NEW YORK APPELLATE DIGEST,LLC

Court of Appeals 2019

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ADMINSTRATIVE LAW, MUNICIPAL LAW.

RELATED PUBLIC AUTHORITIES PROPERLY REQUIRED TO FILE SEPARATE REPORTS WITH THE NYS AUTHORITIES BUDGET OFFICE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined that the NYS Authorities Budget Office (ABO) properly required the Madison County Industrial Development Agency (MCIDA) and the related Madison Grant Facilitation Corporation (MGFC) to file separate reports pursuant to the Public Authorities Accountability Act (PAAA) and the Pbblic Authorities Law. MCIDA had filed a single consolidated report and brought an Article 78 proceeding arguing the ABO's determination that separate reports must be filed was arbitrary and capricious:

The ABO's narrow record-keeping determination was not contrary to law. The Public Authorities Law plainly provides that a local development corporation such as MGFC, which is "affiliated" with a local IDA, is also a local authority subject to the PAAA and, as such, has reporting obligations (Public Authorities Law § 2 [2] [d]). Regardless of whether MGFC is also a subsidiary, it is clearly an "affiliate" of MCIDA within the meaning of the statute … . The PAAA does not contain a reporting exception for subsidiaries of local authorities, and petitioners have not identified any other statute or regulation that excused MGFC from its obligation to separately report. Matter of Madison County Indus. Dev. Agency v State of New York Auths. Budget Off., 2019 NY Slip Op 02150, CtApp 3-21-19

APPEALS.

THE APPEAL OF AN UNPRESERVED ISSUE DID NOT PRESENT A QUESTION OF LAW REVIEWABLE BY THE COURT OF APPEALS, THREE JUDGES DISSENTED (CT APP).

The Court of Appeals, over an extensive two-judge dissenting opinion, and another dissent, determined that the modification by the Appellate Division could not be appealed:

"[A]n Appellate Division reversal [or modification] based on an unpreserved error is considered an exercise of the Appellate Division's interest of justice power" … . Moreover, the Appellate Division's characterization of its own holding (i.e., "on the law" or "on the facts") is not binding; in determining jurisdiction, we look behind that characterization to discern the basis of the ruling … . …

Here, it is undisputed that, in vacating the first-degree robbery count (without disturbing the second-degree robbery convictions …), the Appellate Division relied upon an unpreserved argument concerning the proper interpretation of and minimum proof required to establish the weapon display element of the first-degree offense … . As we have repeatedly recognized, for jurisdictional purposes an unpreserved issue of this nature does not present a question of law. Thus, the Appellate Division determination — the basis of the order of modification — was not "on the law alone" but was necessarily made as a matter of discretion in the interest of justice … . People v Allende, 2019 NY Slip Op 07523, Ct App 10-22-19

ATTORNEYS, CIVIL PROCEDURE.

ACTIONS TAKEN BY A NEW YORK ATTORNEY WHO IS NOT IN COMPLIANCE JUDICIARY LAW 470, WHICH REQUIRES AN OFFICE IN NEW YORK, ARE NOT A NULLITY (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, reversing the Appellate Division, determined that actions taken by an attorney who is admitted to practice in New York but is not in compliance with New York office requirement are not a nullity:

We … hold that a violation of Judiciary Law § 470 [requiring a New York office] does not render the actions taken by the attorney involved a nullity. Instead, the party may cure the section 470 violation with the appearance of compliant counsel or an application for admission pro hac vice by appropriate counsel … . Where further relief is warranted, the trial court has discretion to consider any resulting prejudice and fashion an appropriate remedy and the individual attorney may face disciplinary action for failure to comply with the statute … . This approach ensures that violations are appropriately addressed without disproportionately punishing an unwitting client for an attorney's failure to comply with section 470. Arrowhead Capital Fin., Ltd. v Cheyne Specialty Fin. Fund L.P., 2019 NY Slip Op 01124, CtApp 2-14-19

CIVIL PROCEDURE, BORROWING STATUTE, CONTRACT LAW.

PLAINTIFF TRUSTEE'S RESIDENCE IS CALIFORNIA AND THE CAUSES OF ACTION IN THIS RESIDENTIAL-MORTGAGE-BACKED-SECURITIES BREACH OF CONTRACT ACTION THEREFORE ACCRUED IN CALIFORNIA; UNDER NEW YORK'S BORROWING STATUTE, CPLR 202, THE ACTIONS MUST BE DISMISSED BECAUSE THEY ARE UNTIMELY UNDER CALIFORNIA LAW (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a two-judge dissent, determined that California, the residence of the plaintiff, here a residential-mortgage-backed-securities trustee, was where the breach of contract action accrued, not New York. Therefore, pursuant to CPLR 202, New York's borrowing statute, the action must be timely under both California and New York law. The action was not timely under California law which has a four-year statute for breach of contract:

Defendants argued that as a resident of California, plaintiff suffered economic injury in California, and therefore plaintiff's causes of action accrued in California for the purposes of CPLR 202. Plaintiff conceded that it was a resident of California. It argued, however, that instead of applying the general rule that an economic injury is suffered where the plaintiff resides to determine where the cause of action accrued, the court should apply a multi-factor analysis. Plaintiff asserted that because it was suing in a representative capacity on behalf of the trusts, it did not suffer real economic loss, and its residence was irrelevant, or at least not the primary consideration, for determining the place of accrual. * * *

We reaffirm that "a cause of action accrues at the time and in the place of the injury" … . Although courts may, in appropriate cases, conclude that an economic loss was sustained in a place other than where the plaintiff resides, we decline to apply the multi-factor analysis that plaintiff proposes. * * *

… [W]e conclude that plaintiff's residence applies to determine the place of injury in this case. As trustee, plaintiff is authorized to enforce, on behalf of the certificateholders, the representations and warranties in the relevant agreements. Accordingly, it is appropriate for us to look to plaintiff's residence as the place where the economic injury was sustained and, consequently, where plaintiff's causes of action accrued for purposes of CPLR 202. Deutsche Bank Natl. Trust Co. v Barclays Bank PLC, 2019 NY Slip Op 08519, Ct App 11-25-19

CIVIL PROCEDURE, CLASS ACTIONS, LANDLORD-TENANT.

CLASS ACTION CLAIM BY TENANTS ALLEGING VARIOUS FORMS OF RENT OVERCHARGES PROPERLY SURVIVED A PRE-ANSWER MOTION TO DISMISS AND SHOULD PROCEED TO THE CERTIFICATION STAGE PURSUANT TO CPLR 902 (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a three-judge dissent, determined the pre-answer motion to dismiss a class action claim by tenants alleging various forms of rent overcharges was properly denied and the matter should move on for a ruling on whether the prerequisites for a class action under CPLR 902 are met:

… [T]here is an element of truth to defendants' suggestion that the class claims — particularly those based on the alleged misrepresentation and inflation of the costs of IAIs [individual apartment improvements]— may require separate proof with respect to each plaintiff. Along those lines, defendants note that the operative complaint "alleges overcharges for inflated IAI increases of [various] amounts" — 136%, 97%, 82%, 104%, 113%, 33%, or 254% for various apartments — which they contend supports the idea that the alleged overcharges are separate wrongs to separate persons that do not form the basis for a class action … .

That leads to the friction point on this appeal: are we to look at the common basis for a damages claim or the degree of damage alleged? On the one hand, if, as defendants suggest, the differences in the specific means of harm is considered — that is, if at this stage the Court contemplates nuances of how those overcharges allegedly were accomplished — then plaintiffs may struggle to satisfy the factual component of CPLR 901 (a) (2). On the other hand, as plaintiffs note, to focus on potential idiosyncrasies within the class claims — distinctions that speak to damages, not to liability — at this juncture would potentially be to reward bad actors who execute a common method to damage in slightly different ways. * * *

Here the complaint addresses harm effectuated through a variety of approaches but within a common systematic plan … , and its class claims should not be dismissed at this juncture. Maddicks v Big City Props., LLC, 2019 NY Slip Op 07519, CtApp 10-22-19

CIVIL PROCEDURE, STATUTE OF LIMITATIONS, CONTRACT LAW.

THE SOLE REMEDY PROVISION OF THE CONTRACT IN THIS RESIDENTIAL MORTGAGE BACKED SECURITIES CASE, WHICH REQUIRED THAT THE DEFENDANT BE NOTIFIED AND GIVEN THE OPPORTUNITY TO REPURCHASE DEFECTIVE MORTGAGES, WAS NOT COMPLIED WITH PRIOR TO THE RUNNING OF THE STATUTE OF LIMITATIONS, PLAINTIFF'S TIMELY COMPLAINT WAS PROPERLY DISMISSED WITHOUT PREJUDICE, DESPITE THE FAILURE TO COMPLY WITH THE SOLE REMEDY PROVISION, ALLOWING PLAINTIFF TO REFILE THE COMPLAINT WITHIN SIX MONTHS PURSUANT TO CPLR 205 (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined that the trustee's breach of contract action in the residential-mortgage-backed-securities (RMBS) case was properly dismissed without prejudice, allowing plaintiff to refile pursuant to CPLR 205 (which allows a suit to be refiled within six months of a dismissal that is not on the merits). The contractual sole remedy provision, which requires that the defendant (DLJ) be notified and given the opportunity to repurchase any mortgages deemed defective, was not be complied with and the timely complaint was dismissed for that reason:

As a general rule, under CPLR 205 (a) a subsequent action may be filed within six months of a non-merits dismissal of the initial timely-filed matter. Here, we conclude that CPLR 205 (a) applies to an RMBS trustee's second action when its timely first action is dismissed for failure to comply with a contractual condition precedent. * * *

The difference between a procedural and substantive condition precedent is well-established. A condition precedent is substantive when it "describe[s] acts or events which must occur before a party is obliged to perform a promise made pursuant to an existing contract"… . In other words, the condition is "part of the cause of action and necessary to be alleged and proven, and without this no cause of action exist[s]" … , RMBS notice and sole remedy provisions are not substantive elements of the cause of action, but instead limitations on the remedy for a breach of the mortgage loan representations and warranties … . They serve as a precondition, "a procedural prerequisite to suit," not a separate undertaking by the trustee … . Since notice and sole remedy provisions "do[] not create a substantive condition precedent" … , they do not affect when the statute of limitations commences because the limitations clock begins to run when the contract is executed.

Nevertheless, DLJ argues that the Trustee had to fulfill the procedural condition precedent before the limitations period expired, and its failure to do so rendered the original action untimely, such that a new action cannot be commenced pursuant to CPLR 205 (a). DLJ's argument cannot be reconciled with our case law that a suit may be refiled pursuant to CPLR 205 (a) despite a plaintiff's failure to comply with a condition precedent prior to the expiration of the statute of limitations. U.S. Bank Natl. Assn. v DLJ Mtge. Capital, Inc., 2019 NY Slip Op 01169, CtApp 2-19-19

CIVIL PROCEDURE, STATUTE OF LIMITATIONS, CONTRACT LAW.

TRUSTEE'S BREACH OF CONTRACT ACTION IN THIS RESIDENTIAL MORTGAGE BACKED SECURITIES CASE WAS TIME-BARRED, THE ACTION COULD NOT RELATE BACK PURSUANT TO CPLR 203 BECAUSE THE TIMELY ACTION BY ANOTHER PARTY WAS PRECLUDED BY THE CONTRACT, THE COURT OF APPEALS COULD NOT CONSIDER WHETHER THE ACTION WAS TIMELY PURSUANT TO CPLR 205, EVEN THOUGH THE ISSUE WAS ADDRESSED BY THE APPELLATE DIVISION, BECAUSE THE ISSUE WAS NOT FULLY ADDRESSED IN SUPREME COURT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined that the trustee's breach of contract action in this residential-mortgage-backed-securities securities case was time-barred. A certificate holder had filed a timely action, but the relevant contract precluded the action by the certificate holder. Therefore the trustee's action could not be deemed to relate-back to it (CPLR 203). The Court of Appeals could not consider whether the trustee's action was timely under CPLR 205, despite the fact that the Appellate Division addressed the issue, because the issue was not fully addressed by the parties in Supreme Court and the Court of Appeals does not have interest of justice jurisdiction:

CPLR 203 (f) has no application here because the certificate holder's pre-existing action was not valid. The lower courts concluded that under the no action clause, the certificate holder could not bring the action on behalf of itself, any other certificate holder, or the Trustee. Those conclusions are not at issue in this Court. Thus, the certificate holder's action was subject to dismissal, and there is no valid pre-existing action to which a claim in a subsequent amended pleading may relate back. The Trustee's contention that it may use the relation-back doctrine of CPLR 203 (f) to cure the certificate holder's lack of a right to sue, and that it may therefore avoid

any problem with the identity of the plaintiff upon re-filing pursuant to CPLR 205 (a), is without merit. U.S. Bank Natl. Assn. v DLJ Mtge. Capital, Inc., 2019 NY Slip Op 01168, CtApp 2-19-19

CIVIL PROCEDURE, STATUTE OF LIMITATIONS, BANKRUPTCY.

FEDERAL BANKRUPTCY STAY TOLLED THE STATUTE OF LIMITATIONS IN A FORECLOSURE ACTION COMMENCED BEFORE THE STAY WENT INTO EFFECT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a three-judge dissent, determined an automatic bankruptcy stay tolls the statute of limitations where a party has a pending action at the time the stay was imposed:

New York law tolls the statute of limitations where "the commencement of an action has been stayed by a court or by statutory prohibition" (CPLR 204 [a]). Federal bankruptcy law automatically stays the commencement or continuation of any judicial proceedings against a debtor upon the filing of a bankruptcy petition (see 11 USC § 362 [a]). We must determine whether the bankruptcy stay qualifies as a "statutory prohibition" under CPLR 204 (a), and, if so, whether a party may later avail itself of the toll where, at the time the stay was imposed, that party had a pending action asserting the same claim. … [W]e answer yes to both questions … . * * *

CPLR 204 (a) provides, "[w]here the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced." The result here depends on our reading of the term "commencement."

Plaintiff argues that it is impossible for defendant to have been prohibited from "commencing" an action because a foreclosure action had been commenced prior to plaintiff's bankruptcy filing. Application of plaintiff's rule would be as follows: Because defendant filed the first foreclosure claim and defendant responded by filing a bankruptcy petition, invoking the automatic stay, commencement of that first action was not "stayed" under the statute and the toll is inapplicable. And when defendant filed a second foreclosure action, and plaintiff again responded by again filing a bankruptcy petition that invoked the automatic stay, "commencement" of that second action was not stayed, once again making the toll inapplicable … . * * *

Neither this Court nor the Legislature has restricted the term "commencement" to the first time a party files a complaint asserting a cause of action; instead the term may also include the commencement of subsequent

actions asserting the same claim … . Lubonty v U.S. Bank Natl. Assn.., 2019 NY Slip Op 08520, CtApp 11-25-19

CIVIL PROCEDURE, STATUTE OF LIMITATIONS, RELATION-BACK.

ALTHOUGH THE INITIAL COMPLAINT WAS FILED BUT NEVER SERVED, THE CAUSES OF ACTION IN THE COMPLAINT WERE TIMELY INTERPOSED AND THERE WAS NO NEED TO APPLY THE RELATION-BACK DOCTRINE TO THE AMENDED COMPLAINT (CT APP).

The Court of Appeals, over an extensive dissenting opinion, held, in a brief memorandum, that the claims were timely asserted in a complaint which was filed but never served. The amended complaint included the same claims. Therefore the relation-back doctrine did not apply. The claims should not have been dismissed under CPLR 306-b because the defendants waived that objection:

… [W]e … conclude that plaintiff's first and second causes of action should be reinstated. Those claims, asserted in identical form in both the original and amended complaints, were timely interposed when plaintiff filed the original summons and complaint, i.e., "when the action [was] commenced" (see CPLR 203 [c]; 304 [a]). The relation-back doctrine is therefore inapplicable (see CPLR 203 [f]). Although plaintiff failed to serve the original complaint, on this record, the claims should not have been dismissed under CPLR 306-b because defendants did not properly raise such an objection and thus waived it (see CPLR 320 [b]; 3211 [e]).

From the dissent:

Defendants each moved to dismiss the complaint—referring to the amended complaint—under CPLR 3211 (a) (5) and (7), claiming, amongst other things, that the first and second causes of action are untimely … . Plaintiff opposed the motion, asserting that these causes of action were timely interposed based on the filing of the unserved complaint. In its reply, the [defendant] requested dismissal of the unserved complaint pursuant to CPLR 306-b for lack of service within the statutory time period.

… [P]laintiff responded by filing a motion under CPLR 306-b to extend the time to file the unserved complaint and deem it timely served nunc pro tunc. * * *

Supreme Court, … denied plaintiff's CPLR 306-b motion, and … granted defendants' motions to dismiss and dismissed "the complaint" with prejudice. The Appellate Division affirmed … .. The dispositive point of contention … was whether the first two causes of action were timely … . Vanyo v Buffalo Police Benevolent Assn., Inc., 2019 NY Slip Op 08980, CtApp 12-17-19

CIVIL PROCEDURE, SUBPOENAS, ADMINISTRATIVE LAW.

CPLR 3122 DOES NOT REQUIRE THE STATE COMPTROLLER TO ACQUIRE PATIENT AUTHORIZATIONS BEFORE SUBMITTING SUBPOENAS FOR MEDICAL RECORDS IN CONNECTION WITH AUDITS OF PRIVATE HEALTHCARE PROVIDERS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, determined that the Comptroller of the State of New York, in auditing private health care providers, has the power to subpoena medical records without patient authorizations:

The Comptroller of the State of New York has a constitutional and statutory duty to audit payments of state money, including payments to private companies that provide health care to beneficiaries of a state insurance program. Here, the Comptroller carried out that obligation by means of investigatory subpoenas duces tecum directed to a medical provider, seeking patients' records. We hold that CPLR 3122 (a) (2) does not require that the Comptroller's subpoenas be accompanied by written patient authorizations, as the requirements set out in that paragraph apply only to subpoenas duces tecum served after commencement of an action. Matter of Plastic Surgery Group, P.C. v Comptroller of the State of N.Y., 2019 NY Slip Op 08979, CtApp 12-17-19

CONSTITUTIONAL LAW, ZONING, LAND USE.

ZONING LAWS WHICH PROHIBITED DEFENDANT FROM USING HIS RURAL-DISTRICT LAND TO HOST A LARGE, THREE-DAY MUSIC AND CAMPING EVENT DID NOT VIOLATE HIS FIRST AMENDMENT RIGHTS AND WERE NOT VOID FOR VAGUENESS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined that the town zoning laws which prohibited a landowner from holding a three-day music and camping on his rural property did not unconstitutionally restrict his First Amendment rights and were not void for vagueness:

Defendant Ian Leifer owns a 68-acre property containing a single-family home and undeveloped land within the boundaries of plaintiff Town of Delaware. In 2016, he planned to sponsor on the property a three-day event named "The Camping Trip" — which he had hosted twice before in previous years — over the course of an August weekend. … Meals would be provided at the site through food truck vendors and a religious nonprofit organization would lead in Jewish religious ceremonies. … [P]reparations included off-site parking at a local school and rental of shuttle buses to transport attendees to the event site, a party tent for inclement weather, security at both the parking lot and event, $2,000,000 event insurance, 16 portable toilets, a 30-cubic-yard dumpster, EMTs on site and an ambulance on standby. * * *

None of the principal or accessory uses specifically permitted in the Rural District encompass defendant's three-day outdoor music and camping festival. Such an event cannot reasonably be characterized as a customary accessory use associated with defendant's single-family residence. … [U]nless the provisions are unconstitutional, his proposed use is clearly prohibited in the Rural District under the Town of Delaware Zoning Law and the Town was entitled to enjoin the event … . * * *

Defendant's constitutional challenges … largely focus on a single land use defined in the Zoning Law that is prohibited in the Rural District but permitted in other zoning districts: the "theater" land use. This approach misses the mark because the Town did not rely exclusively on the theater provision but cited the Zoning Law as a whole to show that certain uses are prohibited in a Rural District but expressive aspects of the event, such as the musical presentations, are permitted in other districts. Considering this context, neither the theater provision, nor the Zoning Law as a whole, violates defendant's constitutional rights. Town of Del. v Leifer, 2019 NY Slip Op 08446, CtApp 11-21-19

CONTRACT LAW, DEBTOR-CREDITOR.

LOAN FUNDED BY THE PROCEEDS OF ILLEGAL GAMBLING IS ENFORCEABLE (CT APP).

The Court of Appeals determined that the loan agreement between plaintiff and defendant was enforceable despite the fact that the loan was funded by illegal gambling:

Neither the terms of the agreement nor plaintiff's performance — i.e., loaning money to a friend — was intrinsically corrupt or illegal. Although the loan was funded by the parties' illegal gambling operation (for which both were criminally prosecuted), the record does not support a characterization of their conduct as "malum in se, or evil in itself" … and the source of funds used for a loan is not typically a factor in determining its validity. Defendant argues the agreement should be deemed unenforceable because the courts should not assist a party in profiting from ill-gotten gains. But, here, where both parties were involved in the underlying illegality, neither enforcement nor invalidation of the contract would avoid that result. Indeed, if the loan is not enforced, defendant receives a windfall despite his participation in the criminal acquisition of the funds. We have been reluctant to reward "a defaulting party [who] seeks to raise illegality as a sword for personal gain rather than a shield for the public good'" … . Although we do not condone plaintiff's illegal bookmaking business, for which he was prosecuted and fined, the circumstances presented here do not warrant a departure from this tenet. Centi v McGillin, 2019 NY Slip Op 09058, CtApp 12-19-19

CORPORATION LAW, PROFESSIONAL CORPORATIONS, INSURANCE LAW.

INSURERS MAY PROPERLY REFUSE NO-FAULT INSURANCE PAYMENTS TO A PROFESSIONAL MEDICAL SERVICE CORPORATION WHICH IS EFFECTIVELY OWNED AND CONTROLLED BY NONPHYSICIANS, THERE IS NO NEED TO DEMONSTRATE FRAUDULENT INTENT OR CONDUCT TANTAMOUNT TO FRAUD ON THE PART OF THE PROFESSIONAL CORPORATION; ANY ERROR IN ALLOWING THE JURY TO HEAR NONPARTY DEPOSITION TESTIMONY IN WHICH THE NONPARTIES REPEATEDLY ASSERTED THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION WAS HARMLESS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, determined that the defendant insurers properly refused to make no-fault insurance payments to plaintiff professional corporation because the corporation was owned and controlled by nonphysicians. The court specifically held that fraudulent intent or conduct "tantamount to fraud" need not be demonstrated. The court noted that allowing in evidence the deposition testimony of two nonparties (nonphysicians who allegedly controlled the professional corporation), in which the Fifth Amendment privilege against self-incrimination was repeatedly asserted, if it was error (not determined), was harmless:

… [A]n insurance carrier, seeking to demonstrate that a professional service corporation engaged in corporate practices that violate Business Corporation Law § 1507, Business Corporation Law § 1508, or Education Law § 6507 (4) (c), [need not] show that the professional service corporation or its managers engaged in common-law fraud. … A corporate practice that shows "willful and material failure to abide by" licensing and incorporation statutes … may support a finding that the provider is not an eligible recipient of reimbursement under 11 NYCRR 65-3.16 (a) (12) without meeting the traditional elements of common-law fraud. * * *

While the Fifth Amendment accords an individual the privilege not to answer questions in a civil proceeding if the answers might incriminate the person in future criminal proceedings … , a witness who asserts this Fifth Amendment privilege in a civil trial is not necessarily protected from consequences in the same manner as in a criminal trial. This Court has held that, in a civil case, failure to answer questions by a witness who is a party "may be considered by a jury in assessing the strength of evidence offered by the opposite party on the issue which the witness was in a position to controvert" … . In a civil trial, "an unfavorable inference may be drawn against a party from the exercise of the privilege against self-incrimination" … . We have not previously decided

whether a nonparty's invocation of the Fifth Amendment may trigger an adverse inference instruction against a party in a civil case, and we have no occasion to do so here because any error by the trial court was harmless … . Andrew Carothers, M.D., P.C. v Progressive Ins. Co., 2019 NY Slip Op 04643, CtApp 6-11-19

CORPORATION LAW, MUNICIPAL LAW.

AN ATTORNEY, A PRINCIPAL IN THE CORPORATIONS OWNING SEVERAL BUILDINGS, WAS PROPERLY FOUND TO BE IN THE "OUTDOOR ADVERTISING BUSINESS" WITHOUT A LICENSE BECAUSE HE ADVERTISED HIS LAW PRACTICE IN SIGNS ON THE BUILDINGS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, determined the corporations which owned the buildings were separate from the attorney, a principal in the corporations, who advertised his law office in signs on the buildings. Therefore the attorney was making space available for outdoor advertising to "others" within the meaning of the NYC Administrative Code regulating outdoor advertising. The code requires "outdoor advertising companies" engaged in the :outdoor advertising business" to be licensed. The attorney (Ciafone) was fined for outdoor advertising without a license:

Contrary to the position of the Appellate Division dissent, preserving the distinction between the corporate entities and Mr. Ciafone does not "penalize him for forming corporate entities to own the buildings for tax and liability purposes"… . Myriad statutes and regulations apply to corporations, but not natural persons; those are not "penalties" for creating a corporate legal entity, but consequences of choosing that form of ownership. The New York City Council could rationally conclude that a corporation engaged in the provision of advertising to others, even others who have an ownership interest in the corporation, should be subjected to greater financial disincentives for violating signage laws than natural persons who are advertising themselves. Matter of Franklin St. Realty Corp. v NYC Envtl. Control Bd., 2019 NY Slip Op 08976, CtApp 12-17-19

CRIMINAL LAW, ACCUSATORY INSTRUMENTS, APPEALS.

DEFENDANT CHARGED WITH AN A FELONY AND FACING A POTENTIAL LIFE SENTENCE CANNOT WAIVE INDICTMENT AND PLEAD TO A SUPERIOR COURT INFORMATION; JURISDICTIONAL ISSUE PROPERLY CONSIDERED ON APPEAL DESPITE GUILTY PLEA AND FAILURE TO RAISE THE ISSUE BELOW (CT APP).

The Court of Appeals, reversing defendant's conviction by guilty plea, determined that the NYS Constitution and Criminal Procedure Law 195.10[1] prohibited defendant's waiver of indictment because defendant was charged with an A felony with a potential life sentence. The defendant was charged with second degree murder, waived indictment and pled to a superior court information charging first degree manslaughter. The court noted that this jurisdictional issue could be considered on appeal despite the guilty plea and the failure to raise the issue below:

The New York State Constitution provides that "[n]o person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury" (NY Const, art. 1 § 6). The Constitution contains a limited exception to this jurisdictional requirement: "a person held for the action of a grand jury upon a charge for such an offense, other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney" (id.).

In addition, Criminal Procedure Law § 195.10 provides that a defendant may waive indictment by grand jury when, among other conditions, "the defendant is not charged with a class A felony punishable by death or life imprisonment" (CPL 195.10 [1]). Accordingly, under both the Constitution and Criminal Procedure Law, a defendant who is held for the action of the grand jury on a class A felony punishable by life imprisonment may not waive indictment by the grand jury and agree to be prosecuted for a lesser included offense in order to facilitate a plea bargain on the homicide offense … . People v Monforte, 2019 NY Slip Op 06451, CtApp 9-5-19

CRIMINAL LAW, ACCUSATORY INSTRUMENTS.

THE FACTUAL ALLEGATIONS IN THIS COMMON LAW DRIVING WHILE INTOXICATED CASE WERE SUFFICIENT TO ALLEGE DEFENDANT WAS THE OPERATOR OF THE VEHICLE, APPELLATE TERM REVERSED (CT APP).

The Court of Appeals, reversing the Appellate Term, determined the "factual allegations in the accusatory instrument were sufficient to support the inference that defendant was the operator of the vehicle involved in the accident and, thus, Appellate Term erroneously dismissed the accusatory instrument on that ground." The facts of the case were not described. The Appellate Term decision is: People v Esposito (Monique) 2018 NY Slip Op 28245 Decided on August 3, 2018 Appellate Term, Second Department. People v Esposito, 2019 NY Slip Op 04448, CtApp 6-6-19

CRIMINAL LAW, ACCUSATORY INSTRUMENTS.

THE TOP COUNT OF A MISDEMEANOR COMPLAINT WAS NOT SUPPORTED BY SWORN ALLEGATIONS OF FACT, BUT THE LESSER COUNTS WERE SUPPORTED; A GUILTY PLEA TO THE JURISDICTIONALLY DEFECTIVE TOP COUNT DID NOT WAIVE THE DEFECT AND DEFENDANT'S CONVICTION WAS PROPERLY REVERSED (CT APP).

The Court of Appeals, in a two sentence memorandum decision, followed by two lengthy concurring opinions, and a lengthy three-judge dissenting opinion, determined the Appellate Term properly reversed defendant's guilty plea to a jurisdictionally defective count of a misdemeanor complaint. The top count of the misdemeanor complaint (oxycodone possession) was not sufficiently supported by the factual deposition, but the lesser counts of the complaint (marijuana possession) were supported. Defendant pled guilty to the top count. Defendant's guilty plea did not waive the jurisdictional defect:

Even if the accusatory instrument properly sets out a lower-grade offense, a defendant's challenge to a conviction based on the jurisdictional deficiency of a higher-grade crime of a multi-count complaint is not waived by the defendant's guilty plea. The Appellate Term properly reversed the judgment of conviction and sentence on the ground "that it was jurisdictionally defective as to the crime of which defendant was actually convicted" (People v Hightower, 18 NY3d 249, 254 [2011]). People v Thiam, 2019 NY Slip Op 07712, CtApp 1-29-19

CRIMINAL LAW, APPEALS.

CONVICTION AFFIRMED, THREE-JUDGE DISSENT ARGUED THE APPELLATE DIVISION EXCEEDED ITS AUTHORITY BY AFFIRMING ON A SEARCH-RELATED GROUND THAT WAS NOT RULED ON BY SUPREME COURT (CT APP).

The Court of Appeals, over a three-judge dissent, affirmed the suppression determination, without explaining the facts. The dissent mentions the facts briefly but argues that the Appellate Division exceeded its jurisdiction by affirming the conviction on a search-related ground that was not ruled on by Supreme Court:

The present case clearly falls into the category where the trial court's decision has discrete sections enabling an appellate court to discern which issues it has considered and decided, and yet the Appellate Division reviewed an issue that the trial court had not decided adversely to defendant, offering "an entirely distinct alternative ground for affirmance" … . If a suppression court writes a "fully articulated" decision adverse to a defendant … , but omits discussion of a particular issue raised by the defendant, our law mandates that an appellate court cannot resolve the issue and must remit. Whether our interpretation of CPL 470.15 (1), in LaFontaine [92 NY2d at 474] and its progeny, is "undesirable from a policy point of view" … is a question for another day. LaFontaine is the law and, until such time as that precedent is overruled, "we are constrained by that decision, and . . . cannot be arbitrary in applying it" … . People v Hill, 2019 NY Slip Op 05187, CtApp 6-27-19

CRIMINAL LAW, APPEALS, ACCUSATORY INSTRUMENTS.

IN AN IMPORTANT CLARIFICATION OF THE LAW, THE WAIVERS OF APPEAL IN TWO OF THE THREE APPEALS BEFORE THE COURT WERE DECLARED INVALID BECAUSE THE DEFENDANT WAS GIVEN THE ERRONEOUS IMPRESSION THAT ALL AVENUES OF APPEAL AND COLLATERAL RELIEF ARE CUT OFF BY THE WAIVER; IN ADDITION THE COURT OF APPEALS RULED THAT THE OMISSION OF THE APPROXIMATE TIME AND PLACE OF AN OFFENSE FROM A SUPERIOR COURT INFORMATION (SCI) OR A WAIVER OF INDICTMENT IS NOT A JURISDICTIONAL ERROR (CT APP).

The Court of Appeals, in a comprehensive opinion by Judge DiFiore, over several concurring and two dissenting opinions, determined that the waivers of appeal in two of the three appeals before the court were invalid. The opinion is an important clarification of the law and is too detailed to fairly summarize here. In a nutshell, a court should not give the defendant the impression that all appellate avenues, including the filing of a Notice of Appeal, collateral relief, and the availability of counsel, are cut off by the waiver of appeal. The court approved the Unified Court System's Model Colloquy. In addition the Court of Appeals held that the omission of the approximate time and place of an offense from a superior court information (SCI) or a waiver of appeal is not a jurisdictional defect, an important clarification which contradicts many decisions in the lower courts:

… [T]he Model Colloquy for the waiver of right to appeal drafted by the Unified Court System's Criminal Jury Instructions and Model Colloquy Committee neatly synthesizes our precedent and the governing principles and provides a solid reference for a better practice. The Model Colloquy provides a concise statement conveying the distinction missing in most shorthand colloquies — that: "[b]y waiving your right to appeal, you do not give up your right to take an appeal by filing a notice of appeal . . . within 30 days of the sentence. But, if you take an appeal, you are by this waiver giving up the right to have the appellate court consider most claims of error,[] and whether the sentence I impose, whatever it may be, is excessive and should be modified. As a result, the conviction by this plea and sentence will normally be final" (NY Model Colloquies, Waiver of Right to Appeal [emphasis added]). There is no mention made of an absolute bar to the taking of an appeal or any purported waiver of collateral or federal relief in the Model Colloquy or to the complete loss of the right to counsel to prosecute the direct appeal … .

* * *

… "[A] purported error or insufficiency in the facts of an indictment or information to which a plea is taken does not constitute a nonwaivable jurisdictional defect and must be raised in the trial court" … . By parity of reasoning, the omission from the indictment waiver form of non-elemental factual information that is not necessary for a jurisdictionally-sound indictment is similarly forfeited by a guilty plea. As relevant here, the legislative history accompanying enactment of CPL article 195 makes plain that the purpose of the written waiver of indictment form is to ensure the defendant had notice of the charges upon which the prosecution by SCI would proceed … . Executed solemnly in open court, the waiver form must memorialize with sufficient specificity the charges for which a defendant waives prosecution by indictment. Here, the statutory notice was accomplished as the six counts of sexual abuse designated in the waiver form were identical to the crimes for which [defendant] was held for grand jury action and originally charged in the local court accusatory instruments. People v Thomas, 2019 NY Slip Op 08545, Ct App 11-26-19

CRIMINAL LAW, APPEALS, ATTORNEYS.

DEFENDANT WAS NOT AFFORDED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, DESPITE COUNSEL'S LIMITED COMMUNICATION WITH DEFENDANT, COUNSEL'S NOT ACTING UNTIL THE APPEAL WAS ON THE DISMISSAL CALENDAR, AND COUNSEL'S SUBMISSION OF A MINIMAL BRIEF WITH SIX LINES OF TEXT IN THE STATEMENT OF FACTS AND NO CITATIONS TO THE RECORD, WHICH INCLUDED A 4000 PAGE TRIAL TRANSCRIPT (CT APP)

The Court of Appeals, in a full-fledged opinion by Judge Stein, over two separate, extensive dissenting opinions, determined defendant was not afforded ineffective assistance by his appellate counsel. The majority acknowledged that the appellate brief was "terse" and was not a model to be emulated, but noted the brief raised substantive issues that were addressed by the Appellate Division on the merits. The failure to raise the harsh and excessive sentence issue, and the failure to seek review by the Court of Appeals did not constitute ineffective assistance:

FROM JUDGE RIVERA'S DISSENT:

… [D]efendant maintains that counsel was ineffective because he initially failed to perfect the appeal, causing the Appellate Division to place the matter on the court's Dismissal Calendar, thus risking the loss of defendant's only appeal as of right … .

… [C]ounsel failed to communicate at all with his client in the three years following his appointment to represent defendant, and only as a late-day response to the Dismissal Calendar notification. … * * *

The failings of the brief are substantial. … The brief is barely 20 double-spaced pages, including separate pages for the cover, tables of contents and cases, CPLR 5531 statement, and issues presented. … Inexplicably, at the end of the facts section, appellate counsel inserted a photocopy of a six-page letter from trial counsel to the judge requesting an adjournment. The factual recitation consists of two pages and six lines of text. There is not a single citation in this section to the record on appeal, as required by the First Department's Local Rule § 120.8 (b)(4) which requires an appellant's brief to include a statement of facts "with appropriate citations to the . . . record." This hardly seems adequate given defendant appealed from a judgment following a three-month joint trial with two co-defendants, resulting in a trial transcript spanning over 4,000 pages, and involving multiple serious counts, including murder. In contrast, the People submitted a brief over 175 pages long, with 60 pages solely devoted to the facts. People v Alvarez, 2019 NY Slip Op 02383, CtApp 3-28-19

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

THE RECORD WAS INSUFFICIENT TO ALLOW THE CONCLUSION THAT DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL, A POST-TRIAL EVIDENTIARY PROCEEDING MIGHT ANSWER THE QUESTIONS LEFT OPEN BY THE TRIAL RECORD; ANY ERROR IN ADMITTING DNA EVIDENCE WHERE CONSENT, NOT IDENTITY, IS THE ISSUE IS HARMLESS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a dissent, determined (1) the record was insufficient to demonstrate defendant did not receive effective assistance of counsel and (2) because the DNA evidence was not offered to identify the defendant any error in introducing it was harmless. The defendant argued that defense counsel did not review the surveillance video the People provided and pursued a theory at trial that was at odds with the video evidence. In addition, defense counsel told the jury in his opening statement that defendant would testify (he did not testify), The defendant, who worked at a hotel, unlocked a hotel-room door for a couple who were drunk. At some point defendant had sexual contact with the woman while the man slept. Defendant said the sexual contact was consensual. The video evidence contradicted the time-line the defendant had described. The majority concluded the record evidence was not sufficient to conclude that defense counsel did not review or did not understand the significance of the video evidence, and the failure to call the defendant

as a witness did not prove ineffective assistance as a matter of law. To make a sufficient record, a 440 motion would be necessary:

Mr. Lopez-Mendoza argues that his attorney's opening statement undermined his case by promising the defendant would take the stand and making arguments contradicted by video evidence, then failing to call defendant to the stand and closing with a new version of events. The ineffective assistance, he argues, was caused by either his attorney's failure to review the video evidence or his failure to understand its importance. Either way, Mr. Lopez-Mendoza contends, that failure proved disastrous.

The defendant "bears the ultimate burden of showing . . . the absence of strategic or other legitimate explanations for counsel's challenged actions" … . The record here is insufficient to make that showing. Although "[i]t simply cannot be said that a total failure to investigate the facts of a case, or review pertinent records, constitutes a trial strategy resulting in meaningful representation"… , the limited record in this case does not conclusively establish that counsel was ineffective. On its own, the decision not to call a witness after promising to do so does not establish ineffective assistance of counsel as a matter of law … . * * *

"[T]he lack of an adequate record bars review on direct appeal . . . wherever the record falls short of establishing conclusively the merit of the defendant's claim" … . Here, it is "essential[] that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or post-conviction proceeding brought under CPL 440.10" … . Such a proceeding could answer the questions left open on this record, including whether counsel reviewed the video evidence at all, or whether he may have misunderstood that the evidence was flatly inconsistent with his opening argument. People v Lopez-Mendoza, 2019 NY Slip Op 04759, CtApp 6-13-19

CRIMINAL LAW, ATTORNEYS.

IN THE FACE OF OVERWHELMING EVIDENCE, DEFENSE COUNSEL EFFECTIVELY CONCEDED GUILT AND URGED JURY NULLIFICATION ON THE BURGLARY CHARGE BECAUSE THERE WAS NO BREAK-IN AND THE STOLEN ITEMS WERE NOT WORTH MUCH, THE COURT OF APPEALS HELD THAT DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL (CT APP).

The Court of Appeals determined defendant was not deprived of effective assistance of counsel because counsel effectively conceded defendant stole items from the lobby of an apartment building. Defense counsel argued defendant was overcharged (burglary) because, although defendant had no right to be in the lobby, there was no break-in and the stolen items were of minimal value. The Court of Appeals noted that it has held that a defendant cannot argue jury nullification to the jury:

… [I]n People v Weinberg, we concluded that defendant's argument that "he should have been permitted by the trial court to present the concept of jury nullification during summation is foreclosed by our holding in People v Goetz" (83 NY2d 262, 268 [1994]). Relying on Goetz, we explained that "[p]ermitting defense counsel instead [to en]courage the jury to abdicate its primary function would directly contravene the trial court's authority, recognized [in] Goetz, to instruct the jury that they must follow and properly apply the law" (id.).

We cannot say that, on this record when viewed in totality, defendant was provided with less than meaningful representation. Here, defense counsel was eminently familiar with the facts of the case and the evidence elicited, including the details of the surveillance video and the photographic exhibits. Given the truly overwhelming evidence against his client on all the charges, and constrained by the limited legitimate defense strategies available, counsel raised what he reasonably perceived could be factual issues in the case, such as the method of defendant's entry into the building. Counsel's performance included cogent opening and closing arguments, a motion to dismiss after the People's case-in-chief, and thorough cross-examinations of the People's witnesses. Moreover, the trial court did not curb counsel's jury nullification summation arguments. As a result, the whole record of counsel's performance demonstrates that defendant has failed to sustain his burden that he was deprived of meaningful representation … . People v Mendoza, 2019 NY Slip Op 04758. CtApp 6-13-19

CRIMINAL LAW, ATTORNEYS.

DEFENDANT'S PAPERS SUFFICIENTLY RAISED A QUESTION WHETHER HE WAS DENIED HIS RIGHT TO EFFECTIVE COUNSEL BECAUSE OF COUNSEL'S CONFLICT OF INTEREST, DENIAL OF DEFENDANT'S MOTION TO VACATE HIS CONVICTION WITHOUT A HEARING WAS AN ABUSE OF DISCRETION (CT APP).

The Court of Appeals, over a dissenting opinion by Judge Stein, determined that defendant was entitled to a hearing on his motion to vacate his conviction on the ground his attorney (Chabrowe) was ineffective because of a conflict of interest. Defendant alleged a party (Salaam) who was present at the scene of the depraved indifference murder committed by defendant was represented by Chabrowe and had paid Chabrowe's fees on defendant's behalf:

Although defendant had informed the trial court during the Gomberg inquiry that he or his family had hired Chabrowe, he alleged that Salaam paid Chabrowe to represent defendant, resulting in an undisclosed and "unwaivable" conflict, and that Chabrowe failed to explain any possible conflict of interest related to Salaam's payment of defendant's legal fees. In addition to his own affidavit, defendant submitted an affirmation from his current appellate counsel, who relayed details of a conversation he affirmed he had with Chabrowe about the payment of defendant's legal fees. Defendant also relied on recorded prison phone calls, which purportedly corroborate defendant's allegation that Salaam hired and paid for his attorney. * * *

We review the summary denial of a CPL 440.10 motion under an abuse of discretion standard. On this record, we conclude that Supreme Court abused its discretion in determining that a hearing was not warranted to address the allegations contained in defendant's CPL 440.10 motion regarding Chabrowe's representation of defendant and whether any conflict of interest existed warranting reversal. People v Brown, 2019 NY Slip Op 03404, CtApp 5-2-19

CRIMINAL LAW, ATTORNEYS.

DEFENDANT'S REQUEST TO REPRESENT HIMSELF WAS PROPERLY DENIED AND THERE WAS SUPPORT IN THE RECORD FOR THE EXISTENCE OF PROBABLE CAUSE TO ARREST (CT APP).

The Court of Appeals, affirming defendant's conviction, determined the defendant's request to proceed pro se was properly denied and there was support in the record for the existence of probable cause to arrest. The Court of Appeals did not discuss the facts. The link to the Second Department decision is here:

The trial court concluded—based upon, among other things, its own observations of defendant's conduct throughout these lengthy proceedings and the testimony of defendant's attending physician—that defendant engaged in malingering insofar as he was competent to proceed but persisted in his efforts to avoid trial. Inasmuch as defendant "engaged in conduct which would prevent the fair and orderly exposition of the issues," we conclude that the trial court did not abuse its discretion in denying defendant's request to proceed pro se …. Moreover, the existence of record support for the determination of the courts below that the pursuit of defendant by the police was justified by a "reasonable suspicion" of criminal activity forecloses our further review of that issue … . People v Gregory, 2019 NY Slip Op 04450, CtApp 6-6-19

CRIMINAL LAW, BAIL, INSURANCE LAW.

SUPREME COURT PROPERLY DETERMINED THE COLLATERAL SUPPORTING A POSTED BAIL BOND WAS INSUFFICIENT TO ENSURE THE ACCUSED'S RETURN TO COURT, APPELLATE DIVISION REVERSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, reversing the Appellate Division, determined that Supreme Court did not abuse its discretion when it reviewed the collateral for a bail bond which had been posted by an insurer and found the collateral insufficient:

"Following the posting of a bail bond," CPL 520.30 (1) permits a court to "conduct an inquiry for the purpose of determining," among other things, "the value and sufficiency of any security offered[] and whether any feature of the undertaking contravenes public policy." The statute also allows inquiry "into other matters appropriate to the determination, which include but are not limited to" six enumerated factors (CPL 520.30 [1]). For instance,

the court has broad discretion to examine "[t]he background, character and reputation of any person who has indemnified or agreed to indemnify an obligor upon the bond" (CPL 520.30 [1] [d]) and the source of any property that will be used as indemnification as well as "whether any such money or property constitutes the fruits of criminal or unlawful conduct" … . * * *

The insurance company … has a financial incentive in obtaining a defendant's release on bail so that it may retain its premium. This incentive is separate from the insurance company's interest in securing the defendant's return to court to avoid forfeiting its pledged security. The court, on the other hand, is concerned only with the defendant's continued appearances.

Supreme Court … correctly interpreted the statute and did not abuse its discretion when it disapproved the insurance company bail bond package on public policy grounds, specifically that the limited collateral pledged failed to adequately ensure [the accused's] return to court … . People ex rel. Prieston v Nassau County Sheriff's Dept., 2019 NY Slip Op 08447, CtApp 11-21-19

CRIMINAL LAW, CONTRACT LAW, GUILTY PLEAS.

DEFENDANT'S REFUSING TO TESTIFY WAS DEEMED A VIOLATION OF THE WRITTEN COOPERATION AGREEMENT, HIS MOTION TO WITHDRAW HIS GUILTY PLEA WAS PROPERLY DENIED (CT APP).

The Court of Appeals, affirming the denial of defendant's motion to withdraw his guilty plea, over an extensive two-judge dissent, determined that defendant's refusal to testify against a person who had participated in a home invasion violated the written cooperation agreement:

As part of a plea agreement and in exchange for a favorable sentence, defendant entered into a written cooperation agreement whereby he promised to "cooperate completely and truthfully with law enforcement authorities, including the police and the District Attorney's Office, on all matters in which his cooperation is requested, including but not limited to the prosecution of [defendant's accomplices] on charges related to the murder of Jose Sanchez and the assault of [Sanchez's brother]." Prior to entering into the cooperation agreement, defendant had confessed to his involvement in the Sanchez murder and assault, explaining that the crimes were retaliation for a prior invasion of defendant's home by Sanchez and his associates, including Jose Marin. When defendant signed the agreement, he already had testified to Marin's involvement in the home invasion before the

grand jury in the Sanchez matter, and he also had assisted the police with their investigation of the home invasion by identifying Marin in a photo array. …

… [D]efendant's refusal to testify against Marin violated the express terms of his cooperation agreement. The plain language of the agreement was objectively susceptible to but one interpretation … . County Court, therefore, did not abuse its discretion by denying defendant's motion to withdraw his guilty plea based on his claimed subjective misinterpretation of the agreement or by concluding, to the contrary, that defendant reasonably understood that his cooperation in the Marin prosecution was required … . People v Rodriguez, 2019 NY Slip Op 02444, CtApp 4-2-19

CRIMINAL LAW, CORRECTION LAW.

A FACEBOOK ACCOUNT IS NOT AN 'INTERNET IDENTIFIER' WITHIN THE MEANING OF THE CORRECTION LAW, THEREFORE DEFENDANT SEX OFFENDER'S FAILURE TO DISCLOSE IT TO THE DIVISION OF CRIMINAL JUSTICE SERVICES IS NOT A CRIME (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, affirming the Appellate Division, determined defendant, a sex offender, did not violate the Correction Law by failing to disclose his Facebook account. The Facebook account was not an "internet identifier" which must be disclosed under the Correction Law:

… [T]he Appellate Division correctly concluded that Facebook is not an "internet identifier," and that the existence of a Facebook account—as opposed to the internet identifiers a sex offender may use to access Facebook or interact with other users on Facebook—need not be disclosed to DCJS [Division of Criminal Justice Services] pursuant to Correction Law § 168-f (4). As the People concede, this was the legal theory upon which the indictment was based. The indictment therefore accuses defendant of performing acts that "simply do not constitute a crime" and is jurisdictionally defective … . People v Ellis, 2019 NY Slip Op 05183, CtApp 6-27-19

CRIMINAL LAW, DEPORTATION, MISDEMEANOR, JURY TRIAL.

DEFENDANT, A NONCITIZEN, WAS TOLD DURING HIS PLEA COLLOQUY THAT HE DID NOT HAVE THE RIGHT TO A JURY TRIAL ON THE DEPORTATION-ELIGIBLE B MISDEMEANOR; WHILE THE LEAVE APPLICATION WAS PENDING THE LAW WAS CHANGED TO AFFORD A PERSON IN DEFENDANT'S POSITION THE RIGHT TO A JURY TRIAL; THE MAJORITY UPHELD THE GUILTY PLEA; THE DISSENT ARGUED THE PLEA SHOULD NOT STAND (CT APP).

The Court of Appeals, in a brief memorandum, over an extensive dissenting opinion, determined the accusatory instrument accusing defendant of criminal contempt was sufficient and defendant's guilty plea was voluntary. During the plea colloquy defendant, an noncitizen, was told he did not have the right to a jury trial on the deportation-eligible B misdemeanor. While defendant's leave application to the Court of Appeals was pending, the court decided People v Suazo, 32 NY3d 491, affording persons in defendant's position the right to a jury trial. The dissent argued the guilty plea should be vacated:

From the dissent:

In accordance with the law at the time of defendant Sixtus Udeke's plea allocution, the trial court told defendant, a noncitizen, that he had no right to a trial by jury for a deportation-eligible Class B misdemeanor. While defendant's leave application to this Court was pending, we issued a new rule in People v Suazo (32 NY3d 491 [2018]), recognizing precisely the right defendant was told he did not have during the plea colloquy: that noncitizens like defendant have the right to a trial by jury for crimes carrying the potential penalty of deportation. That rule applies retroactively to defendant's appeal, and it leads to the conclusion that his guilty plea is invalid because he could not have knowingly and intelligently waived a right the court said he did not have. Therefore, I dissent from the majority decision that the guilty plea should stand. People v Udeke, 2019 NY Slip Op 09057, CtApp 12-19-19

CRIMINAL LAW, EVIDENCE.

ANY BRADY VIOLATIONS WERE NOT "MATERIAL" IN THAT THERE WAS NO REASONABLE POSSIBILITY THE EVIDENCE WOULD HAVE CHANGED THE JURY'S VERDICT, DEFENDANT'S MOTION TO VACATE HIS CONVICTION SHOULD NOT HAVE BEEN GRANTED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a dissent, reversing the Appellate Division, determined defendant's motion to vacate his conviction based upon the People's failure to turn over Brady material relevant to the impeachment of a key prosecution witness (JA), and the prosecutor's failure to correct that witness's testimony, should not have been granted. The opinion includes a detailed recitation of the evidence which can not be fairly summarized here. In a nutshell, the Court of Appeals held that any Brady violation that might have occurred, in light of the extensive impeachment evidence forcefully used by defense counsel, the violation was not "material" in that it could not have affected the verdict:

… [D]efendant brought [a] CPL 440.10 motion to vacate his conviction … . … [D]efendant asserted that the People had violated their Brady obligation by failing to turn over evidence that there was an agreement to confer a benefit on JA in exchange for his testimony at defendant's murder trial. In addition, defendant asserted that the trial prosecutor personally intervened in JA's burglary case by procuring his release without bail during the June 13th drug court appearance, failed to correct JA's trial testimony to specify that she was the "DA" who participated on June 13th, and failed to correct his characterization of his performance as 'good' in the drug treatment program … . * * *

"To make out a successful Brady claim, a defendant must show that (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material" … . In New York, where a defendant made a specific discovery request for a document, and the information was not disclosed, we measure the third prong of the materiality of the suppressed Brady material by considering whether there is a reasonable possibility that disclosure of the evidence would have changed the result of the proceedings … . In the absence of a specific request by defendant, materiality is established if there is a "reasonable probability" that the result would have been different if the evidence had been disclosed — meaning " a probability sufficient to undermine the court's confidence in the outcome of the trial' " … . * * *

In determining that a Brady violation occurred, the Appellate Division failed to do the required materiality analysis as to the suppressed information. * * *

… [T]o say that there was ample impeachment evidence at trial against the witness on multiple levels is an understatement. … [T]here is no reasonable possibility that the knowledge that the trial prosecutor was the specific ADA who stood up for the People at the June 13th appearance and that JA was still in a drug program despite additional program violations — leaving treatment and bringing cigarettes into a facility — would have changed the jury's verdict. People v Giuca, 2019 NY Slip Op 04642, CtApp 6-11-19

CRIMINAL LAW, EVIDENCE.

BRADY MATERIAL WHICH CONTRADICTED THE PEOPLE'S THEORY OF THE CASE SHOULD HAVE BEEN PROVIDED TO THE DEFENSE, CONVICTION REVERSED (CT APP).

The Court of Appeals, reversing defendant's conviction, determined that defendant should have been provided with exculpatory (Brady) evidence. Eyewitnesses to the assault made statements that there were two perpetrators, which directly contradicted the People's theory that defendant was the sole perpetrator:

The first two prongs of Brady being satisfied, our inquiry thus turns to whether the suppressed information was material. "In New York, the test of materiality where . . . the defendant has made a specific request for the evidence in question is whether there is a reasonable possibility' that the verdict would have been different if the evidence had been disclosed" … . … [B]oth witnesses' statements, if true, would have directly contradicted the People's theory of the case that defendant was the sole perpetrator. Although the People presented other evidence of defendant's guilt, the only witness who identified defendant at trial initially told the police that he did not see the perpetrator's face. Considering that the nightclub owner provided the police with the name of another possible assailant, and based on the other evidence presented at trial, it is clear that access at least to him could have allowed defendant to develop additional facts, which in turn could have aided him in establishing additional or alternative theories to support his defense. Given the substance of the nightclub owner's statements and the nature of the People's case, we cannot say—under our less demanding standard—that there was no "reasonable possibility" that the defense's investigation of the witnesses would not have affected the outcome of defendant's trial … . People v Rong He, 2019 NY Slip Op 07477, CtApp 10-17-19

CRIMINAL LAW, EVIDENCE.

MONITORING AND RECORDING PHONE CALLS MADE BY PRETRIAL DETAINEES WHO ARE NOTIFIED THE CALLS ARE MONITORED AND RECORDED DOES NOT VIOLATE THE FOURTH AMENDMENT, THE RECORDINGS MAY BE SHARED WITH LAW ENFORCEMENT AND PROSECUTORS WITHOUT A WARRANT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over a two-judge dissent, determined recording phone conversation of pretrial detainees who are notified the calls are monitored and recorded does not violate the Fourth Amendment. Therefore such recordings can be shared with law enforcement and prosecutors:

… [W]here detainees are aware that their phone calls are being monitored and recorded, all reasonable expectation of privacy in the content of those phone calls is lost, "and there is no legitimate reason to think that the recordings, like any other evidence lawfully discovered, would not be admissible" … . Moreover, the signs posted near the telephones used by the inmates state that calls are monitored in "accordance with DOC policy" which, according to the DOC Operations Order, provides that while recordings are confidential and not available to the public, the District Attorney's Office may request a copy of an inmate's recorded calls which will be provided upon approval by DOC … . …

We therefore reject defendant's argument that he retained a reasonable expectation of privacy once the calls were lawfully intercepted by DOC and hold that there were no additional Fourth Amendment protections that would prevent DOC from releasing the recording to the District Attorney's Office absent a warrant. People v Diaz, 2019 NY Slip Op 01260, CtApp 2-19-19

CRIMINAL LAW, EVIDENCE.

PROOF PRESENTED TO THE GRAND JURY DID NOT SUPPORT ATTEMPTED THIRD OR FOURTH DEGREE LARCENY, APPELLATE DIVISION REVERSED (CT APP).

The Court of Appeals, reversing (modifying) the Appellate Division, determined the evidence presented to the grand jury was not sufficient to support attempted third or fourth degree larceny. Apparently defendant used a

sticky object to "fish" mail out of a mailbox. Although there were money orders in the mailbox, the money orders were not stuck to the object:

Viewed in the light most favorable to the People, the evidence presented to the grand jury was insufficient to demonstrate that defendant came dangerously close to taking property valued in excess of $3,000 or $1,000. There was no evidence that the items attached to defendant's mailbox fishing apparatus had any monetary value, no evidence of the volume of the mail contained in the mailbox or whether it was physically possible for defendant to procure the two money orders deposited in the mailbox by the government investigators amidst the other mail, no evidence as to whether the fishing device was immediately reusable, and no evidence that defendant intended to make successive attempts at fishing out the contents of the mailbox in question. Furthermore, the fact that defendant stated he would be paid $100 for each mailbox fished does not establish that he came dangerously close to stealing property valued at more than $3,000 or $1,000. People v Deleon, 2019 NY Slip Op 07522, CtApp 10-22-19

CRIMINAL LAW, EVIDENCE.

SURVEILLANCE VIDEO CONSTITUTED BRADY MATERIAL WHICH COULD HAVE AFFECTED THE OUTCOME OF THE TRIAL, THE PROSECUTOR HAD SEEN THE VIDEO BUT TOLD THE JURY NO VIDEO EXISTED, CONVICTION REVERSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, reversing the Appellate Division, determined the People's failure to turn over to the defense a surveillance video which captured people (not the defendant) present at the time the victim was shot, as well as the victim falling, required a new trial. The prosecutor had seen the video and considered it irrelevant. In her summation, the prosecutor said there was no video of the incident:

In New York, where the defense "did not specifically request the information, the test of materiality is whether there is a reasonable probability that had it been disclosed to the defense, the result would have been different'" … . Defendant concedes that the "reasonable probability" standard applies here. In determining materiality, the "question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence" … . The "defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict" … . Defendant need only show that

"the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict" … . * * *

It requires no frame-by-frame review to grasp that the video would have become the focal point of defendant's trial. It would have set the scene of the murder, identified other potential witnesses, served to impeach eyewitness testimony, and provided a basis for an argument that other suspects might have been involved in the shooting. Instead of playing that role at trial, the video was withheld from the defense and the jury was told it did not exist. The aggregate effect of the suppression of this evidence undermines confidence in the verdict and therefore defendant is entitled to a new trial. People v Ulett, 2019 NY Slip Op 05060, CtApp 6-26-19

CRIMINAL LAW, EVIDENCE.

THE POLICE-OFFICER WITNESS, WHO DID TESTIFY AT TRIAL, DID NOT REMEMBER THE INCIDENT WHICH WAS THE BASIS FOR THE CHARGES AGAINST DEFENDANT, HIS GRAND JURY TESTIMONY WAS PROPERLY ADMITTED AS PAST RECOLLECTION RECORDED, DEFENDANT'S RIGHT OF CONFRONTATION WAS NOT VIOLATED BECAUSE THE WITNESS TESTIFIED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over an extensive three-judge dissent, determined that the police-officer witness's grand jury testimony was properly admitted under the "past recollection recorded" exception to the hearsay rule. The grand jury testimony did not violate the Confrontation Clause because the officer, who could not remember the incident he described to the grand jury, did, in fact, testify at trial:

The foundational requirements for the admissibility of a past recollection recorded are: 1) the witness must have observed the matter recorded; 2) the recollection must have been fairly fresh at the time when it was recorded; 3) the witness must currently be able to testify that the record is a correct representation of his or her knowledge and recollection at the time it was made; and 4) the witness must lack sufficient present recollection of the information recorded … . "When such a memorandum is admitted, it is not independent evidence of the facts contained therein, but is supplementary to the testimony of the witness. * * *

… [T]he right to confrontation guarantees not only the right to cross-examine all witnesses, but also the ability to literally confront the witness who is providing testimony against the accused in a face-to-face encounter before

the trier of fact … . The Confrontation Clause is satisfied when these requirements are fulfilled — even if the witness's memory is faulty. The United States Supreme Court has directly addressed the situation where a witness was unable to explain the basis for a prior out-of-court identification due to memory loss … . In Owens, the Court held that "[t]he Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish" … . To that end, "[i]t is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination), . . . the very fact that he has a bad memory" … . People v Tapia, 2019 NY Slip Op 02442, CtApp 4-2-19

CRIMINAL LAW, EVIDENCE.

THE SUPPRESSION COURT DID NOT ABUSE ITS DISCRETION BY REOPENING THE SUPPRESSION HEARING AFTER THE PEOPLE HAD RESTED TO ALLOW THE PEOPLE TO PRESENT AN ADDITIONAL WITNESS; THE "ONE FULL OPPORTUNITY" DOCTRINE DOES NOT APPLY IN THE "PRE-RULING" STAGE OF A SUPPRESSION HEARING (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a two-judge dissenting opinion, held the suppression court did not abuse its discretion by allowing the People to reopen the suppression hearing to present another witness after the People had rested. The court subsequently denied the motion to suppress. The Court of Appeals framed the issue around the "one full opportunity" rule which precludes reopening a hearing in other contexts and decided not to extend the rule to the ""pre-ruling" stage of a suppression hearing:

In Havelka [45 NY2d 636], we applied the "one full opportunity" rule to a holding by an appellate court overturning the decision of the suppression court. In Kevin W [22 NY3d 287}. we applied the same rule to the suppression court's decision to reopen the hearing after its ruling on the merits of the motion. Defendant now asks us to apply the rule at a point still earlier in the process, similarly restricting the suppression court's discretion before any decision is made. This we decline to do.

A basic concern underlying both Havelka and Kevin W. is finality, described as the "haunt[ing] . . . specter of renewed proceedings" after the defendant initially has prevailed … . We explained in Havelka that allowing the People to present additional evidence at a new hearing would render success at the original suppression hearing "nearly meaningless" … . The People, we said, should not get "a second chance to succeed where once they

tried and failed" … . However, that concern is absent where no decision on the motion has been rendered by the hearing court: no victory will be rendered "nearly meaningless."

The second issue of concern weighing in favor of the "one full opportunity" rule — the risk of improperly tailored testimony at the reopened proceedings — is significantly lower where the People do not have a formal decision from either an appellate court or the hearing court. People v Cook, 2019 NY Slip Op 09059, CtApp 12-19-19

CRIMINAL LAW, EVIDENCE.

DEFENSE COUNSEL SHOULD HAVE BEEN ALLOWED TWO CROSS-EXAMINE THE TWO POLICE OFFICERS WHO IDENTIFIED THE DEFENDANT AS THE SHOOTER ABOUT ALLEGATIONS OF THE OFFICERS' DISHONESTY ARISING FROM OTHER COURT PROCEEDINGS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing defendant's conviction, determined the trial court abused its discretion when it denied defense counsel's requests to cross-examine the two police witnesses about prior acts of dishonesty. The two officers presented the only evidence which identified the defendant as the shooter in this attempted murder prosecution:

At the suppression hearing held before trial, that officer's testimony supported defendant's contention that, in preparing to testify in an unrelated federal criminal proceeding, he had misled the prosecutor in that case with respect to his involvement in a ticket-fixing scheme. … Defense counsel … was not permitted to explore what defense counsel characterized as that officer's lies to the federal prosecutor regarding those activities.

… [T]he court limited exploration of that officer's prior bad acts to his participation in the ticket-fixing scheme, and did not permit inquiry with respect to that officer's deceit of the federal prosecutor.

That ruling was an abuse of discretion as a matter of law. * * *

We also conclude that the trial court abused its discretion as a matter of law in precluding cross-examination of both officers with respect to prior judicial determinations that addressed the credibility of their prior testimony in judicial proceedings. People v Rouse, 2019 NY Slip Op 08522, Ct App 11-25-19

CRIMINAL LAW, EVIDENCE.

DEFENDANT, A PAIN MANAGEMENT PHYSICIAN WHO OPERATED A "PILL MILL," WAS PROPERLY CONVICTED OF RECKLESS MANSLAUGHTER IN THE DEATHS OF TWO PATIENTS WHO DIED OF OPIOID OVERDOSE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a dissenting opinion, determined that defendant, a pain-management doctor, was properly convicted of manslaughter, recklessly causing the death of two persons [Haeg and Pappoid] to whom defendant prescribed opioids as part of a "pill mill" operation:

… [W]e conclude that the evidence was sufficient to support the jury's finding that defendant acted recklessly. A rational juror could have concluded, based on a valid line of reasoning and permissible inferences, that defendant was aware of and consciously disregarded a substantial and unjustifiable risk that Haeg and Rappold would take more drugs than prescribed and would die by overdose, and, given defendant's position as their medical doctor, that defendant's conduct constituted a "gross deviation from the standard of conduct that a reasonable person would observe in the situation" (Penal Law § 15.05 [3]). * * *

The fact that Haeg and Rappold took the substances defendant prescribed for them in a greater dosage than prescribed is neither an intervening, independent agency nor unforeseeable. It is a direct and foreseeable result of defendant's reckless conduct. As explained, viewing the evidence in the light most favorable to the People, a rational juror could conclude that defendant was aware of and consciously disregarded a substantial and unjustifiable risk that Haeg and Rappold would take the medications he prescribed at a higher dose than prescribed in order to attain a narcotic high rather than for legitimate pain management, and that they would die as a result. People v Stan XuHui Li, 2019 NY Slip Op 08544, Ct App 11-26-19

CRIMINAL LAW, JUDGES, GUILTY PLEAS.

THE TRIAL JUDGE'S NEGOTIATION OF A PLEA DEAL DIRECTLY WITH THE CO-DEFENDANT, IN RETURN FOR THE CO-DEFENDANT'S ESSENTIAL TESTIMONY IDENTIFYING THE DEFENDANT AS ONE OF THE ROBBERS DEPICTED IN A VIDEO, DEPRIVED DEFENDANT OF HIS RIGHT TO A FAIR TRIAL (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a concurrence, reversing the Appellate Division, determined the trial judge had deprived defendant of a fair trial by negotiating a plea agreement

directly with the co-defendant in return for the co-defendant's testimony against the defendant. Although the defendant and co-defendant in this robbery case were captured on video, their faces were covered. At trial the co-defendant identified the defendant as the person depicted in the video:

It is undisputed that, as the Appellate Division concluded, the trial court "personally negotiate[ed] and enter[ed] into a quid pro quo cooperation agreement with the codefendant whereby the court promised to sentence the codefendant within a specific range in exchange for his testimony against defendant" (151 AD3d at 1639). In so doing, the trial court improperly "assume[d] the advocacy role traditionally reserved for counsel" … and ventured from its own role as a neutral arbiter "[s]tationed above the clamor of counsel or the partisan pursuit of procedural or substantive advantage" … . Indeed, whatever its subjective intentions, the trial court effectively procured a witness in support of the prosecution by inducing the codefendant to testify concerning statements the codefendant made to police—which identified defendant as one of the robbers—in exchange for the promise of a more lenient sentence. Significantly, by tying its assessment of the truthfulness of the codefendant's testimony to that individual's prior statements to police, the trial court essentially directed the codefendant on how the codefendant must testify in order to receive the benefit of the bargain … . Under these circumstances, the trial court's conduct "conflicted impermissibly with the notion of fundamental fairness" … . That is, by assuming the function of an interested party and deviating from its own role as a neutral arbiter, the trial court denied defendant his due process right to "[a] fair trial in a fair tribunal" (In re Murchison, 349 US at 136). This error is not subject to harmless error review and requires reversal … . People v Towns, 2019 NY Slip Op 03527, CtApp 5-7-19

CRIMINAL LAW, JURORS.

FOR CAUSE CHALLENGE TO A PROSPECTIVE JUROR WAS HANDLED PROPERLY, THERE WAS NO NEED FOR FURTHER INQUIRY OF THE JUROR TO OBTAIN AN UNEQUIVOCAL ASSURANCE THE JUROR COULD BE FAIR (CT APP).

The Court of Appeals, in a brief memorandum, over a three-judge partial dissent, determined the trial court properly handled a for cause challenge to a prospective juror:

The trial court did not abuse its discretion in denying defendant's challenge for cause to a prospective juror pursuant to CPL 270 (1) (b). When defense counsel directly asked the prospective juror, "if you don't hear from [defendant], you don't hear him speak, are you going to hold that against him," she responded, "I don't believe that I would." This response directly refuted any notion that the prospective juror would "hold" defendant's

failure to testify "against him," i.e., that she would be biased in rendering a decision. Viewing this statement "in totality and in context" … , the exchange did not, in the first instance, demonstrate "preexisting opinions that might indicate bias" … . Thus, the trial court was not required to inquire further "to obtain unequivocal assurance that [the juror] could be fair and impartial" … . People v Patterson, 2019 NY Slip Op 08982, CtApp 12-17-19

CRIMINAL LAW, JURORS.

JUROR MISCONDUCT WARRANTED A NEW TRIAL IN THIS MURDER CASE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, affirming the Appellate Division, determined juror misconduct deprived defendant [Dr. Neulander] of a fair trial:

The Appellate Division concluded that the trial court abused its discretion by denying [defendant's] CPL 330.30 motion to set aside the verdict against him based on that juror misconduct. … [H]e is entitled to a new trial. "Nothing is more basic to the criminal process than the right of an accused to a trial by an impartial jury" … .

… [A] jury convicted Dr. Neulander of murdering his wife and tampering with physical evidence. Throughout the trial, one of the jurors, Juror 12, sent and received hundreds of text messages about the case. Certain text messages sent and received by Juror 12 were troublesome and inconsistent with the trial court's repeated instructions not to discuss the case with any person and to report any attempts by anyone to discuss the case with a juror. Juror 12 also accessed local media websites that were covering the trial extensively. In order to hide her misconduct, Juror 12 lied under oath to the court, deceived the People and the court by providing a false affidavit and tendering doctored text message exchanges in support of that affidavit, selectively deleted other text messages she deemed "problematic," and deleted her now-irretrievable internet browsing history. The cumulative effect of Juror 12's extreme deception and dishonesty compels us to conclude that her "improper conduct . . . may have affected a substantial right of defendant" (CPL 330.30[2]). People v Neulander, 2019 NY Slip Op 07521, CtApp 10-22-19

CRIMINAL LAW, JURY INSTRUCTIONS, EVIDENCE.

BECAUSE THE DEFENDANT DREW HIS GUN BEFORE THE UNARMED VICTIM "SWIPED" AT IT, THE DEFENDANT WAS THE INITIAL "DEADLY FORCE" AGGRESSOR AND WAS NOT ENTITLED TO THE JUSTIFICATION-DEFENSE JURY INSTRUCTION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, reversing the Appellate Division, determined defendant (Mr. Brown) was not entitled to the jury instruction on the justification defense. The Court of Appeals found that the defendant was the initial "deadly force" aggressor because he was wielding the gun before the unarmed victim (Mr. Cabbagestalk) "swiped" at the gun:

Mr. Wolf [an eyewitness who testified at trial] said he heard the older man [defendant] say, "Stay away from my daughter, don't come around here." Mr. Cabbagestalk responded, "you can't tell me where to be." According to Mr. Wolf, Mr. Cabbagestalk was "getting in the older guy's face a little bit," "trying to back him down," and Mr. Marshall [who was with Mr. Cabbagestalk] was trying to calm Mr. Cabbagestalk down.

Mr. Wolf testified … he observed Mr. Cabbagestalk throwing a few punches at Mr. Brown but that he believed those punches did not reach Mr. Brown. Mr. Wolf also testified that Mr. Brown was holding a gun slightly "above waist high" and "pointed away from him." Mr. Cabbagestalk then "swiped" at Mr. Brown's gun … … [A]t some point before Mr. Cabbagestalk's last swing or swipe, Mr. Cabbagestalk said, "if you going to pull a gun out, you got to use it." Mr. Brown did just that, shooting Mr. Cabbagestalk in the chest. * * *

Because Mr. Brown's drawing of his gun under these circumstances constituted the imminent threat of deadly physical force, the "initial aggressor" rule bars Mr. Brown from claiming justification unless a reasonable jury could conclude either: (1) that Mr. Brown withdrew from the encounter after drawing his gun, communicated that withdrawal to Mr. Cabbagestalk, and Mr. Cabbagestalk thereafter used or threatened imminent use of deadly physical force (Penal Law § 35.15[1][b]), or (2) that Mr. Cabbagestalk himself was the initial "deadly force" aggressor. No reasonable jury could reach either conclusion based on the evidence in this case, even viewing the evidence in the light most favorable to Mr. Brown (as we must). People v Brown, 2019 NY Slip Op 03529, CtApp 5-7-19

CRIMINAL LAW, JURY INSTRUCTIONS, EVIDENCE.

THE DEFENSE MADE A PRIMA FACIE SHOWING THAT THE MISSING WITNESS JURY INSTRUCTION WAS APPROPRIATE, THE TRIAL COURT IMPROPERLY PLACED THE BURDEN TO DEMONSTRATE THE WITNESS'S TESTIMONY WOULD NOT BE CUMULATIVE ON THE DEFENDANT, THE PEOPLE DID NOT MEET THEIR BURDEN TO DEMONSTRATE THE TESTIMONY WOULD BE CUMULATIVE (CT APP).

The Court of Appeals, reversing defendant's conviction, reversing the Appellate Division, in a full-fledged opinion by Judge Feinman, determined that the trial court's analysis of the defense request for a missing witness jury instruction improperly shifted the burden to the defendant to show that the testimony would not be cumulative. The witness, Dees, was with the shooting victim and was shot himself. The witness was the first to see the shooter in a car that passed by and tried to push the shooter away when the shooter approached:

In Gonzalez [68 NY2d 424], we established the analytical framework for deciding a request for a missing witness instruction. The proponent initially must demonstrate only three things via a prompt request for the charge: (1) "that there is an uncalled witness believed to be knowledgeable about a material issue pending in the case," (2) "that such witness can be expected to testify favorably to the opposing party," and (3) "that such party has failed to call" the witness to testify … . The party opposing the charge can defeat the initial showing by accounting for the witness's absence or demonstrating that the charge would not be appropriate … . "This burden can be met by demonstrating," among other things, that "the testimony would be cumulative to other evidence" … . If the party opposing the charge meets its burden by rebutting the prima facie showing, the proponent retains the ultimate burden to show that the charge would be appropriate … . We have repeatedly reiterated Gonzalez's specific burden-shifting analysis … , but we have never required the proponent of a missing witness charge to negate cumulativeness to meet the prima facie burden … . * * *

Given that defendant, as the proponent of the missing witness charge, met his initial burden, the People were required to rebut that showing by establishing why the charge was inappropriate. They failed to do so. The People simply asserted, without explanation, that Dees's testimony on the issue of identification would be cumulative because "there is absolutely no indication that [Dees] would be able to provide anything that wasn't provided by [the victim]." This conclusory argument was insufficient to satisfy the People's burden in response to defendant's prima facie showing … … Dees's testimony would not have been "trivial or cumulative"; due to inconsistencies in the victim's descriptions of the incident and what the shooter was wearing, the issue of identification was "in

sharp dispute . . . and the testimony of the only additional person who was present [during the shooting] might have made the difference" … . People v Smith, 2019 NY Slip Op 04447, CtApp 6-6-19

CRIMINAL LAW, JURY INSTRUCTIONS, EVIDENCE.

THE MAJORITY DID NOT RULE OUT THE POSSIBILITY THAT THE NON-DEADLY-FORCE JUSTIFICATION-DEFENSE JURY INSTRUCTION COULD BE APPROPRIATE IN A SECOND DEGREE ASSAULT CASE, BUT HELD THAT GIVING THE DEADLY-FORCE JUSTIFICATION-DEFENSE INSTRUCTION WAS NOT ERROR HERE (CT APP).

The Court of Appeals, over a concurrence, determined the jury was properly instructed on the "deadly force" justification defense on the assault second count. Defendant was convicted of beating the victim with a belt with a metal buckle, which was deemed a "dangerous instrument." The defendant argued he was entitled to the "non-deadly" or "ordinary" physical force justification-defense jury instruction:

The Penal Law defines "[d]eadly physical force" as "physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury" (Penal Law § 10.00 [11]). A "[d]angerous instrument" is defined as "any instrument, article, or substance . . . which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury" (id. § 10.00 [13]). Defendant argues that the statutory definitions, while similar, are not identical and that a jury may convict a defendant of a crime containing a dangerous instrument element without necessarily concluding that the defendant used deadly physical force. …

There is no per se rule regarding which justification instructions are appropriate based solely on the fact that the defendant has been charged with second-degree assault with a dangerous instrument. Instead, as in every case where the defendant requests a justification charge, trial courts must view the record in the light most favorable to the defendant and determine whether any reasonable view of the evidence would permit the factfinder to conclude that the defendant's conduct was justified, and, if so, which instructions are applicable … .

Under the particular circumstances of this case, the jury instruction does not require reversal … . Viewing the record in the light most favorable to defendant, there is no reasonable view of the evidence that defendant merely "attempted" or "threatened" to use the belt in a manner readily capable of causing death or serious physical injury … but that he did not "use" it in that manner … . People v Vega, 2019 NY Slip Op 03530, CtApp 5-7-19

CRIMINAL LAW, JURY INSTRUCTIONS, LESSER INCLUDED OFFENSES, EVIDENCE.

DENIAL OF THE REQUEST TO INSTRUCT THE JURY ON ASSAULT THIRD AS A LESSER INCLUDED OFFENSE AND THE ADMISSION OF THE 911 CALL AS AN EXCITED UTTERANCE WERE NOT REVERSIBLE ERRORS (CT APP).

The Court of Appeals, over an extensive dissenting opinion, as well as another brief dissenting opinion, determined the denial of defendant's request for a jury instruction on the lesser included offense of assault third degree, and the admission of the 911 call as an excited utterance was harmless error. The facts are explained only in the dissent and are not summarized here:

Defendant failed to "show that there [was] a reasonable view of the evidence in the particular case that would support a finding that he committed the lesser included offense but not the greater" … . Although "[i]n determining whether such a reasonable view exists, the evidence must be viewed in the light most favorable to [the] defendant" … , charging the lesser included offense here "would [have] force[d] the jury to resort to sheer speculation" … .

Nor does Supreme Court's admission of the call between the victim and the 911 operator require reversal. "A spontaneous declaration or excited utterance—made contemporaneously or immediately after a startling event—which asserts the circumstances of that occasion as observed by the declarant' is an exception to the prohibition on hearsay" … . "The test is whether the utterance was made before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective power to be yet in abeyance'" … . Assuming, without deciding, that it was error to admit the 911 call, any such error would have been harmless … . People v Almonte, 2019 NY Slip Op 05185, CtApp 6-27-19

CRIMINAL LAW, JURY INSTRUCTIONS, LESSER INCLUDED OFFENSES.

ANY ERROR IN FAILING TO INSTRUCT THE JURY ON LESSER INCLUDED OFFENSES WAS HARMLESS BECAUSE DEFENDANT WAS CONVICTED OF THE TOP COUNT AND THE HIGHEST LESSER INCLUDED OFFENSE WAS AVAILABLE TO THE JURY (CT APP).

The Court of Appeals determined denying a request for the jury to be instructed on lesser included offenses in this murder case was harmless error:

Even assuming the court erred in denying defendant's request to submit the crimes of manslaughter in the second degree and criminally negligent homicide to the jury as lesser included offenses of the charged crimes of murder in the second degree and manslaughter in the first degree, the error was harmless … . The Appellate Division properly concluded that defendant's conviction of the lesser inclusory count of first-degree manslaughter, which it dismissed as required by CPL 300.40 (3) (b), did not change the harmless error analysis. Under the circumstances presented here, the jury's guilty verdict on the indictment's highest count despite the availability of the next lesser included offense for their consideration, "forecloses [defendant's] challenge to the court's refusal to charge the remote lesser included offenses" … , because it dispels any speculation as to whether the jury might have reached a guilty verdict on "still lower degree[s] of homicide" … . People v McIntosh, 2019 NY Slip Op 05186, CtApp 6-27-19

CRIMINAL LAW, JURY INSTRUCTIONS, LESSER INCLUDED OFFENSES.

NO REASONABLE VIEW OF THE EVIDENCE SUPPORTED ANYTHING LESS THAN SERIOUS PHYSICAL INJURY, REQUEST FOR A JURY CHARGE ON ASSAULT THIRD WAS PROPERLY DENIED (CT APP).

The Court of Appeals, affirming the assault second conviction, determined defendant's request for a jury charge on assault third as a lesser-included offense was properly denied because of the severity of the victim's injuries:

Both live and photographic evidence at trial, ten months after the attack, demonstrated that the victim's face was disfigured with scars above one eyebrow, under the other eye, on her lip and across her neck, and that apart from the scars, her facial structure and appearance had changed significantly. Testimony from her treating physician established that she suffered at least five displaced fractures around her eye sockets and nose, which were left to heal as displaced. Viewed in a light most favorable to defendant … , we agree that no reasonable view of the evidence could support a finding that the victim sustained anything less than a serious physical injury … . People v Sipp, 2019 NY Slip Op 06432, CtApp 8-29-19

CRIMINAL LAW, JURY INSTRUCTIONS.

HARMLESS ERROR ANALYSIS APPLIES TO A JUDGE'S FAILURE TO CHARGE THE JURY IN ACCORDANCE WITH A RULING MADE PRIOR TO SUMMATION, CONVICTIONS AFFIRMED IN THE FACE OF OVERWHELMING EVIDENCE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a concurring opinion and an extensive two-judge dissenting opinion, determined that, in the two cases before the court, the trial court's reversing, after summation, its pre-summation position on a jury instruction was error, but in both cases was harmless error. The opinion is fact-specific and cannot not be fairly summarized here. In Mairena the judge, after agreeing to do so before summation, failed to charge the jury that defendant could not be convicted of manslaughter unless the jury found the fatal injury was caused by a box cutter or a knife. And in Altamirano, after denying the defense request for a jury charge on the innocent possession of a weapon prior to summation, the judge so charged the jury after summation:

In short, Miller [70 NY2d 903] , Greene [75 NY2d 875] and Smalling [29 NY3d 981] have consistently been applied by the appellate courts of this state and continue to be entitled to full precedential force. In those decisions, this Court meant what it expressly stated: a trial court's error in reversing a prior charging decision after summations have been completed is subject to harmless error analysis. …

We conclude that the evidence of guilt in both of the instant cases was overwhelming. Thus, as in Miller, Greene and Smalling, whether the error was harmless turns on the question of whether defendants were prejudiced. Although those cases do not clarify whether the constitutional or nonconstitutional standard applies in evaluating prejudice, we need not resolve that question today because, under either standard, the error in each case was harmless. People v Mairena, 2019 NY Slip Op 08978, CtApp 12-17-19

CRIMINAL LAW, JURY NOTES.

JURY NOTE FOUND IN THE COURT FILE BY APPELLATE COUNSEL WAS, AFTER A RECONSTRUCTION HEARING, DETERMINED TO HAVE BEEN A DRAFT WHICH WAS DISCARDED BY THE JURY, AS OPPOSED TO A NOTE OF WHICH COUNSEL SHOULD HAVE BEEN NOTIFIED, THEREFORE THE PROHIBITION OF RECONSTRUCTION HEARINGS WITH RESPECT TO THE HANDLING OF JURY NOTES DID NOT APPLY (CT APP).

The Court of Appeals, over a substantive concurrence, determined, based upon a reconstruction hearing held by Supreme Court at the direction of the Appellate Division, a jury note found in the court file by appellate counsel was a draft that was discarded by the jury. Therefore the strict requirements surrounding notification of counsel of the contents of notes from the jury, and the prohibition of reconstruction hearings in that context, did not apply:

We recently held that where the record does not establish that counsel was provided meaningful notice of the contents of a substantive jury note, "the sole remedy is reversal and a new trial," not a reconstruction hearing (People v Parker, 32 NY3d 49, 62 [2018]). However, the purpose of the reconstruction hearing at issue here was not to determine whether the court complied with the counsel notice requirements of CPL 310.30 and People v O'Rama (78 NY2d 270, 276 [1991]). Instead, the hearing was to determine whether, in the first instance, Exhibit XIV reflected a "jury . . . request [to] the court for further instruction or information" (CPL 310.30) such that those obligations were triggered. Moreover, the finding of the courts below, following the reconstruction hearing,

that Exhibit XIV was a draft note that the jury discarded is supported by the record and, thus, beyond our further review. People v Meyers, 2019 NY Slip Op 03658, CtApp 5-9-19

CRIMINAL LAW, MENTAL HYGIENE LAW.

COURT RECORDS RELATED TO PROCEEDINGS FOR THE COMMITMENT AND RETENTION OF DANGEROUS MENTALLY ILL ACQUITTEES ARE NOT CLINICAL RECORDS AND THEREFORE ARE NOT SUBJECT TO THE AUTOMATIC SEALING REQUIREMENT IN THE MENTAL HYGIENE LAW (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined that the records of Criminal Procedure Law 330.20 proceedings related to the commitment and retention of insanity acquittees (suffering from a dangerous mental disorder) are not "clinical records" within the meaning of the Mental Hygiene Law and, therefore, are not subject to the automatic sealing requirement:

The plain text of Mental Hygiene Law § 33.13 … cuts against defendant's interpretation that the term "clinical record" includes the entire record of court proceedings or dictates to a court how to manage its own records. * * *

Throughout our history, "the institutional value" of open judicial proceedings has fostered "an appearance of fairness" … and ensured "the public interest in having proceedings of courts of justice public, not secret, for the greater security thus given for the proper administration of justice" … . Interpreting Mental Hygiene Law § 33.13, despite the absence of any supporting statutory language, to provide a blanket sealing requirement of an entire court record that is automatically conferred disregards that tradition. In balancing the privacy rights of a defendant with the public's right to know how dangerous mentally ill acquittees are managed by the courts, the legislature eschewed an automatic sealing requirement of the court record. We refuse to disturb that balance today. Here, defendant demanded an automatic seal in stark contrast to a case specific analysis that demands a court to find good cause sufficient to rebut the legislative presumption of public access for any sealing, in part or whole, upon due consideration of the competing and compelling interests of the public and the parties … . Matter of James Q. (Commissioner of the Off. for People with Dev. Disabilities), 2019 NY Slip Op 01166, CtApp 2-19-19

CRIMINAL LAW, SENTENCING.

THE FACTS SUPPORTED CONSECUTIVE SENTENCES FOR CRIMINAL POSSESSION OF A WEAPON AND MURDER, DEFENDANT WAS SEEN IN POSSESSION OF THE WEAPON SEVERAL MINUTES BEFORE THE DEFENDANT APPROACHED THE VICTIM (CT APP).

The Court of Appeals, affirming defendant's conviction, noted that the consecutive sentences for possession of a weapon and murder were supported by the facts:

"So long as a defendant knowingly unlawfully possesses a loaded firearm before forming the intent to cause a crime with that weapon, the possessory crime has already been completed, and consecutive sentencing is permissible"… . Here, the record supports Supreme Court's imposition of consecutive sentences. Video surveillance evidence showed defendant in possession of the gun several minutes before approaching the victim, supporting the conclusion that defendant possessed the weapon for a sufficient period of time before forming the specific intent to kill. Thus, consecutive sentencing was permissible. People v Malloy, 2019 NY Slip Op 05061, CtApp 6-25-19

CRIMINAL LAW, SENTENCING.

WHERE A DEFENDANT HAS BEEN RESENTENCED BECAUSE THE ORIGINAL SENTENCE WAS ILLEGAL, THE DATE OF THE ORIGINAL SENTENCE CONTROLS FOR DETERMINATION OF PREDICATE FELONY STATUS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a three-judge dissent, reversing the Appellate Division, determined that, where a defendant has been resentenced because the original sentence was illegal, the date of the original sentence, not the subsequent resentence, controls for the purpose of determining predicate felony status:

… [D]efendant's proffered interpretation of Penal Law § 70.06 is not supported by the plain language of that provision, its well-established legislative purpose, or our precedent. Therefore, because the original sentences on defendant's 1989 convictions were imposed before commission of the present felony, the sequentiality

requirement of the predicate felony statute was satisfied, and defendant was properly sentenced as a second felony offender. People v Thomas, 2019 NY Slip Op 01167, CtApp 2-19-19

CRIMINAL LAW, STREET STOPS.

DEFENDANT WAS PROPERLY PURSUED AND DETAINED BASED UPON HIS DRINKING FROM A CONTAINER IN A PAPER BAG AND RUNNING INSIDE A NEARBY BUILDING; THE INTENT TO DEFRAUD WAS PROPERLY INFERRED FROM DEFENDANT'S POSSESSION OF BOTH REAL AND COUNTERFEIT BILLS, KEPT SEPARATELY ON HIS PERSON (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over an extensive two-judge dissent, determined defendant was properly pursued and detained after a police officer saw him on the street drinking from a container inside a paper bag and then saw him run inside a nearby building as the officer approached. The Court further determined the intent to defraud could be inferred from the defendant's possession of counterfeit bills. The defendant had both counterfeit and real money on his person, kept separately. The issues were succinctly described in the dissent:

From the dissent:

The majority lauds the hot pursuit and forcible detention of Clinton Britt, a man drinking a Lime-A-Rita&TLRtrade; wrapped in a brown paper bag in Times Square shortly before midnight, and his subsequent conviction for intending to spend counterfeit money absent any indication that he attempted or planned to use it, simply because it was found rubber-banded separately from his real money when he was searched upon arrest. Both are mistakes.

The first — let's chase and physically detain people drinking from unseen containers in brown paper bags — is perhaps understandable because of the tremendous difficulty inherent in the mis-application of our De Bour test in many real-world situations. The sad consequence of that mistake is a regression from the legislative and prosecutorial progress eschewing policing based on stereotypes, returning us to the world of broken windows — where police pursue quality of life violations that disproportionately affect the poor (not merely those committing the infractions, but their families, neighbors and communities).

The second — let's equate the separation of real from counterfeit money with the intent to defraud — is inexplicable. It overturns our clear holding in People v Bailey (13 NY3d 67 [2009]), by contravening the most

fundamental proposition of evidence: a fact is not evidence unless it makes the disputed issue more likely to be true than it otherwise would be. Put simply, if you knew you had counterfeit money on your person and did not want to use it, you would keep it separate from your real money. That [defendant] kept his real and fake money separate says nothing about his intent to use it to defraud, deceive or injure anyone, which is a statutory requirement under Penal Law § 170.30. People v Britt, 2019 NY Slip Op 09060, CtApp 12-19-19

CRIMINAL LAW, STREET STOPS.

HAVING DEFENDANT WAIT WITH TWO POLICE OFFICERS WHILE A THIRD TOOK HIS ID TO AN APARTMENT TO VERIFY DEFENDANT'S CLAIM HE WAS VISITING A FRIEND IN THE APARTMENT WAS NOT JUSTIFIED UNDER DE BOUR, CONVICTION REVERSED (CT APP).

The Court of Appeals, reversing the Appellate Division in this street stop case, determined having defendant "stand right there" with two police officers, while a third took defendant's ID to an apartment to verify defendant's claim he was visiting a friend there, was not justified under De Bour:

Defendant … was approached by New York Police Department officers after they observed him exiting and reentering a building in a New York City Housing Authority development several times. Upon the officers' request, defendant explained that he was visiting a friend who lived in the building. The officers asked defendant for his identification, which he provided. An officer then took defendant's identification to the eleventh floor of the building to verify whether the occupant of the apartment defendant identified knew him … . Another officer instructed defendant to "stand right there" under the watch of two officers. When the first officer returned, having determined that the occupant of the apartment did not know defendant, defendant was arrested for trespassing. At the precinct, officers conducted a search of defendant's person incident to his arrest and recovered 42 bags of crack cocaine from his groin area. * * *

At its inception, this was "a general, nonthreatening encounter in which an individual is approached for an articulable reason and asked briefly about his or her identity, destination, or reason for being in the area" … . That request implicated only level one of De Bour … and required only an objective credible reason to make basic inquiries of defendant … . On this record, the initial inquiry was justified.

However, the record demonstrates that the encounter thereafter rose beyond a level-one request for information, which the People failed to justify as lawful. Consequently, the People have failed to preserve any argument that

the encounter in this case was justified under levels two or three of De Bour. People v Hill, 2019 NY Slip Op 03405, CtApp 5-2-19

CRIMINAL LAW, STREET STOPS.

POLICE OFFICER HAD REASONABLE GROUNDS TO PULL OVER PETITIONER'S CAR AFTER THE CAR CROSSED THE FOG LINE WITH A BLINKER ON AND THEN MOVED BACK INTO THE LANE, REVOCATION OF DRIVER'S LICENSE FOR FAILURE TO SUBMIT TO A CHEMICAL TEST AFFIRMED (CT APP).

The Court of Appeals, over a dissent, determined the stop of defendant's car was based upon reasonable grounds to believe petitioner had violated Vehicle and Traffic Law 1128. Therefore the revocation of petitioner's license for refusing to submit to a chemical test was affirmed:

At the administrative hearing, testimony was elicited that, while on patrol at 1:00 AM on December 22, 2013, a police officer observed petitioner's vehicle "make an erratic movement off the right side of the road, crossing the fog line and [moving] off the shoulder [with the vehicle's] right front tire." Once the vehicle left the paved roadway — and with the right-hand turn signal on — the officer saw the vehicle immediately move left, returning to its original lane of travel. After observing that there was no animal or other obstruction of the roadway that would have explained the "erratic jerking action," the police officer pulled the vehicle over. During the stop, the officer noticed that petitioner smelled of alcohol and exhibited other signs of inebriation. Petitioner admitted that he "had a few drinks" and asked the officer to give him a ride home, failing field sobriety tests and a preliminary breath test given at the scene. At the precinct, despite receiving the appropriate warnings, petitioner refused to take a chemical test, resulting in an administrative license revocation hearing. The police officer's testimony at the hearing, articulating credible facts to support a reasonable belief that petitioner violated Vehicle and Traffic Law § 1128 (a) (failure to remain in lane), provided substantial evidence that he had probable cause to stop petitioner's vehicle … . Any negative or adverse inference that was drawn from petitioner's failure to testify at the administrative revocation hearing was permissible … . Matter of Schoonmaker v New York State Dept. of Motor Vehs., 2019 NY Slip Op 02259, CtApp 3-28-19

DEBTOR-CREDITOR, CIVIL PROCEDURE, INSURANCE LAW.

ONCE AN ACTION TO RECOVER THE PRINCIPAL OF A BOND IS TIME-BARRED, THERE IS NO LEGALLY COGNIZABLE CLAIM FOR POST-MATURITY INTEREST (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, determined that a bond issuer is not obligated to pay interest once a claim for the principal is time-barred:

The United States Court of Appeals for the Second Circuit has asked us to decide … "[i]f a bond issuer remains obligated to make biannual interest payments until the principal is paid, including after the date of maturity … , do enforceable claims for such biannual interest continue to accrue after a claim for principal of the bonds is time-barred?" We answer this question in the negative … . Pursuant to New York common law and the terms of the indenture, in the absence of a timely action to recover principal, a bondholder cannot enforce the conditional obligation to make post-maturity interest payments. * * *

The rule we reiterate today effectuates the agreement negotiated by the parties and reinforces our longstanding view of interest as generally dependent on principal. Moreover, it promotes the purposes underlying the statute of limitations … . For those reasons, we conclude that once a claim on the principal is time-barred, a claim to recover unpaid post-maturity interest payments is not legally cognizable. Ajdler v Province of Mendoza. 2019 NY Slip Op 02151, CtApp 3-21-19

EDUCATION-SCHOOL LAW, ATTORNEYS, ADMINISTRATIVE LAW.

IN THIS COLLEGE DISCIPLINARY ACTION, THE COLLEGE'S REFUSAL OF THE STUDENT'S REQUEST FOR A THREE-HOUR ADJOURNMENT TO ALLOW HIS ATTORNEY TO ATTEND WAS AN ABUSE OF DISCRETION, NEW HEARING ORDERED (CT APP).

The Court of Appeals, reversing the Appellate Division in this college disciplinary action, determined the student's request for a three-hour adjournment to allow his attorney to attend should have been granted. The link to the reversed Second Department decision is here:

… [T]he petition insofar as it sought to annul respondents' disciplinary determination [is] granted and the matter remitted to the Appellate Division with directions remand to respondents for a new disciplinary hearing. Petitioner, a student enrolled at respondent Purchase College of the State University of New York, was accused of multiple disciplinary violations including sexual assault of another student. Petitioner requested a three-hour adjournment of his scheduled administrative hearing so that his attorney could attend the proceeding. Respondents denied this request. Under the particular circumstances of this case, we find respondents abused their discretion as a matter of law by failing to grant the requested adjournment … . Matter of Bursch v Purchase Coll. of the State Univ. of N.Y., 2019 NY Slip Op 04449, CtApp 6-6-19

ELECTION LAW.

ELECTION LAW 3-222 WHICH PROHIBITS DISCLOSURE OF VOTED BALLOTS FOR TWO YEARS AFTER AN ELECTION APPLIES BOTH TO PAPER BALLOTS AND ELECTRONIC BALLOTS (CT APP).

The Court of Appeal, in a full-fledged opinion by Judge DiFiore, over two dissenting opinions (three dissenting judges), reversing the Appellate Division, determined that Election Law 3-222 (2), which prohibits, for two years, the disclosure of "voted ballots" absent a court order of legislative committee direction, prohibits the disclosure of the electronic form of the ballots:

Public Officers Law § 87(2)(a), the FOIL exemption at issue, provides that an agency may deny access to records that are "specifically exempted from disclosure by state or federal statute." While an applicable "state or federal statute" need not "expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting a FOIL disclosure claims as protection" … . Respondents assert that Election Law § 3-222 creates such an exemption. To determine whether Election Law § 3-222 reflects the requisite legislative interest in confidentiality, we must interpret the statute. * * *

… . [T]he rule in Election Law § 3-222(2) that "voted ballots" are protected from examination during the first two years after an election absent court order or direction from a relevant legislative committee extends to electronic copies of those ballots. The same is true of absentee and military ballots, which are "voted ballots" under subsection (2) and, along with their envelopes, are also specifically protected in subsection (3). Matter of Kosmider v Whitney, 2019 NY Slip Op 04757, CtApp 6-13-19

EMPLOYMENT LAW, ADMINISTRATIVE LAW, CIVIL PROCEDURE.

DEPARTMENT OF LABOR'S INTERPRETATION OF A WAGE ORDER WHICH ALLOWED 24-HOUR LIVE-IN HOME HEALTH CARE AIDES TO BE PAID FOR 13 HOURS WAS NOT IRRATIONAL OR UNREASONABLE, APPELLATE DIVISION REVERSED, MATTER REMITTED FOR CONSIDERATION OF OTHER GROUNDS FOR CLASS CERTIFICATION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a two-judge dissent, reversing the Appellate Division, determined that the Department of Labor's interpretation of a minimum wage order applicable to home health aides was not irrational or unreasonable. The matter was sent back for consideration of other grounds for class certification:

The common issue presented in these joint appeals is whether, pursuant to the New York State Department of Labor's (DOL) Miscellaneous Industries and Occupations Minimum Wage Order (Wage Order), an employer must pay its home health care aide employees for each hour of a 24-hour shift. DOL has interpreted its Wage Order to require payment for at least 13 hours of a 24-hour shift if the employee is allowed a sleep break of at least 8 hours—and actually receives five hours of uninterrupted sleep—and three hours of meal break time. DOL's interpretation of its Wage Order does not conflict with the promulgated language, nor has DOL adopted an irrational or unreasonable construction, and so the Appellate Division erred in rejecting that interpretation. Therefore, we reverse the Appellate Division orders and remit for consideration of alternative grounds for class certification for alleged violations of New York's Labor Law, inclusive of defendants' alleged systematic denial of wages earned and due, unaddressed by the courts below because of their erroneous rejection of DOL's interpretation. Andryeyeva v New York Health Care, Inc., 2019 NY Slip Op 02258, CtApp 3-26-19

EMPLOYMENT LAW, BATTERY.

BRUTAL, UNPROVOKED ATTACK ON CLAIMANT, AN INMATE, BY CORRECTION OFFICERS WAS DEEMED TO HAVE NO RELATION TO THE DUTIES OF A CORRECTION OFFICER; THEREFORE THE ATTACK WAS NOT WITHIN THE SCOPE OF THE OFFICERS' EMPLOYMENT AND THE STATE, AS A MATTER OF LAW, IS NOT LIABLE UNDER A RESPONDEAT SUPERIOR THEORY (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a three-judge dissent, determined that the state's motion for summary judgment in this assault and battery action by an inmate was properly granted. Claimant was brutally beaten, without cause, by three correction officers and sued the state under a respondeat superior, vicarious liability theory. The Court of Appeals held the state had demonstrated the officers were not acting within the scope of their employment when they assaulted the claimant:

Correction officers are authorized to use physical force against inmates in limited circumstances not present here, such as in self-defense or to suppress a revolt (see Correction Law § 137 [5]; 7 NYCRR 251-1.2 [a], [b]). DOCCS regulations require correction officers to exercise "[t]he greatest caution and conservative judgment" in determining whether physical force against an inmate is necessary (7 NYCRR 251-1.2 [a]). To be sure, correction officers at times use excessive force. Such conduct will not fall outside the scope of employment merely because it violates department rules or policies or crosses the line of sanctioned conduct. Under our multi-factored common-law test for determining respondeat superior liability, an employee's deviation from directions or governing standards is only one consideration in the analysis. Here, the gratuitous and utterly unauthorized use of force was so egregious as to constitute a significant departure from the normal methods of performance of the duties of a correction officer as a matter of law. This was a malicious attack completely divorced from the employer's interests.

Further, there is no evidence in the record that DOCCS should — or could — have reasonably anticipated such a flagrant and unjustified use of force, in which, assisted by other officers who immobilized and handcuffed claimant, Wehby [the primary assailant] repeatedly punched and kicked him during a prolonged assault, removing claimant's protective helmet in order to facilitate more direct blows to his head. As such, based on the uncontested facts, it is evident that claimant's injuries were not caused by actions taken within the scope of employment and thus, there were no triable issues of fact as to the State's vicarious liability for assault and battery. Rivera v State of New York, 2019 NY Slip Op 08521, Ct App 11-25-19

EMPLOYMENT LAW, MUNICIPAL LAW, POLICE OFFICERS, CIVIL RIGHTS LAW.

CITY'S DETERMINATION IT WOULD NOT DEFEND A POLICE OFFICER IN A SUIT ALLEGING THE OFFICER'S USE OF EXCESSIVE FORCE WAS NOT ARBITRARY AND CAPRICIOUS; HIS CONDUCT CONSTITUTED "INTENTIONAL WRONGDOING" WHICH WAS NOT WITHIN THE SCOPE OF HIS EMPLOYMENT (CT APP).

The Court of Appeals, in a brief memorandum decision, over a two-judge dissenting opinion, determined the City of Buffalo's ruling that petitioner police officer was not entitled to defense and indemnification by the City in an action against the officer alleging use of excessive force. The facts were described in the dissent as follows: "Numerous Buffalo police officers, including Officer Corey Krug, were deployed to keep order at Chippewa Street, a popular location for late-night drunken revelry. In the course of doing his job, a 30-second excerpt of a video filmed by a local TV station crew shows Officer Krug performing his duties with what appears to be excessive force: asking an unarmed young man, Devin Ford, why he returned to the area, throwing him onto the hood of a car, striking him in the leg several times with a baton and stopping only when another officer saw the incident and told him to stop. Criminal charges were filed against Officer Krug for the use of excessive force, and Mr. Ford filed a civil suit against him." The Court of Appeals upheld the determination that Officer Krug was not acting within the scope of his employment when he dealt with Mr. Ford:

Given the narrow question before us and under the circumstances presented here, we cannot say that the City's determination was "irrational or arbitrary and capricious"… . Insofar as the record supports the City's conclusion that petitioner was not "acting within the scope of his public employment" under Buffalo City Code § 35-28 because his conduct constituted "intentional wrongdoing" and violated the City's rules regarding the use of force, the City's determination was not "taken without regard to the facts" … . Matter of Krug v City of Buffalo, 2019 NY Slip Op 08546, CtApp 11-26-19

EMPLOYMENT LAW, MUNICIPAL LAW.

‘LABOR CLASS’ EMPLOYEES ARE NOT ENTITLED TO REINSTATEMENT AFTER A YEAR’S ABSENCE DUE TO ON THE JOB INJURY, CIVIL SERVICE LAW 71 DOES NOT APPLY TO ‘LABOR CLASS’ EMPLOYEES (CT APP).

The Court of Appeals, reversing the Appellate Division, determined section 71 of the Civil Service Law, which provides for the reinstatement of an employee after a one-year absence from work due to an injury, did not apply to petitioner (Jordan), a so-called “labor class” employee of the New York City Housing Authority (NYCHA):

Petitioners argue, as they did below, that “employee” is unqualified in the statute and so we should apply that term broadly, consistent with its plain meaning. NYCHA counters that, although “employee” is undefined in the Civil Service Law, section 71 uses terms of art normally not associated with the labor class, including “preferred eligible list” and “grade.” Both are fair points, and therefore to resolve any ambiguity, we turn to the history and the purpose of the statute in resolving this issue.

Our task here is made easier by the fact that we have already articulated section 71’s purpose. Twenty-five years ago, in Allen v Howe, we said that section 71 “w[as] adopted to address the difficult situation created by the prolonged absence of a civil service employee” due to injury (84 NY2d 665, 671 [1994]). Under Civil Service Law § 75, delineated groups of employees “shall not be removed . . . except for incompetency or misconduct after a hearing.” This section left a governmental employer unable to fill a vacancy created by an extended absence due to injury without a “resignation” or the “institut[ion] of disciplinary hearings” (id.). Section 71 was designed to remove the procedural hurdle imposed by section 75 by allowing a “State governmental employer” to terminate an employee without “resort to a disciplinary proceeding” and providing the injured employee a mechanism for later reinstatement (id.).

Including Jordan within the coverage of section 71 would not serve that legislative purpose. As a labor class employee, Jordan was not entitled to a disciplinary hearing before she was terminated and NYCHA did not face the dilemma that led to passage of section 71. Moreover, even if NYCHA was forced to rehire Jordan, she could have been lawfully terminated the next day—”an absurd result that would frustrate the statutory purpose” … . Therefore, we hold that NYCHA did not violate Section 71 when it refused to reinstate Jordan. Matter of Jordan v New York City Hous. Auth., 2019 NY Slip Op 04756, CtApp 5-13-19

ENVIRONMENTAL LAW, ADMINISTRATIVE LAW.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION'S (DEC'S) RULING ALLOWING SNOWMOBILES TO USE A ROADWAY IN THE ADIRONDACK PARK UPHELD (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over two dissenting opinions (three judges) held that the determination by the Department of Environmental Conservation (DEC) to allow snowmobiles to use an existing roadway in the Adirondack Park was not irrational and should stand:

Our state's constitutional commitment to conservation for more than a century has ensured the continued protection of the region's iconic landscapes while providing extraordinary outdoor recreational experiences to citizens of this state and tourists from around the world. Agencies charged with managing park property must balance, within applicable constitutional, statutory and regulatory constraints, the preeminent interest in maintaining the character of pristine vistas with ensuring appropriate access to remote areas for visitors of varied interests and physical abilities. In this appeal, we review a challenge brought by environmental groups to a determination of the New York State Department of Environmental Conservation ("DEC") made in consultation with the Adirondack Park Agency ("APA") that, among other things, permits seasonal snowmobile use on an existing roadway on property recently acquired by the State and added to the Adirondack Forest Preserve. Because we are unpersuaded by petitioners' contention that the determination either contravenes controlling motor vehicle use restrictions in the Adirondack Park State Land Master Plan ("Master Plan") and Wild, Scenic and Recreational Rivers System Act (ECL 15-2701 et seq. ["Rivers Act"]) or is otherwise irrational, we affirm the challenged portion of the Appellate Division order. Matter of Adirondack Wild: Friends of the Forest Preserve v New York State Adirondack Park Agency, 2019 NY Slip Op 07520, CtApp 10-22-19

ENVIRONMENTAL LAW, MUNICIPAL LAW, LAND USE.

CONVERSION OF A HISTORIC LOWER MANHATTAN LANDMARK, A RARE CLOCK AND CLOCK TOWER, TO A LUXURY APARTMENT WAS PROPERLY APPROVED BY THE NYC LANDMARKS PRESERVATION COMMISSION, APPELLATE DIVISION REVERSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over an extensive two-judge dissenting opinion, reversing the Appellate Division, determined the NYC Landmarks Preservation Commission (LPC) properly approved the redevelopment of 346 Broadway, a historic building in Lower Manhattan that the LPC had previously designated as a landmark. The redevelopment entailed conversion of an interior landmark (a clock) to a luxury apartment:

In its initial designation report, the LPC noted several of the building's unique features. The exterior of the "palazzo-like tower," constructed in "the neo-Italian Renaissance style," was largely built with "white Tuckahoe marble." The "interiors" were also "designed using the finest craftmanship and lavish materials" including "marble, bronze, [and] mahogany." Among the interior spaces designated were the former "Banking Hall," a "grand and boldly scaled neo-Classical room" with "monumental freestanding Corinthian columns, and "[t]he clock tower" which housed a "No. 4 Striking Tower Clock"—a mechanical clock driven "by a thousand pound weight" which "strikes the hours" with a hammer and a "5000 pound bell." The clock was manufactured by E. Howard Watch & Clock Company and "was specially equipped with a double three-legged gravity escapement"—a feature, petitioners claim, is shared by only one other tower clock: the clock housed by Elizabeth Tower (also home to the bell known as Big Ben) in London. In total, the LPC landmarked 20,000 square feet out of the building's total interior space of 420,000 square feet. * * *

… [T]the developer intended to keep the clock running electrically. …

… [T]he LPC found that the developer's plan would have "the main lobby, stair hall, clock tower rooms and banking hall . . . fully restored." Additionally, it would "allow accessibility by the public to the lobby and former banking hall." The LPC also found that "the clock mechanism and faces will be retained, thereby preserving these significant features." In sum, the LPC found that "the proposed restorative work will return . . . the interior closer to [its] original appearance, and will aid in [its] long-term preservation."

FROM JUDGE RIVERA'S DISSENT:

Notwithstanding the historical significance of the clock to the City, the LPC approved the building owner's request to convert this interior landmark into a luxury apartment. The former is a rare horological masterpiece; the latter is a typical, now-commonplace, development for the wealthy by the wealthy. Although the LPC has great latitude to decide whether to approve an alteration to an interior landmark, it cannot approve an alteration that, by its very nature, amounts to a de facto rescission of a landmark designation. So, the question is, when is an interior landmark no longer an interior landmark? The answer is contained in the plain language of the Landmarks Preservation Law, which defines an interior landmark as accessible to the public for the people's benefit and welfare. Transforming an interior landmark into a private residence such that it is completely closed off from the public, annuls its designation and is inconsistent with the purpose of the Landmarks Preservation Law. Matter of Save America's Clocks, Inc. v City of New York, 2019 NY Slip Op 02385, CtApp 3-28-19

FALSE ARREST, MALICIOUS PROSECUTION.

DEFENDANT WAS ACQUITTED OF MURDER AFTER IMPRISONMENT FOR TWO AND A HALF YEARS; HIS FALSE ARREST AND MALICIOUS PROSECUTION ACTION WAS PROPERLY DISMISSED AT THE SUMMARY JUDGMENT STAGE; TWO-JUDGE DISSENT ARGUED CONTESTED FACTS REQUIRED A TRIAL (CT APP).

The Court of Appeals, in a one-sentence memorandum decision, over a two-judge dissenting opinion, determined that the defendants' motion for summary judgment in this false arrest/malicious prosecution case was properly granted. The dissenters argued contested facts required a trial:

The order of the Appellate Division should be affirmed, with costs. Plaintiff failed to raise any material, triable issue of fact with respect to whether probable cause for his arrest and prosecution was lacking, or as to whether the police acted with actual malice (see generally De Lourdes Torres v Jones, 26 NY3d 742 [2016]).

From the dissent:

A jury acquitted plaintiff Wayne Roberts of murder in the second degree and related charges. He then sued the City of New York, the City Police Department and various police officers for, amongst other claims, false arrest

and malicious prosecution. In his complaint, plaintiff asserted that he was wrongfully accused and imprisoned for two and half years, and maliciously prosecuted despite the lack of probable cause to arrest and legal justification to pursue his criminal prosecution. He claimed defendants acted with malice and in bad faith, in deliberate indifference to his rights. * * *

Where, as here, conflicting evidence creates one or more material issues of fact, those issues "must be resolved by the jury rather than by the court as a matter of law" (De Lourdes Torres, 26 NY3d at 771). The decision in this Court and the majority decision below both defy this basic principle. Roberts v City of New York, 2019 NY Slip Op 07713, CtApp 10-29-19

FAMILY LAW, CIVIL PROCEDURE, DEBTOR-CREDITOR.

THE DIVISION OF MARITAL PROPERTY PURSUANT TO A DIVORCE DOES NOT RENDER ONE FORMER SPOUSE THE JUDGMENT DEBTOR OF THE OTHER, THEREFORE A JUDGMENT DEBTOR WHO DOCKETS A JUDGMENT DOES NOT HAVE PRIORITY PURSUANT TO CPLR 5203 OVER A JUDGMENT OF DIVORCE WHICH HAS NOT BEEN DOCKETED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, determined the 2015 judgment of divorce which awarded the wife, Andrea, a percentage of marital property, a home worth $5 million, did not make Andrea a judgment creditor such that the failure to docket the judgment of divorce gave priority to a judgment debtor, Pangea, who had docketed a 2016 judgment:

The United States Court of Appeals for the Second Circuit has certified the following question to us: "If an entered divorce judgment grants a spouse an interest in real property pursuant to Domestic Relations Law § 236, and the spouse does not docket the divorce judgment in the county where the property is located, is the spouse's interest subject to attachment by a subsequent judgment creditor that has docketed its judgment and seeks to execute against the property?" We answer that question in the negative. * * *

Pangea's conception of Andrea as judgment creditor is utterly incompatible with our legislature's dramatic revision of the Domestic Relations Law in 1980. By incorporating the concept of "marital property" into Domestic Relations Law § 236, "the New York Legislature deliberately went beyond traditional property concepts when it formulated the Equitable Distribution Law" … . … Marital assets are not owned by one spouse or another, and the dissolution of a marriage involving the division of marital assets does not render one ex-

spouse the creditor of another. Courts are empowered "not only to make an equitable disposition of marital property between [the spouses], but also to make a distributive award in lieu of or to supplement, facilitate or effectuate the division or distribution of property where authorized in a matrimonial action, and payable in a lump sum or over a period of time" … . …

Andrea therefore cannot properly be considered a judgment creditor of John [her ex-husband]. Thus, CPLR 5203 (a), by its plain terms, has no application here, and Pangea can claim no priority. Pangea Capital Mgt., LLC v Lakian, 2019 NY Slip Op 05059, CtApp 6-25-19

HUMAN RIGHTS LAW, COOPERATIVES, ANIMAL LAW.

NYS STATE DIVISION OF HUMAN RIGHTS' DETERMINATION THAT THE DISABLED COOPERATIVE SHAREHOLDER WAS DISCRIMINATED AGAINST WHEN SHE WAS PROHIBITED FROM KEEPING A DOG IN HER COOPERATIVE APARTMENT CONFIRMED BY THE COURT OF APPEALS, REVERSING THE APPELLATE DIVISION (CT APP).

The Court of Appeals, over a two-judge dissent, in a brief memorandum that did not recite the facts, reversed the Appellate Division and confirmed the NYS Division of Human Rights (SDHR) determination that petitioners had discriminated against the disabled complainant, a cooperative shareholder, by prohibiting her from keeping a dog in the cooperative apartment. Matter of Delkap Mgt., Inc. v New York State Div. of Human Rights, 2019 NY Slip Op 02260, CtApp 3-26-19

SUMMARY OF THE FACTS FROM THE APPELLATE DIVISION'S DECISION (WHICH THE COURT OF APPEALS REVERSED HERE):

The complainant testified that, since obtaining the dog, her cardiac arrhythmia, which caused her to have rapid heart rate and experience palpitations, had significantly decreased; her ability to sleep had improved, resulting in her feeling less tired during the day; her discomfort due to her rheumatoid arthritis had improved because she was more physically active with the dog; and the dog decreased her stress, helping to improve the symptoms caused by her rheumatoid arthritis and cardiac arrhythmia.

Sometime after the hearing concluded, the petitioners directed the complainant to immediately remove her dog from her apartment contending, erroneously, that the SDHR had issued a final order in their favor. The complainant thereafter moved out of her apartment with the dog.

In a recommendation and findings … an administrative law judge (hereinafter ALJ) of the SDHR determined that the Coop had discriminated against the complainant in the terms, conditions, and privileges of her housing on the basis of her disability, and that she should have been allowed to keep the dog in her apartment as a reasonable accommodation for her disability. The ALJ also determined that the respondents retaliated against the complainant for opposing the discrimination and filing a complaint with the SDHR. The Acting Commissioner of the SDHR adopted the ALJ's recommendation and findings and directed the petitioners to pay $5,000 to the complainant in compensatory damages for mental anguish and $10,000 in punitive damages, assessed a $5,000 penalty upon each petitioner payable to the State, and directed the petitioners to create and implement standard policies and procedures to evaluate shareholders' requests for reasonable accommodations and to develop and implement training to prevent unlawful discrimination.

INDIAN LAW, CIVIL PROCEDURE.

DISPUTE BETWEEN RIVAL FACTIONS OF THE CAYUGA NATION INVOLVES TRIBAL LAW AND IS NOT THEREFORE WITHIN THE JURISDICTION OF NEW YORK COURTS (CT APP).

The Court of Appeals, in a lengthy, comprehensive opinion by Judge Feinman, over two dissenting opinions, determined the dispute between two factions of the Cayuga Nation involved tribal law and therefore was not within the jurisdiction of New York courts. The opinion is too detailed to fairly summarize here:

Members of the Cayuga Nation, a federally-recognized Indian tribe, have been embroiled in a leadership dispute for more than a decade. One faction commenced this action, purportedly on behalf of the Nation, against individuals comprising the rival faction, asserting tort claims that are premised solely on defendants' alleged lack of authority to act on behalf of the Nation. To resolve these claims, New York courts would have to decide whether defendants were, at various times, or remain legitimate leaders of the tribe, a question that turns on disputed issues of tribal law that are not cognizable in the courts of this state given the Nation's exclusive authority over its internal affairs. Contrary to plaintiff's contentions, we cannot avoid this fundamental jurisdictional problem by decontextualizing a limited recognition determination issued by the Federal Bureau of Indian Affairs (BIA) that recognized the plaintiff faction as the tribal government for the purpose of distributing federal funds. We therefore hold that New York courts lack subject matter jurisdiction to consider this dispute. Cayuga Nation v Campbell, 2019 NY Slip Op 07711, CtApp 10-29-19

INSURANCE LAW.

THE STATUTORY TIMELY-DISCLAIMER REQUIREMENT OF INSURANCE LAW 3420(d)(2) DOES NOT APPLY TO OUT-OF-STATE RISK RETENTION GROUPS (RRG'S), DEFENDANT RRG, WHICH DID NOT ISSUE A TIMELY DISCLAIMER OF COVERAGE IN THE UNDERLYING PERSONAL INJURY ACTION, IS NOT BARRED FROM PRESENTING DEFENSES TO COVERAGE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over an extensive dissenting opinion by Judge Wilson, determined that the statutory timely disclaimer requirement of Insurance Law 3420 (d) (2) does not apply to defendant PCIC, an out-of-state risk retention group (RRG). Therefore PCIC's failure to make a timely disclaimer of coverage in the underlying personal injury action did not bar PCIC's coverage defenses. The central issue was one of statutory interpretation. The Court of Appeals rejected the argument that Insurance Law 2601 (a) (6), which applies to RRG's and requires prompt "disclosure" of coverage, also requires timely "disclaimer" of coverage:

Whether PCIC's disclaimer is regulated by the Insurance Law turns on whether the reference to an insurer's failure "to promptly disclose coverage" in section 2601 (a) (6) includes the timely disclaimer requirement of section 3420 (d) (2). Nadkos [plaintiff] argues that section 2601 (a) (6) cites to section 3420 (d) without limitation, and thus encompasses both paragraphs (d) (1) and (d) (2). According to Nadkos, if the Legislature intended to limit section 2601 (a) (6) to a specific subparagraph of section 3420 (d), it knew how to do so … .

We reject the interpretation advocated by Nadkos, and adopted by the dissent, because the prohibition on an unfair claim settlement practice based on a failure to promptly disclose coverage encompasses the mandates of section 3420 (d) (1), not (d) (2). Nadkos, Inc. v Preferred Contrs. Ins. Co. Risk Retention Group LLC, 2019 NY Slip Op 04641, CtApp 6-11-18

LANDLORD-TENANT, CONTRACT LAW.

WAIVER OF DECLARATORY JUDGMENT ACTIONS TO RESOLVE DISPUTES ARISING FROM A LEASE WAS NOT AGAINST PUBLIC POLICY AND WAS ENFORCEABLE, THE COMMERCIAL LEASE WAS NEGOTIATED BY SOPHISTICATED, COUNSELED PARTIES (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a three-judge dissenting opinion, determined that the clause in a commercial lease which waived any action for a declaratory judgment concerning lease provisions, and required all disputes to be adjudicated in summary proceedings, was not against public policy and was therefore enforceable:

… [T]he declaratory judgment waiver is clear and unambiguous, was adopted by sophisticated parties negotiating at arm's length, and does not violate the type of public policy interest that would outweigh the strong public policy in favor of freedom of contract. … [t]here is simply nothing in our contemporary statutory, constitutional, or decisional law indicating that the interest in access to declaratory judgment actions or, more generally, to a full suite of litigation options without limitation, is so weighty and fundamental that it cannot be waived by sophisticated, counseled parties in a commercial lease. CPLR 3001 enables Supreme Court to grant declaratory judgments in the context of justiciable controversies but in no way indicates that sophisticated parties may not voluntarily waive the right to seek such relief. A declaratory judgment is a useful tool for providing clarity as to parties' obligations and may, in some circumstances, enable parties to perform under a contract they might otherwise have breached. Access to declaratory relief benefits the parties as well as society in quieting disputes. However, a declaratory judgment is merely one form of relief available to litigants in enforcing a contract. In codifying the right to seek declaratory relief, the Legislature neither expressly nor impliedly made access to such a claim nonwaivable with respect to any party, much less sophisticated commercial tenants. 159 MP Corp. v Redbridge Bedford, LLC2019 NY Slip Op 03526, CtApp 5-7-19

LANDLORD-TENANT, MUNICIPAL LAW, REAL PROPERTY LAW.

BUILDINGS RECEIVING REAL PROPERTY TAX LAW 421-g BENEFITS ARE NOT SUBJECT TO THE LUXURY DEREGULATION PROVISIONS OF THE RENT STABILIZATION LAW (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over an extensive dissent, reversing the Appellate Division, determined that "plaintiffs' apartments, which are located in buildings receiving tax benefits pursuant to Real Property Tax Law (RPTL) § 421-g, are [not] subject to the luxury deregulation provisions of the Rent Stabilization Law (RSL … .":

The legislature's intention, as reflected in the language of the statute at issue here, is clear and inescapable. During "the entire period for which the eligible multiple dwelling is receiving" RPTL 421-g benefits, it "shall be fully subject to control" under the RSL, "notwithstanding the provisions of" that regime or any other "local law" that would remove those dwelling units from such control, "unless exempt under such local law from control by reason of the cooperative or condominium status of the dwelling unit" (RPTL 421-g [6] …) … . The statute does not say that eligible units shall be fully subject to "the provisions of" any local law for the stabilization of rents. Put differently, the notwithstanding clause of the statute evinces the legislature's intent that any "local law for the stabilization of rents" that would exempt the unit from "control under such local law" does not apply to buildings receiving RPTL 421-g benefits, with the sole exception being for cooperatives and condominiums … . Kuzmich v 50 Murray St. Acquisition LLC, 2019 NY Slip Op 05057, CtApp 6-25-19

MENTAL HYGIENE LAW, ATTORNEYS.

OFFICE OF MENTAL HEALTH IS NOT REQUIRED TO ALLOW COUNSEL FROM MENTAL HEALTH LEGAL SERVICES TO PARTICIPATE IN TREATMENT PLANNING FOR A SEX OFFENDER (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a dissenting opinion, determined that a Mental Hygiene Legal Services (MHLS) attorney need not be granted permission to attend a treatment planning session for a client in the Sex Offender Treatment Program:

We hold that MHLS counsel is not entitled to be given an interview and an opportunity to participate in treatment planning simply by virtue of an attorney-client relationship with an article 10 respondent. * * *

… [T]he statutory language of Mental Hygiene Law §§ 10.10 (b) and 29.13 (b), as well as the relevant legislative history, support the conclusion that MHLS counsel was not intended to be included, as a matter of law, within the terms "authorized representative" or "significant individual." Thus, OMH [Office of Mental Health] is not required, upon the respondent's request, to provide an interview and an opportunity to participate in treatment planning to MHLS counsel who has only a professional, attorney-client relationship with an article 10 respondent. However, as OMH concedes, a facility has the discretion to permit MHLS counsel to participate in treatment planning and, in a particular case, it is possible that counsel could develop and demonstrate a sufficient personal relationship with a patient such that counsel would qualify as a "significant individual . . . otherwise concerned with the welfare of the patient," entitled to participate therein. Matter of Mental Hygiene Legal Serv. v Sullivan, 2019 NY Slip Op 01122, CtApp 2-14-19

MENTAL HYGIENE LAW, CIVIL PROCEDURE.

MENTAL HEALTH LEGAL SERVICES DOES NOT HAVE STANDING TO SEEK A WRIT OF MANDAMUS TO COMPEL A HOSPITAL TO COMPLY WITH THE MENTAL HYGIENE LAW PROCEDURE WHEN A PATIENT REQUESTS AN ADMISSION OR RETENTION HEARING (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a three-judge dissenting opinion, reversing the Appellate Division, determined Mental Hygiene Legal Services did not have standing to seek a writ of mandamus to compel a hospital to comply with Mental Hygiene Law 9.31 (b) "which sets forth the procedure that must be followed after a patient requests an admission or retention hearing:

MHLS alleges that, in early 2016, it "began to notice problems with the medical charts offered into evidence by BPC [Bronx Psychiatric Center]" because "documents contained in the chart had been added or removed just prior to the hearing." MHLS filed this CPLR article 78 petition in the nature of mandamus, in its own name — and separate from any specific client or proceeding — seeking an order compelling BPC to provide copies of a patient's entire clinical chart when it provides notice of a request for an admission or retention hearing, arguing the clinical chart is part of the "record of the patient" under Mental Hygiene Law § 9.31. Matter of Mental Hygiene Legal Serv. v Daniels, 2019 NY Slip Op 01123, CtApp 2-14-19

NEGLIGENCE, CIVIL PROCEDURE, JURISDICTION.

OHIO FIREARMS DEALER DID NOT HAVE MINIMUM CONTACTS WITH NEW YORK SUFFICIENT FOR THE EXERCISE OF LONG-ARM JURISDICTION OVER HIM, A GUN PURCHASED IN OHIO BY AN OHIO RESIDENT WAS SOLD ON THE BLACK MARKET IN NEW YORK AND WAS USED IN NEW YORK TO SHOOT PLAINTIFF (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a concurring opinion and a three-judge dissenting opinion, determined that an Ohio firearms dealer (Brown) did not have "minimum contacts" with New York sufficient for the exercise of long-arm jurisdiction (CPLR 302) over him. A gun sold by Brown to Bostic, an Ohio resident, in Ohio, was sold on the black market to a member of a gang in Buffalo, New York, who shot plaintiff:

Defendant Charles Brown, a federal firearm licensee, was authorized to sell handguns only in Ohio and only to Ohio residents, which he primarily accomplished through retail sales at gun shows held in various locations in Ohio. Brown did not maintain a website, had no retail store or business telephone listing, and did no advertising of any kind, except by posting a sign at his booth when participating in a gun show. In a series of transactions in 2000, Brown sold handguns to James Nigel Bostic and his associates. Prior to the transaction involving the gun at issue here, Brown consulted with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to ensure its legality. For each transaction, the necessary forms required by the ATF were properly completed and submitted, the purchaser passed the required Federal Bureau of Investigation (FBI) background check before the firearms were transferred, Brown verified that the purchaser had government-issued identification demonstrating Ohio residency, and notification of the purchases was timely sent to local law enforcement and the ATF as required by the federal Gun Control Act (see 18 USC § 922). During the transactions, Bostic indicated he was in the process of becoming a federal firearms licensee and was acquiring inventory for the eventual opening of a gun shop. * * *

… "[A] non-domiciliary tortfeasor has minimum contacts with the forum State . . . if it purposefully avails itself of the privilege of conducting activities within the forum State" …,"thus invoking the benefits and protections of [the forum state's] laws"… . This test envisions something more than the "fortuitous circumstance" that a product sold in another state later makes its way into the forum jurisdiction through no marketing or other effort of defendant … . Put another way, "the mere likelihood that a product will find its way into the forum" cannot establish the requisite connection between defendant and the forum "such that [defendant] should reasonably anticipate being haled into court there" … .

The constitutional inquiry "focuses on the relationship among the defendant, the forum, and the litigation'" … . Significantly, "it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction" … . Williams v Beemiller, Inc., 2019 NY Slip Op 03656, CtApp 5-9-19

NEGLIGENCE, EVIDENCE, PRIVILEGE.

PLAINTIFF WAIVED THE PHYSICIAN-PATIENT PRIVILEGE BY PLACING THE CONDITION OF HER KNEES INTO CONTROVERSY IN THIS ACCIDENT CASE, APPELLATE DIVISION REVERSED (CT APP).

The Court of Appeals, reversing the Appellate Division, determined plaintiff had placed the condition of her knees into controversy in this accident case and defendants were therefore entitled to discovery re: prior treatment of her knees. The facts were not discussed:

Plaintiff affirmatively placed the condition of her knees into controversy through allegations that the underlying accident caused difficulties in walking and standing that affect her ambulatory capacity and resultant damages … . Under the particular circumstances of this case, plaintiff therefore waived the physician-patient privilege with respect to the prior treatment of her knees and the discovery sought by authorizations pertaining to the treatment of plaintiff's knees is "material and necessary" to defendants' defense of the action (CPLR 3101 [a]). Accordingly, Supreme Court erred in denying defendants' motion to compel plaintiff to provide discovery related to the prior treatment of her knees. Brito v Gomez, 2019 NY Slip Op 06452, CtApp 9-10-19

NEGLIGENCE, LANDLORD-TENANT, CONTRACT LAW.

A REGULATORY AGREEMENT ENTERED INTO BY THE OUT-OF-POSSESSION LANDLORD IN CONNECTION WITH AN FHA MORTGAGE, WHICH REQUIRED THAT THE LANDLORD KEEP THE PROPERTY IN GOOD REPAIR, DID NOT CHANGE THE TERMS OF THE LEASE WHICH MADE THE TENANT RESPONSIBLE FOR REPAIRS; THE OUT-OF-POSSESSION LANDLORD THEREFORE IS NOT LIABLE FOR A SLIP AND FALL CAUSED BY A ROOF LEAK (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a two-judge dissenting opinion, determined the owner of a nursing home, Hamilton Inc., as an out-of-possession landlord, was not liable to plaintiff who slipped and fell on the premises. It was alleged the pool of water which caused plaintiff to slip and fall was the result of a leak in the roof. The lease had made the tenant, Grand Manor, responsible for repairs. However a HUD regulatory agreement subsequently entered into by Hamilton Inc in connection with an FHA mortgage required that the property be kept in good repair by Hamilton. The Court of Appeals held that the regulatory agreement did change the terms of the lease:

… [T]he HUD regulatory agreement, as incorporated into the 1978 amendment to the lease, did not alter the contractual relationship between the Hamilton defendants and Grand Manor regarding control of the premises or replace Grand Manor's contractual duty to perform maintenance and repairs at the facility. Although the terms of the HUD agreement were to supersede all other requirements in conflict therewith, the regulatory agreement did not conflict with, or absolve Grand Manor of, its responsibilities under the original lease. Indeed, as previously noted, the amendment continued all terms from the lease that did not conflict with the regulatory agreement. Given the absence of a conflict on the issue of Grand Manor's duties to make repairs, the HUD agreement, as incorporated into the lease amendment, was not a covenant that could be said to displace Grand Manor's duties or alter the relationship between landlord and tenant … . * * *

… [T]he "exception to the general rule" set forth in Putnam is inapplicable to the regulatory agreement, and the general rule applies — that is, the "landlord is not liable for conditions upon the land after the transfer of possession" (38 NY2d at 617). Indeed, adoption of plaintiff's proposed rule — that would require us to extend the exception set forth in Putnam to any agreement made by the lessor to make repairs — would mean that lessees could assume the sole obligation in a lease to maintain premises in good repair but avoid making repairs in reliance on a covenant later discovered between the land owner and a third party, a result not intended or supported by Putnam. Henry v Hamilton Equities, Inc., 2019 NY Slip Op 07642, CtApp 10-24-19

NEGLIGENCE, LANDLORD-TENANT, THIRD-PARTY ASSAULT.

THE LANDLORD DEMONSTRATED THE ASSAILANT IN THIS THIRD-PARTY ASSAULT CASE WAS NOT AN INTRUDER AND PLAINTIFF WAS NOT ABLE TO RAISE A QUESTION OF FACT ON THAT ISSUE, THE LANDLORD'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED, ONE JUDGE DISSENTED (CT APP).

The Court of Appeals, in a brief memorandum with no discussion of the facts, over a dissent, determined the landlord's (NYC Housing Authority's) motion for summary judgment in this third-party assault case was properly granted. The dissenter argued the Housing Authority did not demonstrate the assailant was not an intruder:

… [T]he New York City Housing Authority met its initial burden of demonstrating that no material triable issues of fact exist through its showing that plaintiff's assailant was likely not an intruder. In response, plaintiff failed to adduce any admissible evidence from which a jury could conclude, without engaging in speculation, that her assailant was an intruder and, concomitantly, whether defendant's alleged negligence was a proximate cause of her injuries … . Laniox v City of New York, 2019 NY Slip Op 08448, CtApp 11-21-19

NEGLIGENCE, MUNICIPAL LAW, LANDLORD-TENANT.

PURSUANT TO THE NYC ADMINISTRATIVE CODE, OUT-OF-POSSESSION LANDLORDS ARE RESPONSIBLE FOR THE REMOVAL OF ICE AND SNOW FROM THE ABUTTING CITY SIDEWALKS, NOTWITHSTANDING AN AGREEMENT MAKING THE TENANT RESPONSIBLE; THE OUT-POSSESSION-LANDLORDS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED BY THE APPELLATE DIVISION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, reversing the Appellate Division, determined that the NYC Administrative Code provision which requires the abutting landowners to maintain the city

sidewalks applies to out-of-possession landlords, even where the tenant is responsible for maintaining the sidewalks under the lease:

Section 7-210 of the Administrative Code of the City of New York unambiguously imposes a nondelegable duty on certain real property owners to maintain City sidewalks abutting their land in a reasonably safe condition. Under this duty of care, a subject owner is liable for personal injury claims arising from the owner's negligent failure to remove snow and ice from the sidewalk (id. § 7-210 [b]). The Code makes no exception for out-of-possession landowners and so we hold that the duty applies with full force notwithstanding an owner's transfer of possession to a lessee or maintenance agreement with a nonowner. Thus, defendants are not entitled to summary judgment as a matter of law due solely to the owners' out-of-possession status. Xiang Fu He v Troon Mgt., Inc., 2019 NY Slip Op 07643, CtApp 10-24-19

NEGLIGENCE, MUNICIPAL LAW.

CITY OF NEW YORK CAN SUE IN NEGLIGENCE FOR DAMAGE TO CITY SIDEWALKS (CT APP).

The Court of Appeals, reversing Supreme Court, determined that the city has the capacity to sue for the negligent destruction of city property. The city sought money damages for injury to trees caused by the sidewalk repairs performed by defendants for the adjacent property owner:

The City has the general capacity to sue for the negligent destruction of its property (see General City Law § 20 [1]; New York City Charter § 394 [c]). Moreover, the provisions upon which defendants rely do not abrogate the City's claim for damage to its property (see generally Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgt. Inc., 18 NY3d 341, 351 [2011]). Defendants have not established that the City lacks a cognizable common law claim. City of New York v Tri-Rail Constr., Inc., 2019 NY Slip Op 07478, CtApp 10-17-19

NEGLIGENCE, MUNICIPAL LAW.

VILLAGE CODE PROVISION WHICH REQUIRES WRITTEN NOTICE OF A SIDEWALK DEFECT BEFORE MUNICIPAL LIABILITY CAN BE IMPOSED APPLIES TO A STAIRWAY FROM A PUBLIC ROAD TO A MUNICIPAL PARKING LOT, STAIRWAY SLIP AND FALL ACTION PROPERLY DISMISSED (CT APP).

The Court of Appeals, over an extensive two-judge dissent, determined that the village code provision which requires written notice of a sidewalk defect before the village can be held liable applies to a stairway connecting a public road to a municipal parking lot. Because plaintiff did not plead or prove written notice of a stairway defect, plaintiff's slip and fall action was properly dismissed:

In Woodson v City of New York, this Court determined that a stairway may be classified as a sidewalk for purposes of a prior written notice statute if it "functionally fulfills the same purpose that a standard sidewalk would serve" (93 NY2d 936, 937-938 [1999] …). * * *

The courts below correctly applied Woodson in holding that the stairway at issue "functionally fulfills the same purpose" as a standard sidewalk, and therefore plaintiff was required to show that the Village received prior written notice of the allegedly defective condition … . Hinton v Village of Pulaski, 2019 NY Slip Op 01261, CtApp 2-21-19

NEGLIGENCE, PRODUCTS LIABILITY, EVIDENCE.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED ON THE GROUND THAT PLAINTIFF'S DEPOSITION TESTIMONY CONTRADICTED THE CONCLUSIONS OF PLAINTIFF'S EXPERT (CT APP).

The Court of Appeals, reversing the Appellate Division, over two dissents, determined summary judgment should not have been granted to defendants in this personal injury case stemming from a potholder catching fire. The Appellate Division had reversed because plaintiff's deposition testimony conflicted with the conclusions of plaintiff's expert. The facts were not discussed:

The courts below erred in granting defendants' motions for summary judgment on the basis that plaintiff failed to raise a triable issue of fact sufficient to defeat the motions. Although the plaintiff's deposition testimony partially contradicted the factual conclusions reached by her expert witnesses, the expert opinions were based upon other record evidence and were neither speculative nor conclusory. Insofar as plaintiff raised genuine issues of fact on the element of causation, summary judgment should not have been granted on that ground … . We remit for Supreme Court to consider the alternative grounds for summary judgment defendants raised in their motions and neither Supreme Court nor the Appellate Division reached.

… Judges]Rivera, Stein, Fahey and Wilson concur. Chief Judge DiFiore and Judges Garcia and Feinman dissent and vote to affirm for reasons stated in the Appellate Division memorandum decision (Salinas v World Houseware Producing Co., Ltd., 166 AD3d 493 [1st Dept 2018]). Salinas v World Houseware Producing Co., 2019 NY Slip Op 06537, CtApp 9-12-19

NEGLIGENCE, PRODUCTS LIABILITY, TOXIC TORTS.

DEFENDANT DID NOT DEMONSTRATE AS A MATTER OF LAW THAT COKE OVENS USED IN THE MANUFACTURE OF STEEL WERE NOT PRODUCTS TRIGGERING THE DUTY TO WARN OF THE HAZARDS OF BREATHING EMISSIONS FROM THE OVENS, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a two-judge dissent, reversing the Appellate Division, determined the defendant (Wilputte), which sold coke ovens for steel production, did not demonstrate, as a matter of law, the ovens were not "products" triggering the duty to warn. Therefore defendant's motion for summary judgment should not have been granted (by the Appellate Division). Plaintiff's decedent worked on top of the coke ovens and alleged breathing the toxic substances caused lung cancer. Plaintiffs alleged defendant had a duty to warn plaintiff's decedent to use a respirator when working on the ovens. The Appellate Division had determined the coke ovens, housed in so-called "batteries," were akin to buildings and construction of the buildings was a service, not a product:

… [D]efendant has not met its burden in showing that the coke ovens at issue are not products as a matter of law. Regardless of the alterations Bethlehem [the steel manufacturer] may have made to the scale and specifications of the battery at large, the ovens themselves served one function: the production of coke. This process was standard across all variations of coke ovens that Wilputte sold, ultimately placing the hazardous

thing at issue squarely within the category of products to which liability has attached in the failure-to-warn context. …

… Wilputte was responsible for placing the ovens into the stream of commerce and that it derived financial benefit from its role in the production process. Indeed, by the time decedent began working for Bethlehem, Wilputte had sold hundreds of coke ovens to plants … . Wilputte also marketed its ovens with informational brochures showing the completed ovens and their functionality, indicating that Wilputte, not Bethlehem, was the commercial source of the product. … Although the ovens were largely assembled and completed on-site, that merely speaks to the logistical realties of the market of which Wilputte had a considerable share. …

… [T]he record supports Supreme Court's conclusion that Wilputte was in the best position to assess the safety of the coke ovens because of its superior knowledge regarding the ovens' intended functionality … . "A major determinant of the existence of a duty to warn" is an assessment of "whether the manufacturer is in a superior position to know of and warn against those hazards" inherent to its product … . Matter of Eighth Jud. Dist. Asbestos Litig., 2019 NY Slip Op 04640, CtApp 6-11-19

NEGLIGENCE, PRODUCTS LIABILITY.

THE SCARANGELLA EXCEPTION TO STRICT PRODUCTS LIABILITY WHICH MAY APPLY WHEN A SAFETY FEATURE IS AVAILABLE BUT THE BUYER CHOOSES NOT TO PURCHASE IT, MAY BE APPLICABLE EVEN WHEN THE BUYER IS A RENTAL BUSINESS, SUPREME COURT'S AND THE APPELLATE DIVISION'S CONTRARY RULING REVERSED, NEW TRIAL ORDERED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a dissenting opinion, reversing the Appellate Division and ordering a new trial, determined: (1) the so-called Scarangella exception may apply where the manufacturer sells its product to a rental business; and (2) the jury instruction misstated the law concerning a manufacturer's liability where its product is sold to a rental business. The Scarangella case carved out an exception to strict products liability which may apply when the manufacturer has made a safety feature optional and the buyer chooses not to purchase it. Here the plaintiff was operating a Bodcat loader when he was crushed by a small tree which came into the cab. Bobcat sells a cab enclosure ("door kit") which may have deflected the tree. The rental company, Taylor, which purchased the Bobcat and rented it to plaintiff, did not outfit the rented Bobcat with the door kit. The trial court held that the Scarangella exception is never available

to a manufacturer where the product is sold to a rental company. The Court of Appeals disagreed and held the Scarangella exception can be available where a rental business is the purchaser, depending upon the evidence:

[In Scarangella] we held that a product is not defective — and a manufacturer or seller is not strictly liable for a design defect based upon a claim that optional safety equipment should have been a standard feature — when the following three conditions are met: "(1) the buyer is thoroughly knowledgeable regarding the product and its use and is actually aware that the safety feature is available; (2) there exist normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment; and (3) the buyer is in a position, given the range of uses of the product, to balance the benefits and the risks of not having the safety device in the specifically contemplated circumstances of the buyer's use of the product" … . When these elements are present, "the buyer, not the manufacturer, is in the superior position to make the risk-utility assessment, and a well-considered decision by the buyer to dispense with the optional safety equipment will excuse the manufacturer from liability" … . * * *

Having deemed Scarangella to be wholly inapplicable, neither the trial court nor the Appellate Division examined whether Bobcat raised a triable question of fact warranting a Scarangella charge. … For purposes of resolution of this appeal, it is sufficient to observe as a matter of law, based on the evidence presented at this trial, that Bobcat was not entitled to a directed verdict in its favor on the Scarangella exception. Whether a Scarangella instruction will be appropriate on retrial is a matter for the trial court to determine based on the evidence presented at that time. Fasolas v Bobcat of N.Y., Inc., 2019 NY Slip Op 03657, CtApp 5-9-19

NEGLIGENCE, TOXIC TORTS, CONTRACT LAW.

RELEASE SIGNED BY PLAINTIFF'S DECEDENT IN 1997 DID NOT ENTITLE CHEVRON TO SUMMARY JUDGMENT IN THIS ASBESTOS-MESOTHELIOMA CASE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a three-judge dissent, determined that defendant Chevron was not entitled to summary judgment in this asbestos-mesothelioma action. Plaintiff's decedent [Mr. South] signed a release in 1997 and Chevron argued the release precluded the subsequent lawsuit:

Like Supreme Court, the Appellate Division concluded that the record did not demonstrate Chevron's entitlement to summary judgment, because the release did not specifically mention mesothelioma, which then required the court to determine whether extrinsic evidence entitled Chevron to summary judgment. Pointing to

the "meager consideration" [$1,750] and the lack of any diagnosis of mesothelioma as to Mr. South at the time he settled, the Appellate Division concluded that the record left open the question of whether the release pertained to an existing pulmonary condition and the fear of some future asbestos-related disease, or if it was intended to release all future asbestos-related diseases arising from Mr. South's employment by Texaco. The parties agree that, at the time he executed the release, Mr. South suffered from a nonmalignant pulmonary disease but not from mesothelioma or cancer. …

The sole question presented to us on this appeal is whether Chevron has established that the release, coupled with the 1997 complaint, eliminates all material questions of fact and proves that the release bars the claims here as a matter of law. Answering that question requires us to consider the protections afforded to Mr. South by admiralty law and Section 5 of FELA [Federal Employers' Liability Act] (45 USC § 55), which is incorporated into the Jones Act by 46 USC § 30104. …

… [W]e conclude that Chevron has not met its burden to demonstrate the absence of any material question of fact. The 1997 release does not unambiguously extinguish a future claim for mesothelioma … . The release itself does not mention mesothelioma. It does say that Mr. South "is giving up the right to bring an action against the Released Parties, or any of them, in the future for any new or different diagnosis that may be made about Claimant's condition as a result of exposure to any product[.]" But "claimant's condition" may cabin the "new or different diagnosis" to ones that related to his nonmalignant asbestos-related pulmonary disease—the "condition" both parties agree was the only one he suffered at the time. Matter of New York City Asbestos Litig., 2019 NY Slip Op 01259, CtApp 2-19-19

PRIVATE RIGHT OF ACTION, PUBLIC HEALTH LAW.

PUBLIC HEALTH LAW 230 DOES NOT CREATE A PRIVATE RIGHT OF ACTION FOR MALICIOUS REPORTING OF INSURANCE FRAUD BY A PHYSICIAN TO THE OFFICE OF PROFESSIONAL MEDICAL CONDUCT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, determined that Public Health Law 230 (11) (b) does not create a private right of action. Plaintiff surgeon provided medical care to four patients injured in an automobile accident and submitted claims for payment to the defendant insurer. The insurer fully or partially denied the claims and then filed complaints against plaintiff with the Office of Professional Medical Conduct (OPMC) alleging insurance fraud. The OPMC declined to discipline plaintiff. Plaintiff then sued defendant insurer for bad-faith and malicious reporting in violation of Public Health Law 230 (11) (b). The Court of

Appeals noted a split of authority in the First and Second Departments re: whether a violation of this statute give rise to a private right of action:

Public Health Law § 230 (11) (b) does not expressly create a cause of action authorizing licensees to commence civil litigation against a complainant that files an allegedly bad-faith and/or malicious report with OPMC (compare Public Health Law § 230 [10] [j] [creating an express right to commence a CPLR article 78 proceeding in certain instances]). Consequently, "recovery may be had . . . only if a legislative intent to create such a right of action is fairly implied in the statutory provision[] and [its] legislative history" … . …

We have consistently identified three "essential factors" to be considered in determining whether a private right of action can be fairly implied from the statutory text and legislative history: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme"… . Critically, all three factors must be satisfied before an implied private right of action will be recognized … . Applying these factors here, we conclude that the legislature did not intend to create a right of action under Public Health Law § 230 (11) (b). Haar v Nationwide Mut. Fire Ins. Co., 2019 NY Slip Op 08445, CtApp 11-21-19

RETIREMENT AND SOCIAL SECURITY LAW.

PETITIONER, A COUNTY CORRECTION OFFICER, WAS ENTITLED TO DISABILITY RETIREMENT BENEFITS; AN INMATE, WHO WAS UNSTEADY ON HER FEET AND MAY HAVE BEEN UNDER THE INFLUENCE OF DRUGS, FELL HEAD FIRST FROM A TRANSPORT VAN ONTO PETITIONER (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over a concurring opinion and a three-judge dissenting opinion, reversing the Appellate Division, determined that petitioner, a Nassau County correction officer, was entitled to performance-of-duty disability retirement benefits. An inmate, apparently under the influence of drugs, was unsteady on her feet and had to be helped from the transport van to the court, and then back to the van. Upon arrival at the jail, when the transport doors were opened, the inmate fell head first out of the van on top of petitioner, who suffered rotator cuff and cervical spine injuries. The applicable statute refers to injury caused by "any act of any inmate." The majority concluded the act need not be intentional:

Our task … is to give effect to the text [of the statute, Retirement and Social Security Law § 607-c (a)]. … [E]ven if we were to consider the legislative history, it is inconclusive. While we agree with the dissent insofar as there seemed to have been a desire to provide protections to correction officers because they "come into daily contact with certain persons who are dangerous, profoundly anti-social and who pose a serious threat to their health and safety" (Governor's Approval Mem, Bill Jacket, L 1996, ch 722 at 9), inmates may be "dangerous" and pose a "serious threat" as much through their involuntary acts as by their voluntary acts.

Here, the inmate took one to two steps, lost her balance, and landed on petitioner, injuring her. Petitioner's injuries were thus sustained by "any act of any inmate," i.e., the inmate's fall on petitioner. Matter of Walsh v New York State Comptroller, 2019 NY Slip Op 08518, CtApp 11-25-19

TAX LAW, REAL PROPERTY TAX LAW, CIVIL PROCEDURE.

PETITIONER, A CORPORATION OPERATING A BUSINESS ON THE PROPERTY, WAS NOT THE OWNER OF THE REAL PROPERTY AND WAS NOT OBLIGATED TO PAY PROPERTY TAXES, THEREFORE PETITIONER DID NOT HAVE STANDING TO CHALLENGE THE PROPERTY TAX ASSESSMENT PURSUANT TO RPTL 704 (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over an extensive two-judge dissent, determined that the petitioner, which did not own the property during the years the property tax assessments were challenged, lacked standing pursuant to RPTL 704. The property was owned by a trust during the relevant years, and petitioner is a family corporation which operates a House of Pancakes franchise on the property. The property held by the trust was transferred to Portia DeGast in 2013. She is the president of petitioner corporation, which had paid all the property. The tax years in issue were 2010 – 2013:

… [T]he parties agree that, during the relevant years, petitioner was not the owner of the subject property, nor was petitioner legally bound to pay the real property taxes. * * * … [P]etitioner here was not "legally responsible" for paying the undivided tax liability … . * * *

… Portia DeGast [is not] an aggrieved party based on her status as a beneficiary of the … Trust. The parties agree that, during the relevant years, the trust itself — not Ms. DeGast — owned the subject property. Like petitioner, Ms. DeGast was not authorized to pursue an article 7 proceeding on the property owner's behalf. And, like petitioner, Ms. DeGast lacked any legal obligation to pay the real property taxes; to the contrary, the terms

of the … Trust explicitly authorized beneficiaries to "enjoy the assets held by the trust without rent or other compensation to the trust, such as by occupying the trust's real property" … . In any event, the petitioner in this matter is the …Pancake House — not Ms. DeGast. Matter of Larchmont Pancake House v Board of Assessors, 2019 NY Slip Op 02441, CtApp 4-2-19

TAX LAW, REAL PROPERTY TAX LAW.

CONDOMINIUM UNIT OWNERS' AUTHORIZATION OF THE CONDOMINIUM BOARD TO CHALLENGE THE CONDOMINIUM'S REAL PROPERTY TAX ASSESSMENT REMAINS VALID FOR SUBSEQUENT TAX YEARS UNLESS CANCELED OR RETRACTED, THERE IS NO NEED FOR YEARLY AUTHORIZATIONS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a two judge dissent, reversing the Appellate Division, determined that a condominium board of managers need only seek one authorization from condominium unit owners to challenge the condominium's real property tax assessment The authorization is deemed to remain in effect in subsequent tax years unless canceled or retracted:

This appeal presents the question whether Real Property Law § 339-y (4) requires a condominium board of managers to obtain a separate authorization from each condominium unit owner granting the board authority to proceed on behalf of that owner for each tax year in which the board challenges the condominium's real property tax assessment. We conclude that section 339-y (4) allows a standing authorization issued by an owner to confer authority upon a board to act on behalf of that owner for the tax year in which that authorization was issued and in all subsequent tax years, unless such authorization is canceled or retracted. Matter of Eastbrooke Condominium v Ainsworth, 2019 NY Slip Op 02384, CtApp 3-28-19

TAX LAW.

INFORMATION PROVIDED TO A SUPERMARKET CHAIN ABOUT COMPETITORS' PRICES IS NOT "PERSONAL AND INDIVIDUAL" WITHIN THE MEANING OF TAX LAW 1105, THEREFORE THE REPORTS OF THAT INFORMATION ARE SUBJECT TO SALES TAX (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over a concurrence and two dissenting opinions, reversing the Appellate Division, determined that a supermarket chain, Wegmans, which pays an outfit, RetailData, for information about competitors' prices, must pay sales tax for that information. Wegmans argued the information was "personal and individual" and therefore not taxable under Tax Law 1105:

Tax Law § 1105 (c) (1) imposes a sales tax on certain information services, "but exclud[es] the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons." * *

The information that RetailData compiled and the reports it furnished to Wegmans derived from a non-confidential and widely-accessible source, the supermarket shelves of Wegmans's competitors. There is nothing about the information itself that is personal or individual in nature. RetailData simply collected the prices of products at grocery stores and compiled that information into reports which it furnished to Wegmans. The Tribunal rationally concluded that the information RetailData furnished to Wegmans was not personal or individual in nature because it was collected from prices on supermarket shelves, which are publicly available, widely-accessible, and not confidential. Moreover, in these circumstances, it was rational for the Tribunal to determine that RetailData's customization of the publicly-available information it collected from supermarket shelves into a report format did not render the furnished information personal or individual in nature … . Matter of Wegmans Food Mkts., Inc. v Tax Appeals Trib. of the State of N.Y., 2019 NY Slip Op 05184, CtApp 6-27-19

UTILITIES, ADMINSTRATIVE LAW.

THE PUBLIC SERVICES COMMISSION HAS THE AUTHORITY TO IMPOSE RATE CAPS AND OTHER RESTRICTIONS ON ENERGY SERVICE COMPANIES WHICH USE THE PUBLIC UTILITY INFRASTRUCTURE TO DELIVER ELECTRICITY TO CONSUMERS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, determined the Public Service Commission (PSC) has the authority to impose rate caps on energy service companies (ESCOs) who use the public utility infrastructure:

… [W]e are asked to determine whether the Public Service Law authorizes the Public Service Commission (PSC) to issue an order that conditions access to public utility infrastructure by energy service companies (ESCOs) upon ESCOs capping their prices such that, on an annual basis, they charge no more for electricity than is charged by public utilities unless 30% of the energy is derived from renewable sources. We conclude that the Public Service Law, in authorizing the PSC to set the conditions under which public utilities will transport consumer-owned electricity and gas, has such authority. * * *

Because the PSC is empowered to regulate utilities' transportation of gas and electricity and created the ESCO markets for the benefit of consumers, and because the legislature has delegated to the PSC the authority to condition ESCOs' eligibility to access utility lines on such terms and conditions that the PSC determines to be just and reasonable, it follows that the PSC has authority to prohibit utilities from distributing overpriced products by conditioning ESCOs' access on a price cap. That is, the statutory framework permits the PSC, pursuant to its authority to regulate the energy market, to impose a price cap on ESCOs as a condition of eligibility. Therefore, although the PSC has no direct rate-making authority over ESCOs, it did not exceed its statutory authority in determining that public utility transportation of energy sold by ESCOs is not "just and reasonable" if ESCOs are charging consumers more than that charged by public utilities. Matter of National Energy Marketers Assn. v New York State Pub. Serv. Commn., 2019 NY Slip Op 03655, CtApp 5-9-19