# NEW YORK APPELLATE DIGEST, LLC

Third Department
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January – March 2021

An Organized Compilation of the Summaries of Decisions Released by the Third 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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## ADMINISTRATIVE LAW.

### THE LEGISLATURE PROPERLY EMPOWERED THE COMMITTEE ON LEGISLATIVE AND EXECUTIVE COMPENSATION TO RECOMMEND LEGISLATIVE AND EXECUTIVE BRANCH SALARY INCREASES AND THE COMMITTEE DID NOT EXCEED THE SCOPE OF ITS AUTHORITY (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Lynch, determined the Committee on Legislative and Executive Compensation was properly created by the Legislature in the 2018 budget bill and the recommendations of salary increases did not exceed the scope Committee's authority:

Plaintiffs commenced this declaratory judgment action seeking, among other things, declarations that (1) the enabling statute was an unlawful delegation of legislative authority under the NY Constitution, (2) the Committee exceeded the scope of any authority lawfully delegated to it, (3) the disbursement of funds according to the Committee's report was unlawful under State Finance Law § 123, and (4) the Committee's report was void under the Open Meetings Law (see Public Officers Law art 7). Defendants filed a pre-answer motion to dismiss the complaint pursuant to CPLR 3211 (a) (7). * * *

"While the Legislature cannot delegate its lawmaking functions to other bodies, there is no constitutional prohibition against the delegation of power to an agency or commission to administer the laws promulgated by the Legislature, provided that power is circumscribed by reasonable safeguards and standards" … . Although the NY Constitution vests in the Legislature the authority to "'determine its own compensation'" … , plaintiffs have proffered no persuasive authority supporting the proposition that the Legislature may not delegate such authority to an independent body in the manner done here, so long as the Legislature makes the basic policy choice and provides reasonable standards and safeguards circumscribing the body's authority. Delgado v State of New York, 2021 NY Slip Op 01534, Third Dept 3-18-21

**ATTORNEYS.**

**THE FORMER SURROGATE, NOW IN PRIVATE PRACTICE, CANNOT REPRESENT A CLIENT IN A CASE WHICH WAS BEFORE HER AS SURROGATE (THIRD DEPT).**

The Third Department, reversing Surrogate's Court, over a two-justice dissent, determined the former Surrogate, who is now in private practice, cannot represent a client in a proceeding which was before her as Surrogate:

Respondent contends that Surrogate's Court erred in not granting her motion to disqualify petitioner's counsel. We agree. Just as a judge may not preside over a case that he or she was previously involved in as an attorney (see Judiciary Law § 14; 22 NYCRR 100.3 [E] [1] [b] [i]), an attorney may not appear for a client in a case that he or she previously presided over as a judge (see Judiciary Law § 17; … see also Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.12 [a]). To that end, Judiciary Law § 17 provides that a "former judge or surrogate shall not act as attorney or counsellor in any action, claim, matter, motion or proceeding, which has been before him [or her] in his [or her] official character." This prohibition is "absolute" and "establishes a bright-line disqualification rule" … . By our reading, this statute clearly operates to disqualify petitioner's counsel — who previously presided as the Surrogate over the probate of decedent's will and the issuance of letters testamentary and letters of trusteeship to respondent — from now representing petitioner in his claims against respondent involving the same estate and the same trust … . To the extent that Surrogate's Court determined that Rules of Professional Conduct (22 NYCRR 1200.00) rule 1.12 (a) would permit the former Surrogate to represent petitioner in this matter — a finding with which we do not agree — this rule cannot be relied upon to permit a representation agreement that is otherwise precluded by Judiciary Law § 17. Matter of Gordon, 2021 NY Slip Op 01294, Third Dept 3-4-21

**CIVIL PROCEDURE.**

**ALTHOUGH PLAINTIFF BANK IN THIS FORECLOSURE ACTION DID NOT HAVE A JUSTIFIABLE EXCUSE FOR FAILING TO COMPLY WITH THE 90-DAY DEMAND TO FILE A NOTE OF ISSUE PURSUANT TO CPLR 3216, THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED (THIRD DEPT).**

The Third Department, reversing Supreme Court, determined the complaint in this foreclosure action should not have been dismissed pursuant to CPLR 3216, even though plaintiff's excuse for failure to comply with the 90-day demand to file a note of issue was not justifiable:

Because there was no compliance with the 90-day demand, the party seeking to avoid dismissal had to demonstrate a "justifiable excuse for the delay and a good and meritorious cause of action" … . The opposition to defendant's motion advanced only a conclusory and unsubstantiated claim of law office failure by plaintiff's prior counsel as the justifiable excuse. Although the failure to detail and substantiate a claim of law office failure would justify dismissal of the complaint … , even when presented with an unjustifiable excuse, a court still retains some residual discretion to refuse dismissal of a complaint as a penalty under CPLR 3216 … .

… [S]ome of the delay in this case was not attributable to plaintiff. Taking into account that CPLR 3216 is "extremely forgiving of litigation delay" … , as well as the public policy of resolving disputes on the merits … , defendant's motion, under the particular circumstances of this case, should have been denied to the extent that it sought dismissal of the complaint, and plaintiff's cross motion should have been granted to the extent that it sought an extension of time to file the note of issue … . Chase Home Fin., LLC v Shoumatoff, 2021 NY Slip Op 01537, Third Dept 3-18-21

**CIVIL PROCEDURE.**

**CLASS CERTIFICATION FOR PERSONS DENIED PUBLIC ASSISTANCE BASED ON THE FAIR MARKET VALUE (FMV) OF THEIR VEHICLES WAS PROPER; THE OPT-IN PROCEDURE SHOULD BE USED TO IDENTIFY CLASS MEMBERS (THIRD DEPT).**

The Third Department, in a full-fledged opinion by Justice Lynch, determined the opt-in procedure should be used to identify members of the class who were denied public assistance based upon the fair market value (FMV) of their cars. The class certification by Supreme Court was found proper:

In our prior decision regarding this matter, we affirmed so much of Supreme Court's judgment as annulled a determination of the Office of Temporary and Disability Assistance (hereinafter OTDA) denying petitioner's application for public assistance … . We agreed with Supreme Court that the methodology that OTDA was using to calculate whether an applicant had available resources from an automobile — which focused on the fair market value (hereinafter FMV) of the applicant's vehicle in excess of the statutory exemption (see Social Services Law § 131-n [e]) regardless of whether the applicant had any equity interest therein — was "irrational and unreasonable" … . * * *

… [T]he opt-in approach would prove more efficient … . … In those instances where the opt-in notice is returned as undeliverable, OTDA should then be required to conduct a manual file review. Matter of Stewart v Roberts, 2021 NY Slip Op 01105, Third Dept 2-18-21

## CIVIL PROCEDURE.

### CPLR 205 (A), WHICH ALLOWS AN ACTION TO BE REFILED WITHIN SIX MONTHS OF DISMISSAL, DOES NOT APPLY TO MOTIONS; THE DEFENDANTS WERE AGGRIEVED BY AN ORDER WHICH STAYED THE PROCEEDINGS FOR FURTHER SUBMISSIONS AND THEREFORE COULD APPEAL THE ORDER (THIRD DEPT).

The Third Department, reversing Supreme Court, over a dissent, determined CPLR 205 (a), which allows an action to be refiled within six months of dismissal under certain conditions, does not apply to motions. Here the plaintiff sought to bring a second motion for a deficiency judgment pursuant to Real Property Actions and Proceedings Law (RPAPL) 1371 after the first was deemed untimely because it was not served within the 90-day time-frame. The dissenter argued the defendants were not aggrieved by the lower court's order which stayed the proceedings for further submissions and therefore could not appeal:

As an initial matter, plaintiff contends that, because Supreme Court did not ultimately rule on the relief sought — namely a deficiency judgment — and instead issued a stay to allow further submissions from the parties, defendants are not aggrieved by the ruling and the appeal should be dismissed. … We disagree. A party is aggrieved when the court denies the relief it requested or grants relief, in whole or in part, against a party who had opposed the relief … . Here, defendants opposed plaintiff's second motion for a deficiency judgment as untimely. Had Supreme Court agreed, the case would have been dismissed outright, and defendants would have been relieved of any deficiency judgment. Instead, they continue to be involved in litigation and remain exposed to the potential of said judgment and the financial consequences attendant thereto. Defendants are therefore clearly aggrieved by the finding of timeliness by Supreme Court. * * *

… [P]laintiff urges this Court to find the second motion timely by applying CPLR 205 (a), allowing it to file the second motion six months after the denial of the first motion. … Here, the statute provides that "[i]f an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, 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 provided that the new action would have been timely commenced at the time of commencement of the prior action" … . An action is defined as "a civil or criminal judicial proceeding" … . CPLR 105 defines an action to include a special proceeding, whereas a motion is defined as "an application for an order" (CPLR 2211). RPAPL 1371 (2) and (3) expressly direct that a motion for a deficiency judgment be made. Motions are not subject to the tolling provision of CPLR 205 (a). Had the Legislature intended to include motions in CPLR 205 (a), it could have done so and its failure to do so, is presumed to be intentional … . Trustco Bank v The Preserve Dev. Group Co., LLC, 2021 NY Slip Op 00350, Third Dept 1-21-21

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**CIVIL PROCEDURE.**

**THERE IS NO NEED TO FILE AN AFFIDAVIT OF SERVICE AFTER SERVICE OF A WARRANT AND NOTICE OF EVICTION; THE MATTER WAS CONSIDERED AS AN EXCEPTION TO THE MOOTNESS DOCTRINE (THIRD DEPT).**

The Third Department, reversing Supreme Court, over a two-justice dissent, determined that the failure file an affidavit of service after serving the warrant and notice of eviction did not affect the validity of the service of the warrant of eviction which triggers the 14-day waiting period before execution of the warrant. The court noted that the matter was moot because the petitioner was subsequently evicted based on a different warrant, but the matter should be heard on appeal because the circumstance is likely to recur. The two dissenters argued the mootness of the matter precluded appeal:

… [T]he issuance of a warrant is the court's last act in a summary proceeding, as denoted by the phrase, "Upon rendering a final judgment for [the owner], the court shall issue a warrant" (RPAPL 749 [1]). The execution of the warrant terminates the lease … . Likewise, the execution of the warrant terminates the summary proceeding and the jurisdiction of the court … Because the court no longer has jurisdiction, the filing of the affidavit of service is superfluous. This stands in stark contrast to the purpose of the affidavit of service at the commencement of the summary proceeding,

where it suffices as proof that the party was properly served pursuant to law, as proper service is required to bring a respondent within the jurisdiction of the court … .

… [W]e find that filing the affidavit of service at the conclusion of service of a warrant of eviction is not required, and the 14-day notice begins the day following the date of service, posting or mailing, whichever is later … . Matter of Dixon v County of Albany, 2021 NY Slip Op 01819, Third Dept 3-25-21

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**CONSTITUTIONAL LAW.**

**THE REPEAL OF THE RELIGIOUS EXEMPTION TO THE PUBLIC HEALTH LAW REQUIRING VACCINATION AGAINST MEASLES IS CONSTITUTIONAL (THIRD DEPT).**

The Third Department, in a full-fledged opinion by Justice Pritzker, determined that the repeal of the religious exemption to the Pubic Health Law which allowed parents to refuse to vaccinate their children against measles was constitutional. The statute also allows a medical exemption, which was not repealed. The declaratoy-judgment complaint was dismissed for failure to state a cause of action:

It is well settled that, "the right of free exercise [of religion] does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that [one's] religion prescribes (or proscribes)" … . As such, to state a federal free exercise claim, a plaintiff generally must establish that "the object or purpose of a law is the suppression of religion or religious conduct" … . Significantly, if the law is neutral and of general applicability, a rational basis is all that is required to meet constitutional muster under the First Amendment, even if the law "proscribes (or prescribes) conduct that [one's] religion prescribes (or proscribes)" … . * * *

Those school children with medical exemptions have been advised by a physician that certain immunizations may be detrimental to their physical health (see Public Health Law § 2164 [8]). There are many arguments to be made as to how children formerly subjected to the religious exemption may also be detrimentally impacted,

however, documented concerns as to the physical well-being of children with medical exemptions is a sufficient basis upon which to distinguish the two groups. Indeed, it would be irrational to sacrifice the physical health of some children in the pursuit of protecting public health. In attempting to address the vulnerabilities in its current immunization scheme, the Legislature was permitted to exercise such "broad discretion required for the protection of the public health" … . F.F. v State of New York, 2021 NY Slip Op 01541, Third Dept 3-18-21

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**CRIMINAL LAW.**

**COUNTY COURT'S TELLING DEFENDANT HIS SENTENCE WOULD BE ENHANCED IF HE DID NOT COOPERATE WITH THE PROBATION DEPARTMENT DID NOT ADEQUATELY INFORM DEFENDANT HIS STATEMENT IN THE PROBATION INTERVIEW THAT HE DID NOT REMEMBER THE BURGLARY WOULD TRIGGER AN ENHANCED SENTENCE; SENTENCE VACATED (THIRD DEPT).**

The Third Department, vacating defendant's sentence, determined that County Court's telling defendant he would enhance defendant's sentence if defendant did not cooperate with the Probation Department did not adequately inform defendant his sentence would be enhanced if he told the Probation Department he did not remember the burglary to which he entered a plea:

Prior to adjourning the matter for sentencing, County Court stated to defendant, "It's important that you cooperate with the Probation Department . . ., because if you . . . didn't cooperate with the presentence investigation report, then I could enhance the sentence and sentence you to more time." County Court did not, however, expressly advise defendant (and defendant, in turn, did not agree) that he must provide truthful answers to the Probation Department, refrain from making statements that were inconsistent with his sworn statements during the plea colloquy and/or avoid any attempt to minimize his conduct in the underlying burglary … . Further, County Court summarily denied defendant's oral motion to withdraw his plea upon this ground and, despite defendant's request for a hearing, County Court made no further inquiry as to defendant's allegedly inconsistent statements; rather, County Court simply concluded that defendant's stated inability to recall the burglary at the time

of his interview with the Probation Department constituted a failure to "cooperate" in the preparation of the presentence investigation report. Given the subjective nature of the court's requirement that defendant "cooperate" with the Probation Department and the court's corresponding lack of further inquiry, County Court erred in imposing an enhanced sentence without first affording defendant an opportunity to withdraw his plea … . People v Ackley, 2021 NY Slip Op 01293, Third Dept 3-4-21

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**CRIMINAL LAW.**

**DEFENDANT PRESENTED SUFFICIENT EVIDENCE OF INEFFECTIVE ASSISTANCE OF COUNSEL AND RECANTATION TESTIMONY TO WARRANT A HEARING ON HIS MOTION TO VACATE HIS CONVICTION, COUNTY COURT REVERSED (THIRD DEPT).**

The Third Department, reversing County Court, determined defendant's motion to vacate his conviction should not have been denied without a hearing. The defendant presented sufficient evidence of ineffective assistance of counsel and newly discovered evidence (recantation testimony), as well as evidence of actual innocence, to warrant a hearing on all three issues:

Defendant avers, in his sworn affidavit, that he repeatedly advised his trial counsel that the victim's allegation that defendant did not live with her at the time of the incident was false and that this false claim could be easily disproven, but trial counsel "was not interested and did nothing." Defendant supported this claim with four sworn affidavits of witnesses who all stated that defendant lived with the victim at the time of the incident. These affidavits were not merely conclusory, but rather contained factual allegations based upon firsthand observations by the witnesses … . * * *

… [D]efendant proffered three separate affidavits from witnesses, as well as text messages purportedly from the victim, asserting that they established that the victim had fabricated the allegations against him. * * *

Although we are mindful that recantation testimony is "inherently unreliable" … , the "totality of the circumstances" presented here demonstrates that a hearing is required to scrutinize the circumstances regarding the recantations as well as the credibility of the witnesses, and to create a record … . People v Stetin, 2021 NY Slip Op 01529, Third Dept 3-18-21

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**CRIMINAL LAW.**

**DEFENDANT'S FOR CAUSE CHALLENGE TO A JUROR IN THIS ARSON AND ANIMAL TORTURE CASE SHOULD HAVE BEEN GRANTED; THE JUROR EXPRESSED A HIGHLY EMOTIONAL RESPONSE TO INJURY TO ANIMALS AND THE COURT NEVER SPECIFICALLY ASKED IF SHOULD COULD BE FAIR AND IMPARTIAL (THIRD DEPT).**

The Third Department, reversing defendant's convictions of arson and torturing animals, determined defendant's for cause challenge to a juror who expressed her highly emotional reaction to the injury of animals should have been granted:

Defendant challenged this prospective juror for cause on the ground that "because of the animals, she couldn't be fair and impartial." County Court denied this challenge noting that prospective juror No. 16 had indicated that "it would be very difficult" and that "she would cry," not that she had stated she could not be impartial. Defendant then exercised a peremptory challenge to remove prospective juror No. 16, and later exhausted his peremptory challenges. Relative to the ability of prospective juror No. 16 to be fair and impartial due to her affinity for animals, despite being asked twice, she never unequivocally stated that she could be … . Thus, the court should have posed questions to rehabilitate the prospective juror "by obtaining such assurances or, if rehabilitation was not possible," excuse her … . By failing to do so, the court committed reversible error, considering that defendant exercised a peremptory challenge to remove this prospective juror and exhausted such challenges … . People v Rios, 2021 NY Slip Op 01530, Third Dept 3-18-21

**CRIMINAL LAW.**

**DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE FOUR WITNESSES WHO MAY HAVE CALLED INTO QUESTION THE EYEWITNESS'S ABILITY TO SEE THE SHOOTING AND THE DEFENDANT'S WHEREABOUTS AT THE TIME OF THE SHOOTING; DEFENDANT'S MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS SHOULD HAVE BEEN GRANTED (THIRD DEPT).**

The Third Department, reversing County Court, determined defendant's motion to vacate his conviction, after a hearing, should have been granted on ineffective assistance grounds. Defense counsel was aware of three witnesses who called into question whether the eyewitness to the shooting was outside where she could have seen the shooting, or inside where she could not. In addition defense counsel was aware of an alibi witness. Defense counsel did not sufficiently investigate these witnesses:

… [T]he case against defendant centered, in part, upon the identification of him as the shooter by the eyewitness. The witnesses identified in the letter sent by the People would have cast further doubt on the eyewitness' identification testimony, as well as whether she could have even seen the shooting. Yet, the record reflects that counsel made little efforts to reach out to these witnesses and minimal follow-up efforts.

Defendant also argues that he received ineffective assistance due to counsel's failure to investigate an alibi witness. At the hearing, defendant's uncle testified that defendant was with him in a house at the time of the shooting and that they were nowhere near the area where the shooting occurred. The uncle further stated that he was willing to testify at trial and left numerous voice messages for defendant's counsel. Defendant's counsel testified that she did not receive any voice messages from the uncle but recalled that the uncle would be an alibi witness. Other than stating in a conclusory manner that she was unable to locate the uncle, the record fails to show diligent attempts by counsel to reach him. The uncle's testimony would have bolstered the defense by providing the jury with conflicting evidence as to

defendant's whereabouts at the time of the shooting. In our view, the failure to investigate this potential alibi defense and the witnesses who would have refuted the eyewitness' location at the time of the shooting cannot be considered a reasonable trial strategy … . People v Lanier, 2021 NY Slip Op 01094, Third Dept 2-18-21

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**CRIMINAL LAW.**

**THE 202O AMENDMENT TO CPL 30.30 WHICH ALLOWS AN APPEAL ALLEGING A VIOLATION OF THE SPEEDY TRIAL STATUTE AFTER A GUILTY PLEA DOES NOT APPLY RETROACTIVELY (THIRD DEPT).**

The Third Department, in a full-fledged opinion by Justice Mulvey, determined the 2020 amendment to Criminal Procedure Law 30.30 which allows an appeal alleging the violation of the speedy trial statute after a guilty plea does not apply retroactively:

At the time of defendant's plea in November 2017 and his sentencing in April 2018, it was settled law that a guilty plea forfeited a defendant's right to claim that the trial court erred in denying his or her CPL 30.30 speedy trial motion … . However, CPL 30.30 (6), which was enacted as part of an omnibus budget bill in April 2019 and became effective on January 1, 2020 … , provides that "[a]n order finally denying a motion to dismiss pursuant to [CPL 30.30 (1)] shall be reviewable upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty." * * *

"… [I]t is a bedrock rule of law that, absent an unambiguous statement of legislative intent, statutes that revive time-barred claims if applied retroactively will not be construed to have that effect" … . People v Duggins, 2021 NY Slip Op 00336, Third Dept 1-21-21

**CRIMINAL LAW.**

**THE EVIDENCE DID NOT SUPPORT THE GROUND FOR SUPPRESSION OF A SHOTGUN AND SHOTGUN SHELL RELIED ON BY COUNTY COURT; ALTHOUGH THE PEOPLE RAISED OTHER GROUNDS FOR JUSTIFICATION OF THE SEARCH AND SEIZURE, THOSE GROUNDS CANNOT BE ADDRESSED ON APPEAL BECAUSE COUNTY COURT DID NOT RULE ON THEM; MATTER REMITTED FOR CONSIDERATION OF THE PEOPLE'S OTHER ARGUMENTS (THIRD DEPT).**

The Third Department determined the motion to suppress the shotgun and shotgun shell should have been granted on the ground raised on appeal. The People raised other grounds for suppression on appeal. The Third Department noted it cannot consider grounds for suppression on which the motion court did not rule on and remitted the matter for consideration of the other grounds for suppression raised by the People:

County Court found that the shotgun shell was discovered on defendant's person during a limited protective pat-down search of defendant, which then provided law enforcement with probable cause to search the vehicle. However, this finding is not supported by the evidence presented at the suppression hearing, which demonstrated that the search of the vehicle actually preceded the search of defendant's person and discovery of the shotgun shell. Although the People raised other arguments that could potentially justify the search of the vehicle and defendant's person, this Court is statutorily restricted from considering issues not ruled upon by the trial court … . We are therefore constrained to reverse the denial of defendant's suppression motion. Accordingly, we will hold the appeal in abeyance and remit the matter to County Court to review the evidence presented at the suppression hearing, consider any alternate bases to suppress the physical evidence and render a new determination on defendant's motion … . People v Kabia, 2021 NY Slip Op 00209, Third Dept 1-14-21

**CRIMINAL LAW.**

**THE TRAFFIC STOP AND CANINE SEARCH WERE JUSTIFIED; THE DISSENT ARGUED THE CANINE SEARCH WAS NOT (THIRD DEPT).**

The Third Department, over a dissent, determined the traffic stop was valid and the extended detention for a canine search was justified. The dissent argued the canine search was not justified:

The trooper testified that it was fully dark at the time of the stop and that he and defendant had their vehicles' headlights on, as did other vehicles passing on the roadway. When the trooper turned off his headlights briefly to check the license plate light, he observed that it did not illuminate the plate. Thus, it was "objectively reasonable" for the trooper to conclude that the requisite visibility did not exist and that a traffic violation had been committed … . Additionally, the trooper was entitled to rely upon the investigator's previous observation that defendant was driving without a seatbelt — a separate traffic violation that also provided probable cause for the stop … .

… [T]he trooper's observations of defendant engaging in behaviors commonly seen in outdoor drug transactions at a location known for such activity, his "slow roll response" and furtive movements after the trooper initiated the stop and his evasive, inconsistent answers to the trooper's questions created a founded suspicion that criminal activity was afoot … . Thus, the trooper properly extended the stop beyond its initial justification and conducted the canine search — which, in any event, took place only nine minutes after the initial stop and, according to the trooper, was completed in less than a minute … . People v Blandford, 2021 NY Slip Op 00058, Third Dept 1-7-21

**EDUCATION-SCHOOL LAW.**

**PLAINTIFF HIGH SCHOOL BASEBALL PLAYER ASSUMED THE RISK OF BEING STRUCK WITH A BALL DURING A PRACTICE DRILL WHERE MULTIPLE BALLS WERE IN PLAY; TWO DISSENTING MEMORANDA (THIRD DEPT).**

The Third Department, over two separate dissents, determined plaintiff high school baseball player assumed the risk of injury from being struck with a ball during a so-called "Warrior Drill" where multiple balls are in play:

Having more than one ball in play may not be an inherent risk in a traditional baseball game, but the record indicates that it is a risk inherent in baseball team practices … . Although plaintiff asserts that the presence of a screen between certain players may have provided a false sense of security that they would be protected, thereby creating a dangerous condition beyond the normal dangers inherent in the sport, this argument is belied by his testimony unequivocally establishing that he did not rely upon the screen for safety but, rather, thought that the drill was unsafe even in the presence of the screen. Thus, the conditions were "as safe as they appear[ed] to be" … . As the evidence showed that plaintiff was an experienced baseball player who "knew of the risks, appreciated their nature and voluntarily assumed them," defendants demonstrated their prima facie entitlement to summary judgment under the primary assumption of risk doctrine … . Grady v Chenango Val. Cent. Sch. Dist., 2021 NY Slip Op 00468, Third Dept 1-28-21

**EMPLOYMENT LAW.**

**A PUBLIC LIBRARY IS NOT SUBJECT TO THE PREVAILING WAGE REQUIREMENTS OF THE LABOR LAW; THEREFORE THE CLEANING CONTRACTOR HIRED BY THE LIBRARY WAS NOT REQUIRED TO PAY ITS EMPLOYEES THE PREVAILING WAGE (THIRD DEPT).**

The Third Department, in a full-fledged opinion by Justice Lynch, reversing Supreme Court, determined the public library was not subject to the prevailing wage

requirements of the Labor Law, Therefore the petitioner cleaning service, hired by the library, was not required to pay its employees the prevailing wage:

Although we are mindful that the prevailing wage law "is to be interpreted with the degree of liberality essential to the attainment of the end in view"… , that mandate does not permit an overly-broad reading of the statute that expands its reach to noncovered entities … . The library at issue undoubtedly performs a public function and is closely intertwined with the school district that it serves, but it is not itself "a municipal corporation, school district, district corporation [or] board of cooperative educational services" — the entities that are considered to be "[p]olitical subdivision[s]" of the state for purposes of public contracts … . By statute, an "education corporation" and a "school district" are separately defined, indicating "that they are mutually exclusive" … . An "education corporation" is a type of corporation formed for reasons "other than for profit" … , whereas a "school district" is a type of "municipal corporation" … . Reflecting its status as a distinct entity, the library's Board of Trustees is vested with independent decision-making authority and operational control … . Nor do we view the library as "operat[ing] a public improvement" so as to be considered a public benefit corporation within the embrace of Labor Law § 230 (3) … , or as constituting any of the other public entities included within Labor Law article 9. Consequently, we hold that the library at issue is not a public agency within the meaning of Labor Law § 230 (3). Matter of Executive Cleaning Servs. Corp. v New York State Dept. of Labor, 2021 NY Slip Op 00461, Third Dept 1-28-21

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**EMPLOYMENT LAW.**

**THE FINDINGS LEADING TO THE TERMINATION OF PETITIONER WERE CONCLUSORY AND DID NOT ALLOW MEANINGFUL REVIEW; PETITIONER'S SUPERVISOR, WHO BROUGHT THE MISCONDUCT CHARGES, CHOSE THE HEARING OFFICER AND TESTIFIED AT THE HEARING, SHOULD RECUSE HERSELF FROM FURTHER PROCEEDINGS ON REMITTAL (THIRD DEPT).**

The Third Department, annulling the termination petitioner's employment with the county, determined the findings were conclusory and therefore did not allow

meaningful review. In addition, the Third Department held that petitioner's supervisor, KIssane, who brought the misconduct charges, chose the hearing officer and testified at the hearing, should be disqualified from the proceedings on remittal:

"Administrative findings of fact must be made in such a manner that the parties may be assured that the decision is based on the evidence in the record, uninfluenced by extralegal considerations, so as to permit intelligent challenge by an aggrieved party and adequate judicial review" … . The Hearing Officer made, at most, conclusory statements that petitioner was guilty of the relevant charges. More to the point, he failed to support these conclusions with any factual evidence adduced at the hearing … .. In the absence of specific factual findings, meaningful judicial review cannot be conducted. Accordingly, the determination must be annulled and the matter remitted for the development of appropriate findings … . * * *

"Although involvement in the disciplinary process does not automatically require recusal, . . . individuals who are personally or extensively involved in the disciplinary process should disqualify themselves from reviewing the recommendations of a Hearing Officer and from acting on the charges" … . Matter of Morgan v Warren County, 2021 NY Slip Op 01107, Third Dept 2-18-21

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**ENVIRONMENTAL LAW.**

**LAINTIFFS' ACTION STEMMING FROM PFOA CONTAMINATION PROPERLY SURVIVED SUMMARY JUDGMENT; THE DOCTRINE OF PRIMARY JURISDICTION DID NOT APPLY; QUESTIONS OF FACT RAISED ABOUT THE DUTY OF CARE, PROXIMATE CAUSE, PRIVATE NUISANCE, TRESPASS AND PUNITIVE DAMAGES (THIRD DEPT).**

The Third Department determined plaintiffs' complaint in this PFOA contamination case properly survived defendant's motion for summary judgment. The court found that the doctrine of primary jurisdiction did not apply, defendant owed plaintiffs a duty of care, defendant did not demonstrate it did not proximately cause the alleged injuries, there was a question of fact on the private nuisance and trespass causes of action, and the punitive damages claim was proper. With respect to the doctrine of primary jurisdiction, the court wrote:

[The] doctrine "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views"… . Defendant argues that the various regulatory agencies, who have the requisite expertise, have been investigating the matter at issue and that the recovery sought by plaintiffs is already being provided by these agencies. We disagree. Although defendant points to an announcement that the Department of Health will be providing medical monitoring, this announcement merely stated that a study was being proposed and that, if funded, the study would last for five years. Contrary to defendant's representation, there was no definitive statement that the medical monitoring would be provided. As to the remediation of plaintiffs' private wells, the consent order and other announcements, upon which defendant relies, do not address all of the relief requested by plaintiffs in the second amended complaint. Accordingly, defendant's argument is without merit. Burdick v Tonoga, Inc, 2021 NY Slip Op 01178, Third Dept 2-25-21

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**EQUAL ACCESS TO JUSTICE ACT.**

**BEFORE PETITIONER INMATE'S ARTICLE 78 PETITION WAS CONSIDERED RESPONDENT VOLUNTARILY REVERSED THE GUILTY FINDINGS ON THE PRISON DISCIPLINARY VIOLATIONS; PETITIONER WAS NOT ENTITLED TO ATTORNEY'S FEES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT UNDER THE "CATALYST THEORY" (THIRD DEPT).**

The Third Department determined petitioner inmate was not entitled to attorney's fees as a prevailing party pursuant to the Equal Access to Justice Act [EAJA] (CPLR Article 86). Petitioner contested guilty findings on several prison disciplinary violations and brought an Article 78 proceeding. Before the Article 78 petition was considered the respondent reversed the disposition and expunged it from petitioner's prison record. Petitioner then sought attorney's fees as the prevailing party:

Petitioner contends that he is entitled to counsel fees because he prevailed in the litigation under the "catalyst theory." [The catalyst theory posits that a petitioner is

a prevailing party if the desired result is achieved because the proceeding brought about the voluntary change in the respondent's conduct … .] * * *

Although this Court has not decided whether it will adopt the catalyst theory in EAJA cases, when this Court has been asked to adopt the catalyst theory in other counsel fee award cases, it has declined to do so as the "United States Supreme Court has clearly held that a voluntary resolution of a matter lacks the necessary judicial imprimatur to warrant an award of [counsel] fees" … . … [T]he Court of Appeals specifically agreed … . The same reasoning applies here. The change in the legal relationship was accomplished prior to answering the petition, was based on the voluntary actions of the Department of Corrections and Community Supervision, and was "not enforced by a consent decree or judgment of Supreme Court" … . Matter of Clarke v Annucci, 2021 NY Slip Op 00473, Third Dept 1-28-21

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**FAMILY LAW.**

**ALTHOUGH FATHER WAS CULPABLE IN THE SEVERE BEATING BY MOTHER AND THE SUBSEQUENT DEATH OF THE CHILD, THE SEVERE ABUSE STATUTE APPLIES ONLY TO "PARENTS" AS OPPOSED TO "PERSONS LEGALLY RESPONSIBLE;" BECAUSE FATHER WAS NOT THE BIOLOGICAL FATHER OF THE CHILD BEATEN BY MOTHER, THE SEVERE ABUSE ADJUDICATION WAS REVERSED (THIRD DEPT).**

***ON FEBRUARY 23, 2021, THIS OPINION WAS VACATED AND THE SEVERE ABUSE FINDINGS AGAINST FATHER WERE UPHELD FOR ALL FOUR CHILDREN, NOT JUST FATHER'S BIOLOGICAL CHILDREN. REVISED DECISION-SUMMARY TO FOLLOW.***

The Third Department, in a full-fledged opinion by Justice Egan, reversing the severe abuse and derivative severe abuse adjudications against the father regarding mother's biological children, otherwise affirmed the abuse and severe abuse and derivative abuse and derivative severe abuse adjudications, The severe abuse statute, unlike the abuse statute, permits only a finding against a parent (as opposed to a person legally responsible for the child). Because father was not the biological father

of the child who died after a severe beating by mother, the severe abuse statute did not apply:

… [W]ith respect to Family Court's determination that the father severely abused the deceased child and derivatively severely abused the older daughter and the older son, we are reluctantly constrained to reverse said findings. As this Court has previously made clear, and as petitioner and the attorney for the child concede, unlike findings of abuse and neglect, which may be made against "any parent or other person legally responsible for a child's care" (Family Ct Act § 1012 [a] …), the current statutory language contained in Social Services Law § 384-b (8) (a) (i) only permits a finding of severe abuse to be made against a child's "parent" … . Although we are satisfied that the evidence at the fact-finding hearing demonstrates, by clear and convincing evidence, that the father's failure to intervene to stop the brutal beating of the deceased child or thereafter take any action to provide her with life-saving medical care would otherwise satisfy the elements of severe abuse as against her … and, consequently, derivative severe abuse as against the older daughter and the older son … , because he is not the biological father of these children, Family Court was statutorily precluded from rendering such findings and we, therefore, are constrained to reverse same … . Matter of Lazeria F. (Paris H.), 2021 NY Slip Op 01096, Third Dept 2-18-21

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**FAMILY LAW.**

**FAMILY COURT DID NOT FOLLOW THE PROCEDURE MANDATED BY THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT BEFORE RULING OHIO HAD JURISDICTION IN THE CUSTODY MATTER; MOTHER'S NEW YORK FAMILY OFFENSE PETITION SHOULD NOT HAVE BEEN DISMISSED BECAUSE NEW YORK HAS SUBJECT MATTER JURISDICTION OVER FAMILY OFFENSES OCCURRING IN OHIO (THIRD DEPT).**

The Third Department, reversing Family Court, determined: (1) Family Court did not follow the procedure required by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) before ruling that Ohio had jurisdiction based on father's custody petition there and dismissing mother's New York child support and

custody petitions: and (2) Family Court should not have dismissed mother's New York family offense petition, even though the majority of alleged offenses occurred in Ohio:

Family Court failed to satisfy the procedural mechanisms required by the UCCJEA when a custody petition is pending in another state. After becoming aware of the Ohio proceeding, Family Court properly communicated with the Ohio court … . The extent of these communications is unclear; however, they apparently resulted in the transmittance of the Ohio order to Family Court. Although the contents of the Ohio order strongly implied that the Ohio court intended to retain jurisdiction, as evidenced by its scheduling of the matter for trial, this did not absolve Family Court of its obligation to create a record of its communications and to provide that record to the parties … . Family Court's brief summary of its determination following the communication, which was not placed on the record in the presence of the parties, does not satisfy this statutory mandate … . Moreover, although it was a permissible exercise of discretion for Family Court not to permit the parties to participate in its communication with the Ohio court … , the court was then required to allow the parties an opportunity to present facts and legal arguments before it rendered a decision, which it failed to do … . Thus, "[i]nasmuch as we cannot discern from the record whether Family Court erred in determining that it lacked jurisdiction and, on that basis, dismissing the mother's custody petition, we reverse and remit" for Family Court to render a determination after creating an appropriate record and, if required, affording the parties an opportunity to present facts and legal arguments … . …

… [A]lthough the majority of the acts alleged in the family offense petition occurred in Ohio, Family Court's jurisdiction is not subject to the same geographic limitations as placed on that of the criminal courts, as nothing "requires the predicate acts of a family offense to have occurred in a particular county, state, or country in order for the Family Court to possess subject matter jurisdiction" … . Matter of Vashon H. v Bret I.2021 NY Slip Op 01103, Third Dept 2-18-21

**FAMILY LAW.**

**FAMILY COURT SHOULD NOT HAVE REFUSED FATHER'S COUNSEL'S OFFER TO REMAIN AS STANDBY COUNSEL AND SHOULD NOT HAVE ALLOWED FATHER TO REPRESENT HIMSELF WITHOUT WARNING FATHER OF THE DANGERS OF SELF-REPRESENTATION (THIRD DEPT).**

The Third Department determined Family Court did not abuse its discretion in refusing to assign counsel to father in this child support proceeding, but Family Court should have conducted a right-to-counsel inquiry before allowing father to represent himself, especially in light of father's counsel's offer to remain on standby:

English is not the father's first language. Although he had appeared in Family Court many times, he had been chastised for failing to appreciate the role of counsel, and the court had noted that his prior pro se submissions were inappropriate or inadequate … . Moreover, there was a critical error in holding that the discharged counsel could not be allowed to remain as standby counsel … . For these reasons, although the father's request to represent himself was unequivocal, we cannot find that the waiver of his right to counsel at the confirmation hearing was voluntary, knowing and intelligent, based upon the court's failure to make an appropriate warning of the dangers of so proceeding, coupled with the refusal to allow counsel to remain on standby … . Matter of Saber v Saccone, 2021 NY Slip Op 01811, Third Dept 3-25-21

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**FAMILY LAW.**

**FAMILY COURT SHOULD NOT HAVE REFUSED JURISDICTION OVER THIS CUSTODY AND NEGLECT PROCEEDING STEMMING FROM AN INCIDENT DURING A BRIEF VISIT TO TENNESSEE (THIRD DEPT).**

The Third Department, reversing Family Court and ordering new proceedings in front of a different judge, in a full-fledged opinion by Justice Clark, determined Family Court completely mishandled this custody matter which involved neglect proceedings in Tennessee stemming from an incident during the family's brief visit

there. Family Court had refused to exercise jurisdiction over the matter on inconvenient-forum grounds. On appeal, all parties agreed Family Court had committed reversible errors:

… [T]here was no dispute that the children and their respective parents/custodian had lived in New York for at least six consecutive months prior to the April 2019 commencement of the neglect proceeding in Tennessee, thereby making New York the children's home state … . Thus, pursuant to the UCCJEA, Family Court had jurisdiction over the neglect proceeding commenced in Tennessee … . * * *

The record irrefutably reflects that the children came into emergency care in Tennessee during a brief visit to the state and that, prior to entering care, they had not resided in Tennessee. The children's respective parents/legal custodian reside in New York, as does a half sibling of one of the children. Roughly 850 miles separate the Tennessee court and Chemung County, and the parties have limited financial means to travel to Tennessee to participate in court proceedings or to visit with the children. Additionally, with the exception of DSS, which did not provide an appropriate basis in law for its objection, all parties and the Tennessee court agreed that Family Court should exercise jurisdiction over the dispositional phase of the neglect proceeding. Significantly, evidence regarding the children's best interests and the feasibility of reunifying them with their respective parents and/or petitioner is in New York, including proof relating to any remedial and rehabilitative services offered to and engaged in by the mother and Jamie A. Any testimony required from witnesses located in Tennessee can be taken by phone. Matter of Diana XX v Nicole YY, 2021 NY Slip Op 00352, Third Dept 1-21-21

**FAMILY LAW.**

**FATHER PROPERLY FOUND TO HAVE SEVERELY ABUSED ALL THE CHILDREN IN THE HOME; DESPITE THE WORDING OF THE SEVERE ABUSE STATUTE, WHICH USES THE TERM "PARENT," THE COVERAGE OF THE STATUTE IS NOT LIMITED TO BIOLOGICAL CHILDREN (THIRD DEPT).**

The Third Department, on February 23, 2021, vacated and replaced the opinion in this case which was originally released on February 18, 2021. In the vacated opinion the court held father could not be deemed to have severely abused the children who were not his biological children because the severe abuse statute uses the term "parent." However, in the replacement opinion, the court ruled father was properly found to have severely abused all of the children in the home. Father was present when mother severely beat her daughter, who subsequently died:

With respect to the father, although he is only the biological father of the younger daughter and the younger son, he lived with and had been in a relationship with the mother for approximately five years and, in his statement to police, referred to the all of the children in the home as "[o]ur kids." The older daughter and the older son, moreover, refer to him as "dad" and there is no dispute that he was a person legally responsible for the subject children's care at all relevant times (see Family Ct Act §§ 1012 [a]; 1051 [e]). Thus, as the deceased child's brutal beating occurred while the father was present in the downstairs of the home, at a time when the mother's yelling and the deceased child's screaming could be heard throughout the house, we are satisfied that the father's conduct in failing to intervene or otherwise take any action to provide the deceased child with life-saving medical care satisfied the elements of severe abuse as against her (see Social Services Law § 384-b [8] [a] [i]; Family Ct Act § 1051 [e] … ). The father's conduct also evinced "such an impaired level of parental judgment as to create a substantial risk of harm for any child in [his] care" … . Accordingly, we discern no reason to disturb Family Court's finding that the father derivatively severely abused the four surviving children … . Matter of Lazeria F. (Paris H.), 2021 NY Slip Op 01155, Third Dept 2-18-21

## FAMILY LAW.

### RESPONDENT JUVENILE WAS DENIED HER RIGHT TO A SPEEDY TRIAL IN THIS JUVENILE DELINQUENCY PROCEEDING (THIRD DEPT).

The Third Department, reversing Family Court, determined respondent juvenile was denied her right to a speedy trial in this juvenile delinquency proceeding. The respondent initially waived her speedy trial rights to allow a diagnostic evaluation, which would take 90 days. Before the evaluation was complete, in response to allegations that respondent was acting aggressively in the nonsecure facility where she was detained, Family Court ordered respondent to a secure facility, thereby making the diagnostic evaluation impossible. At that point respondent rescinded her speedy trial waiver:

… [A]lthough respondent waived her right to a speedy fact-finding hearing during the first appearance held on April 4, 2019, the waiver was expressly limited to the time necessary to complete the diagnostic evaluation. By entering an order on June 26, 2019 directing respondent's transfer from Elmcrest Children's Center to a secure facility, Family Court knowingly eliminated the possibility that the diagnostic evaluation would be continued and completed. Under such circumstances, respondent's waiver of her speedy trial rights effectively expired on June 26, 2019. Consequently, Family Court should have commenced a fact-finding hearing within three days of June 26, 2019 or, alternatively, brought the parties before it and either obtained a further waiver of respondent's speedy trial rights or set forth on the record its reasons for adjourning the fact-finding hearing beyond the prescribed three-day period … . Inasmuch as Family Court failed to do any of the foregoing and instead did not commence the fact-finding hearing until August 15, 2019, some 50 days after the expiration of respondent's speedy trial waiver, we find that Family Court violated respondent's right to a speedy fact-finding hearing … . Matter of Erika UU., 2021 NY Slip Op 01543, Third Dept 3-18-21

**FAMILY LAW.**

**THE CHILD'S STATEMENTS ABOUT SEXUAL TOUCHING WERE ADEQUATELY CORROBORATED AND FATHER'S EXPLANATION FOR THE TOUCHING WAS NOT SUPPORTED BY THE EVIDENCE (THIRD DEPT).**

The Third Department, reversing Family Court, determined the evidence supported sexual abuse and neglect by respondent-father. The child's statements were sufficiently corroborated and the father's explanation for touching the child was not credible:

… [T]he proof of the child's consistent descriptions of the inappropriate touching to various individuals, the child's dramatic change in behavior, the reenactment of the touching through sand and play therapy and respondent's admissions satisfied the relatively low threshold of corroboration … . Matter of Lily BB. (Stephen BB.), 021 NY Slip Op 01106, Third Dept 2-18-21

**FAMILY LAW.**

**THE EVIDENCE DID NOT SUPPORT THE FINDING OF NEGLECT ON MOTHER'S PART (THIRD DEPT).**

The Third Department, reversing Family Court, determined the evidence did not support a finding of neglect on the part of mother (respondent). Although mother's husband (Bradley CC.) had been violent on two occasions, the children did not witness the incidents:

Respondent's handling of the domestic abuse and Bradley CC.'s alcohol and substance misuse gave petitioner reasonable cause for concern. Indeed, the evidence established that respondent — a recovering heroin addict — was aware that Bradley CC. had a substance and alcohol abuse problem but failed to acknowledge — or minimized — the impact that such problem was having or could have on her and the children. Respondent admitted to coping with the circumstances by habitually using marihuana, but was resistant to treatment and mental health counseling and failed to

recognize the problematic nature of her chosen coping mechanism, particularly given her history of addiction. Despite the concern that respondent was not dealing with the circumstances in a healthy manner, there was no evidence that she used marihuana in the presence of the children or that her usage had ever rendered her unable to care for the children … . While engaged with preventative services with petitioner, respondent seemingly understood the potential impact that Bradley CC.'s drinking could have on the children and agreed to a safety plan stating that he was not to be left alone to care for the children. … * * *

Respondent's failings … do not rise to such a level to support the conclusion that her actions and inactions actually impaired the children's physical, mental or emotional conditions or placed the children at imminent risk of such impairment … . Matter of Lexie CC. (Liane CC.), 2021 NY Slip Op 00342, Third Dept 1-21-21

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**FAMILY LAW.**

**THE PETITION SEEKING TO TERMINATE FATHER'S PARENTAL RIGHTS, WITH THE GOAL OF FREEING THE CHILD FOR ADOPTION, AND THE CONCURRENT PERMANENCY PLAN TO RETURN THE CHILD TO THE CUSTODY OF MOTHER, HAD CONFLICTING END GOALS; THE PETITION TO TERMINATE FATHER'S PARENTAL RIGHTS SHOULD THEREFORE HAVE BEEN DIMSISSED (THIRD DEPT).**

The Third Department, reversing Family Court, determined the end goals of two concurrent proceedings were contradictory and therefore the petition to terminate father's parental rights should have been dismissed. The abandonment/termination of parental rights petition, which sought to free the child for adoption, was brought in the face of a permanency plan which sought to return the child to the custody of mother:

Respondent [father] contends that the abandonment proceeding, seeking to terminate his parental rights, was improperly brought against him as the permanency plan in place at the time of the hearing with respect to the mother was to return the child to the mother. We agree. … The statutory purpose of an abandonment proceeding is to

free the child for adoption by terminating the parents' rights to the child. Because this proceeding sought to terminate the rights of one parent in the face of an existent permanency plan that sought to reunite the child with the other parent, it did not serve that purpose. In circumstances such as this, dismissal of the petition is mandated … . Matter of Xavier XX. (Godfrey YY.), 2021 NY Slip Op 01295, Third Dept 3-4-21

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**FORECLOSURE.**

**THE DEBT WAS ACCELERATED WHEN THE BANKRUPTCY STAY WAS LIFTED; THE FORECLOSURE ACTION WAS THEREFORE TIME-BARRED; DISAGREEING WITH THE 2ND DEPARTMENT, THE DEFENDANTS DID NOT NEED TO INTERPOSE A COUNTERCLAIM TO CANCEL THE MORTGAGE PURSUANT TO RPAPL 1501 (THIRD DEPT).**

The Third Department, in a full-fledged opinion by Justice Clark, determined the debt was accelerated when the automatic bankruptcy stay was lifted. Therefore the foreclosure action was untimely and the mortgage was properly cancelled pursuant to RPAP 1501:

… [T]he mortgage was accelerated on December 8, 2011, the date on which the bankruptcy court issued the order lifting the automatic bankruptcy stay as to plaintiff's predecessor in interest and its assignees and/or successors in interest … . By filing a proof of claim in the bankruptcy proceeding and shortly thereafter seeking affirmative relief from the automatic bankruptcy stay, plaintiff's predecessor in interest communicated a clear and unequivocal intent to accelerate the entire mortgage debt … . …

Supreme Court did not err in discharging and canceling the mortgage. RPAPL 1501 (4) states, as relevant here, that, where the statute of limitations period for the commencement of a mortgage foreclosure action has expired, "any person having an estate or interest in the real property subject to such encumbrance may maintain an action . . . to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom" … . Contrary to the Second Department, we do not read RPAPL 1501

(4) as stating that the cancellation and discharge of a mortgage can only be obtained by commencing an action or interposing a counterclaim for such relief … .

… [D]efendants did not interpose a counterclaim seeking to discharge and cancel the mortgage. However, defendants requested, in their answer, dismissal of the complaint and such "other and further relief as [Supreme Court] deem[ed] just and equitable" and thereafter specifically requested in their cross motion that the mortgage be discharged and canceled. MTGLQ Invs., L.P. v Wentworth, 2021 NY Slip Op 00064, Third Dept 1-7-21

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**FORECLOSURE.**

**THE DEFAULT LETTER, WHICH INDICATED THE MORTGAGE DEBT WOULD BE ACCELERATED AT A SPECIFIC FUTURE DATE IF THE DEFAULT WERE NOT CURED, DID NOT ACCELERATE THE DEBT; THEREFORE THE STATUTE OF LIMITATIONS DID NOT START RUNNING AND THE FORECLOSURE ACTION WAS TIMELY (THIRD DEPT).**

The Third Department, reversing Supreme Court, determined the mortgage debt was not accelerated by a letter indicating the debt would be accelerated on a specific future date if the arears were not paid:

… [T]he issue is whether the May 2008 default letter was an acceleration event that triggered the statute of limitations. We hold that is was not. Thus, the second action, commenced in October 2014, was timely. To that end, the May 2008 letter provided that, if the default was not cured "on or before June 10, 2008, the mortgage payments will be accelerated with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time." Since this letter was "'merely an expression of future intent that fell short of an actual acceleration,' which could 'be changed in the interim'" … , it did not accelerate the debt … . "[T]he letter did not seek immediate payment of the entire, outstanding loan, but referred to acceleration only as a future event, indicating the debt was not accelerated at the time the letter was written" … . Further, the May 2008 letter specifically discussed other non-acceleration options for defendant, including a

repayment plan or loan modification, which plaintiff, as the holder of the note, should be able to do "without running the risk of being deemed to have taken the drastic step of accelerating the loan" … . Thus, the statute of limitations was not triggered until the debt was accelerated by the commencement of the first action in February 2009 … , rendering the commencement of the second action, in October 2014, timely as it was within the six-year statute of limitations … . GMAT Legal Tit. Trust 2014-1, Us Bank Natl. Assn. v Wood, 2021 NY Slip Op 01455, Third Dept 3-11-21

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**FORECLOSURE.**

**THE DEFAULT NOTIFICATION LETTER DID NOT ACCELERATE THE DEBT BECAUSE IT DID NOT STATE THE DEBT WAS DUE AND PAYABLE IMMEDIATELY; THE BANK DID NOT DEMONSTRATE THE PROPER MAILING OF THE RPAPL 1304 NOTICE (THIRD DEPT)**

The Third Department, reversing Supreme Court, determined plaintiff bank was not entitled to summary judgment in this foreclosure action. The court held the action had never been dismissed pursuant to CPLR 3216 because no 90-day notice requiring the filing of a note of issue had been given. The foreclosure action was timely because the letter which defendants argued had accelerated the debt did not unambiguously state that the full mortgage debt had become due and payable immediately. However proof of the mailing of the the RPAPL 1304 notice was not sufficient:

The December 28, 2009 letter advised Mausler [defendant] that he was in default and that he could cure this default by making a payment "within thirty days from the date of this letter." The letter further stated that "[i]f you do not cure this default within the specified time period, your obligation for payment of the entire unpaid balance of the loan will be accelerated and become due and payable immediately" … . Additionally, the letter provided that if the amount due was not paid, "foreclosure proceedings may commence to acquire the [p]roperty by foreclosure and sale" … . The Court of Appeals, however, recently explained that such language does not evince an intent by the noteholder to "seek immediate payment of the entire, outstanding loan, but referred to acceleration only as a future event"… .

Accordingly, contrary to defendants' contention, the December 2009 letter did not constitute a valid acceleration of the debt so as to trigger the applicable statute of limitations. …

Plaintiff relies on the affidavit from the loan servicing associate to demonstrate compliance with RPAPL 1304. The associate, however, "did not attest to familiarity with or provide any proof of the mailing procedures utilized by the party that allegedly mailed the RPAPL 1304 notice" … . Wilmington Trust, Natl. Assn. v Mausler, 2021 NY Slip Op 01296, Third Dept 3-4-21

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**FREEDOM OF INFORMATION LAW (FOIL).**

**THE ZIP CODES ASSOCIATED WITH THE HOME ADDRESSES OF STATE EMPLOYEES SHOULD NOT BE PROVIDED PURSUANT TO A FOIL REQUEST BECAUSE THE FULL HOME ADDRESSES COULD EASILY BE FOUND ON THE INTERNET BY SEARCHING FOR AN EMPLOYEE'S NAME WITH THE RELATED ZIP CODE (THIRD DEPT).**

The Third Department, in a full-fledged opinion by Justice Garry, reversing (modifying) Supreme Court, determined the request for the zip codes association with the residences of state employees should not have been granted on invasion-of-privacy grounds. The court noted that the employees' full addresses could easily be determined by using the Internet to search for the person by name along with the related zip code:

As to special protections for state employee records, the Legislature's enactment of Public Officers Law § 89 (7) indicates its desire to protect public employees from harassment at home. That statute provides that "[n]othing in [FOIL] shall require the disclosure of the home address of an officer or employee" of the state … . Moreover, by executive order the Governor has prohibited state agencies from disclosing state employees' home addresses except when "compelled . . . by lawful service of process, subpoena, court order, or as otherwise required by law" … . These policy goals are relevant to the interests in protecting the personal privacy of government employees.

The scenario of numerous — or perhaps most — state employees being contacted at home by a private individual or organization that knows who they are, where they live and what they do for a living seems likely to be offensive and objectionable to most reasonable people … . Thus, release of home zip codes would constitute an unwarranted invasion of personal privacy under these circumstances. Accordingly, as respondent met its burden of proving that the requested zip codes are exempt from disclosure under FOIL, Supreme Court erred in ordering the disclosure of such data. Matter of Suhr v New York State Dept. of Civ. Serv., 2021 NY Slip Op 01113, Third Dept 2-18-21

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**JUDGES.**

**BUDGETARY CONCERNS RELATED TO THE COVID-19 PANDEMIC JUSTIFED THE DENIAL OF CERTIFICATION TO CONTINUE SERVING ON THE BENCH TO 46 SUPREME COURT JUSTICES WHO REACHED THE MANDATORY RETIREMENT AGE OF 70 IN 2020 (THIRD DEPT).**

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Lynch, over a partial dissent, determined the Administrative Board of the NYS Unified Court System did not act arbitrarily and capriciously when it denied certification to 46 of 49 Supreme Court Justices who reached the age of 70 in 2020. Retirement at age 70 is mandated by the NYS Constitution. But certification to continue serving on the bench can be granted by the Board. Here the Board based its decision to deny certification to 46 justices on budgetary concerns resulting from the COVID-19 pandemic:

The Board minutes explain that the Board "declined to certify 46 of the 49 [Justices] applying for certification owing to current severe budgetary constraints occasioned by the coronavirus pandemic. Three [Justices], having specialized additional assignments[,] were certified." The Board's certification of three applicants reflects both an individualized assessment and a recognition — "at least impliedly" — that additional judicial services are necessary … . …"[W]hether the services of a particular Justice are 'necessary to expedite the business of the court' encompasses much more than a mechanical inquiry into the size of the courts' docket divided by the number of Justices" … . Certainly, it should be recognized that the continued

services of the petitioner Justices would advance the needs of the court in managing an expanding caseload. That positive contribution, however, is not the deciding factor, as the Board is charged with balancing the costs of certification with the overall needs of the court system … . … [T]he Board made the extremely difficult judgment call that certification would prove too costly under the economic dilemma presented. … [C]ertification would significantly disrupt overall court operations given that the alternative savings mechanism would require more than 300 layoffs of nonjudicial personnel. Achieving the proper balance for the court system was for the Board to determine. … In our view, the Board acted in accord with the governing standard and within the scope of its broad authority in basing its ultimate decision on the overall needs of the court system. Matter of Gesmer v Administrative Bd. of the N.Y. State Unified Ct. Sys., 2021 NY Slip Op 01376, Third Dept 3-9-21

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**LABOR LAW-CONSTRUCTION LAW.**

**WHETHER PLAINTIFF USED ONE OR BOTH HANDS TO MANIPULATE A HOSE WHILE STANDING ON A LADDER WHICH COLLAPSED OR SLIPPED WAS RELEVANT ONLY TO COMPARATIVE NEGLIGENCE, WHICH IS NOT A BAR TO RECOVERY PURSUANT TO LABOR LAW 240 (1) (THIRD DEPT).**

The Third Department, over a dissent, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff alleged he fell from an A-frame ladder which collapsed, slipped or otherwise failed to support him. Plaintiff was using a hose to insert insulation and was supposed to keep one hand on the ladder at all times. Defendant argued plaintiff demonstrated at his deposition that he had both hands on the hose. The majority held, even if plaintiff used both hands to manipulate the hose, that would constitute comparative negligence which is not a bar to recovery:

… [D]efendant relied upon plaintiff's deposition testimony, in which he averred that he chose a wooden, A-frame ladder, which he described as "sturdy," and placed so it was steady and free from "wiggling." Plaintiff testified that, while standing on the steps of the ladder, he maintained a three-point safety stance, with his feet and one arm in contact with the ladder, and his other hand holding the hose that fed the

insulation into the building's overhang. Plaintiff indicated that the ladder began to move forward, causing him to fall and sustain injuries. Defendant argued that this testimony established that the ladder "was adequate and properly placed" … , and that the testimony about plaintiff keeping one hand in contact with the ladder contradicted gestures he made during the deposition, where he seemed to indicate that "both [of his] hands [were] cupped around an imaginary hose," thus posing issues of fact.

As Supreme Court found, the deposition testimony is not clear as to whether plaintiff maintained the three-point safety stance while on the ladder. Nonetheless, even if this disputed issue was resolved against plaintiff, this would merely present a factual question as to his potential comparative negligence, which "does not relieve defendant[] of liability under Labor Law § 240 (1)" … . Bennett v Savage, 2021 NY Slip Op 01306, Third Dept 3-4-21

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**LANDLORD-TENANT.**

**THE EXECUTIVE ORDERS AND LEGISLATION PROHIBITING EVICTIONS DURING THE PANDEMIC APPLIED TO A HOLDOVER TENANT WHO HAD ENTERED AN AGREEMENT TO VACATE THE APARTMENT (THIRD DEPT).**

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Mulvey, determined the Executive Orders and legislation prohibiting evictions during the COVID pandemic precluded the eviction of a holdover tenant based upon an agreement by the tenant to vacate the apartment:

On August 27, 2020, petitioner commenced a summary eviction proceeding seeking a warrant of eviction to remove respondents from the premises (see RPAPL 711 [1]). At an appearance before Supreme Court on September 17, 2020, the parties, with the assistance of counsel, reached an agreement in which respondents agreed to vacate the premises on or before October 2, 2020. Pursuant to the agreement, the court issued a warrant of eviction, effective October 3, 2020, to be executed if respondents failed to vacate. Respondents remained on the premises and, on October 5, 2020, the Sullivan County Sheriff's Office, in accordance with the warrant, served

respondents a 14-day notice indicating that the eviction would take place on October 21, 2020. After counsel for respondent Kaia Humphrey (hereinafter respondent) contacted the County Attorney's office regarding the suspension of evictions via a new executive order issued by Governor Andrew Cuomo, petitioner moved for an order seeking, among other things, enforcement of the parties' agreement to vacate and of the warrant of eviction. Following a virtual appearance on October 20, 2020, Supreme Court granted petitioner's motion and ordered enforcement of the warrant of eviction. Respondent appeals. * * *

Because these executive orders prohibit enforcement of residential evictions, without any exceptions for holdover proceedings or warrants issued based on stipulations, Supreme Court was precluded from ordering enforcement of the warrant to evict respondents. Further executive orders have extended the stay on enforcements to December 3, 2020 … . …

Furthermore, on December 28, 2020, the Legislature passed, and the Governor signed, the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 … . That act, which was effective immediately … , allows tenants to file a hardship declaration, which will prevent an eviction until at least May 1, 2021 … . Matter of Cabrera v Humphrey, 2021 NY Slip Op 00358, Third Dept 1-21-21

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**MENTAL HYGIENE LAW.**

**THE EVIDENCE DEMONSTRATED RESPONDENT, WHO HAD ENTERED A PLEA OF NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT TO RAPE, ASSAULT AND OTHER CHARGES, SUFFERED FROM A DANGEROUS MENTAL DISORDER REQUIRING CONTINUED PLACEMENT IN A SECURE FACILITY, SUPREME COURT REVERSED (THIRD DEPT).**

The Third Department, reversing Supreme Court, determined respondent constituted a danger to himself and others and should remain in a secure facility. Respondent had entered a plea of not responsible by reason of mental disease or defect to rape, assault, criminal possession of a weapon and endangering the welfare of a child.

Supreme Court had found that respondent was no longer suffering from a dangerous mental disorder and placed him in a nonsecure facility:

To establish that a person suffers from a dangerous mental disorder requiring commitment in a secure facility, the petitioner bears the burden of demonstrating, by a fair preponderance of the evidence, that the person suffers from a "mental illness," as that term is statutorily defined (see Mental Hygiene Law § 1.03 [20]), and "that because of such condition he [or she] constitutes a physical danger to himself [or herself] or others" (CPL 330.20 [1] [c]). * * *

Supreme Court rejected petitioner's evidence and instead concluded that respondent no longer suffered from a dangerous mental disorder, implicitly crediting the opinion of respondent's expert. However, the court's factual findings were self-contradictory. Supreme Court credited petitioner's expert's diagnoses of respondent, finding, among other things, that respondent has bipolar disorder and a traumatic brain injury. These diagnoses, which cause impaired judgment and impulse control, contributed to the opinion of petitioner's expert that respondent constituted a present danger to himself and to his female peers. Without explanation, respondent's expert omitted the diagnoses of bipolar disorder and traumatic brain injury. In concluding that respondent no longer suffers from a dangerous mental disorder, Supreme Court relied upon an opinion that did not account for diagnoses that the court found respondent to have. Thus, the court never considered the impact that the diagnoses have on respondent's behavior and present dangerousness. Matter of James Q., 2021 NY Slip Op 01545, Third Dept 3-18-21

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**NEGLIGENT SUPERVISION.**

**QUESTION OF FACT WHETHER LEAVING AN ELEVEN-YEAR-OLD BOY UNSUPERVISED CONSTITUTED NEGLIGENCE; THE BOY, WHO WAS VISITING HIS 13-YEAR-OLD FRIEND'S HOME, WAS SEVERELY INJURED ATTEMPTING TO DO A FLIP OFF A PICNIC TABLE (THIRD DEPT).**

The Third Department determined whether defendant was negligent in leaving an eleven-year-old boy unsupervised for six hours is a question of fact. School had been

cancelled because of snow and defendant went to work. The boy was severely injured when he attempted to do a flip off a picnic table in the backyard:

"The adequacy of supervision and proximate cause are generally issues of fact for the jury" …. It is undisputed that the child was left unattended without any adult supervision for approximately six hours. Although some may argue that it is not unreasonable to leave a child his age unsupervised to allow a parent to go to work, there is no bright line test with regard to age, and we are loathe to impose same. When viewed in a light most favorable to plaintiff, a question of fact exists as to whether Beadle exercised reasonable supervision of the 11-year-old child. As to proximate cause, we discern no reason under the facts here to deviate from the general rule that proximate cause is a jury question … . Justin M. v Beadle, 021 NY Slip Op 01108, Third Dept 2-18-21

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**SLIP AND FALL.**

**PLAINTIFF TRIPPED OVER A FOOTING FOR A TRAFFIC SIGNAL POLE WHICH HAD BEEN REMOVED; ALTHOUGH THE CITY APPROVED THE REMOVAL OF THE POLE IT PLAYED NO ROLE IN ITS REMOVAL; THEREFORE THE CITY DID NOT CREATE THE CONDITION AND THE LACK OF WRITTEN NOTICE RELIEVED THE CITY OF LIABILITY (THIRD DEPT).**

The Third Department, reversing Supreme Court, determined, after a plaintiff's verdict at trial, the defendant city's motion for summary judgment should have been granted in this slip and fall case. Plaintiff tripped over the footing of a traffic signal pole (the pole had been removed). The city demonstrated it did not have written notice of the condition. Therefore the burden shifted to the plaintiff to show that the city created the condition. The city submitted documents showing that the removal of the pole was part of a private construction project over which the city exercised no control:

The City did not receive notice of the project's completion or when and by whom the traffic signals were removed. Trudeau [Chief Supervisor of the Traffic Engineering Division of the Albany Police Department] testified that the City did

not oversee the development project because it was a private project, and he was not aware of when the traffic signals were removed or who removed them. We note that, contrary to Supreme Court's decision, the City's failure to inspect the sidewalk is an omission that does not constitute affirmative negligence that excuses compliance with the prior written notice requirement … . By failing to present any proof that the City received written notice of the defect or of an affirmative act taken by the City that immediately resulted in the defective condition of the sidewalk, plaintiffs failed to raise a material issue of fact as to the exception to the prior written notice requirement … . Vnuk v City of Albany, 2021 NY Slip Op 00600, Third Dept 2-4-21

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**TRUSTS AND ESTATES.**

**A STIPULATION OF SETTLEMENT FOR WHICH A JUDGMENT WAS ENTERED AFTER DECEDENT'S DEATH MAY NOT BE ENTERED IN DECEDENT'S NAME PURSUANT TO CPLR 5016 (d); THEREFORE THE JUDGMENT IS NOT ENTITLED TO PRIORITY IN SETTLING THE ESTATE (THIRD DEPT).**

The Third Department, over a dissent, determined a stipulation of settlement in favor of decedent which was the basis of a judgment entered after decedent's death cannot, pursuant to CPLR 5016 (d), be entered in his or her own name, and therefore is not entitled to priority in settling the estate:

An "accepted offer to compromise pursuant to [CPLR] 3221" (CPLR 5016 [d]) refers to a precise mechanism, which allows a party against whom a claim is asserted, 10 days before trial, to "serve upon the claimant a written offer to allow judgment to be taken against him [or her] for a sum or property or to the effect therein specified, with costs then accrued. If within [10] days thereafter the claimant serves a written notice that he [or she] accepts the offer, either party may file the summons, complaint and offer, with proof of acceptance, and thereupon the clerk shall enter judgment accordingly" (CPLR 3221). Here, there was no written offer or written acceptance; rather, the stipulation occurred on the record before Supreme Court, and the filing in the Clerk's Office occurred after petitioner secured the judgment and order from Supreme Court … .

We decline to adopt the broad interpretation of CPLR 5016 (d), as petitioner urges … . The Legislature, in creating CPLR 5016 (d), set forth three distinct situations where a post-mortem judgment may be entered against the decedent in his or her own name, thus bestowing priority to the creditor. None of these three provisions was met here. Matter of Uccellini, 2021 NY Slip Op 01303, Third Dept 3-4-21

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**WORKERS' COMPENSATION.**

**CARRIER PROPERLY ORDERED TO PAY FOR CLAIMAINT'S PAIN TREATMENT WITH MEDICAL MARIJUANA (THIRD DEPT).**

The Third Department, in a comprehensive opinion by Justice Egan, determined the Workers' Compensation Board properly issued a variance allowing coverage for medical marijuana for treatment of claimant's pain. The opinion is too detailed to fairly summarize here. The carrier's federal conflict preemption and statutory (Public Health Law) exemption arguments were rejected:

"The federal preemption doctrine has its roots in the Supremacy Clause of the United States Constitution, and federal preemption of state laws generally can occur in three ways: where Congress has expressly preempted state law, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law, or where federal law conflicts with state law" … . At issue here is conflict preemption, "which occurs when compliance with both federal and state law is a physical impossibility, or where the state law at issue . . . stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" … .

* * * [R]equiring the carrier to reimburse claimant … does not serve to subvert, in any way, the principal purposes of the Controlled Substances Act in combating drug abuse and controlling "the legitimate and illegitimate traffic in controlled substances" … , particularly where, as here, claimant was validly prescribed and authorized to use medical marihuana by his pain management specialist to both treat his chronic pain and reduce his reliance on opiates. Matter of Quigley v Village of E. Aurora, 2021 NY Slip Op 01174, Third Dept 2-25-21

**WORKERS' COMPENSATION.**

**CLAIMANT, A LIVE-IN HOME HEALTH ATTENDANT, WAS INJURED WHEN SHE FELL AFTER PICKING UP MEDICAL RECORDS FROM HER DOCTOR'S OFFICE; THE PURPOSE OF HER VISIT TO THE DOCTOR'S OFFICE WAS NOT PURELY PERSONAL; THEREFORE SHE WAS ENTITLED TO WORKERS' COMPENSATION BENEFITS (THIRD DEPT).**

The Third Department, reversing the Workers' Compensation Board, determined that claimant, a 24-hour home health aide, was entitled to Workers' Compensation benefits even though she was injured when she fell after picking up records from her doctor's office:

… [I]t is undisputed that it was routine for claimant to escort her client on four- or five-hour walks on days where the client had no scheduled appointments, such as the day of the subject incident. According to claimant, while on such a walk on the day of the incident, she and her client elected to briefly stop at the subject doctor's office for multiple reasons — to collect medical paperwork pertaining to claimant's employment and to confirm whether the doctor accepted the client's insurance prior to scheduling her an appointment. * * *

… [T]here is not substantial evidence that claimant's actions represented a deviation from employment as conduct specifically prohibited by the employer … . Further, without regard to whether claimant prospectively inquired about the acceptance of her client's insurance, claimant's act of briefly stopping while on a routine walk with her client, regardless of where that stop took place, simply cannot be said to be purely personally or wholly unrelated to her work. Moreover, stopping at the subject doctor's office in order to collect the subject paperwork benefited the employer by allowing claimant to continue to provide round-the-clock care to her client, and to secure the documentation necessary to ensure that such care would not be interrupted in the future. We therefore find that, under the circumstances, claimant's activity was reasonable, sufficiently work related and, thus, not purely personal, such that the Board's decision to the contrary is not supported by substantial evidence … .

Matter of Sharipova v BNV Home Care Agency, Inc., 2021 NY Slip Op 00605, Third Dept 2-4-21

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**WORKERS'S COMPENSATION.**

**THE BOARD DEPARTED FROM ITS PRECEDENT WITHOUT EXPLANATION, REVERSED AND REMITTED (THIRD DEPT).**

The Third Department, reversing the Workers' Compensation Board, determined the Board departed from its precedent without explanation:

… [T]he Board did not follow its precedent in finding that, due to his failure to show labor market attachment, he had no compensable lost time from June 16, 2016 to January 26, 2017. The Board has previously held that findings regarding labor market attachment are limited to the period subsequent to the date when the issue was first raised by the workers' compensation carrier … . Although the record reflects that the Special Fund first raised labor market attachment during the January 26, 2017 hearing, the Board found no compensable time from June 1, 2016 to November 9, 2018 based upon a lack of proof of labor market attachment. "While the Board is free to alter a course previously set out in its decisions, it must set forth its reasons for doing so, and the Board's failure to do so renders its decision arbitrary and capricious" … Inasmuch as the Board did not explain its departure from prior precedent in finding that claimant was not entitled to awards from June 1, 2016 to January 26, 2017, that part of the decision must be reversed and the matter remitted for further proceedings … . Matter of Delk v Orange & Rockland, 2021 NY Slip Op 00604, Second Dept 2-4-21