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FIRST DEPARTMENT

CIVIL PROCEDURE, ATTORNEYS.

DEFENDANT'S COUNSEL MISCALENDARED THE RETURN DATE FOR THE MOTION FOR SUMMARY JUDGMENT; THE MOTION TO VACATE THE JUDGMENT DUE TO LAW OFFICE FAILURE SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendant's motion to vacate the judgment due to law office failure should have been granted. Plaintiff's unopposed motion for summary judgment had been granted: "The law office failure of miscalendaring dates has been deemed a reasonable excuse ... . Here, defendant's counsel miscalendared the return date of plaintiff's summary judgment motion for July 1, 2021 rather than June 1, 2021. Counsel explained that it is his regular practice to calendar motion dates once a return date is set; to review his calendar daily and on or about the first of each month; and that he had been working part-time at home with a less robust system compared to his office ... . Accordingly, defendant proffered a reasonable excuse in the form of law office failure and should not be deprived of its day in court for counsel's error ...". ***First Am. Tit. Ins. Co. v. Successful Abstract, LLC*, 2022 N.Y. Slip Op. 07186, First Dept 12-20-22**

CIVIL PROCEDURE, PERSONAL INJURY, MUNICIPAL LAW.

DEFENDANT DID NOT UPDATE ITS ADDRESS FILED WITH THE SECRETARY OF STATE FOR SERVICE OF PROCESS AND DID NOT HAVE A REASONABLE EXCUSE FOR DEFAULT IN THIS SLIP AND FALL CASE; HOWEVER, NO REASONABLE EXCUSE NEED BE SHOWN IN A MOTION TO VACATE A DEFAULT PURSUANT TO CPLR 317; DEFAULT VACATED.

The First Department, reversing Supreme Court, determined defendant property-owner's (St. Andrews') motion to vacate the default judgment in this slip and fall case should have been granted. St. Andrews had not updated its address with the Secretary of State and did not have a reasonable excuse. However a reasonable excuse is not required by CPLR 317: "St. Andrews's principal demonstrated that he had received a letter notification of plaintiff's accident before commencement of the action which he forwarded to his insurance broker, but that he never received any further notice until he received the information subpoena. The principal of DP Realty [designated by St. Andrews to receive service of process] also averred that he was unaware of the summons and complaint ever having been received, and therefore it would not have forwarded any papers to St. Andrews. That evidence was sufficient under CPLR 317 to establish St. Andrews's lack of personal notice of the summons in time to defend. St. Andrews also demonstrated a meritorious defense in that the Yonkers City Code 'does not expressly make the landowner liable for failure to perform' the duty to clean snow and ice from the sidewalk, and an abutting landowner is not liable in the absence of such a statute for failure to clear snow, ice and dirt ... . [P]laintiff demonstrated that St. Andrews never updated its address with the Secretary of State, and thus could not show a reasonable excuse for its default under CPLR 5015(a)(1). However, no showing of a reasonable excuse is required under CPLR 317 ... , and it cannot be inferred solely from the failure to update defendant's address with the Secretary of State that defendant was deliberately avoiding receiving notice ... . In light of the strong public policy favoring resolution of cases on their merits ... , we find that St. Andrews demonstrated entitlement to vacatur under CPLR 317...". ***Gomez v. Karyes Realty Corp.*, 2022 N.Y. Slip Op. 07187, First Dept 12-20-22**

CONTRACT LAW, ATTORNEYS.

THE ELECTRONIC LEGAL RESEARCH (LEXISNEXIS) CONTRACT SIGNED BY PLAINTIFF ATTORNEY WAS NOT PROCEDURALLY OR SUBSTANTIVELY UNCONSCIONABLE.

The First Department, reversing Supreme Court, determined the legal research contract (LexisNexis) signed by plaintiff-attorney was not procedurally or substantively unconscionable: "A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made, namely, some showing of 'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party' ... . Procedural unconscionability examines the circumstances at the time an agreement was entered into, including the commercial setting, whether deceptive or high-pressured tactics were employed, whether a party had a reasonable opportunity to understand the terms of the contract, which party drafted the contract, whether fine print was used in an agreement as to material terms, whether there was an alternative supply for the goods or services in question, the experience and education of the party claiming unconscionability, whether there was disparity in the bargaining power, and whether a contract of adhesion is at issue ... . Whether a contract is procedurally unconscionable presents a question of law for the court although it is a fact-based determination ... . Plaintiff is an attorney, who did not assert any mental deficiencies, but only alleged duress from defendants' conduct in pursuing his signature on the 2020 Agreement. The urgency underlying plaintiff's signing the 2020 Agreement, without reading it, apart from promised lower service rates, is unclear. Plaintiff has not demonstrated how there is inequality in the bargaining power in this instance.

Plaintiff is on equal footing with the defendants in understanding contract law, as well as the consequences of signing a contract. Moreover, the terms in the 2020 Agreement were similar to the majority of the material terms in the parties' 2019 Agreement, which plaintiff does not claim was unconscionable." ***Kaufman v. Relx Inc.*, 2022 N.Y. Slip Op. 07192, First Dept 12-20-22**

CRIMINAL LAW, JUDGES, APPEALS.

THE WAIVER OF APPEAL WAS INVALID; THE SUPPRESSION MOTION SHOULD NOT HAVE BEEN DENIED ON A GROUND NOT RAISED BY THE PEOPLE; AND AN APPELLATE COURT CAN NOT CONSIDER ARGUMENTS ON ISSUES NOT RULED ON BELOW.

The First Department, reversing defendant's conviction by guilty plea and the denial of defendant's motion to suppress, over an extensive dissent, determined defendant's waiver of appeal was invalid, the motion to suppress should not have been denied on a ground not raised by the parties, and the appellate court cannot rule on issues not decided below: "[T]he court conflated defendant's appellate and trial rights by asking the defendant '[i]s that what you wish to do to waive your right to appeal and your other rights . . . by pleading guilty[?]' Instead, the majority of the court's colloquy of defendant's appellate rights focused on sentencing, on which the court itself needed clarification, not in differentiating trial from appellate rights. ... [T]he court made other errors in its oral colloquy that further justify invalidating defendant's waiver of his appellate rights. Specifically, the court failed to advise defendant of the nature of the right to appeal ... , erroneously mischaracterized the finality of the waiver ... , and failed to discuss the written waiver form with defendant ... . The detailed written waiver that defendant executed with counsel cannot save the numerous errors in the court's oral colloquy, as 'a written waiver is not a complete substitute for an on-the-record explanation of the nature of the right to appeal' ... . * * * ... [A]bsent 'on-the-record acknowledgements of [defendant's clear] understanding' ... of his appellate rights waiver, the presumption of defense counsel's competent representation during the plea negotiations is simply insufficient to overcome the court's deficient colloquy ... . * * * ... [T]he People never disputed that defendant had standing to challenge the search warrant. Therefore, the court should not have denied the motion 'based on a ground not raised by the People' ... . [T]he People's current arguments on appeal are precluded by People v LaFontaine (92 NY2d 470, 474 [1998]) because the suppression court did not rule upon these issues, and this Court may not affirm on those alternative grounds ...". ***People v. Bonilla*, 2022 N.Y. Slip Op. 07304, First Dept 12-22-22**

PERSONAL INJURY, LANDLORD-TENANT, CONTRACT LAW.

DEFENDANT OUT-OF-POSSESSION LANDLORD WAS NOT RESPONSIBLE FOR MAINTENANCE OF THE STAIRWAY WHERE PLAINTIFF ALLEGEDLY SLIPPED AND FELL.

The First Department, reversing Supreme Court, determined defendant in this stairway slip and fall case was an out-of-possession landlord who was not responsible for maintenance of the stairway treads: "Article 7(A)(i) of the lease imposed on Cava [the tenant] the obligation to maintain and repair the nonstructural portions of the demised premises ... . The testimonial evidence established that Cava, consistent with its obligations under the lease, assumed responsibility over the subject staircase ... . Although the lease granted defendants the right to re-enter to make repairs, the stairway condition was not a significant structural or design defect that was contrary to a specific statutory safety provision ...". ***Kamara v. 323 Pas Owner LLC*, 2022 N.Y. Slip Op. 07296, First Dept 12-22-22**

SECOND DEPARTMENT

CIVIL PROCEDURE, CONTRACT LAW.

THE DEFAULTING DEFENDANT WAS DEEMED TO HAVE ADMITTED ALL THE ALLEGATIONS IN THE BREACH-OF-CONTRACT COMPLAINT; THEREFORE WHETHER DEFENDANT CAUSED THE DAMAGES SUSTAINED BY PLAINTIFF SHOULD NOT HAVE BEEN CONSIDERED IN THE INQUEST; THE FACT THAT THE AMOUNT OF DAMAGES IS UNCERTAIN DOES NOT JUSTIFY THE FAILURE TO AWARD DAMAGES.

The Second Department, reversing Supreme Court, determined the defendant's default admitted all the allegations in the complaint. Therefore damages should have been awarded for breach of contract: "A defaulting defendant is 'deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them' ... . 'The sole issue to be determined at an inquest is the extent of damages sustained by the plaintiff' ... . Here, the inquest court erred in considering the question of whether the defendants caused the damages sustained by the plaintiff ... . [W]hile there is some uncertainty with respect to the plaintiff's claim of lost profits, 'when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A [party] violating [a] contract should not be permitted entirely to escape liability because the amount of the damages which [the party] has caused is uncertain' ...". ***LD Acquisition Co. 9, LLC v. TSH Trade Group, LLC*, 2022 N.Y. Slip Op. 07227, Second Dept 12-21-22**

CIVIL PROCEDURE, MUNICIPAL LAW, CONTRACT LAW.

THE SO-ORDERED STIPULATION BETWEEN THE PARTIES RENDERED THE RELATED CAUSE OF ACTION IN THE COMPLAINT MOOT; THE OTHER CAUSE OF ACTION RELIED ON SPECULATION ABOUT FUTURE EVENTS AND THEREFORE WAS NOT RIPE FOR JUDICIAL REVIEW (SECOND DEPT).

The Second Department, reversing Supreme Court, determined; (1) the stipulation between the two parties rendered the related cause of action in the complaint moot' and (2) the other cause of action in the complaint was based on speculation about future events and therefore

was not ripe for judicial review: "[P]ursuant to the mootness doctrine, courts are precluded 'from considering questions which, although once live, have become moot by passage of time or change in circumstances' ... . By contrast, if an 'anticipated harm is insignificant, remote or contingent the controversy is not ripe' for judicial review ... . 'To determine whether a matter is ripe for judicial review, it is necessary first to determine whether the issues tendered are appropriate for judicial resolution, and second to assess the hardship to the parties if judicial relief is denied' ... . [T]he first cause of action was resolved by the parties' so-ordered stipulation. ... [T]hat cause of action was rendered academic pursuant to the mootness doctrine ... . [T]he second cause of action relied on speculation about what the County and its various departments might do in response to future audits, and therefore the contemplated harm was both remote and contingent and the controversy was not ripe for judicial review ...". ***Kennedy v. Suffolk County*, 2022 N.Y. Slip Op. 07226, Second Dept 12-21-22**

FORECLOSURE, CIVIL PROCEDURE.

DEFENDANTS IN THIS FORECLOSURE ACTION WERE ENTITLED TO A HEARING PURSUANT TO CPLR 3408 RE: WHETHER THE BANK ENGAGED IN SETTLEMENT NEGOTIATIONS IN GOOD FAITH.

The Second Department, reversing Supreme Court, determined defendants in this foreclosure action were entitled to a hearing on whether plaintiff bank engaged in settlement negotiations in good faith: "… Supreme Court should have granted the defendants' cross motion for a hearing to determine whether the plaintiff negotiated in good faith pursuant to CPLR 3408(f). CPLR 3408 requires the parties in a residential foreclosure action to attend settlement conferences at an early stage of the litigation, at which they must 'negotiate in good faith to reach a mutually agreeable resolution' ... . [T]he circumstances surrounding its servicer's handling of the first two loan modification applications are 'relevant in the overall context of the parties' relationship and the negotiations between them,' and thus, are relevant to the good faith inquiry ... .[D]efendants submitted evidence that the plaintiff 'engaged in dilatory conduct by making piecemeal document requests, providing contradictory information, and repeatedly requesting documents which had already been provided'...". ***Investors Bank v. Brooks*, 2022 N.Y. Slip Op. 07224, Second Dept 12-21-22**

FORECLOSURE, EVIDENCE.

THE CALCULATIONS IN THE REFEREE'S REPORT WERE NOT SUPPORTED BY THE RELEVANT BUSINESS RECORDS; THE REFEREE'S REPORT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN CONFIRMED.

The Second Department, reversing Supreme Court in this foreclosure action, determined the calculations in the referee's report were not supported by the relevant business records and the report, therefore, should not have been confirmed: "[T]he affidavit of Tiffany Bluford, an employee of the plaintiff's servicing agent, submitted for the purpose of establishing the amount due and owing under the subject mortgage loan, 'constituted inadmissible hearsay and lacked probative value because the affiant did not produce any of the business records [she] purportedly relied upon in making [her] calculations' ... . Moreover, the affidavit of Andrea Kruse, another employee of the plaintiff's servicing agent, did not contain any averment as to the amount due and owing under the subject mortgage loan. Thus, the referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record ...". ***HSBC Bank USA, N.A. v. Delgado*, 2022 N.Y. Slip Op. 07223, Second Dept 12-21-22**

Similar issue and result in ***Wilmington Sav. Fund Socy., FSB v. Helal*, 2022 N.Y. Slip Op. 07259, Second Dept 12-21-22**

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

THE BANK DID NOT PROVE COMPLIANCE WITH THE NOTICE AND MAILING REQUIREMENTS OF RPAPL 1304 IN THIS FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank in this foreclosure action did not demonstrate compliance with the notice requirements of RPAPL 1304: "[P]laintiff failed to establish its strict compliance with RPAPL 1304. The plaintiff relied upon the affidavit of Summer Young, a vice president of the plaintiff's purported loan servicer. The affidavit was based upon Young's review of her employer's records, which were attached thereto. Young did not aver that she had personal knowledge of the mailing, and her affidavit did not contain proof of the standard office mailing procedure at the time the RPAPL 1304 notice allegedly was sent ... . Nor did the annexed records demonstrate, prima facie, that the requisite RPAPL 1304 mailings were completed ... . Because 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,' and therefore failed to establish, prima facie, its entitlement to judgment as a matter of law ... The plaintiff also failed to establish, prima facie, that it complied with the notice of default requirement of the mortgage agreement ...". ***HSBC Bank USA, N.A. v. Michalczyk*, 2022 N.Y. Slip Op. 07222, Second Dept 12-21-22**

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

PLAINTIFF IN THIS NON-JURY TRIAL DID NOT DEMONSTRATE COMPLIANCE WITH RPAPL 1303; JUDGMENT OF FORECLOSURE AND SALE REVERSED.

The Second Department, reversing the judgment (after a non-jury trial) of foreclosure and sale, determined plaintiff did not demonstrate compliance with RPAPL 1303: "RPAPL 1303 requires that a notice titled 'Help for Homeowners in Foreclosure' be delivered to the mortgagor along with the summons and complaint in residential foreclosure actions involving owner-occupied, one- to four-family dwellings ... . 'The statute mandates that the notice be in bold, 14-point type and printed on colored paper that is other than the color of the summons and complaint, and that the title of the notice be in bold, 20-point type' ... . 'Proper service of an RPAPL 1303 notice is a condition precedent

to the commencement of a foreclosure action, and noncompliance mandates dismissal of the complaint' … . The foreclosing party bears the burden of establishing compliance with RPAPL 1303 ... . Here, it is undisputed that the plaintiff did not offer any evidence at trial establishing that it complied with the specific requirements of RPAPL 1303, or that it delivered such notice to Nodumehlezi [defendant] at all. Contrary to the plaintiff's contention, the Supreme Court's reliance, in a posttrial decision, on documents that had been previously e-filed to establish the plaintiff's compliance with RPAPL 1303 was improper, since Nodumehlezi had no opportunity to rebut the previously filed affidavit of service and the related documents ...". ***21st Mtge. Corp. v. Nodumehlezi*, 2022 N.Y. Slip Op. 07212, Second Dept 12-21-22**

PERSONAL INJURY, MEDICAL MALPRACTICE, TRUSTS AND ESTATES, CIVIL PROCEDURE.

ALTHOUGH THE MEDICAL MALPRACTICE ACTIONS WERE TIME-BARRED, THE RELATED WRONGFUL DEATH ACTIONS, BROUGHT WITHIN TWO YEARS OF DEATH, WERE NOT.

The Second Department, reversing (modifying) Supreme Court, determined that, although the medical malpractice actions were time-barred, the related wrongful death actions, brought within two years of death, were not: "Although the plaintiff denominated the second cause of action as one for 'loss of services,' she alleged all the]elements necessary to plead a cause of action for wrongful death, including '(1) the death of a human being, (2) the wrongful act, neglect or default of the defendant by which the decedent's death was caused, (3) the survival of distributees who suffered pecuniary loss by reason of the death of decedent, and (4) the appointment of a personal representative of the decedent' ... . [T]he wrongful death cause of action was timely. EPTL 5-4.1 provides that an action for wrongful death 'must be commenced within two years after the decedent's death.' Here, the decedent died on November 9, 2013, and this action was commenced on November 9, 2015. Thus, 'the cause of action alleging wrongful death was timely commenced within two years of the decedent's death, since, at the time of [his] death, [the] cause of action sounding in medical malpractice was not time-barred' ...".***Proano v. Gutman*, 2022 N.Y. Slip Op. 07253, Second Dept 12-21-22**

PERSONAL INJURY, LIMITED LIABILITY COMPANY LAW, DEBTOR-CREDITOR.

THE CRITERIA FOR PIERCING THE CORPORATE VEIL IN THIS PERSONAL INJURY ACTION AGAINST A BAR OWNED AND OPERATED BY A LIMITED LIABILITY COMPANY WERE NOT MET; THE OVER $2,000,000 JUDGMENT AGAINST THE SOLE MEMBER OF THE LLC REVERSED.

The Second Department, reversing Supreme Court after a non-jury trial awarding plaintiff over $2,000,000, determined plaintiff was not entitled to pierce the corporate veil to hold defendant Traina, the sole member of defendant limited liability company (LLC), personally liable. Plaintiff brought a personal injury action against the bar owned and operated by the LLC and was awarded a default judgment: "Generally, a member of a limited liability company cannot personally be held liable for any debts, obligations or liabilities of the limited liability company, 'whether arising in tort, contract or otherwise' (Limited Liability Company Law § 609[a]). The concept of piercing the corporate veil is an exception to this general rule, permitting, in certain circumstances, the imposition of personal liability on members for the obligations of the limited liability company ... . ' ... [G]enerally . . . piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation [or LLC] in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the [party seeking to pierce the corporate veil] which resulted in [the party's] injury' ... . * * * ... [A]lthough Traina did not observe all corporate formalities, the evidence established that he ran a real business, with employees, customers, and vendors, and the petitioner presented no evidence that the LLC was undercapitalized or that Traina commingled the assets of the LLC with his own or used corporate funds for personal use ... . [W]hile the petitioner demonstrated that Traina exercised complete domination and control over the LLC, he failed to show that Traina's actions, including abandoning certain fixtures and equipment to his landlord, were for the purpose of leaving the LLC judgment proof or to perpetrate a wrong against the petitioner ... . [P]etitioner did not meet his burden of proof to establish that there was a basis to pierce the corporate veil ...". ***Matter of DePetris v. Traina*, 2022 N.Y. Slip Op. 07232, Second Dept 12-21-22**

THIRD DEPARTMENT

CIVIL PROCEDURE, FAMILY LAW.

THE HUSBAND DEMONSTRATED HE WAS ILL WHEN THE DIVORCE TRIAL WAS HELD AND THE WIFE MAY NOT BE ENTITLED TO A PORTION OF HIS WORLD TRADE CENTER ACCIDENTAL DISABILITY RETIREMENT BENEFITS BECAUSE PERSONAL-INJURY BENEFITS CONSTITUTE SEPARATE PROPERTY; THE HUSBAND'S MOTION TO VACATE THE DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED.

The Third Department, reversing Supreme Court in this divorce action, determined the husband's motion to vacate the default judgment should have been granted. The husband demonstrated he missed the trial because of illness and he had a meritorious argument that the World Trade Center accidental disability retirement benefits were personal-injury benefits which constituted his personal property: "Pursuant to CPLR 5015 ... a court may vacate an order 'upon the ground of excusable default, if such motion is made within one year' after such order ... . '[A] party seeking to vacate a default must establish a reasonable excuse for the default and a potentially meritorious . . . defense' to the underlying claim ... . Significantly, 'in recognition of the important public policy of determining matrimonial actions on the merits, the courts of this State have adopted a liberal policy with respect to vacating defaults in actions for divorce' ... . * * * ... [I]n support of his motion to vacate the default, the husband proffered an affidavit wherein he averred that on the day of the hearing he was suffering from shingles and, as such, he was in extreme pain, sleep deprived, disoriented and unable to leave his bed. The husband also submitted an affidavit from a physician's

assistant who diagnosed him with, and treated him for, shingles approximately two weeks prior to the date of the trial. She also averred that she saw the husband again the day following the missed trial and that she 'observed a noticeable progression of the shingles rash on [the husband's] body.' ... . [T]he husband claims that the wife is not entitled to the portion of his pension that is for World Trade Center accidental disability retirement benefits. 'While it is true that the portion of a disability pension which represents compensation for personal injuries is separate property, the party so claiming bears the burden of demonstrating what portion of the pension reflects compensation for personal injuries, as opposed to deferred compensation' ...". ***Zeledon v. Zeledon*, 2022 N.Y. Slip Op. 07279, Third Dept 12-22-22**

CONTRACT LAW.

THE PARTIES TO THE CONSTRUCTION CONTRACT DID NOT COMPLY WITH THE FORMAL REQUIREMENTS FOR CHANGE ORDERS; THEREFORE THE FORMAL REQUIREMENTS WERE WAIVED AND THE FAILURE TO COMPLY WAS NOT A BREACH.

The Third Department, reversing Supreme Court, determined the failure to follow the construction contract provisions for change orders was not a breach of contract: "[T]he parties' lack of compliance with the change order procedure contained in the contract did not constitute a breach. ... [T]he trial evidence established that the parties used informal text messages and emails in furtherance of project changes rather than following the formal, detailed change order process set forth in the contract. ... [A] written change order requirement included in a construction contract 'is not applicable where, as here, the conduct of the parties demonstrates an indisputable mutual departure from the written agreement and the changes were clearly requested by plaintiff and executed by defendant' ... Thus, the record amply demonstrates that the parties 'waived their contractual right to insist upon strict compliance' with the change order condition ...". ***107 S. Albany St., LLC v. Scott*, 2022 N.Y. Slip Op. 07276, Third Dept 12-22-22**

CORRECTION LAW, EMPLOYMENT LAW, ADMINISTRATIVE LAW, EVIDENCE.

PETITIONER, A FORMER CORRECTION OFFICER SEEKING REINSTATEMENT, WAS ENTITLED TO THE RECORDS OF THE PSYCHOLOGICAL EXAMINATION WHICH FOUND HIM UNFIT; THE WAIVER OF THE RIGHT TO REVIEW THOSE DOCUMENTS, SIGNED BY PETITIONER, WAS A NULLITY.

The Third Department, in a full-fledged opinion by Justice Pritzker, reversing Supreme Court, determined petitioner, a former correction officer seeking reinstatement, was entitled to discovery of the records of the psychological examination which found him unfit to serve as a correction officer. The court held that the waiver of the right to review such documents (signed by the petitioner at the outset) was a nullity: "[W]e do not agree that the limited review procedures established in Correction Law § 8 can lawfully be used to side-step and effectively eviscerate the robust protections set forth in 4 NYCRR 5.9 (e) (3), which directly apply to those seeking reinstatement under Civil Service Law § 71 ... . Nevertheless, although both statutes have different purposes — Correction Law § 8 is designed to eliminate applicants 'who exhibit psychological disorders that would indicate their unsuitability for the job' ... , whereas Civil Service Law § 71 was enacted for the 'protection of an employee separated from the service by reason of a disability resulting from occupational injury or disease' ... — both purposes can be achieved, and the statutes harmonized by permitting the use of Correction Law § 8 testing while preserving the review procedure set forth in 4 NYCRR 5.9 relative to employees falling within Civil Service Law § 71 ... . Notably, despite the use of Correction Law § 8 testing, this matter remains distinctly a Civil Service Law § 71 reinstatement case. ... [P]etitioner is minimally entitled to receive the clandestine psychological report that formed the very basis for the disqualification for reinstatement, as well as all other rights attendant to a hearing held pursuant to article 3 of the State Administrative Procedure Act. ... [T]o the extent that petitioner signed a waiver purporting to extinguish these rights, the waiver is a nullity inasmuch as respondent's policy requiring all applicants to sign the consent and release form is an unpromulgated rule under the definition of '[r]ule' within State Administrative Procedure Act § 102 (2) (a) (i), and therefore is without effect ...". ***Matter of Williams v. New York State Dept. of Corr. & Community Supervision*, 2022 N.Y. Slip Op. 07280, Third Dept 12-22-22**

CRIMINAL LAW.

THE FELONY COMPLAINT CHARGED DEFENDANT WITH RAPE FIRST (FORCIBLE COMPULSION); THE SUPERIOR COURT INFORMATION (SCI) CHARGED RAPE THIRD (LACK OF CONSENT); BECAUSE RAPE THIRD AS CHARGED IN THE SCI WAS NOT A LESSER INCLUDED OFFENSE OF RAPE FIRST AS CHARGED IN THE FELONY COMPLAINT, THE WAIVER OF INDICTMENT AND SCI WERE JURISDICTIONALLY DEFECTIVE.

The Third Department, reversing defendant's conviction by plea to a superior court information (SCI), determined the SCI did not charge the felony charged in the felony complaint (rape first) or a lesser included offense rendering the waiver of indictment and SCI jurisdictionally defective. The SCI charged rape third based upon lack of consent: "Although we acknowledge that 'it is unnecessary to forcibly compel another to engage in sexual acts unless that person is an unwilling participant' ... , it is nevertheless theoretically possible for one to use physical force to compel a victim to have sexual intercourse where the victim did not clearly express nonconsent. … [O]ne who commits the greater crime of rape in the first degree by forcible compulsion through physical force does not, by the same conduct, necessarily commit the lesser offense of rape in the third degree in which the victim expressly communicated his or her non-consent ... . Consequently, rape in the third degree as charged in the SCI to which defendant pleaded guilty is not a lesser included offense of rape in the first degree as charged in the felony complaint ...". ***People v. Odu*, 2022 N.Y. Slip Op. 07266, Third Dept 12-22-22**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT'S COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A VALID MOTION TO WITHDRAW THE PLEA; THE MOTION WAS MISCHARACTERIZED AS A MOTION TO VACATE THE CONVICTION AND WAS NOT SUPPORTED BY NECESSARY AFFIDAVITS; DEFENDANT'S SENTENCE WAS VACATED.

The Third Department, vacating defendant's sentence, determined defendant's second counsel was ineffective in filing a motion to withdraw the plea: "Instead of filing a motion to withdraw defendant's plea pursuant to CPL 220.60 (3), second counsel moved to vacate the judgment of conviction pursuant to CPL 440.10 (1) (h) based on generalized allegations, supported by his own 'information and belief,' that first counsel had failed to properly investigate the facts, interview witnesses, assess the strength of the People's case, file any motions or inform defendant of the consequences of pleading guilty. The People opposed the motion, noting that, inasmuch as defendant had yet to be sentenced , a motion pursuant to CPL 440.10 was premature. In reply, second counsel agreed that the motion was premature, presented the same allegations and asked that County Court nonetheless exercise its discretion to permit defendant to withdraw his plea, prompting the People to oppose the motion on the merits. By order entered September 14, 2017, County Court denied defendant's CPL 440.10 motion to vacate the judgment of conviction as premature; alternatively, the court treated the motion as one to withdraw the plea and denied it, noting, among other things, that the motion was deficient as it was supported only by second counsel's affirmation. * * * Although second counsel's mischaracterization of the subject motion does not, in and of itself, constitute ineffective assistance of counsel ... , the motion was defective in other ways. Specifically, despite County Court granting second counsel two weeks to prepare a motion to withdraw defendant's plea, he filed the motion in one day. In rushing his submission, second counsel failed to support the motion with affidavits from either defendant or first counsel, and he failed to incorporate any of the allegations that defendant made through the PSI; rather, second counsel opted to rely, exclusively, on his own 'information and belief' and submitted a general, pro forma motion that was facially deficient." ***People v. Williams*, 2022 N.Y. Slip Op. 07265, Third Dept 12-22-22**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THERE WAS DIRECT EVIDENCE DEFENDANT OWNED THE CAMERA WHICH WAS SET UP TO VIEW THE VICTIM'S BEDROOM, THERE WAS NO DIRECT EVIDENCE IT WAS THE DEFENDANT WHO ACTUALLY PLACED THE CAMERA ON THE NEIGHBOR'S PROPERTY; THEREFORE THE CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTION SHOULD HAVE BEEN GIVEN; CONVICTION REVERSED.

The Third Department, reversing defendant's conviction, determined defendant's request for the circumstantial evidence jury instruction should have been granted. Defendant was charged with setting up a camera on a neighbor's property to view the victim's bedroom. There was some direct evidence that the camera belonged to defendant. But the jury would have to rely on circumstantial evidence to find that the defendant had positioned the camera to view the victim: "[P]roof by direct evidence as to one element of a crime ... does not mean that a circumstantial evidence charge should be not given ... . [T]he record fails to disclose any eyewitness testimony — or any other proof — identifying defendant as the perpetrator who placed the camera on the neighbor's lawn ... . To conclude that defendant was the perpetrator, the jury had to make an inference based upon defendant's ownership of the camera and the pictures of him found therein. Because 'the People's proof relative to the identity of the perpetrator . . . was entirely circumstantial' ... County Court should have granted defendant's request for a circumstantial evidence charge ...". ***People v. Lamb*, 2022 N.Y. Slip Op. 07267, Third Dept 12-22-22**

CRIMINAL LAW, EVIDENCE.

THE MAJORITY CONCLUDED THE TRAFFIC STOP, THE 40-MINUTE DETENTION, THE CALLING OF DEFENDANT'S PAROLE OFFICER, AND THE SEARCH OF DEFENDANT'S CAR BY THE PAROLE OFFICER, WERE VALID; TWO DISSENTERS ARGUED THE JUSTIFICATION FOR FURTHER DETENTION AROSE ONLY AFTER THE JUSTIFICATION FOR THE LIMITED DETENTION BASED ON THE TRAFFIC STOP HAD DISSIPATED.

The Third Department, over a two-justice dissent, determined the traffic stop for rolling through a stop sign and the extended 40-minute detention and the search of the vehicle were valid. The dissenters argued that rolling through the stop sign justified only a limited detention. The facts described by the majority are too detailed to fairly summarize. When the officers stopped the car, they were aware of defendant's legal history and parole status. The defendant was outside the geographical limit of his parole conditions: The defendant's parole officer was called to the scene and he conducted a search of the car pursuant to parole rules: "Defendant's multiple and inconsistent explanations about his travels, which the police officers knew were false, coupled with his parole situation and his nervous demeanor throughout the encounter, combined to give the officers a founded suspicion of criminality … . As such, the police officers were authorized to extend the scope of the stop beyond its original justification by requesting consent to search defendant's vehicle and, upon denial, detaining defendant to await a canine sniff of the vehicle's exterior … . * * * Given that defendant was placed on lifetime parole in 1999 due to illegal narcotics activity, we conclude that Pirozzolo's [the parole officer's] decision to search the vehicle was reasonable and substantially related to the performance of his duties ... . **From the dissent:** Defendant did give conflicting answers in response to [officer] Linehan's inquiry, and County Court found that such answers, coupled with defendant's nervous demeanor and parole status, gave Linehan founded suspicion that criminality was afoot. These answers and behavior by defendant, however, came after the initial justification for stopping and detaining defendant had already dissipated ... . Indeed, between the time when Linehan effectuated the traffic stop and processed defendant's license and registration, Linehan did not observe anything suspicious by defendant so as to give him founded suspicion that criminality was afoot in order to continue defendant's detention ...". ***People v. Thomas*, 2022 N.Y. Slip Op. 07263, Third Dept 12-22-22**

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

IN THIS HOSTILE-WORK-ENVIRONMENT ACTION UNDER 42 U.S.C. § 1983 AND THE NYS HUMAN RIGHTS LAW, SOME OF THE DEFENDANTS, ALL CITY EMPLOYEES, WERE DEEMED PROTECTED FROM SUIT BY QUALIFIED IMMUNITY AS A MATTER OF LAW; WITH RESPECT TO THE EMPLOYEE WHO ALLEGEDLY MADE SEXUALLY INAPPROPRIATE COMMENTS TO PLAINTIFF, THERE WERE QUESTIONS OF FACT WHETHER QUALIFIED IMMUNITY WAS APPLICABLE.

The Third Department, reversing (modifying) Supreme Court, determined qualified immunity protected plaintiff's supervisors in this hostile-work-environment action under 42 U.S.C. § 1983 and the NYS Human Rights Law against the City of Albany and individual city employees. Plaintiff alleged a co-worker named Tierney made sexually inappropriate comments to her over a period of two years. The allegations against Tierney properly survived summary judgment, but the allegations against the defendants who played no role in the harassment, alleging supervisory inaction, should have been dismissed. Plaintiff had worked as a civilian dispatcher in the police department: "In the 42 USC § 1983 context, liability of an individual defendant is based on his or her 'personal involvement in the alleged constitutional deprivation' ... . Individual defendant liability only attaches when his or her own conduct is sufficiently severe and pervasive to create the hostile work environment; otherwise, that defendant is protected by qualified immunity ... . * * * Under state law, public officials are protected by qualified immunity for discretionary acts that are unlawful under the Human Rights Law unless 'they are undertaken in bad faith or without reasonable basis' ... . Hostile work environment claims under the Human Rights Law are evaluated under the same severe-or-pervasive standard as a claim brought pursuant to 42 USC § 1983 ... .* * * Although individual liability under 42 USC § 1983 may flow from a supervisor's inaction in the face of known harassment ... , the alleged individual inaction ... did not suffice to create the hostile work environment ... . We reach the same conclusion ... under the Human Rights Law, pursuant to which supervisors may be held individually liable to the extent that they aided and abetted conduct creating a hostile work environment (see Executive Law § 296 [6]). ... [D]efendants[] ... did not actively participate in the conduct creating the hostile work environment as required under the aiding-and-abetting provision ... . Even if plaintiff's Human Rights Law claim against them could proceed under a supervisory inaction theory, we would conclude that they are shielded by qualified immunity ...". ***Mahoney v. City of Albany*, 2022 N.Y. Slip Op. 07288, Third Dept 12-22-22**

FAMILY LAW, EVIDENCE, JUDGES.

ALTHOUGH TWO CHILDREN HAD BEEN REMOVED FROM MOTHER'S CARE AFTER NEGLECT FINDINGS AND MOTHER ALLEGEDLY CONCEALED HER PREGNANCY AND FAILED TO SEEK APPROPRIATE PRENATAL CARE, SUMMARY JUDGMENT FINDING MOTHER HAD NEGLECTED HER NEWBORN WAS NOT APPROPRIATE; MATTER REMITTED TO BE HEARD BY A DIFFERENT JUDGE.

The Third Department, reversing Family Court, determined summary judgment finding respondent mother had neglected and derivatively neglected her newborn baby was not appropriate. Two children had been removed from mother's care based on neglect findings. Mother allegedly had concealed her pregnancy and allegedly had not sought appropriate prenatal case. But triable issues of fact remained. The matter was sent back to be heard by a different judge: "Upon review of the record and considering the nature of the prior neglect findings, the passage of time, and the questions concerning the degree of progress made by respondent over that time, we find that there are triable issues of fact precluding summary judgment (see CPLR 3212 [b] ...). Petitioner's motion was centered upon the two prior findings of neglect and respondent's failure to abide by the corresponding orders of disposition ... . However, the petition itself acknowledged that respondent had recently become more compliant with petitioner, resulting in expanded visitation with her children, and had been making improvements in her engagement with services and communication skills. According to the petition, respondent had put together a safety plan for the subject child to live with her, and petitioner saw this as 'a strength' and was 'hopeful in working with' respondent on this plan. Further, petitioner pointed out in opposition to the motion that she had improved her housing and employment situation and ended a relationship with an abusive partner.... . Accordingly, the matter must be remitted for a fact-finding hearing concerning the allegations in the petition ... . Under the circumstances, we find it appropriate to remit to a different judge for the purpose of conducting the hearing." ***Matter of Ja'layna FF. (Jalyssa GG.)*, 2022 N.Y. Slip Op. 07271, Third Dept 12-22-22**

FAMILY LAW, JUDGES, CRIMINAL LAW, APPEALS.

THE ADMISSION ALLOCUTION IN THIS JUVENILE DELINQUENCY PROCEEDING, WHICH REQUIRES THAT THE JUDGE QUESTION THE JUVENILE AND A PARENT, FELL SHORT OF THE STATUTORY REQUIREMENTS IN THE FAMILY COURT ACT; PETITION DISMISSED.

The Third Department, reversing respondent's admission to criminal mischief in this juvenile delinquency proceeding, determined: (1) the validity of the admission was not moot despite the completion of the one-year placement, and the issue need to be preserved for review; and (2) the admission allocution was insufficient: "[R]espondent's argument that the plea allocution did not comply with Family Ct Act § 321.3 is not moot — despite the expiration of respondent's placement — because the delinquency determination challenged herein 'implicates possible collateral legal consequences' ... . Family Court must 'ascertain through allocution of the respondent and his [or her] parent or other person legally responsible for his [or her] care, if present, that (a) he [or she] committed the act or acts to which he [or she] is entering an admission, (b) he [or she] is voluntarily waiving his [or her] right to a fact-finding hearing, and (c) he [or she] is aware of the possible specific dispositional orders' (Family Ct Act § 321.3 [1]). Although respondent's mother was present at the April 2021 allocution, Family Court only asked her whether she had sufficient time to speak to respondent about the proceedings.... The record reflects that the court failed to question

respondent's mother regarding the acts to which respondent admitted, his waiver of the fact-finding hearing or her awareness of the possible dispositional options. As a result, Family Court's allocution fell short of the statutory mandate ...". ***Matter of Christian VV. (Christian VV.),* 2022 N.Y. Slip Op. 07275, Third Dept 12-22-22**

FAMILY LAW, JUDGES, EVIDENCE.

THE JUDGE'S FAILURE TO MAKE FINDINGS OF FACT IN THIS VISITATION PROCEEDING REQUIRED REMITTAL FOR A NEW HEARING.

The Third Department, reversing Family Court, determined the judge's failure to make findings of fact in the visitation proceedings required remittal: "Although the court recited that its determination was based upon the proof adduced at the fact-finding and Lincoln hearings, it did not make factual findings. Furthermore, the record is also not sufficiently developed in order for us to make an independent determination. In this regard, at the fact-finding hearing, the father withdrew his request for in-person visitation with the child and, on appeal, the father requests monthly telephone contact with the child. The mother testified that she opposed additional visitation than what was provided for in the 2013 order because the child showed signs of fear and apprehension, did not have a relationship with the father and was not engaged in writing letters to the father. The mother also testified that the child has a fear associated with prison and violence. Other than the mother's conclusory testimony, there was scant evidence, if any, demonstrating that the child having telephone contact with the father would be detrimental to the child's welfare ... . Moreover, even crediting the mother's testimony about the child's fear, it is unclear whether such fear relates to in-person visitation with the father at a prison or to telephone calls, as the father now requests. Because the record evidence is not sufficiently developed to determine whether the father should be awarded monthly telephone contact with the child, the matter must be remitted for a new hearing ...". ***Matter of Anthony T. v. Melissa U.*, 2022 N.Y. Slip Op. 07287, Third Dept 12-22-22**

FREEDOM OF INFORMATION LAW (FOIL), ATTORNEYS, DISCIPLINARY HEARINGS (INMATES), EVIDENCE.

THE REASONS FOR THE DENIAL OF ATTORNEY'S FEES AFTER PETITIONER'S SUCCESSFUL FOIL REQUEST MERELY PARROTED THE STATUTORY LANGUAGE FOR THE LAW-ENFORCEMENT AND SAFETY EXEMPTIONS WITHOUT ANY SUPPORTING FACTS; THEREFORE ATTORNEY'S FEES SHOULD HAVE BEEN AWARDED.

The Third Department, reversing Supreme Court, determined petitioner was entitled to attorney's fees associated with his ultimately successful FOIL request for the video of the incident which was the basis for the prison disciplinary proceedings. Attorney's fees were denied on the ground that the respondent had a reasonable basis for denying the request for the video. However the respondent's reasons for the denial merely parroted the relevant statutory language for the law-enforcement and safety exemptions, which was deemed insufficient: "In denying petitioner's initial FOIL request and the subsequent administrative appeal, respondent merely quoted the language from the Public Officers Law. It gave no factual explanation or justification for its blanket denial to release the video footage. Although respondent provided an affirmation by its general counsel in this CPLR article 78 proceeding, the affirmation once again merely quoted the statutory language and failed to explain or demonstrate how the footage was compiled for any law enforcement purposes. In a conclusory and speculative fashion, the affirmation referenced some investigations and adjudications, but failed to provide any factual details or explanation of same. Moreover, the affirmation failed to detail how the release of the video footage would affect or interfere with said investigations and adjudications. '[R]espondent[], by merely parroting the statutory language and otherwise failing to provide any adequate sort of harm risked by disclosure, ha[s] failed to meet [its] burden of proving that disclosure of the records would interfere with a pending law enforcement investigation' ... . The affirmation was equally deficient with regard to the safety exemption (see Public Officers Law § 87 [2] [f]), in that it was neither particularized nor specific and failed to articulate an explanation as to how the release of the video footage could potentially endanger or impair the lives of correction officers or their families." ***Matter of Prisoners' Legal Servs. of N.Y. v. New York State Dept. of Corr. & Community Supervision*, 2022 N.Y. Slip Op. 07277, Third Dept 12-22-22**

PERSONAL INJURY, CIVIL PROCEDURE, EMPLOYMENT LAW, MUNICIPAL LAW, WORKERS' COMPENSATION.

BOTH PLAINTIFF BUS DRIVER AND THE DRIVER OF THE CAR WHICH STRUCK PLAINTIFF'S BUS WERE DEEMED COUNTY EMPLOYEES IN A RELATED PROCEEDING; THEREFORE, PURSUANT TO THE COLLATERAL ESTOPPEL DOCTRINE, WORKERS' COMPENSATION WAS PLAINTIFF'S EXCLUSIVE REMEDY.

The Third Department, in a full-fledged opinion by Justice Egan, determined the doctrine of collateral estoppel required the dismissal of plaintiff bus-driver's causes of action against the estate of driver of the car which struck plaintiff's county bus, and against Jewish Family Services (JFS) for whom the decedent-driver was volunteering at the time of the accident. JFS and the county collaborated on a program to drive senior citizens to medical appointments. Plaintiff sued JFS under a respondeat superior theory. Pursuant to the Workers' Compensation Law, workers' compensation benefits were plaintiff's exclusive remedy because both she and the driver of the car had been deemed county employees in a related action. "A review of the papers supporting [the county's] cross motion [in the related proceeding] establishes, however, that [the county] focused upon the provisions of Workers' Compensation Law § 29 (6). Plaintiff thereafter had a full and fair opportunity to respond to that issue, which was discussed at length in the 2019 order. Indeed, Supreme Court ... expressly held that the provisions of that statute applied because 'both [plaintiff] and Hyde were within the same employ and acting within the scope of employment at the time the alleged injuries occurred, therefore rendering them co-employees which results in workers' compensation being the exclusive remedy.' Accordingly, under the circumstances of this case, the issue of whether plaintiff and Hyde were coemployees was 'actually litigated, squarely addressed and specifically decided' against plaintiff ... . Plaintiff's claim against JFS is premised upon the theory that JFS exercised sufficient control over Hyde to render

it vicariously liable for her negligence. The issue of whether plaintiff and Hyde are coemployees has been resolved against plaintiff with preclusive effect, however, and plaintiff's exclusive remedy for the negligence of Hyde is therefore workers' compensation benefits. As noted above, as Workers' Compensation Law § 29 (6) 'deprive[s] the injured employee of a right to maintain an action against a negligent coemployee, [it also] bars a derivative action which necessarily is dependent upon the same claim of negligence for which the exclusive remedy has been provided' ... . Thus, as 'plaintiff[] did not assert any allegation that [JFS] had committed an act constituting affirmative negligence,' the cross motion of JFS for summary judgment dismissing the complaint against it should have been granted ...". ***Bryant v. Gulnick*, 2022 N.Y. Slip Op. 07284, Third Dept 12-22-22**

PERSONAL INJURY, EVIDENCE.

THERE ARE QUESTIONS OF FACT ABOUT WHETHER THE EMERGENCY DOCTRINE SHOULD HAVE BEEN APPLIED TO DISMISS THE COMPLAINT IN THIS CHAIN-REACTION TRAFFIC ACCIDENT CASE; THE FACT THAT IT WAS SNOWING AND THERE WERE ICY ROAD CONDITIONS DID NOT SUPPORT THE APPLICABILITY OF THE EMERGENCY DOCTRINE AS A MATTER OF LAW.

The Third Department, reversing Supreme Court in this chain-reaction traffic accident case, determined there were questions of fact about the weather (snow and ice) and traffic conditions at the time of the accident. Plaintiff was a passenger in the middle car: Supreme Court had dismissed the complaint pursuant to the emergency doctrine: " 'Striking a vehicle in the rear is negligence as a matter of law absent a sufficient excuse' ... . The excuse proffered by defendants here, and accepted by Supreme Court, was that they were confronted with an emergency in the form of sudden snowfall and icy road conditions such that they could not avoid the respective collisions. '[I]n order for a driver to be entitled to summary judgment based upon the emergency doctrine, he or she must demonstrate, as a matter of law, that the emergency situation with which he or she was confronted was not of his or her own making and that his or her reaction was reasonable under the circumstances such that he or she could not have done anything to avoid the collision' ... . 'Whether [a] defendant was presented with an emergency is generally a question of fact' ... . In addition, 'the emergency doctrine is inapplicable [where a] defendant driver was aware of . . . icy road conditions and should have accounted for them properly' ... . '[A] driver is expected to maintain enough distance between himself [or herself] and cars ahead of him [or her] so as to avoid collisions with [slowing or] stopped vehicles, taking into account weather and road conditions' ...". ***Williams v. Ithaca Dispatch, Inc.*, 2022 N.Y. Slip Op. 07278, Third Dept 12-22-22**

PERSONAL INJURY, EVIDENCE, MUNICIPAL LAW, EMPLOYMENT LAW.

HYDE, THE DRIVER OF THE CAR IN WHICH PLAINTIFF WAS A PASSENGER, LOST CONTROL AND CROSSED INTO THE PATH OF AN ONCOMING COUNTY BUS; HYDE WAS FATALLY INJURED AND PLAINTIFF HAD NO MEMORY OF THE ACCIDENT; THE COUNTY'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE COMPLAINT AGAINST THE BUS DRIVER SHOULD HAVE BEEN GRANTED.

The Third Department, in a full-fledged opinion by Justice Egan, reversing (modifying) Supreme Court in this traffic accident case, determined the complaint against Bryant, the driver of the county bus involved in the accident, should have been dismissed. The driver of the car in which plaintiff was a passenger, Hyde, lost control of the car and crossed into the path of the oncoming bus. Hyde was fatally injured and plaintiff had no memory of the accident: "Bryant stated in her affidavit and deposition testimony that a mixture of snow and ice was falling in the leadup to the accident and that, although the road was coated in snow, she was still able to see the center line and fog lines. Bryant added that she was travelling two to five miles below the speed limit and was comfortable driving the bus in the weather conditions. As for the accident itself, Bryant stated that Hyde's vehicle entered her lane about 1½ car lengths in front of the bus and that she had a second to react before striking it, as well as that she had 'nowhere to go' to evade Hyde's vehicle and that she lightly applied her brakes in an effort to slow down without losing control of the bus. Plaintiff had no recollection of the accident, and nothing else in the record, including the police accident report, contradicted Bryant's version of events. Bryant accordingly established that she reacted reasonably when Hyde's vehicle entered her lane of traffic, and plaintiff's speculation that Bryant might have been able to avoid the collision had she been driving even further below the speed limit or taken other evasive action despite having "at most, a few seconds to react," did not raise a question of fact ...". ***Northacker v. County of Ulster*, 2022 N.Y. Slip Op. 07285, Third dept 12-22-22**

REAL PROPERTY LAW, TRESPASS.

THERE IS A QUESTION OF FACT WHETHER A PRIOR OWNER OF DEFENDANT'S PROPERTY WAS AWARE OF PLAINTIFF'S INSTALLATION OF A SEPTIC SYSTEM ON DEFENDANT'S PROPERTY GIVING RISE TO A PRESCRIPTIVE EASEMENT.

The Third Department, reversing (modifying) Supreme Court, determined there was a question of fact whether plaintiff was entitled to a prescriptive easement with respect to a septic system which encroached on defendant's property: "Plaintiff represents in her complaint that the septic system was installed '[a]t least as early as the 1920s.' The septic system was ostensibly concealed until 1997, when plaintiff replaced part of the tank. Moreover, a June 2000 letter from defendants' father, the prior owner of the property, to his attorney indicates that he was aware of a septic tank that had been installed too close to the well on plaintiff's land ... . Although the record is sparse on information concerning plaintiff's septic tank, the first indication that defendants sought any information from plaintiff concerning permission for the installation of the septic tank came in September 2018. In this respect, there is evidence suggesting a triable issue of fact as to whether plaintiff can establish that the septic system was installed with defendants' predecessors' knowledge and hostile to their interests. Accordingly, we find that defendants are not entitled to judgment as a matter of law as to whether plaintiff can establish her cause of action for a prescriptive easement in

relation to the presence of the septic tank ... which will ultimately implicate whether or not the tank constitutes a trespass ...". ***Sasscer v. Vesey*, 2022 N.Y. Slip Op. 07286, Third Dept 12-22-22**

FOURTH DEPARTMENT

ANIMAL LAW, NEGLIGENCE, CIVIL PROCEDURE.

THE STRICT LIABILITY STANDARD IN DOG-BITE CASES APPLIES HERE WHERE THE DOG WAS HARBORED BY THE DEFENDANT UNTIL THE ANIMAL SOCIETY COULD FIND SOMEONE TO ADOPT HIM; THE NEGLIGENCE STANDARD WHICH APPLIES TO A DOG-BITE IN A VETERINARIAN'S WAITING ROOM (WHERE THE VETERINARIAN IS THE DEFENDANT) IS NOT APPLICABLE.

The Fourth Department determined the plaintiff's motion to amend the complaint in this dog-bite case by adding a negligence cause of action was properly denied. The Court of Appeals recently held that a veterinarian could be liable for a dog-bite under a negligence theory where a dog in the veterinarian's waiting room bit a customer. Here the dog was owned by an animal society and had been placed with defendant O'Rourke until the society could find someone to adopt him: "Although O'Rourke does not own the dog that bit plaintiff, '[a]n owner's strict liability for damages arising from the vicious propensities and vicious acts of a dog 'extends to a person who harbors the animal although not its owner' ... . * * * Even assuming, arguendo, ... [plaintiff could assert] a negligence cause of action against O'Rourke, ... plaintiff would still have to establish in support of her negligence cause of action that O'Rourke had knowledge of the dog's alleged 'vicious propensities' ... . '[T]he vicious propensity notice rule has been applied to animal owners who are held to a strict liability standard, as well as to certain non-pet owners—such as landlords who rent to pet owners—under a negligence standard ...'. ... [P]laintiff's proposed negligence cause of action against O'Rourke does not allege that O'Rourke had knowledge of the dog's vicious propensities; instead, it alleges that O'Rourke was negligent because she did not 'investigate the subject dog accepted from the foster care program . . . before introducing it to her property, thereby creating a dangerous condition on the property which she had a nondelegable duty to keep reasonably safe.' The proposed complaint therefore fails to state a viable negligence cause of action against O'Rourke." ***Cicero v. O'Rourke*, 2022 N.Y. Slip Op. 07316, Fourth Dept 12-23-22**

ANIMAL LAW, NEGLIGENCE, LANDLORD-TENANT, CIVIL PROCEDURE, ATTORNEYS.

THERE WERE QUESTIONS OF FACT WHETHER DEFENDANTS IN THIS DOG-BITE CASE, INCLUDING THE LANDLORD, WERE AWARE OF THE DOG'S VICIOUS PROPENSITIES; THE PRE-DISCOVERY SUMMARY JUDGMENT MOTION WAS PREMATURE; THE ACTION WAS NOT FRIVOLOUS; THE DEFENDANTS WERE NOT ENTITLED TO ATTORNEY'S FEES.

The Fourth Department, reversing Supreme Court, determined defendants in this dog-bite case were not entitled to summary judgment, the action was not frivolous, and defendants were not entitled to attorney's fees. In addition, the summary judgment motion, made before discovery, was deemed premature. The court found there were questions of fact whether defendants, including the landlord (held to an ordinary negligence standard) were aware of the dog's vicious propensities. The relationships among the parties and the unsuccessful arguments made by defendants in support of summary judgment are too detailed to fairly summarize here: "... '[A]n owner of a dog may be liable for injuries caused by that animal only when the owner had or should have had knowledge of the animal's vicious propensities' ... . 'Once such knowledge is established, an owner faces strict liability for the harm the animal causes as a result of those propensities' ... . 'Strict liability can also be imposed against a person other than the owner of an animal which causes injury if that person harbors or keeps the animal with knowledge of its vicious propensit[ies]' ... . '[A] landlord who, with knowledge that a prospective tenant has a vicious dog which will be kept on the premises, nonetheless leases the premises to such tenant without taking reasonable measures, by pertinent provisions in the lease or otherwise, to protect persons who might be on the premises from being attacked by the dog may be held liable [under a negligence standard] to a person who while thereafter on the premises is bitten by the dog' ... . When, 'during the term of the leasehold[,] a landlord becomes aware of the fact that [the] tenant is harboring an animal with vicious propensities, [the landlord] owes a duty to protect third persons from injury . . . if [the landlord] 'had control of the premises or other capability to remove or confine the animal' ...". ***Michael P. v. Dombroski*, 2022 N.Y. Slip Op. 07318, Fourth Dept 12-23-22**

CIVIL PROCEDURE, CONTRACT LAW.

THE MOTION COURT ABUSED ITS DISCRETION BY DEEMING PLAINTIFF'S STATEMENT OF MATERIAL FACTS ADMITTED BECAUSE DEFENDANTS DID NOT SUBMIT A COUNTER STATEMENT OF UNDISPUTED FACTS.

The Fourth Department, reversing Supreme Court, determined that defendants' failure to submit a counter statement of undisputed facts (22 N.Y.C.R.R. § 202.8-g[b]) should not have been deemed an admission to plaintiff's statement of material facts. Therefore plaintiff's motion for summary judgment on the breach of contract cause of action should not have been granted: "Although the court had discretion under section 202.8-g (former [c]) to deem the assertions in plaintiff's statement of material facts admitted, it was not required to do so ... . '[B]lind adherence to the procedure set forth in 22 NYCRR 202.8-g' was not mandated ... . Here, considering that plaintiff's statement of material facts did not fully comply with 22 NYCRR 202.8-g (d) and ignored the pivotal factual dispute arising from discovery, we conclude that, although it would have been better practice for defendants to 'submit a paragraph-by-paragraph response to plaintiff's statement' ... , 'the court abused its discretion in deeming the entire statement admitted' ...". ***On the Water Prods., LLC v. Glynos*, 2022 N.Y. Slip Op. 07320, Fourth Dept 12-23-22**

CRIMINAL LAW.

THIS WAS NOT A CIRCUMSTANCE WHERE THE ACCUSATORY INSTRUMENTS, AS OPPOSED TO THE LANGUAGE OF THE FLORIDA STATUTE ALONE, CAN BE USED TO DETERMINE WHETHER THE FLORIDA CONVICTION ALLOWED DEFENDANT TO BE SENTENCED AS A SECOND CHILD SEXUAL ASSAULT FELONY OFFENDER; THE FLORIDA STATUTE SHOULD NOT HAVE BEEN DEEMED A PREDICATE FELONY.

The Fourth Department, reversing County Court, determined defendant's Florida conviction could not serve as a predicate felony allowing defendant to be sentenced as a second child sexual assault felony offender. This was not a circumstance where the underlying accusatory instruments, as opposed to the language of the Florida statute, can be the basis of a predicate-felony analysis. The appellate division's analysis is comprehensive and too detailed to fairly summarize here: "We agree with defendant that consideration of the facts and circumstances of the underlying Florida conviction is impermissible in this case ... . '[U]nder a narrow exception to the [general] rule, the underlying allegations must be considered when 'the foreign statute under which the defendant was convicted renders criminal several different acts, some of which would constitute felonies and others of which would constitute only misdemeanors [or no crime] if committed in New York' ... . 'In those circumstances, the allegations will be considered in an effort to 'isolate and identify' the crime of which the defendant was accused, by establishing 'which of those discrete, mutually exclusive acts formed the basis of the charged crime' ... . * * * ... [W]e conclude that '[b]ecause the [Florida] statute, itself, indicates that a person can be convicted of the [Florida] crime without committing an act that would qualify as a felony in New York (i.e., by [instead committing the misdemeanor of sexual misconduct]), defendant's [Florida] conviction for [lewd or lascivious battery] was not a proper basis for a predicate felony offender adjudication' ...". ***People v. Gozdziak*, 2022 N.Y. Slip Op. 07377, Fourth Dept 12-23-22**

CRIMINAL LAW, APPEALS, EVIDENCE.

AT THE TIME DEFENDANT RAN AS THE POLICE APPROACHED THERE WAS NO INDICATION THE POLICE WERE GOING TO CITE DEFENDANT FOR TRESPASS OR VIOLATION OF AN OPEN-CONTAINER LAW; DEFENDANT THEREFORE COULD NOT HAVE INTENDED TO OBSTRUCT GOVERNMENTAL ADMINISTRATION BY RUNNING; DEFENDANT'S RUNNING DID NOT PROVIDE PROBABLE CAUSE TO ARREST; THE PEOPLE'S ALTERNATIVE PROBABLE CAUSE ARGUMENT (TRESPASS AND OPEN-CONTAINER VIOLATION), ALTHOUGH PRESENTED TO THE SUPPRESSION COURT, WAS NOT RULED ON AND THEREFORE COULD NOT BE CONSIDERED ON APPEAL.

The Fourth Department, reversing the denial of defendant's suppression motion, determined the police did not have probable cause to arrest defendant for obstructing governmental administration. The People's alternative argument (the police had probable cause to arrest defendant for trespass and violation of an open-container law), made in a post-suppression-hearing memo, could not be considered on appeal because the suppression court did not rule on it. The police approached defendant as he was sitting at a picnic table on vacant property drinking from a cup. As the police approached, defendant got up from the table and ran: "[A]lthough the officers testified that they were planning to issue citations for violation of the open container ordinance as they approached the picnic table, there is no evidence that, when defendant jumped up from the table and attempted to run away, the officers were in the process of issuing the citations ... or that they had given any directive for defendant to remain in place while they issued such citations ... . The officers thus had no reasonable basis to believe that defendant had the requisite intent—i.e., the conscious objective—to prevent them from issuing citations ... . * * * ... [T]he court's determination that the officers had probable cause to arrest defendant for obstructing governmental administration, and that the searches and seizures were incident to a lawful arrest for that offense, 'was the only issue decided adversely to defendant at the trial court' ... . That determination 'alone constituted the ratio decidendi for upholding the legality of the [searches and seizures] and denying the suppression of evidence' … . Our 'review, therefore, is confined to that issue alone' ...". ***People v. Tubbins*, 2022 N.Y. Slip Op. 07317, Fourth Dept 12-23-22**

CRIMINAL LAW, CONSTITUTIONAL LAW.

UPON REMITTITUR FROM THE COURT OF APPEALS, THE APPELLATE DIVISION AGAIN FOUND THE SEVEN-YEAR PREINDICTMENT DELAY DID NOT DEPRIVE DEFENDANT OF DUE PROCESS OF LAW.

The Fourth Department, upon remittal from the Court of Appeals, determined defendant was not deprived of his right to due process by the seven-year preindictment delay. The Fourth Department had reached that same conclusion before the matter was heard by the Court of Appeals. The Court of Appeals sent the matter back because it found the Fourth Department did not correctly analyze the case under the *Taranovich* (37 NY2d 442, 445 [1975]) factors: "After review of defendant's contention upon remittitur, we conclude that he was not deprived of due process of law by the preindictment delay. In determining whether defendant was deprived of due process, we must consider the factors set forth in *Taranovich*, which are: '(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay' ... . '[N]o one factor [is] dispositive of a violation, and [there are] no formalistic precepts by which a deprivation of the right can be assessed' ... , but 'it is well established that the extent of the delay, standing alone, is not sufficient to warrant a reversal' ...". ***People v. Johnson*, 2022 N.Y. Slip Op. 07407, Fourth Dept 12-23-22**

CRIMINAL LAW, CONTEMPT.

PHONE CALLS TO THE PROTECTED PERSON SUPPORTED CRIMINAL CONTEMPT SECOND DEGREE BUT NOT CRIMINAL CONTEMPT FIRST DEGREE.

The Fourth Department determined phone calls, as opposed to "contact with the protected person," did not support the contempt first degree convictions. However the phone calls did support contempt second degree: "The ... five counts of criminal contempt in the first degree ... are based on evidence establishing that an order of protection had been issued against defendant for the benefit of a person and that on five occasions defendant made telephone calls from the Monroe County Jail to that person. ... ... With respect to those counts, the People were required to establish that defendant committed the crime of criminal contempt in the second degree ... , and that he did so 'by violating that part of a duly served order of protection . . . which requires the . . . defendant to stay away from the person or persons on whose behalf the order was issued' ... . Here, defendant was in jail when the calls at issue were made and the People failed to 'prove[], beyond a reasonable doubt, that defendant had any contact with the protected person during the charged incident[s]' ...". ***People v. Caldwell*, 2022 N.Y. Slip Op. 07325, Fourth Dept 12-23-22**

CRIMINAL LAW, EVIDENCE.

SUPPRESSION OF THE WEAPON WAS PROPERLY DENIED, BUT DEFENDANT'S STATEMENT ADMITTING POSSESSION OF THE WEAPON SHOULD HAVE BEEN SUPPRESSED; ALTHOUGH THE HARMLESS ERROR DOCTRINE IS RARELY APPLIED TO UPHOLD A GUILTY PLEA WHERE SUPPRSSION SHOULD HAVE BEEN GRANTED, HERE THE APPELLATE DIVISION DETERMINED THE PLEA WOULD NOT HAVE BEEN AFFECTED BY SUPPRESSION OF THE STATEMENT; THE DISSENT DISAGREED.

The Fourth Department, over a dissent, determined defendant's guilty plea to possession of a weapon could not have been affected by the failure to suppress his statement admitting possession of the weapon. The Fourth Department determined the statement was a product of unwarned custodial interrogation: "The term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response' ... . 'Although the police may ask a suspect preliminary questions at a crime scene in order to find out what is transpiring . . . , where criminal events have been concluded and the situation no longer requires clarification of the crime or its suspects, custodial questioning will constitute interrogation' ... . Here, after defendant had been restrained and handcuffed, an officer asked defendant, 'what's going on? Are you all right? Are you okay?' Defendant responded, 'you saw what I had on me. I was going to do what I had to do.' We conclude that the interaction between defendant and the officer 'had traveled far beyond a 'threshold crime scene inquiry' and, under the circumstances, it was likely that the officer's particular questions ' 'would elicit evidence of a crime and, indeed, it did elicit an incriminating response' ... . '[W]hen a conviction is based on a plea of guilty an appellate court will rarely, if ever, be able to determine whether an erroneous denial of a motion to suppress contributed to the defendant's decision, unless at the time of the plea he [or she] states or reveals his [or her] reason for pleading guilty' (*People v Grant*, 45 NY2d 366, 379-380 [1978]). 'The Grant doctrine is not absolute, however, and [the Court of Appeals has] recognized that a guilty plea entered after an improper court ruling may be upheld if there is no 'reasonable possibility that the error contributed to the plea' ...". ***People v. Robles*, 2022 N.Y. Slip Op. 07336, Fourth Dept 12-23-22**

CRIMINAL LAW, EVIDENCE.

AT THE TIME THE POLICE PARKED THE POLICE CAR BEHIND THE CAR IN WHICH DEFENDANT WAS A PASSENGER SUCH THAT THE DRIVER COULD NOT LEAVE THE AREA, THE POLICE DID NOT HAVE REASONABLE SUSPICION THAT THE OCCUPANTS OF THE CAR HAD COMMITTED A CRIME; DEFENDANT'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED; INDICTMENT DISMISSED.

The Fourth Department, reversing defendant's conviction and dismissing the indictment, determined the police did not have the requisite reasonable suspicion when they parked behind the vehicle in which defendant was a passenger such that the driver could not leave the area. Therefore defendant's motion to suppress should have been granted: "Police officer testimony at the suppression hearing established that, at the time the officers made the initial stop, they were responding to the sound of multiple gunshots that had originated at or near the gas station, which was known to be a high crime area. The officers also testified, however, that at no time did they visually observe the source of the gunshots, and they did not see any shots emanating from the area where defendant's vehicle was parked. The officers' attention was drawn to defendant's vehicle because, at the time they arrived on the scene, it had collided with another vehicle as it tried to leave the area. Defendant's vehicle was one of a number of vehicles and pedestrians that the police saw trying to leave the gas station due to the ongoing gunfire. Under those circumstances—i.e., where the police are unable to pinpoint the source of the gunfire, and the individuals in defendant's vehicle are not the only potential suspects present at the scene—the evidence does not provide a reasonable suspicion that the individuals in defendant's vehicle had committed, were committing, or were about to commit a crime ... . On the record before us, defendant's vehicle was, at most, 'simply a vehicle that was in the general vicinity of the area where the shots were heard,' which is insufficient to establish reasonable suspicion ...". ***People v. Singletary*, 2022 N.Y. Slip Op. 07392, Fourth Dept 12-23-22**

CRIMINAL LAW, EVIDENCE.

THE PEOPLE DID NOT DEMONSTRATE THE POLICE OFFICER HAD SUFFICIENT TRAINING AND EXPERIENCE TO VISUALLY ESTIMATE THE SPEED OF DEFENDANT'S CAR; SUPPRESSION SHOULD HAVE BEEN GRANTED IN THIS SPEEDING CASE.

The Fourth Department, reversing defendant's conviction, determined the People did not demonstrate the defendant was speeding. No radar gun was used and the officer estimated defendant's speed. The People did not demonstrate the officer had sufficient training and experience to support the speed-estimate: "At the suppression hearing, the officer testified that he stopped the vehicle after he visually estimated defendant's speed at 82 miles per hour in a 65 mph zone, and there was no testimony that the officer used a radar gun to establish defendant's speed. While it is well-settled that a qualified police officer's testimony that he or she visually estimated the speed of a defendant's vehicle may be sufficient to establish that a defendant exceeded the speed limit ... , here, the People failed to establish the officer's training and qualifications to support the officer's visual estimate of the speed of defendant's vehicle ... . Thus, inasmuch as the People failed to meet their burden of showing the legality of the police conduct in stopping defendant's vehicle in the first instance, we conclude that the court erred in refusing to suppress the physical evidence and defendant's statements obtained as a result of the traffic stop. Because our determination results in the suppression of all evidence supporting the crime charged, the indictment must be dismissed ...". ***People v. Reedy*, 2022 N.Y. Slip Op. 07397, Fourth Dept 12-23-22**

DEFAMATION, CIVIL RIGHTS LAW, CIVIL PROCEDURE.

THE AMENDMENTS TO THE ANTI-SLAPP STATUTES SHOULD NOT HAVE BEEN APPLIED RETROACTIVELY TO DISMISS PLAINTIFF'S DEFAMATION COMPLAINT.

The Fourth Department, reversing Supreme Court, determined the amendments to the anti-SLAPP statutes (Civil Rights Law §§ 70-a, 76-a) do not apply retroactively and therefore should not have been the basis for dismissal of plaintiff's defamation complaint: "[T]the presumption against retroactivity is not overcome because '[n]othing in the text 'expressly or by necessary implication' requires retroactive application of the [anti-SLAPP] statute as amended . . . Nor does the legislative history support such an interpretation' ... . First, the text of the legislation does not contain an express statement requiring retroactive application ... . Second, while the anti-SLAPP amendments took effect 'immediately' … , that term 'is equivocal in an analysis of retroactivity' ... . Third, although the legislation is remedial in nature and such legislation is generally applied retroactively 'to better achieve its beneficial purpose' ... , simply classifying a statute as remedial 'does not automatically overcome the strong presumption of prospectivity' ... . Finally, the legislative history establishes that the rationale for the amendments was to better advance the purposes of speech protection for which the anti-SLAPP law was initially enacted and to remedy the courts' failure to use their discretionary powers to award costs and fees in such cases. However, the legislative history does not offer any explicit or implicit support for retroactive application ... . Therefore, we conclude that 'the presumption of prospective application of the [anti-SLAPP] amendments has not been defeated' ...". ***Hoi Trinh v. Nguyen*, 2022 N.Y. Slip Op. 07387, Fourth Dept 12-23-22**

EMINENT DOMAIN, MUNICIPAL LAW.

IN ORDER TO OBTAIN TITLE TO THE VACANT BUILDING AT A SHOPPING MALL UNDER THE EMINENT DOMAIN PROCEDURE LAW (EDPL), THE TOWN MUST SPECIFY THE PUBLIC PURPOSE FOR WHICH THE PROPERTY WILL BE USED; THE TOWN'S FAILURE TO SPECIFY THE PUBLIC PURPOSE WAS FATAL TO THE CONDEMNATION PROCEEDING.

The Fourth Department, in a full-fledged opinion by Justice Lindley, annulling the determination authorizing the condemnation of a vacant building at a shopping mall, held that the town's acknowledgment that it did not know how the building would be used was fatal to condemnation proceeding: "Petitioner challenges the taking ... contending ... that neither the condemnation notice nor the Town's determination and findings specifically identifies or describes a legitimate public project, as required by EDPL [Eminent Domain Procedure Law] 207 (C) (3). We agree. Indeed, the Town readily acknowledges that it has not yet decided what to do with the property after obtaining title, and the notice merely states that '[t]he proposed Acquisition is required for and is in connection with a certain project . . . consisting of facilitating the productive reuse and redevelopment of the vacant and underutilized Proposed Site through municipal and/or economic development projects . . . by attracting and accommodating new tenant(s) and/or end user(s).' In its determination and findings, the Town stated that 'no specific future uses or actions have been formulated and/or specifically identified.' Because the Town has not indicated what it intends to do with the property, we are unable to determine whether 'the acquisition will serve a public use' ... . Of course, '[t]he existence of a public use, benefit, or purpose underlying a condemnation is a sine qua non' to the government's ability to exercise its powers to take private property through eminent domain ...". ***Matter of HBC Victor LLC v. Town of Victor*, 2022 N.Y. Slip Op. 07313, Fourth Dept 12-23-22**

EMINENT DOMAIN, MUNICIPAL LAW.

THE CONDEMNATION OF THE REAL PROPERTY WAS NOT FOR A COMMERCIAL PURPOSE AS REQUIRED BY THE CONTROLLING STATUTES; THE DETERMINATION TO CONDEMN THE PROPERTY WAS ANNULLED OVER AN EXTENSIVE DISSENT.

The Fourth Department, annulling the determination to condemn real property, over an extensive dissent, held that the purpose for the condemnation was not "commercial" as required by the statutes authorizing condemnation by the Oneida County Industrial Development Agency (OCIDA): "Petitioners commenced this original proceeding pursuant to EDPL [Eminent Domain Procedure Law] 207 seeking to

annul the determination of respondent Oneida County Industrial Development Agency (OCIDA) to condemn certain real property by eminent domain. Pursuant to EDPL 207 (C), this Court 'shall either confirm or reject the condemnor's determination and findings.' Our scope of review is limited to 'whether (1) the proceeding was constitutionally sound; (2) the condemnor had the requisite authority; (3) its determination complied with [the State Environmental Quality Review Act (SEQRA)] and EDPL article 2; and (4) the acquisition will serve a public use' ... . OCIDA lacked the requisite authority to acquire the subject property. As an industrial development agency, OCIDA's statutory purposes are ... to 'promote, develop, encourage and assist in the acquiring . . . [of] . . . commercial . . . facilities' (General Municipal Law § 858). OCIDA's powers of eminent domain are restricted by General Municipal Law § 858 (4), which provides, in relevant part, that an industrial development agency shall have the power '[t]o acquire by purchase, grant, lease, gift, pursuant to the provisions of the eminent domain procedure law, or otherwise and to use, real property . . . therein necessary for its corporate purposes.' The purposes enumerated in the statute do not include projects related to hospital or healthcare-related facilities (see § 858). While OCIDA's determination and findings indicate that the subject property was to be acquired for use as a surface parking lot, the record establishes that, contrary to respondents' assertion, the primary purpose of the acquisition was not a commercial purpose. Rather, the property was to be acquired because it was a necessary component of a larger hospital and healthcare facility project." ***Matter of Bowers Dev., LLC v. Oneida County Indus. Dev. Agency*, 2022 N.Y. Slip Op. 07327, Fourth Dept 12-23-22**

FAMILY LAW.

EVEN THOUGH THERE WAS A PRIOR STIPULATED ORDER OF CUSTODY AND VISITATION GRANTING PRIMARY CUSTODY TO GRANDMOTHER, THE NONPARENT (GRANDMOTHER), NOT THE FATHER, HAS THE BURDEN TO SHOW EXTRAORDINARY CIRCUMSTANCES JUSTIFYING THE DENIAL OF FATHER'S SUPERIOR RIGHT TO CUSTODY BEFORE THE BEST INTERESTS OF THE CHILDREN CAN BE CONSIDERED PURSUANT TO FATHER'S PETITION TO MODIFY CUSTODY (FOURTH DEPT).

The Fourth Department, reversing (modifying) Family Court, determined, in a modification of custody case, the nonparent (grandmother here), not the father, has the burden to demonstrate extraordinary circumstances exist before the court can consider the best interests of the children: "Pursuant to the prior order, the parties share joint legal custody of the subject children, with the grandmother having primary physical custody and the mother and the father having visitation under separate visitation schedules. … Petitioner father appeals from an order granting the motion of respondent Dawn M. Freeland (grandmother), made at the close of the father's case at a hearing, to dismiss his petition seeking modification of a prior stipulated order of custody and visitation, and his petition alleging that the grandmother violated that prior order. ... [T]he court erred in requiring the father to prove that there had been a change in circumstances prior to making a determination regarding extraordinary circumstances ... . 'It is well settled that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' ... . 'The nonparent has the burden of establishing that extraordinary circumstances exist,' and 'it is only after a court has determined that extraordinary circumstances exist that the custody inquiry becomes 'whether there has been a change [in] circumstances [warranting further inquiry into] the best interests of the child[ren]' ... . 'The foregoing rule applies even if there is an existing order of custody concerning th[e] child[ren] unless there is a prior determination that extraordinary circumstances exist' ... . Here, 'there is no indication in the record that, in the history of the parties' litigation, the court previously made a determination of extraordinary circumstances divesting the [father] of [his] superior right to custody' ...". ***Matter of Wells v. Freeland*, 2022 N.Y. Slip Op. 07375, Fourth Dept 12-23-22**

FAMILY LAW, EVIDENCE.

THE AMENDED STATUTE CHANGING THE CRITERIA FOR NEGLECT BASED ON MARIHUANA USE WENT INTO EFFECT TWO DAYS BEFORE THE HEARING AND WAS NOT APPLIED TO THE FACTS; MATTER REMITTED.

The Fourth Department, modifying Family Court, determined whether mother neglected the children within the meaning of the statute as amended by the Marihuana Regulation and Taxation Act required remittal: " 'The Marihuana Regulation and Taxation Act ... amended Family [Court] Act § 1046 (a) (iii) ... by specifically foreclosing a prima facie neglect finding based solely upon the use of marihuana, while still allowing for consideration of the use of marihuana to establish neglect, provided '[that there is] a separate finding that the child's physical[,] mental or emotional condition was impaired or is in imminent danger of becoming impaired' ... . The amendment to section 1046 (a) (iii) went into effect ... two days before the court rendered its decision in this case and, '[a]s a general matter, a case must be decided upon the law as it exists at the time of the decision' ... . Inasmuch as petitioner's presentation of evidence was based on the state of the law at the time of the hearing, however, petitioner may not have fully explored the issue of impairment. We therefore remit the matter to Family Court to reopen the fact-finding hearing on the issue whether the children's condition was impaired or at imminent risk of impairment as a result of the mother's use of marihuana ...". ***Matter of Gina R. (Christina R.)*, 2022 N.Y. Slip Op. 07321, Fourth Dept 12-23-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF PULLED A LOAD OF WASTE BACKWARDS THROUGH AN ACCESS DOOR APPARENTLY EXPECTING THE LIFT TO BE POSITIONED OUTSIDE THE DOOR; THE LIFT HAD MOVED TO A DIFFERENT FLOOR AND PLAINTIFF FELL FROM THE THIRD FLOOR TO THE GROUND; THE ACCESS DOOR WAS SUPPOSED TO BE LOCKED BEFORE THE LIFT MOVED TO A DIFFERENT FLOOR; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION BECAUSE THE ACCESS DOOR LOCK, A SAFETY DEVICE, WAS MISSING.

The Fourth Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action. Plaintiff pulled a load of waste backwards through an access door which did not have a lock and then fell from the third floor because the lift which he (apparently) assumed was positioned outside the access door had moved to a different floor. Each access door was supposed to have a lock and the lift operator was supposed to lock the door before moving to a different floor: "Plaintiff met his burden of establishing the absence of an adequate safety device that could have prevented his fall, namely, a lock on the third-floor access door ... . In opposition, defendants failed to raise a triable issue of fact whether plaintiff's own negligence was the sole proximate cause of his injuries ... . Here, there is no evidence in the record that plaintiff removed the lock and was therefore the sole proximate cause of the accident ... . Moreover, even assuming, arguendo, that plaintiff was negligent in walking backwards out the access door and in failing to look back prior to going through the door to ensure the lift was there, we conclude that such 'actions [would] render him [merely] contributorily negligent, a defense unavailable under [Labor Law § 240 (1)]' ...". ***Hyde v. BVSHSSF Syracuse LLC*, 2022 N.Y. Slip Op. 07329, Fourth Dept 12-23-22**

MEDICAL MALPRACTICE, NEGLIGENCE, PERSONAL INJURY.

PLAINTIFF WAS PRESCRIBED ATIVAN, WHICH CAUSES DROWSINESS, IN THE EMERGENCY ROOM, WAS DISCHARGED WHILE UNDER ITS INFLUENCE AND WAS INVOLVED IN A CAR ACCIDENT; THE MEDICAL MALPRACTICE CAUSES OF ACTION BASED ON THE ALLEGEDLY NEGLIGENT DISCHARGE AND THE ALLEGED FAILURE TO EXPLAIN THE EFFECTS OF ATIVAN BOTH SOUNDED IN MEDICAL MALPRACTICE AND PROPERLY SURVIVED SUMMARY JUDGMENT.

The Fourth Department determined defendants' motion for summary judgment in this medical malpractice action was properly denied. Plaintiff was treated at the emergency department of defendant hospital and prescribed Ativan, a drug which causes drowsiness. Plaintiff was released while under the influence of the drug and had a car accident. Plaintiff alleged he was negligently discharged and was not informed of the possible effects of Ativan: "[T]he evidence ... raised issues of fact whether Iannolo [the treating physician] deviated from the standard of care by discharging plaintiff at a time when the concentration of Ativan in his system was at or near its peak and while plaintiff was experiencing the effects of the medication, including drowsiness. Those submissions also raised issues of fact whether any such deviation was a proximate cause of plaintiff's injuries ... . Regarding the hospital's motion, the evidence that the hospital submitted raised issues of fact whether ... a nurse employed by the hospital deviated from the standard of care and committed an act of negligence independent of Iannolo ... , by failing to explain the discharge instructions to plaintiff or advise him of the possible effects of Ativan, and whether any such deviation was a proximate cause of plaintiff's injuries ... . [T]he hospital ... contends that the court erred in denying its motion with respect to the negligence cause of action against it. We agree ... . 'A complaint sounds in medical malpractice rather than ordinary negligence where, as here, the challenged conduct [by a nurse] 'constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician' to a particular patient' ...". ***Johnson v. Auburn Community Hosp.*, 2022 N.Y. Slip Op. 07332, Fourth Dept 12-23-22**

PERSONAL INJURY, EMPLOYMENT LAW.

THE EMERGENCY DOCTRINE IS NOT APPLICABLE IN THIS TRAFFIC ACCIDENT CASE BECAUSE THE EMERGENCY (A WATER BOTTLE UNDER THE ACCELERATOR) WAS OF THE DEFENDANT'S OWN MAKING; THE GROSS NEGLIGENCE CAUSE OF ACTION AND THE DEMAND FOR PUNITIVE DAMAGES SURVIVED SUMMARY JUDGMENT; PUNITIVE DAMAGES ARE NOT AVAILABLE AGAINST DEFENDANT DRIVER'S EMPLOYER.

The Fourth Department determined: (1) the emergency doctrine did not apply in this traffic accident case because the defendant driver caused the water bottle to fall from the cup holder where it lodged under the accelerator; (2) the cause of action alleging gross negligence and seeking punitive damages properly survived summary judgment; and (3) punitive damages are not available against defendant's employer [Silvarole] pursuant to the respondeat superior theory: "... '[T]he emergency doctrine is only applicable when a party is confronted by [a] sudden, unforeseeable occurrence not of their own making' ... . The 'emergency doctrine has no application where . . . the party seeking to invoke it has created or contributed to the emergency' ... . [T]he record ... establishes that Davis [defendant driver] was the only person in the vehicle, and defendants did not submit evidence that any other person was responsible for the alleged emergency ... . Thus, we conclude that defendants failed to demonstrate that the emergency encountered was not of Davis's own making, 'i.e., that [Davis] did not create or contribute to it' ... . * * * Punitive damages may be awarded 'based on intentional actions or actions which, while not intentional, amount to gross negligence, recklessness, or wantonness . . . or conscious disregard of the rights of others or for conduct so reckless as to amount to such disregard' ... . * * * Defendants … failed to meet their initial burden of establishing that Davis's conduct, specifically his decision to look for and retrieve the obstacle while the tractor-trailer was in motion—despite the fact that his brakes were in working order—did not 'amount to gross negligence, recklessness, or wantonness . . . or conscious disregard of the rights of others' ... . Plaintiff seeks to hold Silvarole liable for punitive damages

under a theory of vicarious liability. However, punitive damages are unavailable under such a theory absent limited circumstances not present here ...". ***Miller v. Silvarole Trucking Inc.*, 2022 N.Y. Slip Op. 07348, Fourth Dept 12-23-22**

PERSONAL INJURY, EVIDENCE, PRIVILEGE, CIVIL PROCEDURE, CRIMINAL LAW.

DEFENDANT IN THIS PERSONAL INJURY CASE DID NOT WAIVE THE PHYSICIAN-PATIENT PRIVILEGE BY SUBMITTING MENTAL HEALTH RECORDS TO THE SENTENCING COURT IN THE RELATED CRIMINAL CASE; THE RECORDS WERE SUBMITTED AS PART OF A MITIGATION REPORT WHICH IS DEEMED "CONFIDENTIAL" PURSUANT TO THE CRIMINAL PROCEDURE LAW; TWO-JUSTICE DISSENT.

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined defendant in this pedestrian-vehicle-accident case was not required to disclose privileged medical (mental health) information which was provided to the sentencing court in the related criminal case as a "mitigation report:" " 'CPLR 3121 (a) authorizes discovery of a party's mental or physical condition when that party's condition has been placed in controversy' ... . Nevertheless, even where a defendant's mental or physical condition is in controversy, discovery will be precluded if the information falls within the physician-patient privilege and the defendant has not waived that privilege ... . Where the physician-patient privilege has not been waived, the party asserting the privilege may 'avoid revealing the substance of confidential communications made to [his or] her physician, but may not refuse to testify as to relevant medical incidents or facts concerning [himself or] herself' ... . We agree with defendant that he did not waive the physician-patient privilege by disclosing his mental health information in the sentencing phase of the related criminal proceeding. Here, defendant submitted the mitigation report in the criminal proceeding for the court's consideration in the determination of an appropriate sentence. Thus, this is not a case where a criminal defendant waived any privilege applicable to that defendant's mental health records by raising a justification or other affirmative defense to be litigated in the criminal proceeding ... . Instead, the mitigation report was prepared for and 'submitted directly to the court[] in connection with the question of sentence' and, as a result, the mitigation report is 'confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court' (CPL 390.50 [1] ...)." ***Johnson v. Amadorzabala*, 2022 N.Y. Slip Op. 07355, Fourth Dept 12-23-22**

PERSONAL INJURY, LANDLORD-TENANT, CONTRACT LAW.

THE LEASE REQUIRED THE OUT-OF-POSSESSION LANDLORD TO REPAIR STRUCTURAL DEFECTS IN THE ROOF AND WALLS; THERE WAS A QUESTION OF FACT WHETHER WATER ENTERED THE PREMISES THROUGH DEFECTS IN THE ROOF AND WALLS CAUSING THE ALLEGED DANGEROUS CONDITION, A CRACK IN THE FLOOR WHICH ALLEGEDLY CONTRIBUTED TO PLAINTIFF'S INJURY.

The Fourth Department, over a two-justice dissent, determined the out-of-possession landlord was required under the terms of the lease to repair structural defects in the roof and walls and there was a question of fact whether such defects caused a crack in the floor. The cracked floor was alleged to constitute a dangerous condition which cause a load of tines in a payloader to fall and injure plaintiff: "Plaintiff commenced this negligence action seeking damages for personal injuries he sustained when tires that were being moved by a forklift struck him when they fell from the forklift after it drove over a crack in the concrete floor. Insofar as relevant to this appeal, the complaint asserted a negligence cause of action against Estes Express Lines (defendant), which owned the premises on which plaintiff was injured, alleging that defendant negligently permitted a dangerous condition to exist on the premises that contributed to his injury, i.e., the crack in the concrete floor. * * * ... [P]laintiff raised a triable issue of fact whether defendant was liable based on its contractual obligation to maintain the structural integrity of the roof and walls. ... [T]he court .... properly denied defendant's motion for summary judgment. ... [P]laintiff submitted an affidavit from one of plaintiff's former colleagues and from a code enforcement officer, who each averred that the damage to the floor may have been caused by water damage or water infiltration due to poor maintenance of the roof and walls. Plaintiff's former colleague further averred that defendant had conducted annual inspections of the property and had previously repaired damage to the floor of the premises. Thus, there is a question of fact concerning defendant's liability for defects in the condition of the floor ...". ***Weaver v. Deronde Tire Supply, Inc.*, 2022 N.Y. Slip Op. 07328, Fourth Dept 12-23-22**

PRIMA FACIE TORT.

THE COMPLAINT DID NOT STATE A CAUSE OF ACTION FOR PRIMA FACIE TORT BECAUSE IT DID NOT ALLEGE THE SOLE MOTIVATION OF DEFENDANTS WAS DISINTERESTED MALEVOLENCE.

The Fourth Department, reversing Supreme Court, determined the complaint did not state a cause of action for prima facie tort: " 'The requisite elements of a cause of action for prima facie tort are (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful' ... .. A plaintiff alleging prima facie tort must therefore allege that the defendant's 'sole motivation was 'disinterested malevolence' ... . Although the complaint alleges that defendants 'acted maliciously' and 'with disinterested malice,' ... , it does not allege that defendants' 'sole motivation was 'disinterested malevolence' ... . 'There can be no recovery [for prima facie tort] unless a disinterested malevolence to injure [a] plaintiff constitutes the sole motivation for [the] defendant['s] otherwise lawful act' ...". ***Spine Surgery of Buffalo Niagara, LLC v. Geico Cas. Co.*, 2022 N.Y. Slip Op. 07343, Fourth Dept 12-23-22**

REAL PROPERTY LAW.

AN UNRESTRICTED EASEMENT ALLOWING ACCESS TO A LAKE ENCOMPASSES THE RIGHT TO INSTALL, MAINTAIN AND USE A DOCK.

The Fourth Department, reversing Supreme Court, determined that an unrestricted easement which allows access to a lake encompasses the right to installation, maintenance and use of a dock: "[T]he relevant deeds ... established that there were no restrictions on the easement and that the purpose of the right-of-way was to provide ingress to and egress from the lake ... .. Given the purpose of the easement and the absence of restrictions, 'any reasonable lawful use [by plaintiffs] within the contemplation of the grant is permissible' ... , and the installation, maintenance, and use of a dock at the end of a right-of-way providing access to a lake is a 'reasonable use incidental to the purpose of the easement' ...". ***Mosley v. Parnell*, 2022 N.Y. Slip Op. 07342, Fourth Dept 12-23-22**

REAL PROPERTY LAW, CONTRACT LAW, LANDLORD-TENANT.

ALTHOUGH THE AGREEMENT BETWEEN PLAINTIFF COUNTRY CLUB AND DEFENDANT FOR THE CONSTRUCTION, MAINTENANCE AND USE OF A BOAT SLIP WAS A LICENSE, NOT A LEASE, THE LICENSE, BY THE TERMS OF THE AGREEMENT, WAS NOT TERMINABLE AT WILL BY THE COUNTRY CLUB; TWO-JUSTICE DISSENT.

The Fourth Department, over a two-justice dissent, determined the agreement between plaintiff country club and defendant concerning the construction, maintenance and use of a boat slip was a license, not a lease, but, under the terms of the agreement, the license was not terminable at will by the country club: "[T]he terms of the agreement unambiguously state that defendant is required to pay the annual maintenance fee and to comply with plaintiff's rules and policies, thereby establishing through implication that plaintiff may terminate the license only when defendant fails to comply with those specified terms ... . Plaintiff's interpretation of the agreement as permitting plaintiff to terminate the license at will, despite the aforementioned provisions governing defendant's obligations, renders those specific provisions nugatory, contrary to the general approach to interpreting contracts ... ... [T]he agreement expressly permits defendant to terminate it and receive a return of the monies contributed pursuant to the payment agreement, less any monies owed to plaintiff. We agree with defendant that the express inclusion of a right of termination for her compels the conclusion that the exclusion of any corresponding express right for plaintiff to terminate the agreement was intentional ... . [The] structure of the agreement establishes that the license is not terminable at will by plaintiff." ***Skaneateles Country Club v. Cambs*, 2022 N.Y. Slip Op. 07315, Fourth Dept 12-23-22**

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