASON THE GRANDPARENTS' PETITION FOR CUSTODY OF THE CHILD SHOULD NOT HAVE BEEN GRANTED.

The Third Department, reversing (modifying) Family Court, determined the grandparents' petition for custody of the child should not have been granted. Father has a criminal history and has been incarcerated. He was arrested with the child and drug paraphernalia in his car, where he was found asleep. Mother has no criminal history and no drug problems. The "special circumstances" which may have supported granting custody to the grandparents related only to father, not at all to mother. Therefore the grandparents' petition should have been denied: "The record reflects that the child was not subject to surrender, abandonment or persistent neglect nor is the mother unfit. Although the father was the subject of an indicated report relative to the incident when he fell asleep in his vehicle with drug paraphernalia near the child, a finding of neglect was not indicated as to the mother. Moreover, this was an isolated incident and not part of a pattern of persistent neglect. Although there was evidence that the father has a history of drug abuse and criminal convictions, the mother has neither. There was no evidence that the child was at risk of being harmed while in the mother's care; instead, the record demonstrates that the mother provided appropriate shelter, clothing, food and medical attention to the child. Additionally, the mother did not allow the father to have contact with the child in accordance with Family Court's orders. As Family Court found that the grandparents did not meet their burden on extraordinary circumstances as to the mother, the court erred in engaging in a best interests analysis and, instead, the custody petition should have been dismissed ...". ***Matter of Anne MM. v. Vasiliki NN*, 2022 N.Y. Slip Op. 02161, Third Dept 3-31-22**

FREEDOM OF INFORMATION LAW (FOIL).

IF A GOVERNMENT AGENCY TO WHICH A FOIL REQUEST HAS BEEN MADE DOES NOT POSSESS ANY RESPONSIVE DOCUMENTS, THE AGENCY MUST PROVIDE A CERTIFICATION TO THAT EFFECT.

The Third Department, reversing Supreme Court, determined that if the records petitioner sought in his FOIL request do not exist or cannot be found, the respondent must so certify: "[T]he statute commands that a government entity that does not supply any record in response to a FOIL request 'shall certify that it does not have possession of such record or that such record cannot be found after diligent search' (Public Officers Law § 89 [3] [a] ...). Although '[t]he statute does not specify the manner in which an agency must certify that documents cannot be located' ... , respondent failed to provide any such certification ... . Accordingly, 'we remit the matter to Supreme Court for a determination of whether respondent has any other documents in [his] possession which are responsive to petitioner's FOIL request' ... , or, if no responsive records can be found after a diligent search, for respondent to provide a proper certification as required ...". ***Matter of Thomas v. Kane*, 2022 N.Y. Slip Op. 02164, Third Dept 3-31-22**

PRIVILEGE, CIVIL PROCEDURE.

PLAINTIFF STATED A CAUSE OF ACTION FOR BREACH OF THE PHYSICIAN-PATIENT PRIVILEGE, A TORT.

The Third Department, reversing Supreme Court, determined plaintiff stated a cause of action for breach of the physician-patient privilege (CPLR 4504(a)). Plaintiff was a resident at the State College of Veterinary Medicine at Cornell University. During her residency plaintiff was treated by defendant Witlin, a psychiatrist. In a conversation with a staff psychologist at the college, Witlin said he was "aware of [plaintiff's] deterioration" and that she "was a mess the last time [he] saw her." Plaintiff was subsequently denied a second year of residency: " 'The elements of a cause of action for breach of physician-patient confidentiality are: (1) the existence of a physician-patient relationship; (2) the physician's acquisition of information relating to the patient's treatment or diagnosis; (3) the disclosure of such confidential information to a person not connected with the patient's medical treatment, in a manner that allows the patient to be identified; (4) lack of consent for that disclosure; and (5) damages' ... . [P]laintiff's claimed damages are not limited to those related to the decision not to reappoint her. The complaint, as amplified by the bill of particulars, alleges that plaintiff suffered mental distress and related emotional harm as a direct result of the disclosure of her confidential medical information. Because a breach of physician-patient confidentiality is actionable as a tort ... , plaintiff may recover for emotional harm so long as 'the mental injury is a direct, rather than a consequential, result of the breach and . . . the claim possesses some guarantee of genuineness' ...". ***Bonner v. Lynott*, 2022 N.Y. Slip Op. 02175, Third Dept 3-31-22**

TRUSTS AND ESTATES, CIVIL PROCEDURE.

PETITIONER STARTED PROCEEDINGS CONCERNING THE EXECUTOR'S HANDLING OF DECEDENT'S ASSETS IN SURROGATE'S COURT; AFTER RELIEF WAS DENIED WITHOUT PREJUDICE PETITIONER STARTED SIMILAR PROCEEDINGS IN SUPREME COURT, A COURT OF CONCURRENT JURISDICTION; THE EXECUTOR'S MOTION TO TRANSFER THAT PROCEEDING TO SURROGATE'S COURT SHOULD HAVE BEEN GRANTED.

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Garry, determined that Surrogate's Court, not Supreme Court, was the proper forum for this proceeding concerning respondent-executor's handling of decedent's assets. Both respondent and petitioner are decedent's children. Petitioner had commenced proceedings in Surrogate's Court, and, after the requested relief was denied without prejudice, petitioner commenced a similar proceeding in Supreme Court: " 'Supreme Court and . . . Surrogate's Court have concurrent jurisdiction in matters involving decedents' estates' ... . Generally, where courts share concurrent jurisdiction, 'it should continue to be exercised by that one whose process was first issued. Moreover, wherever possible, all litigation involving the property and funds of a decedent's estate should be disposed of in . . . Surrogate's Court' ... . Supreme Court's denial of a motion to transfer to Surrogate's Court will not be disturbed absent an abuse of discretion ... . * * * Petitioner challenges the propriety of transactions allegedly made in breach of respondent's fiduciary duty to decedent while decedent was alive, involving assets that would have become part of decedent's estate. This matter falls squarely within the purview of Surrogate's Court ... . Since 'all the relief requested may be obtained in . . . Surrogate's Court and . . . Surrogate's Court has already acted,' we find that Supreme Court should have granted respondent's motion seeking to transfer the proceeding ...". ***Matter of McNeil v. McNeil*, 2022 N.Y. Slip Op. 02173, Third Dept 3-31-22**

TRUSTS AND ESTATES, CONTRACT LAW, CIVIL PROCEDURE. TAX LAW.

PLAINTIFF COUNTY, ACTING ON BEHALF OF THE NURSING HOME WHERE DECEDENT WAS CARED FOR, WAS ENTITLED TO DISCLOSURE OF DECEDENT'S TAX RETURNS; THE RETURNS ARE RELEVANT TO WHETHER DECEDENT'S SON BREACHED THE "RESPONSIBLE PARTY AGREEMENT" WHICH REQUIRED HIM TO USE THE DECEDENT'S INCOME TO PAY THE NURSING HOME.

The Third Department, reversing (modifying) Supreme Court, plaintiff county (on behalf of the nursing home where decedent was cared for) was entitled to disclosure of decedent's tax returns in this action against decedent's son. The action alleged the son breached the "responsible party agreement" in which the son agreed to pay the decedent's nursing home costs from the decedent's income and resources: "Unlike a typical action where the assets of a defendant are irrelevant unless and until a judgment is obtained, here ... the existence and value of decedent's assets are critical to the issue of whether Jeffrey Garry [decedent's son] breached the agreement by failing to use such assets to pay for decedent's care ... . Although 'tax returns are generally not discoverable unless the party seeking them shows that they are relevant to issues in the case, indispensable to the claim and unavailable from other sources' ... , we are satisfied that plaintiff made the requisite showing here, particularly given defendants' reluctance to produce responsive documents or interrogatory responses that may have otherwise provided information contained in decedent's tax returns ...". ***County of Warren v. Swan*, 2022 N.Y. Slip Op. 02169, Third Dept 3-31-22**

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