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FIRST DEPARTMENT

CIVIL PROCEDURE, ATTORNEYS, JUDGES.

THE PARTIES HAD ALREADY STIPULATED TO RESTORE THE ACTION TO THE CALENDAR; THE JUDGE SHOULD HAVE GRANTED PLAINTIFF'S MOTION TO VACATE THE DISMISSAL OF THE ACTION FOR FAILURE TO APPEAR AT CONFERENCES OR OUTLINE REMAINING DISCOVERY.

The First Department, reversing Supreme Court, determined plaintiff's motion to vacate the order dismissing the action based on plaintiff's failure to appear at conferences or file a stipulation outlining discovery should have been granted. The parties had already stipulated to restore the action to the calendar and the court should have enforced the stipulation: "The motion court improvidently exercised its discretion when it denied plaintiff's motion to vacate the order for failure to appear at conferences or to file a stipulation outlining the remaining discovery ... . Defendants had already stipulated to restore the matter to the calendar, and stipulations between the parties are binding on the parties and generally enforced by the courts ... . Moreover, the assertion by plaintiff's counsel that two of the court's notices were inadvertently routed to counsel's spam folder constitutes an excusable law office failure ... . Nor is there evidence in the record that counsel has engaged in a pattern of dilatory behavior ... . Finally, plaintiff's pleadings, along with the depositions of the witnesses, established a potentially meritorious cause of action ..." . ***Navarro v. Joy Constr. Corp.*, 2022 N.Y. Slip Op. 05602, First Dept 10-6-22**

CRIMINAL LAW, ATTORNEYS, JUDGES.

THE JUDGE DENIED DEFENDANT'S REQUEST FOR NEW COUNSEL WITHOUT INQUIRING ABOUT THE REASON FOR THE REQUEST; CONVICTION REVERSED.

The First Department, reversing defendant's conviction, determined the judge should have allowed the defendant to explain the reason he was requesting new counsel: "Defendant is entitled to a new trial because the court denied his request for new counsel without making any inquiry, and without giving defendant any opportunity to explain the basis for his request (*see People v McCummings*, 124 AD3d 502, 502-03 [1st Dept 2015]; *People v Rodriguez*, 46 AD3d 396 [1st Dept 2007], *lv denied* 10 NY3d 844 [2007])." ***People v. Resheroop*, 2022 N.Y. Slip Op. 05606, First Dept 10-6-22**

FRAUD, CIVIL PROCEDURE.

THE FRAUD CAUSES OF ACTION SHOULD HAVE BEEN DISMISSED BECAUSE "OUT OF POCKET" DAMAGES WERE NOT DEMONSTRATED.

The First Department, reversing Supreme Court, determined the fraud causes of action should have been dismissed because plaintiffs failed to demonstrate "out of pocket" damages: "Defendants are entitled to summary judgment because plaintiffs failed to show the 'out of pocket' damages required for a fraud claim (*see e.g. Kumiva Group, LLC v Garda USA Inc.*, 146 AD3d 504, 506 [1st Dept 2017]). Plaintiffs failed to submit evidence of the value of the ... stock they received ...". ***Danco Enters., LLC v. Livexlive Media, Inc.*, 2022 N.Y. Slip Op. 05589, First Dept 10-5-22**

FRAUD, CIVIL PROCEDURE.

THE COMPLAINT DID NOT STATE A CAUSE OF ACTION FOR FRAUDULENT INDUCEMENT BECAUSE IT DID NOT ADEQUATELY ALLEGE "OUT OF POCKET" DAMAGES.

The First Department, reversing Supreme Court, determined the complaint did not state a cause of action for fraudulent inducement because it did not allege "out of pocket" damages: "[T]he complaint fails to plead a cause of action for fraudulent inducement because it does not adequately allege that plaintiff suffered any ascertainable out-of-pocket pecuniary damages resulting from the alleged fraud ... . Although plaintiff alleges unspecified reputational damages and lost revenue or profits, these allegations are not sufficient to sustain a cause of action based on fraud ... . Similarly, plaintiff fails to allege that it paid any particular amount to acquire the G&P law practice or name, alleging only the value of G&P's practice when plaintiff acquired it; this allegation is insufficient to measure plaintiff's damages ... . Furthermore, although plaintiff states that G&P 'carried undisclosed liabilities,' it does not elaborate on what those might be....". ***CKR Law LLP v. Dipaolo*, 2022 N.Y. Slip Op. 05587, First Dept 10-6-22**

HUMAN RIGHTS LAW, EMPLOYMENT LAW, MUNICIPAL LAW, CIVIL PROCEDURE.

THE HOSTILE WORK ENVIRONMENT ALLEGATIONS STATED CLAIMS UNDER THE STATE AND CITY HUMAN RIGHTS LAW (HRL); THE SEXUAL HARASSMENT ALLEGATIONS STATED A CLAIM UNDER ONLY THE CITY HRL; THE CONTINUING VIOLATION DOCTRINE DID NOT APPLY TO ISOLATED STATEMENTS MADE OUTSIDE THE STATUTE OF LIMITATIONS.

The First Department, reversing (modifying) Supreme Court, determined plaintiff stated a hostile work environment claim under the state and city Human Rights Law (HRL) and sexual harassment claim under the city, but not the state, HRL: The isolated statement made outside the statute of limitations were not subject to the continuing violation doctrine: "Plaintiff's allegations, that several times a week over a period of at least two years, plaintiff's coworker spoke to him in a mock Chinese accent, told plaintiff to 'open your eyes,' and tormented him about his mandatory drug testing in a sexually and racially charged manner, are sufficient to state a hostile work environment claim based on national origin discrimination under both the State and City HRLs ... . [T]he allegations that his coworker regularly made statements about plaintiff's penis size when plaintiff took bathroom breaks or reported for drug testing 'fall within the broad range of conduct that falls between 'severe and pervasive' on the one hand and a 'petty slight or trivial inconvenience' on the other,' such that they are sufficient under the City HRL but not under the State HRL ... . The continuing violation doctrine does not apply to the isolated statements made outside the limitations period because they do not form part of 'a single continuing pattern of unlawful conduct extending into the [limitations] period . . . , but rather discrete events, involving different actors, occurring months to years apart' ...". ***Lum v. Consolidated Edison Co. of N.Y., Inc.*, 2022 N.Y. Slip Op. 05594, First Dept 10-6-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF SLIPPED AND FELL CARRYING A TANK WHILE WALKING ON THE MUDDY BOTTOM OF AN EXCAVATED HOLE; THE BOTTOM OF THE HOLE WAS NOT A PASSAGEWAY (LABOR LAW § 241(6)) AND THERE WAS NO ELEVATION-RELATED RISK (LABOR LAW § 240(1); THOSE TWO CAUSES OF ACTION SHOULD HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) causes of action should have been granted. Plaintiff slipped and fell walking in a muddy, excavated hole. The bottom of the hole was not a passageway within the meaning of Labor Law § 241(6) and there was relevant elevation-related risk: "Plaintiff is not entitled to relief under Labor Law § 241(6) for the alleged violation of Industrial Code § 23-1.7(d), since the 'excavation pit' where he slipped and fell, 'which at that time was no more than a big hole in the ground with an unfinished muddy bottom[,] ... was not the type of flooring or passageway contemplated by' the Industrial Code ... . Contrary to plaintiff's contention, his 'accident did not occur on a floor, platform, passageway or similar work area or surface within the purview of [section 23-1.7(d)], but rather on muddy ground in an open area exposed to the elements' ... . There was no testimony tending to establish that he was walking along a walkway or path that 'workers generally took' ... . Summary judgment also should have been granted to defendants dismissing plaintiff's Labor Law § 240(1) claim, because there was no elevation-related risk involved with his carrying a tank on his shoulder while he walked along the ground ...". ***Alvarado v. SC 142 W. 24 LLC*, 2022 N.Y. Slip Op. 05584, First Dept 10-6-22**

PERSONAL INJURY, CONTRACT LAW.

WHEN THE CONTRACTOR'S EMPLOYEE ARRIVED TO CLEAN THE TANK, THE OPENING WAS COVERED ONLY BY CARDBOARD; AFTER FINISHING THE WORK, THE EMPLOYEE REPLACED THE CARDBOARD COVER; PLAINTIFF SUBSEQUENTLY STEPPED ON THE CARDBOARD AND FELL INTO THE TANK; THE CONTRACTOR'S EMPLOYEE DID NOT LAUNCH AN INSTRUMENT OF HARM WITHIN THE MEANING OF *ESPINAL*.

The First Department, reversing Supreme Court, determined the contractor's (A&L's) employee did not launch an instrument of harm by leaving the accident site as it was when the employee arrived to clean a sewage tank, The tank access was covered only by cardboard. The employee replaced the cardboard when the work was done. Plaintiff stepped on the cardboard and fell into the tank: "Supreme Court should have granted A&L summary judgment dismissing the complaint as against it. Plaintiff was not a party to A&L's contract to clean the sewage tank. Plaintiff argues that A&L may nevertheless be liable in tort because it failed to exercise reasonable care in the performance of its contractual duties and thereby launched a force or instrument of harm (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). However, this exception to the general rule that a contractual obligation does not give rise to tort liability to a third party is inapplicable where "the breach of contract consists merely in withholding a benefit . . . where inaction is at most a refusal to become an instrument for good' ... . Thus, a defendant who neglects to make the accident site 'safer — as opposed to less safe — than it was before" the defendant came upon the site is not liable pursuant to the *Espinal* exception ... . By simply replacing the cardboard box cover already in place over the sewage tank after he completed his work, A&L's employee returned the site to the condition in which he originally found it. Thus, he neglected to make the area safer, but did not affirmatively make the area less safe than it was when he first came upon it ... . That A&L's employee did not report the cardboard is immaterial because a third-party contractor's awareness of a condition and failure to warn does not amount to launching an instrument of harm ...". ***Skeete v. Greyhound Lines, Inc.*, 2022 N.Y. Slip Op. 05511, First Dept 10-4-22**

SECOND DEPARTMENT

CONTRACT LAW, CIVIL PROCEDURE. COURT OF CLAIMS.

ALTHOUGH IT MAY BE PLED IN THE ALTERNATIVE, A QUANTUM MERUIT CAUSE OF ACTION MUST BE DISMISSED WHERE THE ISSUE IS ADDRESSED BY A VALID CONTRACT.

The Second Department, reversing (modifying) the Court of Claims, determined the quantum meruit cause of action should have been dismissed because the action was based upon a valid contract: "Contrary to the conclusion of the Court of Claims, that branch of the State's motion which was for summary judgment dismissing the eleventh cause of action, which sought damages based upon a 'total cost,' or quantum meruit, method of recovery, should have been granted, on the ground that parties to a valid contract cannot seek damages in quantum meruit as an alternative to a breach of contract claim arising out of the same subject matter ... . Quantum meruit may be pleaded in the alternative where there is a bona fide dispute as to the existence of a contract, or where the contract does not cover the dispute in issue ... . Here, there clearly was a valid contract, and the amount in dispute was incurred pursuant to the contract. Further, the claims did not involve a qualitative change in the nature of the work which was outside the contemplation of the contract ...". ***Tutor Perini Corp. v. State of New York*, 2022 N.Y. Slip Op. 05556, Second Dept 10-5-22**

CRIMINAL LAW, JUDGES, APPEALS.

THE AMOUNT OF RESTITUTION IS PART OF THE SENTENCE AND MUST BE PRONOUNCED AT SENTENCING; THE ISSUE NEED NOT BE PRESERVED FOR APPEAL AND SURVIVES A WAIVER OF APPEAL.

The Second Department determined the judge's failure to pronounce the amount of restitution at sentencing required vacating the imposition of restitution and remitting the matter for further proceedings. The issue does not need to be preserved for appeal and is not precluded by a waiver of appeal: " 'CPL 380.20 and 380.40(1) collectively require that courts 'must pronounce sentence in every case where a conviction is entered' and that—subject to limited exceptions not relevant here—'[t]he defendant must be personally present at the time sentence is pronounced' ... . 'Restitution is a component of the sentence to which CPL 380.20 and 380.40(1) apply' ... . A violation of CPL 380.20 or 380.40(1) 'may be addressed on direct appeal notwithstanding a valid waiver of the right to appeal or the defendant's failure to preserve the issue for appellate review' ... . Here, it is undisputed that the precise dollar amount of restitution was not pronounced by the County Court at the time of sentencing, or at any other point on the record. 'The County Court should have, but failed to, fix the amount and terms of restitution at the time it pronounced the sentence[s] of which restitution was to be a part' ...". ***People v. Long*, 2022 N.Y. Slip Op. 05545, Second Dept 10-5-22**

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW.

DEFENDANT MOVED TO VACATE HIS CONVICTION BY GUILTY PLEA ON THE GROUND HE WAS NOT AWARE HE COULD PERMANENTLY LOSE HIS DRIVER LICENSE BASED ON THE PLEA; THE MOTION SHOULD NOT HAVE BEEN GRANTED; POST-REVOCATION RELICENSING IS OUTSIDE OF THE COURTS' CONTROL.

The Second Department, reversing Supreme Court, determined defendant's motion to vacate his conviction by guilty plea should not have been granted. Defendant argued he would not have pled guilty had he realized he could permanently lose his driver license. The regulation which allowed permanent revocation of defendant's license did not exist at the time of the plea: "The subject regulations that led to the denial of the defendant's application to restore his driver license did not exist at the time he pleaded guilty, and the defendant failed to identify any conduct that occurred during the plea proceedings that constituted a violation of his due process rights ... . 'The defendant's grievance lies with the enactment and enforcement of the new regulation, not the manner of his conviction' ... . [T]he loss of a driver license is a collateral consequence of a plea of guilty and is not a consequence within the control of the court system ... . The Supreme Court had no duty to inform the defendant of this consequence during the plea colloquy ... . As the Court of Appeals stated in *Matter of Acevedo v New York State Dept. of Motor Vehs*. (29 NY3d at 220), 'the Commissioner [of the DMV] will have exclusive authority over post-revocation relicensing, and . . . those relicensing determinations will be discretionary.' " ***People v. DiTore*, 2022 N.Y. Slip Op. 05541, Second Dept 10-5-22**

EDUCATION-SCHOOL LAW, SOCIAL SERVICES LAW, CIVIL PROCEDURE.

IN THIS CHILD VICTIMS ACT SUIT AGAINST DEFENDANT SCHOOL DISTRICT ALLEGING THE ABUSE OF PLAINTIFF-STUDENT BY A TEACHER AND HER STEPFATHER IN THE 1970s, THE FAILURE-TO-REPORT-ABUSE CAUSES OF ACTION PURSUANT TO THE SOCIAL SERVICES LAW SHOULD HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court in this Child Victims Act lawsuit, determined the causes of action alleging the defendant school district failed to report the abuse of plaintiff-student by a teacher (Bova) pursuant to the Social Services Law should have been dismissed: "Social Services Law § 413, which went into effect on September 1, 1973, provides that certain school officials 'are required to report or cause a report to be made in accordance with this title when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child' ... . Social Services Law § 420(2) provides that '[a]ny person, official or institution required by this title to report a case of suspected child abuse or maltreatment who knowingly and willfully fails to do so shall be civilly liable for the damages proximately caused by such failure.' For purposes of Social Services Law § 413, an 'abused child' means 'a child under eighteen years of age and who is defined as an abused child by the family court act' ... . Family Court Act § 1012(e) defines an 'abused child' as one harmed by a 'parent or other person legally responsible for his [or her] care.' ... . Supreme Court should have granted that

branch of the District's motion which was to dismiss the ninth cause of action, alleging that it failed to report suspected child abuse committed by Bova, because Bova was not a 'person legally responsible' for the plaintiff's care ... . The court also should have granted that branch of the District's motion which was to dismiss the tenth cause of action, alleging that it failed to report suspected child abuse committed by the plaintiff's stepfather, insofar as asserted against it. The complaint does not contain any allegation that the District received information about abuse committed by the plaintiff's stepfather at any time after the end of the 1972-1973 school year in June 1973, which was months prior to September 1, 1973, the date that Social Services Law § 413 went into effect ... . Finally, ...punitive damages are not available against the District ...". ***Hanson v. Hicksville Union Free Sch. Dist.*, 2022 N.Y. Slip Op. 05519, Second Dept 10-5-22**

FAMILY LAW, ATTORNEYS, JUDGES.

ALTHOUGH THE JUDGE CAN PROPERLY AWARD COUNSEL FEES TO PETITIONER BASED UPON RESPONDENT'S VIOLATION OF AN ORDER OF PROTECTION, A HEARING IS NECESSARY TO DETERMINE THE AMOUNT OF THE FEE.

The Second Department determined that the judge properly exercised discretion in awarding counsel fees to petitioner based upon appellant's (Gorish's) violation of an order of protection. However, the amount of counsel fees should have been determined by a hearing: "Under Family Court Act § 846-a, the court 'may order the respondent to pay the petitioner's reasonable and necessary counsel fees in connection with the violation petition where the court finds that the violation of its order was willful.' … 'The award of counsel fees is committed to the discretion of the Family Court' ... . '[T]he reasonable amount and nature of the claimed services must be established at an adversarial hearing' ... . Here, while the Family Court providently exercised its discretion in awarding counsel fees to the petitioner, the court erred in determining the amount of the counsel fees without a hearing." ***Matter of Sicina v. Gorish*, 2022 N.Y. Slip Op. 05535, Second Dept 10-5-22**

FAMILY LAW, JUDGES.

EVEN THOUGH FATHER REFUSED TO COOPERATE WITH AN INVESTIGATION RELATED TO HIS PETITION FOR CUSTODY, THE JUDGE SHOULD NOT HAVE AWARDED CUSTODY TO MOTHER WITHOUT FIRST HOLDING A HEARING.

The Second Department, reversing (modifying) Supreme Court, determined the judge should not have awarded mother sole custody of the child without first holding a hearing: "Supreme Court directed that the Administration for Children's Services (hereinafter ACS) conduct an investigation and directed supervised visits between the father and the child. The father failed to comply with the investigation, including refusing to provide his address to ACS, and he failed to complete the intake process for arranging the supervised visits. * * * '[C]ustody determinations should generally be made only after a full and plenary hearing and inquiry' ... . 'This general rule furthers the substantial interest, shared by the State, the children, and the parents, in ensuring that custody proceedings generate a just and enduring result that, above all else, serves the best interest of a child' ... . '[A] court opting to forgo a plenary hearing must take care to clearly articulate which factors were—or were not—material to its determination, and the evidence supporting its decision' ... . Here, the Supreme Court erred in making a final custody determination without a hearing and without inquiring into the best interests of the child ...". ***Matter of Jones v. Rodriguez*, 2022 N.Y. Slip Op. 05529, Second Dept 10-5-22**

FAMILY LAW, JUDGES, EVIDENCE.

A DECISION TO RETURN TO THE REGULAR ACCESS SCHEDULE OF PARENTING TIME AFTER A PERIOD OF SUPERVISED PARENTAL VISITS MUST BE BASED UPON ADMISSIBLE EVIDENCE; WHERE FACTS REMAIN IN DISPUTE, A HEARING IS REQUIRED.

The Second Department, reversing Supreme Court, determined that a hearing should have been held before granting defendant's motion to return to the regular access schedule of parenting time because some facts were still in dispute: "... Supreme Court should have conducted an evidentiary hearing prior to directing that the regular access schedule as set forth in the parties' stipulation of settlement be implemented immediately. Although the court based its determination on information contained in the parties' applications, reports from Kids in Common, and statements from counsel for the parties and the attorney for the child during multiple conferences, Kids in Common had not yet advised that the child was ready for a fully normalized access schedule, and a decision regarding child custody and/or parental access should be based on admissible evidence ... . Where, as here, facts material to a determination of what parental access is in the best interests of the child remain in dispute, a hearing is required ...". ***Stolzenberg v. Stolzenberg*, 2022 N.Y. Slip Op. 05554, Second Dept 10-5-22**

FORECLOSURE, EVIDENCE, CIVIL PROCEDURE, JUDGES.

THE BANK DID NOT DEMONSTRATE THE NOTICE OF DEFAULT COMPLIED WITH THE REQUIREMENTS IN THE MORTGAGE AGREEMENT BECAUSE THE NOTICE OF DEFAULT WAS NOT ATTACHED TO THE PAPERS; THE JUDGE SHOULD NOT HAVE DENIED DEFENDANT'S CROSS MOTION FOR A HEARING ON WHETHER PLAINTIFF NEGOTIATED IN GOOD FAITH AS REQUIRED BY CPLR 3408.

The Second Department, reversing Supreme Court, determined the plaintiff bank did not demonstrate compliance with the provision in the mortgage agreement requiring certain advisements in the notice of default. The affidavit purporting to demonstrate compliance did not have the notice of default attached. In addition, Supreme Court should not have denied defendant's cross motion for a hearing on whether plaintiff bank met its obligation to negotiate in good faith (CPLR 3408): "[T]he plaintiff failed to demonstrate, prima facie, that it complied with the provision in the mortgage agreement requiring the plaintiff to send to the defendant a notice of default containing certain advisements and

setting forth a 30-day cure period. The affidavit of its employee, Lindsay Hodges, was insufficient for this purpose inasmuch as Hodges failed to attach business records upon which she relied—specifically, the notice of default itself—in averring that notice was provided in compliance with the mortgage agreement. ... Hodges's averment was therefore hearsay lacking in probative value ... . Supreme Court improperly denied the defendant's cross motion for a hearing to determine whether the plaintiff met its obligation to negotiate in good faith pursuant to CPLR 3408(f). 'The purpose of the good-faith requirement in CPLR 3408 is to ensure that both the plaintiff and the defendant are prepared to participate in a meaningful effort at the settlement conference to reach a resolution' ... . To conclude that a party failed to negotiate in good faith pursuant to CPLR 3408(f), a court must determine that 'the totality of the circumstances demonstrates that the party's conduct did not constitute a meaningful effort at reaching a resolution' ... . [T]he defendant's submissions in support of her cross motion raised a factual issue as to whether the plaintiff failed to negotiate in good faith and deprived her of a meaningful opportunity to resolve the action through loan modification or other potential workout options ...". ***Citimortgage, Inc. v. Rose*, 2022 N.Y. Slip Op. 05516, Second Dept 10-5-22**

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

CANCELLATION AND DISCHARGE OF A MORTGAGE AND VACATION OF A NOTICE OF PENDENCY MUST BE SOUGHT BY AN ACTION OR A COUNTERCLAIM PURSUANT TO RPAPL 1501, NOT, AS HERE, BY A CROSS-MOTION; THE ISSUE WAS PROPERLY RAISED FOR THE FIRST TIME ON APPEAL.

The Second Department, reversing (modifying) Supreme Court, determined defendant's cross-motion to cancel and discharge the mortgage pursuant to RPAPL 1501(4) should not have been granted because that relief must be sought in an action or counterclaim, not by motion. The issue was properly raised for the first time on appeal: "Supreme Court should not have granted that branch of the cross motion which was pursuant to RPAPL 1501(4) to cancel and discharge of record the mortgage and vacate the notice of pendency, since relief pursuant to RPAPL 1501(4) must be sought in an action or counterclaim and not by motion ... . Although the plaintiff raises this issue for the first time on appeal, it involves a question of law that appears on the face of the record and could not have been avoided if brought to the attention of the Supreme Court ...". ***U.S. Bank N.A. v. O'Rourke*, 2022 N.Y. Slip Op. 05558, Second Dept 10-5-22**

PERSONAL INJURY, CIVIL PROCEDURE.

IN THIS SLIP AND FALL CASE, THE DEFENDANTS DEMONSTRATED MEDICAL RECORDS PERTAINING TO PLAINTIFF'S PRIOR ANKLE INJURY WERE MATERIAL AND NECESSARY TO THE DEFENSE; DISCOVERY OF THOSE RECORDS SHOULD HAVE BEEN ALLOWED.

The Second Department, reversing Supreme Court, determined defendants were entitled to discovery of the medical records for plaintiff's prior injuries in this slip and fall case. Although the facts are not explained, the appellate court deemed he medical records relevant to whether plaintiff was negligent: "The plaintiff Shadia Hamed allegedly sustained personal injuries when she slipped and fell in a building owned and operated by the defendants. The plaintiff commenced this action alleging, inter alia, that the defendants negligently maintained their premises in an unsafe condition. The defendants moved pursuant to CPLR 3124 to compel the plaintiff to provide certain discovery, including authorizations to obtain medical records related to the plaintiff's treatment for pre-existing injuries to her right ankle. The defendants argued that these medical records were material and necessary to their defense of this action because these records were necessary to establish the plaintiff's negligence. ... ... Supreme Court improvidently exercised its discretion in only conditionally granting that branch of the defendants' motion which was to compel the plaintiff to provide medical records pertaining to her pre-existing injury to her right ankle only in the event that the plaintiff 'claims any effects on her gait or mobility as a result of this incident.' The defendants established that these records are material and necessary to the defense of this action (see CPLR 3101[a][1])." ***Hamed v. Alas Realty Corp.*, 2022 N.Y. Slip Op. 05518, Second Dept 10-5-22**

PERSONAL INJURY, EVIDENCE.

ALTHOUGH TRADER JOE'S APPARENTLY DID NOT OWN THE PARKING LOT WHERE PLAINTIFF FELL, IT FAILED TO DEMONSTRATE IT DID NOT OCCUPY, CONTROL OR MAKE SPECIAL USE OF THE PARKING LOT; TRADER JOE'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing (modifying) Supreme Court, determined defendant Trader Joe's motion for summary judgment in this parking lot slip and fall case should not have been granted. Although the parking lot was apparently owned by the town, Trader Joe's did not demonstrate it did not occupy, control, or make special use of the parking lot: " 'Liability for a dangerous condition on property is generally predicated upon ownership, occupancy, control, or special use of the property' ... . 'In the absence of ownership, occupancy, control, or special use, a party generally cannot be held liable for injuries caused by the dangerous or defective condition of the property' ... . * * * Trader Joe's failed to submit evidence sufficient to establish, prima facie, that it did not occupy, control, or make special use of the parking lot where the accident occurred, and that it cannot be held liable for Toner's alleged injuries ...". ***Toner v. Trader Joe's E., Inc.*, 2022 N.Y. Slip Op. 05555, Second Dept 10-5-22**

PERSONAL INJURY, EVIDENCE, VEHICLE AND TRAFFIC LAW.

ALTHOUGH DEFENDANT DRIVER HAD THE RIGHT-OF-WAY AND PLAINTIFF APPARENTLY PULLED OUT OF A DRIVEWAY IN FRONT OF DEFENDANT, PLAINTIFF RAISED A QUESTION OF FACT WHETHER DEFENDANT KEPT A PROPER LOOKOUT.

The Second Department, reversing Supreme Court, determined plaintiff had raised a question of fact in this traffic accident case, even though defendant driver had the right-of-way and plaintiff pulled out of a driveway in front of defendant. The facts are not described: "The defendants' evidence established, prima facie, that the defendant driver had the right-of-way, that the plaintiff was at fault in the happening of the accident, and that the defendant driver was not at fault in the happening of the accident (see Vehicle and Traffic Law § 1143 ...). In opposition, the plaintiff submitted, among other things, his own affidavit, in which he gave a completely different version of the events preceding the accident. The plaintiff's evidence raised a triable issue of fact as to whether the defendant driver, who was obligated to keep a proper lookout, see what was there to be seen through the reasonable use of his senses, and avoid colliding with other vehicles ... , was indeed at fault in the happening of the accident." ***Hassan v. Brauns Express, Inc.*, 2022 N.Y. Slip Op. 05520, Second Dept 10-5-22**

PERSONAL INJURY, MEDICAL MALPRACTICE, MUNICIPAL LAW, CIVIL PROCEDURE, JUDGES.

THE PETITION FOR LEAVE TO SERVE A LATE NOTICE OF CLAIM SHOULD NOT HAVE BEEN DISMISSED BASED ON THE WRONG VENUE BECAUSE RESPONDENTS DID NOT OBJECT TO THE VENUE; IN THIS MEDICAL MALPRACTICE CASE BASED UPON A STILLBIRTH, MOTHER'S AND FATHER'S PETITIONS MUST BE CONSIDERED SEPARATELY; ALTHOUGH PETITIONERS DID NOT SHOW RESPONDENTS HAD TIMELY KNOWLEDGE OF THE POTENTIAL LAWSUIT, MOTHER DEMONSTRATED AN ADEQUATE EXCUSE AND RESPONDENTS' LACK OF PREJUDICE; MOTHER'S PETITION WAS GRANTED AND FATHER'S WAS DENIED.

The Second Department, reversing Supreme Court, determined mother's (but not father's) petition for leave to serve a late notice of claim should have been granted in this medical malpractice action stemming from a stillbirth. Supreme Court had dismissed the petition because it was brought in the wrong county. But, because the respondents did not object to the venue, the judge did not have the authority to dismiss the petition on that ground. Even though mother did not demonstrate the respondents had timely knowledge of the potential malpractice action, her petition should have been granted because she had an adequate excuse (mental health issues triggered by the stillbirth) and demonstrated respondents were not prejudiced by the delay. Father's petition must be considered separately from mother's and was denied (mother's excuse did not apply to father): "... Supreme Court ... erred when it raised the issue of improper venue sua sponte and dismissed this proceeding on that ground. The court should have instead decided the merits of the petition. * * * Where leave is sought in one proceeding to pursue both a direct claim by an injured person and a derivative claim by his or her spouse, the spouse's request for leave to serve a late notice of claim will not automatically be granted even if leave is granted to the injured person. Instead, the spouse's request must be analyzed separately ... . . * * * While the actual knowledge factor [i.e., knowledge of the potential lawsuit] generally should be given 'great weight' in the analysis ... , the petitioners' failure to satisfy that factor is not fatal to their petition for leave to serve a late notice of claim ... . * * * ... [T]he petitioners met their initial minimal burden of providing a plausible argument supporting a finding of no substantial prejudice based on their contention that the respondents could defend themselves by reviewing the relevant medical records, interviewing witnesses, and consulting with experts. * * * ... [Mother] demonstrated a reasonable excuse for her delay due to her emotional and psychological injuries and the accompanying preoccupation with her well-being, as well as her attorney's prompt investigation into the claim ...". ***Matter of Balbuenas v. New York City Health & Hosps. Corp.*, 2022 N.Y. Slip Op. 05526, Second Dept 10-5-22**

FOURTH DEPARTMENT

CRIMINAL LAW.

THE PEOPLE ARE NOT REQUIRED TO HAVE THEIR WITNESSES READY FOR TRIAL IN ORDER FOR A STATEMENT OF READINESS TO BE VALID; THE MOTION TO DISMISS THE INDICTMENT ON SPEEDY-TRIAL GROUNDS SHOULD NOT HAVE BEEN GRANTED; THE STATEMENTS OF READINESS WERE NOT ILLUSORY; THERE WAS A DISSENT.

The Fourth Department, reversing County Court's speedy-trial dismissal of the indictment, over a dissent, determined County Court should not have deemed several of the prosecutor's statements of readiness illusory because the witnesses were not ready for trial at the time the statements were made: "Prior to August 4, 2021, no adjournment was caused by the People's failure to have their witnesses ready for trial. Rather, the matter was adjourned on those occasions due to other, older matters proceeding to trial before this case was reached. 'The People are not required to contact their witnesses on every adjourned date . . . , nor do they have to be able to produce their witnesses instantaneously in order for a statement of readiness to be valid' ... . To the contrary, '[p]ostreadiness delay may be charge[able] to the People when the delay is attributable to their inaction and directly implicates their ability to proceed to trial' ... . Here, although the time after the People withdrew their statement of readiness was properly charged to them, there was no prior delay attributable to the People's inaction. Consequently, the prior statements of readiness were not illusory ...". ***People v. Hill*, 2022 N.Y. Slip Op. 05626, Fourth Dept 10-7-22**

CRIMINAL LAW, APPEALS.

A MOTION TO SET ASIDE A JURY VERDICT PURSUANT TO CPL § 330.30(1) MUST BE BASED UPON MATTERS IN THE RECORD; I.E., ISSUES THAT CAN BE RAISED ON APPEAL; HERE THE MOTION WAS BASED ON MATTERS OUTSIDE THE RECORD AND SHOULD HAVE BEEN DENIED ON THAT GROUND.

The Fourth Department, reversing County Court's granting of defendant's CPL 330.30 (1) motion to set aside the jury verdict, determined the motion was improperly based upon matters outside the record. A CPL § 330.30(1) motion must be based upon issues which can be raised on appeal: "Pursuant to CPL 330.30 (1), following the issuance of a verdict and before sentencing a court may set aside a verdict on '[a]ny ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court.' Defendant's motion to set aside the verdict pursuant to CPL 330.30 (1) was procedurally improper because it was 'premised on matters outside the existing trial record, and CPL 330.30 (1) did not permit defendant[] to expand the record to include matters that did not 'appear[ ] in the record' prior to the filing of the motion[]' ... . We therefore reverse the order, deny the motion, and reinstate the verdict inasmuch as defendant's claim was not reviewable pursuant to CPL 330.30 (1) ...". ***People v. Allen*, 2022 N.Y. Slip Op. 05647, Fourth Dept 10-7-22**

CRIMINAL LAW, APPEALS.

A MOTION TO SET ASIDE A VERDICT PURSUANT TO CPL § 330.30(1) MUST BE BASED UPON MATTERS IN THE RECORD WHICH HAVE BEEN PRESERVED FOR APPEAL; A MOTION TO SET ASIDE A VERDICT PURSUANT TO CPL § 330.30(2) CAN BE BASED UPON JUROR MISCONDUCT OF WHICH THE DEFENDANT WAS NOT AWARE PRIOR TO THE VERDICT; BUT HERE THE DEFENSE WAS AWARE OF THE ALLEGED MISCONDUCT PRIOR TO THE VERDICT AND DID NOT OBJECT.

The Fourth Department explained that a motion to set aside a verdict pursuant to CPL § 330.30(1) or (2) cannot be based upon an issue the defense could have addressed (but did not) prior to the verdict. Although CPL § 330.30(2) allows a motion to set aside the verdict based upon juror conduct of which the defendant was not aware prior to the verdict, here the defense was aware of the alleged juror conduct: " 'A trial court's authority to set aside a verdict under CPL 330.30 (1) is limited to grounds which, if raised on appeal, would require reversal as a matter of law . . . Accordingly, only a claim of error that is properly preserved for appellate review may serve as the basis to set aside the verdict' ... . Here, despite being afforded an opportunity to object or seek further relief when the court brought the issue to the parties' attention during deliberations, defendant did not do so and thus failed to preserve his claim ... . The court therefore properly denied without a hearing the motion insofar as it was based on CPL 330.30 (1) because defendant's unpreserved argument 'did not furnish a proper predicate for setting aside the verdict' ... . A trial court is also authorized to set aside a verdict on the ground that "during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict" (CPL 330.30 [2] ...). Here, the record establishes that the alleged juror misconduct 'was addressed by the court and counsel on the record at the time of trial" and that defendant thus "had knowledge of the matter prior to the verdict' ... . We therefore conclude that the court properly denied without a hearing the motion insofar as it was based on CPL 330.30 (2) because 'the juror misconduct alleged was known to . . . defendant and . . . defendant had the opportunity to act on the information but failed to do so prior to the verdict' ...".***People v. Kenney*, 2022 N.Y. Slip Op. 05645, Fourth Dept 10-7-22**

CRIMINAL LAW, EVIDENCE.

THE DEFENDANT, WHO WAS BEING TREATED AT THE HOSPITAL, WAS IN CUSTODY AND HAD NOT BEEN INFORMED OF HIS *MIRANDA* RIGHTS; THE DEFENDANT CALLED A POLICE OFFICER OVER AND SAID, "I'M BEAT UP;" THE OFFICER THEN ASKED, "WHAT HAPPENED?"; DEFENDANT'S ANSWER WAS NOT SPONTANEOUS AND SHOULD HAVE BEEN SUPPRESSED.

The Fourth Department, vacating defendant's guilty plea, determined statements made by the defendant to a police officer while he was being treated at the hospital should have been suppressed. Although the initial statement "I'm beat up" was spontaneous, the statements made after the police officer asked "what happened?" were not spontaneous and were made while the defendant was in custody: "[I]t is undisputed that defendant was in police custody at the time he made the statements and that no one read defendant his *Miranda* warnings prior to defendant making the statements. The officer testified at the suppression hearing that defendant 'called [the officer] over' to his bed and said 'I'm beat up,' after which the officer asked defendant 'what happened.' Defendant then explained the circumstances surrounding how he allegedly came into possession of a weapon he was not legally authorized to possess. We conclude that defendant's initial statement, 'I'm beat up,' was not subject to suppression because it was ' 'spontaneous and not the result of inducement, provocation, encouragement or acquiescence' ... . The court, however, erred in refusing to suppress the remainder of his statements, which were made in response to the officer's question that was intended to elicit a response, and thus those statements cannot be said to have been 'genuine[ly] spontane[ous],' i.e., they were not 'spontaneous in the literal sense of that word as having been made without apparent external cause' ...". ***People v. Corey*, 2022 N.Y. Slip Op. 05646, Fourth Dept 10-7-22**

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW.

REFUSING TO SUBMIT TO A DWI BREATH TEST IS NOT AN OFFENSE.

The Fourth Department, reversing the conviction, noted that refusing to submit to a DWI field screening test (Alco-Sensor breath test) is not an offense: "We agree with defendant ... that his 'refusal to submit to a [field screening device] did not establish a cognizable offense' (*People v Alim*, 204 AD3d 1418, 1419 [4th Dept 2022] …; *see People v Bembry*, 199 AD3d 1340, 1342 [4th Dept 2021] …). We therefore modify the judgment by reversing that part convicting defendant of count seven of the indictment and dismissing that count." ***People v. Shirley*, 2022 N.Y. Slip Op. 05631, Fourth Dept 10-7-22**

PERSONAL INJURY, EVIDENCE, VEHICLE AND TRAFFIC LAW, COURT OF CLAIMS.

THERE WERE QUESTIONS OF FACT WHETHER THE SNOWPLOW WAS "ENGAGED IN HIGHWAY WORK" AT THE TIME OF THE TRAFFIC ACCIDENT; THEREFORE, THERE WERE QUESTIONS OF FACT CONCERNING WHETHER THE HIGHER "RECKLESS DISREGARD" STANDARD OF CARE APPLIED; THE STATE'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing the Court of Claims, determined the state's motion for summary judgment in this snow-plow traffic-accident case should not have been granted because there were questions of fact concerning whether the higher "reckless disregard" standard of care for snowplows was applicable. Although the "reckless disregard" standard may still apply where, as here, the snow plow is raised, the snow plow must be salting the road or otherwise "working its run" at the time of the accident: "Vehicle and Traffic Law § 1103 (b) 'exempts from the rules of the road all vehicles, including [snowplows], which are 'actually engaged in work on a highway' . . . , and imposes on such vehicles a recklessness standard of care' ... . The exemption 'applies only when such work is in fact being performed at the time of the accident' ... , which includes a snowplow engaged in plowing or salting a road ... . Although the exemption does 'not apply if the snowplow . . . [is] merely traveling from one route to another route' ... , a snowplow may be 'engaged in work even if the plow blade [is] up at the time of the accident and no salting [is] occurring' when the snowplow is nevertheless 'working [its] 'run' or 'beat' at the time of the accident' ... . [W]e conclude that the State failed to establish as a matter of law that the snowplow was 'actually engaged in work on a highway' at the time of the accident (Vehicle and Traffic Law § 1103 [b] ...)." ***Lynch-Miller v. State of New York*, 2022 N.Y. Slip Op. 05640, Fourth Dept 10-7-22**

FAMILY LAW, APPEALS.

FATHER WAS NOT SERVED WITH THE ORDER OF FACT-FINDING AND DISPOSITION IN THE MANNER PRESCRIBED BY FAMILY COURT ACT § 1113 (FATHER WAS SERVED BY EMAIL) AND THEREFORE THE 30-DAY APPEAL DEADLINE DID NOT APPLY; FATHER'S STRIKING THE 14-YEAR-OLD CHILD ONCE DURING A MULTI-PERSON MELEE AFTER THE CHILD BROKE THE WINDOW OF FATHER'S CAR WITH A ROCK DID NOT CONSTITUTE NEGLECT.

The Fourth Department, reversing Family Court, determined: (1) Family Court did not follow the statutory procedure for serving father with the order of fact-finding and disposition and, therefore, father's appeal was timely; and (2) father's striking the child once during a multi-person melee, after the child threw a rock at father's car, did not constitute neglect: " '[T]here is no evidence in the record that the father was served with the order of fact-finding and disposition by a party or the child's attorney, that he received the order in court, or that the Family Court mailed the order to the father' ... . Instead, despite using a form order that provided typewritten check boxes for the two methods of service by the court mentioned in the statute (i.e., in court or by mail) ... , the court here crossed out the word 'mailed' and edited the form to indicate that the order was emailed to, among others, the father's attorney. The statute, however, does not provide for service by the court through email or any other electronic means ... . Inasmuch as the father was served the order by the court via email, which is not a method provided for in Family Court Act § 1113, and there is no indication that he was served by any of the methods authorized by the statute, we conclude that the time to take an appeal did not begin to run and that it cannot be said that the father's appeal is untimely ... .* * * ... [W]e conclude that, '[g]iven the age of the subject child, the provocation, and the dynamics of the incident, the [father's] act against [the child] did not constitute neglect' … . The record establishes that, during the course of a multi-person melee that included the 15-year-old sister beating up the 18-year-old daughter of the father's girlfriend, the 14-year-old child threw a rock at the vehicle causing the window to break, to which provocation the father instantly reacted by striking the child once either in the face or the back of the head ... . Petitioner presented no evidence that the child sustained any injury or required medical treatment as a result of the single strike by the father during the altercation, and the police who investigated the incident did not file any charges ...". ***Matter of Grayson S. (Thomas S.)*, 2022 N.Y. Slip Op. 05649, Fourth Dept 10-7-22**

FAMILY LAW, EVIDENCE.

THE DETERIORATION OF THE RELATIONSHIP BETWEEN FATHER AND MOTHER WAS A SUFFICIENT CHANGE IN CIRCUMSTANCES TO WARRANT AN INQUIRY RE: FATHER'S PETITION FOR A MODIFICATION OF CUSTODY; AFTER CONSIDERING THE MERITS, THE APPELLATE COURT AWARDED SOLE CUSTODY TO FATHER.

The Fourth Department, reversing Family Court, determined father demonstrated a change in circumstance (deterioration of the relationship with mother, inability to communicate) sufficient to warrant an inquiry into whether the joint custody arrangement should be modified, and the record supported awarding father sole custody: "[T]he court had previously awarded joint custody to the parties on the basis that communications between them had 'improved and the two were working together more than ever before, the results of which were positive for [the subject child].' However, the evidence at the hearing established that, after the initial custody award was entered, the parties reverted to 'an acrimonious relationship and are not able to communicate effectively with respect to the needs and activities of their child[ ], and it is

well settled that joint custody is not feasible under those circumstances' ... . [W]e conclude that it is in the child's best interests to award the father sole custody. Although the parties have shared alternating week custody since the entry of the prior custody order, the evidence at the hearing established that the father 'provided a more stable environment for the child and was better able to nurture the child' ... . The evidence further established that the mother made a concerted effort to interfere with the father's contact with the child by, inter alia, disparaging him to educational and medical professionals, which raises a strong probability that the mother 'is unfit to act as custodial parent' ... and warrants the grant of sole custody to the father....". ***Matter of Johnson v. Johnson*, 2022 N.Y. Slip Op. 05651, Fourth Dept 10-7-22**

PUBLIC HEALTH LAW, NEGLIGENCE, IMMUNITY.

PURSUANT TO THE EMERGENCY OR DISASTER TREATMENT PROTECTION ACT (EDTPA), HEALTH CARE WORKERS WHO TREATED COVID-19 PATIENTS WERE IMMUNE FROM CIVIL LIABILITY; THE EDTPA HAS SINCE BEEN REPEALED; THE REPEAL SHOULD NOT BE APPLIED RETROACTIVELY; THE CAUSES OF ACTION ALLEGING IMPROPER TREATMENT FOR COVID-19 DURING THE TIME THE EDTPA WAS IN EFFECT MUST BE DISMISSED.

The Fourth Department determined the repeal of the COVID-19-related Emergency or Disaster Treatment Protection Act (EDTPA) (Public Health Law sections 3080-3082) should not be applied retroactively. Therefore, the immunity from civil liability provided by the EDTPA for health care workers who treated COVID-19 patients was in effect when the causes of action in the complaint arose. The complaint, which alleged plaintiff nursing-home resident was not properly tested and treated for COVID-19, was dismissed: "We ... conclude that applying the repeal of EDTPA to the allegations in the complaint would have retroactive effect 'by impairing rights [defendants] possessed in the past, increasing their liability for past conduct and imposing new duties with respect to transactions already completed' ... . 'Because the [repeal of EDTPA], if applied to past conduct, would impact substantive rights and have retroactive effect, the presumption against retroactivity is triggered' ...". ***Ruth v. Elderwood At Amherst*, 2022 N.Y. Slip Op. 05637, Fourth Dept 10-7-22**

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