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COURT OF APPEALS.

CRIMINAL LAW, CONSTITUTIONAL LAW, JUDGES.

HERE IT WAS REVERSIBLE ERROR TO PLACE THE DEFENDANT IN HANDCUFFS, WITHOUT EXPLANATION, BEFORE THE JURY RETURNED TO ANNOUNCE THE VERDICT; AT THAT POINT THE DEFENDANT IS CONSIDERED INNOCENT AND RESTRAINING THE DEFENDANT WITHOUT EXPLANATION IS CONSTITUTIONALLY PROHIBITED.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined the defendant should not have been handcuffed when the jury returned to announce the verdict: At that point the defendant is considered innocent and the defendant may be prejudiced if the jury is polled. Here defense counsel expressly objected to the handcuffs on those grounds: "[T]he reading of the verdict is an integral part of the guilt-determination phase. ... '[A] verdict reported by the jury is not final unless properly recorded and accepted by the court' ... . Indeed, in accordance with CPL 310.80, the trial court must order the jury to resume deliberations when polling elicits a negative answer from one or more jurors. As a consequence, until the jury returns to the courtroom, publicly announces the verdict and, if polled, confirms the verdict, there is no finding of guilt, defendant is still presumed innocent, and the constitutional prohibition on restraining a defendant without explanation remains in full force." ***People v. Sanders*, 2023 N.Y. Slip Op. 00692, CtApp 2-9-23**

CRIMINAL LAW, EVIDENCE.

THE ATTORNEY GENERAL'S OFFICE WAS MONITORING A WIRETAP WHEN DEFENDANT WAS OVERHEARD IN A CALL WHICH HAD ORIGINATED FROM THE COUNTY JAIL; LOCAL POLICE WERE ALERTED TO THE CONVERSATION AND THE POLICE OBTAINED THE RECORDING FROM THE JAIL; ALTHOUGH THE JAIL RECORDING WAS NOT AN "INTERCEPTED CONVERSATION" WITHING THE MEANING OF CPL § 700.70, IT WAS EVIDENCE DERIVED FROM AN "INTERCEPTED CONVERSATION" TRIGGERING THE CPL § 700.70 NOTICE REQUIREMENTS.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, reversing the appellate division, determined the failure to provide defendant with notice of a recorded phone conversation was improper. The Attorney General's office was monitoring a wiretap in an unrelated case when defendant was overheard in a call originating from the county jail talking about a fatal hit-and-run accident. Local police were informed of the defendant's conversation and they obtained a recording of it made by the county jail. The jail recording, which was introduced at trial, was not an "intercepted conversation" within the meaning of Criminal Procedure Law § 700.70. But the conversation overheard pursuant to the wiretap which alerted the police to the jail conversation was an "intercepted conversation" which triggered the CPL § 700.70 notice: "The People produced the recording ... to defendant in discovery but did not furnish defendant with a copy of the wiretap warrant and underlying application within the fifteen-day period prescribed by CPL 700.70. Several months after defendant was arraigned, the People informed defendant by letter that the police were 'alerted' to the call by the wiretap. Defendant moved to preclude the call from evidence on the grounds that the People failed to adhere to the CPL 700.70 notice procedure. * * * The substance of the wiretap recording informed law enforcement that the same conversation had been recorded by [jail], leading the Syracuse Police directly to the recording that the People used as evidence at defendant's trial. In listening to the wiretap, a detective heard incriminating statements about the hit-and-run, identified defendant as the declarant, and directed authorities to the [jail] recording. Clearly, the [jail] call is evidence derived from the wiretap. ... [I]t is not certain that police investigating the hit-and-run would otherwise have discovered the call—indeed, the inmate who placed the call had no apparent connection to the hit-and-run incident. Because the wiretap was an 'intercepted communication,' the People's failure to timely furnish defendant with a copy of the eavesdropping warrant and underlying application precluded the admission of the wiretap recording and any evidence derived therefrom—namely, the jail recording—into evidence at trial ...". ***People v. Myers*, 2023 N.Y. Slip Op. 00691, CtApp 2-9-23**

ENVIRONMENTAL LAW, ZONING.

THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION (DEC) MAY APPROVE MINING WHERE MINING IS OTHERWISE PROHIBITED IF THE MINING IS AN UNDISPUTED PRIOR NONCONFORMING USE.

The Court of Appeals, in a full-fledged opinion by Judge Cannataro, determined the Department of Environment Conservation (DEC) can renew mining permits where mining is an undisputed prior nonconforming use. The "mining" at issue in this case is a sand and gravel mine on Long Island. Although mining was a permitted use when the mine opened, the area where the mine is located had been rezoned as a residential district where mining is prohibited: "The question raised on this appeal is whether Environmental Conservation Law 23-2703 (3) bars the Department of Environmental Conservation from processing all applications for permits to mine in covered counties, including applications for renewal and modification permits, when 'local zoning laws or ordinances prohibit mining uses within the area proposed to be mined' ... .

We hold that DEC may process renewal and modification applications when such applications seek to mine land that falls within the scope of an undisputed prior nonconforming use. The applications at issue implicate some prior nonconforming uses that are undisputed and others that are disputed but not yet resolved. Because prior nonconforming use was not taken into account by either DEC or the courts below, we modify and remit for further proceedings." ***Matter of Town of Southampton v. New York State Dept. of Envtl. Conservation*, 2023 N.Y. Slip Op. 00689, Second Dept 2-9-23**

FIRST DEPARTMENT

CIVIL PROCEDURE, JUDGES.

THE MOTION TO AMEND THE COMPLAINT SHOULD NOT HAVE BEEN DENIED ON THE GROUND THE PROPOSED CHANGES WERE NOT "REDLINED."

The First Department, reversing Supreme Court, determined the motion to amend the complaint should not have been denied on the ground the proposed changes were not "redlined" (apparently referring to the failure to mark the proposed changes to make them more visible): "The court improvidently exercised its discretion in denying plaintiff's cross motion solely on the technical basis that the proposed amended complaint was not redlined (see CPLR 3025[b]), since the proposed amendments to add the third-party defendants as direct defendants were sufficiently described in the moving papers and easily discerned on review of the proposed amended summons and complaint ...". ***Herrera v. Highgate Hotels, L.P.*, 2023 N.Y. Slip Op. 00729, First Dept 2-9-23**

CRIMINAL LAW, EVIDENCE.

THE PEOPLE DID NOT MEET THEIR "BURDEN OF GOING FORWARD" BY PRESENTING SUFFICIENT PROOF OF THE LEGALITY OF POLICE CONDUCT AT THE SUPPRESSION HEARING; THERE WAS NO EVIDENCE THE OFFICERS WHO ARRESTED DEFENDANT WERE MADE AWARE OF THE CO-DEFENDANT'S STATEMENT WHICH WAS THE BASIS OF THE ARREST; THE FACT THAT GAPS IN THE PEOPLE'S PROOF MAY HAVE BEEN FILLED IN BY THE DEFENDANT'S TESTIMONY AT THE HEARING DIDN'T CURE THE DEFICIENCY.

The First Department, reversing defendant's conviction and suppressing his postarrest statement, determined the People did not meet their "burden of coming forward" with proof of the legality of police conduct. The fact that some of the gaps in the proof might have been filled by the defendant's testimony at the suppression hearing did not cure the defect: "The People failed to submit evidence sufficient to support the suppression court's findings, thus failing to meet their burden of coming forward ... . Although the officers who arrested defendant were not required to testify, the People's initial evidentiary presentation, consisting of the testimony of the investigating detective, was insufficient to permit the inference that information constituting probable cause was transmitted by the detective to the officers effectuating the arrest of defendant, as required to meet the People's prima facie burden of establishing the legality of the challenged police conduct and shift the burden of persuasion to defendant ... . Although defendant testified after the People rested, we need not consider whether defendant's testimony before the suppression court could have been used to remedy deficiencies in the People's presentation. As the People repeatedly informed the court, they relied solely on the detective's testimony to meet their burden. Further, the suppression court discredited defendant's testimony as 'unworthy of belief' and based its decision to deny defendant's motion to suppress solely on the testimony of the detective, which it credited." ***People v. Watkins*, 2023 N.Y. Slip Op. 00742, First Dept 2-9-23**

CRIMINAL LAW, EVIDENCE.

THE ADMISSION OF AN UNNOTICED STATEMENT BY DEFENDANT WAS NOT HARMLESS ERROR; ALTHOUGH THE PEOPLE HAD DISCLOSED THE INTERVIEW IN WHICH THE STATEMENT WAS MADE, THEY DID NOT DISCLOSE THE SPECIFIC STATEMENT; THE DEFENDANT MOVED TO PRECLUDE THE STATEMENT AT TRIAL.

The First Department, reversing defendant's convictions, determined the evidence defendant knew the codefendant was armed and shared the codefendant's intent to cause serious injury was legally insufficient. Although the robbery second conviction was based on legally sufficient evidence, an unnoticed statement was allowed in evidence at trial, a reversible error: "[D]efendant is entitled to a new trial on the second-degree robbery count. The People should not have been permitted to submit evidence of defendant's August 9, 2016 statement to a detective regarding defendant's discussion with the victim about the value of the latter's jewelry because this statement was not properly noticed pursuant to CPL 710.30(1)(a). Although the People disclosed the interview generally, they did not disclose this particular statement ... . At a suppression hearing, defendant only moved to suppress other statements not at issue on appeal, and the statement at issue was first revealed during trial testimony, at which time defendant moved for preclusion on the ground of lack of notice." ***People v. Weathers*, 2023 N.Y. Slip Op. 00741, First Dept 2-9-23**

LANDLORD-TENANT.

THE TENANT MADE GOOD FAITH EFFORTS TO CURE THE DEFAULTS CITED BY THE LANDLORD AND WAS ENTITLED TO A YELLOWSTONE INJUNCTION TOLLING TENANT'S TIME TO CURE.

The First Department, in a full-fledged opinion by Justice Gonzalez, determined the tenant liquor-store had made good faith efforts to cure the defaults cited by the landlord and was entitled to a Yellowstone injunction tolling the tenant's time to cure the defaults. The opinion lays out the fact in a level of detail which cannot be fairly summarized here: "In keeping with public policy against forfeiture, courts grant

Yellowstone relief on 'far less than the normal showing required for preliminary injunctive relief' ... . The tenant need only demonstrate that (1) it holds a lease; (2) it received a notice of default, notice to cure, or threat to terminate the lease; (3) it requested injunctive relief prior to the termination of the lease or expiration of the cure period; and (4) it is prepared to cure the alleged default by any means short of vacating the premises ... ,. Once the tenant establishes these elements, the motion court may exercise its discretion to issue a Yellowstone injunction tolling the tenant's time to cure ...". ***Elite Wine & Spirit LLC v. Michelangelo Preserv. LLC*, 2023 N.Y. Slip Op. 00631, First Dept 2-7-23**

SECOND DEPARTMENT

CIVIL PROCEDURE.

IF PLAINTIFF DOES NOT REJECT AN UNTIMELY ANSWER SUBMITTED WITHOUT LEAVE OF COURT OR STIPULATION, OBJECTION TO THE ANSWER AS UNTIMELY IS WAIVED.

The Second Department, reversing (modifying) Supreme Court, determined the amended answer should not have been struck because it was untimely. The plaintiff did not reject the amended answer: "Although Saldarriaga [defendant] filed her amended answer approximately 20 months after filing her original answer, well beyond the period within which an amended pleading could have been served as of right (see CPLR 3025[a]), without obtaining leave of court or the stipulation of all parties to the amendment ... , the plaintiff did not reject the amended answer. By 'retaining the amended pleading without objection,' the plaintiff waived any 'objection as to untimeliness' ... . Thus, Saldarriaga's amended answer should not have been stricken as untimely." ***Citibank, N.A. v. Saldarriaga*, 2023 N.Y. Slip Op. 00647, Second Dept 2-8-23**

CIVIL PROCEDURE, COURT OF CLAIMS, NEGLIGENCE.

IN THIS CHILD VICTIMS ACT CASE, THE ALLEGATION THE ABUSE TOOK PLACE IN 1982–1983 WAS SPECIFIC ENOUGH TO MEET THE PLEADING REQUIREMENTS OF THE COURT OF CLAIMS ACT.

The Second Department, reversing the Court of Claims in this Child Victims Act proceeding, determined the claim sufficiently described when the sexual abuse occurred. The claimant alleged she was abused by a state employee in 1982 and 1983 when she was 17. The Court of Claims had dismissed the claim finding that the allegations when the abuse took place were not specific enough. The Second Department found the 1982–1983 time frame adequate: "Court of Claims Act § 11(b) 'places five specific substantive conditions upon the State's waiver of sovereign immunity by requiring the claim to specify (1) the nature of [the claim]; (2) the time when it arose; (3) the place where it arose; (4) the items of damage or injuries claimed to have been sustained; and (5) the total sum claimed' ... . *** Under the particular circumstances of this case, the date ranges provided in the claim stating that the sexual abuse commenced in approximately 1982 and occurred 'repeatedly' and 'multiple times' from approximately 1982 to 1983, during periods when the claimant was directed to the Workshop to receive counseling, along with other information contained in the claim including, inter alia, that there was a criminal investigation, prosecution, and conviction of West based upon the claimant's complaints of sexual abuse, were sufficient to satisfy the 'time when' requirement of Court of Claims Act § 11(b) ...". ***Fenton v. State of New York*, 2023 N.Y. Slip Op. 00650, Second Dept 2-8-23**

Similar issues and result in ***Meyer v. State of New York***, 2023 N.Y. Slip Op. 00658, Second Dept 2-8-23

CRIMINAL LAW, JUDGES.

AFTER COMPLAINING THAT A JUROR APPEARED TO BE SLEEPING AT TIMES, DEFENSE COUNSEL MADE A MOTION TO DISQUALIFY HIM; THE JUDGE DID NOT MAKE AN ADEQUATE INQUIRY BEFORE DENYING THE MOTION; CONVICTION REVERSED.

The Second Department, reversing defendant's conviction, determined the judge did not make a sufficient inquiry of juror number 2 after complaints from defense counsel and the prosecutor that he appeared to be sleeping at times. The judge's denial of the defense motion to disqualify the juror was therefore based on speculation: "The court never asked juror number two during any of the inquiries if he had fallen asleep or was sleepy. During the third inquiry, the court did not ask juror number two about defense counsel's specific observations, including that juror number two had allegedly put his head back with his eyes closed and his mouth dropped. The court also failed to ask juror number two what he meant by his equivocal statement that he '[m]ore or less' understood the jury charge, or to ask if there were any specific portions of the jury charge that juror number two did not understand. Although the court did state at one point that '[w]e have not seen [juror number two] sleeping,' the statement, in context, indicates that the court was correcting defense counsel's misstatement, rather than making its own observation. Likewise, a statement by a court officer that he had not observed juror number two sleeping was not determinative in this case because defense counsel's assertion that the officer was seated behind juror number two was uncontradicted ... . Since the court failed to ask during the third inquiry whether juror number two had fallen asleep during the jury charge, whether he had difficulty staying awake, or about any of defense counsel's specific observations, its determination that juror number two was not grossly unqualified to serve was based on speculation ...". ***People v. Mentor*, 2023 N.Y. Slip Op. 00677, Second Dept 2-8-23**

CRIMINAL LAW, JUDGES, APPEALS.

THE PLEA ALLOCUTION RAISED THE POSSIBILITY OF DURESS AS AN AFFIRMATIVE DEFENSE; THE JUDGE MADE NO INQUIRY INTO THE VALIDITY OF PLEA; CONVICTION REVERSED DESPITE DEFENDANT'S FAILURE TO MOVE TO WITHDRAW THE PLEA.

The Second Department, reversing defendant's conviction by guilty plea, determined the plea allocution raised duress as a possible affirmative defense and the judge did not inquire into the validity of the plea. The issue was considered on appeal despite the failure to move to withdraw the plea: "To be valid, a plea of guilty must be entered voluntarily, knowingly, and intelligently ... . Generally, a defendant must preserve for appellate review a challenge to the validity of a guilty plea ... . When, however, a 'defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea,' the court has a duty to inquire further to make sure that the defendant understands the nature of the charge and that the plea has been intelligently entered ... . Where the court failed in its duty to inquire further, a defendant may raise a claim regarding the validity of the plea even without having moved to withdraw the plea ... . In this case, the defendant's contention challenging the validity of his plea of guilty is unpreserved for appellate review since he did not move to withdraw his plea or otherwise raise that issue prior to the imposition of sentence ... . However, the County Court's failure to inquire into the validity of the plea after the defendant's allocution raised the possibility of an affirmative defense based on duress (see Penal Law § 40.00) permits the defendant to challenge the sufficiency of the allocution on direct appeal, and requires reversal of the judgment of conviction ...". ***People v. Rodriguez*, 2023 N.Y. Slip Op. 00678, Second Dept 2-8-23**

TRUSTS AND ESTATES.

THE INSTRUMENT SHOULD HAVE BEEN ADMITTED TO PROBATE AS A LOST WILL.

The Second Department, reversing Surrogate's Court, determined the will should have admitted an instrument to probate as a lost will. It was shown the will was never in decedent's possession which negated the presumption the will had been revoked: "A lost or destroyed will may be admitted to probate if (1) it is shown that the will has not been revoked, (2) execution of the will is proved in the manner required for probate of an existing will, and (3) '[a]ll of the provisions of the will are clearly and distinctly proved by each of at least two credible witnesses or by a copy or draft of the will proved to be true and complete' ... . 'When a will, although once possessed by a testator, cannot be found after the death of the testator, a strong presumption arises that the testator revoked the will by destruction' ... . 'The presumption may be overcome, and the lost will admitted to probate, if the proponent establishes that the will was not revoked by the testator during his or her lifetime' ... . Here, in support of the petition, the petitioners submitted, among other things, the affirmation of the attorney-draftsperson, the affidavit of an attesting witness, and the unsigned copy of the decedent's lost will. The petitioners' submissions established that the will was never in the decedent's possession, that the will had not been revoked, and that the will was duly executed ...". ***Matter of McKenna*, 2023 N.Y. Slip Op. 00664, Second Dept 2-8-23**

FOURTH DEPARTMENT

ANIMAL LAW.

THE MAJORITY IN THIS DOG-BITE CASE DETERMINED DEFENDANT DID NOT DEMONSTRATE A LACK OF KNOWLEDGE OF THE DOG'S VICIOUS PROPENSITIES; TWO DISSENTERS ARGUED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED BECAUSE THE DOG HAD NEVER EXHIBITED VICIOUS BEHAVIOR BEFORE.

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined defendant's motion for summary judgment in this dog-bite case should not have been granted. The dissenters argued defendant demonstrated she did not have knowledge of the dog's vicious propensities: "[D]efendant submitted plaintiff's deposition testimony that, while plaintiff was at defendant's door, the dog came running and was barking, pushed the door open, and lunged at plaintiff, biting him in the right thigh. After plaintiff was on the ground, having been knocked to the bottom of the front steps, the dog bit the back of plaintiff's left leg and then his calf. Plaintiff further testified that, immediately after the incident, defendant told plaintiff, who was wearing a winter coat at the time of the attack, that 'the dog doesn't like people who wear coats.' Plaintiff also testified that defendant told him that 'the dog was protective.' Defendant further submitted the deposition testimony of defendant Jennifer McMahon, who lived in the home and was familiar with the dog, that the dog was 'protective' of the persons who lived in the home and that, when a stranger was present in the house, the dog would get in front of a member of the household to protect him or her. That evidence, combined with the evidence of the unprovoked and vicious nature of the attack and the severity of the injuries sustained by plaintiff, is 'sufficient to raise triable issues of fact as to whether the dog[] had vicious propensities and whether. . . defendant[] knew or should have known of them' ... . **From the dissent:** ... [D]efendant's submissions in support of the motion, including the deposition testimony of defendant and the tenant, establish that the dog was a gentle, well-behaved family dog, who was not aggressive, menacing, or intimidating, was not a guard dog, and had never growled at, nipped, or bitten anyone before ... . Neither defendant nor the tenant had ever observed the dog exhibit any aggressive behavior in the past. In sum, defendant established that the dog had not previously behaved in a threatening or menacing manner ... . The majority nonetheless cites evidence in defendant's submissions that defendant and the tenant characterized the dog as protective and having a dislike of people wearing coats, but conspicuously absent from the majority's analysis is any explanation of how

these characteristics reflect a 'propensity to do any act that might endanger the safety of the persons and property of others in a given situation' ...". ***Zicari v. Buckley*, 2023 N.Y. Slip Op. 00788, Fourth Dept 2-10-23**

CIVIL PROCEDURE, FORECLOSURE, TRUSTS AND ESTATE.

DEFENDANT WAS IMPROPERLY SUBSTITUTED AS A JOHN DOE IN THIS FORECLOSURE ACTION AND BECAUSE HE WAS SUED AS AN HEIR TO THE MORTGAGEE, AND NOT AS A REPRESENTATIVE OF THE MORTGAGEE'S ESTATE, THE ACTION WAS TIME BARRED.

The Fourth Department, reversing Supreme Court in this foreclosure action, determined defendant was not properly substituted in the amended complaint for a John Doe in the original complaint and, because defendant was sued in his capacity as the heir of the decedent, and not as a representative of the decedent's estate, the action was time-barred: "Plaintiff commenced this mortgage foreclosure action ... against ... the mortgagee, David B. Bailey (decedent), and certain 'John Does' and 'Jane Does' defined in the complaint as 'the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint.' Plaintiff subsequently discovered that decedent had died in 2018 and made an ex parte application seeking ... to substitute Arthur Bailey, in his capacity as heir to decedent's estate (defendant), as a John Doe defendant and for leave to file an amended complaint. ... We agree with defendant that his motion should be granted insofar as it seeks dismissal of the amended complaint against him. Defendant correctly contends that he was improperly substituted as John Doe #1 pursuant to CPLR 1024. Inasmuch as the original complaint 'fail[ed] to mention decedent's death' and defendant is being sued in the amended complaint in his capacity as an heir to decedent's estate, defendant does not fit within the categories of John and Jane Does set forth in the original complaint and thus cannot be substituted therefor ... . Further, although here plaintiff also filed and served an amended complaint on defendant solely in his capacity as heir to decedent's estate and not as a representative thereof (... see generally EPTL 3-3.6 [a], [b] ...), ... the relevant statute of limitations expired prior to the order granting plaintiff's ex parte application for leave to file the amended complaint (see generally CPLR 213 [4])." ***Citibank, N.A. v. Bailey*, 2023 N.Y. Slip Op. 00777, Fourth Dept 2-10-23**

CRIMINAL LAW, EVIDENCE.

THE MAJORITY CONCLUDED THAT EVEN IF DEFENDANT WAS ILLEGALLY FRISKED AND DETAINED OUTSIDE OF HIS VEHICLE, THE DEPUTY'S SEEING COCAINE ON THE DRIVER'S SEAT PROVIDED PROBABLE CAUSE FOR THE SEARCH OF THE VEHICLE; THE TWO-JUSTICE DISSENT ARGUED THE OBSERVATION OF THE DRUGS WAS A PRODUCT OF THE ILLEGAL FRISK AND DETENTION OF THE DEFENDANT.

The Fourth Department, over a two-justice dissent, determined the motion to suppress evidence seized from a vehicle was properly denied. After observing what appeared to be a drug transaction the defective called for assistance. As one of the deputies approached defendant's vehicle, defendant got out and walked toward the deputy. The deputy frisked the defendant, found nothing and told defendant to wait behind his vehicle. The deputy then walked to defendant's vehicle where he saw a rolled up dollar bill and white powder on the driver's seat. The dissent argued the deputy did not have reasonable suspicion of a crime when defendant was frisked and his observation of the drugs in the car was a product of the illegal detention of defendant: "The court properly determined that, based on the totality of the observations by the detective, which he communicated with the deputy ... , the deputy had a reasonable suspicion that defendant was involved in a drug transaction ... . In any event, 'the seizure of [the items inside the vehicle] was not the result of the allegedly illegal detention of defendant, who was outside the parked vehicle when the police officer approached and detained him' ... . Even if the deputy had not detained defendant, he could have simply walked up to the vehicle, looked in the window, and observed the drugs in plain view on the driver's seat. Contrary to defendant's further contention, the deputy's observations of the rolled-up dollar bill and white powdery substance provided probable cause to arrest defendant for possession of drugs ...". ***People v. Messano*, 2023 N.Y. Slip Op. 00769, Fourth Dept 2-10-23**

CRIMINAL LAW, EVIDENCE, JUDGES,

EVEN THOUGH DEFENDANT CLAIMED THE STABBING INJURIES WERE ACCIDENTAL, HE WAS ENTITLED TO A JURY INSTRUCTION ON THE JUSTIFICATION DEFENSE.

The Fourth Department, reversing defendant's conviction, determined defendant was entitled to have the jury instructed on the justification defense despite his claim the stabbing injuries were an accident. Defendant alleged the complainant attacked him with a knife and, in self-defense, he grabbed her arm and pinned it behind her back, causing the injuries. The court noted that the trial judge stuck with his opinion the justification defense is not available when it is alleged the injury was accidental or unintentional after he was presented with case law to the contrary: "It has long been settled law that '[a] defendant is entitled to a justification charge if there is some reasonable view of the evidence to support it, even if the defendant alleges that the victim's injuries were accidentally inflicted' ... . That is so because 'the defense of justification applies fully to a defendant's risk-creating conduct, even though it had unintended consequences' ... . Here, defendant's statements during his interview with a police investigator, an audio recording of which was introduced in evidence by the People, indicated that the stabbing injuries sustained by the complainant were the unintended result of defendant's defensive maneuvers. In particular, defendant asserted that the complainant, while intoxicated, confronted him with a knife and swung it at him, thereby prompting him to act defensively by twisting the complainant's arm behind her back with the knife still in her hand and pinning it against her. Contrary to the court's determination, defendant's statements 'do[ ] not defeat his entitlement to a justification charge' ...". ***People v. Rayford*, 2023 N.Y. Slip Op. 00786, Fourth Dept 2-10-23**

CRIMINAL LAW, EVIDENCE, PRIVILEGE.

THE RECORDED CONVERSATION BETWEEN THE 15-YEAR-OLD DEFENDANT AND HIS FATHER IN THE POLICE INTERVIEW ROOM IS PROTECTED BY PARENT-CHILD PRIVILEGE AND SHOULD HAVE BEEN SUPPRESSED.

The Fourth Department, reversing defendant's murder convictions, determined the recorded conversation between the 15-year-old defendant and his father in the interview room at the police station was protected by parent-child privilege and should have been suppressed. The defendant had requested a lawyer and the police had left the interview room at the time the conversation was recorded: "We conclude that a parent-child privilege did arise under the circumstances of this case ... . The application of the privilege is not dependent on a finding of police misconduct ... . [W]e recognize, as other courts have, that a young defendant will naturally look to a parent 'as a primary source of help and advice' ... The statements defendant now seeks to suppress were made in an attempt to utilize his father as such a source of assistance. 'It would not be consistent with basic fairness to exact as a price for that assistance, his acquiescence to the overhearing presence of government agents' ...". ***People v. Kemp*, 2023 N.Y. Slip Op. 00776, Fourth Dept 2-10-23**

CRIMINAL LAW, FAMILY LAW, JUDGES, APPEALS.

THE JUDGE FAILED TO INQUIRE FURTHER DURING THE PLEA ALLOCUTION WHEN DEFENDANT SAID HE DID NOT VIOLATE THE ORDER OF PROTECTION INTENTIONALLY; THERE IS NO NEED TO PRESERVE A DEFECTIVE-ALLOCUTION ERROR; CONVICTION REVERSED.

The Fourth Department, reversing defendant's conviction of an aggravated family offense by guilty plea, determined the judge should have inquired further when defendant stated he did not intend to violate the order of protection when he sent a letter to the protected person. A defective allocution will be considered on appeal in the absence of preservation: "[A]fter acknowledging his awareness of the valid and effective order of protection directing him to have no contact with the protected person, defendant stated that he 'didn't intentionally violate' the order of protection by sending the protected person a letter and instead asserted that any violation 'was unintentional.' Following an off-the-record discussion between defendant and defense counsel, defendant admitted that sending the letter did, in fact, violate the order of protection, but the court did not inquire, and defendant never clarified, whether his conscious objective was to disobey the order of protection ... . Contrary to the People's assertion, which 'conflates the culpable mental states for acts done 'intentionally' ... and those done 'knowingly' ... , this is not a case in which defendant's "further statements removed any doubt regarding th[e requisite] intent' ...". ***People v. Vanwuyckhuyse*, 2023 N.Y. Slip Op. 00754, Fourth Dept 2-10-23**

CRIMINAL LAW, JUDGES, APPEALS.

THE TRIAL JUDGE DID NOT RULE ON DEFENDANT'S MOTION FOR A TRIAL ORDER OF DISMISSAL; THE APPELLATE COURT CANNOT TREAT THE FAILURE TO RULE AS A DENIAL; MATTER REMITTED FOR A RULING.

The Fourth Department, remitting the matter for a ruling, determined the trial judge never ruled on defendant's motion for a trial order of dismissal: "At the close of the People's case, defendant moved for a trial order of dismissal, arguing ... that the People failed to make a prima facie case with respect to the second count of the indictment. There is no indication in the record that the court ruled on that part of defendant's motion. We lack the power to review defendant's contention that the evidence is legally insufficient to support the conviction of burglary in the second degree because, 'in accordance with *People v Concepcion* (17 NY3d 192, 197-198 [2011]) and *People v LaFontaine* (92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]), we cannot deem the court's failure to rule on the . . . motion as a denial thereof' ...". ***People v. Desmond*, 2023 N.Y. Slip Op. 00791, Fourth Dept 2-10-23**

FAMILY LAW, JUDGES.

THE JUDGE SHOULD NOT HAVE LEFT IT TO THE AGENCY TO DETERMINE FATHER'S VISITATION AND SHOULD NOT HAVE MADE THERAPEUTIC COUNSELING A PREREQUISITE FOR VISITATION.

The Fourth Department, reversing (modifying) Family Court determined (1) the judge should not have left it to the agency to decide whether father should receive visitation, and (2) father's participation in therapeutic counseling should not have been made a prerequisite to unsupervised overnight weekend visitation: "[T]he court erred in failing to set an appropriate supervised visitation schedule by implicitly leaving it to the agency to determine whether the father would receive any such visitation ... . 'Although a court may include a directive to obtain counseling as a component of a custody or visitation order, the court does not have the authority to order such counseling as a prerequisite to custody or visitation' ...". ***Matter of Bonilla-Wright v. Wright*, 2023 N.Y. Slip Op. 00756, Fourth Dept 2-10-23**

FAMILY LAW, JUDGES, APPEALS.

THE JUDGE'S FAILURE TO MAKE FINDINGS OF FACT IN THIS CUSTODY CASE PRECLUDED APPELLATE REVIEW; MATTER REMITTED.

The Fourth Department, remitting the matter to Family Court, determined the judge's failure to make findings of fact in this custody case precluded appellate review: "The court, in the order on appeal, however, failed to make any factual findings whatsoever to support the award of primary physical custody. It is 'well established that the court is obligated 'to set forth those facts essential to its decision' ... . Here, the court completely failed to follow that well-established rule when it failed to issue any factual findings to support its initial custody determination ... , nor did it make any findings with respect to the relevant factors that it considered in making a best interests of the child determination ... . 'Effective appellate review, whatever the case but especially in child visitation, custody or neglect proceedings, requires that appropriate factual

findings be made by the trial court—the court best able to measure the credibility of the witnesses' ...". ***Matter of Ianello v. Colonomos*, 2023 N.Y. Slip Op. 00767, Fourth Dept 2-10-23**

MUNICIPAL LAW, CIVIL RIGHTS LAW, MEDICAL MALPRACTICE, NEGLIGENCE, EMPLOYMENT LAW, CIVIL PROCEDURE, PERSONAL INJURY.

PLAINTIFF ALLEGED HE WAS DENIED PROPER MEDICAL CARE IN THE NIAGARA COUNTY JAIL AND SUED THE JAIL DOCTOR, THE COUNTY AND THE SHERIFF; THE CAUSES OF ACTION ALLEGING THE VIOLATION OF PLAINTIFF'S CIVIL RIGHTS PURSUANT TO 42 U.S.C. § 1983 SURVIVED MOTIONS TO DISMISS; OTHER CAUSES OF ACTION WERE DEEMED TIME-BARRED; ACTIONS ALLEGING THE COUNTY WAS VICARIOUSLY LIABLE FOR THE ACTS OF THE SHERIFF WERE DISMISSED; THE RELATION-BACK DOCTRINE DID NOT APPLY BECAUSE THE COUNTY AND SHERIFF WERE NOT DEEMED "UNITED IN INTEREST."

The Fourth Department, reversing (modifying) Supreme Court, determined some causes of action should have been dismissed and others should not have been dismissed in this action against the county, county employees and sheriff alleging plaintiff was denied proper medical care while he was an inmate in the Niagara County Jail. The medical malpractice and negligence causes of action against a doctor employed by the county were time-barred pursuant to General Municipal Law § 50-d (one year and ninety days). The causes of action against the doctor and the county alleging civil rights violations pursuant to 42 U.S.C. § 1983 properly survived motions to dismiss. But the 42 U.S.C. § 1983 cause of action against the sheriff should have been dismissed because the sheriff had no personal involvement in plaintiff's medical care. The relation-back doctrine was improperly invoked for time-barred causes of action against the sheriff because the county and the sheriff are not united interest (the county is not vicariously liable for the acts of the sheriff and the sheriff's department does not have an identity separate from the county). The negligent investigation cause of action should have been dismissed because New York does not recognize it. Claims alleging the county was vicariously liable for the acts of the sheriff should have been dismissed because plaintiff did not allege there was a local law imposing such a responsibility. ***Prezioso v. County of Niagara*, 2023 N.Y. Slip Op. 00768, Fourth Dept 2-10-23**

PERSONAL INJURY, EVIDENCE.

THE PLAINTIFF MADE A LEFT TURN IN FRONT OF DEFENDANT WHEN DEFENDANT HAD THE RIGHT OF WAY; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED; PLAINTIFF'S AFFIDAVIT ALLEGING DEFENDANT ATTEMPTED TO GO AROUND ANOTHER VEHICLE WAS BASED ON SPECULATION WHICH IS NOT SUFFICIENT TO DEFEAT SUMMARY JUDGMENT.

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment in this intersection traffic accident case should have been granted. Plaintiff made a left turn in front of defendant who had the right of way: "[D]efendant met his initial burden of establishing that he was not negligent because he had the right-of-way while traveling along Route 5, was operating his vehicle in a lawful and prudent manner, and was traveling at a lawful rate of speed, and that there was nothing he could have done to avoid the accident, which occurred when plaintiff suddenly turned left into defendant's lane of travel ... . We further conclude that plaintiff failed to raise an issue of fact in opposition to the motion ... . Contrary to plaintiff's assertion, the deposition testimony did not raise an issue of fact whether defendant was negligently passing another vehicle on the right in violation of Vehicle and Traffic Law § 1123 at the time of the collision. Although there is conflicting deposition testimony concerning the precise lane in which defendant was traveling at the time of the collision, there is no dispute that defendant never changed lanes while driving along Route 5 at the time of the collision. Thus, plaintiff's assertion that defendant unsafely attempted to go around another vehicle at the time of the accident 'is based on speculation and is insufficient to defeat a motion for summary judgment' ...". ***Gomez v. Buczynski*, 2023 N.Y. Slip Op. 00771, Fourth Dept 2-10-23**

PERSONAL INJURY, MUNICIPAL LAW, EVIDENCE.

PLAINTIFF STEPPED OFF A CURB AND FELL INTO A FOUR-FOOT-DEEP STORM DRAIN; THE GRATE WHICH USUALLY COVERED THE DRAIN WAS FOUND AT THE BOTTOM; THE DEFENDANT MUNICIPALITY DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE CONDITION; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined defendant municipality's motion for summary judgment in this slip and fall case should not have been granted. Plaintiff stepped off a curb into a four-foot deep storm drain. The grate which usually covers the drain was found at the bottom of the drain. The municipality did not show the missing grate was not obvious or visible and did not prove when the area had last been inspected: "[P]laintiff's testimony that he did not notice the uncovered storm drain before he stepped off the curb onto the street 'does not establish defendants' entitlement to judgment as a matter of law on the issue whether that condition was visible and apparent' ... . Indeed, plaintiff testified that he was looking for any oncoming traffic on the street before falling into the uncovered storm drain, which he observed immediately after he fell ... . We further conclude that the photographs included in defendants' moving papers, which were taken within days of the accident and, according to plaintiff's testimony, constitute fair and accurate representations of the uncovered storm drain at the time of the accident ...), raise a triable issue of fact whether the allegedly dangerous condition was visible and apparent ... . Moreover, while defendants submitted evidence that its employees generally maintained storm drains, including by cleaning them out and reporting missing grates, their submissions failed to establish when the storm drain into which plaintiff fell was last cleaned out or inspected ...". ***Lobianco v. City of Niagara Falls*, 2023 N.Y. Slip Op. 00787, Fourth Dept 2-10-23**

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