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COURT OF APPEALS

APPEALS, CIVIL PROCEDURE, LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THE APPELLATE DIVISION INITIALLY REVERSED SUPREME COURT AND HELD PLAINTIFF WAS NOT ENTITLED TO SUMMARY JUDGMENT IN THIS LABOR LAW § 240(1) LADDER-FALL CASE; THERE WAS A DEFENSE VERDICT AFTER TRIAL; THE ORDER DENYING SUMMARY JUDGMENT IS NOT APPEALABLE TO THE COURT OF APPEALS.

The Court of Appeals determined the Appellate Division order denying summary judgment in this Labor Law § 240(1) ladder-fall case did not "affect the final judgment" after trial. Therefore, the order was not appealable to the Court of Appeals: "The 2018 Appellate Division order may be reviewed on appeal from a final paper only if, pursuant to CPLR 5501 (a), the nonfinal order 'necessarily affects' the final judgment. 'It is difficult to distill a rule of general applicability regarding the 'necessarily affects' requirement' ... and '[w]e have never attempted, and we do not now attempt, a generally applicable definition' .... That said, to determine whether a nonfinal order 'necessarily affects' the final judgment, in cases where the prior order 'str[uck] at the foundation on which the final judgment was predicated' we have inquired whether 'reversal would inescapably have led to a vacatur of the judgment' .... This is not such a case. In other cases, we have asked whether the nonfinal order 'necessarily removed [a] legal issue from the case' so that 'there was no further opportunity during the litigation to raise the question decided by the prior non-final order' .... In resolving plaintiff's summary judgment motion, the Appellate Division held that factual questions existed as to whether a statutory violation occurred and as to proximate cause, or more specifically as to whether plaintiff's own acts or omissions were the sole proximate cause of the accident .... That nonfinal order did not remove any issues from the case. Rather, the question of proximate cause and liability was left undecided. The parties had further opportunity to litigate those issues and in fact did so during the jury trial." ***Bonczar v. American Multi-Cinema, Inc.*, 2022 N.Y. Slip Op. 02835, CtApp 4-28-22**

APPEALS, CRIMINAL LAW, ATTORNEYS, CONSTITUTIONAL LAW.

THE MAJORITY CONCLUDED (1) THE RECORD SUPPORTED THE FINDING THAT DEFENDANT DID NOT MAKE AN UNEQUIVOCAL REQUEST FOR COUNSEL, AND (2) WHETHER A REQUEST FOR COUNSEL IS UNEQUIVOCAL IS A MIXED QUESTION OF LAW AND FACT WHICH IS NOT REVIEWABLE BY THE COURT OF APPEALS.

The Court of Appeals, over a two-judge extensive dissenting opinion, determined (1) the record supported the finding that defendant's request for counsel was not unequivocal and (2) whether the request was unequivocal presents a mixed question of law and fact which is not reviewable by the Court of Appeals: "Once a defendant in custody unequivocally requests the assistance of counsel, the right to counsel may not be waived outside the presence of counsel .... But '[a] suggestion that counsel might be desired; a notification that counsel exists; or a query as to whether counsel ought to be obtained will not suffice' to unequivocally invoke the indelible right to counsel .... Furthermore, '[w]hether a particular request is or is not unequivocal is a mixed question of law and fact that must be determined with reference to the circumstances surrounding the request including the defendant's demeanor, manner of expression and the particular words found to have been used by the defendant' .... Here, there is support in the record for the lower courts' determination that defendant—whose inquiries and demeanor suggested a conditional interest in speaking with an attorney only if it would not otherwise delay his clearly-expressed wish to speak to the police—did not unequivocally invoke his right to counsel while in custody. That mixed question of law and fact is therefore beyond further review by this Court .... **From the dissent:** Here, Mr. Dawson [defendant] unequivocally invoked his right to counsel—the record supports no other conclusion. As is clear from the quoted portion of the colloquy with the detective, he twice said he wanted to call his lawyer, and the detective twice expressly stated that he understood Mr. Dawson had asked to call counsel and therefore the detective could no longer speak to Mr. Dawson. Additionally, the detective then told Mr. Dawson to wait while the detective retrieved Mr. Dawson's phone so he could call counsel." ***People v. Dawson*, 2022 N.Y. Slip Op. 02772, CtApp 4-26-22**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE FAILURE TO CONDUCT A *FRYE* HEARING TO DETERMINE THE ADMISSIBILITY OF THE ANALYSIS OF DNA EVIDENCE USING THE FORENSIC STATISTICAL TOOL WAS ERROR, THE MAJORITY CONCLUDED IT WAS HARMLESS ERROR BECAUSE OF VIDEO EVIDENCE CIRCUMSTANTIALLY CONNECTING DEFENDANT TO THE GUN FOUND BY THE POLICE; THREE-JUDGE DISSENT ON WHETHER THE ADMISSION OF THE DNA EVIDENCE CONNECTING DEFENDANT TO THE GUN WAS HARMLESS.

The Court of Appeals, over a three-judge dissenting opinion, held the acknowledged DNA-evidence error was harmless. All the judges agreed that a *Frye* hearing should have been held to determine the admissibility of the DNA analysis using the Forensic Statistical Tool. The issue was whether the defendant or others at the scene of the assault (a deli store) possessed a gun which was found on a display shelf by a police officer. DNA evidence connected the gun to the defendant. The majority concluded the video footage, which showed defendant placing an item on the shelf where the gun was found, rendered the DNA-evidence error harmless: "It was an abuse of discretion for the trial court to admit the results of DNA analysis conducted using the Forensic Statistical Tool without first holding a *Frye* hearing .... Here, however, this error was harmless. The evidence of defendant's guilt was overwhelming. Video footage from a security camera inside the store was entered into evidence at trial, including footage from one camera trained on a display shelf which captured a group of men holding defendant against the shelf. The other men then scatter, leaving the video frame, at which point defendant places an item on the shelf directly in front of him before he too runs out of the frame. After approximately two minutes and fifteen seconds, during which no one approaches the shelf or the area where defendant placed the item, a police officer looks at the space on the shelf where the item was placed, walks over, and removes a gun. Rather than 'mere physical proximity,' the video shows that only defendant could have placed the item—the gun recovered minutes later—on the shelf, not 'any of the several others in the same area' (dissenting op at 8). Therefore, there is no significant probability that the jury would have acquitted defendant had it not been for this error ...". ***People v. Easley*, 2022 N.Y. Slip Op. 02770 CtApp 4-26-22**

CRIMINAL LAW, EVIDENCE, CONSTITUTIONAL LAW.

THE DNA EVIDENCE GENERATED BY THE TRUEALLELE CASEWORK SYSTEM WAS PROPERLY ADMITTED IN EVIDENCE; THE DEFENSE WAS NOT ENTITLED TO THE TRUEALLELE SOFTWARE CODE EITHER IN CONNECTION WITH THE *FRYE* HEARING OR TO CONFRONT THE WITNESSES AGAINST DEFENDANT; THE CONCURRENCE STATED WHETHER THE CODE WOULD BE AVAILABLE TO THE DEFENSE UNDER A PROTECTIVE ORDER REMAINED AN OPEN QUESTION.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a three-judge concurring opinion, determined that the trial judge, after a *Frye* hearing, properly admitted DNA evidence generated by the TrueAllele Casework System. The arguments that the defense was entitled to the TrueAllele software source code in connection with the *Frye* hearing and in order to confront the witnesses against the defendant were rejected. The concurrence stated that it remains an open question whether a protective order could be used to supply the defense with the source code: "This appeal primarily concerns the admissibility of DNA mixture interpretation evidence generated by the TrueAllele Casework System. We conclude that Supreme Court did not abuse its discretion in finding, following a Frye hearing, that TrueAllele's use of the continuous probabilistic genotyping approach to generate a statistical likelihood ratio—including the use of peak data below the stochastic threshold—of a DNA genotype is generally accepted in the relevant scientific community. We also hold that there was no error in the court's denial of defendant's request for discovery of the TrueAllele software source code in connection with the Frye hearing or for the purpose of his Sixth Amendment right to confront the witness against him at trial. **From the concurring opinion:** Although the prosecutor failed to establish that, at the time of the Frye hearing, TrueAllele's methodology was properly validated by disinterested parties with access to the source code, and defendant was denied an opportunity to review the source code because of the developer's proprietary claims, the error, considered alone or with the other alleged constitutional error, was harmless on the facts of this case. Even though the majority rejects defendant's claim to the source code on the facts of this case, it remains an open question in this Court whether a defendant should be granted access to a proprietary source code under a protective order. This familiar method of ensuring a defendant's right to present a defense would safeguard commercial interests. It provides no help to this defendant, but it is squarely within a court's authority to grant such an order in an appropriate future case." ***People v. Wakefield*, 2022 N.Y. Slip Op. 02771, CtApp 4-26-22**

ELECTION LAW, CONSTITUTIONAL LAW.

THE 2022 CONGRESSIONAL AND STATE SENATE REDISTRICTING MAPS DECLARED VOID BECAUSE THEY WERE DRAWN WITH AN UNCONSTITUTIONAL PARTISAN INTENT.

The Court of Appeals declared the 2022 congressional and state senate redistricting maps void, finding they were drawn with "an unconstitutional partisan intent." "Opinion by Chief Judge DiFiore. Judges Garcia, Singas and Cannataro concur. Judge Troutman dissents in part in an opinion, in which Judge Wilson concurs in part in a dissenting opinion, in which Judge Rivera concurs in part. Judge Rivera dissents in a separate dissenting opinion, in which Judge Wilson concurs": "In 2014, the People of the State of New York amended the State Constitution to adopt historic reforms of the redistricting pro-

cess by requiring, in a carefully structured process, the creation of electoral maps by an Independent Redistricting Commission (IRC) and by declaring unconstitutional certain undemocratic practices such as partisan and racial gerrymandering. No one disputes that this year, during the first redistricting cycle to follow adoption of the 2014 amendments, the IRC and the legislature failed to follow the procedure commanded by the State Constitution. A stalemate within the IRC resulted in a breakdown in the mandatory process for submission of electoral maps to the legislature. The legislature responded by creating and enacting maps in a nontransparent manner controlled exclusively by the dominant political party — doing exactly what they would have done had the 2014 constitutional reforms never been passed. On these appeals, the primary questions before us are whether this failure to follow the prescribed constitutional procedure warrants invalidation of the legislature's congressional and state senate maps and whether there is record support for the determination of both courts below that the district lines for congressional [*2]races were drawn with an unconstitutional partisan intent. We answer both questions in the affirmative and therefore declare the congressional and senate maps void. As a result, judicial oversight is required to facilitate the expeditious creation of constitutionally conforming maps for use in the 2022 election and to safeguard the constitutionally protected right of New Yorkers to a fair election." ***Matter of Harkenrider v. Hochul*, 2022 N.Y. Slip Op. 02833, CtApp 4-27-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT IN THIS LABOR LAW § 240(1) LADDER-FALL CASE; APPELLATE DIVISION REVERSED; EXTENSIVE THREE-JUDGE DISSENTING OPINION.

The Court of Appeals, reversing the Appellate Division, over a three-judge dissenting opinion, determined plaintiff in this Labor Law § 240(1) ladder-fall case should not have been awarded summary judgment. Plaintiff used an A-frame ladder in a closed position because of limited space. While rerouting pipes in the ceiling, plaintiff received an electric shock and fell to the floor. The majority found questions of fact were raised about whether the ladder failed to protect plaintiff and whether other safety devices should have been provided: "An 'accident alone' is insufficient to establish a violation of Labor Law § 240 (1) or causation .... Moreover, Labor Law § 240 (1) is designed to protect against "harm directly flowing from the application of the force of gravity to an object or person" .... We agree with the dissent below that plaintiff was not entitled to partial summary judgment on his Labor Law § 240 (1) claim .... Indeed, questions of fact exist as to whether 'the ladder failed to provide proper protection,' whether 'plaintiff should have been provided with additional safety devices,' and whether the ladder's purported inadequacy or the absence of additional safety devices was a proximate cause of plaintiff's accident ...". ***Cutaia v. Board of Mgrs. of the 160/170 Varick St. Condominium*, 2022 N.Y. Slip Op. 02834, CtApp 4-28-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

WHETHER "CLEANING" IS A COVERED ACTIVITY UNDER LABOR LAW § 240(1) DEPENDS ON WHETHER THE CLEANING WORK IS "ROUTINE;" "ROUTINE" CLEANING WORK IS NOT COVERED.

The Court of Appeals, reversing the Appellate Division, determined plaintiff should not have been awarded summary judgment on the Labor Law § 240(1) cause of action and defendant's summary judgment motion should have been granted. The issue was whether plaintiff was injured doing "cleaning" work covered by the Labor Law. The Court of Appeals held plaintiff was doing "routine" work, which therefore did not qualify as "cleaning" under Labor Law § 240(1). The facts were not explained: "Labor Law § 240 (1) requires certain contractors and property owners to provide adequate safety devices when workers engage in particular tasks involving elevation-related risks. To recover under section 240 (1) for an injury caused by a failure to provide such safety devices, plaintiffs must first show that they were engaged in one of that section's enumerated activities including, among others, 'cleaning.' To determine whether an activity is 'cleaning' within the meaning of the statute, courts apply a four-factor analysis (see Soto v. J. Crew Inc., 21 NY3d 562, 568 [2013]). The first factor considers whether the work is 'routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises' (id. [emphasis added]). This factor does not involve a fact-specific assessment of a plaintiff's regular tasks—it instead asks whether the type of work would be expected to recur with relative frequency as part of the ordinary maintenance and care of a commercial property (see id. at 569). Here, plaintiff's work was 'routine' within the meaning of the first factor, which therefore weighs against concluding that he was 'cleaning.' '[V]iewed in totality,' the Soto factors do not 'militate in favor of placing the task' in the category of 'cleaning' (id. at 568-569)." ***Healy v. EST Downtown, LLC*, 2022 N.Y. Slip Op. 02836, CtApp 4-28-22**

PERSONAL INJURY, TOXIC TORTS.

THE OVER $3,000,000 VERDICT IN THIS TOXIC TORT CASE REVERSED; THE PROOF THAT DEFENDANT'S TALCUM POWDER, WHICH ALLEGEDLY CONTAINED ASBESTOS, CAUSED PLAINTIFF'S DECEDENT'S LUNG CANCER WAS DEEMED INSUFFICIENT; THE STANDARD FOR PROOF OF CAUSATION IN TOXIC TORT CASES DISCUSSED IN DEPTH.

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Garcia, over an extensive dissenting opinion, determined the proof of plaintiff's decedent's exposure to asbestos in defendant's talcum powder was not sufficient to demonstrate the powder caused decedent's mesothelioma (lung cancer). The opinion reviews the toxic tort

caselaw with respect to the sufficiency of proof of causation. That discussion is too comprehensive to fairly summarize here: "Although we have recognized that in any given case it may be 'difficult, if not impossible, to quantify a plaintiff's past exposure' to a toxin ... , our standard itself is not 'impossible' for plaintiffs to meet .... We must, as always, strike a balance between the need to exclude 'unreliable or speculative information' as to causation with our obligation to ensure that we have not set 'an insurmountable standard that would effectively deprive toxic tort plaintiffs of their day in court' .... The requirement that plaintiff establish, using expert testimony based on generally accepted methodologies, sufficient exposure to a toxin to cause the claimed illness strikes the appropriate balance .... The fault here is not in our standard, but in plaintiff's proof." ***Nemeth v. Brenntag N. Am.*, 2022 N.Y. Slip Op. 02769, CtApp 4-26, 2022**

FIRST DEPARTMENT

CIVIL PROCEDURE, EMPLOYMENT LAW, HUMAN RIGHTS LAW.

PLAINTIFF'S STATE AND CITY HUMAN RIGHTS LAW CAUSES OF ACTION PROPERLY DISMISSED PURSUANT TO THE DOCTRINE OF COLLATERAL ESTOPPEL; THE IDENTICAL CLAIMS UNDER FEDERAL LAW WERE DISMISSED IN FEDERAL COURT ON SUMMARY JUDGMENT; TWO-JUSTICE DISSENT.

The First Department, over a two-justice dissent, determined plaintiff was collaterally estopped from asserting her NYC Human Rights Law causes of action after the dismissal of identical claims made under federal law in federal court. The First Department acknowledged the NYC Human Rights Law causes of action must be analyzed separately and independently from the federal and state human rights law causes of action, but held that collateral estoppel was proper under the facts: "In light of the particular express facts that the federal courts found were conclusively demonstrated by the record on the summary judgment motions before the district court; the nature of the allegations underlying plaintiff's State and City Human Rights Law claims in this action and the manner in which plaintiff has litigated those claims; and the relevant collateral estoppel case law ... , we conclude that, even affording the City Human Rights Law claims the liberal analysis to which they are entitled, plaintiff's claims under both the State and City Human Rights Laws were properly dismissed under the doctrine of collateral estoppel ... . In concluding that plaintiff failed to allege discriminatory intent, the motion court correctly held that collateral estoppel applied to facts identical to those necessarily found by the district court to be undisputed when it granted summary judgment dismissing plaintiff's federal employment discrimination claims .... [I]n dismissing the discrimination and hostile work environment claims against NYU, the motion court correctly relied on the district court's finding that defendants Joseph Thometz and Eve Meltzer (the individual defendants) were not supervisors or managers, and thus that NYU, as plaintiff's employer, was not strictly liable for their conduct .... [T]he federal courts found that NYU provided a legitimate, nonretaliatory reason for plaintiff's termination: plaintiff breached a protective order issued by the district court by sending unsolicited emails to a potential witness in the federal action. Moreover, the federal courts found that plaintiff failed to present evidence that NYU's reason was pretextual...." ***Russell v. New York Univ.*, 2022 N.Y. Slip Op. 02765, First Dept 4-26-22**

CORPORATION LAW, NEGLIGENCE, LANDLORD-TENANT.

A CORPORATE OFFICER OR SHAREHOLDER CANNOT BE PERSONALLY LIABLE FOR NONFEASANCE (DOING NOTHING) AS OPPOSED TO MISFEASANCE.

The First Department, reversing (modifying) Supreme Court, determined the complaint against the individual defendant, John Milevoi, an officer or shareholder of the property management company, defendant M&L Milevoi Management, must be dismissed. Plaintiff alleged a leak in the ceiling of her apartment caused her slip-and-fall: "The complaint should be dismissed against the individual defendant John Milevoi, because there is no allegation that his liability stems from an act of misfeasance or malfeasance, as opposed to nonfeasance. A corporate officer or shareholder may not be held personally liable for a failure to act .... Defendant owner and defendant management company, on the other hand, have not established their entitlement to judgment as a matter of law." ***De Barcacel v. 1015 Concourse Owners Corp.*, 2022 N.Y. Slip Op. 02869, First Dept 4-28-22**

INSURANCE LAW.

PLAINTIFF'S FALLING INTO A HOLE ON THE PREMISES AFTER HIS TRUCK WAS LOADED WAS NOT THE RESULT OF "USE" OF THE TRUCK WITHIN THE MEANING OF THE INSURANCE POLICIES.

The First Department, reversing Supreme Court, determined the plaintiff's falling into a hole after he was finished loading his truck did not result from his "use" of the truck within the meaning of the applicable insurance policies: "While 'use' of an automobile includes loading and unloading, an accident does not arise from the 'use' of an automobile merely because it occurs during the loading or unloading process, but rather 'must be the result of some act or omission related to the use of the vehicle' ...". ***Tishman Constr. Corp. v. Zurich Am. Ins. Co.*, 2022 N.Y. Slip Op. 02886, First Dept 4-28-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF'S DECEDENT WAS IN THE ELEVATOR SHAFT WHEN THE ELEVATOR, OPERATING NORMALLY, DESCENDED AND CRUSHED HIM; THE ELEVATOR WAS NOT A "FALLING OBJECT" WITHIN THE MEANING OF LABOR LAW § 240(1); COMPLAINT DISMISSED.

The First Department, reversing Supreme Court, determined the elevator that descended and crushed plaintiff's decedent, who had entered the shaft, was not a "falling object" within the meaning of Labor Law § 240(1). Therefore, the complaint against defendants must be dismissed: "Plaintiff's decedent, an elevator mechanic, entered an elevator shaft on the lobby level, under an elevator that he had sent to one of the floors above. After the shaft doors closed, the call button was pressed, and the elevator descended to the lobby, crushing the decedent. The parties agree that the elevator was working normally, in the 'automatic' setting, at the time of the accident. The Labor Law § 240(1) claim must be dismissed because the elevator did not 'fall' as a result of the force of gravity but descended in automatic mode, as it was designed to do ...". ***Luna v. Brodcom W. Dev. Co. LLC*, 2022 N.Y. Slip Op. 02873, First Dept 4-28-22**

NEGLIGENT HIRING, EMPLOYMENT LAW, MUNICIPAL LAW.

PLAINTIFF DANCER STATED CAUSES OF ACTION AGAINST DEFENDANT DANCER AND THEIR EMPLOYER, THE NEW YORK CITY BALLET (NYCB), IN CONNECTION WITH INTIMATE IMAGES ALLEGEDLY DISCLOSED BY THE DEFENDANT DANCER.

The First Department, in a full-fledged opinion by Justice Singh, over an extensive dissenting opinion, determined plaintiff, Waterbury, stated causes of action for: (1) violation of the NYC Administrative Code provision, which prohibits the disclosure of intimate images without consent; (2) intentional infliction of emotional distress; and (3) negligent hiring, supervision, and retention. The plaintiff (Waterbury) was a dancer with the defendant New York City Ballet (NYCB). The defendant Finlay, who allegedly disclosed the images, was also a NYCB dancer. The negligent hiring cause of action is against NYCB as the defendant-dancer's employer: "Waterbury's allegations that images depict her engaged in sexual activity suffice (see Administrative Code § 10-180 [a] ...). Construing the complaint liberally and according Waterbury 'the benefit of every possible favorable inference' ..., the allegations that Finlay shared images of her breasts are also sufficient (see Administrative Code § 10-180 [a] ...). ... Waterbury also sufficiently alleges that Finlay intended to cause her economic, physical, or substantial emotional harm. 'A result is intended if the act is done with the purpose of accomplishing such a result or with knowledge that to a substantial certainty such a result will ensue' .... Waterbury alleges that NYCB dancers and others affiliated with NYCB shared images and commentary regarding other women and that NYCB knew that Finlay and other dancers were degrading and exploiting young women. She asserts that NYCB implicitly encouraged this behavior. Waterbury states that NYCB knew of Finlay's sexual conduct towards young women and took no steps to prevent such conduct." ***Waterbury v. New York City Ballet, Inc.*, 2022 N.Y. Slip Op. 02890, First Dept 4-28-22**

SECOND DEPARTMENT

CIVIL PROCEDURE, CONTRACT LAW.

THE VENUE DESIGNATION IN THE NURSING HOME ADMISSION AGREEMENT, SIGNED BY PLAINTIFF'S DECEDENT'S WIFE, WAS NOT ENFORCEABLE BY THE NURSING HOME.

The Second Department, reversing Supreme Court, determined the nursing home admission agreement, signed by plaintiff's decedent's wife (Anderson), was not a sufficient basis for changing the venue of this action against the nursing home from plaintiff's residence, Bronx County, to the venue designated in the admission agreement, Westchester County. The decision is comprehensive and addresses several substantive issues (agency, rights of non-signatories, for example) not summarized here: "Although the defendant submitted a copy of the admission agreement, it did not provide an affidavit from anyone who signed the agreement, who was present when it was signed, or who otherwise claimed to have personal knowledge of that agreement. The admission agreement was not signed by the plaintiff or the decedent, and it did not identify or include the names of the plaintiff or the decedent anywhere on that document. * * * An admission agreement may be enforced against an individual where it was properly executed by that individual's "designated representative" .... As relevant here, "[d]esignated representative shall mean the individual or individuals designated in accordance with [10 NYCRR 415.2(f)] to receive information and to assist and/or act in behalf of a particular resident to the extent permitted by State law" .... The subdivision lists three ways in which a designation may occur …. As the plaintiff correctly contends, the defendant failed to establish that Anderson was properly designated in any of the three ways authorized by applicable law ...". ***Sherrod v. Mount Sinai St. Luke's*, 2022 N.Y. Slip Op. 02826, Second Dept 4-27-22**

CRIMINAL LAW.

THE SENTENCE FOR WEAPON POSSESSION SHOULD BE CONCURRENT WITH THE SENTENCES FOR THE SHOOTING-RELATED CONVICTIONS.

The Second Department determined the sentence for weapon possession should be concurrent with the sentences for the shooting-related convictions: "[T]he sentence imposed on the conviction of criminal possession of a weapon in the second degree should not run consecutively to the concurrent sentences imposed on the convictions of manslaughter in the first degree and attempted murder in the second degree. The evidence adduced at trial failed to establish that the defendant's "possession of a gun was separate and distinct from his shooting [at the two victims, resulting in the death of one of them] ...". ***People v. Burgess*, 2022 N.Y. Slip Op. 02814, Second Dept 4-27-22**

CRIMINAL LAW, CONSTITUTIONAL LAW.

THE 21-YEAR DELAY BETWEEN THE CRIME AND DEFENDANT'S ARREST DID NOT VIOLATE DEFENDANT'S SPEEDY-TRIAL RIGHTS.

The Second Department determined the 21-year delay between the crime (rape) defendant's arrest did not violate defendant's right to a speedy trial: "[T]he People met their burden of demonstrating good cause for the delay .... Nineteen years of the subject delay was due to the lack of connection between the semen sample collected at the time of the rape in 1994 and the defendant's DNA profile, which was not developed and uploaded to the law enforcement databases until 2013. Once the police were able to identify a viable suspect, they had a good-faith basis to wait until they could locate the victim to arrest the defendant. Furthermore, the detectives' hearing testimony established that the police made reasonable and diligent efforts to locate the victim, and the defendant was arrested immediately after a detective located and interviewed the victim .... The extent of the delay in prosecution is outweighed by the People's good cause for the delay, the nature of the crime, the fact that there was no period of pretrial incarceration during the period at issue, and the lack of any prejudice from the delay identified by the defendant. We are satisfied that the defendant was not deprived of his due process right to prompt prosecution ...". ***People v. Gardner*, 2022 N.Y. Slip Op. 02816, Second Dept 4-27-22**

CRIMINAL LAW, JUDGES, EVIDENCE, APPEALS.

THE JUDGE'S INTERFERENCE IN AND RESTRICTIONS ON THE DEFENSE SUMMATION AND IMPROPER EXCLUSION AND ADMISSION OF EVIDENCE REQUIRED REVERSAL IN THE INTEREST OF JUSTICE.

The Second Department, reversing defendant's murder, assault, and weapon-possession convictions in the interest of justice, determined the judge improperly restricted defense counsel's summation and evidence submissions and improperly allowed hearsay identification evidence that supported the People's theory. Identification of the shooter was the key issue, and the eyewitness accounts were inconsistent and contradictory. The judge prohibited defense counsel from questioning the fairness of the identification procedure (line up) in summation and repeatedly interposed "objections" during the defense summation, in the absence of any objection by the prosecutor: "The Supreme Court's limitation of the defendant's cross-examination of the police witness and its sua sponte admonishments to defense counsel during summation improperly limited the defendant's right to challenge the lineup procedures as unfair and suggestive ... . Moreover, the court erred in informing the jury and the parties in front of the jury that it had already determined that the pretrial identification procedure was fair and not suggestive, and that the lineup was 'constitutional,' wrongly intimating that those facts were not within the jury's province to determine ....The Supreme Court also substantially impaired the defendant's right "to make an effective closing argument" ... through sua sponte 'objection sustained' interruptions without any actual objection being posited by the People.... … The Supreme Court also erred in admitting into evidence the hearsay statement of an unidentified woman that a man 'wearing all gray had the firearm' as an excited utterance exception to the hearsay rule .... The record contained no evidence from which a trier of fact could reasonably infer that the statement was based on the woman's personal observation .... [T]he Supreme Court should have granted the defendant's application to admit into evidence the photographs of the defendant and Cruzado [who was also at the scene] to allow the jury to compare their likenesses, since, under the circumstances of this case, such evidence was highly probative of the defense of third-party culpability and plainly outweighed any danger of delay, prejudice, and confusion ...". ***People v. Aponte*, 2022 N.Y. Slip Op. 02813, Second Dept 4-27-22**

EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW, CIVIL PROCEDURE, EMPLOYMENT LAW.

THE SCHOOL PRINCIPAL HAD THE AUTHORITY TO MAKE A PROBABLE CAUSE DETERMINATION IN THIS DISCIPLINARY PROCEEDING WHICH RESULTED IN THE TERMINATION OF A TENURED TEACHER.

The Second Department, reversing Supreme Court, determined the NYC Department of Education's (DOE's) motion to dismiss the petition to vacate the arbitrator's award should have been granted. The arbitrator determined the petitioner, a tenured teacher, was properly charged with incompetence, misconduct, and neglect of duty, and termination of the teacher's employment was appropriate. The teacher petitioner argued unsuccessfully that the initial probable cause determination must be made by the school board, not, as was the case here, the school principal: "[T]he absence of a vote on probable cause

by the 'employing board' (Education Law § 3020-a[2]), did not deprive the hearing officer of the jurisdictional authority to hear and determine the underlying disciplinary charges. Rather, ... the Chancellor was vested with the authority '[t]o exercise all of the duties and responsibilities of the employing board as set forth in [Education Law § 3020-a]' ..., and with the authority to 'delegate the exercise of all such duties and responsibilities' ...". ***Matter of Cardinale v. New York City Dept. of Educ.*, 2022 N.Y. Slip Op. 02791, Second Dept 4-27-22**

EMPLOYMENT LAW.

VAGUE, CONCLUSORY ALLEGATIONS WILL NOT SUPPORT A CONSTRUCTIVE DISCHARGE CAUSE OF ACTION.

The Second Department, reversing Supreme Court, determined the plaintiff did not state a cause of action for constructive discharge from his employment as a civil engineer for the City of New York: "The plaintiff was employed by the New York City Department of Transportation (hereinafter DOT) as an assistant civil engineer from 1997 until 2014, when he resigned. He commenced this action in 2017 alleging, inter alia, that he had been constructively discharged because he had reported other employees' misconduct .... * * * 'An employee is constructively discharged when her or his employer, rather than discharging the plaintiff directly, deliberately created working conditions so intolerable that a reasonable person in the plaintiff's position would have felt compelled to resign' .... Here, affording the complaint a liberal construction, accepting the facts as alleged to be true, and according to the plaintiff the benefit of every possible favorable inference ..., the complaint fails to state a cause of action alleging constructive discharge, as the allegations are either vague and conclusory ..., or pertain to events that occurred after the plaintiff resigned." ***Dhar v. City of New York*, 2022 N.Y. Slip Op. 02779, Second Dept 4-27-22**

FAMILY LAW, ATTORNEYS, JUDGES, SOCIAL SERVICES LAW.

MOTHER WAS ENTITLED TO A HEARING ON HER CLAIM SHE ADMITTED TO PERMANENT NEGLECT BECAUSE HER COUNSEL WAS INEFFECTIVE; MOTHER ALLEGED COUNSEL DID NOT INFORM HER OF THE RELEVANT BURDENS OF PROOF AT TRIAL.

The Second Department, reversing Family Court, determined mother was entitled to a hearing on whether her counsel was ineffective in failing to inform her of the applicable burdens of proof and in allowing her to admit to permanent neglect: "'A respondent in a proceeding pursuant to Social Services Law § 384-b has the right to the assistance of counsel (see Family Ct Act § 262[a][iv]), which encompasses the right to the effective assistance of counsel' ... . '[T]he statutory right to counsel under Family Court Act § 262 affords protections equivalent to the constitutional standard of effective assistance of counsel afforded to defendants in criminal proceedings' .... Effective assistance is predicated on the standard of 'meaningful representation' .... [M]other submitted an affidavit alleging that, prior to entering her admission to permanent neglect, counsel failed to inform her of the burden and standard of proof at trial and that she made the admission 'because [she] was advised that it was necessary in order to have [her] children returned.' She further alleged that she 'would not have made the statements that [she] made to the court if [she] had been fully advised of [her] rights.' The Family Court did not ameliorate these purported deficiencies in its colloquy with the mother, and also omitted any reference to the possible consequences of the finding, including termination of her parental rights ...". ***Matter of Skylar P. J.*, 2022 N.Y. Slip Op. 02793, Second Dept 4-27-22**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE, UNIFORM COMMERCIAL CODE.

THE BANK DID NOT OFFER A REASONABLE EXCUSE FOR FAILURE TO TAKE PROCEEDINGS FOR A DEFAULT JUDGMENT WITHIN A YEAR AND DID NOT SUBMIT AN ADEQUATE LOST NOTE AFFIDAVIT; THE DEFAULT JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED; THE ACTION IS DEEMED ABANDONED.

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action did not submit sufficient evidence to support a late motion for default judgment against the borrower. The bank did not offer a reasonable excuse for failure to take proceedings for a default judgment within a year and did not submit a sufficient lost note affidavit. The Second Department deemed the action abandoned pursuant to CPLR 3215: "[T]he plaintiff failed to proffer a reasonable excuse for its failure to take proceedings for the entry of a judgment within one year after the action was released from the foreclosure settlement part .... Further, a plaintiff moving for leave to enter default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defendant's failure to answer or appear .... Pursuant to UCC 3-804, '[t]he owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his [or her] own name and recover from any party liable thereon upon due proof of his [or her] ownership, the facts which prevent his [or her] production of the instrument and its terms.' Here, the plaintiff failed to set forth the facts that prevented the production of the original note .... The lost note affidavit submitted by the plaintiff in support of its motion, inter alia, for leave to enter a default judgment did not identify who conducted the search for the lost note or explain when or how the note was lost ...". ***LaSalle Bank N.A. v. Carlton*, 2022 N.Y. Slip Op. 02785, Second Dept 4-27-22**

FORECLOSURE, EVIDENCE, CONTRACT LAW.

THE AFFIDAVIT SUBMITTED BY THE BANK TO PROVE STANDING TO FORECLOSE LAID AN ADEQUATE FOUNDATION FOR THE RELEVANT BUSINESS RECORDS, BUT THE RECORDS THEMSELVES WERE NOT SUBMITTED, RENDERING THE AFFIDAVIT HEARSAY; THE BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISION OF THE MORTGAGE, A CONDITION PRECEDENT.

The Second Department, reversing Supreme Court, determined the evidence that the bank had standing to bring the foreclosure action was insufficient and the bank did not demonstrate compliance with the notice provision of the mortgage, a condition precedent. Although the affidavit submitted by the bank laid a sufficient foundation for the business records described in the affidavit, the records themselves were not submitted: "Although the foundation for the admission of a business record may be provided by the testimony of the custodian, 'it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted' ... . 'Without submission of the business records, a witness's testimony as to the contents of the records is inadmissible hearsay' ...". ***HSBC Bank USA, N.A. v. Boursiquot, 2022 N.Y. Slip Op. 02782*, Second Dept 4-27-22**

Similar issue (failure to submit records referenced in affidavits) and result in ***U.S. Bank N.A. v. Tesoriero*, 2022 N.Y. Slip Op. 02830, Second Dept 4-27-22**

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

THE BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1303, INCLUDING THE REQUIRED TYPE SIZE; THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action did not demonstrate compliance with the notice requirements of RPAPL 1303: "'RPAPL 1303 requires that a notice titled 'Help for Homeowners in Foreclosure' be delivered to the mortgagor along with the summons and complaint in residential foreclosure actions involving owner-occupied, one- to four-family dwellings' ... . 'The statute mandates that the notice be in bold, 14-point type and printed on colored paper that is other than the color of the summons and complaint, and that the title of the notice be in bold, 20-point type' .... Here, the plaintiff failed to establish, prima facie, that it provided notice in compliance with RPAPL 1303. The plaintiff's submissions did not demonstrate that the notice served upon the defendant complied with the type-size requirements in RPAPL 1303 ...". ***Bank of Am., N.A. v. Keefer*, 2022 N.Y. Slip Op. 02776, Second Dept 4-27-22**

FREEDOM OF INFORMATION LAW (FOIL), ATTORNEYS.

PETITIONER WAS ENTITLED TO ATTORNEY'S FEES IN THIS FOIL PROCEEDING; THE RESPONDENTS DID NOT PROVIDE THE BULK OF THE REQUESTED DOCUMENTS UNTIL AFTER THE ARTICLE 78 WAS BROUGHT; RESPONDENTS DID NOT PRESENT AN ADEQUATE EXCUSE FOR FAILING TO INITIALLY DISCLOSE THE REQUESTED DOCUMENTS.

The Second Department, reversing Supreme Court, determined petitioner was entitled to attorney's fees as the prevailing party in this FOIL proceeding. It was only after petitioner brought an Article 78 petition that the respondents provided the bulk of the requested documents: "[T]he respondents did not timely respond to the petitioner's FOIL request .... The first response, which consisted of four pages of materials, failed to address three of the four enumerated categories of material the petitioner sought. It was not until after the commencement of this proceeding that the respondents provided a significant number of additional documents responsive to the FOIL request. Under the circumstances of this case, the petitioner was the 'substantially prevailing' party .... [T]he respondents did not have a reasonable basis for initially denying the petitioner access to the responsive materials. Although a limited amount of material was reasonably withheld based on attorney-client privilege, the 'petitioner's legal action ultimately succeeded in obtaining substantial unredacted post-commencement disclosure responsive to h[is] FOIL request' ...". ***Matter of McNerney v. Carmel Cent. Sch. Dist.*, 2022 N.Y. Slip Op. 02799, Second Dept 4-27-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

IN THIS LABOR LAW § 240(1) CASE, PLAINTIFF ALLEGED THE LADDER WAS UNSECURED AND SHIFTED; DEFENDANT ALLEGED PLAINTIFF TOLD HIS SUPERVISOR HE LOST HIS BALANCE AND JUMPED FROM THE LADDER, RAISING A QUESTION OF FACT.

The Second Department determined conflicting facts precluded summary judgment in this Labor Law § 240(1) ladder-fall case. Plaintiff alleged the ladder was unsecured and shifted when he attempted to descend. The defendant alleged plaintiff told his supervisor he lost his balance and jumped off the ladder: "[T]he defendants raised a triable issue of fact as to whether the ladder shifted to the right and backwards, as the plaintiff testified, or whether the plaintiff's own actions were the sole proximate cause of the subject accident. The defendants submitted an affidavit from the plaintiff's supervisor, who averred that the plaintiff had told him, just after the accident occurred while he was still on the roof, that he had lost his balance as he descended the ladder and jumped off the ladder. The different versions of the accident given by the plaintiff create triable issues of fact that required denial of the motion, including a triable issue of fact as to the plaintiff's credibility ...". ***Jurski v. City of New York*, 2022 N.Y. Slip Op. 02783, Second Dept 4-27-22**

LIEN LAW.

THE COMPOSITE LIEN ENCOMPASSING SEVERAL PARCELS OF PROPERTY WAS NOT INVALID ON ITS FACE BECAUSE IT WAS NOT SHOWN INDIVIDUAL PROPERTY OWNERS HIRED THE RESPONDENT IN SEPARATE TRANSACTIONS; THE LIEN SHOULD NOT HAVE BEEN SUMMARILY DISCHARGED ON THE GROUND THE AMOUNT WAS WILFULLY EXAGGERATED, A FINDING WHICH CAN ONLY BE MADE IN A FORECLOSURE PROCEEDING.

The Second Department, reversing Supreme Court, determined the composite lien encompassing several parcels of real property was not invalid on its face and had not been declared void for willful exaggeration. Therefore, the validity of the lien must be determined in a foreclosure proceeding: "[T]he composite mechanic's lien was facially valid and the Supreme Court should not have summarily discharged it.... [T]he composite mechanic's lien was not invalid because of a failure to apportion the work and material furnished between the four parcels of real property that were identified in the composite mechanic's lien. The requirement to do so 'applies where several transactions, involving the improvement of distinct parcels of property, have been effected at the request of independent owners' .... Here, the petitioners failed to establish that the individual and independent lot owners identified in the composite mechanic's lien hired BKS in separate and distinct transactions. Furthermore, the composite mechanic's lien was not invalid on its face merely because it identified multiple lots by their respective tax block and lot designations .... The Supreme Court also should not have summarily determined that branch of the petition which alleged that the amount claimed in the composite mechanic's lien was willfully exaggerated. 'Pursuant to Lien Law § 39, the court may declare a lien void and deny recovery if the lienor has willfully exaggerated the amount claimed'…. This Court has held that the remedy in Lien Law § 39-a is 'available only where the lien was valid in all other respects and was declared void by reason of willful exaggeration after a trial of the foreclosure action' ...". ***Matter of Matrix Staten Is. Dev., LLC v. BKS-NY, LLC*, 2022 N.Y. Slip Op. 02795, Second Dept 4-27-22**

PERSONAL INJURY, MUNICIPAL LAW.

THERE WAS NO OBJECTIVE SUPPORT FOR PLAINTIFF BUS PASSENGER'S CLAIM THE MOVEMENT OF THE BUS THAT CAUSED HER TO FALL WAS "UNUSUAL AND VIOLENT."

The Second Department, reversing Supreme Court, determined the defendant bus company's, MTA's, motion to dismiss the complaint in this bus passenger injury case should have been granted: "To establish a prima facie case of negligence against a common carrier for injuries sustained by a passenger as a result of the movement of the vehicle, a plaintiff must establish that the movement consisted of a jerk or lurch that was 'unusual and violent' …. 'Moreover, a plaintiff may not satisfy that burden of proof merely by characterizing the stop as unusual and violent' .... There must be 'objective evidence of the force of the stop sufficient to establish an inference that the stop was extraordinary and violent, of a different class than the jerks and jolts commonly experienced in city bus travel and, therefore, attributable to the negligence of defendant' .... 'In seeking summary judgment dismissing the complaint, however, common carriers have the burden of establishing, prima facie, that the movement of the vehicle was not unusual and violent' .... MTA established its prima facie entitlement to judgment as a matter of law. MTA demonstrated, by submitting the transcript of the plaintiff's deposition testimony, that the movement of the bus was not unusual and violent or of a 'different class than the jerks and jolts commonly experienced in city bus travel' .... The nature of the incident, according to the plaintiff's deposition testimony, was that she was caused to fall as the bus stopped at the intersection. According to the plaintiff, who did not provide an estimate as to how fast the bus was traveling prior to stopping at the intersection, she was the only passenger on the bus who fell, although there was another passenger standing within two feet of her at the time. The plaintiff testified that she landed on the floor near where she was standing prior to falling down. This is not, in itself, sufficient to provide the objective support necessary to demonstrate that the movement of the bus was unusual and violent, and of a different class than the jerks and jolts commonly experienced in city bus travel ...". ***Orji v. MTA Bus Co.*, 2022 N.Y. Slip Op. 02811, Second Dept 4-27-22**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

THE RIGHT LANE WAS FOR RIGHT TURNS ONLY; THE MIDDLE LANE WAS FOR EITHER GOING STRAIGHT OR TURNING RIGHT; HERE THE DRIVER IN THE FAR RIGHT LANE DID NOT TURN RIGHT AND STRUCK THE CAR IN THE MIDDLE LANE WHICH WAS MAKING A RIGHT TURN; THE DRIVER IN THE MIDDLE LANE WAS ENTITLED TO SUMMARY JUDGMENT DISMISSING THE COMPLAINT.

The Second Department, reversing Supreme Court in this traffic accident case, determined plaintiff's motion for summary judgment against defendant Rubio should not have been granted and defendant Rubio's motion for summary judgment should have been granted. Plaintiff was a passenger in a taxi driven by defendant Muy-Angamarca. Muy-Angamarca was in the far right lane, which was for right turns only. Rubio was in the middle lane, which could be used to go straight or turn right. When Rubio attempted the right turn, Muy-Angamarca continued straight and struck Rubio's car: "[T]he Rubio defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the sole proximate cause of the accident was Muy-Angamarca's vehicle continuing straight through the intersection in disregard of a traffic sign directing that his lane was for right turns only ... . Based upon Muy-Angamarca's disregard of the traffic sign, he was in violation of the Vehicle and Traffic Law, and thus, he was negligent as a matter of law (see Vehicle and Traffic Law

§ 1110[a] ...). Rubio was entitled to assume that Muy-Angamarca would obey the traffic sign requiring Muy-Angamarca to turn right .... Indeed, the plaintiff testified at his deposition that he observed that Rubio had signaled before making a legal right turn from the middle lane, that Muy-Angamarca 'started to accelerate' toward the intersection while Rubio's vehicle was turning, and that he did not believe Rubio was at fault in the happening of the accident." ***Ellsworth v. Rubio*, 2022 N.Y. Slip Op. 02781, Second Dept 4-27-22**

REAL ESTATE, CONTRACT LAW.

THE REAL ESTATE PURCHASE CONTRACT DID NOT INCLUDE THE CLOSING DATE OR THE MORTGAGE TERMS; THE CONTRACT WAS THEREFORE UNENFORCEABLE PURSUANT TO THE STATUTE OF FRAUDS.

The Second Department, reversing Supreme Court, determined the seller was entitled to summary judgment dismissing the action for specific performance of the real estate purchase contract because the contract did not meet the requirements of the statute of frauds: "Under the statute of frauds, a contract for the sale of real property must be evidenced by a writing (see General Obligations Law § 5-703[1]). The writing must 'identify the parties, describe the subject matter, be signed by the party to be charged, and state all of the essential terms of an agreement' .... 'In a real estate transaction, the essential terms of a contract typically include the purchase price, the time and terms of payment, the required financing, the closing date, the quality of title to be conveyed, the risk of loss during the sale period, and adjustments for taxes and utilities' .... '[T]he writing must set forth the entire contract with reasonable certainty so that the substance thereof appears from the writing alone . . . If the contract is incomplete and it is necessary to resort to parol evidence to ascertain what was agreed to, the remedy of specific performance is not available' .... In addition to the document not specifying the closing date, the evidence established that the parties never agreed with respect to the mortgage terms. At his deposition, the plaintiff testified that he was purchasing the property 'subject' to the existing mortgage and that he had the 'option' of obtaining a purchase money mortgage. The document, however, did not state whether the plaintiff was purchasing the property subject to the existing mortgage, obtaining a purchase money mortgage, or obtaining his own mortgage. The failure to include such terms makes the purported real estate contract unenforceable ...". ***Cohen v. Holder*, 2022 N.Y. Slip Op. 02778, Second Dept 4-27-22**

THIRD DEPARTMENT

CIVIL PROCEDURE, CONSTITUTIONAL LAW.

THE CURRENT GOVERNOR AND LIEUTENANT GOVERNOR, AS WELL AS FORMER GOVERNOR CUOMO, ARE NECESSARY PARTIES IN THIS SUIT PURSUANT TO THE STATE FINANCE LAW CHALLENGING THE CONSTITUTIONALITY OF THE SALARY INCREASES FOR THOSE PARTIES.

The Third Department, reversing Supreme Court, determined the action under the State Finance Law challenging the constitutionality of the salary increases for governor and lieutenant governor should have included the current Governor and Lieutenant Governor, as well as former Governor Cuomo, as necessary parties: "CPLR 1001 (a) provides that '[p]ersons . . . who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants.' When such a person 'has not been made a party and is subject to the jurisdiction of the court, the court shall order him [or her] summoned' .... This requirement protects the right to due process by providing such a person the opportunity to be heard before his or her interests are adversely affected .... [T]he interests of the Governor and Lieutenant Governor are not necessarily being represented or protected by defendant and his counsel — the Attorney General, who would also typically represent those other state officials ...; We cannot determine whether the Governor and Lieutenant Governor will necessarily support and integrate defendant's argument that the resolution is constitutional; indeed, they may argue against its constitutionality, to establish precedent that would prevent a potential future intra-term diminution of their salaries. Accordingly, and as the Governor and Lieutenant Governor are subject to its jurisdiction, Supreme Court should have granted defendant's request that those officers be joined as necessary parties and ordered them summoned (see CPLR 1001 [b] ...)." ***Arrigo v. DiNapoli*, 2022 N.Y. Slip Op. 02845, Third Dept 4-28-22**

EMPLOYMENT LAW.

PETITIONER WAS CHARGED WITH MAKING A COMMENT TO A FELLOW EMPLOYEE AT A SOCIAL GATHERING, WAS FOUND GUILTY, AND WAS TERMINATED; THE EMPLOYEE TESTIFIED THE REMARK WAS MADE AT THE WORKPLACE; THEREFORE, PETITIONER WAS FOUND GUILTY OF CONDUCT THAT WAS NEVER CHARGED; DETERMINATION ANNULLED.

The Third Department, annulling the determination terminating petitioner's employment with the state, found that petitioner's due process rights were violated because he was found guilty of conduct that was never charged. Petitioner was charged with making a comment to a fellow employee at a social gathering. But the employee testified the remark was made at the workplace: "Pursuant to Civil Service Law § 75 (1), a civil service employee 'shall not be removed or otherwise subjected to any disciplinary penalty . . . except for incompetency or misconduct shown after a hearing upon stated

charges.' 'The standard of review of such a determination made after a disciplinary hearing is whether it is supported by substantial evidence' .... 'The first fundamental of due process is notice of the charges made. This principle equally applies to an administrative proceeding for even in that forum no person may lose substantial rights because of wrongdoing shown by the evidence, but not charged' ... Fundamentally, the determination made in a disciplinary proceeding 'must be based on the charges made' and it is error to find a public employee guilty of uncharged specifications of misconduct and impose a penalty thereon ...". ***Matter of Kiyonaga v. New York State Justice Ctr. for the Protection of People with Special Needs*, 2022 N.Y. Slip Op. 02850, Third Dept 4-28-22**

FAMILY LAW, APPEALS.

THE ELECTRONICALLY RECORDED HEARING INCLUDED 80 QUESTIONS POSED TO A WITNESS BY COUNSEL, BUT ONLY FOUR ANSWERS WERE AUDIBLE; NEW HEARING WITH A STENOGRAPHER ORDERED.

The Third Department determined the record on appeal was insufficient and ordered a new hearing with a stenographer. The hearing was electronically recorded. Counsel asked a witness 80 questions, but only four answers were audible. ***Matter of Jereline Z. v. Joseph AA.*, 2022 N.Y. Slip Op. 02848, Third Dept 4-28-22**

FAMILY LAW, APPEALS, SOCIAL SERVICES LAW.

FOR PURPOSES OF A PERMANENT NEGLECT/TERMINATION-OF-PARENTAL-RIGHTS PROCEEDING, DIRECT PLACEMENT OF THE CHILD WITH A SUITABLE PERSON MEETS THE DEFINITION OF PLACEMENT IN THE "CARE OF AN AUTHORIZED AGENCY" SUCH THAT A PERMANENT NEGLECT PROCEEDING IS AVAILABLE AFTER DIRECT PLACEMENT FOR ONE YEAR; ALTHOUGH RESPONDENT'S PARENTAL RIGHTS HAD BEEN TERMINATED WHEN THIS APPEAL WAS CONSIDERED, THE "EXCEPTION TO THE MOOTNESS DOCTRINE" WAS INVOKED.

The Third Department, considering the appeal as an exception to the mootness doctrine in this neglect/termination-of-parental-rights proceeding, determined that direct placement of the child with a suitable person met the definition of placement in the "care of an authorized agency" for purposes of the prerequisite for a permanent neglect proceeding seeking to terminate parental rights. Family Court had ruled placement with a suitable person was not placement in the "care of an authorized agency" and dismissed the permanent neglect proceeding on that ground. The Third Department, after finding the permanent neglect proceeding should not have been dismissed, went ahead and ruled on the merits, finding that mother had permanently neglected the child: "[W]e find Family Court's interpretation of Social Services Law § 384-b too narrow and calling for a result that is 'unnecessarily circuitous' ... and ultimately contrary to the stated legislative intent … . A proceeding for termination of parental rights may be originated by an 'authorized agency' such as petitioner ..., seeking an order for guardianship and custody when a child is a permanently neglected child .... A 'permanently neglected child' is defined as 'a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of either at least one year or [15] out of the most recent [22] months . . . substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child' .... Regarding the phrase 'care of an authorized agency,' courts have consistently held that a direct placement authorized by Family Court, like the order of fact-finding and disposition issued ... pursuant to Family Ct Act § 1055, falls within the purview of Social Services Law § 384-b." ***Matter of Frank Q. (Laurie R.)*, 2022 N.Y. Slip Op. 02843, Third Dept 4-28-22**

FAMILY LAW, EVIDENCE.

THE PETITIONER SEEKING TO MODIFY A CUSTODY ARRANGEMENT MUST MAKE A THRESHOLD SHOWING THAT THERE HAS BEEN A CHANGE IN CIRCUMSTANCES SINCE THE LAST CUSTODY ORDER WAS ISSUED; HERE, FATHER'S WANTING MORE PARENTING TIME TO DEVELOP A CLOSER RELATIONSHIP WAS NOT A CHANGED CIRCUMSTANCE.

The Third Department, reversing Family Court, determined father did not meet his burden of showing changed circumstances warranting an increase in parenting time. Father's simply wanting more parenting time is not a changed circumstance: "Family Court found that a change in circumstances existed — namely, that the father wanted to have a closer relationship with the child and the amount of parenting time provided in the January 2019 order was insufficient to develop that relationship. Even crediting the father's testimony, the father's mere dissatisfaction with the amount of parenting time provided in the January 2019 order and the desire for more time do not constitute a change in circumstances .... Furthermore, the record fails to show any 'new developments or changes that have occurred since the [January 2019] order was entered' .... Accordingly, because the father did not satisfy his threshold burden of establishing a change in circumstances, the modification petition should have been dismissed ...". ***Matter of Joshua KK. v. Jaime LL.*, 2022 N.Y. Slip Op. 02847, Third Dept 4-28-22**

MENTAL HYGIENE LAW.

THE MODIFICATION OF THE GUARDIANSHIP ORDER MUST BE IN THE BEST INTEREST OF THE DEVELOPMENTALLY DISABLED PERSON; HERE THE APPOINTMENT OF STEPFATHER AS LIMITED COGUARDIAN CONSTITUTED A CHANGE THAT WAS NOT IN THE DISABLED PERSON'S BEST INTERESTS BECAUSE CONSISTENCY IN ROUTINE AND REGIMEN WAS PARAMOUNT.

The Third Department, modifying Surrogate's Court, determined the appointment of the stepfather as limited coguardian of Jonathan JJ, a developmentally disabled adult, was not in Jonathan's best interests. Jonathan had apparently thrived with his father as guardian and his stepfather had not seen Jonathan since 2009: "… Surrogate's Court granted the father's petition for coguardianship of the person and property of Jonathan JJ. along with the Commissioner. The court also appointed the stepfather as a limited coguardian with the ability to attend only the medical appointments of Jonathan JJ. The father appeals, arguing that Surrogate's Court erred in appointing the stepfather as a limited coguardian. In order to modify an existing guardianship order, it must be shown that such change would further the best interests of the person who is intellectually or developmentally disabled .... Such a modification is warranted where it is necessary to protect the 'personal and/or financial interests' of the person with a disability ..., or 'as may be deemed necessary or proper for the welfare' of such person .... The testimony elicited at the hearing demonstrated that Jonathan JJ. has thrived from consistency in his routine and regimen. In that regard, his outbursts were a primary concern among his treatment providers, and the routine that was put in place, together with management by medical personnel, helped control the outbursts, as well as contributed to other positive physical, medical and cognitive improvements in his life." ***Matter of Jonathan JJ. (Alan JJ.–Caren KK.),* 2022 N.Y. Slip Op. 02837, Third Dept 4-28-22**

TRUSTS AND ESTATES, FRAUD, CIVIL PROCEDURE.

PLAINTIFFS HAD STANDING TO CHALLENGE THE TRUST SET UP BY DECEDENT; PLAINITIFFS DID NOT STATE A CAUSE OF ACTION FOR FRAUD BECAUSE IT WAS ALLEGED THE DECEDENT (A THIRD PARTY), NOT THE PLAINTIFFS, RELIED ON THE ALLEGEDLY FALSE STATEMENT; THE COMPLAINT STATED A CAUSE OF ACTION ALLEGING DEFENDANTS EXERCISED UNDUE INFLUENCE OVER THE DECEDENT WHICH AFFECTED THE DECEDENT'S ESTATE-RELATED DECISIONS.

The Third Department, reversing (modifying) Supreme Court, determined: (1) the complaint did not state a cause of action for fraud because it was alleged a third party (the decedent), not plaintiffs, relied upon the alleged false statement; (2) the complaint stated a cause of action for "undue influence" on the decedent by the defendants; and (3) the plaintiffs had standing to challenge the validity of the trust set up by the decedent. It was alleged that the decedent made decisions about the disposition of his assets based upon the false assertion that his daughter-in-law killed his son: "Here, as the grandchildren were given specific bequests in decedent's ... last will and testament, and the instrument creating the trust ... reserved to decedent a limited power of appointment to name his grandchildren as possible beneficiaries of trust assets upon his death, the grandchildren are interested persons within the meaning of the SCPA, so plaintiffs have capacity to challenge the validity of the trust ... . [P]laintiffs cannot state a cause of action for fraud because the Court of Appeals has expressly declined 'to extend the reliance element of fraud to include a claim based on the reliance of a third party' .... As to plaintiffs' cause of action asserting undue influence, plaintiffs' broadly stated theory is that, upon the death of the deceased son, the previously absent defendants drove a wedge between the daughter-in-law and decedent, took control of decedent's caretaking as he aged and grew infirm and then moved him into defendants' home where decedent created the trust and conveyed into it his assets to benefit defendants and the son upon his death. ... [A]ffording the plaintiffs the benefit of every favorable inference ..., we find that such allegations are enough to assert a cause of action for undue influence ...". ***Constantine v. Lutz*, 2022 N.Y. Slip Op. 02842, Third Dept 4-28-22**

UNEMPLOYMENT INSURANCE.

STAFFING COMPANY THAT SCREENED JOB APPLICANTS FOR ITS CLIENTS WAS NOT AN EMPLOYER LIABLE FOR UNEMPLOYMENT INSURANCE CONTRIBUTIONS.

The Third Department, reversing the Unemployment Insurance Appeal Board, determined Strikeforce Staffing was not an employer of the persons for whom it found employment with its clients. Therefore, Strikeforce was not liable for additional unemployment insurance contributions on remuneration paid to the claimant and others similarly situated: "Strikeforce recruited job seekers for its clients, businesses in need of workers, by placing advertisements on various websites. For example, claimant completed an application on Indeed.com for a line production position at a bakery. Strikeforce would first screen a job seeker's application to see if he or she potentially met a client's needs and, if so, send the individual for an interview with the client. The client would make a hiring decision and, according to the testimony of the owner and operator of Strikeforce, Strikeforce clients did not hire about 30% to 40% of the applicants referred to them. If hired, the client, not Strikeforce, would provide the worker with his or her rate of pay, which the worker was free to negotiate with the client, and the worker's schedule. * * * As Strikeforce does not exercise any control over the manner in which the workers hired by

its clients perform their services, the means used to supply those services or the results produced, we cannot find that there is substantial evidence to support the Board's determination that Strikeforce exercised sufficient direction, supervision and control over claimant, and those similarly situated, to demonstrate an employment relationship ...". ***Matter of Cruz (Strikeforce Staffing LLC–Commissioner of Labor)*, 2022 N.Y. Slip Op. 02849, Third Dept 4-28-22**

FOURTH DEPARTMENT

ADMINSTRATIVE LAW, MUNICIPAL LAW.

THE CITY COMMISSIONER ORDERED THE DEMOLITION OF A GRAIN ELEVATOR, A CITY LANDMARK, WHICH HAD BEEN DAMAGED BY WIND; SUPREME COURT PROPERLY ORDERED A HEARING ON WHETHER THE COMMISSIONER HAD A RATIONALE BASIS FOR ORDERING DEMOLITION BUT IMPROPERLY PROHIBITED THE PETITIONER FROM PRESENTING EVIDENCE THAT DEMOLITION WAS NOT NECESSARY; NEW HEARING ORDERED.

The Fourth Department, reversing Supreme Court and ordering another hearing, determined that the petitioner was entitled to present evidence at the hearing about the Buffalo Commissioner of the City's Department of Permit and Inspections Services' (Commissioner's) ruling that a grain elevator, a City landmark, which was damaged by wind, must be demolished. Supreme Court had confined the hearing to whether the Commissioner had a rational basis for ordering demolition and did not allow the petitioner to submit evidence. Petitioner had submitted with the petition "an unsworn and unsigned expert affidavit from a licensed architect who opined that the Grain Elevator could be adequately repaired and did not need to be demolished": "We agree with petitioner … that, while petitioner is not entitled to a de novo hearing on the Commissioner's determination … , the court erred in refusing to consider petitioner's proposed evidence inasmuch as it should have afforded petitioner the opportunity to submit 'any competent and relevant proof . . . bearing on the triable issue here presented and showing that any of the underlying material on which the [Commissioner] based [his] determination has no basis in fact' . . . , or that the determination was irrational or arbitrary' ...". ***Matter of Campaign for Buffalo History, Architecture & Culture, Inc. v. City of Buffalo*, 2022 N.Y. Slip Op. 02927, Fourth Dept 4-29-22**

CIVIL PROCEDURE, JUDGES, CONTRACT LAW, FRAUD, APPEALS.

TO FACILIATATE APPELLATE REVIEW, THE JUDGE WHO AWARDED PLAINTIFFS SUMMARY JUDGMENT, ATTORNEY'S FEES, AND COSTS SHOULD HAVE WRITTEN A DECISION EXPLAINING THE BURDENS OF PROOF AND REASONING; ISSUING ORDERS WITHOUT AN EXPLANATORY DECISION IS AN "UNACCEPTABLE PRACTICE;" PLAINTIFFS DID NOT SHOW THEIR INTERPRETATION OF THE CONTRACT WAS THE ONLY REASONABLE ONE; THE FRAUDULENT MISREPRESENTATION CAUSE OF ACTION CANNOT BE BASED UPON AN ALLEGED INTENT TO BREACH THE CONTRACT AND WAS NOT SUFFICIENTLY PLED.

The Fourth Department, reversing Supreme Court, determined (1) to facilitate appellate review, the court should have written a decision explaining the burdens of proof and its reasoning in granting plaintiffs summary judgment and awarding attorney's fees and costs; (2) the plaintiffs did not demonstrate the contract was unambiguous and therefore were not entitled to summary judgment on the breach of contract claims; and (3) summary judgment should not have been awarded on plaintiffs' fraudulent misrepresentation cause of action. A fraudulent misrepresentation cause of action cannot be based upon an alleged intent to breach a contract: "Although the court granted plaintiffs' motion insofar as it sought summary judgment, it failed to address the burdens of proof or any specific cause of action. In addition, the court awarded costs and attorneys' fees without providing the basis therefor. As noted, this case involved a motion for summary judgment and for costs, attorneys' fees, and sanctions, and the court chose not to write. This is an unacceptable practice .... To maximize effective appellate review, we must remind our colleagues in the trial courts to provide their reasoning instead of simply issuing orders.... [P]laintiffs did not meet their initial burden on those parts of the motion seeking summary judgment ... inasmuch as plaintiffs failed to submit sufficient evidence to establish that their interpretation of the relevant contracts is the only reasonable interpretation thereof. ... '[F]ar from being collateral to the contract, the purported misrepresentation was directly related to a specific provision of the contract' .... In addition, CPLR 3016 (b) provides that, '[w]here a cause of action . . . is based upon . . . fraud, the circumstances constituting the wrong shall be stated in detail,' and we conclude that the cause of action here failed to satisfy that requirement ...". ***Wilsey v. 7203 Rawson Rd., LLC*, 2022 N.Y. Slip Op. 02905, 4-29-22**

CRIMINAL LAW, APPEALS.

DEFENDANT SHOULD NOT HAVE BEEN SENTENCED AS A SECOND FELONY OFFENDER BASED UPON A PRIOR FEDERAL DRUG CONSPIRACY CONVICTION; THE ISSUE FALLS WITHIN A NARROW EXCEPTION TO THE PRESERVATION REQUIREMENT.

The Fourth Department determined defendant should not have been sentenced as a second felony offender based upon a prior federal drug conspiracy conviction: "[T]his case 'falls within the narrow exception to [the] preservation rule permitting appellate review when a sentence's illegality is readily discernible from the . . . record' .... Here, the record establishes

that the predicate felony was based on defendant's previous conviction in federal court of conspiracy to possess with intent to distribute 500 grams or more of cocaine (21 USC § 846; see § 841 [a] [1]; [b]). However, 'under New York's 'strict equivalency' standard for convictions rendered in other jurisdictions, a federal conviction for conspiracy to commit a drug crime may not serve as a predicate felony for sentencing purposes' ...". ***People v. Lopez*, 2022 N.Y. Slip Op. 02925, Fourth Dept 4-29-22**

CRIMINAL LAW, ATTORNEYS, APPEALS.

THE TWO-JUSTICE DISSENT ARGUED THAT THE MAJORITY ERRONEOUSLY AFFIRMED THE DENIAL OF THE MOTION TO VACATE THE CONVICTION ON A GROUND NOT RELIED UPON BY THE MOTION COURT.

The Fourth Department affirmed the summary denial of defendant's motion to vacate his conviction on ineffective assistance grounds. Defendant argued his counsel was ineffective because counsel did not object to defendant's being forced to wear a stun belt. The two-justice dissent noted that the ground on which the majority based its decision, i.e., that defense counsel's failure to object did not rise to ineffective assistance, was not the ground relied on by the motion court. Therefore, the dissent argued, the appellate court could not affirm on that ground. **From the dissent:** "The court summarily denied the motion, concluding in relevant part that defendant is not entitled to relief on his ineffective assistance of counsel claim because we determined on direct appeal that he was not deprived of effective assistance of counsel ... . The majority affirms that ruling on another ground, one not argued by the People on appeal—namely, that defense counsel's failure to object to the stun belt, standing alone, was not such an egregious or prejudicial error as to compromise defendant's right to a fair trial. Because the court did not deny defendant's motion on the ground relied upon by the majority, we are precluded from affirming on that ground (see People v. Concepcion, 17 NY3d 192, 197-198 [2011]; People v. LaFontaine, 92 N.Y.2d 470, 473-474 [1998], rearg denied 93 NY2d 849 [1999])." ***People v. Bradford*, 2022 N.Y. Slip Op. 02897, Fourth Dept 4-29-22**

CRIMINAL LAW, EVIDENCE.

THE MAJORITY HELD THE DEFENDANT'S ACTIONS INSIDE THE STOPPED VEHICLE RAISED A REASONABLE SUSPICION DEFENDANT WAS ARMED, JUSTIFYING A PAT DOWN SEARCH; THE DISSENT ARGUED THE DEFENDANT'S ACTIONS WERE EQUIVOCAL AND INNOCUOUS.

The Fourth Department, over a dissent, determined the police officer's observations of defendant inside the stopped vehicle were sufficient to raise a reasonable suspicion the defendant was armed, which justified the pat-down search. The dissent argued that the proof presented at the suppression hearing did not meet the "reasonable suspicion" standard. "Although the dissent suggests otherwise, the fact that the officer's view of defendant was obscured to some extent when defendant was partially concealed inside the vehicle and was observed surreptitiously reaching toward his waistband constitutes a 'circumstance that supports a reasonable suspicion that [defendant was] armed or pose[d] a threat to [officer] safety' .... **From the dissent:** 'Reasonable suspicion 'may not rest on equivocal or 'innocuous behavior' that is susceptible of an innocent as well as a culpable interpretation' .... Inasmuch as defendant's nervousness and movements were susceptible of an innocent interpretation, particularly in light of his status as the vehicle's only black occupant, and inasmuch as defendant was, according to the officer's testimony, 'fully compliant' with the officers' instruction to exit the vehicle, I agree with defendant that his conduct while in the vehicle was insufficient to establish reasonable suspicion necessary for law enforcement to conduct a pat frisk of his person ...". ***People v. Ginty*, 2022 N.Y. Slip Op. 02899, Fourth Dept 4-29-22**

CRIMINAL LAW, EVIDENCE.

THE MAJORITY CONCLUDED THAT, IF IT WAS ERROR TO ADMIT TESTIMONY THAT THE RAPE VICTIM WAS AWARE DEFENDANT HAD BEEN INCARCERATED, THE ERROR WAS HARMLESS; TWO DISSENTERS ARGUED THE EVIDENCE HAD NO PROBATIVE VALUE BECAUSE THE VICTIM'S STATE OF MIND WAS NOT IN ISSUE AND ITS INTRODUCTION WAS THERFORE HIGHLY PREJUDICIAL.

The Fourth Department, over a two-justice dissent, determined that, if it was error to admit testimony that the rape victim was aware defendant had been incarcerated, the error was harmless. The dissenters argued that the victim's state of mind, i.e., awareness of defendant's prior incarceration, was irrelevant because the victim was immediately overpowered and pushed to the floor upon opening the door for the defendant. **From the dissent:** "The evidence ... had no probative value under the circumstances of this case and should have been excluded as prejudicial ...". ***People v. Hartsfield*, 2022 N.Y. Slip Op. 02908, Fourth Dept 4-29-22**

CRIMINAL LAW, EVIDENCE, APPEALS.

DEFENDANT WAS CONVICTED OF ASSAULT THIRD BASED UPON HIS LOSING CONTROL OF THE CAR AND CRASHING, INJURING A PASSENGER; THE "CRIMINAL NEGLIGENCE" ELEMENT OF ASSAULT THIRD WAS NOT SUPPORTED BY THE EVIDENCE; CONVICTION REVERSED UNDER A "WEIGHT OF THE EVIDENCE" ANALYSIS.

The Fourth Department, reversing defendant's conviction and dismissing the indictment, determined the criminal-negligence element of assault third was not proven. Defendant was driving with a passenger when he crossed into the oncoming lane, pulled back into his lane, lost control, and crashed, injuring the passenger: "In cases involving criminal negligence arising out of automobile accidents involving excess rates of speed, such as here, 'it takes some additional affirmative act by the defendant to transform 'speeding' into 'dangerous speeding' ... . With respect to the issue of defendant's rate of speed, the trial testimony from the prosecution's expert witness that defendant was driving at the excessive speed of approximately 92 miles per hour at the time of the incident was speculative .... The expert's calculation of the vehicle's speed was based on the assumption of '100 percent braking,' but there was no evidence that defendant braked at all before his vehicle collided with the mailbox, tree and utility pole and came to a stop. Moreover, the People's version of the events, that defendant deliberately attempted to "flatten out the curve" by crossing the double line of the curve, does not rise to the level of moral blameworthiness to constitute criminal negligence ...". ***People v. Palombi*, 2022 N.Y. Slip Op. 02896, Fourth Dept 4-29-22**

CRIMINAL LAW, EVIDENCE, JUDGES.

A PROSECUTION WITNESS'S WRITTEN STATEMENT DID NOT MEET THE CRITERIA FOR PAST RECOLLECTION RECORDED AND SHOULD NOT HAVE BEEN ADMITTED; THE JUDGE'S USE OF THE PHRASE "POTENTIALLY AIDS" INSTEAD OF "INTENTIONALLY AIDS" IN THE ACCOMPLICE LIABILITY JURY INSTRUCTION PREJUDICED THE DEFENDANT; ALTHOUGH THE JURY INSTRUCTION ERROR WAS NOT PRESERVED, THE ISSUE WAS CONSIDERED IN THE INTEREST OF JUSTICE.

The Fourth Department, reversing defendant's conviction and ordering a new trial, determined: (1) a written statement by a prosecution witness should not have been admitted as "past recollection recorded"; and (2) the jury instruction on accomplice liability prejudiced defendant. The jury-instruction error was not preserved but was considered in the interest of justice: "'The foundational requirements for the admissibility of a past recollection recorded are: (1) the witness must have observed the matter recorded; (2) the recollection must have been fairly fresh at the time when it was recorded; (3) the witness must currently be able to testify that the record is a correct representation of his or her knowledge and recollection at the time it was made; and (4) the witness must lack sufficient present recollection of the information recorded' ... . [T]he prosecution witness in question did not testify that his written statement accurately represented his knowledge and recollection when made. To the contrary, the witness testified that the statement was not accurate when given because he was under the influence of narcotics at that time .... Moreover, because the statement was made more than six months after the alleged events recorded therein, the recollection was not 'fairly fresh' when recorded .... Penal Law § 20.00 provides that a 'person is criminally liable for [the conduct of another] when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct'.... [W]e conclude that the court's use of the phrase 'potentially aids' rather than 'intentionally aids' significantly prejudiced defendant, who was alleged to have aided and abetted the principal by driving him to and from the crime scene....". ***People v. Gardner*, 2022 N.Y. Slip Op. 02911, Fourth Dept 4-29-22**

CRIMINAL LAW, JUDGES.

ALTHOUGH BAIL-SETTING IS NOT APPEALABLE, WHETHER THE BAIL-SETTING COURT COMPLIED WITH THE CONSTITUTIONAL OR STATUTORY STANDARDS INHIBITING EXCESSIVE BAIL IS A PROPER SUBJECT FOR A HABEAS CORPUS PETITION; HERE THE BAIL-SETTNG COURT DID NOT COMPLY WITH CPL 510.30; MATTER REMITTED.

The Fourth Department, remitting the matter, determined that, although bail-setting is not appealable, the habeas corpus petition was the proper vehicle for a review of whether the constitutional or statutory standards inhibiting excessive bail were met. Here it was alleged the bail-setting court did not comply with CPL 510.30 by explaining its finding that remand was the least restrictive option: "[A]fter considering all of the relevant factors under CPL 510.30 (1), the bail-setting court determined that remand was the least restrictive condition. We conclude that the bail-setting court failed to comply with the statutory mandate of CPL 510.10 (1) because it failed to 'explain its choice of release, release with conditions, bail or remand on the record or in writing.' We therefore reverse the judgment, reinstate the petition, and grant the petition in part, and we remit the matter to the bail-setting court for further proceedings to satisfy the requirements of CPL 510.10 (1) ...". ***People ex rel. Steinagle v. Howard*, 2022 N.Y. Slip Op. 02901, Fourth Dept 4-29-22**

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