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COURT OF APPEALS

ADMINISTRATIVE LAW, INSURANCE LAW, CONSUMER LAW, CONSTITUTIONAL LAW.

AN AMENDED REGULATION DESIGNED TO PROTECT THE INTERESTS OF LIFE-INSURANCE AND ANNUITY CONSUMERS IS NOT VOID FOR VAGUENESS AND WAS PROPERLY CRAFTED AND ISSUED BY THE NYS DEPARTMENT OF FINANCIAL SERVICES.

The Court of Appeals, in a full-fledged opinion by Judge Singas, reversing the appellate division, determined an amended regulation designed to protect the interests of life-insurance and annuity consumers was not void for vagueness and was properly crafted and issued by the NYS Department of Financial Services (DFS): "The amendment addressed concerns that the purchase of annuities and life insurance had become increasingly complex with more products available to purchase. DFS reasoned that consumers, finding themselves more reliant on professional advice in order to understand the options available and to make purchasing decisions, had become more susceptible to producers and insurers recommending transactions that prioritized their own compensation over the consumer's best interest ... . The amendment ... extended the scope of the regulation to cover both annuity and life insurance contracts, and created a new standard applicable when producers and insurers make 'recommendations' to consumers. The amended regulation, which applies to both 'sales transactions' and 'in-force transactions' ... , requires that producers, or insurers when no producer is involved, act in the 'best interest of the consumer' when making a 'recommendation ... . The producer or insurer must, among other things: make 'reasonable efforts' to obtain the consumer's 'suitability information'; base any recommendation 'on an evaluation of the relevant suitability information' that 'reflects the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use under the circumstances then prevailing'; '[o]nly [consider] the interests of the consumer . . . in making the recommendation' and not be influenced by compensation or other incentives; recommend only 'suitable' transactions; and have a 'reasonable basis' to believe that the consumer has been reasonably informed of the features of the policy, the potential consequences of the transactions, both favorable and unfavorable, and that the consumer would benefit from certain features of the policy and the particular policy as a whole ...". ***Matter of Independent Ins. Agents & Brokers of N.Y., Inc. v. New York State Dept. of Fin. Servs.*, 2022 N.Y. Slip Op. 05917, CtApp 10-20-22**

CONTRACT LAW, ATTORNEYS, PARTNERSHIP LAW.

THE INDEMNIFICATION CLAUSE IN THE PARTNERSHIP AGREEMENT DID NOT INCLUDE "UNMISTAKABLY CLEAR" LANGUAGE INDICATING THE WAIVER OF THE "AMERICAN RULE" REQUIRING EACH PARTY TO PAY THAT PARTY'S OWN ATTORNEY'S FEES; PLAINTIFF WAS NOT ENTITLED TO ATTORNEY'S FEES ASSOCIATED WITH DEFENDANT'S UNSUCCESSFUL DISSOLUTION ACTION.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, reversing the appellate division, determined the indemnification clause in the partnership agreement did not serve to waive the "American Rule" that each party is responsible for that party's own attorney's fees. The indemnification clause states: "The Partnership and the other Partners shall be indemnified and held harmless by each Partner from and against any and all claims, demands, liabilities, costs, damages, expenses and causes of action of any nature whatsoever arising out of or incidental to any act performed by a Partner which is not performed in good faith or is not reasonably believed by such Partner to be in the best interests of the Partnership and within the scope of authority conferred upon such Partner under this Agreement, or which arises out of the fraud, bad faith, willful misconduct or negligence of such Partner." Here defendant had brought an unsuccessful dissolution action and plaintiff argued defendant was obligated to pay plaintiff's attorney's fees because the indemnification clause waived the American Rule: "Under the American Rule, 'attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule' ... . The American Rule is intended to increase 'free access to the courts' for those who would otherwise be discouraged from seeking 'judicial redress of wrongs' for fear of having to pay a defendant's attorney's fees ... . The Rule is straightforward enough, but in the context of private agreements to avoid the Rule, courts have had to determine the intent of vague fee-shifting language and broad indemnification provisions that do not explicitly allow for the prevailing party in an action between contracting parties to collect attorney's fees ... . To the extent that some of these decisions presume that broadly worded indemnification provisions by their nature are intended to cover attorney's fees in direct party actions, they deviate from this Court's exacting standard that the agreement must contain 'unmistakably clear' language of the parties' intent to encompass such actions ... . * * * Here, the indemnification provision makes no explicit mention that partners may recoup attorney's fees in an action on the contract. Nor is there any basis to infer the provision is limited to actions between the partners." ***Sage Sys., Inc. v. Liss*, 2022 N.Y. Slip Op. 05918, CtApp 10-20-22**

CRIMINAL LAW, JUDGES.

THE ALTERNATE JURORS WERE DISCHARGED JUST PRIOR TO THE LUNCH BREAK; A PROBLEM WITH A SITTING JUROR AROSE DURING THE BREAK AND THE JUROR WAS REMOVED; DELIBERATIONS HAD NOT YET BEGUN BUT THE ALTERNATE JURORS WERE NO LONGER AVAILABLE FOR SERVICE; THE JUDGE THEREFORE SHOULD NOT HAVE RECALLED ONE OF THE ALTERNATE JURORS; NEW TRIAL ORDERED.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, reversing the appellate division and ordering a new trial, determined that once the alternate jurors were discharged, they were not longer "available for service." Therefore, the judge should not have seated one of the discharged alternate jurors after a trial juror was removed for alleged misconduct. The alternates were discharged just before the court broke for lunch. During the break, before deliberations had begun, the problem with the sitting juror arose. The Court of Appeals noted that, had the judge waited to discharge the alternates until deliberations were about to begin, instead of before the lunch break, there would have been no need for a mistrial: "Prior to the start of deliberations in defendant's trial, the court discharged the alternate jurors. A trial juror was subsequently challenged and ultimately removed for alleged misconduct, and the court recalled, questioned, and seated one of the discharged alternates. Seating of this discharged alternate juror was error. An alternate juror, once discharged, is no longer 'available for service' as a replacement for a trial juror.... . * * * ... [W]hen the trial judge thanked the alternate jurors for their service and 'excused [them] from this case,' the alternate jurors were discharged. At that point, the alternates 'cease[d] to function' as jurors ... and were no longer available for service under the statute." ***People v. Murray*, 2022 N.Y. Slip Op. 05916, CtApp 10-20-22**

CRIMINAL LAW, JUDGES, ATTORNEYS.

THE DEFENDANT WAS REPRESENTED AT TRIAL BUT REPRESENTED HIMSELF IN PRETRIAL PROCEEDINGS; THE JUDGE NEVER ADEQUATELY EXPLAINED THE RISKS OF REPRESENTING ONESELF OR THE DIFFERENCE BETWEEN AN ATTORNEY ACTING AS A "LEGAL ADVISOR" TO THE DEFENDANT AND AN ATTORNEY WHO "REPRESENTS" THE DEFENDANT; CONVICTION REVERSED AND MATTER REMITTED TO REPEAT PRETRIAL PROCEEDINGS.

The Court of Appeals, in a full-fledged opinion by Judge Troutman, reversing the appellate division, determined the judge never adequately explained to the defendant the risks associated with representing himself, and the judge did not explain the difference between an attorney who acts as a "legal advisor" to the defendant as opposed to an attorney who "represents" the defendant. Although the defendant was represented at trial, he was not represented during much of the pretrial proceedings. The matter was remitted to repeat the pretrial proceedings: "[T]he court's record exploration of the issue did not warn defendant of the risks of proceeding pro se or apprise him of the importance of a lawyer in the adversarial system, nor does the record as a whole demonstrate that defendant effectively waived his right to counsel. Initially, the court conducted no discussion whatsoever of these issues before stating that defendant was representing himself ... . Although the court later told defendant that it was 'not a great idea' to represent himself, that defendant was putting himself 'in a very bad position,' and that a lawyer would have knowledge of criminal procedure that defendant did not, these brief, generalized warnings do not satisfy the requirement for a searching inquiry ... . * * * ... [W]hen the court, in its discretion, permits standby counsel ... , it should explain to the defendant the court's rules regarding the role of a legal advisor or standby counsel and how that role differs from representation by an attorney." ***People v. Baines*, 2022 N.Y. Slip Op. 05919, CtApp 10-24-22**

FIRST DEPARTMENT

DEFAMATION.

AN UNFAVORABLE ANONYMOUS GOOGLE REVIEW OF PLAINTIFF ORTHODONTIST, ALTHOUGH IT INCLUDED BOTH FACT AND OPINION, WOULD BE UNDERSTOOD BY A READER TO BE PURE OPINION; THE REVIEW IS NOT ACTIONABLE DEFAMATION.

The First Department, reversing Supreme Court, determined that an unfavorable Google review of plaintiff orthodontist by a former minor patient did not constitute actionable defamation: "Plaintiffs, an orthodontist and his professional corporation, allege that defendants — a former minor patient and that patient's parents — defamed them in an unfavorable review posted on Google. Contrary to Supreme Court's holding, we find that, although defendants' Google review contains elements of both fact and opinion, it nevertheless is not actionable ... , and it was not the motion court's province to 'sift[] through [the] communication for the purpose of isolating and identifying assertions of fact' ... . Rather, the court should have considered the overall context in which the communication was made, an anonymous online review of plaintiff's services ... . Here, a reasonable reader of defendants' Google review would understand it to be pure opinion based on the context in which it was posted and its arguably '[l]oose, figurative, or hyperbolic' tone ... . Furthermore, defendants' Google review was posted anonymously online and, as we have recognized, '[R]eaders give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts' ...". ***DeRicco v. Maidman*, 2022 N.Y. Slip Op. 05921, First Dept 10-20-22**

SECOND DEPARTMENT

CIVIL PROCEDURE, ATTORNEYS, FORECLOSURE.

DEFENDANT WAIVED THE LACK-OF-PERSONAL-JURISDICTION DEFENSE BY COUNSEL'S FILING A NOTICE OF APPEARANCE WITHOUT RAISING THE JURISDICTION OBJECTION.

The Second Department, reversing Supreme Court, determined the defendant waived a lack-of-personal-jurisdiction defense by counsel's filing a notice of appearance without raising the jurisdictional objection: " 'By statute, a party may appear in an action by attorney (CPLR 321), and such an appearance constitutes an appearance by the party for purposes of conferring jurisdiction' ... . Here, the defendant appeared in the action by its counsel's filing of the notice of appearance ... , and neither the defendant nor its attorney moved to dismiss the complaint for lack of personal jurisdiction at that time or asserted lack of personal jurisdiction in a responsive pleading. Thus, the defendant waived any objection based on lack of personal jurisdiction by failing to move to dismiss the complaint on this ground at the time its counsel filed a notice of appearance in the action or to serve an answer which raised this jurisdictional objection ...". ***Capital One N.A. v. Ezkor*, 2022 N.Y. Slip Op. 05829, Second Dept 10-19-22**

Similar issue and result in: ***HSBC Bank USA N.A. v. Mohammed***, 2022 N.Y. Slip Op. 05843, Second Dept 10-19-22

CRIMINAL LAW.

DEFENDANT'S OUT-OF-STATE CONVICTION DID NOT REQUIRE SUMMARY DENIAL OF DEFENDANT'S MOTION TO SEAL THE RECORDS OF HIS NEW YORK CONVICTION; HOWEVER, THE OUT-OF-STATE CONVICTION MUST BE PART OF THE ANALYSIS OF THE APPROPRIATENESS OF SEALING THE NEW YORK RECORDS; SUPREME COURT GRANTED THE MOTION WITHOUT CONSIDERING THE OUT-OF-STATE CONVICTION; MATTER REMITTED FOR A HEARING.

The Second Department, in a full-fledged opinion by Justice Connolly, reversing Supreme Court, determined that an out-of-state conviction should be considered where defendant seeks to seal the records of a New York conviction. Here Supreme Court had granted the motion to seal, finding that only New York convictions need be considered. The matter was remitted for a hearing in which the out-of-state conviction would be part of the analysis: "This appeal presents the question of whether CPL 160.59(3)(f) requires a court to summarily deny a defendant's motion to seal an eligible offense where the defendant subsequently has been convicted of a crime under the laws of another state. We hold that CPL 160.59(3)(f) does not require summary denial under these circumstances. Instead, a defendant's subsequent conviction under the laws of another state is a factor that the motion court should consider in its discretionary determination as to whether to seal the eligible offense ... . * * * ... [A] hearing is ... appropriate in this case. Although the defendant's 2018 Virginia misdemeanor conviction was not a ground to summarily deny the defendant's motion to seal, at the hearing, the parties may provide additional evidence related to that conviction, as well as any other evidence relevant to the determination of the defendant's motion. Further, assuming that the defendant was in fact convicted of a misdemeanor in Virginia, the Supreme Court should consider that conviction and the nature and circumstances of the underlying conduct in making its discretionary determination as to whether to grant the defendant's motion to seal. The court should also consider how the conviction reflects upon the defendant's character under CPL 160.59(7)(d). In particular, we note that the defendant's affidavit failed to disclose the existence of the 2018 Virginia misdemeanor conviction or explain the circumstances surrounding the conviction. Further, the affirmation of the defendant's attorney affirmatively stated that the defendant had no contact with the criminal justice system since his 1990 New York conviction, which does not appear to be accurate. Upon remittal, the court should consider all of these circumstances, as well as the nonexhaustive list of factors in CPL 160.59(7), in its new determination of the defendant's motion to seal. . Although the Supreme Court properly determined that it was not required to summarily deny the defendant's motion to seal his 1990 conviction for attempted grand larceny in the third degree pursuant to CPL 160.59(3)(f), as the People opposed the defendant's motion to seal, the court was required to hold a hearing pursuant to CPL 160.59(6)." ***People v. Witherspoon*, 2022 N.Y. Slip Op. 05866, Second Dept 10-19-22**

CRIMINAL LAW, ATTORNEYS, APPEALS.

DEFENSE COUNSEL WAITED UNTIL AFTER THE PROSECUTOR MADE SEVERAL ARGUABLY IMPROPER REMARKS IN SUMMATION BEFORE OBJECTING "TO ALL OF THIS;" THE OBJECTION WAS DEEMED UNTIMELY, VAGUE, AMBIGUOUS, GENERAL AND NONSPECIFIC; THEREFORE THE ISSUES RAISED BY THE PROSECUTOR'S REMARKS WERE NOT PRESERVED FOR APPEAL.

The Second Department, in a full-fledged opinion by Justice Dillon, over an extensive two-justice dissent, determined defense counsel did not make timely objections to remarks made by the prosecutor in summation. After several arguably improper comments by the prosecutor, defense counsel objected "to all of this." The judge struck the only last of the prosecutor's remarks. After the jury was charged and deliberating, defense counsel raised objections to several other remarks made by the prosecutor which were denied as untimely. The Second Department agreed the objections were not timely or specific and affirmed defendant's conviction: "The objection of defense counsel most relevant to this appeal was to 'all of this,' which was interposed only after the prosecutor likened a hypodermic needle to a dangerous instrument. The objection, as interposed, suffers from a number of problems in failing to preserve the issues now raised on appeal. First, the objection was vague and ambiguous. Second, it was untimely. Third, its language was general and nonspecific. The preservation rules ... , requiring that objections be timely and specific rather than untimely and general, are basic, well-understood, and time-tested concepts, which should prompt no dispute in their application to this appellate record. ... The prosecutor had been speaking at some length, for a total of 28 uninterrupted sentences, before defense counsel interposed the objection at issue here. ... As to [the] objection and its timing, the Supreme Court understandably

treated it as applying to the last occurring statement of the prosecutor ... . For preservation, the defendant's objection was ... general, as it did not identify to the Supreme Court any particular argument or remark by the prosecutor or any specific basis. The basis for the objection was not explained, rendering the entire objection general and insufficient for preservation purposes ... . … Defense counsel initiated further colloquy with the Supreme Court about the subject objection after the jury had been charged and after the jury had begun its deliberations. By then, counsel's objection was clearly untimely, as there was no longer an opportunity for the court to promptly make a curative ruling to the jury, had one even been indicated." ***People v. Adorno*, 2022 N.Y. Slip Op. 05856, Second Dept 10-19-22**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE. UNIFORM COMMERCIAL CODE (UCC).

THE BANK IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE IT WAS THE HOLDER OF THE NOTE AND DID NOT DEMONSTRATE POSSESSION OF THE NOTE AT THE TIME THE ACTION WAS BROUGHT BECAUSE THE NOTE ITSELF WAS NOT ATTACHED TO THE LOAN SERVICER'S AFFIDAVIT; THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the plaintiff bank should not have been awarded summary judgment in this foreclosure action because it did not demonstrate standing to foreclose: "[T]here was no evidence that the plaintiff is the assignee of the note, and a triable issue of fact exists as to whether the plaintiff was the holder of the note at the time this action was commenced. A promissory note is a negotiable instrument within the meaning of the Uniform Commercial Code (see UCC 3-104[2][d] ...) 'holder' is 'the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession' (UCC 1-201[b][21][A] ...). In the present case, there is a triable issue of fact as to whether the note was properly specially endorsed by an allonge 'so firmly affixed thereto as to become a part thereof' when it came into the possession of the plaintiff (UCC 3-202[2] ...). Further, the affidavit of Verdooren [loan servicer employee] and the accompanying business records were insufficient to establish the plaintiff's standing ... . 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' (... see CPLR 4518[a]). Here, although Verdooren stated that Wells Fargo had possession of the note on the plaintiff's behalf at the time the action was commenced, the documents attached to Verdooren's affidavit failed to establish this fact." ***Bank of N.Y. Mellon Trust Co., N.A. v. Andersen*, 2022 N.Y. Slip Op. 05827, Second Dept 10-19-22**

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

PLAINTIFF IN THIS STRICT FORECLOSURE ACTION SHOULD HAVE BEEN ALLOWED TO AMEND THE COMPLAINT TO ADD A CAUSE OF ACTION FOR REFORECLOSURE UNDER RPAPL 1503; REFORECLOSURE IS AN OPTION WHEN THE ORIGINAL FORECLOSURE MAY BE VOID OR VOIDABLE AS AGAINST ANY PERSON.

The Second Department, reversing Supreme Court, determined plaintiff's motion to amend the complaint in this strict foreclosure action to add a cause of action for reforeclosure under RPAPL 1503: "Section 1503 of the Real Property Actions and Proceedings Law establishes an action in reforeclosure where an original foreclosure judgment, sale, or conveyance may be void or voidable as against any person. The statute grants a purchaser the right to maintain an action 'to determine the right of any person to set aside such judgment, sale or conveyance or to enforce an equity of redemption or to recover possession of the property, or the right of any junior mortgagee to foreclose a mortgage' (id.). 'Such action may be maintained even though an action against the defendant to foreclose the mortgage under which the judgment, sale or conveyance was made, or to extinguish a right of redemption, would be barred by the statutes of limitation' ...". ***Bank of N.Y. v. Karistina Enters., LLC*, 2022 N.Y. Slip Op. 05828, Second Dept 10-19-22**

FORECLOSURE, CONTRACT LAW.

IN THIS REVERSE MORTGAGE FORECLOSURE ACTION, DEFENDANT WAS NAMED AS A BORROWER IN THE MORTGAGE (WHICH SHE SIGNED) BUT NOT IN THE NOTE; THE NOTE AND MORTGAGE MUST BE READ AS A SINGLE AGREEMENT, RAISING A QUESTION OF FACT WHETHER DEFENDANT WAS A "SURVIVING BORROWER" THEREBY PRECLUDING FORECLOSURE.

The Second Department, reversing Supreme Court, determined defendant raised a question of fact in this reverse-mortgage foreclosure action. The mortgage allowed foreclosure upon the death of a borrower (Goldman) as long as the property is not occupied by a "surviving borrower." Although the defendant was not named as a borrower in the note, she was names as a borrower in the mortgage, which she signed: "[T]he defendant raised a triable issue of fact as to whether she was a 'surviving Borrower' under the note and mortgage, which would preclude the plaintiff from requiring payment in full upon Goldman's death ... . Although the defendant was not named as a borrower in the note, she signed the mortgage in which she was named as a borrower. 'Generally, the rule is that separate contracts relating to the same subject matter and executed simultaneously by the same parties may be construed as one agreement' ... . Here, the note and mortgage, construed together, were ambiguous as to whether the defendant was intended to be a borrower ... . Where, as here, contract language is 'reasonably susceptible of more than one interpretation, . . . extrinsic or parol evidence may be . . . permitted to determine the parties' intent as to the meaning of that language' ... Here, the extrinsic evidence submitted by the parties raised a triable issue of fact as to whether the defendant was a borrower under the subject loan. Although Goldman, and not the defendant, was named as the borrower on various documents, including the loan application, both Goldman and the defendant signed a copy of a Truth-in-Lending Act disclosure. Moreover, in her affidavit, the defendant averred that when she and Goldman applied for the reverse mortgage, they were 'assured that when [Goldman] passed away, that I would get the house and that I could continue to live there.' " ***Nationstar Mtge., LLC v. Hoar*, 2022 N.Y. Slip Op. 05853, Second Dept 10-19-22**

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

THE AFFIDAVIT SUBMITTED BY THE BANK IN THIS FORECLOSURE ACTION DID NOT PRESENT SUFFICIENT EVIDENCE TO DEMONSTRATE COMPLIANCE WITH THE NOTICE OF DEFAULT PROVISIONS OF RPAPL 1304.

The Second Department, reversing Supreme Court, in this foreclosure action, determined plaintiff bank did not submit sufficient proof of compliance with the notice-of-default provisions of RPAPL 1304. Among other deficiencies, the documents necessary to prove the notice was mailed were not attached to the affidavit stating the mailing requirements were met: "[P]laintiff failed to establish, prima facie, that it complied with RPAPL 1304. Although Crystal Jean McClelland, a vice president of loan documentation for the plaintiff, stated in her affidavit that the RPAPL 1304 notices were mailed by certified and regular first-class mail, and attached copies of those notices, the plaintiff failed to attach, as exhibits to the motion, any documents to prove that the mailing actually happened. The plaintiff failed to provide any documentation from the United States Post Office demonstrating that the notice was sent by registered or certified mail. Further, while McClelland attested that she was familiar with the business records maintained by the plaintiff, had personal knowledge of the operation of and the circumstances surrounding the preparation, maintenance, distribution, and retrieval of records in the plaintiff's record-keeping system, and had knowledge of how the plaintiff drafted, generated, triggered, sent, and stored letters in the servicing process, she did not present proof of a standard office mailing procedure by the plaintiff designed to ensure that items are properly addressed and mailed. Since the plaintiff failed to provide proof of the actual mailing, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure, the plaintiff failed to establish its strict compliance with RPAPL 1304 ...". ***Wells Fargo Bank, N.A. v. Kowalski*, 2022 N.Y. Slip Op. 05887, Second Dept 10-19-22**

PERSONAL INJURY, CIVIL PROCEDURE.

IN THIS REAR-END TRAFFIC ACCIDENT CASE, WHERE PLAINTIFF WAS AN INNOCENT PASSENGER, DEFENDANTS' FAILURE-TO-STATE-A-CAUSE-OF-ACTION DEFENSE SHOULD NOT HAVE BEEN STRUCK BECAUSE THE MOTION TO STRIKE AMOUNTED TO TESTING THE SUFFICIENCY OF PLAINTIFF'S OWN CLAIM.

The Second Department, reversing (modifying) Supreme Court, determined the "failure to state a cause of action" affirmative defense in this traffic accident case should not have been struck. Plaintiff was a passenger in a car rear-ended by defendants. The court noted that any comparative negligence among defendant-drivers does not preclude summary judgment on liability in favor of a non-negligent passenger: "The right of an innocent passenger to summary judgment on the issue of whether he or she was at fault in the happening of an accident is not restricted by potential issues of comparative negligence as between two defendant drivers (see CPLR 3212[g] ...). ... Supreme Court should have denied that branch of the plaintiff's motion which was, in effect, pursuant to CPLR 3211(b) to dismiss the defendants' first affirmative defense, alleging that the complaint fails to state a cause of action. '[N]o motion by the plaintiff lies under CPLR 3211(b) to strike the defense [of failure to state a cause of action], as this amounts to an endeavor by the plaintiff to test the sufficiency of his or her own claim' ...". ***Ochoa v. Townsend*, 2022 N.Y. Slip Op. 05854, Second Dept 10-19-22**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

DEFENDANTS' VAN FAILED TO YIELD TO APPELLANT'S VEHICLE, WHICH HAD THE RIGHT OF WAY, WHEN DEFENDANTS' VAN ATTEMPTED TO MERGE INTO APPELLANT'S LANE; THE DASH CAM VIDEO DEMONSTRATED DEFENDANT-DRIVER VIOLATED THE VEHICLE AND TRAFFIC LAW; APPELLANT WAS NOT NEGLIGENT AS A MATTER OF LAW.

The Second Department, reversing Supreme Court, determined a dash cam video demonstrated that defendants' van failed to yield to appellant's vehicle. Therefore, appellant was not negligent as a matter of law: " 'A driver has a duty not to merge into a lane of moving traffic until it is safe to do so, and a violation of this duty constitutes negligence as a matter of law' (... see Vehicle and Traffic Law § 1128[a]). Moreover, a driver of a vehicle with the right-of-way is entitled to anticipate that the driver in the lane next to him or her will obey the traffic laws requiring them to yield to a driver with the right-of-way ... . '[A] driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision' ... . Here, in support of her motion, the appellant submitted evidence which included, among other things, a dash cam video of the accident which demonstrated that the defendant van driver failed to yield the right-of-way to the appellant's vehicle in violation of Vehicle and Traffic Law § 1128(a). The video revealed that the defendant van driver suddenly moved into the appellant's lane of travel as that lane widened to become both a travel lane and an exit ramp lane and, within seconds, the right side of the vehicle of the defendant van driver collided with the driver's side of the appellant's vehicle as the appellant's vehicle was entering the exit ramp lane. Thus, the evidence submitted by the appellant established, prima facie, that the defendant van driver's failure to yield was the sole proximate cause of the collision and that the appellant was free from fault ...". ***Vigdorchik v. Vigdorchik*, 2022 N.Y. Slip Op. 05886, Second Dept 10-19-22**

REAL ESTATE, CONTRACT LAW.

THE BROKER WAS THE PROCURING CAUSE OF THE SALE OF THE REAL PROPERTY AND THEREFORE WAS ENTITLED TO THE AGREED 4% COMMISSION.

The Second Department, reversing Supreme Court, over an extensive dissent, determined the broker in this sale of real property was the procuring cause of the sale and was therefore entitled to the agreed 4% commission: " 'To prevail on a cause of action to recover a commission,

the broker must establish (1) that it is duly licensed, (2) that it had a contract, express or implied, with the party to be charged with paying the commission, and (3) that it was the procuring cause of the sale' ... . Here, the issue disputed by the parties was whether the plaintiff was the procuring cause of the sale. 'To establish that a broker was the procuring cause of a transaction, the broker must establish that there was 'a direct and proximate link, as distinguished from one that is indirect and remote' between the bare introduction of the parties to the transaction and the consummation of the sale ... . '[I]n order to qualify for a commission, a broker need not have been involved in the ensuing negotiations or in the completion of the sale,' if such a direct and proximate causal link exists ... . It was Minetree's [the broker's] introduction of the subject properties to, and work with, TNC [the nature conservancy] which brought the County and the defendants together on a bargain sale transaction." ***Saunders Ventures, Inc. v. Catcove Group, Inc.*, 2022 N.Y. Slip Op. 05879, Second Dept 10-19-22**

THIRD DEPARTMENT

CIVIL PROCEDURE, NEGLIGENCE, MUNICIPAL LAW.

THE PLAINTIFF SHOULD HAVE BEEN ALLOWED TO AMEND THE COMPLAINT TO CURE THE OMISSION OF THE "PRIOR WRITTEN NOTICE" REQUIREMENT IN THIS SIDEWALK SLIP AND FALL CASE; THE AMENDMENT WAS NOT PALPABLY DEVOID OF MERIT AND WOULD NOT PREJUDICE THE CITY DEFENDANT; PLAINTIFF DID NOT NEED TO PRESENT ANY PROOF ON THE ISSUE; THEREFORE THE AMENDMENT SHOULD NOT HAVE BEEN DENIED ON THE GROUND THE PROOF SUBMITTED WAS INSUFFICIENT.

The Third Department, reversing Supreme Court, determined plaintiff should have been allowed to amend the complaint to cure a pleading omission in this slip and fall case. The complaint did not allege the defendant city had written notice of the sidewalk condition which allegedly caused plaintiff's fall. The amendment sought to cure the omission. The Third Department explained that plaintiff did not need to present any proof at this pre-discovery stage. As long as the amendment is not palpably devoid of merit and does not prejudice the defendant it should have been allowed. Therefore Supreme Court should not have considered plaintiff's "written notice" proof and denied the amendment on the ground the proof did not demonstrate the defendant city had written notice of the condition: "As it is undisputed that plaintiff timely filed a notice of claim concerning her fall and the City and plaintiff thereafter participated in a 50-h hearing (see General Municipal Law§ 50-h), the City cannot allege prejudice or surprise. Moreover, as demonstrated by her proposed amended complaint, plaintiff is not changing her theory of causation, but merely curing her pleading omission. Although Supreme Court correctly determined that the proposed amended complaint cured the pleading omission, its attendant conclusion that '[plaintiff's] claim is belied by the documentary evidence' and subsequent dismissal of the action on that basis was error. At this stage of the litigation, where discovery has not yet even commenced, plaintiff has no burden to submit any proof. As such, the documents that she did submit are of no moment, and do not provide a basis upon which to dismiss her action ... . [C]ontrary to the City's assertion that the proposed amended complaint contains bare legal conclusions, plaintiff need not establish the merits of the proposed amendments ... . Inasmuch as the proposed amendments were not palpably insufficient or patently meritless, and the City cannot allege surprise or prejudice as the proposed amended complaint otherwise contains facts formerly pleaded and previously known to it, leave should have been granted to amend the complaint ...". ***Mohammed v. New York State Professional Fire Fighters Assn., Inc.*, 2022 N.Y. Slip Op. 05909, Third Dept 10-20-22**

CRIMINAL LAW, CONSTITUTIONAL LAW.

DESPITE THE DRIVER'S FAILURE TO USE A TURN SIGNAL AS THE JUSTIFICATION FOR THE TRAFFIC STOP, DEFENDANT WAS ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS CONVICTION ON THE GROUND THE STOP WAS ACTUALLY BASED UPON RACIAL PROFILING; IN THE FIRST DEPARTMENT THE "TURN SIGNAL" GROUND FOR THE STOP WOULD BE ENOUGH, EVEN IF THE STOP WAS ACTUALLY MOTIVATED BY DISCRIMINATION; NOT SO IN THE THIRD DEPARTMENT.

The Third Department, reversing County Court, in a full-fledged opinion by Justice Lynch, disagreeing with the First Department, determined defendant was entitled to a hearing on his motion to vacate his conviction on the ground the traffic stop was motivated by racial profiling. The traffic stop was justified by the driver's failure to use a turn signal. In the First Department, that is good enough, even if racial profiling was the real reason for the stop. Not so in the Third Department: "[Defendant] asserted a violation of his constitutional rights ... based on the allegedly discriminatory police stop. Defendant, who is black, supported this claim with sworn affidavits from himself and the vehicle's driver. The driver — a white woman — averred in her affidavit that, during the police encounter, the investigator who initiated the stop chided her, saying 'you stupid little white b****, you think this black guy cares about you, but he's just using you to run drugs.' .* * * ... [W]e are mindful that both the majority and dissent in Robinson rejected as unworkable the 'primary motivation' subjective test for a traffic stop (see People v Robinson, 97 NY2d at 353; id. at 371 ...). We abide by that conclusion. Whether a traffic stop was premised on racial profiling must be assessed objectively with reference to the facts and circumstances of the encounter. Such considerations may include, for example, whether the arresting officers were involved in a plausible investigation prior to executing the vehicle stop. Also important — and certainly most relevant here — is consideration of the officers' actions and comments during the encounter. ... Defendant [submitted] the sworn affidavit of the driver of the vehicle, who ... recounted a highly concerning racist statement ostensibly made by the investigator conducting the stop. ... [T]he People neither controverted the driver's statement nor included an affidavit from the investigator doing so ... . Having demonstrated his right to a hearing (see CPL 440.30 [5]), defendant bears the burden of proving his claims by a preponderance of the evidence ... . In resolving the

motion, the court should undertake an objective analysis of the facts and circumstances of the entire police encounter." ***People v. Jones*, 2022 N.Y. Slip Op. 05892, Third Dept 10-20-22**

CRIMINAL LAW, CONSTITUTIONAL LAW.

THE FACT THAT DEFENDANT DID NOT APPEAL HIS 2006 CONVICTION ON THE GROUND HE WAS NOT INFORMED OF THE PERIOD OF POSTRELEASE SUPERVISION DID NOT PREVENT DEFENDANT FROM RAISING THAT ISSUE TO CHALLENGE THE CONSTITUTIONALITY OF THE 2006 CONVICTION IN THE CONTEXT OF A PERSISTENT VIOLENT FELONY OFFENDER PROCEEDING.

The Third Department, vacating defendant's sentence as a persistent violent felony offender, determined the fact that defendant didn't appeal his 2006 conviction on the ground he was not informed of the period of postrelease supervision did not prevent him from raising that issue to challenge use of the 2006 conviction in a persistent-felony-offender proceeding: "Defendant ... challenged the constitutionality of the 2006 conviction, alleging that he was not informed during the plea allocution that his sentence would include a period of postrelease supervision ... . The record reflects that Supreme Court and the People were under the impression that, because defendant had not raised that objection at his 2006 sentencing and had never appealed the 2006 judgment of conviction, such conviction remained unchallenged as of the hearing date and that, as a consequence, defendant's sole recourse was to bring a motion under CPL article 440 seeking to vacate that conviction. Defendant was advised that, if the CPL article 440 motion was successful, he could then petition Supreme Court regarding his status as a persistent violent felony offender. The court then adjudicated defendant a persistent violent felony offender. Significantly, '[n]otwithstanding his failure to appeal from the [2006] conviction, defendant had an independent statutory right to challenge its use as a predicate conviction on the ground it was unconstitutionally obtained' ... . Under these circumstances, defendant was not afforded a sufficient opportunity to challenge the constitutionality of his 2006 conviction at the hearing. Accordingly, the sentence must be vacated and the matter remitted for a proper persistent felony offender hearing under CPL 400.16 and resentencing." ***People v. Hoyt*, 2022 N.Y. Slip Op. 05894, Third Dept 10-20-22**

CRIMINAL LAW, EVIDENCE.

THERE WAS SUFFICIENT EVIDENCE, INCLUDING EXPERT EVIDENCE, OF DEFENDANT'S INTOXICATION TO RAISE A DOUBT WHETHER DEFENDANT FORMULATED THE INTENT TO COMMIT ASSAULT SECOND; THE REQUEST FOR THE INTOXICATION JURY CHARGE SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED.

The Third Department, reversing defendant's conviction and ordering a new trial, determined there was sufficient evidence of defendant's intoxication to warrant the jury charge on intoxication. There was enough evidence of intoxication to support a doubt whether defendant was able to formulate the requisite intent to commit assault second: "' To warrant the submission of an intoxication charge to a jury, there must be sufficient evidence of intoxication in the record for a reasonable person to entertain a doubt as to the element of intent on that basis' ... . When making the determination as to whether an intoxication charge is warranted, the evidence must be viewed 'in the light most favorable to the defendant' ... . '[A]lthough a relatively low threshold exists to demonstrate entitlement to an intoxication charge' ... , '[e]vidence of intoxication, even under this standard, requires more than a bare assertion by a defendant that he [or she] was intoxicated' ... . * * * Here, in proving assault in the second degree, the People had the burden of establishing that defendant possessed the intent to 'cause serious physical injury to another person' ... . Although there was testimony that defendant was loud and obnoxious and was arguing with the bartender about the benefit poster just prior to the altercation, there was no testimony regarding interactions between the victim and defendant just prior to the altercation, which could have left a question in the jurors' minds as to defendant's intent and how things escalated as quickly as they did ... . The testimony at trial regarding defendant entering the bar with a beer, consuming two more drinks prior to being refused service, coupled with the surveillance footage, established that the suspect consumed multiple alcoholic beverages within a short period of time prior to the assault ... . Moreover ... the surveillance footage revealed that someone looking strikingly similar to defendant consumed several alcoholic beverages hours before the assault and that, upon returning to the bar, exhibited markedly different behavior from earlier in the evening. Additionally, ... the People's expert witness testified that consumption of alcohol in excess can alter one's personality, which supported his theory of voluntary intoxication." ***People v. Adrian*, 2022 N.Y. Slip Op. 05896, Third Dept 10-20-22**

EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW.

WHETHER A PRIVATE COLLEGE ACTED IRRATIONALLY OR ARBITRARILY AND CAPRICIOUSLY IN ELIMINATING FACULTY POSITIONS IN RESPONSE TO A BUDGET SHORTFALL IS PROPERLY DETERMINED IN AN ARTICLE 78 PROCEEDING; HERE THE COLLEGE FOLLOWED THE RELEVANT RULES IN THE COLLEGE MANUAL; SUPREME COURT SHOULD NOT HAVE RULED THE COLLEGE ACTED ARBITRARILY AND CAPRICIOUSLY.

The Third Department, reversing Supreme Court, determined the respondent private college followed the relevant provisions of the college manual in determining what programs and faculty positions to eliminate in response to a budget shortfall. Petitioners, members of the music department faculty whose positions were eliminated, did not demonstrate the respondents' decisions were irrational or arbitrary and capricious: "A private college, 'having accepted a charter and having thus become a quasi-governmental body, can be compelled in a[CPLR] article 78 proceeding to fulfill not only obligations imposed upon them by State or municipal statutes but also those imposed by their internal rules' ... Thus, a CPLR article 78 proceeding is the appropriate vehicle for judicial review of matters involving a determination of a professor's benefits and privileges of his or her academic tenure ... . As 'the administrative decisions of educational institutions involve the exercise of highly specialized professional judgment and these institutions are, for the most part, better suited to make relatively final decisions concerning wholly internal matters' ... . Deference should be accorded to a college's determination, 'and judicial review is circumscribed to whether the

[college] failed to substantially comply with its internal rules and whether its decision was arbitrary [and] capricious or made in bad faith ... . [T]he record confirms ... there were no procedural rule violations. ... [T]he record confirms that Supreme Court did not give appropriate deference to respondents' interpretation of the termination preference — as set forth in chapter 2, § E (1) (1.6) of the manual ... — and that Supreme Court improperly concluded that respondents' determination was arbitrary and capricious." ***Matter of Hansbrough v. College of St. Rose*, 2022 N.Y. Slip Op. 05915, Third Dept 10-20-22**

EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW, MUNICIPAL LAW.

NYC DEPARTMENT OF EDUCATION'S (DOE'S) DENIALS OF PETITIONERS' APPLICATIONS FOR ADMISSION TO THE CITY'S SPECIALIZED HIGH SCHOOLS (SHS'S) WERE NOT ARBITRARY AND CAPRICIOUS.

The Third Department, in a full-fledged opinion by Justice Clark, determined the NYC Department of Education's (DOE's) denials of petitioners' applications for admission to NYC's Specialized High Schools (SHS's) were not arbitrary and capricious. The opinion includes a detailed history of the SHS's and detailed explanations of the criteria for admission of students deemed to be disadvantaged within meaning of the SHS's Discovery program. The petitioners were not disadvantaged students. It is difficult to discern the precise nature of the petitioners' claims from the opinion, but it appears petitioners were questioning the propriety of the implementation of the Discovery program for disadvantaged students. ***Matter of C.K. v. Tahoe*, 2022 N.Y. Slip Op. 05899, Third Dept 10-20-22**

FAMILY LAW, EVIDENCE.

THE EVIDENCE INDICATED VISITATION WITH FATHER WOULD NOT BE IN THE BEST INTERESTS OF THE CHILD; FATHER'S PETITION FOR VISITATION SHOULD NOT HAVE BEEN GRANTED.

he Third Department, reversing Family Court, determined the evidence indicated visitation with father would not be in the best interests of the child and his petition for visitation should not have been granted: "[I]t is undisputed that the father has not lived with the child in over a decade and has only infrequently visited the child due to, among other things, his moving out of the area and frequently relocating around the United States. The father also made no effort to seek a formal award of visitation until 2019, more than seven years after the issuance of the 2012 custody order and over two years after he had last seen the child. This failure by the father to seek a visitation order or otherwise 'avail himself . . . of opportunities for visitation over a lengthy period of time is appropriately taken into account in considering whether visitation is appropriate' ... . [T]he mother testified as to how the father behaved in an irresponsible and harmful manner on the occasions when he did interact with the child and, although the father disputed those claims, we defer to Family Court's assessment that the father's testimony was not credible ... . * * * [T]he attorney for the child confirmed to Family Court, and now advises us, that the teenage child is upset by interactions with the father for a variety of reasons and does not wish to see him. The child's preference to have no in-person contact with the father is not dispositive, but is entitled to "considerable weight" given the child's age ...". ***Matter of Ajmal I. v. LaToya J.*, 2022 N.Y. Slip Op. 05912, Third Dept 10-20-22**

FAMILY LAW, EVIDENCE.

THE EVIDENCE DID NOT DEMONSTRATE A CHANGE IN CIRCUMSTANCES WARRANTING A MODIFICATION OF THE CUSTODY ARRANGEMENT, FAMILY COURT REVERSED.

The Third Department, revering Family Court, determined the evidence did not demonstrate a change in circumstances sufficient to warrant a modification of the custody arrangement: "The father's primary contention was that the change in his work schedule constituted a sufficient change in circumstances. In that regard, at the time that the 2016 order was entered, the father was working weekday night shifts. When the father filed the instant petition, his work schedule was such that he was working a continuous four-day-on, four-day-off schedule. However, in the midst of the hearing, the father revealed that his work schedule had again changed, this time to Monday through Thursday from 4:00 p.m. to 2:00 a.m., which aligned much more closely with his schedule as of the 2016 order. In our view, this does not constitute a sufficient change in circumstances to trigger a best interests analysis. As for the other factors relied upon by Family Court, there was no showing that the mother's new job, the parties' new residences, their new relationships, or the introduction of half-siblings and a stepsibling into the child's life 'constitute[d] changed circumstances evidencing any infirmity in the present custody arrangement' ... . Accordingly, the father failed to meet his burden of establishing the necessary change in circumstances, and the petition should have been dismissed." ***Matter of Kenneth N. v. Elizabeth O.*, 2022 N.Y. Slip Op. 05904, Third Dept 10-20-22**

FAMILY LAW, JUDGES, EVIDENCE.

THE EVIDENCE DID NOT SUPPORT FAMILY COURT'S SUA SPONTE FINDING THERE HAD BEEN A CHANGE IN CIRCUMSTANCES, I.E., A BREAKDOWN IN COMMUNICATION BETWEEN MOTHER AND FATHER, WARRANTING A MODIFICATION OF THE CUSTODY ARRANGEMENT AND AWARDING SOLE CUSTODY TO MOTHER.

The Third Department, reversing Family Court, determined the judge should not have, sua sponte, found there had been a change in circumstances, i.e., a breakdown in communication between mother and father, justifying awarding sole custody to mother. The evidence did not support the finding that communication had broken down: "... Family Court erred in determining that the parties being unwilling or unable to cooperatively raise the child constituted a change in circumstances and sua sponte modifying the prior order. ... Initially, the parties did provide some evidence as to how each has failed to properly communicate with respect to the child, such as the father being unresponsive to the mother's messages regarding child support payments and the mother failing to inform him that she had unenrolled the child from daycare. However, the mother acknowledged that the father has been able to communicate with her via the TalkingParents app to discuss issues regard-

ing the child, such as custodial exchange dates. The father similarly stated that he has been able to communicate with the mother via email. Thus, although their communication is strained at times, partially as a result of these proceedings, the record does not establish that it has completely broken down ... . Indeed, '[t]he record establishes that the parties' relationship was no more antagonistic during [the relevant time] period than it was at the time of the entry of the original order' ... , which, in this case, was only two months prior to the filing of the father's petition. Accordingly, Family Court should not have proceeded to a best interest analysis and, instead, should have continued the joint legal custody arrangement reflected in the prior order ...". ***Matter of Karl II. v. Maurica JJ.*, 2022 N.Y. Slip Op. 05905, Third Dept 10-20-22**

MEDICAL MALPRACTICE, NEGLIGENCE, EMPLOYMENT LAW, CIVIL PROCEDURE.

THE PLEADINGS ALLEGED THE NEGLIGENCE OF THE HOSPITAL'S "AGENTS AND EMPLOYEES" AND PLAINTIFF'S EXPERT POINTED TO THE ALLEGED NEGLIGENCE OF THE EMERGENCY ROOM PHYSICIAN WHO TREATED PLAINTIFF'S DECEDENT; THEREFORE THERE WAS A QUESTION OF FACT WHETHER THE HOSPITAL WOULD BE VICARIOUSLY LIABLE FOR THE EMERGENCY ROOM PHYSICIAN'S ACTS OR OMISSIONS.

The Third Department, reversing (modifying) Supreme Court, determined there were questions of fact whether the defendant hospital was vicariously liable for the acts or omissions of the emergency room doctor, Vaugeois, who treated plaintiff's decedent. Although the complaint did not name Vaugeois as a defendant, the pleadings alleged the negligence of defendant's agents and employees: "[Plaintiff's expert] points to Vaugeois, the hospitalist who admitted and initially rendered care to decedent, as the negligent party. ... [P]laintiff's bill of particulars speaks to defendant's 'agents and employees, specifically including' Smithem and Dey [who had been dropped from the suit]. The word 'including' is not exclusive, leaving open the prospect that vicarious liability was premised on the negligence of other providers. 'A hospital is responsible for the malpractice of . . . a professional whom it holds out as performing the services it offers, even though in fact he or she is an independent contractor' ... . At the very least, a question of fact is presented as to whether liability may be imposed against the hospital based on an apparent authority theory ... . 'Pursuant to that theory, under the emergency room doctrine, 'a hospital may be held vicariously liable for the acts of an independent physician if the patient enters the hospital through the emergency room and seeks treatment from the hospital, not from a particular physician' ...". ***Fasce v. Catskill Regional Med. Ctr.*, 2022 N.Y. Slip Op. 05906, Third Dept 10-20-22**

REAL PROPERTY LAW, CONTRACT LAW.

ALTHOUGH PLAINTIFF-SELLER MAY HAVE THOUGHT THE PARCEL OF REAL PROPERTY SHE SOLD WAS SMALLER THAN IT ACTUALLY WAS, DEFENDANT-BUYER WAS NEVER UNDER THAT IMPRESSION; THE COMPLAINT ALLEGING THE DEAL SHOULD BE RESCINDED BASED ON MUTUAL MISTAKE SHOULD HAVE BEEN DISMISSED.

The Third Department, reversing Supreme Court and granting defendant's motion for summary judgment dismissing the complaint, determined the plaintiff-seller of real property did not demonstrate the sale should be rescinded based upon mutual mistake. Plaintiff alleged she intended to transfer 20 acres but the deed described a 39-acre parcel. The parcel, however, was described in feet, not acres, and defendant was never under the impression the parcel was 20 acres in size. There was no "mutual mistake:" "[E]ven if plaintiff misunderstood the size of the parcel she ultimately conveyed in the corrected deed, she was bound by the contents of a deed she executed absent fraud or other wrongdoing by defendant that she does not suggest occurred, and any unilateral mistake on her part as to the acreage being conveyed by it 'resulted from [her] negligence in failing to take the means readily accessible of checking' its property description ...". ***Williams v. Sowle*, 2022 N.Y. Slip Op. 05914, Third Dept 10-20-22**

RETIREMENT AND SOCIAL SECURITY LAW.

PETITIONER, AN ADMINISTRATIVE LAW JUDGE, WAS INJURED WHEN A HEAVY SELF-CLOSING DOOR CLOSED ON HER AS SHE LEFT THE HEARING ROOM; THE INCIDENT WAS AN "ACCIDENT" WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW ENTITLING PETITIONER TO DISABILITY BENEFITS.

The Third Department, reversing the finding that petitioner was not injured in an "accident," determined petitioner was entitled to disability benefits. Petitioner, an administrative law judge, was injured leaving a hearing room when a heavy door closed on her: "[P]etitioner bears the burden of establishing that the disability was the result of an accident, which is defined as 'a sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact' ... . 'Under this standard, petitioner was required to demonstrate that [her] injuries were caused by a precipitating event that was sudden, unexpected and not a risk inherent in [her] ordinary job duties' ... . Although petitioner was aware of the hazard posed by the heavy, self-closing door, she reasonably expected that the supervisor, who was holding the door open, would continue to do so as petitioner walked through. Thus, petitioner demonstrated that her injuries were caused by a 'sudden [and] unexpected' precipitating event — the supervisor letting go of the heavy, self-closing door while petitioner walked through it — which was not a risk inherent in her job duties ...". ***Matter of Campbell v. DiNapoli*, 2022 N.Y. Slip Op. 05911, Third Dept 10-20-22**

TAX LAW, ADMINISTRATIVE LAW.

DISNEY WAS DEDUCTING ROYALTY PAYMENTS MADE BY AFFILIATES WHICH DID NOT PAY NEW YORK TAXES; THE TAX LAW WAS DESIGNED TO PLUG THAT "LOOPHOLE" AND THE DEDUCTIONS WERE PROPERLY DISALLOWED.

The Third Department, in a full-fledged opinion by Justice Fisher, determined the Tax Law did not permit petitioner to deduct royalty payments made by affiliates organized under the law of foreign countries pursuant to intellectual-property licensing agreements. The opinion is too detailed and comprehensive to be fairly summarized here: Essentially, the petitioner was deemed to be taking advantage of a "loophole" to avoid paying franchise taxes which had been addressed and closed by the Tax Law: "At the hearing, the Department's employees testified that

petitioner was denied the royalty deduction because the foreign affiliates it had received payments from were not New York taxpayers. The ALJ [Administrative Law Judge] found that '[t]he addback and exclusion provisions contained in Tax Law [§ 208 former] (9) (o) work in tandem to ensure that royalty transactions between related members are taxed only once' and do 'not escape taxation altogether.' In determining that petitioner's interpretation of the statute effectively allowed it to avoid taxation on that income, which went against the Legislature's intent in enacting the statute, the ALJ concluded that the Department's interpretation of the statute was rational and therefore petitioner was not permitted to deduct royalty payments from its income. When the Tribunal affirmed the findings of the ALJ, it added that 'the [L]egislature did not intend for a taxpayer to gain the benefit of the income exclusion . . . without the corresponding cost to a related member of the add back.' " ***Matter of Walt Disney Co. & Consol. Subsidiaries v. Tax Appeals Trib. of the State of N.Y.*, 2022 N.Y. Slip Op. 05898, Third Dept 10-20-22**

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