NEW YORK APPELLATE DIGEST, LLC

Fourth Department
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An Organized Compilation of the Summaries of Decisions Released by the Fourth Department January – March 2021. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header of Any Page to Return There.

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The Fourth Department, reversing Supreme Court, determined defendant's motion to vacate the default judgment on the ground defendant had not been properly served with the complaint should not have been granted. The matter was remitted for a hearing to determine the validity of the service of process:

" 'Ordinarily, the affidavit of a process server constitutes prima facie evidence that the defendant was validly served' " … . Although " 'bare and unsubstantiated denials are insufficient to rebut the presumption of service . . . , a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing' " … . Here, the presumption of service was created by the affidavit of plaintiff's process server, but defendant rebutted that presumption by submitting, inter alia, his sworn affidavit in which he averred that he had never been personally served, that since at least 2013 he had rented out the dwelling at the address reflected on the affidavit of the process server, that it had been rented to the individual reflected on the affidavit of service, that defendant "did not live or otherwise reside [at the address] in any form," and instead that he had been living at another address at the time of the purported service. Contrary to plaintiff's contention, defendant's submissions raised " 'a genuine question' " on the issue whether service was properly effected in accordance with CPLR 308 (2) … . Garvey v Global Asset Mgt. Solutions, Inc., 2021 NY Slip Op 01664, Fourth Dept 3-19-21

CIVIL PROCEDURE.

ALTHOUGH THE ARTICLE 78 PROCEEDING WAS PROPERLY TRANSFERRED TO THE APPELLATE DIVISION, THE RELATED DECLARATORY JUDGMENT ACTION WAS NOT TRANSFERABLE (FOURTH DEPT).

The Fourth Department determined Supreme Court properly transferred the Article 78 proceeding to the appellate division because there was a quasi-judicial hearing before an administrative law judge at which evidence was taken. The court noted that the aspect of the underlying action which sought a declaratory judgment could not be transferred to the appellate division:

… [A]lthough petitioner also contends that she is entitled to declaratory relief, we do not "have jurisdiction to consider the declaratory judgment action as part of this otherwise properly transferred CPLR article 78 proceeding" … . The transfer of a declaratory judgment action to this Court is not authorized by CPLR 7804 (g) … and we "lack[] jurisdiction to consider a declaratory judgment action in the absence of a proper appeal from a court order or judgment" … . We therefore vacate the order insofar as it transferred the declaratory judgment action, sever the declaratory judgment action and CPLR article 78 proceeding, and remit the declaratory judgment action to Supreme Court for further proceedings … . Matter of Blue v Zucker, 2021 NY Slip Op 01924, Fourth Dept 3-26-21

CIVIL PROCEDURE.

COMPREHENSIVE DISCUSSION OF THE PROCEDURES AND CRITERIA FOR THE ISSUANCE AND QUASHING OF SUBPOENAS IN THIS FRAUD ACTION STEMMING FROM HIGH CREDITWORTHINESS RATINGS GIVEN TO RESIDENTIAL MORTGAGE-BACKED SECURITIES (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff bank's motion to quash defendant's subpoena of a nonparty former employee of plaintiff should not have been granted. The decision provides an extensive discussion of the

procedures and criteria for subpoenas and motions to quash, and refused to apply the standing requirement for governmental agency investigative subpoenas. . Plaintiff bank had invested in residential mortgage-backed securities (RMBS) to which defendant had given high creditworthiness ratings. The action sounded in fraud:

… [W]e reject defendant's contention that plaintiff was not entitled to seek to quash the nonparty subpoena. CPLR 2304, which authorizes a motion to quash a subpoena, provides as relevant here that, "[i]f the subpoena is not returnable in a court, a request to withdraw or modify the subpoena shall first be made to the person who issued it and a motion to quash . . . may thereafter be made in the supreme court." …

… [P]laintiff, in moving to quash the nonparty subpoena, failed to meet its burden of establishing "either that the discovery sought is 'utterly irrelevant' to the action[s] or that the 'futility of the process to uncover anything legitimate is inevitable or obvious' " … . …

… [P]laintiff has not shown that the nonparty's testimony would be utterly irrelevant or that it was inevitable or obvious that taking the nonparty's deposition would be futile to uncovering anything legitimate … . …

… [P]laintiff's own submissions suggest that the nonparty has at least some knowledge of plaintiff's underwriting practices with respect to the non-prime loans at issue here … . M&T Bank Corp. v Moody's Invs. Servs., Inc., 2021 NY Slip Op 00706, Fourth Dept 2-5-21

CIVIL PROCEDURE.

FRAUD WAS NOT ADEQUATELY PLED, THE SIX-YEAR STATUTE OF LIMITATIONS DID NOT APPLY TO THE FRAUD ALLEGATIONS, THE JUDICIARY LAW 487 CAUSE OF ACTION WAS NOT ADEQUATELY PLED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the fraud and Judiciary Law 487 causes of action should have been dismissed. All of the elements of fraud were not pled with particularity, the six-year statute of limitations did not apply because the fraud allegations were identical to the injurious falsehood and

tortious interference claims, and the Judiciary Law 487 causes of actions did not relate to any proceedings before the court:

Although fraud claims are generally governed by a six-year statute of limitations (see CPLR 213 [8]), "courts will not apply the fraud [s]tatute of [l]imitations if the fraud allegation is only incidental to the claim asserted; otherwise, fraud would be used as a means to litigate stale claims" … . "In classifying a cause of action for statute of limitations purposes, the controlling consideration is not the form in which the cause of action is stated, but its substance" … . Inasmuch as the gravamen of plaintiffs' fraud claim is that plaintiffs suffered reputational damages and a loss of goodwill as a result of defendants' conduct and that [plaintiff] lost its contract … as a result of defendants' fraudulent scheme, we conclude that the fraud allegation is incidental to the injurious falsehood and tortious interference claims, which were dismissed by the court as time-barred.

… [T]he court erred in denying that part of the motion seeking to dismiss the ninth cause of action, for violations of Judiciary Law § 487 … .Under section 487 (1), an attorney who "[i]s guilty of any deceit or collusion . . . with intent to deceive the court or any party," is guilty of a misdemeanor and is potentially liable for treble damages to be recovered in a civil action. A violation of the statute may be established by evidence of the defendant's alleged deceit … but "alleged deceit that is not directed at a court must occur in the course of 'a pending judicial proceeding' " … .

… The complaint failed to allege, however, that [defendant law firm] engaged in egregious misconduct or made a material false statement in the course of a judicial proceeding. The allegedly deceitful memorandum was not directed at the court, and the complaint failed to allege that it was promulgated during a pending judicial proceeding … . Dreamco Dev. Corp. v Empire State Dev. Corp., 2021 NY Slip Op 00952, Fourth Dept 2-11-21

CIVIL PROCEDURE.

IT IS REVERSIBLE ERROR TO ENTERTAIN A MOTION FOR A DIRECTED VERDICT BEFORE THE OPPONENT HAS PRESENTED EVIDENCE AND CLOSED HIS OR HER CASE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that the motion for a directed verdict should not have been granted because defendant had not yet presented any evidence:

"[I]t is reversible error to grant a motion for a directed verdict prior to the close of the party's case against whom a directed verdict is sought" … . "By its express language, [CPLR 4401] authorizes the grant of a motion for a directed verdict only if the opponent of the motion has presented evidence and closes his or her case. The requirement that each party await the conclusion of the other's case before moving for judgment [under CPLR 4401] is designed to afford all of them a day in court . . . Accordingly, the timing of a motion prescribed by CPLR 4401 must be strictly enforced and the grant of a dismissal [pursuant to CPLR 4401] prior to the close of the opposing party's case will be reversed as premature, even if the ultimate success of the opposing party in the action is improbable" … . Here, it is undisputed that plaintiff's motion was granted before defendant had an opportunity to present any evidence. Thus, it was error for the court to entertain plaintiff's motion … . Veley v Manchester, 2021 NY Slip Op 00760, Fourth Dept 2-5-21

CIVIL PROCEDURE.

THE CONTEMPT FINDING AND THE $535,000 FINE WERE BASED ON AN ORDER WHICH SUPREME COURT DID NOT HAVE THE JURISDICTION TO ISSUE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined the contempt finding and the imposition of a $535,000 fine could not be enforced because it was based on an order which Supreme Court did not have jurisdiction to issue:

… [A]fter the entry of the order on appeal, this Court modified the prior order upon an appeal by defendant … . Defendant had transferred title to the … property to her children while reserving a life interest for herself, and she transferred title to … property to an LLC of which she was the sole owner, but later gifted that LLC to her children … . We stated in our decision that Supreme Court … equitably distributed the … properties "by directing defendant to prepare and execute deeds listing plaintiff as a one-half owner of those properties" … . We held that "[t]he court, however, lacked jurisdiction to do so inasmuch as the children and the LLC were not named as parties to this action" … . We therefore conclude in this appeal that the directive in the prior order requiring defendant to sign those deeds cannot be a basis for a finding of contempt, and we therefore modify the order by vacating the finding of contempt and the imposition of a fine upon that contempt. Jolley v Lando, 2021 NY Slip Op 00679, Fourth Dept 2-5-21

CIVIL PROCEDURE.

THE COURT OF CLAIMS, NOT SUPREME COURT, IS THE PROPER FORUM FOR THIS DECLARATORY JUDGMENT ACTION AGAINST THE STATE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the proper forum for the declaratory judgment cause of action against the state was the Court of Claims. The plaintiffs had filed a breach of contract action in the Court of Claims and this declaratory judgment action is incidental to the alleged breach of contract. Therefore the Court of Claims should handle it:

The Court of Claims has subject matter jurisdiction over claims for breach of contract against the State … . As long as the primary claim is for money damages, the Court of Claims "may [also] apply equitable considerations" and grant incidental equitable relief … . Here, because the relief sought in the complaint arises out of an alleged breach of contract, the proper forum for this action is the Court of Claims … . Rice v New York State Workers' Compensation Bd., 2021 NY Slip Op 01669, Fourth Dept 3-19-21

CIVIL PROCEDURE.

THE DUE PROCESS PRONG OF LONG-ARM JURISDICTION WAS NOT DEMONSTRATED WITH RESPECT THE GERMAN MANUFACTURER; IN ADDITION THE FAILURE TO WARN CAUSE OF ACTION WAS PREEMPTED BY THE FEDERAL MEDICAL DEVICE AMENDMENTS TO THE FDA REGULATIONS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the due process prong of long-arm jurisdiction was not satisfied and the failure to warn allegation was preempted by Federal Drug Administration (FDA) regulations under the Medical Device Amendments (MDA). The medical device was not described in the decision but it apparently involves treatment of the eye:

Plaintiff has not shown a regular flow of Morcher's [the German manufacturer's] goods into New York, advertising directed at New York, the delivery of Morcher's goods into the stream of commerce with the expectation of purchase in New York, or any other facts that may arguably have established jurisdiction … . …

It is undisputed that the device in question is a class III medical device with respect to which the federal government has established requirements. Thus, we must determine whether plaintiff's "common-law claims are based upon New York requirements with respect to the device that are 'different from, or in addition to,' the federal ones, and that relate to safety and effectiveness" … . If so, those claims are preempted by the MDA … . If, on the other hand, the common-law claims provide a damages remedy and are premised on a violation of the regulations of the Food and Drug Administration (FDA), they " 'parallel,' rather than add to, federal requirements" and are not preempted … . … Plaintiff … fails to identify any federal statute or regulation that requires defendants to provide warnings to consumers or their physicians … . Barone v Bausch & Lomb, Inc., 2021 NY Slip Op 00745, Fourth Dept 2-5-21

CIVIL PROCEDURE.

THE JUDGE WHO DISMISSED THE ACTION PURSUANT TO CPLR 205 (a) FOR FAILURE TO PROSECUTE DID NOT PLACE ON THE RECORD THE SPECIFIC CONDUCT CONSTITUTING NEGLECT; THEREFORE THE ACTION WAS TIMELY FILED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the action should not have been dismissed because the tolling provisions of CPLR 205 (a) applied. The judge who dismissed the action did not place on the record specific conduct constituting neglect to prosecute demonstrating a general pattern of delay:

… [T]he tolling provisions of CPLR 205 (a) apply inasmuch as the 2012 action was not dismissed for neglect to prosecute. CPLR 205 (a) provides, in relevant part, that "[i]f an action is timely commenced and is terminated in any other manner than by . . . a dismissal of the complaint for neglect to prosecute the action . . . , the plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination," even though the new action would otherwise be barred by the statute of limitations. "Where a dismissal is one for neglect to prosecute the action made pursuant to [CPLR 3216] or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation" … .

Here, it is undisputed that the 2012 action was timely commenced and that the instant action was commenced within six months of the termination of the 2012 action. …

Here, the court did not outline a general pattern of delay by plaintiff in its order dismissing the 2012 complaint or in the attached decision … . Broadway Warehouse Co. v Buffalo Barn Bd., LLC, 2021 NY Slip Op 00963, Fourth Dept 2-11-21

CRIMINAL LAW.

FOR CAUSE CHALLENGES TO TWO JURORS SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined the for cause challenges to two jurors should have been granted. Both jurors said they would have difficulty considering each crime separately when the crimes occurred close in time. The judge did not elicit any responses from the two jurors after they expressed their concerns:

… [D]efense counsel questioned each juror as to whether he or she would have trouble separating the proof in the case or understanding that the prosecution had to prove each individual incident beyond a reasonable doubt, as well as whether they could set aside any preconceived notions and consider each incident individually. Two prospective jurors indicated that they were not sure if they could consider each incident separately. Specifically, one prospective juror stated, "I don't know if I could," while a second prospective juror stated, "I'm not sure. Like I'm not sure who said it, like the timeframe like if it was one after another, another day, day, day, I don't know if I can separate it. But if it's like once, you know, a year or three years later this—maybe I would be able to separate it then." …

In response, the court explained to the entire panel that defendant "is presumed to be innocent of each and every one of those [allegations], and the fact that there was something on one day, something on another day, you're going to decide each and every one of those on its own merits." The court also specifically asked the panel if they understood that they had "to decide each one of the cases on their—each one of the charges on their own merit." The prospective jurors remained silent. People v Padilla, 2021 NY Slip Op 00732, Fourth Dept 2-5-21

CRIMINAL LAW.

ALTHOUGH DEFENDANT ACTED SUSPICIOUSLY THE POLICE DID NOT HAVE A REASONABLE SUSPICION HE WAS ENGAGED IN CRIMINAL ACTIVITY AT THE TIME DEFENDANT FLED; DEFENDANT'S SUPPRESSION MOTION SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing County Court, over a two-justice dissent, determined the police did not have reasonable suspicion defendant was involved in criminal activity at the time he fled and the police pursued him. Therefore his suppression motion (re: a discarded weapon and statements) should have been granted and the indictment dismissed. Defendant was a passenger in the back seat of a car stopped for a traffic infraction. When the occupants were asked to step out of the car, defendant ran:

… [T]he officers stopped the vehicle for a traffic infraction as opposed to a call related to a particular crime. Although defendant appeared to reach toward his waistband, he never touched his waistband and there was no other indication of a weapon, such as a bulge or the visible outline of a gun … . A suspect's action in grabbing at his or her waistband, standing alone, is insufficient to establish reasonable suspicion of a crime … .

Defendant's nervousness, use of a bottle cap, and "blading" do not provide additional specific circumstances indicating that defendant was engaged in criminal activity. There is no doubt that defendant engaged in furtive and suspicious activity and that his pattern of behavior, viewed as a whole, was suspicious, but there is nothing in this record to establish that the officers had a reasonable suspicion of criminal conduct to justify the pursuit … . People v Williams, 2021 NY Slip Op 00983, Fourth Dept 2-11-21

CRIMINAL LAW.

AN APPELLATE COURT CANNOT CONSIDER A MOTION NOT RULED UPON BELOW; MATTER REMITTED FOR A RULING ON DEFENDANT'S MOTION FOR A TRIAL ORDER OF DISMISSAL (FOURTH DEPT).

The Fourth Department remitted the case for a ruling on defendant's motion for a trial order of dismissal. An appellate court cannot consider a motion not ruled upon:

Defendant … contends that the evidence is legally insufficient to support the conviction with respect to all counts. At the close of proof, defendant moved for a trial order of dismissal, and the court reserved decision. There is no indication in the record that the court ruled on defendant's motion (cf. CPL 290.10 [1]). Thus, we may not address defendant's contention because, "in accordance with People v Concepcion (17 NY3d 192, 197-198 [2011]) and People v LaFontaine (92 NY2d 470, 474 [1998], rearg denied 93 NY2d 849 [1999]), we cannot deem the court's failure to rule on the . . . motion as a denial thereof" … . We therefore hold the case, reserve decision, and remit the matter to Supreme Court for a ruling on defendant's motion … . People v Johnson, 2021 NY Slip Op 01675, Fourth Dept 3-19-21

CRIMINAL LAW.

AN OFFICER MAY FOLLOW A SUSPECT IN A POLICE VEHICLE; THE OFFICER DID NOT GET OUT OF HIS VEHICLE AND CHASE THE DEFENDANT UNTIL HE SAW THE DEFENDANT DISCARD A WEAPON; THE SEIZURE OF THE WEAPON WAS NOT THE RESULT OF UNLAWFUL POLICE CONDUCT (FOURTH DEPT).

The Fourth Department, reversing County Court, determined defendant did not discard a weapon in response to unlawful police conduct. Therefore the weapon should not have been suppressed. In response to a 911 call a police officer in a car was observing the defendant. The officer pursued the defendant only after he saw the defendant discard a weapon:

As the … officer approached the scene, he observed defendant in a black coat walking westbound on the sidewalk. Upon seeing the third officer in his vehicle, defendant ran down a driveway. The … officer pulled into the driveway of that residence and, while still in the vehicle, observed defendant toss what appeared to be a long-barreled handgun over the fence while he ran. It was at that point that the third officer exited his vehicle and chased defendant, ultimately apprehending him. A loaded .22-caliber firearm was found on the ground in the backyard adjacent to the driveway.

… "[A]]n officer may use his or her vehicle to unobtrusively follow and observe an individual without elevating the encounter to a level three pursuit" … . A police-civilian encounter will escalate to a level three encounter, i.e., a forcible stop or seizure, "whenever an individual's freedom of movement is significantly impeded . . . Illustrative is police action which restricts an individual's freedom of movement by pursuing one who, for whatever reason, is fleeing to avoid police contact" … .

Here, the … officer had activated his emergency lights en route to the scene and before he encountered defendant. Upon observing defendant walking on the sidewalk, the third officer stopped his vehicle in a driveway. At no point did the third officer engage in any particularized act toward defendant or restrict his freedom of movement … . People v Moore, 2021 NY Slip Op 00927, Fourth Dept 2-11-21

CRIMINAL LAW.

COUNTY COURT DID NOT FOLLOW THE PROPER PROCEDURE FOR DETERMINING WHETHER DEFENDANT IS ELIGIBLE FOR YOUTHFUL OFFENDER STATUS; MATTER REMITTED (FOURTH DEPT).

The Fourth Department, remitted the mater for a determination whether defendant is eligible for youthful offender status:

Because defendant was convicted of an armed felony offense … , he is ineligible to receive a youthful offender adjudication unless the court determines that one of two mitigating factors is present … . If the court, in its discretion, determines that neither

of the mitigating factors is present and states the reason for its determination on the record, then no further determination on the youthful offender application is required … . If, however, the court determines that one or more of those mitigating factors are present, and that defendant is therefore an eligible youth, it must then determine whether defendant is a youthful offender … .

Here, the court did not follow the procedure set forth in Middlebrooks [25 NY3d 516], inasmuch as it made no on-the-record determination of defendant's eligibility for a youthful offender adjudication at sentencing … . People v Reed, 2021 NY Slip Op 01590, Fourth Dept 3-19-21

CRIMINAL LAW.

DEFENDANT WAS CONVICTED OF DIRECTING THE CODEFENDANT TO KILL; THE CODEFENDANT WAS ACQUITTED OF MURDER; THE VERDICTS WERE REPUGNANT; DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE REPUGNANT VERDICTS (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined defendant's attorney was ineffective for failing to object to the repugnant verdict. Defendant was convicted of directing the codefendant to shoot and kill the victim. The codefendant was acquitted of the murder charge:

We agree with defendant … that he was denied meaningful representation at trial inasmuch as there is no reasonable and legitimate trial strategy for defense counsel's failure to object to the repugnant verdicts … . …

… "[A] conviction will be reversed [as repugnant] only in those instances where acquittal on one crime as charged to the jury is conclusive as to a necessary element of the other crime as charged, for which the guilty verdict was rendered" … . "The determination as to the repugnancy of the verdict is made solely on the basis of the trial court's charge and not on the correctness of those instructions" … . The repugnancy doctrine also applies when one codefendant is convicted of a crime while another is acquitted of the same crime … . …

By acquitting the codefendant, the jury negated an essential element of the crime for which defendant was charged, i.e., that the codefendant committed the offense at defendant's direction … . People v Jennings, 2021 NY Slip Op 00944, Fourth Dept 2-11-21

CRIMINAL LAW.

DEFENDANT WAS CONVICTED OF FELONY MURDER, TWO COUNTS OF ROBBERY AND CRIMINAL POSSESSION OF A WEAPON BASED PRIMARILY ON HIS CONFESSION; THE ROBBERY CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE; THE JUDGE DID NOT MAKE THE REQUIRED MINIMAL INQUIRY WHEN DEFENDANT REQUESTED NEW COUNSEL; COUNSEL WERE INEFFECTIVE FOR FAILING TO REQUEST THE REDACTION OF DEFENDANT'S VIDEO STATEMENT; NEW TRIAL ORDERED ON THE FELONY MURDER AND CRIMINAL POSSESSION OF A WEAPON COUNTS (FOURTH DEPT).

The Fourth Department, reversing defendant's convictions, dismissing the robbery counts, and ordering a new trial on the murder and criminal possession of a weapon counts, in a full-fledged opinion by Justice Troutman, determined: (1) conviction of felony murder based upon a confession requires only corroboration of the murder, not the underlying felony (robbery here); (2) the convictions on the two robbery counts were against the weight of the evidence; (3) the judge did not conduct the required "minimal inquiry" when defendant made specific factual complaints about his counsel and asked for new counsel–the error was not cured by the appointment of new counsel right before trial; and (4) defendant's counsel were ineffective because defendant's video statement was not redacted to remove reference to defendant's history of incarceration. The legal discussions are too detailed to fairly summarize here. The facts are:

On October 14, 2013, the victim stumbled home, a fatal knife wound in his back. He was pronounced dead that evening. Two days later, the police interviewed defendant, who provided a video-recorded statement. Defendant admitted that, on the evening of the crime, he was on South Salina Street in the City of Syracuse with three other young men—a cousin of his, a juvenile, and Tony Comer, Jr.—when the victim

approached them for the purpose of buying drugs. Comer used the promise of drugs to lure the victim into a cut in the roadway and steal his wallet. When Comer and the victim came out of the cut, the victim was shirtless. Comer was smiling, holding the victim's torn, white T-shirt. The victim left, shouting that he would come back with a gun and start shooting. Comer told the others that the victim still had $10 on his person, and the juvenile stated that he wanted the victim's last $10. About 10 or 15 minutes later, the victim returned wearing a sweatshirt, looking for his wallet. Defendant, his cousin, and the juvenile fought the victim. Defendant admitted that, by fighting the victim, he was helping the juvenile to acquire the victim's last $10 and that, during the fight, defendant stabbed the victim once in the back using a knife that he had concealed in his sleeve. People v Stackhouse, 2021 NY Slip Op 01883, Fourth Dept 3-26-21

CRIMINAL LAW.

DEFENDANT WAS ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS CONVICTION ON THE GROUND THAT DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO MAKE AN ADEQUATE SPEEDY TRIAL MOTION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant's motion to vacate his conviction on ineffective assistance grounds should not have been denied without a hearing. The motion alleged defense counsel was ineffective for failing to make an adequate speedy trial motion. The Fourth Department found there was a question of fact about whether 88 days should have been excluded from the speedy trial calculation because the defendant was evading arrest:

… [T]he People contended that the speedy trial motion would have been denied even if properly pleaded because defendant was attempting to avoid apprehension and thus the 88 days preceding the People's first statement of readiness were excludable pursuant to CPL 30.30 (4) (c) (i). In denying the CPL 440.10 motion without a hearing, the court concluded that the trial court had ruled that the 88 days between the commencement of the action and the People's initial statement of readiness "was not chargeable to the People[] because defendant evaded arrest." We note, however, that the only evidence in the record supporting the conclusion that defendant was

evading arrest was the prosecutor's statement at defendant's arraignment on the indictment that she understood that defendant had "fled the area" and was heading to the New York City area, an assertion that was based solely on the supposition of an unnamed member of the police department's central investigation division. We thus conclude that defendant's submissions "support[] his contention that he was denied effective assistance of counsel . . . and raise[] a factual issue that requires a hearing" … and that "[t]he People submitted nothing in opposition to the motion that would require or indeed allow the court to deny the motion without a hearing" … . People v Reed, 2021 NY Slip Op 00758, Fourth Dept 2-5-21

CRIMINAL LAW.

DEFENDANT WAS NOT INFORMED OF THE DIRECT CONSEQUENCES OF HIS GUILTY PLEA PRIOR TO ENTERING THE PLEA; THEREFORE THE PLEA WAS VACATED (FOURTH DEPT).

The Fourth Department, vacating defendant's guilty plea, determined defendant was not provided with sufficient information about the direct consequences of his guilty prior to entering the plea:

… Supreme Court failed to inform [defendant] that a fine would be imposed and failed to advise him that, following his indeterminate term of imprisonment, he would be subject to a mandatory three-year period of conditional discharge, during which he would be required to install and maintain an ignition interlock device in his vehicle … . …

"The direct consequences of a plea—those whose omission from a plea colloquy makes the plea per se invalid—are essentially the core components of a defendant's sentence: a term of probation or imprisonment, a term of postrelease supervision, a fine"… , and the failure to advise a defendant at the time of his or her guilty plea of a direct consequence of that plea "requires that [the] plea be vacated" … . Here, defendant was advised of the fine and mandatory conditional discharge for the first time immediately prior to sentencing, when the prosecutor stated that defendant would be required to pay "all mandatory fines [and] surcharges" and that the period of incarceration "would be followed by a conditional discharge for the ignition

interlock to be enforced." We note that preservation of defendant's contention was not required under the circumstances of this case inasmuch as "defendant did not have sufficient knowledge of the terms of the plea at the plea allocution and, when later advised, did not have sufficient opportunity to move to withdraw [his] plea" … . People v Tung Nguyen, 2021 NY Slip Op 00724, Fourth Dept 2-5-21

CRIMINAL LAW.

DEFENDANT'S CONVICTIONS RELATING TO THE CODEFENDANT'S POSSESSION AND FIRING OF A WEAPON DURING A ROBBERY AT WHICH DEFENDANT WAS NOT PRESENT WERE BASED UPON LEGALLY INSUFFICIENT EVIDENCE; DEFENDANT'S CONVICTION OF POSSESSION OF A WEAPON BASED UPON THE CODEFENDANT'S GETTING INTO DEFENDANT'S CAR WITH THE WEAPON WAS AGAINST THE WEIGHT OF THE EVIDENCE (FOURTH DEPT).

The Fourth Department, reversing defendant's convictions and dismissing the indictment, determined the evidence of possession of a weapon and reckless endangerment (stemming from a robbery by the codefendant) was legally insufficient, and the conviction of another possession of a weapon charge (stemming from the codefendant's getting into defendant's car after the robbery) was against the weight of the evidence. Shots were fired by the codefendant during the robbery. The defendant was not with the codefendant during the robbery. Then the codefendant, still in possession of the firearm, got into defendant's car which was parked a couple of blocks away from the robbery scene and defendant drove away with the codefendant. There was no evidence the defendant shared the codefendant's intent to commit the robbery:

… [T]here is no evidence that defendant and the codefendant were together earlier on the day of the robbery and shooting, no evidence that defendant had prior knowledge either that the codefendant would be armed that day or that he was intending to rob someone, and no evidence that defendant and the codefendant had an ongoing relationship … . * * *

… [T]he evidence is legally insufficient to establish that defendant had any knowledge of the codefendant's possession of a firearm prior to the shooting or that defendant somehow "solicited, requested, commanded, importuned or intentionally aided [the codefendant] to engage in" the reckless shooting at the vehicle in which the victim was riding … . * * *

… [A]lthough the evidence that defendant knew who the codefendant was prior to the robbery provides a rational basis for questioning defendant's credibility, we conclude … that the People failed to prove beyond a reasonable doubt that defendant, finding himself in the presence of a man with a loaded weapon, willingly "solicited, requested, commanded, importuned or intentionally aided" the codefendant's possession of that weapon … , or that defendant "shared a 'community of purpose' with [the codefendant]" … . People v Hawkins, 2021 NY Slip Op 01882, Fourth Dept 3-26-21

CRIMINAL LAW.

DEFENDANT'S SUPPRESSION MOTION PAPERS RAISED A FACTUAL ISSUE REQUIRING A HEARING, MATTER REMITTED (FOURTH DEPT).

The Fourth Department, remitting the matter, determined defendant had raised a factual issue requiring a suppression hearing:

"When made before trial, suppression motions must be in writing, state the legal ground of the motion and contain sworn allegations of fact made by defendant or another person" … . A hearing may be denied "unless the papers submitted raise a factual dispute on a material point which must be resolved before the court can decide the legal issue" … .

Here, defendant specifically alleged that officers "responded to [the scene] after . . . defendant, or someone at his behest, called 911" and that defendant, upon their arrival, told them that he "found [the victim] on the stairs bleeding and was trying to help him." Defendant alleged that, based on that information, "[t]he police removed [him] from the scene and placed him in the back of a police vehicle, and took his

personal cell phone from him" without reasonable suspicion or probable cause justifying the intrusion. Although the People contended that defendant made other statements to the officers that heightened their level of suspicion and justified the intrusion, defendant's motion papers disputed this assertion, alleging instead that, at the time of the intrusion, "the police knew nothing more than [that the victim] appeared to have been shot, and [that defendant] . . . had discovered him and summoned help while trying to give assistance at the scene." Indeed, at oral argument on the motion, defendant further explained that he specifically disputed what information the police had at the time of the intrusion. We conclude that, under these circumstances, defendant sufficiently raised a factual issue necessitating a hearing … . People v White, 2021 NY Slip Op 01639, Fourth Dept 3-19-21

CRIMINAL LAW.

HERE THE ASSAULT SECOND DEGREE COUNT WAS AN INCLUSORY CONCURRENT COUNT OF ASSAULT ON A POLICE OFFICER; THE ASSAULT SECOND CONVICTION WAS REVERSED AND THE COUNT DISMISSED; THE TERM "INCLUSORY CONCURRENT COUNT" WAS EXPLAINED (FOURTH DEPT).

The Fourth Department noted that assault in the second degree is an inclusory concurrent count of assault on a police officer and the assault second conviction must therefore be reversed and the count dismissed:

Counts are concurrent when "concurrent sentences only may be imposed in case of conviction thereon," and such counts "are 'inclusory' when the offense charged in one is greater than any of those charged in the others and when the latter are all lesser offenses included within the greater" (CPL 300.30 [3], [4]). Here, concurrent sentencing was required inasmuch as the same conduct formed the basis of each count … and, as charged here, assault in the second degree is a lesser included offense of assault on a police officer … . People v Felong, 2021 NY Slip Op 01901, Fourth Dept 3-26-21

CRIMINAL LAW.

SENTENCE DEEMED UNDULY HARSH (FOURTH DEPT).

The Fourth Department determined defendant's sentence was unduly harsh and directed that all but one of the sentences run concurrently:

For the kidnapping and murder counts, defendant was sentenced to concurrent terms of incarceration of 25 years to life. For the burglary and robbery counts, related to the crimes committed at the victim's residence, defendant received determinate terms of incarceration of 15 years. Although those sentences run concurrently with each other, they were directed to run consecutively to the kidnapping and murder sentences. In addition, defendant received an indeterminate term of incarceration of 1⅓ to 4 years for the count of tampering with physical evidence, which was to run consecutively to all other counts.

It is well settled that this Court's "sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court" … and that "we may 'substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence' " … . Here, the record establishes that defendant, who was 22 years old and gainfully employed at the time of the crimes, had no prior criminal history. In addition, although she was an accessory to the crimes committed at the victim's residence, the evidence establishes that she was one block away during that incident and did not physically participate in those crimes. There is also evidence suggesting that defendant was the victim of repeated acts of domestic abuse perpetrated by one of the codefendants.

Under the circumstances, we conclude that the sentence imposed is unduly harsh and severe. We therefore modify the judgment as a matter of discretion in the interest of justice by directing that all sentences except the sentence imposed on the count of tampering with physical evidence run concurrently with each other … . People v Colon, 2021 NY Slip Op 01652, Fourth Dept 3-18-21

CRIMINAL LAW.

SENTENCE DEEMED UNDULY HARSH (FOURTH DEPT).

The Fourth Department reduced defendant's sentence, finding it unduly harsh. The defendant was several hours late in surrendering to the jail and the sentence initially promised was increased. The Fourth Department imposed the lesser sentence initially promised:

… [T]his Court "has broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range," and we may exercise that power, "if the interest of justice warrants, without deference to the sentencing court" … . Here, the court initially promised to sentence defendant to a concurrent eight-year determinate term of imprisonment on each count of the indictment and agreed to release him until 9:00 a.m. on the ensuing Monday to allow him to attend his mother's wedding on the intervening weekend. Defendant accepted the plea offer and was released as promised but did not surrender himself to the jail until 5:30 p.m. on the appointed date. Nevertheless, the record establishes that he surrendered voluntarily and that he called the jail prior to the appointed time and reported that he was having transportation difficulties. In addition, the record establishes that defendant has a lengthy record, but no violent felonies, and that he had not been arrested in the 10 years preceding these incidents, which involve sale and possession of small amounts of cocaine. Under these circumstances, as a matter of discretion in the interest of justice, we modify the judgment by reducing the sentence of imprisonment imposed under each count of the indictment to a determinate term of eight years, to be followed by the three years of postrelease supervision imposed by the court, and directing that the sentences run concurrently with each other. People v Brinson, 2021 NY Slip Op 01648, Fourth Dept 3-19-21

CRIMINAL LAW.

SENTENCE DEEMED UNDULY HARSH (FOURTH DEPT).

The Fourth Department determined the defendant's sentence (12 years) was unduly harsh and imposed a sentence (eight years) close to that promised before defendant rejected the offer and went to trial:

The charges arose from defendant's unsuccessful attempt to rob a cab driver at knifepoint. Sitting behind the victim, defendant pulled out a knife and put it to the victim's neck. The victim grabbed the knife and a struggle ensued during which the vehicle, which had been stopped, started moving and crashed into a tree. During the struggle, the victim sustained a wound to his hand (from grabbing the knife) and a cut on his neck that was not life threatening. Both men then exited the vehicle. …

After realizing that the victim had been injured, defendant yelled for help and said, "I did it." Defendant took off his sweatshirt and offered it to the victim to staunch the bleeding. When neighbors and others arrived at the scene, they saw defendant crying and pleading with them to help the victim. Although no one prevented him from fleeing, defendant remained at the scene until the police arrived and was taken into custody without incident. When approached by the responding officer, defendant said, "Officer, I stabbed him. I was trying to rob him." While in custody, defendant repeatedly asked whether the victim was going to be all right. The victim was given stitches for his wounds and released from the hospital later that night.

We agree with defendant that, under the unique circumstances of this case, the sentence is unduly harsh and severe. Defendant was 41 years old when he committed the crimes in this case, and he had previously been convicted of only one other crime, a misdemeanor in 2001 for which he was sentenced to probation. The presentence report indicates that defendant has an extensive history of mental illness and no prior incidents of violence. People v Zdatny, 2021 NY Slip Op 01659, Fourth Dept 3-19-21

CRIMINAL LAW.

STATEMENTS MADE AFTER DEFENDANT ASSERTED HIS RIGHT TO REMAIN SILENT SHOULD HAVE BEEN SUPPRESSED, BUT THE ERROR WAS HARMLESS; CRIMINAL POSSESSION OF A WEAPON WAS A CONTINUING CRIME AND SHOULD HAVE BEEN CHARGED AS A SINGLE COUNT, NOT FOUR COUNTS; AN OBJECTION OR A MOTION FOR A MISTRIAL IS NECESSARY TO PRESERVE AN ERROR AFTER A CURATIVE INSTRUCTION HAS BEEN GIVEN (FOURTH DEPT).

The Fourth Department determined statements made after defendant unequivocally asserted his right to remain silent should have been suppressed, but the error was harmless. In addition the Fourth Department dismissed three counts of criminal possession of a weapon because all four counts related to the uninterrupted possession of a single weapon at different times. The court also noted that if the trial court gives a curative instruction after an objection, another objection or a motion for a mistrial is necessary to preserve the issue for appeal:

… [D]efendant told the police three times that he did not wish to speak to them. We conclude that the court's determination that defendant did not unequivocally invoke his right to remain silent is supported by the record with respect to the first such instance, because in that instance he "did not clearly communicate a desire to cease all questioning indefinitely" … , "especially in light of his continued participation in the conversation" … . We further conclude, however, that the remainder of the court's determination is not supported by the record, inasmuch as, twice more during the questioning, "defendant said that he did not want to talk about [the crimes], thus unequivocally invoking his right to remain silent" … . Consequently, the court was required to suppress the statements that defendant made after invoking his right to remain silent for the second time. * * *

Defendant … contends in his main brief that the court erred in refusing to dismiss various counts of the indictment charging criminal possession of a weapon in the second degree under Penal Law § 265.03 (3) inasmuch as the indictment charged him with multiple counts of that crime based on his commission of a singular continuing offense. We agree. "An indictment cannot charge a defendant with more than one count of a crime that can be characterized as a continuing offense unless

there has been an interruption in the course of conduct" … . Here, the indictment charged defendant with four separate counts of criminal possession of a weapon in the second degree under Penal Law § 265.03 (3) for the uninterrupted possession of a single weapon at different times. We conclude that such possession "constituted a single offense for which he could be prosecuted only once" … . Consequently, we affirm that part of the judgment convicting defendant of criminal possession of a weapon in the second degree under Penal Law § 265.03 (3) in count 17 of the indictment, and we modify the judgment by reversing those parts convicting him of that crime under counts 8, 11, and 16 of the indictment and dismissing those counts of the indictment. People v Johnston, 2021 NY Slip Op 01632, Fourth Dept 3-19-21

CRIMINAL LAW.

SYNTHETIC MARIJUANA IS NOT "DANGEROUS CONTRABAND" WITHIN THE MEANING OF THE "PROMOTING PRISON CONTRABAND" STATUTES (FOURTH DEPT).

The Fourth Department, reducing defendant's conviction of promoting prison contraband first degree to second degree, determined that synthetic marijuana did not meet the definition of ""dangerous contraband:"

The Court of Appeals has "conclude[d] that the test for determining whether an item is dangerous contraband is whether its particular characteristics are such that there is a substantial probability that the item will be used in a manner that is likely to cause death or other serious injury, to facilitate an escape, or to bring about other major threats to a detention facility's institutional safety or security" … . "Generally, dangerous contraband refers to weapons . . . Items that facilitate escape are also dangerous contraband" (id. [internal quotation marks omitted]). Conversely, small amounts of marihuana, "unlike other contraband such as weapons, are not inherently dangerous and the dangerousness is not apparent from the nature of the item" … . Additionally, we note that the substance at issue here is a synthetic drug that mimics the effects of THC, the active ingredient in marihuana, and "the conclusion that . . . small amounts of marihuana . . . are not dangerous contraband is informed by the Legislature's more lenient treatment of marihuana offenses, as opposed to those

involving other drugs" … . People v Mclamore, 2021 NY Slip Op 00926, Fourth Dept 2-11-21

CRIMINAL LAW.

THE ALLEGED VICTIM IN THIS RAPE PROSECUTION TESTIFIED SHE PROMPTLY NOTIFIED HER BOYFRIEND OF THE RAPE AND, A FEW HOURS LATER, NOTIFIED HER MOTHER; HER MOTHER TESTIFIED BUT THE BOYFRIEND WAS NOT CALLED; THE DEFENSE REQUEST FOR A MISSING WITNESS JURY INSTRUCTION SHOULD NOT HAVE BEEN DENIED ON THE GROUND THE TESTIMONY WOULD BE CUMULATIVE; THE CONCEPT OF "CUMULATIVE" EXPLAINED IN SOME DEPTH (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined the defense request for the missing witness jury instruction should have been granted. The alleged victim in this rape case testified she promptly reported the rape to her boyfriend and, a few hours later, told her mother. The People called her mother as a witness, but not her boyfriend. The trial judge denied the missing witness charge on the ground that the testimony would be cumulative:

In People v Smith (33 NY3d 454 [2019]), the Court of Appeals held that the proponent of a missing witness charge has no initial burden to show that the missing testimony would not be cumulative of the remaining testimony, and that the concept of cumulativeness in this context functions only as a tool for defeating an otherwise-meritorious request for a missing witness instruction (id. at 458-460). Thus, the Court of Appeals explained, the opponent of the missing witness instruction has the burden of showing that the missing testimony would be cumulative in order to defeat the requested instruction on that ground (id.).

Applying the standard set forth in Smith, we conclude that the People failed to show that the boyfriend's testimony would have been cumulative of the mother's testimony. The respective accounts would concern different outcries, separated by several hours and many blocks. The boyfriend could not have duplicated the mother's account of the complainant's outcry, because the boyfriend was not present

during that particular event. Conversely, the mother could not have duplicated the boyfriend's account of the complainant's outcry, because the mother was not present during that particular event. People v Garcia, 2021 NY Slip Op 01571, Fourth Dept 3-19-21

CRIMINAL LAW.

THE APPEAL WAIVER WAS INVALID AND THE SENTENCE WAS UNDULY HARSH (FOURTH DEPT).

The Fourth Department determined defendant's waiver of appeal was invalid and his sentence was unduly harsh. The sentences were modified to run concurrently, not consecutively:

We agree with defendant that the purported waiver of the right to appeal is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant "understood the nature of the appellate rights being waived" … . Here, County Court provided no oral explanation of the waiver of the right to appeal and the written waiver executed by defendant "mischaracterized the waiver of the right to appeal, portraying it in effect as an absolute bar to the taking of an appeal" … . We note that the better practice is for the court to use the Model Colloquy, which "neatly synthesizes . . . the governing principles" … . People v Smith, 2021 NY Slip Op 01666, Fourth Dept 3-19-21

CRIMINAL LAW.

THE EVIDENCE OF CONSTRUCTIVE POSSESSION OF DRUGS AND PARAPHERNALIA IN AN APARTMENT IN WHICH DEFENDANT WAS PRESENT WAS INSUFFICIENT; DEFENDANT'S CONVICTION WAS THEREFORE AGAINST THE WEIGHT OF THE EVIDENCE (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction after a bench trial, determined the evidence that defendant constructively possessed drug and paraphernalia was insufficient. The "possession" convictions, therefore, were against the weight of the evidence:

Although defendant was present in the apartment at the time the police executed the search warrant, no other evidence was presented "to establish that defendant was an occupant of the apartment or that he regularly frequented it" … . Two of the police officers testified that they did not discover anything that belonged to defendant on the premises. The clothing, cell phone, and identification found on the premises belonged instead to other men who were present in the apartment during the execution of the search warrant. Photographs found on the premises included the other men but not defendant. While defendant admitted that he had been at the apartment on one other occasion, the evidence did not otherwise specifically connect defendant to the apartment in which the contraband was found. We thus conclude that the weight of the evidence does not support a finding that defendant "exercised dominion and control over the [contraband] by a sufficient level of control over the area in which [it was] found" … . People v Ponder, 2021 NY Slip Op 00923, Fourth Dept 2-11-21

CRIMINAL LAW.

THE FAILURE TO INFORM DEFENDANT AT THE TIME OF THE PLEA THAT HIS SENTENCE WOULD INCLUDE A SPECIFIC PERIOD OF POSTRELEASE SUPERVSION REQUIRED VACATION OF THE PLEA; BECAUSE THE DEFENDANT DID NOT RECEIVE TIMELY NOTICE OF THE POSTRELEASE SUPERVISION, PRESERVATION OF THE ERROR WAS NOT NECESSARY (FOURTH DEPT).

The Fourth Department, vacating defendant's guilty plea, determined defendant should have been informed that postrelease supervision (PRS) would be part of his sentence. Under the circumstances preservation of the error for appeal was not necessary:

Pursuant to the plea agreement, defendant entered his plea in exchange for a promise of youthful offender adjudication and a sentence of probation. Following the entry of the plea, the court informed defendant that, if he violated the terms of the plea agreement, the court would "not keep the promise [it] made regarding [his] sentence" and that it could "impose a much more significant or higher sentence." The court did not specify what that higher sentence could entail, nor did it mention the possibility of postrelease supervision (PRS).

Prior to sentencing, defendant violated the terms of the plea agreement when he failed to cooperate with the probation department and was arrested on new felony charges. The court held a hearing pursuant to People v Outley (80 NY2d 702 [1993]) and determined that there was a valid basis on which to enhance the sentence. The prosecutor then requested that the court sentence defendant as an adult and impose a sentence of 15 years of incarceration with five years of PRS. The court imposed a determinate sentence of 7½ years of incarceration plus five years of PRS.

The court was required "to advise defendant that his enhanced sentence would include PRS, and was also required to specify the length of the term of PRS to be imposed" … . Although defendant did not object to the imposition of PRS or move to withdraw his plea or to vacate the judgment of conviction, this case falls under an exception to the preservation rule inasmuch as "[t]he prosecutor's mention of PRS immediately before sentencing was not the type of notice under People v Murray (15

NY3d 725 [2010]) that would require defendant to preserve the issue" … . People v Stanley, 2021 NY Slip Op 00924, Fourth Dept 2-11-21

CRIMINAL LAW.

THE JUDGE DID NOT MAKE THE REQUIRED INQUIRY TO ENSURE DEFENDANT'S WAIVER OF HIS RIGHT TO COUNSEL FOR THE SORA HEARING WAS KNOWING, INTELLIGENT AND VOLUNTARY; THE NOTICE OF THE SORA HEARING PROVIDED TO DEFENDANT WAS INADEQUATE (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the judge did not conduct the required inquiry to ensure defendant's waiver of his right to counsel for the SORA hearing was knowing, intelligent and voluntary. The Fourth Department also noted that notice of the SORA hearing provided to the defendant was inadequate:

…[D]efendant's purported waiver of the right to counsel is invalid. "It is well settled that defendants have a statutory right to counsel in SORA proceedings" … . In order for a defendant to validly waive his right to counsel, "the court must undertake a 'searching inquiry . . . aimed at [e]nsuring that the defendant [is] aware of the dangers and disadvantages of proceeding without counsel' " … . Such an inquiry ensures that the defendant's waiver is " 'made competently, intelligently and voluntarily' " … .

Here, County Court failed to conduct the necessary searching inquiry and, instead, relied upon defendant's notation on the form notice he received about his SORA classification proceeding that he did "not wish to have counsel appointed." …

… [T]he form notice provided to [defendant] about his SORA classification contained numerous deficiencies. The notice did not fully describe the SORA hearing or the consequences that would follow if defendant failed to appear … . It also appears that the court failed to provide defendant with a "copy of the recommendation received from the [Board of Examiners of Sex Offenders] and any statement of the reasons for the recommendation" … . In providing the requisite

notice to defendants pursuant to section 168-n (3), courts should be tracking the language used in that statute instead of giving a shortened summary. People v Huntley, 2021 NY Slip Op 00688, Fourth Dept 2-5-21

CRIMINAL LAW.

THE JUDGE'S REFUSAL TO HOLD A PRE-TRIAL HUNTLEY HEARING ON THE VOLUNTARINESS OF DEFENDANT'S STATEMENTS WAS REVERSIBLE ERROR (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined the judge's refusal to hold a Huntley hearing to determine the voluntariness of defendant's statements until several witnesses testified at trial was reversible error:

"When [a] motion [to suppress evidence] is made before trial, the trial may not be commenced until determination of the motion" (CPL 710.40 [3] …). Here, defendant moved to suppress his statements to the police on the ground that they were involuntarily made (see CPL 710.20 [3]), but the court did not rule on the motion prior to trial and repeatedly refused to conduct a pretrial Huntley hearing, even after the People requested a Huntley hearing at the outset of the trial. Instead, the court granted the People's request for a Huntley hearing over defendant's objection after nine of the ten prosecution witnesses had already testified. Following that hearing, the court found the statements to be voluntary and thus admissible.

The error is not harmless. It is well established that, "unless the proof of the defendant's guilt, without reference to the error, is overwhelming, there is no occasion for consideration of any doctrine of harmless error" … . Here, the evidence was not overwhelming … . The central factual question in this case was identity. The evidence of identity was that defendant was apprehended coming out of a building located on the block towards which the culprit had been seen running, he fit the description of the culprit, and he was identified by three eyewitnesses after a showup procedure. On the other hand, defendant did not have in his possession the fruits of the crime or the firearm used in the crime, nor was he dressed like the culprit. Moreover, showup identification procedures are inherently suggestive … , and the culprit had been wearing a partial face covering at the time of the crime, which

further undermined the reliability of the identifications … . People v Coffie, 2021 NY Slip Op 01884, Fourth Dept 3-26-21

CRIMINAL LAW.

THE PEOPLE DID NOT OBTAIN PERMISSION TO PRESENT TO A SECOND GRAND JURY RENDERING THE SECOND INDICTMENT VOID (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the indictment to which defendant plead guilty was void because the People did not obtain the court's permission to present to a second grand jury after the first indictment was dismissed:

… [T]he People failed to seek leave pursuant to CPL 210.20 (4) to resubmit the matter to a second grand jury after County Court granted that part of defendant's omnibus motion seeking to dismiss the original indictment as against him on the ground that the evidence before the first grand jury was legally insufficient. "[T]he failure to obtain leave of court to present a matter to a second grand jury, where required, deprives the grand jury of jurisdiction to hear the matter, thereby rendering the indictment void . . . , which, in turn, deprives the court of jurisdiction" … . Although, here, defendant failed to make a motion to dismiss the indictment issued by the second grand jury pursuant to CPL 210.20 (1), the failure of the People to obtain from the court authorization to submit the matter to the second grand jury deprived the second grand jury of jurisdiction to hear the matter, thereby rendering void the indictment issued by the second grand jury and depriving the court of jurisdiction, and the right to challenge a lack of jurisdiction cannot be waived by defendant … . Under these circumstances, we must dismiss the indictment issued by the second grand jury that is at issue on this appeal … . We note that there is no limit to the number of times that the People may resubmit a charge to a grand jury with leave pursuant to CPL 210.20 (4) … . People v Owens, 2021 NY Slip Op 00958, Fourth Dept 2-11-21

CRIMINAL LAW.

THE PEOPLE WERE NOT GIVEN THE OPPORTUNITY TO RESPOND TO THE ISSUE WHETHER THE CHEMICAL BREATH TEST SHOULD BE SUPPRESSED; NEW SUPPRESSION HEARING ORDERED (FOURTH DEPT).

The Fourth Department, on an appeal by the People, determined County Court should not have suppressed the chemical breath test evidence in this DWI case because the People were not given an opportunity to respond to that suppression issue. The matter was remitted for a new suppression hearing:

… [T]he court erred in granting that part of defendant's omnibus motion seeking to suppress evidence because the court failed to notify the People of its intention to consider that issue and failed to give the People an opportunity to present evidence at the hearing on that issue … . At the Huntley hearing, the issues of the officer's compliance with Vehicle and Traffic Law § 1194 and defendant's limited right to counsel were merely ancillary. Moreover, we reject defendant's contention that the limited evidence that was admitted at the hearing supports the court's determination to suppress the chemical breath test results. The evidence at the hearing established that the police administered a field breath test and then a chemical breath test at the jail, only the latter of which is the subject of section 1194 (2) (a) and would be admissible at trial … , but the court conflated the administration of both tests in determining that suppression was warranted. On this record, it is unclear whether the officer complied with section 1194 (2) (b) by warning defendant of the consequences of refusal in " 'clear and unequivocal language' " before administering the chemical test … . The record is also unclear whether defendant, who made a request to speak with his attorney, was afforded the opportunity to do so prior to deciding whether to submit to the chemical breath test … . People v Williams, 2021 NY Slip Op 01570, Fourth Dept 3-19-21

CRIMINAL LAW.

THE POLICE DID NOT HAVE PROBABLE CAUSE TO SEARCH THE VEHICLE IN WHICH DEFENDANT WAS A PASSENGER WHEN AN OFFICER ENTERED THE VEHICLE TO RETRIEVE THE REGISTRATION AND SAW A HANDGUN; THE DEFENDANT HAD STANDING TO CONTEST THE SEIZURE BECAUSE OF THE PEOPLE'S RELIANCE ON THE STATUTORY AUTOMOBILE PRESUMPTION; THE HANDGUN SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the handgun seized from the vehicle in which defendant was a passenger should have been suppressed. The police arrived after an accident and defendant was standing outside the car. When an officer asked for the vehicle registration, defendant offered to retrieve it, but a police officer standing near the car said he would retrieve it. The officer then saw a handgun that had been hidden from view by the deployed air bag. The court noted defendant had standing to contest the search and seizure because of the People's reliance on the statutory automobile presumption:

As an initial matter, there is no dispute that defendant has standing as a passenger of the vehicle to challenge its search by virtue of the People's reliance on the statutory automobile presumption … . … [U]nder the circumstances of this case, we agree with defendant that the officer who conducted the search lacked probable cause to do so … . In reaching that conclusion, we reject the People's assertion that, based on the holdings of People v Branigan (67 NY2d 860 [1986]) and People v Philbert (270 AD2d 210 [1st Dept 2000] …), the officer was entitled to enter the vehicle for the purpose of obtaining the vehicle's registration certificate. Unlike in Branigan, there were no " 'safety reasons' " in this case preventing the officer from allowing defendant to retrieve the registration himself … . and, here, defendant did not initially fail to produce the registration when prompted to do so by law enforcement (cf. id. at 861-862). Unlike in Philbert … , the officer here, as he confirmed at the suppression hearing, lacked probable cause to search the vehicle and had no reason to believe that the vehicle contained evidence of a crime. People v Lawrence, 2021 NY Slip Op 01921, Fourth Dept 3-26-21

CRIMINAL LAW.

THE PROOF OF CONSTRUCTIVE POSSESION OF WEAPONS WAS LEGALLY INSUFFICIENT (FOURTH DEPT).

The Fourth Department reversed defendant's convictions for criminal use of a firearm and criminal possession of weapon because the proof of constructive possession was legally insufficient:

… [T]he evidence is legally insufficient to support her conviction of the counts of criminal use of a firearm in the first degree, criminal possession of a weapon in the third degree, and criminal possession of a weapon in the fourth degree, and we therefore modify the judgment accordingly. Those counts were based on defendant's constructive possession of a rifle that was found in the house after the police entered. The People failed to establish that defendant "exercised dominion or control over [the rifle] by a sufficient level of control over the area in which [it was] found" to establish that she had constructive possession of it … . People v Lora, 2021 NY Slip Op 01597, Fourth Dept 3-19-21

CRIMINAL LAW.

THE SENTENCE FOR CRIMINAL POSSESSION OF A WEAPON SHOULD HAVE BEEN CONCURRENT WITH THE SENTENCE FOR MURDER (FOURTH DEPT).

The Fourth Department determined the sentence for criminal possession of a weapon should not have been imposed consecutively to the sentence for murder:

… [T]he court erred in directing that the sentence imposed on count three of the indictment, charging criminal possession of a weapon in the second degree under Penal Law § 265.03 (3), run consecutively to the sentence imposed on count one, i.e., murder in the second degree. The People had the burden of establishing that the consecutive sentences were legal, i.e., that the crimes were committed through

separate acts or omissions … , and they failed to meet that burden. The People failed to present evidence at trial that defendant's act of possessing the loaded firearm 'was separate and distinct from' his act of shooting the victim … . **People v Alligood, 2021 NY Slip Op 01628, Fourth Dept 3-19-21**

CRIMINAL LAW.

THE SEXUAL ASSAULT REFORM ACT (SARA), WHICH REQUIRES THAT CERTAIN SEX OFFENDERS RESIDE IN SARA-COMPLIANT HOUSING (AWAY FROM SCHOOL GROUNDS) UPON RELEASE FROM PRISON DOES NOT APPLY TO SEX OFFENDERS WHO HAVE BEEN ADJUDICATED YOUTHFUL OFFENDERS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, in a full-fledged opinion by Justice Bannister, determined the conditions imposed by the Sexual Assault Reform Act (SARA) requiring certain sex offenders live in SARA-compliant housing upon release (away from school grounds) does not apply to those sex offenders who are adjudicated youthful offenders:

A "sex offender," as defined in the Correction Law, "includes any person who is convicted of any of the [enumerated offenses]" … . A "sex offense" is defined as "a conviction of or a conviction of an attempt to commit [an enumerated crime]" … Additionally, the school grounds mandatory condition as set forth in Penal Law § 65.10 (4-a) (a) expressly applies only to those persons convicted of the enumerated offenses.

When a sentencing court adjudicates a defendant a youthful offender, however, the conviction is "deemed vacated and replaced by a youthful offender finding" … . CPL 720.35 (1) states that a youthful offender adjudication "is not a judgment of conviction for a crime or any other offense," which is in keeping with the "legislative desire not to stigmatize youths [adjudicated youthful offenders] . . . with criminal records triggered by hasty or thoughtless acts" … . Thus, by definition, a youthful offender is not a convicted sex offender and does not fall within the category of persons intended to be restricted under SARA. People ex rel. Suarez v

Superintendent, Livingston Corr. Facility, 2021 NY Slip Op 00705, Fourth Dept 2-5-21

CRIMINAL LAW.

THE TESTIMONY OF THE ACCOMPLICE WAS SUFFICIENTLY CORROBORATED; THE INDICTMENT WAS SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the indictment should not have been dismissed because there was sufficient corroboration of the testimony of an accomplice:

The People contend that County Court erred in determining that the grand jury testimony of defendant's accomplice was not sufficiently corroborated. We agree. The corroboration requirement is satisfied by evidence that " 'tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the accomplice is telling the truth' " … . Sufficient corroboration may be provided by evidence that " 'harmonize[s]' " with the accomplice testimony, i.e., when "read with the accomplice's testimony, [it] makes it more likely that the defendant committed the offense" … .

Here, the accomplice's testimony that, on a specific date, defendant and the accomplice had a telephone conversation regarding the alleged criminal conduct is corroborated by defendant's cell phone records, which establish "that cell phone calls were made as the accomplice[] testified" … . The accomplice's testimony is also corroborated by, among other things, the testimony of non-accomplices and the transcript of the criminal jury trial during which the charged offenses were allegedly committed … . People v Baska, 2021 NY Slip Op 00947, Fourth Dept 2-11-21

CRIMINAL LAW.

THE THREE-STEP BATSON PROCEDURE WAS NOT FOLLOWED WHEN THE DEFENDANT OBJECTED TO THE PEOPLE'S PEREMPTORY CHALLENGE TO AN AFRICAN-AMERICAN PROSPECTIVE JUROR, MATTER REMITTED FOR FURTHER PROCEEDINGS TO SATISFY BATSON (FOURTH DEPT).

The Fourth Department, remitting the matter, determined the three-step Batson procedure was not followed when the defense objected to the People's peremptory challenge to an African-American prospective juror:

After defendant made a prima facie showing of discrimination in step one, the prosecutor offered a race-neutral explanation for the peremptory challenge … , namely, that the prospective juror had a sister who was incarcerated for assaulting someone with a gun and that the prospective juror said that the criminal justice system could have treated her sister better. When defense counsel attempted to respond, the court interrupted him and stated, "I ruled. There is no Batson issue." Defense counsel timely objected to the court's ruling. In our view, defense counsel should have been "given the opportunity to argue that the prosecutor's explanation[was] a pretext for discrimination" … . * * *

… [W]hen it interrupted defense counsel, "the court improperly rushed and compressed the Batson inquiry," precluding defendant from meeting "his burden of establishing an equal protection violation" … . To be distinguished are situations in which defense counsel does not make "any attempt to respond or protest[ ]" … or in which the court implicitly rejects the pretext argument by letting the challenge stand after hearing a defense counsel's arguments concerning pretext … . People v Singleton, 2021 NY Slip Op 01638, Fourth Dept 3-19-21

CRIMINAL LAW.

THE TRANSCRIBED RECORD IS WOEFULLY INCOMPLETE; DEFENDANT DID NOT DEMONSTRATE THE RECORD COULD NOT BE RECONSTRUCTED; MATTER REMITTED (FOURTH DEPT).

The Fourth Department, holding the case and reserving decision, remitted the matter for reconstruction of the record which was missing several vital parts:

… [M]issing and otherwise defective transcripts from the trial preclude appellate review of defendant's conviction. Indeed, the present state of the record on appeal is "deplorable" … inasmuch as it is missing, inter alia, three days of jury selection, opening statements, summations, final jury instructions, County Court's handling of a jury note, and the verdict. In addition, the transcription of the testimony of some of the witnesses includes irregularities such as notations stating "omitted," "untranscribable," and "blah, blah," and unintelligible strings of characters that appear to be in code. We reject defendant's contention, however, that summary reversal and a new trial is the appropriate remedy at this point. The "loss of reporter's minutes is rarely sufficient reason in itself for reversing a conviction" … . The Court of Appeals has held that "the right of a defendant to a fair appeal, or for that matter a fair trial, does not necessarily guarantee him [or her] a perfect trial or a perfect appeal" … . "To overcome the presumption of regularity, a defendant must show not only that minutes are missing, but also 'that there were inadequate means from which it could be determined whether appealable and reviewable issues were present' " … . It is only when a defendant shows that a reconstruction is not possible that a defendant is entitled to summary reversal and a new trial … .

Here, we conclude that defendant failed to establish that alternative means to provide an adequate record are not available … .There is no indication that defendant's former attorneys could not participate in a reconstruction hearing, despite the fact that one of them is now employed by the District Attorney's Office. There is also no indication that the now-retired trial judge could not participate as well … . People v Meyers, 2021 NY Slip Op 00919, Fourth Dept 2-11-21

CRIMINAL LAW.

THE WAIVER OF INDICTMENT WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT DID NOT PRECISELY IDENTIFY WHICH OF TWO UNDERLYING OFFENSES IT DESCRIBED AND DID NOT PROTECT AGAINST DOUBLE JEOPARDY (FOURTH DEPT).

The Fourth Department, vacating defendant's guilty plea and the waiver of indictment, determined the waiver of indictment was jurisdictionally defective because it was not clear which of two charged rapes it referred to and there was no language that the plea would be in full satisfaction of all charges:

… [T]he underlying felony complaint alleged four offenses predicated on defendant's purported violation of three Penal Law provisions: two separate acts of rape in the first degree that occurred in September and October 2016, respectively (Penal Law § 130.35 [4]), an act of criminal sexual act in the first degree that occurred in November 2016 (§ 130.50 [4]), and acts that constituted endangering the welfare of a child (§ 260.10 [1]). In contrast, the waiver of indictment listed only a single count to be charged in the SCI [superior court information]: a count of rape in the first degree that allegedly occurred sometime between July and November 2016. Inasmuch as the sole charge in the waiver of indictment and SCI could plausibly refer to either of the acts of rape in the first degree alleged in the felony complaint, the waiver of indictment failed to put defendant on notice of the precise crime for which he was waiving prosecution by indictment and was thus jurisdictionally defective. …

In addition to impeding defendant's ability to prepare a defense … , the defect in the waiver of indictment—i.e., the indeterminancy of the precise rape offense for which defendant was agreeing to waive indictment—implicates double jeopardy concerns because there was no language in the waiver form, SCI, or at the plea colloquy informing defendant that his plea to one count of rape in the first degree would be in full satisfaction of the offenses alleged in the felony complaint. Consequently, defendant could potentially be subjected to a subsequent prosecution for the offenses not identified in the waiver of indictment or charged in the SCI … . People v Meeks, 2021 NY Slip Op 01925, Fourth Dept 3-26-21

CRIMINAL LAW.

THERE WAS NO EVIDENCE DEFENDANT POSSESSED THE FIREARM BEFORE FORMING THE INTENT TO SHOOT; THE POSSESSION OF A WEAPON SENTENCE MUST RUN CONCURRENTLY WITH THE SENTENCES FOR THE SHOOTING-RELATED OFFENSES (FOURTH DEPT).

The Fourth Department, directing that the sentences run concurrently, noted there was no evidence defendant possessed the loaded firearm before he formed the intent to shoot the victim:

Defendant appeals from a judgment convicting him upon his plea of guilty of three counts of robbery in the first degree (Penal Law § 160.15 [1], [4]), two counts each of burglary in the first degree (§ 140.30 [2], [4]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), and one count each of assault in the first degree (§ 120.10 [4]), attempted murder in the second degree (§§ 110.00, 125.25 [1]), and criminal possession of stolen property in the fourth degree (§ 165.45 [5]). … . * * *

Where a defendant is charged with both criminal possession of a weapon in violation of Penal Law § 265.03 (3) and a different crime that has an element involving the use of that weapon, consecutive sentencing is permissible if "[the] defendant knowingly unlawfully possesses a loaded firearm before forming the intent to cause a crime with that weapon" such that the possessory crime has already been completed … . The People have the burden of establishing that consecutive sentences are legal, i.e., that the two crimes were committed through separate and distinct acts … . …

The People failed to meet their burden inasmuch as there are no facts alleged in the counts of the indictment to which defendant pleaded guilty or in the plea allocution that would establish that defendant possessed the loaded firearm prior to forming his intent to shoot the victim … or that the act of possessing the loaded firearm "was separate and distinct from" his act of shooting the victim … . People v Boyd, 2021 NY Slip Op 01897, Fourth Dept 3-26-21

CRIMINAL LAW.

WHEN DEFENDANT BECAME DISRUPTIVE JUST BEFORE THE PROSPECTIVE JURORS WERE BROUGHT IN THE JUDGE HAD HIM REMOVED FROM THE COURTROOM WITHOUT FIRST WARNING HIM AS REQUIRED BY STATUTE; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined the failure to warn defendant before removing him from the courtroom during jury selection required a new trial:

On the morning that jury selection was scheduled to begin, but before the prospective jurors had been brought into the courtroom, defendant began shouting, insisting that the court was calling him by the wrong name and that he could not wear the clothes provided to him. The court immediately had defendant removed from the courtroom, stating that it deemed defendant to have waived his right to be present based on his "outburst and behavior." After defendant had been removed, the court stated that defendant's "voice was raised to a level of almost deafening proportions, and it was very clear that it was imminent he was going to turn violent." Defendant was absent for the selection of the first 11 jurors, but returned to the courtroom at the next recess and did not cause any further disruption.

A defendant has a fundamental right to be present at all material stages of trial, and that right is "violated by his or her absence during the questioning of prospective jurors during the impaneling of the jury" … . However, "[a] defendant's right to be present during trial is not absolute" … . CPL 260.20 provides, in relevant part, "that a defendant who conducts himself in so disorderly and disruptive a manner that his trial cannot be carried on with him in the courtroom may be removed from the courtroom if, after he has been warned by the court that he will be removed if he continues such conduct, he continues to engage in such conduct" … . People v Brown, 2021 NY Slip Op 01668, Fourth Dept 3-19-21

CRIMINAL LAW.

WHETHER THE HOUSE FIRE WAS DELIBERATELY SET WAS NOT RELEVANT TO THE ESSENTIAL ELEMENTS OF THE INSURANCE-FRAUD OFFENSES STEMMING FROM OVERSTATING THE VALUE OF DESTROYED ITEMS AND MAKING CLAIMS FOR ITEMS DEFENDANT DID NOT OWN OR POSSESS; THEREFORE THE PROBATIVE VALUE OF THE ARSON INVESTIGATOR'S TESTIMONY OUTWEIGHED ITS PROBATIVE EFFECT; ALTHOUGH THE ERRORS WERE NOT PRESERVED, THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined the arson investigator's testimony the fire had been deliberately set was irrelevant to the insurance-fraud offenses and was sufficiently prejudicial to require a new trial. The defendant was charged with making false insurance claims for objects alleged to be lost in the house fire:

… [T]he investigator's conclusion was highly prejudicial because it allowed the jury to speculate that defendant burned the house down with all of her possessions inside of it in order to collect the insurance money, which, if true, would be conclusive of her alleged intent to defraud. That prejudice was compounded by the limiting instructions that the court provided to the jury after opening statements. Inasmuch as the court had concluded prior to trial that the evidence in question was relevant and admissible for the purpose of completing the narrative of events, the court appropriately instructed the jury that the evidence would be received only for that limited purpose and, consistent with defendant's request, also instructed the jury that she had not been charged with arson. However, the court further instructed the jury that, "every time you hear the word arson, . . . you should be thinking about not tying the arson to [defendant]." We conclude that the further instruction, if anything, had the effect of linking defendant to the arson in the minds of the jurors. Moreover, the prejudice to defendant was also compounded by the court's failure to issue appropriate limiting instructions when the evidence in question was admitted and during the final charge to the jury … . Although defendant failed to preserve any challenge to the content or timing of the limiting instructions … we exercise our

power to review in the interest of justice her contentions in those respects … . People v Murray, 021 NY Slip Op 00722, Fourth Dept 2-5-21

DENTAL MALPRACTICE.

IN THIS DENTAL MALPRACTICE ACTION, PLAINTIFF RAISED ISSUES OF FACT ABOUT THE APPLICABILITY OF THE CONTINUOUS TREATMENT DOCTRINE TO TOLL THE STATUTE OF LIMITATIONS, THE DEVIATION FROM THE STANDARD OF CARE, AND THE LACK OF INFORMED CONSENT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court in this dental malpractice action, determine there were questions of fact about (1) the applicability of the continuous treatment doctrine to toll the statute of limitations, (2) the deviation from the standard of care, and (3) the lack of informed consent:

The instant case does not involve gaps in treatment longer than the 2½-year statute of limitations … , and "a discharge by a physician [or dentist] does not preclude application of the continuous treatment toll if the patient timely initiates a return visit to complain about and seek further treatment for conditions related to the earlier treatment" … . …

… [B]y submitting the affidavits of her experts, plaintiff raised issues of fact whether defendants deviated from the standard of care and whether such deviation was a proximate cause of plaintiff's injuries … . …

… [P]laintiff raised an issue of fact whether she would have opted for extraction of several teeth and placement of implants had she been fully informed … . Bellamy v Baron, 2021 NY Slip Op 00953, Fourth Dept 2-11-21

EMPLOYMENT LAW.

DEFENDANTS WERE NOT ENTITLED TO A DIRECTED VERDICT ON THE EMPLOYMENT DISCRIMINATION CAUSE OF ACTION; DEFENSE COUNSEL'S REMARK ABOUT THE FINANCIAL CONSEQUENCES OF A PLAINTIFF'S VERDICT DEPRIVED PLAINTIFF OF A FAIR TRIAL; THE COURT OF CLAIMS HAS EXCLUSIVE JURISDICTION OVER ACTIONS SEEKING MONEY DAMAGES FROM THE STATE, RELEVANT CAUSES OF ACTION PROPERLY DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a dissent, determined defendants' motion for a directed verdict should not have been granted and the defense attorney's remark in summation warranted a new trial. Plaintiff alleged he was denied promotion at the Central New York Psychiatric Center (CNYPC) because the defendants deemed him mentally unstable due to his status as a veteran of the Iraq war. The directed verdict awarded defendants on that issue was reversed. The defense counsel's remark in summation that one of the individual defendants would have to "open up her checkbook and write somebody a check" if plaintiff wins deprived plaintiff of a fair trial (the state is required to indemnify defendants as state officers and employees). This case was brought in Supreme Court. The Fourth Department noted that the Court of Claims has exclusive jurisdiction over actions against the state for money damages (apparently the relevant causes of action were properly dismissed for that reason):

Plaintiff … contends that the court erred in granting defendants' motion for a directed verdict with respect to plaintiff's cause of action under the New York Human Rights Law alleging discrimination based on military status … . We agree. * * * Based upon the … testimony that plaintiff was not promoted because "[t]here was a question after [plaintiff's] military service about his [mental] stability," the jury could have rationally inferred that defendants refused to promote plaintiff in part because they perceived that combat veterans, such as plaintiff, develop dangerous and disqualifying mental health issues as a result of their military service. Thus, "it cannot be said that 'it would . . . be utterly irrational for a jury to reach [a verdict in favor of plaintiff]' " … . * * *

… [R]emarks about a party's financial status "have been universally condemned by the courts of this State" … . The defense attorney's argument that his clients should

not be "forced to open [their] checkbook" likely conveyed that the individual defendants would be required to pay any damages out-of-pocket. That remark was "grossly improper" … . Moreover, it misrepresented the law to the jury. The State has a duty to indemnify its employees for judgments that arise out of actions within the scope of their public duties, although that duty does not arise from injury or damage resulting from intentional wrongdoing on the part of the employee (see Public Officers Law § 17 [3] [a]). Hubbard v New York State Off. of Mental Health, Cent. N.Y. Psychiatric Ctr., 2021 NY Slip Op 01661, Fourth Dept 3-19-21

EMPLOYMENT LAW.

HUMAN RIGHTS LAW CLAIMS DID NOT ALLEGE DISCRIMINATION; INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS DOES NOT APPLY TO TERMINATION OF AT WILL EMPLOYMENT; WORKERS' COMPENSATION IS THE EXCLUSIVE REMEDY FOR NEGLIGENCE ACTIONS AGAINST AN EMPLOYER; PUNITIVE DAMAGES NOT AVAILABLE FOR THE EMPLOYMENT DISCRIMINATION OR BREACH OF CONTRACT CAUSES OF ACTION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that several of plaintiff's causes of action, as well as claims for punitive damages, should have been dismissed. Plaintiff's lawsuit stemmed from alleged wrongful conduct in terminating the plaintiff's employment and evicting him from a work-provided apartment:

… [P]laintiff alleges that he engaged in "protected activity" when his attorney sent a letter to one or more defendants about an altercation between plaintiff and a neighbor. We agree with defendants that … sending the letter did not constitute "protected activity" because the letter did not suggest, much less allege, that anyone had engaged in "unlawful discrimination," i.e., conduct prohibited by the [Human Rights Law]. …

… [I]t is well established that "[t]ort causes of action alleging intentional infliction of emotional distress . . . 'cannot be allowed in circumvention of the unavailability

of a tort claim for wrongful discharge or the contract rule against liability for discharge of an at-will employee' " … . …

With respect to the fifth and eighth causes of action (negligent infliction of emotional distress and negligent hiring, training, and supervision, respectively), it is well established that workers' compensation benefits are the "exclusive remedy for . . . injuries allegedly caused by the negligence of [a person's] employer and fellow employee" … . …

Punitive damages are not available for the employment discrimination claims in the complaint … . … [T]he breach of contract claim … does not qualify for punitive damages because plaintiff does not allege that [the] alleged breach of contract was " 'aimed at the public generally' " … . Miller v National Prop. Mgt. Assoc., Inc., 2021 NY Slip Op 00729, Fourth Dept 2-5-21

EQUAL ACCESS TO JUSTICE ACT.

PETITIONER SOUGHT ATTORNEY'S FEES AS THE PREVAILING PARTY PURSUANT TO NEW YORK'S EQUAL ACCESS TO JUSTICE ACT UNDER THE "CATALYST THEORY;" THE 4TH DEPARTMENT REJECTED THE CATALYST THEORY, FINDING PETITIONER WAS NOT THE PREVAILING PARTY UNDER THE TERMS OF THE STATUTE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that the so-called "catalyst theory" did not apply to New York's Equal Access to Justice Act (EAJA). The EAJA, in certain circumstances, allows a prevailing party to recover attorney's fees against the state. Here petitioner argued that petitioner's seeking reconsideration of a determination by the NYS Office for People with Developmental Disabilities (OPWDD) prompted the OPWDD to grant petitioner's application. Petitioner argued the request for reconsideration was the "catalyst" for the OPWDD's granting the application and petitioner was therefore entitled to attorney's fees. The Fourth Department determined petitioner was not a "prevailing party" within the meaning of the NYS EAJA:

This Court has yet to address the issue, but we now reject application of the catalyst theory in State EAJA cases. Where, as here, litigation is rendered moot by an administrative change in position, the petitioner or plaintiff has not prevailed "in the civil action" (CPLR 8602 [f]). Matter of Criss v New York State Dept. of Health, 2021 NY Slip Op 01642, Fourth Dept 3-19-21

FAMILY LAW.

AN AMENDED STIPULATED ORDER CONCERNING THE WIFE'S INTEREST IN THE HUSBAND'S LIFE INSURANCE AND 401k IN THE CONTEXT OF AN ONGOING DIVORCE ACTION, ISSUED AFTER THE HUSBAND'S DEATH, WAS WITHOUT EFFECT EVEN THOUGH THE ORGINAL STIPULATED ORDER WAS ISSUED ONE DAY BEFORE THE HUSBAND'S DEATH; THE DIVORCE ACTION ABATED UPON THE HUSBAND'S DEATH (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that the death of the husband abated the divorce action and an "amended stipulated order" issued after the husband's death concerning the wife's interest in the husband's insurance policy and 401k account was without effect. The original stipulated order had been issued one day before the husband's death:

It is well settled that "where one party to a divorce action dies prior to the rendering of a judicial determination which dissolves or terminates the marriage, the action abates inasmuch as the marital relationship between the parties no longer exists" … . "Although an exception to this rule exists where the court has made a final adjudication of divorce but has not performed 'the mere ministerial act of entering the final judgment,' " that exception does not apply here inasmuch as the court had merely granted some pretrial orders but had not made any final adjudication of divorce … . In this instance, the husband's death "abated the . . . action for a divorce and ancillary relief" … . Adams v Margulis, 2021 NY Slip Op 00971, Fourth Dept 2-11-21

FAMILY LAW.

EVIDENCE THE CHILD WAS OFTEN ABSENT FROM SCHOOL WARRANTED A HEARING ON FATHER'S PETITION FOR A MODIFICATION OF CUSTODY (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined father's petition for modification of custody should not have been dismissed without holding a hearing. There was evidence the child, now in third grade, was often absent from school:

In seeking to modify the stipulated custody order, the father was required to show "a change in circumstances 'since the time of the stipulation' " … . Here, the father and respondent mother entered into the stipulated order shortly after the child's fifth birthday, before she would have entered kindergarten. At the hearing on the petition, the court received the child's third-grade school attendance records in evidence. Although we cannot discern the precise number of absences from our review of the appellate record, the court expressed that it was "concerned" with the number of absences up to that point in the school year, of which there were approximately 30. Thus, we conclude that the father established a change in circumstances sufficient to warrant an inquiry into whether a change in custody is in the best interests of the child because the child's school records demonstrate that she had excessive school absences in the third grade … . Therefore, we reverse the order, reinstate the petition, and remit the matter to Family Court for a hearing on the best interests of the child … . Matter of Myers v Myers, 2021 NY Slip Op 01916, Fourth Dept 3-26-21

FAMILY LAW.

FAILURE TO TIMELY FILE THE OBJECTIONS TO THE SUPPORT MAGISTRATE'S DETERMINATION DID NOT WARRANT DISMISSAL OF THE OBJECTIONS (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined that the failure to time file proof of service of respondent's objections to the determination of the Support Magistrate did not warrant dismissal of the objections:

Family Court Act § 439 (e) provides that a party filing objections to the determination of the Support Magistrate must serve those objections upon the opposing party, and that proof of service "shall be filed with the court at the time of filing of objections." Here, the record indicates that respondent timely filed his objections and served a copy of those objections upon petitioner on the same day, but respondent failed to file proof of service with Family Court until two days later.

Under the particular circumstances of this case, we substitute our discretion for that of Family Court and conclude that dismissal of respondent's objections is not warranted … . Although respondent failed to comply with the statutory deadline for filing proof of service, " '[s]trict adherence to this deadline is not required,' " and courts have " 'discretion to overlook a minor failure to comply with the statutory requirement' " … . Here, there is no dispute that petitioner was not prejudiced by the late filing inasmuch as she was served with a copy of respondent's objections within the statutory time period (see Family Ct Act § 439 [e]). Indeed, the record shows that petitioner filed a rebuttal to respondent's objections. Matter of Sigourney v Santaro, 2021 NY Slip Op 01591, Fourth Dept 3-19-21

FAMILY LAW.

FATHER'S PETITION FOR CUSTODY SHOULD NOT HAVE BEEN DISMISSED WITHOUT MAKING A DETERMINATION ON THE MERITS, MATTER REMITTED; THE USUAL PROOF REQUIREMENTS FOR AWARDING CUSTODY TO A NONPARENT DO NOT APPLY TO A TEMPORARY PLACEMENT WITH A NONPARENT (FOURTH DEPT).

The Fourth Department, remitting the matter for a hearing, determined father's petition for modification of custody should not have been dismissed as moot without making a determination of the merits. The court noted that the usual requirements for awarding custody to a nonparent did not apply to the maternal aunt in this case because she did not petition for custody and the children were merely placed with her temporarily:

The father initially filed a petition for modification of custody and visitation against the mother, seeking primary residential custody of their three children. Petitioner Genesee County Department of Social Services then commenced a neglect proceeding against the mother, and the mother consented to the entry of orders finding the subject children to be neglected children. Family Court held a joint hearing regarding the neglect petition and the father's custody petition … , after which the court placed the children with their maternal aunt with the mother's consent but over the father's objection, and dismissed the father's custody petition as moot.

… [W]e agree with the father that the court erred in dismissing his petition for modification of custody and visitation as moot without making a determination on the merits of his petition pursuant to Family Court Act article 6 … . We further agree with the father that, " '[a]s between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' " … . Nevertheless, on the facts of this case, we conclude that the maternal aunt did not have the burden of making a showing of extraordinary circumstances inasmuch as she did not file a petition in this matter and was not awarded custody of the children, but rather the children were placed with her for the pendency of the article 10 proceeding pursuant

to Family Court Act § 1017 … . Matter of Michael J.M. v Lisa M.H., 2021 NY Slip Op 01573, Fourth Dept 3-19-21

FAMILY LAW.

ONCE PETITIONER'S PATERNITY HAD BEEN ESTABLISHED BY GENETIC TESTING FAMILY COURT HAD THE AUTHORITY TO VACATE THE ACKNOWLEDGMENT OF PATERNITY (AOP) PREVIOUSLY EXECUTED BY MOTHER'S BOYFRIEND (FOURTH DEPT).

The Fourth Department, reversing (modifying) Family Court, determined that once petitioner had been established to be the father of the child by court-ordered genetic testing Family Court had the power to vacate mother's boyfriend's acknowledgment of paternity (AOP):

… [G]iven the continued existence of the AOP, we acknowledge respondents' concern that the order of filiation might have effectively created an impermissible three-parent arrangement for the subject child … . The court … had the power to vacate the AOP to address that concern … , and we conclude that the AOP should be vacated in order to eliminate any question that petitioner is the child's only legal father. We therefore modify the order by granting petitioner's motion in its entirety and vacating the AOP. Matter of Ryan M. E. v Shelby S., 2021 NY Slip Op 00717, Fourth Dept 2-5-21

FAMILY LAW.

PETITIONER DID NOT DEMONSTRATE THE NEGLECT PETITION WAS PROPERLY MAILED TO MOTHER AND MOTHER PRESENTED EVIDENCE REBUTTING THE PROCESS SERVER'S AFFIDAVIT; A HEARING ON WHETHER MOTHER WAS PROPERLY SERVED IS REQUIRED (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined a hearing on whether mother was properly served with the neglect petition was necessary:

… [P]etitioner failed in the first instance to establish that the documents were mailed to the mother's " 'last known address' " inasmuch as "[t]he affidavit of service says that the [papers] were mailed [by prepaid, first class mail] . . . , without identifying th[e] address" to which they were mailed … . In any event, even assuming, arguendo, that the process server's affidavit was sufficient to create the presumption of valid service, we conclude that the mother's submissions were sufficient to rebut that presumption.

The mother's attorney submitted an affidavit from his legal assistant establishing that the person who accepted service mistakenly thought the papers were for his daughter, who shared the same first name as the mother. That person also informed the legal assistant that the mother had never resided at that address and that the mother's father, with whom petitioner believed the mother was residing, "had moved out of the home months earlier." We thus conclude that the mother rebutted any presumption that she was properly served at her "actual place of business, dwelling place or usual place of abode so as to satisfy the requirements of CPLR 308 (2) [or (4)]" … . Additionally, we note that petitioner's own submissions in the application for an order of substituted service raise a question whether the mother ever resided at the address listed in the affidavit of service inasmuch as that address was not among the numerous identified addresses for her. Matter of William A. (Jessica F.), 2021 NY Slip Op 01580, Fourth Dept 3-19-21

FAMILY LAW.

THE CONTEMPT APPLICATIONS IN THIS NEGLECT/CUSTODY PROCEEDING WERE JURISDICTIONALLY DEFECTIVE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the contempt charges in this neglect/custody proceeding were jurisdictionally defective:

We… conclude that the court erred in granting in part plaintiff's contempt applications because they were jurisdictionally defective under Judiciary Law § 756. Section 756 provides that a contempt "application shall contain on its face a notice that the purpose of the hearing is to punish the accused for a contempt of court, and that such punishment may consist of fine or imprisonment, or both, according to law together with the following legend . . . : WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT." It is well settled that the failure to include the notice or the warning language of Judiciary Law § 756 constitutes a jurisdictional defect, requiring the court to deny the application … .

Here, it is undisputed that plaintiff's initial and amended contempt applications did not include, verbatim, the required warning language of Judiciary Law § 756. Importantly, plaintiff's contempt applications omitted the language warning defendant that his "failure to appear in court may result in [his] immediate . . . imprisonment for contempt of court" (id.). Thus, because plaintiff's contempt applications failed to include the required warning language, they did not strictly comply with Judiciary Law § 756, rendering them jurisdictionally defective … . Rennert v Rennert, 2021 NY Slip Op 01630, Fourth Dept 3-19-21

FAMILY LAW.

THE ESTATE OF A PARTY TO A SEPARATION AGREEMENT MAY SEEK A DOWNWARD MODIFICATION OF THE AGREED MAINTENANCE PAYMENTS; THE DISSENT ARGUED ONLY THE PARTY, NOT THE ESTATE OF THE PARTY, CAN SEEK A DOWNWARD MODIFICATION AND THE MATTER SHOULD BE HANDLED IN PROBATE (FOURTH DEPT).

The Fourth Department, over a dissent, determined that the estate of a party to a separation agreement that was merged but not incorporated into a judgment of divorce could seek a downward modification of the maintenance payments. The dissent argued only the party to the agreement, not the estate of the party, could seek a downward modification based on extreme hardship:

FROM THE DISSENT:

… [T]his Court recently held that plaintiff and defendant's decedent entered into a Separation and Property Settlement Agreement (settlement agreement), which was incorporated but not merged into a judgment of divorce, whereby decedent agreed to pay lifetime maintenance to plaintiff that continued even in the event of decedent's death … . * * *

Pursuant to the Domestic Relations Law, "[w]here . . . [a separation agreement] remains in force, no modification of an order or judgment incorporating the terms of said agreement shall be made as to maintenance without a showing of extreme hardship on either party" (§ 236 [B] [9] [b] [1] …). A modification of maintenance based on extreme hardship is thus, personal to the parties who contracted as to the amount of maintenance in the separation agreement and, as noted, a modification of that amount has only been awarded in situations involving personal hardships. In my view, an "estate" can never establish a personal hardship and thus, is never entitled to a downward modification of maintenance. While defendant in this case submitted evidence that the continued payment of the maintenance obligation would pose a hardship on the estate, such a hardship is not upon any party to the settlement agreement. Indeed, it is only a hardship upon the beneficiaries of decedent's estate who wish to maximize their inheritance. In my view, any difficulty in the estate's ability to pay the amount of lifetime maintenance agreed to by decedent is an issue

that should be raised by the estate in the probate court when determining the reserve funds to be set aside to satisfy the maintenance obligation. Gardner v Zammit, 2021 NY Slip Op 00707, Fourth Dept 2-5-21

FAMILY LAW.

THE GENETIC MARKER TESTING TO ESTABLISH PATERNITY SHOULD NOT HAVE BEEN ORDERED IN THE ABSENCE OF A HEARING TO DETERMINE THE BEST INTERESTS OF THE CHILD (FOURTH DEPT).

The Fourth Department. reversing Family Court, determined genetic marker testing to establish paternity should not have ordered without holding a hearing to determine if the testing is in the best interests of the child:

We agree with the mother that the court erred in ordering genetic marker testing without first holding a hearing to determine whether testing was in the best interests of the child. It is undisputed that, at the time of the child's birth, respondents were married to one another, and respondents alleged that they had access to each other during the relevant time frame such that the presumption of legitimacy would apply. Although the court has the authority to order genetic marker and DNA testing in order to establish paternity, "[n]o such test shall be ordered . . . upon a written finding by the court that it is not in the best interests of the child on the basis of . . . the presumption of legitimacy of a child born to a married woman" … . On this record, "[t]here was insufficient evidence before the court to determine the child's best interests," and we thus conclude that, before ordering the genetic marker test, the court should have conducted a hearing to determine whether it was in the best interests of the child to do so, based on the presumption of legitimacy … . Matter of Kirk M.B. v Rachel S., 2021 NY Slip Op 01602, Fourth Dept 3-19-21

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF, A BUILDING MAINTENANCE WORKER, FELL FROM AN 8-FOOT UNSECURED LADDER WHEN ATTEMPTING TO REMOVE A BIRD'S NEST FROM A GUTTER; THE ACTIVITY WAS NOT ROUTINE CLEANING AND PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION; TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, over an extensive two-justice dissent, determined plaintiff, who maintained a mixed use building, was engaged in a "Labor Law 240 (1)" covered activity when he was attempting to remove a bird's nest from a gutter. Plaintiff fell from an 8-foot unsecured ladder when he was surprised by a bird flying out of the nest:

… [P]laintiff's work in removing the bird's nest from one of the building's gutters was not routine cleaning. Plaintiff had never before been given such a task during his time working on the premises. Indeed, the reason for removing the nest was, in part, to prevent the further accumulation of bird excrement under the nest. Plaintiff's supervisor characterized the task of removing the nest as nonroutine cleaning. In addition, removing the bird's nest from the gutter, which was located above the tenant's entry door, necessarily involved elevation-related risks that are not generally associated with typical household cleaning … . Although plaintiff's work did not necessitate the use of specialized equipment or expertise, nor was it performed in conjunction with any construction, renovation or repair project on the building … , those factors are not dispositive in light of the atypical nature of the work and its attendant elevation-related risks and, moreover, the fact that plaintiff's task involved the removal of extraneous materials that had formed in the gutter not due to its normal operation … . Healy v Est Downtown, LLC, 2021 NY Slip Op 00699, Fourth Dept 2-5-21

LABOR LAW-CONSTRUCTION LAW.

THE ACKNOWLEDGED VIOLATION OF THE INDUSTRIAL CODE WAS MERELY "SOME EVIDENCE OF NEGLIGENCE" TO BE CONSIDERED BY THE FACTFINDER AND WAS NOT SUFFICIENT TO WARRANT SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF ON THE LABOR LAW 241 (6) CAUSE OF ACTION (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court determined plaintiff was not entitled to summary judgment on the Labor Law 241 (6) cause of action, despite the acknowledged violation of an Industrial Code provision, 12 NYCRR 23-1.7 (d). Plaintiff alleged he slipped and fall on metal decking on which there was some snow. 12 NYCRR 23-1.7 (d) requires that snow be removed from places where worker walk. The Fourth Department noted that the violation of the regulation, as opposed to a statute, is merely "some evidence of negligence" to be considered by the jury:

… [P]laintiff's claim that defendants are liable under Labor Law § 241 (6) is based on the alleged violation of 12 NYCRR 23-1.7 (d), which, in pertinent part, directs that workers not be permitted to use "a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition" and requires that substances such as snow and ice be "removed . . . or covered to provide safe footing." It is undisputed that "12 NYCRR 23-1.7 (d) mandates a distinct standard of conduct, rather than a general reiteration of common-law principles, and [thus] is precisely the type of 'concrete specification' " upon which liability under section 241 (6) may be premised … . Moreover, defendants do not challenge plaintiff's showing that the subject regulation was violated. As defendants correctly contend, however, the violation of 12 NYCRR 23-1.7 (d) is not conclusive with respect to defendants' liability and, instead, merely constitutes "some evidence of negligence and thereby reserve[s], for resolution by a [factfinder], the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances" … . In particular, we conclude that plaintiff's own submissions, including the deposition of [defendant] Burke's owner who testified—in contrast to plaintiff's testimony—regarding his efforts to clear

snow from the metal decking upon arriving at the work site prior to any workers, "raised factual issues with respect to the reasonableness of the safety measures undertaken at the work site" … . Chrisman v Syracuse Soma Project, LLC, 2021 NY Slip Op 01663, Fourth Dept 3-19-21

LABOR LAW-CONSTRUCTION LAW.

THE APPLICABLE INDUSTRIAL CODE PROVISION APPLIES TO MORE THAN JUST THE OBSTRUCTION OF PASSAGEWAYS; IT ALSO APPLIES TO BUILDING MATERIAL WHICH IS NOT PROPERLY STORED AND SECURED (AND FALLS); PLAINTIFF'S LABOR LAW 241 (6) CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff's Labor Law 241 (6) cause of action should not have been dismissed in this falling object case. Plaintiff was struck by a component of an unbuilt mail box which fell:

Plaintiff's Labor Law § 241 (6) claim is predicated on 12 NYCRR 23-2.1 (a) (1), which provides in relevant part that "[a]ll building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare" … . Contrary to defendants' assertion, the scope of 12 NYCRR 23-2.1 (a) (1) is not limited exclusively to obstructed thoroughfares … . Rather, the plain text of the regulation creates three distinct obligations and potential sources of liability: first, "[a]ll building materials shall be stored in a safe and orderly manner"; second, "[m]aterial piles shall be stable under all conditions"; and third, "[m]aterial piles shall be . . . so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare" … . …

… [W]e agree with plaintiff that the mailbox component at issue qualifies as a "building material[]" within the meaning of 12 NYCRR 23-2.1 (a) (1), and we further agree with plaintiff that triable issues of fact exist regarding the "safe[ty] and orderl[iness]" of the "manner" in which defendants "stored" that "building

material[].” Slowe v Lecesse Constr. Servs., LLC, 2021 NY Slip Op 01887, Fourth Dept 3-26-21

LABOR LAW-CONSTRUCTION LAW.

THERE WAS A QUESTION OF FACT WHETHER THE LEVEL OF CONTROL EXERCISED BY THE DEFENDANT OVER THE CONSTRUCTION WAS SUCH THAT HE WAS NOT ENTITLED TO THE HOMEOWNER’S EXEMPTION IN THIS LABOR LAW 240(1) AND 241(6 ACTION; COMPLAINT REINSTATED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the defendant’s motion for summary judgment in this Labor Law 240 (1) and 241 (6) action should not have been granted. Plaintiff fell from an unsecured ladder used to get from the basement to the first floor of the building under construction. Supreme Court had ruled the statutory homeowner’s exemption insulated the defendant from liability:

… [P]laintiff testified that defendant supplied the ladders that were used by the contractors, and the nonparty contractor testified that defendant was on site giving direction nearly every day. The nonparty contractor had asked defendant several times prior to plaintiff’s accident for permission to build stairs from the basement to the first floor, insisting that it was necessary to allow for safer and easier access to the first floor. Although defendant was aware that workers had been entering the house through the basement and using a ladder to access the first floor, he refused permission to build the stairs until after plaintiff’s accident, at which time defendant immediately directed the nonparty contractor to build the stairs. Such participation goes “far beyond ‘[a] homeowner’s typical involvement in a construction project’ ” … .. Indeed, the nonparty contractor further testified that a real estate limited liability company of which defendant was a member had hired him to perform work on the construction of a six-story building, suggesting that defendant had a degree of “sophistication or business acumen” such that he was in a position to know about and insure himself against his exposure to absolute liability … . O’Mara v Ranalli, 2021 NY Slip Op 00982, Fourth Dept 2-11-21

MEDICAID.

A CORPORATION OPERATING A SKILLED NURSING FACILITY MAY BRING A PLENARY ACTION BASED UPON THE DENIAL OF MEDICAID BENEFITS FOR ONE OF ITS RESIDENTS; NO NEED TO EXHAUST ADMINISTRATIVE REMEDIES AND NOT SUBJECT TO THE FOUR-MONTH STATUTE OF LIMITATIONS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the corporation that operates a skilled nursing facility may bring a plenary action based on the denial of Medicaid benefits for one of its residents:

Plaintiff, a domestic corporation that operates a skilled nursing facility, commenced this action seeking a declaratory judgment or money damages for expenses it allegedly incurred in providing care for one of its residents after the resident was determined to be ineligible for Medicaid benefits during a penalty period of 11.74 months. Defendant moved to dismiss the complaint on the grounds, inter alia, that plaintiff failed to exhaust its administrative remedies and that the statute of limitations had expired … .

… [A]skilled nursing facility such as plaintiff "may bring a plenary action in its own right against the agency designated to declare Medicaid eligibility" … . In such a plenary action, the facility is "not bound by the patient's failure to request an administrative appeal of the local agency's denial of medical assistance" or "by the four-month Statute of Limitations contained in CPLR 217" … . VDRNC, LLC v Merrick, 2021 NY Slip Op 00945, Fourth Dept 2-11-21

MEDICAID.

CERTAIN TRANSFERS AND LOANS SHOULD NOT HAVE BEEN INCLUDED IN THE CALCULATION FOR THE PERIOD OF MEDICAID INELIGIBILITY (FOURTH DEPT).

The Fourth Department, reversing (modifying) the NYS Department of Health (DOH), determined several transfers and loans made before petitioner was

diagnosed with Parkinson's in 2016 should not have been included in the calculation for the period of Medicaid ineligibility. The facts are too complex to summarize here:

… "T]he relevant standard is not whether [petitioner] could or should have foreseen that nursing home placement might eventually become necessary, but whether she made the requisite showing that the transfers were made 'exclusively for a purpose other than to qualify for medical assistance' (Social Services Law § 366 [5] [e] [4] [iii] [B]). The fact that a future need for nursing home care may be foreseeable for a person of advanced age with chronic medical conditions is not dispositive of the question whether a transfer by such a person was made for the purpose of qualifying for such assistance" … . Matter of Underwood v Zucker, 2021 NY Slip Op 00951, Fourth Dept 2-11-21

MEDICAL MALPRACTICE.

MENTAL HEALTH TREATMENT PROVIDERS, WHO WERE TREATING MOTHER, DID NOT OWE A DUTY OF CARE TO HER SON, WHO WAS STABBED AND KILLED BY MOTHER (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant medical/mental health facilities and psychiatrist, who were treating plaintiff's wife, did not owe a duty to plaintiff's son, who was killed by plaintiff's wife. Plaintiff had called defendant Unity Mental Health (UMH) several times seeking additional care because his wife's condition was worsening. Plaintiff was told his wife should keep her psychiatric appointment which was two weeks away. Two days later plaintiff's wife stabbed their son (decedent):

Generally, medical providers owe a duty of care only to their patients, and courts have been reluctant to expand that duty to encompass nonpatients because doing so would render such providers liable "to a prohibitive number of possible plaintiffs" … .The scope of that duty of care has, on occasion, been expanded to include nonpatients where the defendants' relationship to the tortfeasor " 'place[d] [them] in the best position to protect against the risk of harm,' " and "the balancing of factors such as the expectations of the parties and society in general, the proliferation of

claims, and public policies affecting the duty proposed herein . . . tilt[ed] in favor of establishing a duty running from defendants to plaintiffs under the facts alleged" … . Under the circumstances of this case, however, we conclude that those factors do not favor establishing a duty running from defendants to decedent. The complaint herein does not allege that plaintiff's wife sought treatment specifically in order to prevent physical injury to decedent or her family, that defendants were aware whether she had threatened or displayed violence towards her family in the past, or that defendants directly put in motion the danger posed by the patient … . Cardenas v Rochester Regional Health, 2021 NY Slip Op 01641, Fourth Dept 3-19-21

MUNICIPAL LAW.

THE COURT LACKED AUTHORITY TO DEEM A NOTICE OF CLAIM TIMELY FILED MORE THAN ONE YEAR AND 90 DAYS AFTER THE CAUSE OF ACTION (SLIP AND FALL) ACCRUED, EVEN THOUGH THE SUMMONS AND COMPLAINT WAS SERVED WITHIN THAT TIME PERIOD; A NOTICE OF CLAIM FILED MORE THAN 90 DAYS AFTER THE CAUSE OF ACTION ACCRUES WITHOUT LEAVE OF COURT IS A NULLITY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the notice of claim served more than 90 after the slip and fall without leave of court was a nullity. The court further determined that the request for an order deeming the notice of claim timely served made more than one year and 90 days after the slip and fall could not be authorized by the court, even where the summons and complaint was served within that time period:

It is well settled that an "application for the extension [of time within which to serve a notice of claim] may be made before or after the commencement of the action but not more than one year and 90 days after the cause of action accrued, unless the statute has been tolled" .. . Where that time expires before the application for an extension is made, "the court lack[s] the power to authorize late filing of the notice [of claim]" … .

Here, we conclude that "[p]laintiff's service of the summons and complaint within the limitations period does not excuse the failure to serve a notice of claim within that period," and we further conclude that "plaintiff's earlier service of a notice of claim is a nullity inasmuch as the notice of claim was served more than 90 days after the accident but before leave to serve a late notice of claim was granted" … . Thus, because plaintiff's cross motion seeking an order deeming her notice of claim to be timely filed "was made after the expiration of the maximum period permitted" for seeking such relief, i.e., one year and 90 days, Supreme Court should have denied plaintiff's cross motion, granted defendant's motion, and dismissed the complaint … . Bennett v City of Buffalo Parks & Recreation, 2021 NY Slip Op 01920, Fourth Dept 3-26-21

REAL PROPERTY LAW.

PLAINTIFF, WHO PURCHASED THE PROPERTY, SUED THE PRIOR OWNER IN NEGLIGENCE FOR DAMAGES STEMMING FROM PLAINTIFF'S EXPOSURE TO CHEMICAL CONTAMINATION ON THE PROPERTY; LIABILITY FOR A DANGEROUS CONDITION ON PROPERTY GENERALLY CEASES UPON TRANSFER OF THE PROPERTY; THE NEGLIGENCE CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supeme Court, determined plaintiff's negligence cause of action seeking damages for exposure to contaminants on the land plaintiff purchased from defendant city should have been dismissed. A property owner's liability for a dangerous condition ceases upon the transfer of the property:

We … agree with defendant that the court erred in denying the motion with respect to the negligence cause of action, and we therefore further modify the order accordingly. That cause of action is based on allegations that plaintiff was injured due to a dangerous condition on the parcel of property that defendant sold to plaintiffs, i.e., chemical contamination, to which plaintiff was exposed after the sale. It is well settled that "[o]ne's liability in negligence for the condition of land ceases when the premises pass out of one's control before injury results. Such is the general

rule" … . Thus, under that general rule, defendant's liability for negligence based on a dangerous condition on the property ended when it sold the parcel to plaintiffs … , and "liability may be imposed upon defendant only if the allegedly dangerous condition . . . existed at the time [it] relinquished possession and control of the premises 'and the new owner has not had a reasonable time to discover the condition, if it was unknown, and to remedy the condition once it is known' " … .

Here, defendant met its burden on the motion of establishing that any injury allegedly sustained by plaintiff was caused by exposure after defendant sold the property. In response, "plaintiff[s have] offered nothing to show that [they, as] the new owner[s,] did not have adequate time to discover and remedy such defects" … . Powers v City of Geneva, 2021 NY Slip Op 01684, Fourth Dept 3-19-21

SLIP AND FALL.

IN THE FOURTH DEPARTMENT, UNLIKE IN THE SECOND DEPARTMENT, A MUNICIPALITY MOVING FOR SUMMARY JUDGMENT IN A SLIP AND FALL CASE NEED ONLY SHOW IT DID NOT HAVE WRITTEN NOTICE OF THE DANGEROUS CONDITION EVEN WHERE THE COMPLAINT ALLEGES THE MUNICIPALITY CREATED THE DANGEROUS CONDITION; HERE AN ONLINE COMPLAINT DID NOT SATISFY THE WRITTEN NOTICE REQUIREMENT; EVIDENCE A MUNICIPAL CONTRACTOR CREATED THE DANGEROUS CONDITION RAISED A QUESTION OF FACT ABOUT MUNICIPAL LIABILITY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined: (1) disagreeing with the Second Department, a municipality moving for summary judgment in a slip and fall case need only show it did not receive written notice of the dangerous condition and need not affirmatively show it did not create the dangerous condition even if alleged in the complaint; (2) if the lack of written notice is demonstrated the burden shifts to plaintiff to show the municipality created the condition; (3) the written notice requirement is not necessarily satisfied by an online (CityLine) complaint; and (4) plaintiff raised a question of fact whether a municipal contractor created the

dangerous condition. Plaintiff was injured when his bicycle went into a pavement cutout concealed by a puddle:

… [D]efendant met its initial burden by submitting the affidavit of its commissioner of public works establishing that he did not receive prior written notice of the allegedly dangerous or defective condition in the street as required by its prior notification law … . As a result, the burden shifted to plaintiff to demonstrate the existence of a triable issue of fact as to the requisite written notice or, as relevant here, the applicability of the affirmative negligence exception … . …

… [As] CityLine complaints were simply received by complaint investigators and routed through a computer system to the appropriate department, and … such complaints were stored solely in the electronic file on the computer system, there is no indication in the record that such complaints were actually given to the commissioner of public works as required by the prior notification law … . …

… [T]here is circumstantial evidence that defendant created the defect through its contractor's actions and, thus, a triable issue of fact whether the affirmative negligence exception applies … . Horst v City of Syracuse, 2021 NY Slip Op 00708, Fourth Dept 2-5-21

TRAFFIC ACCIDENTS.

THE COURT OF CLAIMS PROPERLY DISMISSED THE CLAIM FINDING THAT CLAIMANT'S DECEDENT WOULD HAVE BEEN KILLED IN THE CAR ACCIDENT EVEN IF THE PROPER W BEAM AS OPPOSED TO THE IMPROPER BOX BEAM HAD BEEN ERECTED AS A BARRIER ACROSS THE CLOSED BRIDGE; TWO JUSTICE DISSENT ARGUED THE MAJORITY IMPROPERLY APPLIED A "BUT FOR" STANDARD OF CAUSATION (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the Court of Claims properly dismissed the claim on the ground that claimant's decedent would have been killed in the car crash even if the barrier the car struck was a proper W beam as opposed to an improper steel box beam. The beams were erected across a closed bridge and claimant's decedent was a passenger in the convertible which struck and

passed under the box beams at both ends of the bridge. The dissenters argued that, upon remittal after a reversal in the first appeal, the Court of Claims was called upon to determine if the box beam was a dangerous condition which was a proximate cause in aggravating the injuries and did not do so. The dissenters noted that claimant's decedent's head injuries occurred when the car passed under the second box beam and he survived for 18 hours after the accident:

… [W]e remitted the matter to the Court of Claims to determine "whether the steel box beam was a substantial factor in aggravating decedent's injuries and causing his death" … . …

… [W]e conclude that a fair interpretation of the evidence supports the court's determination that the steel box beam was not a substantial factor in aggravating decedent's injuries and causing his death. Claimant's witnesses testified with respect to the type of barrier that defendants were required to use to block access to the bridge, i.e., a W-beam. Claimant also presented evidence that decedent's impact with a W-beam would have led to the same result, i.e., a fatality.

FROM THE DISSENT:

… [T]he majority improperly elected to apply a "but for" standard of causation, rather than considering whether the negligence was a proximate cause of injury. In our view, applying a "but for" causation standard "would relieve from liability a negligent actor if the same harm might have been sustained had the actor not been negligent; yet the law is clear that that fact may be considered in fixing damages but does not relieve from liability" … . Reames v State of New York, 2021 NY Slip Op 00712, Fourth Dept 2-5-21