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FIRST DEPARTMENT

CRIMINAL LAW, FAMILY LAW, JUDGES, CIVIL PROCEDURE.

BG, AN ADOLESCENT OFFENDER (AO) WITHIN THE MEANING OF THE "RAISE THE AGE ACT," ASSAULTED A MAN AND THREW HIM ON SUBWAY TRACKS; A BYSTANDER JUMPED DOWN TO HELP THE ASSAULT VICTIM; THE BYSTANDER WAS KILLED BY A SUBWAY TRAIN WHICH STOPPED BEFORE REACHING THE ASSAULT VICTIM; THE JUDGE RULED THE MATTER SHOULD BE TRANSFERRED TO FAMILY COURT; THE PEOPLE SOUGHT A WRIT OF PROHIBITION WHICH WAS DENIED.

The First Department denied the People's request for a writ of prohibition to prevent respondent judge from sending a criminal case involving an adolescent offender (AO) to Family Court pursuant to the "Raise the Age Law." In criminal matters involving AO's the Raise the Age Law allows judges to decide whether the matter should be heard in Family Court. Here BG, the AO, assaulted the victim in a subway station and threw the victim on the tracks. A bystander jumped down to try to help the victim. The train was able to stop before reaching the assault victim, but the bystander who tried to help the victim was killed by the train: "Justice Semaj rejected the People's argument that BG engaged in 'heinous' conduct by pushing the surviving victim onto the tracks and leaving him there unconscious, observing that this argument was 'rebutted by the video footage offered by the People,' which showed that the surviving victim 'was conscious at the time he was pushed on to the tracks and even if he became unconscious once on the tracks, [BG] and another young person are seen going into the tracks and seemingly moving [him], possibly inadvertently, but . . . out of harm's way.' The court further noted that Hueston [the bystander] chose to jump onto the train tracks, and that BG left after he 'was told to leave by [Hueston].' ... . * * * 'A writ of prohibition against a judge may be issued only when a court acts or threatens to act without jurisdiction in a matter of which it has no power over the subject matter or where it exceeds its authorized powers in a proceeding over which it has jurisdiction' ... . 'Prohibition cannot be used merely to correct errors of law, however egregious and however unreviewable' … . The Court of Appeals has stressed that, in the context of criminal proceedings, the writ should be issued 'only when a court exceeds its jurisdiction or authorized power in such a manner as to implicate the legality of the entire proceeding, as for example, the prosecution of a crime committed beyond the county's geographic jurisdiction' ... . 'Although the distinction between legal errors and actions in excess of power is not always easily made, abuses of power may be identified by their impact upon the entire proceeding as distinguished from an error in a proceeding itself' ...". ***Matter of Clark v. Boyle*, 2022 N.Y. Slip Op. 06316, First Dept 11-10-22**

MUNICIPAL LAW, ADMINISTRATIVE LAW.

PETITIONER NYC FIREFIGHTER WAS DENIED ACCIDENTAL DISABILITY RETIREMENT (ADR) BENEFITS WITHOUT ANY EXPLANATION IN THE MEDICAL BOARD'S FINDINGS; THE MATTER WAS REMITTED FOR A NEW DETERMINATION BASED ON A RECORD ADEQUATE FOR REVIEW.

The First Department, annulling the denial of accidental disability retirement (ADR) benefits in this firefighter-disability case, determined that the Medical Board's failure to explain the reasons for its conclusion there was no accident and the injuries were not debilitating required remittal to the Medical Board and a new determination by the Board of Trustees with a record adequate for review: "[T]he Medical Board found petitioner to be disabled on account of the left shoulder injuries he sustained on March 22, 2018. However, citing 'inconsistencies' and a 'lack of witnessed accounts . . . that would suggest . . . an accident,' the Board denied petitioner an ADR benefit. When the insufficient explanation was raised before the Board of Trustees, they acknowledged that a witness statement was not necessary, and stated that they did not understand what the Medical Board was referring to with regard to inconsistencies in the manner of petitioner's injuries. Nevertheless, when the Board of Trustees reconsidered the matter, it simply took a vote on petitioner's application without any deliberation or indication as to why he had been denied an ADR benefit, issuing a conclusory denial without any explanation as to why they had adopted the Medical Board's unsupported statements about alleged inconsistencies concerning the nature of petitioner's injuries. The Medical Board failed to provide any factual basis concerning the alleged inconsistencies and why it did not believe petitioner's injuries to be accidental. Further, the determination of the Medical Board was devoid of any articulated basis for its conclusion that the limitations of petitioner's cervical and lumbar spine were not a debilitating or incapacitating condition for performing the duties of a firefighter. The failure to set forth an adequate statement of the factual basis for the determination forecloses the possibility of fair judicial review ...". ***Matter of Reynolds v. New York City Fire Pension Fund*, 2022 N.Y. Slip Op. 06330, First Dept 11-10-22**

SECURITIES, CORPORATION LAW.

PLAINTIFF ALLEGED DEFENDANT CORPORATION'S REGISTRATION STATEMENT CONTAINED FALSE AND MISLEADING CLAIMS WHICH INDUCED PLAINTIFF TO BUY STOCK IN DEFENDANT CORPORATION; THE CLAIMS IN DEFENDANT'S REGISTRATION STATEMENT WERE MERE PUFFERY AND WERE NOT ACTIONABLE VIOLATIONS OF THE SECURITIES ACT OF 1933.

The First Department, reversing Supreme Court, determined the complaint alleging several violations of the Securities Act of 1933 should have been dismissed. The complaint alleged that it was induced to buy stock by defendant's registration statement. The First Department concluded the statements not false or misleading and therefore were not actionable: "The ... registration statement ... includes the following statements: 'We believe we have created a financially strong company built upon a foundation of three thriving, independent brands with significant global growth potential.' 'New product development is a key driver of the long-term success of our brands. We believe the development of new products can drive traffic by expanding our customer base.' 'We face intense competition in our markets, which could negatively impact our business. . . Our ability to compete will depend on the success of our plans to improve existing products, to develop and roll-out new products, [and] to effectively respond to consumer preferences.' * * * ... [T]he statements were nonactionable immaterial puffery and/or nonactionable opinion ... . The statements did not become misleading by omission as a result of a failure to disclose a slight decline in 'same-store sales' for a single quarter's sales ...". ***City of Warwick Mun. Empls. Pension Fund v. Restaurant Brands Intl. Inc.*, 2022 N.Y. Slip Op. 06315, First Dept 11-10-22**,

SECOND DEPARTMENT

CIVIL PROCEDURE, JUDGES.

ALTHOUGH THE FAILURE TO FILE PROOF OF SERVICE IS NOT A JURISDICTIONAL DEFECT AND CAN BE CURED SUA SPONTE, HERE THE PLAINTIFFS DID NOT PROPERLY SEEK LEAVE TO EXCUSE THE FAILURE AND THE JUDGE DID NOT GRANT PLAINTIFFS LEAVE TO FILE A LATE PROOF OF SERVICE; THE SERVICE WHICH WAS ALLOWED TO STAND BY THE JUDGE WAS THEREFORE A NULLITY.

The Second Department, reversing Supreme Court, determined the judge should not granted plaintiffs leave to file late proof of service on defendant Joffe. Plaintiffs offered no excuse for the failure: "Supreme Court granted that branch of the plaintiffs' motion which was for a declaration that Joffe was properly served with process pursuant to CPLR 308(2) and 313. The court did not acknowledge or address Joffe's argument that the plaintiffs' proof of service had not been filed with the court within the requisite time. The court recognized, but did not reach the merits of, that branch of the plaintiffs' motion which was, in the alternative, pursuant to CPLR 306-b to extend the time to serve Joffe by 120 additional days. The court, in effect, denied the alternative branch of the plaintiffs' motion on the ground that it was academic. ... CPLR 308(2) provides that 'proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later.' ... [T]he failure to file timely proof of service does not constitute a jurisdictional defect ... . Rather, '[t]he failure to file proof of service is a procedural irregularity . . . that may be cured by motion or sua sponte by the court in its discretion pursuant to CPLR 2004' ... . Here, since the plaintiffs did not properly seek leave to excuse their failure to timely file proof of service, and the Supreme Court did not grant them leave to file proof of service beyond the statutory window (see CPLR 308[2]), the proof of service relating to Joffe was a nullity ... . Under the circumstances, the court should have denied that branch of the plaintiffs' motion which was for a declaration that Joffe was properly served with process pursuant to CPLR 308(2) and 313." ***Chunyin Li v. Joffe*, 2022 N.Y. Slip Op. 06227, Second Dept 11-9-22**

CIVIL PROCEDURE, JUDGES.

REPEATED FAILURES TO COMPLY WITH DISCOVERY ORDERS WITH NO EXCUSE WARRANTED STRIKING DEFENDANTS' ANSWER.

The Second Department, reversing Supreme Court, determined the defendants' failure to comply with discovery orders justified striking the answer: "Supreme Court improvidently exercised its discretion in denying that branch of the plaintiffs' motion which was pursuant to CPLR 3126 to strike the defendants' answer. The defendants' willful and contumacious conduct can be inferred from their repeated failures, over an extended period of time, to comply with the plaintiffs' discovery demands and the court's discovery orders without an adequate excuse ...". ***L.K. v. City of New York*, 2022 N.Y. Slip Op. 06236, Second Dept 11-9-22**

CRIMINAL LAW, ADMINISTRATIVE LAW.

DEFENDANT PLED GUILTY TO DWI AND THE JUDGE REVOKED HIS DRIVERS LICENSE FOR ONE YEAR; THE DMV SUBSEQUENTLY DENIED DEFENDANT'S APPLICATION TO REINSTATE HIS LICENSE; DEFENDANT'S MOTION TO VACATE HIS CONVICTION ON THE GROUND HE WAS NOT AWARE HE COULD PERMANENTLY LOSE HIS LICENSE SHOULD HAVE BEEN DENIED.

The Second Department, reversing Supreme Court, in a comprehensive decision worth consulting, determined defendant's motion to vacate his DWI conviction should not have been granted: Defendant pled guilty and Supreme Court revoked his driving license for one year. When defendant applied to reinstate his drivers license he was notified by the Department of Motor Vehicles (DMV) that, based on his prior DWI-related convictions or incidents, his application had been denied. Defendant brought a motion to vacate his conviction, arguing that

his guilty plea was not knowing and voluntary because the plea was based on his understanding that he would lose his license for one year. Supreme Court granted the motion and the People appealed: "The Supreme Court erred in granting the defendant's motion to vacate the judgment of conviction on the ground that his plea of guilty was not entered knowingly, voluntarily, and intelligently. The subject regulation that led to the denial of the defendant's application for relicensing did not exist at the time he entered his plea of guilty, and it would have been impossible for the court to inform the defendant of consequences flowing therefrom ... . 'The defendant's grievance lies with the enactment and enforcement of the new regulation, not the manner of his conviction' ... . To the extent that the potentially permanent license revocation authorized under the subject regulation is a consequence of the defendant's instant plea of guilty at all (*see People v Avital*, 64 Misc 3d 483, 485 [Town of East Fishkill Just Ct, Dutchess County] [denial of relicensing under 15 NYCRR 136.5 results not from any particular conviction, but from the applicant's 'complete driving history']), it is, as the defendant acknowledges, a collateral consequence of his plea ... . * * * ... [A] consequence of a conviction must represent an exceptionally severe liberty deprivation [i.e., deportation] in order to fall within the narrow category of collateral consequences of which a defendant must be advised at the time of entering the plea. ... [W]e cannot conclude that the permanent loss of a driver license fits into that category." ***People v. Maggio*, 2022 N.Y. Slip Op. 06262, Second Dept 11-9-22**

FAMILY LAW, JUDGES.

THE JUDGE SHOULD NOT HAVE PRECLUDED MOTHER FROM BRINGING FURTHER PETITIONS WITHOUT COURT APPROVAL.

The Second Department, reversing (modifying) Supreme Court, determined the judge should not have precluded mother from filing petitions for custody of a family offense without the court's permission: "[T]he provisions of the order ... directing the mother to seek permission from the court before filing any additional petitions, whether for custody or alleging a family offense, constituted an improvident exercise of discretion. Here, the mother filed one family offense petition, ultimately determined to be unfounded, and filed one related petition to modify the parties' custody arrangement. On this record, it cannot be said that the mother engaged in vexatious litigation or that her petitions were filed in bad faith ... " ***Matter of McDowell v. Marshall*, 2022 N.Y. Slip Op. 06248, Second Dept 11-9-22**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE. LANDLORD-TENANT, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

IN THIS FORECLOSURE ACTION, THE BANK FAILED TO PROVE DEFENDANT'S DEFAULT (EVIDENCE SUBMITTED IN REPLY NOT CONSIDERED) AND THE BANK FAILED TO DEMONSTRATE IT NOTIFIED A TENANT OF THE FORECLOSURE AS REQUIRED BY RPAPL 1303.

The Second Department, reversing Supreme Court, determined plaintiff bank (Merrill Lynch) in this foreclosure action failed to prove defendant's default and failed to notify a tenant on the property of the foreclosure. The bank's attempt to prove the default in reply papers was rejected: "Merrill Lynch failed to submit admissible evidence establishing the defendant's default. In support of its motion, Merrill Lynch submitted, inter alia, the affidavit of Theresia Ang, the vice president of its loan servicer and attorney-in-fact. However, Ang failed to attach the business records on which she relied, and thus, her averment to the defendant's default was hearsay lacking in probative value ... . Although Merrill Lynch attempted to submit evidence of the defendant's default in reply, a moving party 'cannot meet its prima facie burden by submitting evidence for the first time in reply' ... . RPAPL 1303 requires, inter alia, the party foreclosing a mortgage on residential property to provide the notice prescribed by the statute to any tenant of the property by certified mail, if the identity of the tenant is known to the foreclosing party (see id. § 1303[1][b]; [4]). Proper service of an RPAPL 1303 notice is a condition precedent to commencing a foreclosure action, and the 'foreclosing party has the burden of showing compliance therewith' ... . Here, Merrill Lynch failed to submit any evidence that it served any tenant of the subject property with the notices required by RPAPL 1303 by certified mail, or that it was not aware of any tenant's identity. In contrast, the defendant's affidavit and the affidavit of Richard Nicholson, submitted in opposition to Merrill Lynch's motion, established that Richard Nicholson resided at the subject property, that he paid rent, and that the mortgage loan servicer was aware that he resided at the subject property." ***Merrill Lynch Credit Corp. v. Nicholson*, 2022 N.Y. Slip Op. 06239, Second Dept 11-9-22**

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

THE BANK DID NOT DEMONSTRATE THE ALLONGE, A SEPARATE PAPER, WAS FIRMLY ATTACHED TO THE NOTE, AS REQUIRED BY THE UCC; THEREFORE THE BANK DID NOT DEMONSTRATE IT HAD STANDING TO BRING THE FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined the bank did not demonstrate standing to bring the foreclosure action: "[T]he plaintiff failed to establish, prima facie, that it had standing to commence the action based on its annexation of the note to the summons and complaint, since the plaintiff did not demonstrate that the purported allonge, which was on a piece of paper completely separate from the note, was 'so firmly affixed thereto as to become a part thereof,' as required by UCC 3-202(2) .." . ***Hudson City Sav. Bank v. Ellia*, 2022 N.Y. Slip Op. 06235, Second Dept 11-9-22**

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

THE BANK INCLUDED OTHER NOTICES WITH THE NOTICE OF DEFAULT, A VIOLATION OF THE SEPARATE ENVELOPE RULE (RPAPL 1304).

The Second Department, reversing Supreme Court, determined plaintiff bank included other notice with the notice of default, a violation of RPAPL 1304 (the separate envelope rule): " '[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent

to the commencement of a residential foreclosure action' ... . Here, the defendants established, prima facie, that the plaintiff did not comply with RPAPL 1304, since additional notices were sent in the same envelope as the 90-day notice required by RPAPL 1304, and a single notice was jointly addressed to both of the defendants ...". ***HSBC Bank USA, N.A. v. Schneps*, 2022 N.Y. Slip Op. 06234, Second Dept 11-9-22**

LIEN LAW.

FAILURE TO INCLUDE ALL THE INFORMATION REQUIRED BY LIEN LAW 201 IN THE NOTICE OF SALE DID NOT WARRANT CANCELLATION OF THE LIENS.

The Second Department, reversing Supreme Court, determined that the deficiencies in the notice of sale did not warrant cancellation of the liens: "Pursuant to Lien Law § 201-a, within 10 days after service of a notice of sale, the owner or any person entitled to notice may commence a special proceeding to determine the validity of a lien. Here, while service upon the petitioners of the notices of sale was in accordance with the proprietary lease and the cooperative by-laws, the notices of sale did not contain a statement setting forth '[t]he nature of the debt or the agreement under which the lien arose, with an itemized statement of the claim and the time when due,' as required under Lien Law § 201. Nevertheless, the deficiencies in the notices of sale did not provide a basis for cancellation of the liens ...". ***Matter of Ger v. Saxony Towers Realty Corp.*, 2022 N.Y. Slip Op. 06243, Second Dept 11-9-22**

PERSONAL INJURY, MUNICIPAL LAW.

PETITIONER SHOULD NOT HAVE BEEN GRANTED LEAVE TO FILE A LATE NOTICE OF CLAIM AGAINST THE COUNTY IN THIS SLIP AND FALL CASE.

The Second Department, reversing Supreme Court, determined petitioner in this slip and fall case should not have been allowed file a late notice of claim. The fact that county personnel responded to the scene of her injuries did not demonstrate the county had timely knowledge of the potential lawsuit. The late notice was served 50 days after the expiration of the 90 time-limit and therefore did not provide notice within a reasonable time. The petitioner's injuries did not constitute an adequate excuse. And the petitioner did not provide any evidence the county would not be prejudiced by the late notice: "[T]he fact that members of the Nassau County Police Department and a County ambulance responded to the scene and tended to her injuries, without more, cannot be considered actual knowledge of the essential facts constituting the claim against the County ... . The petitioner failed to present any evidence to demonstrate that the County had knowledge of the circumstances of the accident from which it could 'readily infer' that a 'potentially actionable wrong had been committed' by it ... . Moreover, the late notice of claim, served upon the County without leave of court 50 days after the 90-day statutory period had expired, was served too late to provide the County with actual knowledge of the essential facts constituting the claim within a reasonable time after the 90-day statutory period expired ... . The petitioner also failed to demonstrate a reasonable excuse for the failure to serve a timely notice of claim. The petitioner's conclusory assertion that her injuries prevented her from making timely service, without any supporting medical documentation or evidence, was insufficient to constitute a reasonable excuse ... . [T]he petitioner failed to come forward with 'some evidence or plausible argument' that the County will not be substantially prejudiced in maintaining a defense on the merits as a result of the delay in commencing this proceeding and the lack of timely, actual knowledge of the essential facts constituting the claim ...". ***Matter of Lang v. County of Nassau*, 2022 N.Y. Slip Op. 06245, Second Dept 11-9-22**

PERSONAL INJURY, MUNICIPAL LAW.

IN THIS SIDEWALK SLIP AND FALL CASE, THE TOWN DID NOT HAVE WRITTEN NOTICE OF THE DEFECT AND THE TOWN DEMONSTRATED THE "CREATION OF THE DEFECT" EXCEPTION TO THE WRITTEN-NOTICE REQUIREMENT DID NOT APPLY; THE DEFECT WAS THE RESULT OF DETERIORATION OF THE REPAIRED AREA OVER A 10-YEAR PERIOD.

The Second Department, reversing Supreme Court, determined the town demonstrated it did not create the sidewalk condition which allegedly caused plaintiff's slip and fall. Rather the sidewalk repair was done by the town 10 years ago and the current deteriorated condition had developed over time: "The Court of Appeals 'has recognized only two exceptions to the statutory rule requiring prior written notice, namely, where the locality created the defect or hazard through an affirmative act of negligence and where a 'special use' confers a special benefit upon the locality' Only the affirmative negligence exception is implicated in this case, and it 'is limited to work [done] by [a municipality] that immediately results in the existence of a dangerous condition' ... . The defendant was not required to eliminate all triable issues of fact with respect to the affirmative negligence exception to the prior written notice rule in order to satisfy its prima facie burden ... . Nevertheless, the defendant did eliminate all triable issues of fact with respect to that exception. In particular, the defendant submitted an affidavit of its employee, John Carroll, who averred that the asphalt patch would have been 'rolled smooth and level to remove any existing tripping hazard between the two existing concrete slabs,' but now, 'the tar was eroded from the patch' and '[p]ortions of the asphalt patch . . . appear to be missing.' Based on Carroll's 'observation of the asphalt repair as it exist[ed] in 2019,' he believed that the repair was '[more than] 10 years old' and that its separation from the concrete slabs 'would be caused by natural erosion, wear and tear over time, and/or in this case tree roots causing the concrete slabs to uplift, not by the method of its installation.' " ***Parthesius v. Town of Huntington*, 2022 N.Y. Slip Op. 06254, Second Dept 11-9-22**

THIRD DEPARTMENT

REAL ESTATE, CONTRACT LAW.

CONTRARY TO SUPREME COURT'S RULING, THE REAL ESTATE PURCHASE AGREEMENT, BY ITS TERMS, DECLARED THE CONTRACT CANCELLED IF THE INSPECTION REVEALED PROBLEMS AND THE PARTIES DID NOT AGREE ON HOW TO ADDRESS THOSE PROBLEMS WITHIN TEN DAYS; THE INSPECTION IN FACT REVEALED PROBLEMS AND NO AGREEMENT ON RESOLUTION WAS MADE WITHIN THE ALLOTTED TEN DAYS.

The Third Department, reversing Supreme Court, determined that the real estate purchase agreement was canceled in accordance with its own terms: "[P]laintiff's transmission of the form contract and rider constituted an offer, and the sellers counteroffered by signing and returning to plaintiff only the form contract without the rider. Plaintiff then accepted the counteroffer by proceeding with the inspections, as 'a counteroffer may be accepted by conduct' ... . We also agree with the court that plaintiff's counsel's May 18, 2020 letter did not constitute attorney disapproval of the contract under the attorney approval contingency. This letter merely acknowledged receipt of the signed contract and inquired as to the rider and other documents; in no way did it signal disapproval. ... Plaintiff's attorney, in his letter of June 17, 2020, notified the sellers' attorney that the property had failed multiple inspections, and provided a copy of the relevant inspection report. This conduct, in accordance with the language set forth in the inspection contingency, rendered the contract 'cancelled, null and void' unless plaintiff chose to defer cancellation for 10 days. Given that the letter from plaintiff's attorney also set forth potential ways in which the inspection issues could be resolved, we are satisfied that the 10-day option was exercised. That said, the parties did not reach a written agreement on these issues within 10 days as was expressly required pursuant to the inspection contingency ... " ***Savignano v. Play*, 2022 N.Y. Slip Op. 06307, Third Dept 11-10-22**

FOURTH DEPARTMENT

ATTORNEYS.

PLAINTIFF LAW FIRM SHOULD HAVE BEEN ALLOWED TO REPRESENT ITSELF IN ITS SUIT FOR ATTORNEY'S FEES AGAINST A FORMER CLIENT; ALTHOUGH THE ATTORNEYS DIRECTLY INVOLVED WITH THE FORMER CLIENT WERE DISQUALIFIED, DEFENDANT DID NOT DEMONSTRATE THE TESTIMONY OF THE DISQUALIFIED ATTORNEYS WOULD PREJUDICE PLAINTIFF LAW FIRM SUCH THAT DISQUALIFICATION OF THE ENTIRE FIRM WAS WARRANTED.

The Fourth Department, reversing Supreme Court, determined that plaintiff law firm, HoganWillig, could represent itself in a suit seeking payment from defendant volunteer fire company (SFC), a former client. The attorneys who were directly involved in representing the fire company were disqualified from this suit. The defendant argued the testimony of the disqualified attorneys would be prejudicial to HoganWillig, a violation of Rules of Professional Conduct rule 3.7[b][1]: "[W]e agree with HoganWillig that SFC failed to establish that 'it is apparent that the testimony [of the disqualified attorneys] may be prejudicial to [HoganWillig]' (Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7 [b] [1] ...). 'The word 'apparent' means that prejudice to the client must be visible, as opposed to merely speculative, conceivable, or imaginable,' i.e., the prejudice 'has to be a real possibility, not just a theoretical possibility' ... . Consistent therewith, a movant's 'vague and conclusory' assertions are insufficient to establish that an attorney's testimony may be prejudicial to the client ... . * * * Here, the court erred in failing to 'consider such factors as [HoganWillig's] valued right to choose its own counsel, and the fairness and effect in the particular factual setting of granting disqualification' ... . 'Disqualification denies a party's right to representation by the attorney of its choice,' and we conclude under the circumstances of this case that depriving HoganWillig of its right to represent itself in the present action is particularly unwarranted given that counsel and client are one and the same ... . As the court properly determined when it first considered the original motion, whether HoganWillig thinks it is desirable, despite the disqualification of three of its attorneys, to continue representing itself is a strategic decision that should be left to HoganWillig." ***Hoganwillig, PLLC v. Swormville Fire Co., Inc.*, 2022 N.Y. Slip Op. 06331, Fourth Dept 11-10-22**

CIVIL PROCEDURE, APPEALS, FORECLOSURE.

THE SIX-MONTH PERIOD FOR REFILING A COMPLAINT AFTER DISMISSAL (CPLR 205(A)) BEGAN TO RUN ONLY WHEN THE APPEAL OF THE DENIAL OF THE MOTION TO VACATE THE DISMISSAL WAS EXHAUSTED.

The Fourth Department, reversing Supreme Court, determined the six-month period for filing a new complaint after dismissal started to run when the appeal of the denial of the motion to vacate the dismissal was exhausted: "Where a plaintiff has sought to appeal as of right from the denial of a motion to vacate the dismissal of its action, the action terminates for purposes of CPLR 205 (a) when the appeal 'is truly 'exhausted,' either by a determination on the merits or by dismissal of the appeal, even if the appeal is dismissed as abandoned' ... . 'Here, the dismissal of the 2012 action 'did not constitute a final termination of that action within the meaning of CPLR 205 (a) because plaintiff's predecessor in interest was statutorily authorized to file a motion to vacate [the dismissal] and to appeal from the denial of that motion' ... . The 2012 action thus terminated for purposes of CPLR 205 (a) on November 30, 2018, when this Court dismissed the appeal and plaintiff's predecessor in interest thereby exhausted its right of appeal ... . Inasmuch as the instant action was commenced within six months of November 30, 2018, we conclude that it was timely commenced." ***MTGLQ Invs., LP v. Zaveri*, 2022 N.Y. Slip Op. 06335, Fourth Dept 11-10-22**

CIVIL PROCEDURE, CONTRACT LAW.

THE NOTE REQUIRED THE APPLICATION OF FLORIDA SUBSTANTIVE AND PROCEDURAL LAW TO THE "TERMS OF THE DOCUMENTS" BUT SPECIFICALLY CONTEMPLATED A SUIT IN EITHER NEW YORK OR FLORIDA; THEREFORE SUPREME COURT SHOULD NOT HAVE INTERPRETED THE CHOICE OF LAW PROVISIONS TO RULE OUT A NEW YORK LAWSUIT.

The Fourth Department, reversing Supreme Court, determined that the terms of the note which required the application of Florida law did not preclude bringing the action in New York. The language in the note indicated the parties intended suit to be brought either in New York or Florida: "[Supreme Court] stated in its decision that, 'having elected to have the 'procedur[al] laws of the State of Florida' apply exclusively in this action, the [p]laintiff could not rely on any of the provisions of New York's Civil Practice Law and Rules in prosecuting this action.' The court relied on CPLR 101, which the court quoted in its decision as providing, in pertinent part, that '[t]he civil practice law and rules shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute' ... . The court ... concluded that, due to the perceived conflict between the contractual choice-of-law provisions and CPLR 101, it could not grant the [plaintiff's summary judgment] motion. * * * 'Contractual '[c]hoice of law provisions typically apply to only substantive issues' ... , although parties can agree otherwise. Here, the note provides that '[t]he terms' of the documents are to be governed by the substantive and procedural rules of Florida, but that does not establish that the rules of Florida were intended to govern the procedures of the New York State court system, which would effectively preclude any action on the note in New York. Indeed, the note itself provides that venue for any action related to the note may be in either 'Onondaga County, New York or Broward County, Florida.' Thus, the parties anticipated that New York courts could and would be able to handle a judicial action related to the note ...". ***Bankers Healthcare Group, LLC v. Pasumbal*, 2022 N.Y. Slip Op. 06334, Fourth Dept 11-10-22**

CONTEMPT, APPEALS, FAMILY LAW.

DIRECT APPEAL, AS OPPOSED TO AN ARTICLE 78, WAS APPROPRIATE IN THIS CONTEMPT PROCEEDING; MOTHER SHOULD HAVE BEEN GIVEN THE OPPORTUNITY TO ARGUE AGAINST THE CONTEMPT ADJUDICATIONS.

The Fourth Department, reversing Supreme Court, determined direct appeal of the contempt adjudications in this custody matter, as opposed to an Article 78 action, was appropriate under the circumstances. The contempt adjudications were vacated because mother was not given the opportunity to argue she should not be held in contempt: "[T]he mother's challenge to the summary contempt adjudications is properly raised via direct appeal from the order under the circumstances of this case. Although a direct appeal from an order punishing a person summarily for contempt committed in the immediate view and presence of the court ordinarily does not lie and a challenge must generally be brought pursuant to CPLR article 78 to allow for development of the record (see Judiciary Law §§ 752, 755 ...), an appeal from such an order is appropriately entertained where, as here, there exists an adequate record for appellate review ... . With respect to the merits, '[b]ecause contempt is a drastic remedy, . . . strict adherence to procedural requirements is mandated' ... . Here, we conclude that the court committed reversible error by failing to afford the mother the requisite 'opportunity, after being 'advised that [she] was in peril of being adjudged in contempt, to offer any reason in law or fact why that judgment should not be pronounced' ...". ***S.P. v. M.P.*, 2022 N.Y. Slip Op. 06377, Fourth Dept 11-10-22**

CRIMINAL LAW.

UNAUTHORIZED USE OF A VEHICLE THIRD DEGREE IS A LESSER INCLUSORY COUNT OF GRAND LARCENY FOURTH DEGREE.

The Fourth Department determined the unauthorized use of a vehicle third degree count should have been dismissed as a lesser inclusory count of grand larceny fourth degree: "[T]he part of the judgment convicting defendant of unauthorized use of a vehicle in the third degree must be reversed and count two of the indictment dismissed because that offense is a lesser inclusory concurrent count of count one, grand larceny in the fourth degree ...". ***People v. Mitchell*, 2022 N.Y. Slip Op. 06359, Fourth Dept 11-10-22**

CRIMINAL LAW, ATTORNEYS, JUDGES.

DEFENSE COUNSEL STATED DEFENDANT'S PRO SE MOTION TO WITHDRAW THE PLEA WAS WITHOUT MERIT; DEFENSE COUNSEL AND THE COURT INCORRECTLY TOLD THE DEFENDANT THE ISSUES RAISED IN THE MOTION TO WITHDRAW HAD BEEN DECIDED IN A PRIOR APPEAL: DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE.

The Fourth Department, remitting the matter to determined defendant's pro se motion to withdraw his plea, determined defendant did not receive effective assistance of counsel. Counsel stated the pro se motion did not have merit, taking a position adverse to the client's position. In addition, defense counsel and the court incorrectly told defendant that the issues raised in defendant's motion to withdraw the plea had been determined in a prior appeal: "When defense counsel takes a position adverse to his or her client, 'a conflict of interest arises, and the court must assign a new attorney to represent the defendant on the motion' ... . Here, by stating that there were no grounds for defendant's pro se motion, defense counsel essentially said that it lacked merit, which constitutes taking a position adverse to defendant ... . It appears from the record that defense counsel advised defendant that the issues raised by defendant in his pro se motion to withdraw his plea had already been decided against him in the prior appeal. The court agreed with defense counsel's interpretation of our ruling. Both defense counsel and the court were incorrect." ***People v. Hemingway*, 2022 N.Y. Slip Op. 06356, Fourth Dept 11-10-22**

CRIMINAL LAW, EVIDENCE.

A WITNESS WHO WOULD HAVE TESTIFIED THE COMPLAINANT IN THIS SEXUAL ABUSE PROSECUTION HAD OFFERED TO GIVE FALSE TESTIMONY ABOUT THE WITNESS'S BOYFRIEND SHOULD HAVE BEEN ALLOWED TO TESTIFY.

The Fourth Department, reversing defendant's conviction in this sexual abuse prosecution, determined a witness who would have testified about the complainant's offer to give false testimony about the witness's boyfriend should have been allowed to testify: "County Court erred in precluding him from calling a witness who would testify that the complainant offered to make a false allegation of abuse against the witness's boyfriend. 'Questioning concerning prior false allegations of rape or sexual abuse is not always precluded . . . , and the determination whether to allow such questioning rests within the discretion of the trial court' ... . Evidence of a complainant's prior false allegations of rape or sexual abuse is admissible to impeach the complainant's credibility where a 'defendant establishe[s] that the [prior] allegation may have been false[, and] . . . that the particulars of the complaints, the circumstances or manner of the alleged assaults, or the currency of the complaints were such as to suggest a pattern casting substantial doubt on the validity of the charges made by the complainant' ... . Here, based on the proffer made at trial, defendant's proposed witness would have testified that the complainant offered to knowingly make a false allegation against the witness's boyfriend and that this conduct took place around the same time as the first incident alleged against defendant and just months before the second such incident. Further, per defense counsel's proffer, the nature and circumstances of the allegations against defendant and the offered allegation against the witness's boyfriend were sufficiently similar to 'suggest a pattern casting substantial doubt on the validity of the charges' ...". ***People v. Andrews*, 2022 N.Y. Slip Op. 06366, Fourth Dept 11-10-22**

FREEDOM OF INFORMATION ACT (FOIL).

THE FOIL REQUEST FOR THE DISCIPLINARY RECORDS OF POLICE OFFICERS SHOULD NOT HAVE BEEN CATEGORICALLY DENIED PURSUANT TO THE PERSONAL PRIVACY EXEMPTION; RATHER THE RECORDS MUST BE REVIEWED AND ANY DENIALS OR REDACTIONS EXPLAINED.

The Fourth Department, reversing (modifying) Supreme Court, determined the request for the disciplinary records of police officers should not have categorically denied pursuant to the personal privacy exemption. The decision encompasses several important issues not summarized here and therefore should be consulted: "[T]he personal privacy exemption 'does not . . . categorically exempt . . . documents from disclosure', even in the case where a FOIL request concerns release of unsubstantiated allegations or complaints of professional misconduct. In order to invoke the personal privacy exemption here, respondents must review each record responsive to petitioner's FOIL request and determine whether any portion of the specific record is exempt as an invasion of personal privacy and, to the extent that any portion of a law enforcement disciplinary record concerning an open or unsubstantiated complaint of SPD [Syracuse Police Department] officer misconduct can be disclosed without resulting in an unwarranted invasion of personal privacy, respondents must release the non-exempt, i.e., properly redacted, portion of the record to petitioner ... . Inasmuch as respondents withheld the requested law enforcement disciplinary records concerning open and unsubstantiated claims of SPD officer misconduct in their entirety and did not articulate any particularized and specific justification for withholding any of the records, we conclude that respondents did not meet their burden of establishing that the personal privacy exemption applies ... . Respondents further failed to establish that 'identifying details' in the law enforcement disciplinary records concerning open and unsubstantiated claims of SPD officer misconduct 'could not be redacted so as to not constitute an unwarranted invasion of personal privacy' ... . Thus, the court erred in granting that part of respondents' motion seeking to dismiss petitioner's request for law enforcement disciplinary records concerning open or unsubstantiated claims of SPD officer misconduct in reliance on the personal privacy exemption under Public Officers Law § 87 (2) (b)." ***Matter of New York Civ. Liberties Union v. City of Syracuse*, 2022 N.Y. Slip Op. 06348, Fourth Dept 11-10-22**

Similar issues in: ***Matter of New York Civ. Liberties Union v. City of Rochester*, 2022 N.Y. Slip Op. 06346, Fourth Dept 11-10-22**

INSURANCE LAW, ATTORNEYS.

THE INFORMATION SOUGHT BY DEFENDANT IN THIS SUIT BY THE INSURER TO DISCLAIM COVERAGE WAS PROTECTED BY ATTORNEY-CLIENT PRIVILEGE AS MATERIAL PREPARED IN ANTICIPATION OF LITIGATION.

The Fourth Department, reversing (modifying) Supreme Court, determined that the information sought by defendant (Charleus) in this insurance coverage dispute was privileged as material prepared in anticipation of litigation. Plaintiff insurance company brought this suit against the defendant, who was injured in a car accident involving its insured, to disclaim coverage because of the insured's lack of cooperation: " '[A]n insurance company's claim file is conditionally exempt from disclosure as material prepared in anticipation of litigation' (... see CPLR 3101 [d] [2]). Nevertheless, material prepared in anticipation of litigation may be subject to disclosure upon 'a party's showing that he or she is in substantial need of the material and is unable to obtain the substantial equivalent of the material by other means without undue hardship' ... . Here, we conclude that the materials sought by Charleus and ordered by the court to be disclosed following its in camera review constitute material prepared in anticipation of litigation ... and were prepared at a time after plaintiff had already determined to reject and defend against the claim made by Charleus ... . Because the materials sought by Charleus and ordered to be disclosed by the court's order were prepared in anticipation of litigation and because Charleus has not made a showing justifying disclosure ... , we modify the order by denying the motion in its entirety and granting the cross motion." ***Merchants Preferred Ins. Co. v. Campbell*, 2022 N.Y. Slip Op. 06370, Fourth Dept 11-10-22**

INSURANCE LAW, CONTRACT LAW.

THE PROFESSIONAL LIABILITY EXCLUSION IN THE NAIL SALON'S INSURANCE POLICY IS NOT AMBIGUOUS AND EXCLUDES INJURY RESULTING FROM A "COSMETIC SERVICE;" PLAINTIFF ALLEGED SHE CONTRACTED AN INFECTION DURING A PEDICURE; COVERAGE WAS PROPERLY DENIED.

The Fourth Department, reversing Supreme Court, determined the "professional liability" exclusion from the insured nail salon's policy applied and coverage was properly denied. Plaintiff alleged she contracted an infection during a pedicure: "[T]he professional liability exclusion states—in clear and unmistakable language—that the insured's policy 'does not apply to 'bodily injury' . . . due to . . . [t]he rendering of or failure to render cosmetic . . . services or treatments.' We agree with defendant that, contrary to plaintiff's contention, '[t]here is no ambiguity in the wording of the exclusion' inasmuch as it is susceptible of only one reasonable interpretation: there is no coverage for bodily injury due to (i.e., 'caused by') the rendering (i.e., the performance) of a cosmetic service or treatment (e.g., a pedicure) ... . Thus, employing 'the test to determine whether an insurance contract is ambiguous [by] focus[ing] on the reasonable expectations of the average insured upon reading the policy and employing common speech' ... , we conclude that the exclusion is unambiguous because the average insured would understand the policy to exclude coverage for injuries caused by the performance of acts that constitute part of the pedicure service ...". ***Walker v. Erie Ins. Co.*, 2022 N.Y. Slip Op. 06332, Fourth Dept 11-10-22**

LABOR LAW-CONSTRUCTION LAW, AGENCY, PERSONAL INJURY.

THE TOWN CONTRACTED FOR THE CONSTRUCTION PROJECT ON WHICH PLAINTIFF WAS INJURED; DEFENDANT CONTRACTED WITH THE TOWN TO HANDLE BIDS FOR THE PROJECT; DEFENDANT WAS NOT AN AGENT FOR THE TOWN AND THE LABOR LAW §§ 240(1), 241(6), 200 AND NEGLIGENCE ACTIONS AGAINST DEFENDANT SHOULD HAVE BEEN DISMISSED.

The Fourth Department, reversing Supreme Court in this Labor Law §§ 240(1), 241(6), 200 and negligence action, determined the defendant was not an agent for the town which had contracted for the work plaintiff was doing when injured. Defendant had contracted with the town to prepare a bid package, solicit bids, obtain grant money and review bids for the construction project: " 'An agency relationship for the purposes of section 240 (1) arises only when work is delegated to a third party who obtains the authority to supervise and control the job' ... . 'Thus, unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law' ... . Pursuant to the express terms of the contract between the Town and the nonparty contractor—i.e., plaintiff's employer—as well as the terms of the contract between the Town and defendant, defendant had no control over the means or methods of the performance of the work by the contractor, and it also had no control over safety precautions for the workers at the construction site ... . For those same reasons, it was error to deny defendant's motion with respect to the Labor Law § 241 (6) cause of action ... . Defendant also established that it did not actually direct or control the work that brought about plaintiff's injuries, and plaintiff raised no issue of fact with respect thereto. Therefore, it was error to deny defendant's motion with respect to the Labor Law § 200 and common-law negligence causes of action ... " ***Smith v. MDA Consulting Engrs., PLLC*, 2022 N.Y. Slip Op. 06389, Fourth Dept 11-10-22**

MEDICAID, SOCIAL SERVICES LAW, CONTRACT LAW.

THE $40,000 PAID BY DECEDENT TO HER CAREGIVERS SHORTLY BEFORE DECEDENT ENTERED A NURSING HOME WAS PAYMENT FOR PAST SERVICES RENDERED PURSUANT TO A PERSONAL SERVICE AGREEMENT (PSA); IT WAS NOT AN "UNCOMPENSATED TRANSFER" SUBJECT TO THE 60-MONTH LOOKBACK FOR MEDICAID ELIGIBILITY.

The Fourth Department, reversing Supreme Court, determined the $40,000 paid to decedent's caregivers shortly before decedent entered a nursing home was pursuant to a valid personal service agreement (PSA) for past services rendered. Therefore the payment was not an "uncompensated transfer" to which the Medicaid 60-month lookback applied: " 'In determining the medical assistance eligibility of an institutionalized individual, any transfer of an asset by the individual . . . for less than fair market value made within or after the look-back period shall render the individual ineligible for nursing facility services' for a certain penalty period (Social Services Law § 366 [5] [d] [3]). The look-back period is the '[60]-month period[] immediately preceding the date that an [applicant] is both institutionalized and has applied for medical assistance' ... . When such a transfer has occurred, a presumption arises that the transfer 'was motivated, in part if not in whole, by . . . anticipation of a future need to qualify for medical assistance,' and it is the applicant's burden to establish his or her eligibility for Medicaid by rebutting the presumption ... . As pertinent here, 'an applicant may do so by demonstrating that he or she intended to receive fair consideration for the transfers or that the transfers were made exclusively for purposes other than qualifying for Medicaid' ... . Here, petitioner submitted documentary proof of the PSA, which was entered into in 2015, more than three years before decedent entered the nursing home. As noted above, while the PSA contemplated monthly payments for the personal care services, it also contemplated that decedent may make payments in advance. In addition, petitioner submitted bank statements demonstrating that decedent did not have money to pay for the services until after she received cash value for the insurance policies. Petitioner also submitted a monthly calendar that documented the care provided to decedent during the relevant time period. While the calendar did not provide the number of hours spent on each task, 'a daily log of hours worked and services rendered is not necessarily required' ...". ***Matter of Boldt v. New York State Off. of Temporary & Disability Assistance*, 2022 N.Y. Slip Op. 06344, Fourth Dept 11-10-22**

PERSONAL INJURY, EVIDENCE.

THE DEFENDANT CONSTRUCTION COMPANY DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE KNOWLEDGE OF THE SIGN ON THE SIDEWALK OVER WHICH PLAINTIFF ALLEGEDLY TRIPPED AND FELL AND DID NOT DEMONSTRATE IT WAS NOT RESPONSIBLE FOR THE PRESENCE OF THE SIGN ON THE SIDEWALK.

The Fourth Department, reversing (modifying) Supreme Court, determined defendant construction company (Pinto) did not demonstrate that it did not have constructive notice of the condition alleged to have caused plaintiff's slip and fall (a construction sign on the sidewalk) and that it did not create the condition: "Pinto failed to meet its initial burden on its cross motion with respect to constructive notice because its submissions 'failed to establish as a matter of law that the [dangerous] condition [was] not visible and apparent or that [it] had not existed for a sufficient length of time before the accident to permit [Pinto] or [its] employees to discover and remedy [it]' ... . Testimony from Pinto's superintendent that Pinto had a general policy of taking down and storing its construction signs at the end of each workday was insufficient to establish that Pinto lacked constructive notice of the dangerous condition because Pinto failed to establish that it had complied with that general policy prior to the occurrence of the incident in question ... . Pinto also failed to establish as a matter of law that it did not create the allegedly dangerous condition because its own submissions raise triable issues of fact with respect to that issue ... . There is no dispute that Pinto's submissions established that the sign plaintiff tripped over belonged to Pinto. Although the deposition testimony from Pinto's superintendent established that, at the time of the accident, Pinto had not been present at the work site for about a week, he did not know how the sign ended up on the ground or how long it had been there, and he only speculated that the sign may have been used by another contractor who failed to properly put it away." ***Brioso v. City of Buffalo*, 2022 N.Y. Slip Op. 06380, Fourth Dept 11-10-22**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

ALTHOUGH DEFENDANT WAS A VOLUNTEER AMBULANCE DRIVER AND WAS RESPONDING TO A CALL AT THE TIME OF THE TRAFFIC ACCIDENT, DEFENDANT WAS DRIVING HIS OWN PERSONAL PICKUP TRUCK, WHICH WAS NOT AN AUTHORIZED EMERGENCY VEHICLE; THEREFORE THE "RECKLESS DISREGARD" STANDARD OF CARE DID NOT APPLY TO DEFENDANT.

The Fourth Department, reversing (modifying) Supreme Court, determined that, although defendant driver was a volunteer ambulance driver responding to a call at the time of the accident, defendant was driving his own personal pickup truck which did not qualify as an emergency vehicle. Therefore the ordinary negligence, not the "reckless disregard," standard applied to the defendant: "We agree with plaintiff, however, that he met his initial burden on his cross motion of establishing that defendant was not operating an 'authorized emergency vehicle' at the time of the accident and thus that the reckless disregard standard of care does not apply. '[T]he reckless disregard standard of care in Vehicle and Traffic Law § 1104 (e) . . . applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b)' ... . [A]t the time of the accident, defendant was driving his personally-owned vehicle, which was not affiliated with Eden Emergency ... . The vehicle also did not comply with Vehicle and Traffic Law § 1104 (c), which requires authorized emergency vehicles to be equipped with 'at least one red light.' Moreover, at the time of the accident, defendant's vehicle was not being 'operated by' Eden Emergency because, while defendant was a volunteer with Eden Emergency, he was not on call at the time of the incident ... . Further, defendant did not qualify as an ambulance service. Defendant was not an 'individual . . . engaged in providing emergency medical care and the transportation of sick or injured persons' (Public Health Law § 3001 [2]). We also note that defendant was not an emergency medical technician ...". ***Spence v. Kitchens*, 2022 N.Y. Slip Op. 06355, Fourth Dept 11-10-22**

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