NEW YORK APPELLATE DIGEST, LLC

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ARBITRATION.

THE PARTIES DID NOT AGREE THAT THE INITIAL 'PARTIAL' ARBITRATION AWARD WAS A FINAL AWARD; THEREFORE THE ARBITRATORS HAD THE AUTHORITY TO REVISIT THE MATTER AND ISSUE A VALID FINAL AWARD (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, reversing the Appellate Division, determined the arbitrators had the power to revisit a "partial final award" and issue a valid final award. The Appellate Division had held the doctrine of functus officio prohibited the arbitrators from revisiting the initial award:

… [T]he Appellate Division held, that the arbitration panel exceeded its authority because it violated the common law doctrine of functus officio … . Functus officio, Latin for "having performed [one's] office" … , has operated historically as a restriction on the authority of arbitrators, precluding them from taking additional actions after issuing a final award. As this Court stated well over one hundred years ago, "[a]s soon as [the arbitrators] have made and delivered their award, they become functus officio, and their power is at an end. After having once fully exercised their judgment upon the facts submitted to them and reached a conclusion which they have incorporated into their award, they are not at liberty at another and subsequent time to exercise a fresh judgment on the case and alter their award" … . * * *

This Court has not had occasion to determine whether or under what circumstances parties may agree to the issuance of a final award that disposes of some, but not all, of the issues submitted to the arbitrators; nor must we resolve that question in this case. Even assuming that parties to an arbitration may agree to the issuance of a partial determination that constitutes a final award, the parties here, as the arbitration panel below concluded, did not reach any such agreement. American Intl. Specialty Lines Ins. Co. v Corporation, 2020 NY Slip Op 02529, Second Dept 4-30-20

ATTORNEYS.

JUDICIARY LAW 487 APPLIES ONLY TO MISREPRESENTATIONS BY AN ATTORNEY WHICH ARE MADE IN THE COURSE OF A LAWSUIT; THE STATUTE DOES NOT APPLY WHERE, AS HERE, THE ALLEGED MISREPRESENTATIONS WERE MADE TO INDUCE PLAINTIFFS TO START A MERITLESS LAWSUIT TO GENERATE A LEGAL FEE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over an extensive dissenting opinion, determined the Judiciary Law 487 cause of action, based upon the allegation plaintiffs' attorneys (defendants) deceitfully induced plaintiffs to bring a meritless lawsuit in order to generate a legal fee, was properly dismissed. A Judiciary Law 487 cause of action lies only if misrepresentations are made in the course of litigation, as opposed to, as here, before litigation is commenced:

Here … defendants established prima facie entitlement to judgment as a matter of law on the Judiciary Law § 487 (1) claim by demonstrating that plaintiffs failed to allege that defendants engaged in deceit or collusion during the course of the underlying federal intellectual property lawsuit … . In response, plaintiffs failed to satisfy their burden to establish material, triable issues of fact … . The affidavits plaintiffs submitted in opposition to summary judgment did not allege that defendants committed any acts of deceit or collusion during the pendency of the underlying federal lawsuit. To the extent defendants were alleged to have made deceitful statements, plaintiffs' allegation that defendants induced them to file a meritless lawsuit based on misleading legal advice preceding commencement of the lawsuit is not meaningfully distinguishable from the conduct we deemed insufficient to state a viable attorney deceit claim in Looff (97 NY at 482). The statute does not encompass the filing of a pleading or brief containing nonmeritorious legal arguments, as such statements cannot support a claim under the statute … . Similarly, even assuming it constituted deceit or collusion, defendants' alleged months-long delay in informing plaintiffs that their federal lawsuit had been dismissed occurred after the litigation had ended and therefore falls outside the scope of Judiciary Law § 487 (1). Thus, plaintiffs' Judiciary Law § 487 cause of action was properly

dismissed. Bill Birds, Inc. v Stein Law Firm, P.C., 2020 NY Slip Op 02125, CtApp 3-31-20

CIVIL PROCEDURE.

NEW YORK RECOGNIZES CROSS-JURISDICTIONAL TOLLING OF THE STATUTE OF LIMITATIONS WHEN A CLASS ACTION IS FILED IN ANOTHER STATE OR FEDERAL COURT; THE TOLLING ENDS UPON DISMISSAL OF THE OUT-OF-STATE ACTION, EVEN WHEN NOT ON THE MERITS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a three-judge partial dissent, answering certified questions from the Second Circuit, determined: (1) New York recognizes the tolling of the statute of limitations for absent members of putative class actions filed in other state and federal courts (cross-jurisdictional tolling); and (2) the tolling of the statute ceases when the filed actions are terminated, even for reasons not on the merits (i.e., forum non conveniens or a denial of certification for any reason). Here class actions stemming from the use of a pesticide (nematicide) in the growing of bananas, involving foreign plaintiffs from countries where bananas are grown, were filed in Texas in 1993. The Texas actions were dismissed in 1995. The instant action was filed in 2012 in the Southern District of New York:

We conclude that a determination that tolling is not available cross-jurisdictionally would subvert article 9—the primary function of which is to allow named plaintiffs to bring truly representative lawsuits without necessitating a multiplicity of litigation that squanders resources and undermines judicial economy, while still ensuring that defendants receive fair notice of the specific claims advanced against them. CPLR article 9 is closely related to and modeled on Federal Rules of Civil Procedure rule 23 …, and the same animating policies the United States Supreme Court discussed in American Pipe [414 US 538] and its progeny also underlie article 9. * * *

Because recognition of cross-jurisdictional tolling implicates our statutes of limitations, a bright-line rule is necessary to provide clarity to all parties in understanding their rights and obligations and, in fairness—as with the policies

underlying the application of statutes of limitations, generally—to balance the interests of both plaintiffs and defendants. Therefore, we hold that tolling ends—as a matter of law—when there is a clear dismissal of a putative class action, including a dismissal for forum non conveniens, or denial of class certification for any reason. Under those circumstances, future plaintiffs are on notice that they must take steps to protect their rights because the litigation no longer compels the court to address class certification or the named plaintiffs to advance absent class members' interests. At that point, it is no longer objectively reasonable for absent class members to rely upon the existence of a putative class action to vindicate their rights, and tolling is extinguished … . Thus, in this case, the 1995 Texas orders that dismissed that action on forum non conveniens grounds ended tolling, as a matter of law. Chavez v Occidental Chem. Corp., 2020 NY Slip Op 05839, CtApp 10-20-20

CONSUMER LAW, INSURANCE LAW, EMPLOYMENT LAW.

GENERAL BUSINESS LAW CAUSES OF ACTION ALLEGING DECEPTIVE PRACTICES AND FALSE ADVERTISING WERE SUFFICIENTLY ALLEGED AGAINST AN INSURER PROVIDING HEALTH INSURANCE TO NEW YORK CITY EMPLOYEES; PLAINTIFF, A RETIRED POLICE OFFICER, ALLEGED DECEPTIVE AND FALSE MARKETING BY THE INSURER INDUCED HIM TO CHOOSE THE INSURER'S PLAN (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, determined General Business Law sections 349 and 350 applied to a health insurance plan offered to New York City employees. Plaintiff, a retired NYC police officer brought the action in federal court alleging the insurer (GHI) engaged in "deceptive practices" and "false advertising." The Third Circuit asked the Court of Appeals to rule on whether the General Business Law causes of action were applicable to plaintiff who was a third-party beneficiary of the insurance contract which had been negotiated by sophisticated parties. The insurer argued a contract between sophisticated parties did not raise a "consumer-oriented" issue:

We have explained that, to state a claim under sections 349 or 350, "a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct, that is (2)

materially misleading, and that (3) the plaintiff suffered injury as a result of the allegedly deceptive act or practice" … . Thus, a plaintiff claiming the benefit of either section 349 or 350 "must charge conduct of the defendant that is consumer-oriented" or, in other words, "demonstrate that the acts or practices have a broader impact on consumers at large" … . * * *

Here, although there was an underlying insurance contract negotiated by sophisticated entities—only one of which is a party to this action—neither plaintiff, nor any of the other hundreds of thousands of employees and retirees who participated in the GHI Plan, were participants in its negotiation and, critically, that negotiation was followed by an open enrollment period, which exposed City employees and retirees to marketing resembling a traditional consumer sales environment. During the open enrollment period, the employees and retirees could select only one of 11 previously-negotiated health insurance plans offered as part of their compensation and retirement packages from the City, and the insurers were able to market their health care plans directly to the employees and retirees. Significantly, it is the allegedly misleading summary materials that are the subject of plaintiff's case—not the contract between the City and GHI, which purportedly was never provided to City employees and retirees. Plavin v Group Health Inc., 2020 NY Slip Op 02025, CtApp 3-24-2020

CONTRACT LAW, LANDLORD-TENANT.

UNDER THE TERMS OF THE SURRENDER AGREEMENT THE TENANT OWED THE LANDLORD AN ADDITIONAL $175,000; UPON DEFENDANT'S DEFAULT, THE PLAINTIFF SUED FOR THE CONTRACTUAL LIQUIDATED DAMAGES OF OVER $1,000,000; THE JUDGMENT FOR $175,000 WAS UPHELD; THE LIQUIDATED DAMAGES OF OVER $1,000,000 VIOLATED THE PUBLIC POLICY AGAINST NON-STATUTORY PENALTIES AND FORFEITURES (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a three-judge dissent, determined the liquidated damages provision of the landlord-tenant surrender agreement violated the public policy against penalties or forfeitures for which there is no statutory penalty. Defendant-tenant, a grocery store chain, entered

a surrender agreement with plaintiff-landlord which allowed defendant to get out from under the lease by making certain installment payments. Defendant defaulted on some of the payments (approximately $175,000) and plaintiff sought to recover liquidated damages of over $1,000,000. Defendant had timely surrendered the premises and it had been relet. Supreme Court had denied plaintiff's motion for summary judgment and granted defendant's cross-motion agreeing to pay $175,000:

Under our well-established rules of contract, the Surrender Agreement's liquidated damages provision does not fairly compensate plaintiff for defendant's delayed installment payments. The provision calls for a sum more than sevenfold the amount due if defendant had complied fully with the Surrender Agreement. We cannot enforce such an obviously and grossly disproportionate award without offending our State's public policy against "the imposition of penalties or forfeitures for which there is no statutory authority" … . Accordingly, there was no error in rejecting plaintiff's liquidated damages provision. Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc., 2020 NY Slip Op 06937, Ct App 11-24-20

CONTRACT LAW, SECURITIES.

THE SOLE REMEDY PROVISION IN THE REPRESENTATIONS AND WARRANTIES AGREEMENT IN THIS RESIDENTIAL MORTGAGE-BACKED SECURITIES CASE WAS VALID AND ENFORCEABLE; THE GROSS NEGLIGENCE PUBLIC POLICY RULE DOES NOT APPLY WHERE THE SOLE REMEDY PROVISION IMPOSES REASONABLE LIMITATIONS ON LIABILITY OR REMEDIES (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Fahey, over a partial dissent, held that the sole remedy provision in the Representations and Warranties Agreement (RWA) in this residential mortgage-backed securities (RBMS) case was valid and enforceable. Plaintiff unsuccessfully tried to avoid the sole remedy provision by arguing the defendants breached the contract with gross negligence:

… [W]e … conclude that the parties' contract, as written, means what it says. In this RMBS put-back action, plaintiff seeks to avoid a provision in the contract … that

sets out a sole remedy for a breach by alleging that defendants breached the contract with gross negligence. This sole remedy provision purports to limit, but not eliminate, the remedies available to the plaintiff in the event of a breach. We conclude that, in a breach of contract action, the public policy rule prohibiting parties from insulating themselves from damages caused by grossly negligent conduct applies only to exculpatory clauses or provisions that limit liability to a nominal sum. The rule does not apply to contractual limitations on remedies that do not immunize the breaching party from liability for its conduct. The sole remedy provision is not an exculpatory or nominal damages clause. Plaintiff cannot render it unenforceable through allegations of gross negligence. * * *

We have previously considered the application of the gross negligence public policy rule only in cases where the contract provision at issue was an exculpatory clause, purporting to wholly immunize a party from liability, or a nominal damages clause limiting damages to, at most, $250 … . We have not yet determined whether grossly negligent conduct may render unenforceable contractual provisions that do not wholly insulate a party from liability for its breach, but instead impose reasonable limitations on either liability or the remedies available to the non-breaching party. We conclude that, in a breach of contract case, grossly negligent conduct will render unenforceable only exculpatory or nominal damages clauses, and the public policy rule does not extend to limitations on the remedies available to the non-breaching party. Matter of Part 60 Put-Back Litig., 2020 NY Slip Op 07687, CtApp 12-22-20

CRIMINAL LAW.

AN INDICATION THE DEFENDANT'S VEHICLE HAD BEEN IMPOUNDED, REVEALED WHEN THE TROOPER RAN THE PLATES, DID NOT SUPPORT THE TRAFFIC STOP; THE WEAPON AND DRUGS FOUND IN THE VEHICLE SHOULD HAVE BEEN SUPPRESSED; APPELLATE DIVISION REVERSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a concurring opinion and an extensive dissenting opinion, reversing the Appellate Division, determined the state trooper did not have probable cause or reasonable suspicion to support the traffic stop. The weapon and drugs found in a search of defendant's (Mr.

Hinshaw's) car should have been suppressed. The stop was based entirely on an indication the car had been impounded revealed when the officer ran the plates. The notice explicitly stated it "should not be treated as a stolen vehicle hit:"

The trooper here did not observe any violations of the Vehicle and Traffic Law and "everything looked good." Putting aside the result of the license plate inquiry, "[t]he trooper candidly testified that he had had no reason to stop defendant" … . …

The result of the license plate check provided neither probable cause to conclude a traffic infraction had occurred nor any basis for an objectively reasonable belief that criminal behavior had occurred or was afoot. Although the People and our dissenting colleague argue that the trooper understood the "generic" impound notification to require further investigation as to its cause, the trooper's speculation that the car could have been impounded for "registration . . . problems," the "plates could have been suspended," "insurance could have been suspended," or the vehicle could have been stolen was just that — pure speculation … . * * *

Because "there was not even a suggestion that the conduct of the defendant or his companions had been furtive in character before the police interfered with their car's progress," and "the record here is bare of any objective evidence of criminal activity as of the time of the stop" … , the stop of Mr. Hinshaw's vehicle was invalid. People v Hinshaw, 2020 NY Slip Op 04816, CtApp 9-1-20

CRIMINAL LAW, APPEALS.

A NUMBER OF GUILTY-PLEA CONVICTIONS REVERSED BECAUSE THE DEFENDANTS WERE TOLD THE WAIVER OF APPEAL WAS AN ABSOLUTE BAR TO APPEAL (CT APP).

The Court of Appeals, over an extensive dissent with respect to one case, reversed a number of guilty-plea convictions because the judges told the defendants the waiver was an absolute bar to appeal:

The waivers of the right to appeal were invalid and unenforceable pursuant to our analysis in People v Thomas (34 NY3d 545 [2019]). It is well-settled that "a waiver

of the right to appeal is not an absolute bar to the taking of a first-tier direct appeal" … . Nonetheless, in each case, among other infirmities, the rights encompassed by an appeal waiver were mischaracterized during the oral colloquy and in written forms executed by defendants, which indicated the waiver was an absolute bar to direct appeal, failed to signal that any issues survived the waiver and, in the Queens and Orleans Counties cases, advised that the waiver encompassed "collateral relief on certain nonwaivable issues in both state and federal courts" … . Viewing these deficiencies in the context of the record in each case and considering the totality of the circumstances, including in several cases defendants' significant mental health issues … , we cannot say that "defendants comprehended the nature [and consequences] of the waiver of appellate rights" … . People v Bisono, 2020 NY Slip Op 07484, CtApp 12-15-20

CRIMINAL LAW, APPEALS.

THE APPELLATE DIVISION COULD NOT DECIDE THE APPEAL OF THE DENIAL OF A SUPPRESSION MOTION ON A GROUND NOT RELIED UPON BY THE SUPPRESSION COURT (CT APP).

The Court of Appeals, reversing the Appellate Division, determined the Appellate Division could not decide the appeal of the denial of a suppression motion on a ground (exigent circumstances) that was not relied on by the suppression court:

… [D]efendant moved to suppress physical evidence found inside a suitcase that he was carrying at the time of his arrest, relying on People v Gokey (60 NY2d 309 [1983]), and arguing that exigent circumstances were needed to justify a warrantless search of the closed suitcase. Supreme Court determined that Gokey did not apply and, therefore, made no findings regarding the existence of exigent circumstances. The Appellate Division affirmed on a different ground, determining, as both defendant and the People argued, that Gokey did apply and accepting the People's argument that exigent circumstances—namely, the protection of evidence or the safety of the police or the public—justified the search … .

"Upon an appeal to an intermediate appellate court from a judgment, sentence or order of a criminal court, such intermediate appellate court may consider and

determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant" (CPL 470.15 [1]). "This provision is a legislative restriction on the Appellate Division's power to review issues either decided in an appellant's favor, or not ruled upon, by the trial court'" … . The statute " bars the Appellate Division from affirming a judgment, sentence or order on a ground not decided adversely to the appellant by the trial court'" … . This "restriction applies in equal force to this Court which itself has no broader review powers'" … .

Here, the Appellate Division did not err in determining that Gokey was applicable, the only reviewable issue before it. However, "[b]ecause the suppression court did not deny the motion on the ground that there were exigent circumstances, that issue was not decided adversely to defendant and it could not be invoked by the Appellate Division" … . Accordingly, the Appellate Division erred in deciding that issue. People v Harris, 2020 NY Slip Op 03208, CtApp 6-9-20

CRIMINAL LAW, ATTORNEYS.

THE RECORD DID NOT SUPPORT DEFENDANT'S ARGUMENT THAT DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE AN ALLEGEDLY BIASED JUROR; THE RECORD DID NOT SUPPORT A CONSTITUTIONAL INEFFECTIVE ASSISTANCE CLAIM; THEREFORE DIRECT APPEAL, AS OPPOSED TO A MOTION TO VACATE THE CONVICTION, WAS NOT AVAILABLE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a comprehensive, extended dissenting opinion, determined defendant's constitutional ineffective assistance argument based upon defense counsel's failure to challenge an allegedly biased juror was properly rejected. The record was deemed insufficient to support the constitutional challenge. A motion to vacate the conviction, pursuant to Criminal Procedure Law section 440, based upon matters not in the record, may be the only avenue available to the defendant here. The defendant was charged with depraved indifference murder stemming from a drive-by shooting:

We reject defendant's argument here that prospective juror number 10's statements during voir dire reflect actual bias against defendant predicated on any evidence precluding the juror from rendering an impartial verdict, as opposed to general discomfort with the case based on media coverage. Contrary to defendant's assertion, the juror's verbatim statements did not reveal what about the case gave rise to his uneasiness — whether it be the seemingly random nature of the shooting, the defendant's or victim's identity, or the manner in which the police investigated … . Nor did this juror convey that his uneasiness was connected to any particular personal experience or relationship, … or whether his impressions risked predisposition toward the prosecution or defense. Moreover, as both the prosecutor and trial court indicated in questioning the juror, this case turned not on a dispute about the nature of the crime but on the prosecutor's ability to prove that this defendant committed it — an issue not impacted by the juror's apprehension. * * *

A defendant's views at trial about a prospective juror as conveyed to counsel are relevant to an ineffectiveness claim based on the joint decision to accept that juror. Here, where we do not know what was said between defendant and his counsel or how that conversation may have affected counsel's impression of prospective juror number 10, the ineffective assistance claim cannot be resolved on direct appeal. People v Maffei, 2020 NY Slip Op 02680, CtApp 5-7-20

CRIMINAL LAW, SEX OFFENDER REGISTRATIO ACT (SORA).

IN THESE THREE CASES, CONFINING LEVEL THREE SEX OFFENDERS WHO ARE ELIGIBLE FOR RELEASE FROM PRISON UNTIL COMPLIANT HOUSING IS AVAILABLE WAS NOT A CONSTITUTIONAL VIOLATION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over two separate dissenting opinions, determined, in the three cases before the court, confining level three sex offenders who are eligible for release from prison until compliant housing is available was not a constitutional violation:

In these appeals, we consider constitutional challenges to the practice of temporarily confining level three sex offenders in correctional facilities, after the time they

would otherwise be released to parole or postrelease supervision (PRS), while they remain on a waiting list for accommodation at a shelter compliant with Executive Law § 259-c (14). In each case, we conclude that there was no constitutional violation. People ex rel. Johnson v Superintendent, Adirondack Corr. Facility, 2020 NY Slip Op 06934, CtApp 11-23-20

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

‘RELIABLE HEARSAY’ IN A PRESENTENCE INVESTIGATION (PSI) REPORT IS A SUFFICIENT BASIS FOR A FINDING DEFENDANT USED VIOLENCE IN THE COMMISSION OF A SEX OFFENSE; LEVEL TWO RISK ASSESSMENT UPHELD (CT APP).

The Court of Appeals, over an extensive two-judge dissent, determined documentary evidence of “reliable hearsay” was sufficient for a finding defendant used violence to coerce the child victim in this “course of sexual conduct against a child” case, Therefore defendant was properly adjudicated a level two risk of reoffense:

At a SORA hearing conducted as defendant was nearing completion of his prison sentence, he was adjudicated a level two risk of reoffense due, in part, to the assessment of ten points under risk factor one, use of violence. That finding was based on information in the Presentence Investigation (PSI) report prepared in connection with the offense stating that “[o]n one or more occasions, he used physical force to coerce the victim into cooperation,” information also included in the case summary prepared by the Board of Examiners of Sex Offenders. Defendant argues that this evidence was insufficient to supply evidence of use of violence because it constituted hearsay and did not more specifically describe his conduct. …

SORA adjudications, by design, are typically based on documentary evidence under the statute’s “reliable hearsay” standard. Case summaries and PSI reports meet that standard … , meaning they can provide sufficient evidence to support the imposition of points. PSI reports are prepared by probation officers who investigate the circumstances surrounding the commission of the offense, defendant’s record of delinquency or criminality, family situation and social, employment, economic, educational and personal history, analyzing that data to provide a sentencing

recommendation (see CPL 390.30[1]). Their primary function is to assist a criminal court in determining the appropriate sentence for the particular defendant based on the specific offense. Defendants have a right to review the report prior to sentencing (see CPL 390.50[2][a]) and may challenge the accuracy of any facts contained therein at that time (see CPL 400.10). * * *

Because there is record support for the imposition of points under risk factor one, there is no basis to disturb the Appellate Division order. People v Diaz, 2020 NY Slip Op 01114, CtApp 2-18-20

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

SEX OFFENDERS SUBJECT TO POSTRELEASE SUPERVISION MAY BE HOUSED IN A RESIDENTIAL TREATMENT FACILITY BEYOND THE SIX-MONTH STATUTORY PERIOD BEFORE COMPLIANT HOUSING HAS BEEN FOUND (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a three-judge dissent, determined that sex offenders under a period of postrelease supervision (PRS) maybe housed in a residential treatment facility (RTF) after the statutory six-month period has expired and before compliant housing has been found:

This appeal presents us with a question of statutory interpretation. Penal Law § 70.45 (3) provides that, “notwithstanding any other provision of law, the board of parole may impose as a condition of postrelease supervision (PRS) that for a period not exceeding six months immediately following release from the underlying term of imprisonment the person be transferred to and participate in the programs of a residential treatment facility (RTF).” Correction Law § 73 (10), in turn, authorizes the Department of Corrections and Community Supervision (DOCCS) “to use any [RTF] as a residence for persons who are on community supervision,” which includes those on PRS (see Correction Law § 2 [31]). The question before us is whether Correction Law § 73 (10) authorizes DOCCS to provide temporary housing in an RTF to sex offenders subject to the mandatory condition set forth in the Sexual Assault Reform Act (SARA) (see Executive Law § 259—c [14]) after the six-month period specified in Penal Law § 70.45 (3) has expired but before the offender on

PRS has located compliant housing. We conclude that it does. People ex rel. McCurdy v Warden, Westchester County Corr. Facility, 2020 NY Slip Op 06933, Ct App 11-23-20

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

UPWARD DEPARTURE SUPPORTED BY EVIDENCE DEFENDANT COMMITTED RAPE TO TAKE REVENGE UPON SOMEONE OTHER THAN THE VICTIM; THE FACT DEFENDANT HAD BEEN DEPORTED DID NOT RENDER THE APPEAL MOOT (CT APP).

The Court of Appeals, in a brief memorandum decision, upheld the Appellate Division's finding that the upward departure was justified because it was based on a risk factor not addressed the Sex Offender Registration Act (SORA) Guidelines. The court noted that the fact defendant had been deported did not render the appeal moot:

Under the circumstances presented here, we reject the People's argument that defendant's appeal is rendered moot by his deportation … . On the merits, we conclude that it was not an abuse of discretion for the Appellate Division to sustain the upward departure based on the People's proof that defendant raped the victim in order to take revenge upon someone other than the victim—a risk factor not adequately captured by the Guidelines. People v Rosario, 2020 NY Slip Op 07688, CtApp 12-22-20

CRIMINAL LAW.

A FRYE HEARING SHOULD HAVE BEEN HELD TO DETERMINE THE ADMISSIBILITY OF THE LOW COPY NUMBER (LCN) DNA EVIDENCE AND THE EFFICACY OF A FORENSIC STATISTICAL TOOL (FST); THE ERROR WAS HARMLESS HOWEVER (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a three-judge concurrence, ruled a Frye hearing should have been held to the determine

admissibility of low copy number (LCN) DNA evidence and the efficacy of the forensic statistical tool (FST) used to conduct the statistical analysis. The abuse of discretion was deemed harmless however:

At the time this motion practice was initiated no court had completed a Frye hearing with respect to the FST, and only one court—namely, the Megnath (27 Misc 3d 405) court …—had conducted such a hearing with respect to LCN testing. * * *

… [T]here was "marked conflict" with respect to the reliability of LCN DNA within the relevant scientific community at the time the LCN issue was litigated in this case … . * * *

… FST is a proprietary program exclusively developed and controlled by [the New York City Office of Chief Medical Examiner (OCME)]. The sole developer and the sole user are the same. That is not "an appropriate substitute for the thoughtful exchange of ideas . . . envisioned by Frye" … . It is an invitation to bias. People v Williams, 2020 NY Slip Op 02123, CtApp 3-31-20

Similar issues and result in People v Foster-Bey, 2020 NY Slip Op 02124, CtApp 3-31-20

CRIMINAL LAW.

AFTER DEFENSE COUNSEL REPEATEDLY USED THE N-WORD (QUOTING A CO-DEFENDANT) IN CROSS-EXAMINING THE VICTIM A JUROR STOOD UP AND SAID SHE FOUND THE WORD VERY OFFENSIVE AND WOULD LEAVE IF COUNSEL USED THE WORD AGAIN; THE TRIAL COURT DID NOT CONDUCT A BUFORD HEARING TO DETERMINE WHETHER THE JUROR SHOULD BE DISQUALIFIED; CONVICTION AFFIRMED OVER A THREE-JUDGE DISSENT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DeFiore, over a three-judge dissent, determined there was no need for the trial court to conduct a Buford hearing to determine whether a juror should be disqualified. Defense counsel, quoting the words used by a co-defendant, repeatedly said the "n-word." A juror stood up and said she would leave if counsel use the word again because she found very offensive.

The trial court denied a motion for a mistrial and gave a curative instruction. On appeal the defendant argued the trial court should have conducted a Buford hearing and determined that the juror was grossly unqualified:

This appeal by defendant presents the issue … whether the trial court abused its discretion as a matter of law in giving the jury a curative instruction and forgoing a Buford inquiry (People v Buford, 69 NY2d 290 [1987]) of a sworn juror after her mid-trial exclamation that she was “very offen[ded]” by the repetitive use of a racial slur by Bailey’s counsel while cross-examining the victim. Viewed in context, the record supports the trial court’s findings that the juror’s reaction was triggered by counsel’s fifth and gratuitous use of the epithet, and provided no basis to indicate she was grossly unqualified. Since the entire incident unfolded in open court, a Buford inquiry of the juror was unnecessary, as the court was able to adequately assess that her outburst was not a transformative one and her sworn oath to be impartial remained intact. The court’s remedy of admonishing the juror and counsel and issuing a carefully crafted curative instruction—which included a mechanism for any juror to advise the court if they could not be fair and impartial due to anything that occurred at trial—was not an abuse of its discretion. * * *

… [N]ot every allegation of juror misconduct warrants an intrusive Buford inquiry, and we have approved alternate procedures and ameliorative instructions when juror bias or partiality is not in doubt … . In determining whether there are new facts to impugn the jury’s original oath of impartiality or a need to investigate alleged juror misconduct, “‘the court must consider the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source’” … . Thus, while a court “must investigate and, if necessary, correct a problem, it must also avoid tainting a jury unnecessarily. . . . In this endeavor, sometimes less is more” … . People v Batticks, 2020 NY Slip Op 05840, Ct App 10-20-20

CRIMINAL LAW.

ALTHOUGH DEFENDANT'S SUPPRESSION MOTION RELATED TO A THEFT ON OCTOBER 3 AND DEFENDANT PLED GUILTY TO A DIFFERENT THEFT ON OCTOBER 1 IN SATISFACTION OF BOTH, DEFENDANT WAS ENTITLED TO APPELLATE REVIEW OF HIS SUPPRESSION MOTION; THE APPELLATE DIVISION'S DENIAL OF REVIEW REVERSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing the Appellate Division, determined defendant was entitled to appellate review of the denial of his suppression motion even though the suppression motion did not relate to the offense to which defendant pled guilty. The defendant was charged with two thefts from the same residence on different days, a laptop computer taken on October 1 and jewelry taken on October 3. The police stopped the defendant on the street on October 3 and seized the jewelry. The suppression hearing related to that street stop. The defendant pled guilty to the theft of the computer and the jewelry-theft was satisfied by the plea. The Fourth Department held defendant was not entitled to appellate review of the jewelry-related suppression motion because defendant pled to the computer-theft. The case was sent back for review of the denial of the suppression motion:

Defendant was charged by indictment with two counts of burglary in the second degree … . The first count related to the laptop computer, taken from a dwelling on October 1, 2014; the second count related to the jewelry, which was taken from the same dwelling on October 3, 2014, the day of the arrest.

Defendant moved to suppress the jewelry, contending that his detention and the seizure of the jewelry violated his right to freedom from unreasonable searches and seizures …. Following a suppression hearing, with testimony from two of the police officers present at the arrest, Supreme Court denied defendant's motion, concluding that the police had "reasonable suspicion that a crime had been committed and that the defendant was the perpetrator."

Defendant, a predicate felony offender who was facing a maximum sentence of 30 years in prison if convicted of both counts of burglary, pleaded guilty to one count of burglary in the second degree, in satisfaction of the entire indictment. …

[D]efendant pleaded guilty to the October 1 burglary, as charged in the count pertaining to the theft of the laptop computer, in satisfaction of the count charging the October 3 burglary of jewelry, which was the subject of his motion to suppress. * * *

"[W]hen a conviction is based on a plea of guilty an appellate court will rarely, if ever, be able to determine whether an erroneous denial of a motion to suppress contributed to the defendant's decision, unless at the time of the plea he states or reveals his reason for pleading guilty" … . * * *

A defendant who pleads guilty to one count will invariably take into consideration that other counts are satisfied by the plea. Importantly, a count satisfied by a guilty plea bears the double jeopardy consequences of a judgment of conviction. The judgment in this case prevents the People from prosecuting defendant again for the October 3, 2014 burglary, even though defendant did not plead to that count … . People v Holz, 2020 NY Slip Op 02682, CtApp 5-7-20

CRIMINAL LAW.

CONVERSATIONS ABOUT AND PLANNING OF THE MURDER OF DEFENDANT'S WIFE AND MOTHER-IN-LAW DID NOT CONSTITUTE LEGALLY SUFFICIENT EVIDENCE OF ATTEMPTED MURDER (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over a three-judge dissent, determined the evidence of attempted first and second degree murder was legally insufficient. Defendant's conversations and planning with a feigned confederate did not constitute an "actual step" toward killing his wife and mother-in-law:

… [T]he only conduct to be considered is defendant's own acts because his purported accomplice [MS], who was working with the authorities, did not take any steps toward furthering the planned murders other than listening to defendant's scheme. MS did not, for example, acquire the instrumentality for the crimes (such as drugs or poison), verify the existence of the keys and obtain them from the stated

location, or stake out the address supplied by defendant to make sure that the wife and mother-in-law were present at the location specified. Nevertheless, the People, mostly by parsing defendant's communications with MS, argue that defendant engaged in sufficient conduct by: (1) promising to provide a house to MS; (2) giving MS the purported address of the targets; (3) instructing MS when to carry out the murders; (4) providing MS with a hand-drawn map of the location of the third party's house, where MS was to drop off the children after the murders; (5) handing MS a detailed plan of how to carry out the murders; (6) telling MS the location of the keys to the house; (7) calling MS's girlfriend to arrange for MS to visit the jail; (8) writing a fake suicide note; (9) showing MS the suicide note; and (10) creating a prearranged code to discuss the postmortem over the recorded jail phone.

Not only are these acts "preparatory in a dictionary sense" … , they are also limited to the planning stages of committing the offense: they specify the who, what, where, when, and how of defendant's murder plans. Notably absent are any acts that can be deemed to bring the crimes dangerously close to completion. People v Lendof-Gonzalez, 2020 NY Slip Op 06940, CtApp 11-24-20

CRIMINAL LAW.

DEFENDANT MAY NOT APPEAL OR COLLATERALLY ATTACK AN "ILLEGALLY LENIENT" SENTENCE BECAUSE THE SENTENCE DID NOT ADVERSELY AFFECT THE DEFENDANT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined that the defendant may not appeal from an "illegally lenient" sentence because the sentence did not adversely affect the defendant. The defendant was attempting to have prior sentences declared illegal to avoid a subsequent "persistent felony offender" classification. Defendant had used aliases and had been given "illegally lenient" sentences because the sentencing court was unaware of the prior conviction(s):

The Appellate Division [held] that it could not consider the merits of defendant's appeal because denial of the motion — leaving in place defendant's illegally lenient sentence — had not "adversely affected" defendant within the meaning of CPL

470.15 … . When a defendant moves to vacate a sentence on the ground that it is illegally lenient, denial of such a motion is not reviewable because any purported "error or defect in the criminal court proceedings" has not "adversely affected" the defendant (CPL 470.15 [1]). Accordingly, we affirm.

Defendant's criminal history consists of at least four felony convictions over a fifteen-year period. During this time, it appears that he repeatedly attempted to conceal that history, primarily through the use of aliases. To a remarkable degree, though a recidivist, he avoided enhanced punishment required by statute. Instead, he obtained sentences that were "illegally lenient" given his actual status as a predicate felon. However, in 1997, the court, based on the evidence of defendant's prior convictions, sentenced him to a term of twenty-three years to life in prison as a persistent violent felony offender (see Penal Law § 70.08). Since then, by direct appeal and collateral attack, defendant has tried to overturn the illegally lenient sentences that were previously imposed based on his incomplete criminal history, with the ultimate goal of invalidating his 1997 persistent violent felony offender sentence. People v Francis, 2020 NY Slip Op 00996, CtApp 2-13-20

CRIMINAL LAW.

DEFENDANT, WHO ACCEPTED POSSESSION OF THE WEAPON FROM HIS FRIEND, DID SO IN ANTICIPATION OF A POSSIBLE CONFRONTATION; DURING THE CONFRONTATION DEFENDANT SHOT TWO PEOPLE; THE ARGUMENT THAT DEFENDANT ACTED IN SELF-DEFENSE DID NOT RENDER DEFENDANT'S POSSESSION OF THE WEAPON TEMPORARY AND LAWFUL (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over two concurring opinions, determined defendant was not entitled to a jury instruction on temporary and lawful possession of a firearm. Defendant was leaving a friend's apartment building when he saw a man, Carson, pull a gun out of his pocket. Defendant and Carson had a history of violent confrontations, including shootings. Defendant went back to his friend's (Foe's) apartment. Foe picked up a loaded gun and offered to walk defendant out of the building. When they got to the lobby Foe handed defendant

the gun. When defendant saw Carson he believed Carson was about to shoot him and defendant shot Carson and a bystander:

… "[A] defendant may not be guilty of unlawful possession if the jury finds that [the defendant] found the weapon shortly before [the defendant's] possession of it was discovered and [the defendant] intended to turn it over to the authorities" … . We have also indicated that temporary and lawful possession may result where a defendant "took [the firearm] from an assailant in the course of a fight" … and the circumstances do not otherwise evince an intent to maintain unlawful possession of the weapon . In such scenarios, "[t]he innocent nature of the possession negates . . . the criminal act of possession" … . Ultimately, whether the weapon is found fortuitously or obtained by disarming an attacker, "the underlying purpose of the charge is to foster a civic duty on the part of citizens to surrender dangerous weapons to the police" … . …

… [D]efendant's possession did not "result temporarily and incidentally from the performance of some lawful act, [such] as disarming a wrongful possessor" or unexpected discovery … . Rather, under the circumstances presented here, defendant's contention that his possession should be legally excused on the grounds of self-defense amounts to a claim that he was entitled to possess the weapon for his protection. Even crediting defendant's testimony that he had been confronted by Carson at the building's exit earlier and that Carson had displayed a firearm at that time, defendant testified that he then safely retreated to Foe's apartment. There was no evidence suggesting that Carson chased after defendant when he re-entered the building, or that Carson had any awareness of defendant's location in the building. Further, defendant admitted that he accepted possession of the firearm from Foe in the stairwell, at a time when he was unaware of Carson's whereabouts and was not facing any imminent threat to his safety. Defendant then chose to retain possession of the firearm and to enter the lobby with the weapon in his hand. Under these circumstances, the only reasonable conclusion to be drawn from the evidence is that defendant armed himself in anticipation of a potential confrontation; however, the law is clear that defendant "may not avoid the criminal [possession] charge by claiming that he possessed the weapon for his protection" … . People v Williams, 2020 NY Slip Op 07664, CtApp 12-17-20

CRIMINAL LAW.

DEFENSE COUNSEL WAS GIVEN NOTICE AND THE OPPORTUNITY TO BE HEARD BEFORE THE ISSUANCE OF THE WARRANT TO TAKE A DNA SAMPLE FROM THE DEFENDANT; DEFENSE COUNSEL WAS NOT ENTITLED TO DISCOVERY OF THE WARRANT APPLICATION PRIOR TO THE ISSUANCE OF THE WARRANT TO ASSESS PROBABLE CAUSE; A VIDEO DEPICTING DEFENDANT WAS PROPERLY AUTHENTICATED; APPELLATE DIVISION REVERSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a concurrence and a two-judge dissent, reversing the Appellate Division, determined defendant was not entitled to review the application for the warrant to collect DNA evidence from the defendant's person before the warrant was issued. Defense counsel was given notice and an opportunity to be heard on the application and did not contest the reasonableness of the bodily intrusion at that time. The Appellate Division held (1) the defense was entitled to review the search warrant application before the warrant was issued (to assess probable cause) and (2) a video depicting the defendant was not properly authenticated. The Court of Appeals reversed on both issues:

The [Appellate Division] held that Supreme Court erred in precluding defense counsel from reviewing the search warrant application and in denying counsel the opportunity to be heard on the issue of probable cause. The Court rejected the People's argument that Abe A. [56 NY2d 288] requires notice only for the first level of intrusion—seizure of the person—and held that the due process requirement of notice and an opportunity to be heard is likewise required for the subsequent search and seizure of corporeal evidence. The Court also held that the People failed to adequately authenticate the YouTube video … . * * *

It is evident that Abe A.'s requirement of notice and an opportunity to be heard in the pre-execution stage of a warrant authorizing the seizure of evidence by bodily intrusion was satisfied in this case. Defense counsel, having received notice of the hearing on the warrant, was given an opportunity to be heard on the application, other than on the issue of probable cause. Counsel failed to direct any argument to the nature of the intrusion, the value of comparative DNA analysis evidence or the sufficiency of the safeguards preventing unwarranted disclosure of the results of his DNA testing, either at the hearing or in his motion to suppress. … [T]he method

and procedures employed in taking the saliva undoubtedly respected relevant Fourth Amendment standards of reasonableness, and defendant's claim that the failure to provide him discovery of the extant probable cause and an adversarial hearing nonetheless warrants the invocation of the exclusionary rule is without constitutional basis.

[With respect to the video,] …defendant did not dispute that he was the individual who appeared in the video reciting certain words [and] the video contains distinctive identifying characteristics … . … [T]estimony … provided evidence pertinent to the timing of the making of the video—including defendant's admission of his future intent to make the video the next morning … —and the video was uploaded to YouTube close in time to the homicide. … [T]he video was introduced for its relevance to defendant's motive related to territorial gang activity—which is not an element of the offense—rather than specifically offered for its truth. People v Goldman, 2020 NY Slip Op 05977, Ct App 10-22-20

CRIMINAL LAW.

EVEN IF THE OFFICER WERE WRONG ABOUT WHETHER A NON-FUNCTIONING CENTER BRAKE LIGHT VIOLATES THE VEHICLE AND TRAFFIC LAW, THE OFFICER'S INTERPRETATION OF THE LAW WAS OBJECTIVELY REASONABLE; THEREFORE THE STOP WAS VALID AND THE SUPPRESSION MOTION SHOULD NOT HAVE BEEN GRANTED (CT APP).

The Court of Appeals, reversing the Appellate Term, over a concurring memorandum, a concurring opinion, and two dissenting opinions, determined the police officer who stopped defendant reasonably believed the non-functioning center brake light violated the Vehicle and Traffic Law. Therefore the stop was valid and the DWI evidence should not have been suppressed. The Vehicle and Traffic Law requires at least two functioning brake lights. Here there were two functioning lights but the center brake light was not working:

We conclude that the officer's interpretation of the Vehicle and Traffic Law was objectively reasonable. Vehicle and Traffic Law § 375 (40) (b) mandates that motor

vehicles manufactured after a certain date be "equipped with at least two stop lamps, one on each side, each of which shall display a red to amber light visible at least five hundred feet from the rear of the vehicle when the brake of such vehicle is applied." Vehicle and Traffic Law § 376 (1) (a) prohibits, in relevant part, (1) operating a vehicle "during the period from one-half hour after sunset to one-half hour before sunrise, unless such vehicle is equipped with lamps of a type approved by the commissioner which are lighted and in good working condition"; and (2) operating a vehicle at any time "unless such vehicle is equipped with signaling devices and reflectors of a type approved by the commissioner which are in good working condition." Vehicle and Traffic Law § 375 (19), in turn, prohibits the operation of a motor vehicle on highways or streets if the vehicle "is defectively equipped and lighted." Taken together, these provisions could reasonably be read to require that all lamps and signaling devices be in good working condition, and that all equipment and lighting be non-defective, regardless of whether a vehicle is actually required to be equipped with those lamps, signaling devices, equipment, or lights. Even assuming the officer was in fact mistaken on the law, it was nevertheless objectively reasonable to conclude that defendant's non-functioning center brake light violated the Vehicle and Traffic Law … . Because any error of law by the officer was reasonable, there was probable cause justifying the stop … . People v Pena, 2020 NY Slip Op 06836, CtApp 11-19-20

CRIMINAL LAW.

EVEN THOUGH THE DEFENDANT ARGUED HE NEVER HAD ACTUAL OR CONSTRUCTIVE POSSESSION OF THE WEAPON FOUND IN ANOTHER'S HOUSE, DEFENDANT WAS ENTITLED TO THE "INVOLUNTARY POSSESSION" JURY INSTRUCTION; POSSESSION, EITHER ACTUAL OR CONSTRUCTIVE, IS NOT VOLUNTARY IF IT IS FOR SO BRIEF A PERIOD OF TIME THAT THE DEFENDANT COULD NOT HAVE TERMINATED POSSESSION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a three-judge dissent, reversing defendant's conviction, determined there was a reasonable view of the evidence which supported a jury instruction on voluntary (involuntary) possession of a weapon. In addition to actual and constructive possession, there is

the concept of involuntary possession. Both actual and constructive possession can be involuntary if it is so fleeting that the defendant was not able to terminate possession. Defendant argued he was a guest for the night in the house where the weapon was found and did not possess it all, either actually or constructively. The Court of Appeals noted that "involuntary possession" conflicted with "no possession at all," but the jury still should have been instructed on involuntary possession because there was evidence to support the instruction:

The distinction among constructive, knowing, and voluntary possession that defendant emphasizes is reflected in the Criminal Jury Instructions' model charge on voluntary possession, which provides that "[p]ossession . . . is voluntary when the possessor was aware of [their] physical possession or control . . . for a sufficient period to have been able to terminate the possession" (CJI2d [NY] Voluntary Possession § 15.00 [2] … . * * *

… [T]he trial court denied the charge here, not because the requested charge lacked evidentiary support, but because the court considered the proposed language more confusing than helpful. … . This determination was in error because the requested charge did not inject confusion into the instructions. Rather, it addressed an entirely different aspect of the charged possessory crime: the temporal requirement of voluntary possession. Indeed, the requested charge would have clarified the law because the charge, as erroneously given, allowed the jury to conclude that if defendant had control over the area where the gun was found—i.e., the bedroom—then he had constructive possession of the gun, regardless of how long he was actually aware of its presence. This is not an accurate statement of the relevant law where, as here, there is a reasonable view of the evidence that the possession may not have been voluntary. People v J.L., 2020 NY Slip Op 07663, CtApp 12-17-20

CRIMINAL LAW.

FAILURE TO INSTRUCT THE GRAND JURY ON THE DEFENSE OF PROPERTY JUSTIFICATION DEFENSE REQUIRED DISMISSAL OF THE MURDER/MANSLAUGHTER INDICTMENT (CT APP).

The Court of Appeals affirmed for the reasons stated in the Fourth Department's memorandum. People v Ball, 2020 NY Slip Op 03209, CtApp 6-9-20

SUMMARY OF THE AUGUST 22, 2019, MEMORANDUM AFFIRMED BY THE COURT OF APPEALS ON JUNE 9, 2020

The Fourth Department, over a two-justice dissent, determined County Court properly dismissed the murder/manslaughter indictment because the grand jury was not charged with the defense of property justification defense. After decedent had twice attacked defendant inside the home, the decedent reentered the home from the front yard and was shot by the defendant:

During a recess in the grand jury proceeding, defendant asked the People to deliver to the grand jury foreperson a letter requesting, among other things, that the grand jurors be charged with respect to the justifiable use of physical force in defense of a person pursuant to Penal Law § 35.15 and the justifiable use of physical force in defense of premises and in defense of a person in the course of a burglary pursuant to § 35.20 (3). The People did not deliver the letter to the foreperson.

The People instructed the grand jury on the law with respect to murder in the second degree (Penal Law § 125.25 [1]), manslaughter in the first degree (§ 125.20 [1]), and the justification defense pursuant to Penal Law § 35.15; however, the People did not instruct the grand jury with respect to the justification defense pursuant to § 35.20 (3).

… [W]e conclude that the court properly dismissed the indictment based on the People's failure to instruct the grand jury on the justification defense pursuant to Penal Law § 35.20 (3) … . A court may dismiss an indictment on the ground that a grand jury proceeding is defective where, inter alia, the proceeding is so irregular "that the integrity thereof is impaired and prejudice to the defendant may result" (CPL 210.35 [5]; see CPL 210.20 [1] [c]). With respect to grand jury instructions,

CPL 190.25 (6) provides, as relevant here, that, “[w]here necessary or appropriate, the court or the district attorney, or both, must instruct the grand jury concerning the law with respect to its duties or any matter before it.” “If the prosecutor fails to instruct the grand jury on a defense that would eliminate a needless or unfounded prosecution, the proceeding is defective, mandating dismissal of the indictment” … . Under the circumstances of this case, we conclude that an instruction regarding the justification defense pursuant to Penal Law § 35.20 (3) was warranted, and the prosecutor’s failure to provide that instruction impaired the integrity of the grand jury proceeding (see CPL 210.35 [5]). Furthermore, we conclude that the error was not cured by the instruction regarding the justification defense under Penal Law § 35.15 … . People v Ball, 2019 NY Slip Op 06295, Fourth Dept 8-22-19

CRIMINAL LAW.

FEDERAL CUSTOMS AND BORDER PATROL MARINE INTERDICTION AGENT IS NOT A PEACE OFFICER UNDER NEW YORK LAW; THEREFORE THE AGENT MADE A VALID CITIZEN’S ARREST OF AN ERRATIC DRIVER HE OBSERVED WHILE ON THE HIGHWAY; MOTION TO SUPPRESS THE WEAPON FOUND IN DEFENDANT’S CAR SHOULD NOT HAVE BEEN GRANTED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, reversing the Appellate Division, over a dissent, determined the federal marine interdiction agent with US Customs and Border Protection (CBP) was not a peace officer under New York law and, therefore, could effect a citizen’s arrest. The federal agent observed defendant driving erratically and putting other drivers in danger so he activated his emergency lights and pulled the driver over. The agent stayed in his vehicle and called the Buffalo police. After the Buffalo police arrived, the agent left. The police found a weapon in defendant’s car and he was charged with criminal possession of a weapon. Supreme Court granted defendant’s motion to suppress and the Fourth Department affirmed. Both courts relied on People v Williams (4 NY3d 535 [2005]) which held that peace officers could not make a citizen’s arrest. The Court of Appeals reasoned that Williams did not control because the federal agent in this case

was not a peace officer under the relevant New York statutory definitions and therefore could make a citizen's arrest:

Because the agent who stopped defendant in this case is not considered a federal law enforcement officer with peace officer powers pursuant to CPL 2.10 and 2.15, he could not have improperly circumvented the jurisdictional limitations on the powers reserved for those members of law enforcement under CPL 140.25, as the peace officers in Williams did. In other words, the agent's conduct here did not violate the Legislature's prescribed limits on a peace officer's arrest powers because he is not, in fact, a peace officer. …

… [A]side from the clear limits as to the justifiable use of physical force that may be applied during an arrest by a private citizen (CPL 35.30 [4]; CPL 140.35 [3]), as well as the requirement that "[s]uch person must inform the person whom he [or she] is arresting of the reason for such arrest unless he [or she] encounters physical resistance, flight or other factors rendering such procedure impractical" (CPL 140.35 [2]), nothing in the citizen's arrest statutes themselves set forth the methods that must be employed when, as here, a crime is committed in the responding citizen's presence (see CPL 140.30, 140.40 …). We reiterate that whether this stop comported with constitutional principles or the express terms of the arrest statutes is simply not before us, as defendant failed to raise any such arguments before the suppression court. People v Page, 2020 NY Slip Op 03265, CtApp 6-11-20

CRIMINAL LAW.

INFORMATION CHARGING OBSTRUCTING GOVERNMENT ADMINISTRATION DID NOT INCLUDE FACTUAL ALLEGATIONS DESCRIBING THE OFFICIAL FUNCTION WHICH WAS OBSTRUCTED AND WAS THEREFORE JURISDICTIONALLY DEFECTIVE (CT APP).

The Court of Appeals, reversing the Appellate Term, determined the accusatory information (information) charging defendant with obstructing government administration was jurisidictionally defective because it did not include factual allegations of the official function alleged to have been obstructed:

Defendant was convicted of obstructing governmental administration in the second degree for backing his vehicle away from police officers who were attempting to execute a warrant to search the vehicle. Prior to trial, defendant moved to dismiss the accusatory instrument, arguing that it was facially insufficient because it failed to put him on notice of the "official function" with which he was alleged to have interfered (Penal Law § 195.05). Specifically, defendant asserted that the accusatory instrument was defective because it lacked any reference to the search warrant and alleged in a conclusory fashion that defendant's actions were intentionally taken to prevent the police officers from "effecting a proper vehicle stop." …

… [W]ith regard to the "official function" element of the obstruction charge, the accusatory instrument lacked factual allegations providing defendant with notice of the official function with which he was charged with interfering—namely, a police stop of defendant in his vehicle in order to execute a search warrant (Penal Law § 195.05). Defendant therefore lacked sufficient notice to prepare his defense, rendering the information jurisdictionally defective … . People v Wheeler, 2020 NY Slip Op 00998, CtApp 2-13-20

CRIMINAL LAW.

MISDEMEANOR COMPLAINTS AND INFORMATIONS CANNOT BE CORRECTED BY AMENDMENT; RATHER A SUPERSEDING INSTRUMENT SUPPORTED BY A SWORN STATEMENT WITH THE CORRECT FACTS MUST BE FILED; THE ISSUE WAS NOT WAIVED BY DEFENDANT'S GUILTY PLEA TO THE AMENDED INSTRUMENT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, reversing the Appellate Term and overruling precedent from 1954, over a two-judge dissent and an additional dissent, determined the misdemeanor complaint and the information to which the complaint was converted should not have been amended to correct wrong dates. The Criminal Procedure Law does not include a provision allowing amendment of misdemeanor complaints and informations. The proper procedure is to file a superseding accusatory instrument with a sworn statement supporting the correct facts. This appellate issue was not waived by defendant's guilty plea:

The text, structure, and legislative history of the CPL, as well as a straightforward application of our canons of statutory construction, all demonstrate that the CPL does not permit the kinds of factual amendments once countenanced by [People v Easton (307 NY 336 [1954])]. The CPL does provide its own pathway for correcting factual errors in complaints and informations, through the filing of a superseding accusatory instrument (CPL 100.50), not through a prosecutor's amendment of facts averred by someone else. We recognize that the October 25, 2015 date in the accusatory instrument here cannot possibly be correct and that the correct date can be inferred from information outside the four corners of the accusatory instrument. However, in evaluating the sufficiency of an accusatory instrument we do not look beyond its four corners (including supporting declarations appended thereto) … . It is the People's responsibility to obtain a sworn statement with the correct factual allegations and proceed on a superseding instrument. People v Hardy, 2020 NY Slip Op 05803, CtApp 10-15-20

CRIMINAL LAW.

NEW JERSEY CONVICTION FOR LEWDNESS, ALTHOUGH NOT A REGISTRABLE OFFENSE IN NEW JERSEY, IS THE EQUIVALENT OF ENDANGERING THE WELFARE OF A CHILD; IT IS APPROPRIATE TO CONSIDER THE CONDUCT UNDERLYING THE FOREIGN OFFENSE IN ADDITION TO THE ELEMENTS OF THE OFFENSE; 30 POINT ASSESSMENT BASED ON THE NEW JERSEY CONVICTION WAS CORRECT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over a concurrence and a two-judge dissent, determined defendant was properly assessed 30 points based upon his prior New Jersey conviction for lewdness. The New Jersey offense, based upon defendant's repeatedly exposing himself to the 12-year-old victim, was deemed the equivalent of New York's endangering the welfare of a child:

At the SORA court hearing, defendant challenged the assessment of 30 points under risk factor 9, asserting that his New Jersey lewdness conviction was neither a registrable offense in New Jersey nor did the comparable offense under New York

law—public lewdness (a misdemeanor)—subject defendant to SORA registration in New York … . * * *

At the outset, we must resolve whether reliance on the underlying conduct of a prior foreign conviction is appropriate as a matter of law for purposes of assessing points under risk factor 9 when conducting a SORA risk-level determination. Under these circumstances, we hold that it is. * * *

Our analysis of the New Jersey conviction starts with North v Board of Examiners of Sex Offenders of State of New York, wherein we considered whether the defendant was required to register as a sex offender as a result of his federal conviction for possession of child pornography (8 NY3d 745 [2007]). That question turned on the "essential elements" provision in SORA, which defines "sex offense," in relevant part, as "a conviction of an offense in any other jurisdiction which includes all of the essential elements of any [registrable sex offense in New York listed in section 168-a (2) of the Correction Law]" … . We concluded that, with respect to registrable offenses, the "essential elements" provision "requires registration whenever an individual is convicted of criminal conduct in a foreign jurisdiction that, if committed in New York, would have amounted to a registrable New York offense" … . …

In the SORA registration context … we [have held] that the strict equivalency standard was "not the optimal vehicle to effectuate SORA's remedial purposes" and it was thus appropriate to utilize a more flexible approach that allowed consideration of the underlying conduct of a foreign conviction in addition to comparing the essential elements of the foreign and New York offense … . People v Perez, 2020 NY Slip Op 02096, CtApp 3-26-20

CRIMINAL LAW.

PETITIONER WAS INITIALLY APPROVED FOR PAROLE, BUT AFTER THE VICTIM IMPACT HEARING A RESCISSION HEARING WAS HELD AND PAROLE WAS RESCINDED; THE RESCISSION WAS PROPERLY BASED UPON VICTIM IMPACT STATEMENTS SUPPLYING INFORMATION WHICH WAS NOT "NEW" BUT WHICH WAS NOT PREVIOUSLY KNOWN TO THE PAROLE BOARD (CT APP).

The Court of appeals affirmed the Third Department's decision upholding the rescission of petitioner's parole:

Judicial intervention in Parole Board determinations is warranted "only when there is a showing of irrationality bordering on impropriety" … . Petitioner failed to make such a showing here with regard to the Parole Board's determination to rescind his parole release. Matter of Benson v New York State Bd. of Parole, 2020 NY Slip Op 03207, CtApp 6-9-20

SUMMARY OF THE OCTOBER 31, 2019, DECISION AFFIRMED BY THE COURT OF APPEALS ON JUNE 9, 2020

The Third Department, over a two-justice dissent, determined petitioner's parole was properly rescinded after a rescission hearing was triggered by a victim impact hearing:

In August 2016, letters were sent from the Department of Corrections and Community Supervision to the Albany County District Attorney's office and the judge who imposed the sentence informing them that petitioner was scheduled to appear before respondent.Petitioner appeared before respondent in December 2017, after which he was granted parole with an open release date in February 2018. Thereafter, in January 2018, a victim impact hearing was held at which the victim's mother and two brothers gave victim impact statements. After this hearing, petitioner was served with a notice of rescission hearing, which was subsequently held in February 2018. Following the rescission hearing, petitioner's open release date was rescinded and a hold period of nine months was imposed. This determination was upheld on administrative appeal. Petitioner thereafter commenced this CPLR article 78 proceeding.

Petitioner argues that the victim impact statements and letters from the District Attorney's office and sentencing judge disclosed no new facts about petitioner's crime. … . … Although we agree that the letters should not have been considered as they did not reveal any information not previously known by respondent, this argument must fail with respect to the victim impact statements because neither the relevant regulation, nor the existing case law, requires that "new" information must be disclosed for parole to be rescinded (see 9 NYCRR 8002.5) … Simply stated, although the regulation provides that such information must be "significant" and "not known" by respondent at the time of the original hearing, the origin of this information need not be "new" … .

Here, respondent was presented with previously unknown information from the mother, including that she was so traumatized by her son's death that she did everything she could to avoid thinking about it, including never visiting his grave. The mother explained that, in the 25 years since the victim's death, she has not celebrated Christmas, Thanksgiving or her other sons' birthdays. She described how she thought that, once petitioner went to prison, it was done, and that she was safe, but she no longer felt safe. Matter of Benson v New York State Bd. of Parole, 2019 NY Slip Op 07829, Third Dept 10-31-19

CRIMINAL LAW.

THE INFORMATION SUFFICIENTLY ALLEGED THE ELEMENTS OF OFFICIAL MISCONDUCT; THE 'OBTAIN A BENEFIT' ELEMENT OF THE OFFENSE CAN BE INFERRED FROM THE OTHER ALLEGATIONS (CT APP).

The Court of Appeals determined the information charging defendant with official misconduct in violation of Penal Law section 195 was not jurisdictionally defective because the "obtain a benefit" element of the offense could be inferred from the allegations. The defendant, an alcohol and substance abuse treatment program aide at a prison, was charged with the unauthorized provision of prison documents concerning an incident at the prison to an inmate. The allegations were sufficient to infer that the defendant intended that providing the documents benefited the inmates involved:

With respect to the third element—that defendant must act with the intent to obtain a benefit or deprive another of a benefit—defendant's intent may be reasonably inferred from her conduct and the surrounding circumstances … . …[T]he information, with defendant's statement attached as a supporting deposition, sufficiently alleged that defendant disclosed information to an inmate that the inmate was not authorized to have, and that defendant knew that this disclosure was unauthorized. From those allegations, coupled with defendant's admissions in her statement regarding inappropriate contact with and favors conducted for inmates involved in the unusual incident and the disclosure, one can reasonably infer that defendant committed the unauthorized disclosure with the intent to benefit herself or the inmates involved. Notably."benefit" is defined as "any gain or advantage to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary" (Penal Law § 10.00 [17]). In this case, the People were not required to specify in the information whether defendant intended to benefit herself or the inmates, because either or both would satisfy this element of the statute and both theories are supported by defendant's statement to police … . People v Middleton, 2020 NY Slip Op 02530, CtApp 4-30-20

CRIMINAL LAW.

THE OMISSION OF NON-ELEMENTAL FACTUAL INFORMATION, HERE THE TIME OF THE INCIDENT, FROM THE WAIVER OF INDICTMENT FORM WAS A DEFECT WAIVED BY THE GUILTY PLEA (CT APP).

The Court of Appeals, reversing the Appellate Division, determined the omission of the time of the incident from the waiver of indictment form was a defect waived by the guilty plea:

Shortly after the Appellate Division rendered its decision, we held in People v Lang (34 NY3d 545, 567 [2019]) that any "omission from the indictment waiver form of non-elemental factual information that is not necessary for a jurisdictionally-sound indictment is [] forfeited by a guilty plea" and "must be raised in the trial court" … . The time of incident is not an element of second-degree criminal possession of a weapon (Penal Law § 265.03 [2]), and defendant was on notice of

the crime charged. Therefore, Lang controls. People v Zaquan Walley, 2020 NY Slip Op 07691, CtApp 12-22-20

CRIMINAL LAW.

THE TRAFFIC STOP WAS BASED ON A COMPUTER-GENERATED "SIMILARITY HIT;" AT THE SUPPRESSION HEARING THE PEOPLE DID NOT MEET THEIR BURDEN OF GOING FORWARD BECAUSE THE BASIS OF THE "SIMILARITY HIT" WAS NOT DEMONSTRATED; THIS PRESENTED A QUESTION OF LAW REVIEWABLE BY THE COURT OF APPEALS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, reversing the Appellate Division, determined the People did not meet their burden of going forward at the suppression hearing because they did not make a minimum showing of reasonable suspicion for the traffic stop. Whether the People meet that burden has been deemed a question of law which the Court of Appeals can address. Whether a stop was justified by reasonable suspicion is usually a mixed law and fact question which the Court of Appeals can not review. Here the traffic stop was based on a so-called "similarity hit" generated by the Department of Motor Vehicles database. A "similarity hit" apparently indicates some possible connection between the registered owner of a vehicle and an outstanding warrant. But, at the suppression hearing, the People did not present any evidence of the basis for the "similarity hit;"

According to the officer, a "similarity hit" is generated "based on the name of the registered owner, the date of birth[,] and other aliases." He testified that the system considers "certain parameters" when identifying "similarity hits," but he did not know how the Department of Motor Vehicles set those parameters. Nor did he testify as to any specifics of this match.

… [T]he officer did not think that the driver was the subject of the "similarity hit" because the driver was female and the registered owner was male. As the officer stepped around the vehicle to look at the registration and inspection stickers, he spotted a handgun on the floor under the front passenger seat, in which defendant was sitting. After defendant was arrested, the officer checked the MDT [mobile data

terminal] information and discovered that the person with the warrant did not, in fact, match the vehicle's registered owner or anyone else in the vehicle. The officer did not testify as to the name, date of birth, or address of the registered owner, or provide the specific identifying facts of the person set forth in the arrest warrant. …

While information generated by running a license-plate number through a government database may provide police with reasonable suspicion to stop a vehicle …, the information's sufficiency to establish reasonable suspicion is not presumed … . Thus, when police stop a vehicle based solely on such information, and the defendant, as here, challenges its sufficiency, the People must present evidence of the content of the information … . People v Balkman, 2020 NY Slip Op 06838, CtApp 11-19-20

CRIMINAL LAW.

THE TRIAL JUDGE DID NOT MAKE AN ADEQUATE INQUIRY ABOUT THE REASONS FOR A SITTING JUROR'S ABSENCE BEFORE SUBSTITUTING AN ALTERNATE JUROR; NEW TRIAL ORDERED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, reversing the Appellate Division, determined the trial judge did not make an adequate inquiry about a sitting juror's absence before substituting an alternate juror for the sitting juror (Juror Number 9). The defendant had moved for a mistrial on that ground:

… [T]he trial court failed to conduct the requisite "reasonably thorough inquiry" before substituting Alternate Number 1 for Juror Number 9 (see CPL 270.35 [2] [a]). When it ordered the substitution, the court had merely stated its "belie[f]" that Juror Number 9 had an "appointment for a family member," and incorrectly claimed that Juror Number 9 had stated during voir dire that she had a medical appointment for her son in Rochester. Not only did the court provide only limited — and inaccurate — reasons to support a finding of unavailability, there is nothing on the record reflecting that it made any inquiry into Juror Number 9's whereabouts or likelihood of appearing prior to ordering the substitution of Juror Number 9 with Alternate Number 1. On this record, the court failed to satisfy the requirement that a trial court

conduct a “reasonably thorough inquiry” to ensure that its substitution determination is adequately informed … . People v Lang, 2020 NY Slip Op 03487, CtApp 6-23-20

CRIMINAL LAW.

BECAUSE THE DEFENDANT WAS MADE AWARE OF THE POSSIBILITY OF DEPORTATION MONTHS BEFORE HE PLED GUILTY, HIS ARGUMENT THAT THE TRIAL JUDGE DID NOT INFORM HIM OF THE IMMIGRATION CONSEQUENCES OF HIS PLEA WAS SUBJECT TO THE PRESERVATION REQUIREMENT; THE FAILURE TO PRESERVE THE ERROR PRECLUDED APPEAL (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a three-judge concurrence, determined defendant’s argument that the trial judge failed to inform him of the deportation consequences of his plea to a felony was subject to the preservation requirement. The defendant’s failure to preserve the error precluded appeal:

“[D]ue process compels a trial court to apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to a felony” … . However, before we may consider whether a trial court fulfilled that obligation, we must determine whether a defendant preserved the claim as a matter of law for our review or whether an exception to the preservation doctrine applies … . Here, service on defendant, in open court and months before the plea proceedings, of a “Notice of Immigration Consequences” form provided him with a reasonable opportunity to object to the plea court’s failure to advise him of the potential deportation consequences of his plea, making the narrow exception to the preservation doctrine unavailable to him … . * * *

“Generally, in order to preserve a claim that a guilty plea is invalid, a defendant must move to withdraw the plea on the same grounds subsequently alleged on appeal or else file a motion to vacate the judgment of conviction pursuant to CPL 440.10” (Peque, 22 NY3d at 182). While reiterating this rule in Peque, we also acknowledged that “where a defendant has no practical ability to object to an error in a plea

allocution which is clear from the face of the record, preservation is not required" (id.). This exception to the preservation requirement, however, remains narrow … .
* * *

The very first sentence of the Notice explicitly told defendant that "a plea of guilty to any offense" could "subject[] [him] to a risk that adverse consequences w[ould] be imposed on [him] by the United States immigration authorities, including, but not limited to, removal from the United States . . . ." It further noted that, among other things, a conviction for "burglary . . . or any other theft-related offense . . . for which a sentence of one year or more is imposed" would be deportable.

Those unambiguous statements provided defendant with sufficient notice of possible immigration consequences, including deportation, of his conviction, giving him "a reasonable opportunity" to express concerns to the court — during either his plea or at sentencing — regarding those consequences … . People v Delorbe, 2020 NY Slip Op 02126, CtApp 3-31-20

CRIMINAL LAW.

TESTIMONY SUPPORTING THE ADMISSION OF DNA PROFILES WAS HEARSAY WHICH VIOLATED THE CONFRONTATION CLAUSE (CT APP).

The Court of Appeals, reversing defendant's conviction, over a concurrence, determined the testimony which formed the basis for the admission in evidence of DNA profiles was hearsay which violated the Confrontation Clause:

In People v John, we held that, when confronted with testimonial DNA evidence at trial, a defendant is entitled to cross-examine "an analyst who witnessed, performed or supervised the generation of defendant's DNA profile, or who used his or her independent analysis on the raw data" (27 NY3d 294, 315 [2016]). In People v Austin, we reiterated that a testifying analyst who did not participate in the generation of a testimonial DNA profile satisfies the Confrontation Clause's requirements only if the analyst "used his or her independent analysis on the raw data to arrive at his or her own conclusions" (30 NY3d 98, 105 [2017] …). The

records before us do not establish that the testifying analyst had such a role in either case. Accordingly, because the analyst's hearsay testimony as to the DNA profiles developed from the post-arrest buccal swabs "easily satisfies the primary purpose test" for determining whether evidence is testimonial … , we conclude that her testimony and the admission of those DNA profiles into evidence, over defendants' objections, violated defendants' confrontation rights. People v Tsintzelis, 2020 NY Slip Op 02026, CtApp 3-24-20

CRIMINAL LAW.

THE ERRONEOUSLY UNSEALED RECORD OF A CRIMINAL PROCEEDING TERMINATED IN FAVOR OF THE DEFENDANT SHOULD NOT HAVE BEEN CONSIDERED BY THE SENTENCING COURT, MATTER REMITTED FOR RESENTENCING (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, reversing the Appellate Division, over a three-judge dissenting opinion, determined the sentencing court should not have considered the erroneously unsealed records of a prior criminal action which was terminated in favor of the defendant. The matter was sent back for resentencing. "A court is without authority to consider for sentencing purposes erroneously unsealed official records of a prior criminal action or proceeding terminated in favor of the defendant. Where violation of the sealing mandate of CPL 160.50 impacts the ultimate sentence, the error warrants appropriate correction. Such is the case here, where the court imposed on defendant a higher sentence than promised at his plea, based on its finding that the unsealed trial record—which the court mistakenly believed it could consider—established defendant's violation of a pre-sentence condition of his plea:"

Before sentencing, defendant was arrested and prosecuted for a crime allegedly committed after entering his plea. At defendant's request, the sentencing court agreed to adjourn defendant's sentencing pending resolution of the matter. The jury acquitted defendant of the new charge and the official record, including the trial transcript, was sealed in accordance with CPL 160.50.

The day following that acquittal, the prosecutor informed the court which had accepted defendant's criminal possession plea that the People would be requesting an enhanced sentence on the criminal possession conviction because defendant violated a pre-sentence condition of the plea by engaging in criminal conduct during the sentencing adjournment, as made clear by defendant's trial testimony in the other case. The prosecutor then moved to unseal the records in the prior criminal action terminated by acquittal, arguing "justice requires" unsealing because the trial testimony was relevant to defendant's request to be sentenced under the terms of his plea. The court granted the motion. People v Anonymous, 2020 NY Slip Op 01113, CtApp 2-18-20

DEBTOR-CREDITOR.

STRICT FORECLOSURE AT THE DIRECTION OF THE MAJORITY BONDHOLDERS WHICH CANCELLED THE NOTES PRECLUDED RECOVERY BY THE PLAINTIFFS WHO PURCHASED SOME OF THE NOTES IN THE SECONDARY MARKET (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, reversing the Appellate Division, over a three-judge dissent, determined the strict foreclosure at the direction of the majority bondholders which cancelled the notes precluded plaintiffs from recovering on notes purchased in the secondary market. The decision is fact-specific, dependent on the wording of documents, and cannot be fairly summarized here:

After the issuer defaulted, plaintiffs, the holders of a minority in principal amount of senior secured debt, brought this lawsuit against the debtor and its guarantors to recover payment of principal and interest. We are called upon to determine whether plaintiffs' right to sue for payment on the notes survived a strict foreclosure, undertaken by the trustee at the direction of a group of majority bondholders over plaintiffs' objection, that purported to cancel the notes. We hold that it did … . …

In December 2005, defendant Cleveland Unlimited, Inc. (Cleveland Unlimited), a telecommunications company, issued $150 million of "senior secured" debt in the form of "Notes" pursuant to an indenture agreement (the Indenture). The Notes had

a five-year term and required Cleveland Unlimited to pay interest to holders of the Notes (Noteholders or Holders) on a quarterly basis up to and including the maturity date, at which point the principal also became due. The Indenture named Cleveland Unlimited as the "Issuer" of the Notes, eighteen of Cleveland Unlimited's subsidiaries and affiliates as the "Guarantors," and U.S. Bank National Association (U.S. Bank) as the Indenture "Trustee." At the same time the Indenture was executed, the Issuer, the Guarantors, and the Trustee executed a Collateral Trust Agreement and a Security Agreement (collectively, Indenture Documents) … . In April 2010, plaintiffs purchased approximately $5 million of the Notes in the secondary market, amounting to 3.33% of the outstanding principal value.

At issue in this case are certain provisions in the Indenture Documents governing the rights of the Noteholders to receive payment, the remedies available in the event of default, and the power of a majority of Noteholders to direct the Trustee's choice of remedy. CNH Diversified Opportunities Master Account, L.P. v Cleveland Unlimited, Inc., 2020 NY Slip Op 05976, Ct App 10-20-20

DISCIPLINARY HEARINGS (INMATES).

SUBSTANTIAL EVIDENCE SUPPORTED THE MISBEHAVIOR REPORT ALLEGING THE INMATE WAS ISSUED A RAZOR FOR SHAVING BUT THE ROUTINE "RAZOR CHECK" INDICATED THE RAZOR WAS MISSING; THE INMATE CLAIMED HE WAS NEVER ISSUED A REPLACEMENT AND UNSUCCESSFULLY SOUGHT TO PRESENT WITNESSES TO DEMONSTRATE THE RAZOR CHECK SYSTEM IS NOT RELIABLE; THERE WAS AN EXTENSIVE DISSENT (CT APP).

The Court of Appeals, over an extensive dissent, determined the hearing officer's finding the inmate was guilty of the infraction charged in the misbehavior report was supported by substantial evidence. The dissent fleshes out the facts. The misbehavior report alleged the inmate had been issued a razor (for shaving) but no razor was found in a routine "razor check"–raising the possibility that the missing razor could be used to make a weapon. The inmate claimed he had not been issued a replacement razor and sought to present witnesses to demonstrate the razor security system was unreliable (the witness-request was denied):

Substantial evidence supported the administrative determination because there was “a rational basis for the conclusion adopted by the agency” … . The record proof, including the inmate misbehavior report, “razor check records,”… and contraband receipt, was adequate to permit a reasonable person to conclude that petitioner was guilty of the charged infraction. In reaching the opposite conclusion, the dissent exceeds the judicial function by impermissibly crediting testimony rejected by the agency and re-weighing the record evidence in petitioner’s favor.

The hearing officer did not violate petitioner’s constitutional right to call witnesses, as “implemented by the prison regulations in this State” … . The hearing officer explained that the requested witnesses’ testimony was not material and, in the circumstances presented, that conclusion was justified. Petitioner’s other arguments are unpersuasive … . Matter of Zielinski v Venettozzi, 2020 NY Slip Op 04905, CtApp 9-15-20

ELECTION LAW.

DESIGNATING PETITION PERMEATED BY FRAUD INVALIDATED; THREE JUDGE DISSENT (CT APP).

The Court of Appeals, in an opinion per curiam, reversing the Appellate Division, over a three-judge dissent, determined the designating petition was permeated by fraud and must be invalidated:

… [W]here appropriate, a court may … conclude that, “because of its magnitude[,]” fraud and irregularity established by clear and convincing evidence “so permeated’ the [designating] petition as a whole to call for its invalidation” … .

Based on the undisputed facts of this matter, which establish, among other things, “that 512 out of 944 signatures submitted in the [designating] petition are backdated to dates preceding the candidate’s receipt of the blank petition pages,” and that “14 of the 28 subscribing witnesses” swore that those signatures were placed on the designating petition before the blank petition pages were obtained from the printer (… cf. Election Law § 6-134 [3]), the lower courts should have concluded that this is one of those rare instances in which the designating petition is so “permeated” by

fraud "as a whole as to call for its invalidation" … . Matter of Ferreyra v Arroyo, 2020 NY Slip Op 02994, CtApp 5-21-20

ELECTION LAW.

DESPITE THE HARDSHIP IMPOSED BY THE COVID-19 PANDEMIC, THE FAILURE TO TIMELY FILE A COVER SHEET ACCOMPANYING A DESIGNATING PETITION IS A FATAL DEFECT (CT APP).

The Court of Appeals, in an opinion per curiam, reversing the First Department and affirmed the Third Department, over two comprehensive dissenting opinions, determined that, despite the hardship imposed by Covid-19, the failure to timely file a cover sheet accompanying a designating petition is a fatal defect:

In Matter of Seawright v Board of Elections in the City of New York, the Appellate Division, First Department, held that — in light of the "unique circumstances" created by the COVID-19 pandemic — the candidate's belated filing of a cover sheet and certificate of acceptance did not constitute a fatal defect (2020 NY Slip Op 02900, *1 [1st Dept May 14, 2020]). In Matter of Hawatmeh v New York State Board of Elections, the Appellate Division, Third Department, rejected the First Department's approach and reached the opposite conclusion, holding that — notwithstanding the "unprecedented circumstances created by the COVID-19 pandemic" — the candidate's belated filing of a certificate of acceptance was a fatal defect (2020 NY Slip Op 02907, *1-2 [3d Dept May 15, 2020]). …

We granted leave to resolve this departmental split. We now reverse in Seawright and affirm in Hawatmeh. * * *

The COVID-19 pandemic has undoubtedly presented uniquely challenging circumstances for Seawright and Hawatmeh — among countless other candidates for public office. Nonetheless, as in our prior cases, we remain constrained by the express directive of the Election Law: the complete failure to file, by the applicable deadline, either a cover sheet with a designating petition or a certificate of acceptance constitutes a "fatal defect" (Election Law § 1-106 [2]). The First Department's analysis, employed in Seawright, Mejia (___ NY3d ___ [decided

herewith]), and Mujumder (___ NY3d ___ [decided herewith]), directly conflicts with that well-established statutory mandate … . Matter of Seawright v Board of Elections in the City of New York, 2020 NY Slip Op 02993, CtApp 5-21-20

ELECTION LAW.

FAILURE TO FILE A COVER SHEET ACCOMPANYING A DESIGNATING PETITION IS A FATAL DEFECT (CT APP).

The Court of Appeals reversing these two election matters, determined the failure to timely file a cover sheet accompanying a designating petition is a fatal defect:

For the reasons stated in Matter of Seawright v Board of Elections in the City of New York (____ NY3d ____ [decided herewith]), the failure to timely file a cover sheet accompanying a designating petition constitutes a fatal defect.

For each case: Order reversed, without costs, and petition to validate the designating petitions denied, in a memorandum. Chief Judge DiFiore and Judges Stein, Fahey, Garcia and Feinman concur. Judge Wilson dissents for reasons stated in his dissenting opinion in Matter of Seawright v Board of Elections in the City of New York and Matter of Hawatmeh v New York State Board of Elections (decided today). Matter of Mejia v Board of Elections in the City of New York, 2020 NY Slip Op 02995, CtApp 5-21-20

ENVIRONMENTAL LAW, EMINENT DOMAIN, UTILITIES.

THE CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY ISSUED BY THE FEDERAL ENERGY REGULATORY COMMISSION (FERC) EXEMPTED THE GAS PIPELINE COMPANY FROM ANY REVIEW REQUIREMENTS OF THE EMINENT DOMAIN PROCEDURE LAW (EDPL); THE COMPANY WAS FREE TO EXERCISE EMINENT DOMAIN OF THE LAND IN DISPUTE (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Stein, over a two-judge dissent, determined that the certificate of public convenience and necessity issued to petitioner, National Fuel Gas Supply, for construction of a gas pipeline, exempted National Fuel from any requirements of the Eminent Domain Procedure Law (EDPL). Therefore National Fuel did not need to comply with the notice and hearing requirements of the EDPL before exercising eminent domain of the land in dispute:

In 2017, the Federal Energy Regulatory Commission issued a certificate of public convenience and necessity to petitioner National Fuel Gas Supply for its proposed construction of a 99-mile natural gas pipeline spanning from Pennsylvania to Western New York. … [t]his certificate …—which did not condition National Fuel's eminent domain power on receipt of a water quality certification and which remained valid and operative at all relevant times despite the New York State Department of Environmental Conservation's intervening denial of National Fuel's application for such a certification—exempted National Fuel from the public notice and hearing provisions of article 2 of the Eminent Domain Procedure Law (EDPL) in accordance with EDPL 206 (A). …

The question before us distills to whether the certificate of public convenience and necessity issued by the Federal Energy Regulatory Commission (FERC) to National Fuel satisfies EDPL 206 (A) so as to entitle National Fuel to exercise eminent domain over the land in dispute without undertaking additional review of the pipeline's public benefit. If satisfied, EDPL 206 (A) excuses compliance with various provisions of EDPL article 2 where a proposed condemnor has successfully completed a review of the project's public benefit and use before a state, federal, or local agency. * * *

… [W]here, as here, a gas company holds a valid certificate of public convenience or necessity from FERC for the proposed construction of a pipeline and that certificate places no relevant conditions on the eminent domain power and has not been stayed or revoked by FERC or a federal court properly reviewing its issuance, compliance with article 2 is excused under EDPL 206 (A). Matter of National Fuel Gas Supply Corp. v Schueckler, 2020 NY Slip Op 03563, CtApp 6-25-20

SUMMARY OF THE FOURTH DEPARTMENT DECISION REVERSED BY THE COURT OF APPEALS ON JUNE 25, 2020

ALTHOUGH THE FEDERAL ENERGY REGULATORY COMMISSION (FERC) APPROVED THE GAS PIPELINE, THE STATE DID NOT ISSUE A WATER QUALITY CERTIFICATION (WQC) FOR THE PROJECT, THEREFORE THE PIPELINE COMPANY CAN NOT SEEK EASEMENTS OVER PRIVATE LAND PURSUANT TO THE EMINENT DOMAIN PROCEDURE LAW (EDPL) TO INSTALL THE PIPELINE (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice NeMoyer, over a two-justice dissent, considering a matter of first impression, reversing Supreme Court, determined that a gas supply company could not acquire easements over private property by eminent domain for the installation of a pipeline for which the state denied a permit:

In February 2017, the FERC [Federal Energy Regulatory Commission] granted petitioner's application for a certificate of public convenience and necessity to construct and operate a 97-mile natural gas pipeline from Pennsylvania into western New York. The pipeline's proposed route travels directly across respondents' land … . Within the voluminous certificate, the FERC found that petitioner's "proposed [pipeline] project is consistent with the Certificate Policy Statement," i.e., the public interest. "Based on this finding and the environmental review for the proposed project," the FERC further found "that the public convenience and necessity require approval and certification of the project." …

… [T]he New York State Department of Environmental Conservation (DEC) denied petitioner's application for a WQC [water quality certification]. The WQC application, held the DEC, "fails to demonstrate compliance with New York State water quality standards." Petitioner has taken various steps to challenge the WQC

denial, including the filing of a petition for judicial review in the Second Circuit pursuant to 15 USC § 717r (d). It appears that those challenges have not yet been finally resolved. It is undisputed, however, that if the WQC denial is ultimately upheld, the pipeline cannot be built … . * * *

… [P]etitioner is trying to expropriate respondents' land in furtherance of a pipeline project that, as things currently stand, cannot legally be built. Such an effort turns the entire concept of eminent domain on its head. If the State's WQC denial is finally annulled or withdrawn, then petitioner can file a new vesting petition. But until that time, petitioner cannot commence a vesting proceeding to force a sale without going through the entire EDPL [Eminent Domain Procedure Law] article 2 process. Matter of National Fuel Gas Supply Corp. v Schueckler, 2018 NY Slip Op 07550, Fourth Dept 11-9-18

FAMILY LAW, APPEALS.

THE MAJORITY HELD THE ISSUES WHETHER MOTHER HAD MADE ALLEGATIONS OF DOMESTIC ABUSE IN A SWORN PLEADING OR WHETHER MOTHER HAD PROVEN DOMESTIC ABUSE ALLEGATIONS AGAINST FATHER WERE NOT PRESERVED FOR APPEAL; THE DISSENT ARGUED THE ISSUES WERE PRESERVED AND WOULD REMIT FOR A BEST INTERESTS OF THE CHILD ANALYSIS (CT APP).

The Court of Appeals, over a detailed and comprehensive dissent, affirmed the award of custody to father, finding that the issues raised on appeal by mother were not preserved. Defendant mother argued she had made allegations of domestic abuse in a sworn pleading (petition) and, therefore, pursuant to Domestic Relations Law 240(1)(a), the court was required to consider the effect of the domestic violence on the best interests of the child:

Defendant failed to preserve her arguments regarding Domestic Relations Law § 240 (1) (a). As a result, the parties never litigated, and Supreme Court did not pass upon, or make any findings with respect to, whether a withdrawn family offense petition constitutes "a sworn petition" for purposes of this statute or whether defendant

proved allegations of domestic violence "by a preponderance of the evidence" (Domestic Relations Law § 240 [1] [a]) — issues that are essential to the arguments defendant now raises. Record evidence supports the affirmed custody award. * * *

From the dissent:

Because the issue is preserved, I would reverse and remit to Supreme Court for a new best interest of the child analysis consistent with the framework of Domestic Relations Law § 240 (1) (a), and any development of the record as needed. Cole v Cole, 2020 NY Slip Op 03489, CtApp 6-23-20

FAMILY LAW.

DOMESTIC RELATIONS LAW 111 GIVES A COURT THE DISCRETION TO DISPENSE WITH AN ADULT ADOPTEE'S CONSENT TO ADOPTION; HERE PETITIONERS WERE PROPERLY ALLOWED TO ADOPT MARION T., A 66-YEAR-OLD NON-VERBAL WOMAN WITH A SIGNIFICANT DEVELOPMENTAL DISABILITY (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a concurrence and an extensive dissent, determined that the lower court rulings that Domestic Relations Law 111 (1)(a) gives a court the discretion to dispense with the adoptee's consent to an adoption. Here the petitioners sought to adopt Marion T, a non-verbal 66-year-old women with a significant developmental disability.

[The} issue turns on the proper interpretation of Domestic Relations Law (DRL) § 111(1)(a), which generally requires the consent of an "adoptive child" who is over 14 years old but gives the court discretion to dispense with that consent. We agree with the Appellate Division that, in appropriate circumstances, the statute permits a court to approve an adoption even absent the consent of an adult adoptee. Because that discretion was not abused here and there is record support for the affirmed best interests finding, we affirm. Matter of Marian T. (Lauren R.), 2020 NY Slip Op 06932, CtApp 11-23-20

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW.

ALTHOUGH RPAPL 1320-a, ENACTED WHILE THIS APPEAL WAS PENDING, HAS CHANGED THINGS, THE DEFENDANTS' LACK-OF-STANDING DEFENSE WAS WAIVED BECAUSE IT WAS NOT RAISED IN THEIR ANSWERS OR PRE-ANSWER MOTIONS; THE BANK'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED (CT APP).

The Court of Appeals, in a brief memorandum with an extensive concurring opinion, determined the defendants in the foreclosure action had waived the lack-of-standing defense by not raising it in their answers or pre-answer motions. The court noted that Real Property Actions and Proceedings Law (RPAPL) 1320-a, which was enacted when this appeal was pending, may allow standing to be raised "at this stage of the litigation:"

… Supreme Court did not err in granting plaintiff's motions for summary judgment and for a judgment of foreclosure and sale. Defendants failed to raise standing in their answers or in pre-answer motions as required by CPLR 3211 (e) and accordingly, under the law in effect at the time of the orders appealed from, the defense was waived … . Defendants' argument that ownership is an essential element of a foreclosure action, raised for the first time in support of their motion for reargument at the Appellate Division, is unpreserved for our review. We do not reach the issue of whether RPAPL 1302-a, enacted while this appeal was pending, affords defendants an opportunity to raise standing at this stage of the litigation. Defendants are free to apply to the trial court for any relief that may be available to them under that statute. JPMorgan Chase Bank, N.A. v Caliguri, 2020 NY Slip Op 07660, CtApp 12-17-20

INSURANCE LAW, CONTRACT LAW.

BASED UPON THE LANGUAGE OF THE INSURANCE POLICIES AT ISSUE, THE EXCESS INSURER WAS NOT LIABLE FOR THE PREJUDGMENT INTEREST ON THE PERSONAL INJURY JUDGMENT AFTER THE PRIMARY POLICY WAS VOIDED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over two dissenting opinions, interpreted the insurance policies at issue such that the excess insurer was not obligated to pay interest on the underlying personal injury judgment after the primary policy was voided:

This appeal involves a dispute concerning an excess insurer's obligation to pay interest on an underlying personal injury judgment after the primary policy was voided. Like the courts below, we are unpersuaded by the injured plaintiff's argument that the excess policy provided overlapping coverage for certain interest payments covered in the primary policy … .

Plaintiff Jin Ming Chen was injured at a construction site and sued the general contractor Kam Cheung Construction, Inc. (Kam Cheung). At the time, Kam Cheung maintained both primary and excess liability insurance policies: a primary policy with a liability limit of $1 million per occurrence from Arch Specialty Insurance Company (Arch) and an excess policy with $4 million per occurrence in coverage from defendant Insurance Company of the State of Pennsylvania (ICSOP). In December 2011, Supreme Court granted partial summary judgment to plaintiff in that action, and, in October 2013, the court entered a personal injury judgment awarding plaintiff $2,330,000 plus $396,933.70 in prejudgment interest. During that time, Arch commenced a declaratory judgment action seeking rescission of the primary policy due to material misrepresentations made by Kam Cheung in its application, securing a judgment declaring that the Arch Policy was void ab initio. Thus, Arch provided no coverage relating to the personal injury judgment. * * *

Plaintiff effectively asks us to treat interest payments on the underlying award as falling within or reducing the Arch Policy's $1 million liability limit, which is contrary to the plain language of the Arch Supplementary Payments provision and the ICSOP Policy's Coverage, Ultimate Net Loss, and Maintenance of Underlying Insurance provisions. To do so would be inconsistent with the language chosen by

the parties to the insurance contracts, rendering several clauses forceless—a result that should be avoided …. Arch agreed to expand its coverage of pre- and post-judgment interest beyond its liability limits, and ICSOP agreed to provide coverage only for losses in excess of Arch's coverage—including both the $1 million Arch policy limit and its Supplementary Payments. Jin Ming Chen v Insurance Co. of the State of Pa., 2020 NY Slip Op 06938, Ct App 11-24-20

LABOR LAW-CONSTRUCTION LAW.

DECEDENT'S WORK AS A WELDER NOT A COVERED ACTIVITY UNDER LABOR LAW 240 (1) (CT APP).

The Court of Appeals, in a one-sentence memorandum, determined the plaintiff was not engaged in an activity covered by Labor Law 240 (1) when he was injured:

Decedent's work as a welder during the "normal manufacturing process" of fabricating rotor components for air preheaters did not involve "erection, demolition, repairing, altering, painting, cleaning or pointing" of a building or structure (Jock v Fien , 80 NY2d 965, 968 [1992]; Labor Law § 240 [1]). Preston v APCH, Inc., 2020 NY Slip Op 01000, Ct App 2-13-20

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF WAS INJURED ATTEMPTING TO ENTER A BUILDING FROM A SCAFFOLD THROUGH A WINDOW CUT-OUT; THERE WAS A QUESTION OF FACT WHETHER PLAINTIFF WAS AWARE THAT METHOD OF ENTERING THE BUILDING WAS PROHIBITED BY DEFENDANTS; THE LABOR LAW 240(1) CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (CT APP).

The Court of Appeals, reversing (modifying) the Appellate Division, over a three-judge dissent, determined defendants' motion for summary judgment should not have been granted in this Labor Law 240(1) action. Plaintiff was injured when he

fell attempting to enter a building from a scaffold through a window cut-out. Although there was evidence of a standing order prohibiting use of that method for entering the building, other workers used that method:

A defendant has no liability under Labor Law § 240 (1) when plaintiffs: (1) “had adequate safety devices available,” (2) “knew both that” the safety devices “were available and that [they were] expected to use them,” (3) “chose for no good reason not to do so,” and (4) would not have been injured had they “not made that choice” … . Here, a triable issue of fact exists as to whether plaintiff knew he was expected to use the safety devices provided to him, despite the apparent accepted practice of entering the building through the window cut-outs from the scaffolding. Indeed, as the Appellate Division dissent concluded, the Appellate Division majority (and the dissent here) “ignore[] the evidence in the record that workers on this job site used the scaffold to go through window cut-outs to enter the interior of the building and that the scaffold was clearly inadequate for that purpose” … .

Given defendants’ purported acquiescence to this alleged practice, the general contractor’s standing order directing workers not to enter the building through the cut-outs is insufficient to entitle defendants to summary judgment … . Further, the accepted practice could have negated the normal and logical inclination to use the scaffold, stairs, or hoist instead of the cut-outs … . Finally, in context and given the other conflicting evidence in the record, a factfinder should determine whether plaintiff’s statement that he “wasn’t supposed to pass through there” unambiguously establishes that he knew he was expected to use the safety devices. Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp., 2020 NY Slip Op 01116, CtApp 2-18-20

LANDLORD-TENANT, CONSUMER LAW.

GENERAL BUSINESS LAW 349 DECEPTIVE BUSINESS PRACTICES CAUSE OF ACTION IN THE CONTEXT OF A RENT STABILIZATION LAW (RSL) RENT-OVERCHARGE SUIT WAS PROPERLY DISMISSED (CT APP).

The Court of Appeals, over a partial dissent, determined the General Business Law 349 cause of action alleging deceptive business practices in the context of the Rent Stabilization Law (RSL) rent-overcharge suit was properly dismissed:

… General Business Law … , section 349 prohibits "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state" … . We have held that this statute "cannot fairly be understood to mean that everyone who acts unlawfully, and does not admit the transgression, is being deceptive'" within the meaning of section 349 … . For purposes of this appeal, we assume without deciding that a claim may lie under General Business Law § 349 based upon a landlord's alleged misrepresentation to the public that an apartment was exempt from rent regulation following deregulation in violation of the Rent Stabilization Law. Here, however, plaintiffs alleged only that defendants failed to admit that they violated the Rent Stabilization Law in deregulating plaintiffs' apartments—three of which were, in fact, never deregulated—rather than any affirmative conduct that would tend to deceive consumers. Inasmuch as plaintiffs failed to allege more than "bare legal conclusions" … regarding the existence of consumer-oriented, deceptive acts … , their General Business Law claim was properly dismissed. Collazo v Netherland Prop. Assets LLC, 2020 NY Slip Op 02128, CtApp 4-2-20

LANDLORD-TENANT.

THE HOUSING STABILITY AND TENANT PROTECTION ACT OF 2019 (HSTPA) DOES NOT APPLY RETROACTIVELY TO RENT OVERCHARGE ACTIONS UNDER THE RENT STABILIZATION LAW (RSL) COMMENCED BEFORE THE COURT OF APPEALS RULING IN ROBERTS (CT APP).

The Court of Appeals, in a per curiam opinion, over a three-judge dissent, determined the Housing Stability and Tenant Protection Act of 2019 (HSTPA) did not apply retroactively to extend the look back period for rent overcharge actions from four to six years, and did not alter the overcharge calculation methodology for pre-Roberts actions. The opinion and the dissent are too comprehensive and detailed to fairly summarize here:

… [T]hese four appeals … present a common issue under the Rent Stabilization Law (RSL): what is the proper method for calculating the recoverable rent overcharge for New York City apartments that were improperly removed from rent stabilization during receipt of J-51 benefits prior to our 2009 decision in Roberts v Tishman Speyer Props., L.P. (13 NY3d 270 [2009]). …

… [T]he HSTPA includes amendments that, among other things, extend the statute of limitations [and] alter the method for determining legal regulated rent for overcharge purposes and substantially expand the nature and scope of owner liability in rent overcharge cases … . The tenants in these cases urge us to apply the new overcharge calculation provisions to these appeals that were pending at the time of the HSTPA's enactment, some of which seek recovery of overcharges incurred more than a decade before the new legislation. * * *

We … decline to create a new exception to the lookback rule and instead clarify that, under pre-HSTPA law, the four-year lookback rule and standard method of calculating legal regulated rent govern in Roberts overcharge cases, absent fraud. * * *

We conclude that the overcharge calculation amendments [enacted by the HSTPA] cannot be applied retroactively to overcharges that occurred prior to their

enactment. Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal, 2020 NY Slip Op 02127, CtApp 4-2-20

MUNICIPAL LAW, EMPLOYMENT LAW.

NYC POLICE OFFICERS IN THE TIER 3 RETIREMENT SYSTEM ARE ENTITLED TO CREDIT FOR PERIODS OF UNPAID CHILDCARE LEAVE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing the Appellate Division, over a two-judge dissent, determined that retiring police officers are entitled to credit for the unpaid leave for child care. The appeal raised a question of statutory interpretation. The Court of Appeals found that the relevant provision of the NYC Administrative Code was not preempted by the Retirement and Social Security Law (RSSL):

The Appellate Division order should be reversed and Supreme Court's judgment declaring that defendants violated the second subdivision (h) of Administrative Code of the City of New York § 13-218 by excluding police officers in tier 3 of the state retirement system from the retirement benefits conferred by that subdivision reinstated. Applying longstanding, basic rules of statutory interpretation, we conclude that the relevant part of Administrative Code § 13-218 renders officers of the New York City Police Department (NYPD) who are members of the tier 3 retirement system eligible for credit for certain periods of unpaid childcare leave, and that the grant of such benefits for those officers is consistent with the Retirement and Social Security Law (RSSL). Lynch v City of New York, 2020 NY Slip Op 05841, Ct App 10-20-20

MUNICIPAL LAW, REAL PROPERTY TAX LAW (RPTL).

THE COUNTY MUST REIMBURSE THE TOWNS FOR UNPAID PROPERTY MAINTENANCE AND DEMOLITION CHARGES (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, reversing the Appellate Division, determined Monroe County was required to credit unpaid property maintenance and demolition charges assessed by the Town of Irondequoit and the Town of Brighton. The county is required to deduct the unpaid town charges from the sales tax owed by the towns to the county:

Requiring that these charges be credited pursuant to section [RPTL] 936 accords with the overall structure for the enforcement of property tax liens, including the legislative grant of exclusive authority to counties in RPTL 1123 to commence in rem proceedings to foreclose on real property to “enforce the payment of delinquent taxes or other lawful charges which have accumulated and become liens against certain property” … , permitting counties—but not towns—to initiate proceedings to enforce the types of liens at issue here. Indeed, Town Law § 64 (5-a) directs that these charges “levied” on “real property” are to “be collected in the same manner and at the same time as other town charges” by virtue of the normal process of levying and collecting town property taxes, in which towns make the first attempt at collection and after which enforcement shifts to the county … . It appears that the Legislature, recognizing that towns have little power to recoup their costs for unpaid real property tax liens, has shifted the risk of loss to counties, which are in the best position to recover the funds through in rem foreclosure proceedings. The same considerations apply to blighted properties, where the Legislature may have presumed that counties are in a better position to recover charges imposed on real property pursuant to the Town Law … . Thus, the County was required to credit the maintenance and demolition charges, and its determination to the contrary should have been annulled. Matter of Town of Irondequoit v County of Monroe, 2020 NY Slip Op 07689, CtApp 12-22-20

NEGLIGENCE, ANIMAL LAW.

VETERINARY CLINIC MAY BE LIABLE IN NEGLIGENCE FOR INJURY CAUSED BY A DOG IN THE CLINIC'S WAITING ROOM, BUT THE CLINIC'S LIABILITY SHOULD NOT TURN ON WHETHER THE CLINIC WAS AWARE OF THE DOG'S VICIOUS PROPENSITIES, THE STRICT LIABILITY STANDARD IMPOSED ON DOG-OWNERS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a two-judge concurrence, determined that the defendant veterinary clinic (Palmer) should not have been awarded summary judgment in this dog-bite case. As a veterinarian was returning a dog (Vanilla) which had just been treated to the dog's owner in the waiting room the dog slipped out of its collar and allegedly attacked plaintiff. The question was whether the liability theory requiring knowledge of a dog's vicious propensities applied to the clinic as it does to a dog-owner. The clinic had been awarded summary judgment on the ground it had demonstrated it was not aware of the dog's vicious propensities. The Court of Appeals held the case against the clinic should be analyzed under a standard negligence theory, not under the strict liability theory applicable to dog-owners:

The vicious propensity notice rule has been applied to animal owners who are held to a strict liability standard, as well as to certain non-pet-owners—such as landlords who rent to pet owners—under a negligence standard … . However, we have recognized that other competing policies and contemporary social expectations may be at play in certain instances where domestic animals cause injuries. For example, we held that the owner of a farm animal "may be liable under ordinary tort-law principles" when that farm animal is allowed to stray from the property on which it is kept … . …

It is undisputed that Palmer owed a duty of care to plaintiff—a client in its waiting room. Palmer is a veterinary clinic, whose agents have specialized knowledge relating to animal behavior and the treatment of animals who may be ill, injured, in pain, or otherwise distressed. An animal in a veterinary office may experience various stressors—in addition to illness or pain—including the potential absence of its owner and exposure to unfamiliar people, animals, and surroundings. Moreover, veterinarians or other agents of a veterinary practice may—either unavoidably in the

course of treatment, or otherwise—create circumstances that give rise to a substantial risk of aggressive behavior. …

… [W]e conclude that Palmer does not need the protection afforded by the vicious propensities notice requirement, and the absence of such notice here does not warrant dismissal of plaintiff's claim. To be sure, "[w]e do not intend to suggest that [Palmer] would be subject to the same strict liability" as the owner of a domestic animal … . However, we are satisfied that, under the circumstances presented here, a negligence claim may lie despite Palmer's lack of notice of Vanilla's vicious propensities. Furthermore, viewing the record in the light most favorable to plaintiff, as we must … , questions of fact exist as to whether the alleged injury to plaintiff was foreseeable, and whether Palmer took reasonable steps to discharge its duty of care. Thus, neither party was entitled to summary judgment. Hewitt v Palmer Veterinary Clinic, PC, 2020 NY Slip Op 05975, Ct App 10-20-20

NEGLIGENCE, MUNICIPAL LAW.

PLAINTIFFS, THE DRIVER AND PASSENGER IN THIS TRAFFIC ACCIDENT CASE, REPRESENTED BY THE SAME ATTORNEY, REFUSED TO PARTICIPATE IN THE GENERAL MUNICIPAL LAW 50-h HEARING(S) UNLESS EACH PLAINTIFF WAS PRESENT WHEN THE OTHER TESTIFIED; THE COURT OF APPEALS AFFIRMED THE DISMISSAL OF ACTION BASED UPON PLAINTIFFS' FAILURE TO APPEAR FOR THE 50-h HEARING(S) (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a concurring opinion, determined plaintiffs, the driver and passenger in this traffic accident case, did not have the right to observe each other's testimony at a General Municipal Law 50-h hearing. Both plaintiffs were represented by the same attorney. The action was dismissed because plaintiffs refused to appear for the hearing(s) after plaintiffs' counsel insisted that both plaintiffs be present during the testimony. The Court of Appeals affirmed the dismissal of the action:

As General Municipal Law § 50-h (5) makes clear on its face, compliance with a municipality's demand for a section 50-h examination is a condition precedent to

commencing an action against that municipality … . A claimant's failure to comply with such a demand generally warrants dismissal of the action … . Requiring claimants to comply with section 50-h before commencing an action augments the statute's purpose, which "is to afford the city an opportunity to early investigate the circumstances surrounding the accident and to explore the merits of the claim, while information is readily available, with a view towards settlement" … . Colon v Martin, 2020 NY Slip Op 02681, CtApp 5-7-20

NEGLIGENCE.

NON-MANDATORY STANDARDS FOR THE GAP BETWEEN A SUBWAY TRAIN AND THE PLATFORM PROPERLY ADMITTED IN THIS SLIP AND FALL CASE; HOWEVER THE EVIDENCE OF PRIOR GAP-RELATED ACCIDENTS SHOULD NOT HAVE BEEN ADMITTED; NEW TRIAL ORDERED (CT APP).

The Court of Appeals, ordering a new trial, in a brief memorandum with no description of the facts, determined evidence of prior accidents involving the gap between the subway train and the platform should not have been admitted because there was no showing the conditions were the same. However the evidence of the non-mandatory gap standards were properly admitted:

In these circumstances, the trial court properly admitted plaintiff's expert testimony regarding non-mandatory gap standards promulgated by the American Public Transit Association and the Public Transportation Safety Board … . However, Supreme Court abused its discretion as a matter of law by admitting evidence of prior accidents at New York City subway stations involving the gap between the train car and platform in the absence of a showing that the relevant conditions of those accidents were substantially the same as plaintiff's accident … . Daniels v New York City Tr. Auth., 2020 NY Slip Op 02027, CtApp 3-24-20

RETIREMENT AND SOCIAL SECURITY LAW.

INCREASES IN PAY TO PORT AUTHORITY EXECUTIVE EMPLOYEES, AIMED AT RETAINING THOSE EMPLOYEES IN THE WAKE OF THE 9-11 ATTACKS, SHOULD NOT BE TREATED AS SALARY IN THE CALCULATION OF THOSE EMPLOYEES' RETIREMENT BENEFITS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing the Appellate Division, determined certain increases in pay to executive employees of the Port Authority, aimed at retaining those employees in the wake of the 9-11 attacks, should not be treated as salary in the calculation of those employees' retirement benefits. " … Retirement and Social Security Law § 431 provides that "[i]n any retirement or pension plan to which the state or municipality thereof contributes, the salary base for the computation of retirement benefits shall in no event include . . . *any additional compensation paid in anticipation of retirement"* (Retirement and Social Security Law § 431 [3] [emphasis added]):"

… [W]e must … ask whether there is substantial evidence in the record to support the Comptroller's determination that the Port Authority's compensation adjustment program constituted "additional compensation paid in anticipation of retirement" (Retirement and Social Security Law § 431 [3]). Under this standard, where substantial evidence exists to support the administrative agency's determination, a court may not substitute its judgment for that of the agency, even if there is evidence supporting a contrary conclusion … . In order to determine whether the purpose of the compensation was "to circumvent the provisions of Retirement and Social Security Law § 431," courts " must look to the substance of the transaction and not to what the parties may label it' " … .

Here, the record contains substantial evidence supporting the Comptroller's determination that the Port Authority provided the compensation adjustments to artificially increase the executive employees' final average salaries so that, upon retirement, they would receive pension increases roughly equivalent to those they would have received under the retirement incentive program. Indeed, the letter agreements signed by petitioner employees directly referred to a program "designed to provide a limited number of staff members with a parity' benefit" to make their

"pension calculation[s] . . . roughly equivalent to the calculation[s] if [they] had been eligible to retire with the incentive." Plainly, substantial evidence supports the conclusion that the compensation, by design, was made in anticipation of petitioner employees' retirement within the meaning of the statute. Matter of Bohlen v DiNapoli, 2020 NY Slip Op 00997, CtApp 2-13-20

SOCIAL SERVICES LAW, FAMILY LAW.

ALTHOUGH TWO OF MOTHER'S FIVE CHILDREN, AS FULL-TIME COLLEGE STUDENTS, WERE INELIGIBLE FOR THE SNAP (FOOD STAMP) PROGRAM, THE ENTIRE AMOUNT OF FATHER'S CHILD SUPPORT PAYMENTS MUST BE CONSIDERED AS HOUSEHOLD INCOME, RENDERING THE FAMILY INELIGIBLE FOR THE SNAP PROGRAM (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, determined that the child support payments made by father constituted income to mother (Ms. Leggio), not to the children. Therefore, although two of the children are full-time college students and ineligible for the SNAP (food stamp) program, the full amount of the child support must be considered in determining the family's eligibility for the SNAP program. Applying the full amount of the child support to the mother's income rendered the family ineligible:

… [I]f Ms. Leggio's two eldest children are the owners of their pro rata shares of the child support she receives, the household would be eligible for SNAP benefits … . Conversely, if child support funds are considered income of the custodial parent who received them (here, Ms. Leggio) they are household income not subject to any exclusion, and Ms. Leggio's household's income would be too high to receive SNAP benefits. Although the consequences of allocating the income are clear, the threshold question, whether child support is income of the recipient-parent or of the beneficiary-child for purposes of determining eligibility for SNAP benefits, is unresolved by any federal or state statute or regulation or decision of this Court.

We conclude that OTDA's [Office of Temporary and Disability Assistance's] interpretation of the federal statutes it administers was not irrational and is entitled

to deference and thus, for the purposes of SNAP, child support directly received by a parent is household income, even if it is used for the benefit of an ineligible college student living at home. Matter of Leggio v Devine, 2020 NY Slip Op 00999, Ct App 2-13-20

TORTIOUS INTERFERENCE WITH CONTRACT, BANKRUPTCY, FORECLOSURE.

PLAINTIFFS SOUGHT TO FORECLOSE ON LOANS TO THE BORROWERS WHO THEN STARTED BANKRUPTCY PROCEEDINGS; PLAINTIFFS THEN SUED DEFENDANTS, WHO ARE NOT PARTIES TO THE FORECLOSURE/BANKRUPTCY ACTIONS, FOR TORTIOUS INTERFERENCE WITH THE LOAN AGREEMENTS; THE TORTIOUS INTERFERENCE WITH CONTRACT ACTIONS ARE NOT PREEMPTED BY FEDERAL BANKRUPTCY LAW (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a three-judge dissent, determined the tortious interference with contract claims, against defendants who are not parties in the foreclosure/bankruptcy proceedings, were not preempted by federal law. Plaintiff sought to foreclose on a loan and the borrowers commenced bankruptcy proceedings. Plaintiff then sued defendants, who are not parties to the foreclosure, alleging tortious interference with the loan agreements. The opinion focuses on the law of preemption:

It is not disputed that valid contracts existed between plaintiff and the borrowers. Plaintiff's claims arising out of the borrowers' breach of those contracts as asserted against the borrowers were resolved by the bankruptcy proceeding. Here, plaintiff alleges that defendants knew of the relevant contractual terms and deliberately induced the borrowers' violations of those terms prior to the bankruptcy proceedings. In other words, plaintiff's allegations state a claim for tortious interference with contract, and the remedy for that tort will not affect the debtor's estate. As such, these claims will not encroach upon the province of the bankruptcy court. Stated simply, plaintiff's claims "do[] not require the adjudication of rights and duties of creditors and debtors under the Bankruptcy Code" … . Sutton 58 Assoc. LLC v Pilevsky, 2020 NY Slip Op 06939, Ct App 11-24-20

UNEMPLOYMENT INSURANCE.

CLAIMANT, A COURIER, WAS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT BENEFITS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, reversing the Appellate Division, over a concurrence and a two-judge dissent, determined the claimant courier was an employee of Postmates and was therefore entitled to unemployment benefits:

Postmates is a delivery business that uses a website and smartphone application to dispatch couriers to pick-up and deliver goods from local restaurants and stores to customers in cities across the United States—deliveries that are, for the most part, completed within an hour. Postmates solicits and hires its couriers, who undergo background checks before being approved to work by Postmates. Once they are approved, the couriers decide when to log into the application and which delivery jobs to accept. Once a courier accepts a delivery job made available through the application, the courier receives additional information about the job from Postmates, including the destination for the delivery. After completing a job, Postmates pays the couriers 80% of the delivery fees charged to customers, and payments are made by the customer directly to Postmates, which pays its couriers even when the fees are not collected from customers. Couriers' pay and the delivery fee are both nonnegotiable. * * *

Postmates exercises more than "incidental control" over its couriers—low-paid workers performing unskilled labor who possess limited discretion over how to do their jobs. That the couriers retain some independence to choose their work schedule and delivery route does not mean that they have actual control over their work or the service Postmates provides its customers; indeed, there is substantial evidence for the Board's conclusion that Postmates dominates the significant aspects of its couriers' work by dictating to which customers they can deliver, where to deliver the requested items, effectively limiting the time frame for delivery and controlling all aspects of pricing and payment. Matter of Vega (Postmates Inc.–Commissioner of Labor), 2020 NY Slip Op 02094, CtApp 3-26-20

VEHICLE AND TRAFFIC LAW.

THE RECORD SUPPORTED THE SUSPENSION OF PETITIONER BUS DRIVER'S LICENSE FOR CAUSING SERIOUS PHYSICAL INJURY TO A PEDESTRIAN WHILE FAILING TO EXERCISE DUE CARE; APPELLATE DIVISION REVERSED (CT APP).

The Court of Appeals, reversing the Appellate Division, determined the proof before the Department of Motor Vehicles (DMV) was sufficient to find that petitioner bus driver caused serious physical injury to a pedestrian warranting suspension of petitioner's driver's license for six months:

In November 2014, a New York City Transit bus driven by petitioner struck the victim, an 88-year-old pedestrian. At the time of the accident, the victim was in a marked crosswalk with the right of way, and petitioner was making a right turn. The bus ran "over [the victim's] legs . . . with the front passenger's side tire," pinning him under the bus. The victim was transported to the hospital, where he died less than four weeks later.

A summons was issued to petitioner alleging that he caused serious physical injury to a pedestrian while failing to exercise due care (see VTL § 1146 [c]). The Administrative Law Judge found that the charge was established by clear and convincing evidence. The DMV's Traffic Violations Bureau Appeal Board affirmed, and petitioner's license was suspended for six months (see VTL § 510 [2] [b] [xiv]). …

On this record, the agency's determination — that clear and convincing evidence demonstrated that petitioner caused serious physical injury while failing to exercise due care in violation of VTL § 1146 (c) — is supported by substantial evidence … . Matter of Seon v New York State Dept. of Motor Vehs., 2020 NY Slip Op 03564, CtApp 6-25-20

SUMMARY OF FIRST DEPARTMENT DECISION REVERSED BY THE COURT OF APPEALS ON JUNE 25, 2020

APPLYING THE CLEAR AND CONVINCING EVIDENTIARY STANDARD, THE DEPARTMENT OF MOTOR VEHICLES' (DMV'S) SUSPENSION OF PETITIONER BUS DRIVER'S LICENSE BASED UPON STRIKING A PEDESTRIAN WAS NOT SUPPORTED BY EVIDENCE OF THE EXTENT OF THE INJURY OR ANY CONNECTION BETWEEN THE INJURY AND THE PEDESTRIAN'S DEATH A MONTH LATER, DETERMINATION ANNULLED AND LICENSE REINSTATED (FIRST DEPT).

The First Department, annulling the determination of the Department of Motor Vehicles (DMV), over a two-justice dissenting opinion, determined the record did not support the suspension of petitioner-bus-driver's license for a violation of Vehicle and Traffic Law 1146. The court noted that the standard of proof in the DMV hearing is "clear and convincing" and the standard of proof in the instant Article 78 proceeding is "substantial evidence." Effectively, therefore, the "clear and convincing" standard applies to the Article 78. Here, on a dark and rainy night, an 88-year-old pedestrian apparently came into contact with the bus in the crosswalk when the bus was turning. The man died a month later. In the opinion of the majority, the hearing evidence did not demonstrate how seriously the man was injured by the bus, or a connection between any injury and the man's death a month later:

Here, DMV was required to establish that petitioner violated Vehicle and Traffic Law § 1146(c)(1), which imposes liability on "[a] driver of a motor vehicle who causes serious physical injury as defined in article ten of the penal law to a pedestrian or bicyclist while failing to exercise due care." The referenced definition of "serious physical injury" includes "physical injury . . . which causes death," … which is presumably the basis for the charge against petitioner since he was not issued a summons until after the pedestrian died in the hospital. Thus, DMV was required to present clear and convincing evidence of both failure to exercise care and that such failure led to the pedestrian's demise. * * *

To be sure, one could speculate, as does the dissent, that the pedestrian suffered a "serious physical injury." But to engage in speculation would be to ignore the underlying standard of clear and convincing evidence, which even the dissent agrees

applied in the administrative proceeding and is relevant to our review. “Clear and convincing evidence is evidence that satisfies the factfinder that it is highly probable that what is claimed actually happened . . . and it is evidence that is neither equivocal nor open to opposing presumptions”… . Given that standard, and the remarkable lack of compelling evidence before us, we would be abdicating our role were we simply to defer to the conclusions drawn by the Administrative Law Judge, and raising a serious question as to the very purpose of having any appellate review in this matter. Matter of Seon v New York State Dept. of Motor Vehs., 2018 NY Slip Op 02240, First Dept 3-29-18

WORKERS’ COMPENSATION.

WORKERS’ COMPENSATION BOARD DEPARTED FROM ITS PRECEDENT WITHOUT AN EXPLANATION, MATTER REMANDED TO THE BOARD (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, remanding the matter to the Workers’ Compensation Board, determined the Court could not rule on the appeal because the Board did not place on the record its reasons for departing from its own precedent. Claimant retired after she was injured and the Board held that she did not have to demonstrate efforts to get work in order to obtain benefits:

… [T]he Board now maintains that it departed from its administrative precedent by applying a discretionary inference in favor of claimant as permitted by Matter of Zamora v New York Neurologic Assoc. (19 NY3d 186 [2012]), without first requiring claimant to present evidence of her efforts to obtain work or get retrained. All parties agree that pursuant to Zamora the Board may, but need not, infer from the fact that a claimant involuntarily retired due to claimant’s permanent partial disability that the claimant’s reduced post-accident earnings resulted from that disability … . All parties also agree that once initially so classified, a claimant entitled under Workers’ Compensation Law (“WCL”) § 15 (3) (w) to compensation for the disability-related loss of wage-earning capacity need not demonstrate ongoing efforts to work or retrain for work after classification under the 2017 amendment to that provision. Given the parties’ agreement on the applicable

law, and the Board's representation that it departed from its purported precedent without explanation, we reverse and remit so that the Board may clarify its rationale and issue a decision in accordance with Zamora, which should include an explanation if it chooses to depart from an evidentiary requirement imposed on similarly situated claimants in prior proceedings. Matter of O'Donnell v Erie County, 2020 NY Slip Op 02095, CtApp 3-26-20

ZONING.

NYC'S "OPEN SPACE" ZONING REQUIREMENT IS MET BY ROOFTOP GARDENS ON A SINGLE BUILDING IN A MULTI-BUILDING ZONING LOT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, reversing the Appellate Division and upholding the NYC Board of Standards and Appeals (BSA), over an extensive three-judge dissent, determined the "open space" requirement of the NYC Zoning Resolution in a zoning lot with multiple buildings was met by rooftop gardens accessible to a single building's residents:

The question before us is whether an area must be accessible to the residents of every building on a zoning lot containing multiple, separately owned buildings in order to constitute "open space" within the meaning of the New York City Zoning Resolution … . The Board of Standards and Appeals of the City of New York (BSA), which is responsible for administering the Zoning Resolution, has interpreted the definition of open space to encompass rooftop gardens accessible to a single building's residents as long as the residents of each building on the zoning lot receive at least a proportionate share of open space. …

… "'Open space' is that part of a zoning lot, including courts or yards, which is open and unobstructed from its lowest level to the sky and is accessible to and usable by all persons occupying a dwelling unit or a rooming unit on the zoning lot" … . The minimum amount of open space required on a zoning lot is determined by the "open space ratio," which is "the number of square feet of open space on the zoning lot, expressed as a percentage of the floor area on that zoning lot" … . … [T]he minimum amount of open space required on a zoning lot is calculated by multiplying the given

open space ratio by the total residential floor area on the zoning lot. * * * The Appellate Division … opined that the definition of open space in ZR [Zoning Resolution] § 12-10 unambiguously requires that open space be accessible to the residents of every building on a zoning lot. By contrast, the dissent concluded that the statute was ambiguous and would have deferred to the BSA's practical reading of the open-space definition as applied to multi-owner zoning lots. * * *The BSA's interpretation is rational as applied to multi-owner zoning lots. Matter of Peyton v New York City Bd. of Stds. & Appeals, 2020 NY Slip Op 07662, CtApp 12-17-20

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