NEW YORK APPELLATE DIGEST LLC

Weekly Newsletter
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An Organized Compilation of the Summaries of Selected Decisions Released by Out New York State Appellate Courts the Week of March 19 – April 2, 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 on Any Page to Return There.

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CIVIL PROCEDURE.

PLAINTIFF ESTATE MET THE CRITERIA FOR ATTACHMENT AGAINST REAL PROPERTY OWNED BY DEFENDANTS WHO OWNED AND/OR OPERATED A LIMOUSINE RENTAL SERVICE; THE LIMOUSINE WAS INVOVLED IN A HORRIFIC ACCIDENT KILLING PLAINTIFF'S DECEDENT AND 19 OTHERS (THIRD DEPT).

The Third Department, affirming Supreme Court, over a concurring memorandum, determined the criteria for attachment were met by plaintiff against real property owned by the Hussain defendants. The Hussain defendants owned and/or operated a business which rented a limousine involved in an accident killing plaintiff's decedent and 19 others:

Plaintiff demonstrated a probability of success on his claims [relating the maintenance of the limousine].

Plaintiff … pointed to CPLR 6201 (3), which, because he is likely to succeed in recovering a money judgment against defendants, applies if defendants "assigned, disposed of, encumbered or secreted property," or were about to do so, with the "intent to defraud [their] creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor" … . … As "[t]he mere removal or assignment or other disposition of property is not grounds for attachment," however, plaintiff was further required to show that defendants offered the four properties for sale with the requisite intent to either defraud their creditors or frustrate a potential money judgment … . …

Plaintiff … met his burden of showing that defendants harbored the requisite intent in attempting to dispose of the parcels at issue and, in the absence of any proof to rebut that showing, he was properly granted confirmation under CPLR 6201 (3) … . …

Plaintiff was … entitled to confirmation with regard to Shahed Hussain because he was "a nondomiciliary residing without the state" within the meaning of CPLR 6201 (1). Plaintiff represented, with support from annexed newspaper accounts, that Shahed Hussain left New York for Pakistan in March 2018 and had no plans to return to the United States. Halse v Hussain, 2021 NY Slip Op 02032, Third Dept 4-1-21

CONSITUTIONAL LAW, CRIMIMAL LAW, ATTORNEYS.

EXECUTIVE LAW 552 (PART OF THE PROTECTION OF PEOPLE WITH SPECIAL NEEDS ACT), WHICH CREATED A SPECIAL PROSECUTOR TO PROSECUTE CRIMES OF ABUSE AND NEGLECT OF VULNERABLE PERSONS IN STATE FACILITIES, IS UNCONSTITIONAL TO THE EXTENT IT ALLOWS THE PROSECUTION OF CRIMES BY AN UNELECTED APPOINTEE OF THE GOVERNOR (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over two concurring opinions, determined Executive Law 552 (part of the Protection of People with Special Needs Act), which created a special prosecutor to prosecute crimes of abuse or neglect of vulnerable persons in facilities operated by the state, is unconstitutional to the extent it allows an unelected appointee of the governor to prosecute crimes. The portions of the statute which do not relate to the prosecution of crimes, however, remain viable:

Given that the purpose of enacting the Special Needs Act was to "bolster the ability of the state to respond more effectively to abuse and neglect of vulnerable persons" … , it is apparent that the Legislature would wish that as much of Executive Law § 552 aimed at protecting that class of victims as can be preserved remain in effect. Nor would excising the offending provisions leave the remainder without any beneficial impact. Therefore, while the subdivisions of the statute that provide the special prosecutor with the discretionary authority to bring criminal cases … must be struck as unconstitutional … , the portion of Executive Law § 552 (1) that provides the special prosecutor with non-prosecutorial functions should remain in force. Likewise, we leave intact Executive Law § 552 (2) (a) (ii), which empowers the special prosecutor "to cooperate with and assist district attorneys and other local law enforcement officials in their efforts against . . . abuse or neglect of vulnerable persons," without interfering with those efforts (emphasis added). Cooperation with the local District Attorney furthers the overarching goal of the Legislature—providing resources to address crimes of abuse and neglect committed against vulnerable persons—without infringing on that constitutional officer's essential authority. People v Viviani, 2021 NY Slip Op 01934, CtApp 3-30-21

CRIMINAL LAW, ARTICLE 78.

WARREN COUNTY DID NOT HAVE "PARTICULAR EFFECT" JURISDICTION OVER CRIMINAL OFFENSES ALLEGED TO HAVE BEEN COMMITTED IN SARATOGA COUNTY (THIRD DEPT).

The Third Department determined the Article 78 prohibition petition was the appropriate vehicle for raising the issue whether Warren County had jurisdiction over offenses alleged to have been committed in Saratoga County. The Third Department held the charges could not be brought in Warren County under the so-called "particular effect" rationale (i.e., the argument that the offenses had a "particular effect" on Warren County). The petitioner, who resided in Warren County, was charged with grand larceny and other offenses alleged to have been committed when petitioner was treasurer of Lake George EMS involving bank accounts in Saratoga County:

Respondent failed to demonstrate that the evidence before the grand jury established that Warren County has particular effect jurisdiction over the instant crimes. Respondent submitted his paraphrased testimony of one witness, whose familiarity with Lake George EMS and/or source of information was not disclosed. According to respondent, the witness testified that petitioner stole money from Lake George EMS at a time when he knew the organization was having difficulty meeting payroll. Based on this testimony, respondent argued that petitioner's conduct "was likely to create a situation where emergency medical services would be restricted or discontinued by the Lake George [EMS] thus having a materially harmful impact upon the community welfare." In our view, such testimony fails to demonstrate a concrete and identifiable injury to the Warren County community. Matter of Gentner v Hall, 2021 NY Slip Op 02028, Third Dept 4-1-21

CRIMINAL LAW, JUDGES.

THE TRIAL JUDGE DID NOT CONDUCT AN ADEQUATE INQUIRY BEFORE ALLOWING DEFENDANT TO REPRESENT HIMSELF (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the trial judge did not conduct an adequate inquiry before allowing defendant to represent himself:

A court must determine that the defendant's waiver of the right to counsel is made competently, intelligently, and voluntarily before allowing that defendant to represent himself or herself … . In order to make that evaluation, the court "must undertake a 'searching inquiry' designed to 'insur[e] that a defendant [is] aware of the dangers and disadvantages of proceeding without counsel'" … . The court's inquiry "must accomplish the goals of adequately warning a defendant of the risks inherent in proceeding pro se, and apprising a defendant of the singular importance of the lawyer in the adversarial system of adjudication" … . "The record should also disclose 'that a trial court has delved into a defendant's age, education, occupation, previous exposure to legal procedures and other relevant factors bearing on a competent, intelligent, voluntary waiver' of the right to counsel" … . Here, although the court obtained certain pedigree information from the defendant, it failed to ascertain that the defendant was aware of the risks inherent in proceeding without an attorney and the benefits of having counsel represent him at trial … . Moreover, the court failed to discuss the potential sentence that could be imposed … . Thus, the court's inquiry was insufficient to ensure that the defendant understood the dangers and disadvantages of self-representation. People v Lemmo, 2021 NY Slip Op 01997, Second Dept 3-31-21

CRIMINAL LAW.

ARGUING FOR LENIENCY IN SENTENCING DOES NOT PRESERVE THE ARGUMENT THAT THE SENTENCING WAS VINDICTIVE (CT APP).

The Court of Appeals determined the argument that the sentence to imprisonment was vindictive was not preserved. Defendant had successfully appealed his conviction after a nonjury verdict and then pled guilty to a different offense before a different judge. Although defendant argued for leniency, that did not preserve the "vindictive sentencing" argument:

The claim that the sentence imposed upon defendant's guilty plea was presumptively vindictive and imposed without State Due Process protections … is unpreserved. Defendant's arguments against imposition of the term of imprisonment, registered before the court imposed sentence, were consistent with arguments for leniency and made no specific reference to the principle of vindictiveness or any potential constitutional violation. Defendant also failed to either object to the sentence actually imposed or move to withdraw his guilty plea. Nor does this record support a claim that the sentence, which was within the ambit of the range of sentences for a class A misdemeanor, was illegal in a respect that "can readily be discerned from the . . . record" … . As a result, defendant's arguments are unreviewable. People v Olds, 2021 NY Slip Op 02019, CtApp 4-1-21

CRIMINAL LAW.

BASED UPON THE RIGHT TO CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST HIM, DEFENDANT SHOULD HAVE BEEN PRESENT AT THE IN CAMERA INTERVIEW OF THE STATUTORY-RAPE COMPLAINANT TO DETERMINE THE RELEVANCE OF HER PSYCHIATRIC HISTORY (A MATERIAL STAGE OF THIS PROCEEDING); DEFENDANT'S STATEMENT FOR WHICH NO 710.30 NOTICE WAS PROVIDED SHOULD NOT HAVE BEEN ADMITTED; THE MOLINEUX EVIDENCE OF INTENT, MOTIVE, OR LACK OF MISTAKE WAS NOT RELEVANT TO STATUTORY RAPE (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined: (1) based upon his right to confront and cross-examine the witnesses against him, the defendant should have been present during the judge's in camera interview with the complainant in this statutory rape case to determine the relevance of her psychiatric history (a material stage of this proceeding); (2) the defendant's statement for which no CPL 710.30 notice was provided should not have been admitted on that ground; and (3) that same statement should not have been admitted as "Molineux" evidence of intent, motive or lack of mistake because such evidence is not relevant to statutory rape:

The right of an accused to confront the witnesses against him or her through cross-examination is a fundamental right of constitutional dimension … . The right of cross-examination is an essential safeguard of fact-finding accuracy and "the principal means by which the believability of a witness and the truth of his testimony are tested" … .

Where a primary prosecution witness is shown to suffer from a psychiatric condition, the defense is entitled to show that the witness's capacity to perceive and recall events was impaired by that condition … .

In this case, the defendant's absence during the Supreme Court's in camera interview with the complainant to determine if her psychiatric history was relevant had a substantial effect on his ability to defend the charges against him, and thus, the

interview constituted a material stage of the trial for which the defendant should have been present … . Where, as here, the "defendant was absent during a material part of his trial, harmless error analysis is not appropriate," and a new trial is required … . Moreover, while the scope of cross-examination generally rests within the trial court's discretion … , here, the court improvidently exercised its discretion in striking the complainant's testimony adduced during cross-examination with respect to her psychiatric history. People v King, 2021 NY Slip Op 01996, Second Dept 3-31-21

CRIMINAL LAW.

SENTENCES FOR THE SALE OF TWO DRUGS IN THE SAME TRANSACTION SHOULD HAVE BEEN IMPOSED CONCURRENTLY (THIRD DEPT).

The Third Department determined the sentences for two counts of criminal sale of a controlled substance should run concurrently because they were committed during a single transaction:

… [T]he People failed to prove that defendant committed two separate and distinct acts. Counts 1 and 2 were for criminal sale of a controlled substance in the third degree — one for each drug; thus, the actus reus elements are the same … . The record reveals that the CI made arrangements for one sale to take place and defendant engaged in a single transaction — one sale of two controlled substances. The sale occurred in defendant's vehicle where there was an exchange of money for one bag of drugs, containing two smaller bags of drugs. As the offenses were committed through one single distinct act, the sentences imposed on counts 1 and 2 should run concurrently … . People v Muniz, 2021 NY Slip Op 02023, Third Dept 4-1-21

CRIMINAL LAW.

THE CRIMINAL PROCEDURE LAW DOES NOT PROHIBIT REPROSECUTION BY A SIMPLIFIED TRAFFIC INFORMATION AFTER THE ORIGINAL IS DISMISSED FOR FAILURE TO PROVIDE A SUPPORTING DEPOSITION; THE CONTRARY RULE IN THE APPELLATE TERM FOR THE NINTH AND TENTH JUDICIAL DISTRICTS SHOULD NO LONGER BE FOLLOWED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over an extensive dissenting opinion, determined the Appellate Term's prohibiting the filing of a new simplified traffic information after the original was dismissed for failure to provide a supporting deposition was not supported by the Criminal Procedure Law and conflicted with a prior Court of Appeals decision:

The Appellate Term for the Ninth and Tenth Judicial Districts has adopted a rule of criminal procedure under which, absent special circumstances, the People cannot reprosecute a defendant by filing a new simplified traffic information after the original simplified traffic information was dismissed for facial insufficiency under CPL 100.40 (2) for failure to provide a requested supporting deposition in a timely manner. Because that rule has no basis in the Criminal Procedure Law and contravenes our holding in People v Nuccio (78 NY2d 102 [1991]), we reverse. * * *

… [A]lthough the Criminal Procedure Law requires a prosecutor to seek permission from the court to resubmit evidence and charges to a grand jury after dismissal of a defective or legally insufficient indictment, there is no similar statutory requirement for filing a new accusatory instrument after dismissal of a facially insufficient simplified information. In Nuccio, we concluded that "the different treatment accorded indictments and informations in the statute manifests the Legislature's intention to permit reprosecution for nonfelony charges when the information is dismissed for legal insufficiency" (Nuccio, 78 NY2d at 105). …

The Criminal Procedure Law does not prohibit reprosecution upon a facially sufficient accusatory instrument after such a dismissal, whether by information or by simplified traffic information with a supporting deposition. Accordingly, the People were entitled to reprosecute the traffic violation after dismissal of the first

simplified traffic information. People v Epakchi, 2021 NY Slip Op 02018, CtApp 4-1-21

CRIMINAL LAW.

THE DRIVER BEING VISIBLY NERVOUS, COUPLED WITH THE VEHICLE HAVING OUT-OF-STATE PLATES AND BEING IN A HIGH CRIME AREA, DID NOT PROVIDE A FOUNDED SUSPICION OF CRIMINALITY; THEREFORE THE POLICE OFFICER WAS NOT JUSTIFIED IN ASKING WHETHER THERE WERE ANY WEAPONS IN THE CAR, A LEVEL TWO INQUIRY (FIRST DEPT).

The First Department, reversing defendant's conviction of attempted criminal possession of a weapon and dismissing the indictment, determined the police officer did not have a founded suspicion of criminality when he asked whether any weapons were in the vehicle:

Defendant was a passenger in a car, bearing a Massachusetts license plate, that was stopped for driving through a red light in a "high crime" neighborhood. The driver of the car complied with the demands of one of the officers for his driver's license and that he get out of the car, but was "visibly nervous," breathing heavily, and stammering in his responses to the officer's questions. Moments later, one of the other officers asked whether there were any weapons in the car. This ultimately led to the recovery of a pistol from defendant.

These circumstances did not give rise to the founded suspicion of criminality that was required to authorize this level two inquiry … . Contrary to the People's contention, neither occurrence of the stop for a traffic violation in a "high crime" area, nor the unproven perception of one of the officers that in general out-of-state license plates are more highly correlated with criminality than New York license plates, elevated the suspicion to the level required to authorize a common-law inquiry. People v Jonathas, 2021 NY Slip Op 01954, First Dept 3-30-21

CRIMINAL LAW.

THE JURY NOTE INDICATED THE REQUEST WAS FOR THE TRANSCRIPT OF THE PHONE CALL, BUT THE JUDGE DESCRIBED THE NOTE AS A REQUEST FOR THE PHONE CALL AND PROVIDED THE JURY WITH THE RECORDING OF THE CALL; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction and ordering a new trial, determined that the judge did not inform counsel of the full nature of a note from the jury. The jury note indicated the request was for the transcript of a phone call, but the judge said the note was asking for the phone call:

At trial, a recording of one of the defendant's jail phone calls was introduced into evidence and played for the jury. In addition, the jury was provided with a purported transcript of the call, which was described merely as an aid and was not itself in evidence, and which the Supreme Court instructed should not control in the event of any discrepancy between the recording and the transcript. During deliberations, the jury sent the court a note, marked as court exhibit number 4, which the court stated on the record as "asking for [the defendant's] phone call from jail." This description, however, omitted the word "transcript," which was included at the end of the note in parentheses. The court then stated to the jury that it would play the call again, but would not provide a copy of the transcript.

Contrary to the People's contention, the jury's request did not only implicate the court's ministerial function, as the request can be interpreted as seeking the transcript of the phone call, rather than the call itself. Notably, there was a discrepancy between the transcript and the phone call, and to the extent that the jury's request implied that the transcript left an impression on the jury, despite the court's instructions … ,counsel for the defendant should have been made aware of the verbatim contents of the request … . Failure to disclose the precise contents of the note deprived the defense of the opportunity to "analyze the jury's deliberations" given the note's ambiguous meaning, "and frame intelligent suggestions for the court's response" … . People v Dennis, 2021 NY Slip Op 01994, Second Dept 3-31-21

CRIMINAL LAW.

THE PEOPLE DID NOT DEMONSTRATE DEFENDANT PROCURED THE ABSENCE OF A WITNESS; THEREFORE THE WITNESS'S STATEMENT SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE; ALLOWING THE PEOPLE TO MAKE PEREMPTORY CHALLENGES AFTER THE DEFENSE WAS REVERSIBLE ERROR (SECOND DEPT).

The Second Department, reversing defendant's conviction and ordering a new trial, determined a witness's out-of-count statement should not have been admitted because the People did not demonstrate defendant procured the witness's absence and the failure to follow proper procedure in jury selection was reversible error:

"The purpose of a Sirois hearing is to determine whether the defendant has procured a witness's absence or unavailability through his own misconduct, and thereby forfeited any hearsay or Confrontation Clause objections to admitting the witness's out-of-court statements" … . The People must "present legally sufficient evidence of circumstances and events from which a court may properly infer that the defendant, or those at defendant's direction or acting with defendant's knowing acquiescence, threatened the witness" … . "At a Sirois hearing, the People bear the burden of establishing, by clear and convincing evidence, that the defendant has procured the witness's absence or unavailability" … .

Here, the People failed to establish by clear and convincing evidence that the defendant was responsible for procuring a certain witness's refusal to testify at trial … . Specifically, the People's evidence did not establish that the defendant controlled the individuals who threatened the witness or that the defendant influenced or persuaded any individual to threaten the witness or his family … .

The Supreme Court committed reversible error when it permitted the People to exercise peremptory challenges to prospective jurors after the defendant and his codefendant exercised peremptory challenges to that same panel of prospective jurors (see CPL 270.15[2] … . This procedure violated "the one persistently protected and enunciated rule of jury selection—that the People make peremptory challenges first, and that they never be permitted to go back and challenge a juror accepted by the defense" … . People v Burgess, 2021 NY Slip Op 01993, Second Dept 3-31-21

The same peremptory challenge issue required reversal in People v Taylor, 2021 NY Slip Op 01998, Second Dept 3-31-21

EDUCATION-SCHOOL LAW.

NYU DID NOT ACT ARBITRARILY AND CAPRICIOUSLY WHEN IT SUSPENDED THREE STUDENTS FOR ATTENDING OFF-CAMPUS ROOFTOP PARTIES IN AUGUST 2020 WHERE THE ATTENDEES DID NOT WEAR MASKS AND DID NOT PRACTICE SOCIAL DISTANCING (FIRST DEPT).

The First Department, reversing Supreme Court, determined the school (New York University NYU) properly suspended three students for attending off-campus, rooftop parties in August 2020 where the attendees did not wear masks or practice social distancing. The First Department found that the general student conduct policies prohibiting behavior which endangers health and safety, the COVID-19 Executive Orders in effect at the time, and emails sent out by the school provided sufficient pre-conduct notice of the prohibited conduct:

… [W]e find that NYU's determination to suspend petitioners was not arbitrary and capricious and was made in the exercise of honest discretion. Petitioners had notice that the gatherings they attended in August 2020 could result in disciplinary action by NYU. Matter of Storino v New York Univ., 2021 NY Slip Op 02087, First Dept 4-1-21

EDUCATION-SCHOOL LAW.

THE FINDING THAT THE COMPLAINANT CONSENTED TO LYING DOWN IN BED WITH PETITIONER FOR THE NIGHT BUT DID NOT CONSENT TO HAVING SEX WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE; THE COLLEGE'S DETERMINATION THAT PETITIONER VIOLATED THE STUDENT CODE OF CONDUCT ANNULLED (SECOND DEPT).

The Second Department, annulling the determination of the Campus Appeals Board of SUNY Purchase College, held the Board's conclusion petitioner had sexual intercourse with the complainant without the complainant's consent was not supported by substantial evidence. The Board had found the evidence that complainant was unable to give consent "conflicting and unreliable:"

After the hearing, the Hearing Board found "the complainant's statements to be conflicting and unreliable as it pertained to her inability to give consent." The Hearing Board concluded that "[t]here were considerable gaps in the complainant's memory," and indicated that it was "concerned that some of her statements after her initial report were tainted by reading the reports that were submitted by other witnesses and parties." Nevertheless, the Hearing Board found that although there was consent for lying together in bed, kissing, and the removal of the complainant's pants, the complainant had not consented to the remainder of the sexual activity. …

… [T]he determination that the petitioner violated code C.8 was not supported by substantial evidence. Having rejected the complainant's testimony that she was incapable of giving consent, the Hearing Board was not left with adequate evidence to support the conclusion that while the complainant consented to spending the night in the petitioner's bed, kissing, and removing her pants, she did not consent to the remainder of the sexual activity. The Board indicated that its finding of nonconsensual conduct was based on the statements of the petitioner and the complainant "that clear, affirmative consent for these activities was not given." However, the petitioner, while freely admitting that he did not obtain verbal consent, clearly asserted that the complainant consented with her actions … . Matter of Doe v Purchase Coll. State Univ. of N.Y., 2021 NY Slip Op 01974, Second Dept 3-31-21

FAMILY LAW, JUDGES.

THE CUSTODY AWARD SHOULD NOT HAVE BEEN MADE, SUA SPONTE, WITHOUT A PLENARY HEARING; WHERE A CUSTODY AWARD IS MADE WITHOUT A HEARING THE COURT SHOULD ARTICULATE THE FACTORS CONSIDERED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the court should have held a hearing before awarding sole custody of the children to plaintiff. The Second Department noted that, where a hearing is not held, the court should articulate the factors considered:

"The court's paramount concern in any custody and visitation proceeding is to determine, under the totality of the circumstances, what is in the best interests of the child[ren]" … . "Custody determinations should generally be made only after a full and plenary hearing and inquiry. This general rule furthers the substantial interest, shared by the State, the children, and the parents, in ensuring that custody proceedings generate a just and enduring result that, above all else, serves the best interests of the child" … . "[A] court opting to forgo a plenary hearing must take care to clearly articulate which factors were—or were not—material to its determination, and the evidence supporting its decision" … .

Here, the record reflects that the Supreme Court failed to inquire into whether an award of sole legal and physical custody to the plaintiff was in the best interests of the children … . Moreover, the court failed to articulate what factors it considered in awarding custody to the plaintiff … . Indictor v Indictor, 2021 NY Slip Op 01968, Second Dept 3-31-21

FAMILY LAW

A CONDITIONAL JUDICIAL SURRENDER OF A CHILD FOR ADOPTION MUST BE REVOKED WHERE THE DESIGNATED ADOPTIVE PARENT DECLINES TO ADOPT AND THE BIRTH PARENT PROMPTLY APPLIES FOR REVOCATION OF THE JUDICIAL SURRENDER (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Oing, reversing Family Court, determined the conditional judicial surrender of a child for adoption must be revoked where the designated adopting parent declines to adopt the child and the birth parent promptly applies for revocation. The child, now 16 years old, had been in foster care for nine years. Although the First Department revoked the judicial surrender, the court remanded the matter for a quick hearing on the petition to terminate mother's parental rights:

This appeal requires us to resolve an issue not previously addressed by this Court. When the person designated in a conditional judicial surrender as the adopting parent declines to adopt the child must the surrender be revoked upon the birth parent's application? The Family Court was unwilling to vacate the surrender given the undisputed toll on the child's well-being as a result of spending virtually her entire life in foster care. Instead, the court held a best interests hearing and determined that the mother's parental rights remain terminated, and converted her conditional judicial surrender to an unconditional one, which permitted the child to remain free for adoption. This issue pits the basic principle that a parent has a "fundamental liberty interest . . . in the care, custody and management" of his or her child … against this state's statutory framework governing conditional judicial surrenders … . … We conclude that the order of the Family Court should be reversed because the designated person to adopt is a fundamental condition precedent to a surrender such that the person's declination mandates its revocation upon the birth parent's prompt application. * * *

Order, Family Court, … reversed, on the law, … the petition denied and dismissed, and the mother's application granted and the matter remanded for an expeditious continued hearing on the agency's petition to terminate the mother's parental rights." Matter of L.S. (Diana A.), 2021 NY Slip Op 02085, First Dept 4-1-21

FAMILY LAW.

FATHER'S EXCUSE FOR NOT APPEARING (HE OVERSLEPT) WAS REASONABLE UNDER THE CIRCUMSTANCES AND FATHER DEMONSTRATED A MERITORIOUS DEFENSE TO THE GRANDPARENTS' PETITION FOR CUSTODY OF THE CHILD; DEFAULT CUSTODY ORDER VACATED AND MATTER REMITTED FOR A HEARING (THIRD DEPT).

The Third Department, reversing Supreme Court, determined father's motion to vacate the order granting, without a hearing, custody of the child to the grandparents should have been granted. The Third Department found that father's failure to appear was excusable (he overslept) and father had a meritorious defense to the grandparents' application for custody:

Although oversleeping may not ordinarily constitute a reasonable excuse, we find such excuse to be reasonable under the particular circumstances of this case … . …

… [B]efore Family Court may award custody to a nonparent, it must have first made a finding of extraordinary circumstances and then determined that such award is in the child's best interests … . …

… .Family Court failed to conduct an evidentiary hearing and make the requisite extraordinary circumstances and best interests findings prior to awarding the grandparents permanent custody of the child. … Family Court's failures in this regard, together with the father's superior claim to custody of the child, constitute a meritorious defense … . Matter of Melissa F. v Raymond E., 2021 NY Slip Op 02026, Third Dept 4-1-21

FAMILY LAW.

GRANDMOTHER, BASED UPON HER PAST CARE OF THE CHILDREN, WAS THE FUNCTIONAL EQUIVALENT OF A PARENT WHO HAD STANDING TO APPLY FOR A HEARING TO DETERMINE WHETHER THE CHILDREN SHOULD BE RETURNED TO HER, FAMILY COURT REVERSED (SECOND DEPT).

The Second Department, reversing Family Court, determined grandmother's application for a hearing to determine whether the children should be returned to her should have been granted. The children were removed from grandmother's care and placed in a foster home. Grandmother's application for a hearing was denied on the ground she did not have standing. But the Second Department held that grandmother met the definition of a person legally responsible for the care of the children based upon the level of care she had provided when the children were placed with her:

Family Court Act § 1028(a) provides that "[u]pon the application of the parent or other person legally responsible for the care of a child temporarily removed under this part . . . the court shall hold a hearing to determine whether the child should be returned," with two exceptions not relevant here … . …

… [T]he evidence submitted in support of the paternal grandmother's application is sufficient to support a determination that she is a person legally responsible for the care of the children. The evidence demonstrated that the children lived with the paternal grandmother for months at a time, during which time she purchased food and clothes for the children, did their laundry, fed them, brought them to and from school, church, and extracurricular activities, acted as the contact person for the school in case the children were ill or injured, and attended medical appointments with them. These actions, parental in nature and over an extended period of time, support a determination that the paternal grandmother was the functional equivalent of a parent to the children … . Thus, the paternal grandmother was entitled to a hearing pursuant to Family Court Act § 1028, and the Family Court's denial of her application deprived the paternal grandmother of her due process rights … . Matter of Kavon A. (Kavon A.–Monetta A.), 2021 NY Slip Op 01972, Second Dept 3-31-21

FORECLOSURE, CIVIL PROCEDURE.

THE ESTATE OF THE MORTGAGOR WAS NOT A NECESSARY PARTY IN THIS FORECLOSURE ACTION; THE PROPERTY WAS CONVEYED BEFORE HER DEATH AND THE COMPLAINT DOES NOT SEEK A DEFICIENCY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the estate of the mortgagor was not a necessary party in the foreclosure proceeding and the complaint should not have been dismissed on that ground:

The estate of the mortgagor was not a necessary party to this action, as it had no interest in the property at the time this action was commenced, inasmuch as the mortgagor conveyed the property that is subject to the mortgage to the defendant prior to her death, and the complaint does not seek a deficiency judgment against her estate … . U.S. Bank N.A. v Apelbaum, 2021 NY Slip Op 02008, Second Dept 3-31-21

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

PLAINTIFF BANK PRESENTED INSUFFICIENT PROOF OF COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304, THE BANK SHOULD NOT HAVE BEEN AWARDED SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank did not present sufficient evidence of compliance with the notice requirements of RPAPL 1304:

[T]he plaintiff submitted the affidavit of April Simmons, an employee of the plaintiff's loan servicer, Nationstar Mortgage, LLC (hereinafter Nationstar), along with copies of two 90-day notices addressed to the defendant. Simmons, however, did not state in her affidavit that she personally mailed these notices to the defendant, and she did not aver that she was familiar with the mailing practices and procedures

of the entity which sent the notices … . Moreover, although the envelopes accompanying the 90-day notices state "First-Class Mail" and contain a bar code above a 20-digit number, the plaintiff failed to submit any receipt or corresponding document proving that the notices were actually sent by first-class and certified mail to the defendant more than 90 days prior to the commencement of the action … . U.S. Bank, N.A. v Zientek, 2021 NY Slip Op 02015, Second Dept 3-31-21

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

PLAINTIFF BANK PRESENTED INSUFFICIENT PROOF OF COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304, THE BANK SHOULD NOT HAVE BEEN AWARDED SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank did not demonstrate compliance RPAPL 1304 and therefore was not entitled to summary judgment:

… [T]he plaintiff submitted, inter alia, an affidavit of Tewana Sheriff, a foreclosure administrator for the plaintiff's servicer who, based upon review of "business records maintained for the purpose of servicing plaintiff's mortgage loans," averred that the 90-day notice was sent via first-class and certified mail in accordance with RPAPL 1304. Sheriff did not refer to any specific records demonstrating compliance with RPAPL 1304, did not aver that she had personal knowledge of the subject mailings, and did not set forth personal knowledge of a standard office mailing procedure designed to ensure that items were properly addressed and mailed. Although the plaintiff submitted a signed certified mail receipt and United States Postal Service tracking information, those items do not refer to a 90-day notice, and a copy of the 90-day notice does not include a United States Postal Service tracking number corresponding with the certified mail receipt … . Moreover, the plaintiff failed to, inter alia, submit any proof of mailing the 90-day notice by first-class mail. Therefore, the Supreme Court should have denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted

against the defendants, to strike their answer, and for an order of reference … . Santander Bank, N.A. v Schaefer, 2021 NY Slip Op 02005, Second Dept 3-31-21

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

THE 2ND DEPARTMENT REVERSED THE AWARD OF SUMMARY JUDGMENT TO THE BANK BECAUSE ONE OF TWO BORROWERS WAS NOT NAMED IN THE RPAPL 1306 FILING; THIS RULING MAY NOT HOLD UP BECAUSE, ON MARCH 30, 2021, THE COURT OF APPEALS HELD ONLY ONE BORROWER NEED BE NAMED IN THE RPAPL 1306 FILING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank's motion for summary judgment in this foreclosure action should not have been granted because an apparent borrower, Kosin, was not named in the bank's electronic filing required by RPAPL 1306. [Note that the Court of Appeals, on March 30, 2021, held that the bank need only name one borrower in the RPAPL 1306 notice. That holding may or may not apply to this case, which has slightly different facts in that it was not certain Kosin was, in fact, a borrower. See CIT Bank N.A. v Schiffman, 2021 NY Slip Op 01933, CtApp 3-30-21.]:

… [T]he plaintiff's noncompliance with RPAPL 1306 by establishing that the plaintiff only made an RPAPL 1306 filing with respect to [defendant borrower] Hollien, but did not make any such filing with respect to Kosin. In opposition, the plaintiff failed to raise a triable issue of fact as to its compliance with this necessary precondition to commencement of a foreclosure action … . Contrary to the plaintiff's contention, it was still required to comply with RPAPL 1304 and 1306 with respect to Kosin because, although Kosin was not listed as a "borrower" on the note, he was defined as a "borrower" on the mortgage agreement. Since the mortgage agreement refers to Kosin as a "borrower" on both the first page and the signature page, Kosin is a "borrower" for purposes of RPAPL 1304 and 1306 … . Although there is some ambiguity in the language of the mortgage agreement, any ambiguities in the language of the document must be construed against the plaintiff, as the plaintiff is

the party who supplied the document … . Federal Natl. Mtge. Assn. v Hollien, 2021 NY Slip Op 01963, Second Dept 3-31-21

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

WHERE THE BANK ATTEMPTS TO DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIRMENTS OF RPAPL 1304 WITH PROOF OF THE STANDARD OFFICE MAILING PROCEDURE, A DEFENDANT BORROWER MAY REBUT THE PRESUMPTION OF PROPER MAILING AND RECEIPT WITH PROOF OF A MATERIAL DEVIATION FROM THE BANK'S MAILING PROCEDURE; WHERE THERE ARE MULTIPLE BORROWERS, THE BANK NEED ONLY NAME ONE IN THE ELECTRONIC FILING REQUIRED BY RPAPL 1306 (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a concurring opinion, answering two certified questions from the Second Circuit, determined: (1) where, in an action for foreclosure, the bank attempts to demonstrate compliance with the mailing and notice requirements of RPAPL 1304 with proof of the standard office mailing procedure, a defendant borrower can rebut the presumption of proper mailing and receipt with proof of a material deviation from the bank's mailing procedure; and (2) where there are multiple borrowers, the bank need only provide information about one borrower in the bank's electronic filing required by RPAL 1306. Here the defendants alleged there was a material deviation from the bank's mailing procedure because the bank averred the envelopes for the RPAPL 1304 notice are "created upon default," but the notices were dated almost a year after the initial payment default. The Court of Appeals expressed no opinion whether the "nearly one-year gap" was a material deviation from the bank's mailing procedure such that the presumption of proper mailing and receipt was rebutted. The court noted the borrowers' claim they never received the notice is not, standing alone, sufficient to rebut the presumption:

What is necessary to rebut the presumption that a RPAPL 1304 notice was mailed will depend, in part, on the nature of the practices detailed in the affidavit. Moreover, contextual considerations may also factor into the analysis. For example, here, [the

bank] points out that residential notes and mortgages are negotiable instruments that often change hands at various points during their duration, which may impact the timing of the creation and mailing of RPAPL 1304 notices—a contextual factor a court could consider in assessing whether a purported deviation from routine procedure was material. We reject defendants' argument that a single deviation from any aspect of the routine office procedure necessarily rebuts the presumption of mailing. Such a standard would undermine the purpose of the presumption because, in practice, it would require entities to retain actual proof of mailing for every document that could be potentially relevant in a future lawsuit. CIT Bank N.A. v Schiffman, 2021 NY Slip Op 01933, CtApp 3-30-21

FORECLOSURE, UNIFORM COMMERCIAL CODE (UCC).

THE BANK'S PROOF OF STANDING TO BRING THE FORECLOSURE ACTION WAS INSUFFICIENT (SECOND DEPT),

The Second Department determined the bank's motion for summary judgment in this foreclosure action should have been denied because the proof the bank has standing was insufficient:

… [T]he plaintiff failed to establish, prima facie, that it had standing to commence this action. Although the plaintiff attached to the complaint copies of the note and an undated purported allonge endorsed in blank, the plaintiff did not demonstrate that the purported allonge, which was on a piece of paper completely separate from the note, was "so firmly affixed thereto as to become a part thereof," as required by UCC 3-202(2) … . U.S. Bank, N.A. v Ainsley, 2021 NY Slip Op 02014, Second Dept 3-31-21

FORECLOSURE.

THE DEFAULT LETTER DID NOT DECLARE THE MORTGAGE DEBT IMMEDIATELY DUE AND PAYABLE; THEREFORE THE LETTER DID NOT ACCELERATE THE DEBT AND THE FORECLOSURE ACTION WAS NOT TIME-BARRED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the default letter did not accelerate the debt and, therefore, the foreclosure action was not time-barred:

The appealed case directly on point with the dispositive issue here is Vargas v Deutsche Bank [2021 NY Slip Op. 01090], in which the Court of Appeals set a clear standard for determining whether a default letter constitutes a "clear and unequivocal acceleration of a debt." Applying the long-standing rule … "that a noteholder must effect an 'unequivocal overt act' to accomplish such a substantial change in the parties' contractual relationship," the Court, in Vargas, held that to constitute a "clear and unequivocal" acceleration of a debt, a default letter must demand from a noteholder an immediate repayment of the entire outstanding loan, and must not also refer to acceleration only as a future event, indicating the debt was not accelerated at the time the letter was written.

… The default letter notified plaintiff that the subject mortgage loan was in default as of September 1, 2010. The letter gave plaintiff 30 days to cure the default by payment of the amount due and owing, which was just over $9,000. It also stated: "Unless we receive full payment of all past-due amounts, we will accelerate the maturity of the loan, declare the obligation due and payable without further demand, and begin foreclosure proceedings." Thus, as in Vargas, the default letter did not effectuate an unequivocal acceleration of the debt because it did not seek an immediate repayment of the entire balance outstanding on the loan, but rather "referred to acceleration only as a future event, indicating the debt was not accelerated at the time the letter was written." Kirschenbaum v Wells Fargo Bank, N.A., 2021 NY Slip Op 02073, First Dept 4-1-21

Similar issue and result in Ditech Fin., LLC v Rector 70 LLC, 2021 NY Slip Op 02062, First Dept 4-1-21

FREEDOM OF INFORMATION LAW (FOIL).

A WARNING LETTER ISSUED TO THE NYC MAYOR BY THE NYC CONFLICTS OF INTEREST BOARD MUST BE RELEASED PURSUANT TO A FOIL REQUEST BY THE NEW YORK TIMES (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Acosta, determined that a warning letter issued to the NYC mayor by the Conflicts of Interest Board (Board) must be released pursuant to a Freedom of Information Law (FOIL) request:

At issue in this appeal is whether a "private" warning letter issued to the Mayor of the City of New York by the Conflicts of Interest Board (Board) is subject to disclosure pursuant to the Freedom of Information Law (FOIL). The City of New York office of the Mayor (Mayor's Office) declined to disclose the letter to the New York Times (NYT) on the ground that the letter was exempt pursuant to New York City Charter § 2603(k), which states that "the records, reports, memoranda and files of the board shall be confidential and shall not be subject to public scrutiny." The Mayor's Office argues that since the letter was designated as "private" by the Board, and therefore confidential, it falls within the ambit of § 2603(k). We disagree. As the plain text of section 2603(k) indicates, it is meant to protect the confidentiality of documents in possession of the Board. Once the letter was issued to another entity, the Mayor could not rely on section 2603(k), because the NYT sought disclosure from the Mayor and not from the Board … . The Mayor's Office's privacy arguments are also inconsistent with the public interest in disclosure of warning letters, contrary to its own past practice of disclosing the Board's correspondence, and otherwise have no merit. Accordingly, the letter must be disclosed. * * *

DOI [NYC Department of Investigations] found that the Mayor's Office solicited contributions for CONY [Campaign for One New York] from executives of real estate development firms that likely had or potentially had business pending before the City. Although there was no finding of any quid pro quo, on several occasions, a firm achieved a favorable outcome from a City agency after it had made a donation to CONY … . These findings were transmitted to the Board, whose Chairman declined "for confidentiality reasons," to tell a reporter whether the Board had issued a private warning letter, the only action available … . …

The NYT reporter to whom the Board chairman had spoken then filed a FOIL request with the Mayor's Office for "a copy of a letter" sent by the Board to the Mayor's Office regarding his fundraising for [CONY]." The request was denied on the ground that "the class of records you have requested would be exempt from disclosure pursuant to New York City Charter § 2603(k)." Matter of New York Times Co. v City of New York Off. of the Mayor, 2021 NY Slip Op 01948, First Dept 3-30-21

INSURANCE LAW, CONTRACT LAW.

THE DEFENDANTS SOUGHT REFORMATION OF AN INSURANCE POLICY ALLEGING THE FAILURE TO NAME THEM INDIVIDUALLY AS INSUREDS WAS DUE TO A MUTUAL MISTAKE; THE 3RD DEPARTMENT, OVER A TWO-JUSTICE DISSENT, REVERSED SUPREME COURT AND HELD THE COMPLAINT FAILED TO STATE A CAUSE OF ACTION (THIRD DEPT).

The Third Department, reversing Supreme Court, over a two-justice dissent, determined defendant property owners (Pollards) did not state a cause of action for reformation of an insurance policy based upon mutual mistake. Defendants' tenant slipped and fell on a staircase outside his apartment at 192-198 Main Street and made a claim against defendants. Defendants' business, Pollard Excavating, was insured. The insurer disclaimed coverage of the slip and fall at defendants' apartment because the policy covered only defendants' business:

The Pollards … allege that they believed that they were covered in their individual capacities and that the failure of [the insurer] to name them as such was the product of a mutual mistake. "It is well established that when interpreting an insurance contract, as with any written contract, the court must afford the unambiguous provisions of the policy their plain and ordinary meaning" … .

… [T]he … third-party complaint asserts that the Pollards own the buildings located at 192-198 Main Street and that they are shareholders of Pollard Excavating and Pollard Disposal. The coverage form contained in the policy issued to Pollard Excavating specifically identifies the insured under the policy as a "corporation in

the business of excavating" and further identifies, as relevant here, that "your stockholders are also insureds, but only with respect to their liability as stockholders." Inasmuch as the express provisions of the insurance policy contract do not include individual coverage for the Pollards, it was incumbent upon the Pollards to allege sufficient facts showing mutual mistake. To that end, the second amended third-party complaint fails to contain any factual allegations that [the insurer] agreed to provide coverage to the Pollards in their individual capacities or that any oral agreement was reached by which [the insurer] was obligated to do so. We therefore find that the … third-party complaint fails to allege with sufficient particularity that the parties "reached an oral agreement and, unknown to either [party], the signed writing does not express that agreement" … . Hilgreen v Pollard Excavating, Inc., 2021 NY Slip Op 02031, Third Dept 4-1-21

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF WAS STRUCK BY AN AIR CONDITIONER WHEN TWO OF THE FOUR RODS ATTACHING THE AIR CONDITIONER TO THE CEILING DETACHED AND ONE END OF THE UNIT FELL; QUESTION OF FACT WHETHER THE AIR CONDITIONER WAS A FALLING OBJECT WHICH SHOULD HAVE BEEN SECURED WITHIN THE MEANING OF LABOR LAW 240 (1) (FIRST DEPT).

The First Department, reversing Supreme Court, determined there was a question of fact whether an air conditioner installed by plaintiff's employer was a falling object which should have been secured in this Labor Law 240 (1) action. the air condition was attached to the concrete ceiling by four rods. Two of the rods came out of the ceiling causing one end of the unit to drop, striking plaintiff:

Plaintiff testified that he was standing on the fourth rung of an A-frame ladder, which he had set up on a solid and clean part of the floor and had been using without incident, directly under an air-conditioning unit, while attempting to follow his foreman's instructions by connecting a "canvas" device to air-conditioning duct work, when the air-conditioning unit fell onto his head, causing him to fall off the ladder onto the floor. The air-conditioning unit had recently been installed by plaintiff's employer as part of its work on the project and was not part of the pre-

existing building structure as it appeared before the project began. The air-conditioning unit was mounted a few inches below the approximately 12-foot ceiling by four rods. Plaintiff testified that two of those rods detached from the concrete ceiling, causing one end of the unit to drop, while the other end of the unit remained attached to the ceiling by two bent rods.

There is an issue of fact as to whether the air-conditioning unit constituted a falling object that was required to be secured for the purposes of the undertaking … . Erby v 36 LLC, 2021 NY Slip Op 02065, First Dept 4-1-21

MENTAL HYGIENE LAW, CIVIL PROCEDURE.

BASED UPON JUROR MISCONDUCT, THE TRIAL JUDGE SET ASIDE THE JURY VERDICT FINDING DEFENDANT SEX OFFENDER DID NOT SUFFER FROM A MENTAL ABNORMALITY AND ORDERED A NEW TRIAL; THE APPELLATE DIVISION REVERSED; THE COURT OF APPEALS REINSTATED THE TRIAL JUDGE'S RULING (CT APP).

The Court of Appeals, without any discussion of the facts or the law, reversed the Appellate Division (Matter of State of New York v Donald G., 2020 NY Slip Op 04716, Fourth Dept 8-20-20) and reinstated the trial court's setting aside the verdict based on juror misconduct. The jury had decided defendant, a sex offender, did not suffer from a mental abnormality requiring civil commitment and should be released. The trial judge set aside that verdict and ordered a new trial. The trial judge's ruling was here reinstated by the Court of Appeals:

Under these circumstances, Supreme Court did not abuse its discretion as a matter of law in ordering a new trial in the interest of justice on the ground of juror misconduct. Respondent's remaining contentions have been considered and are without merit. Matter of State of New York v Donald G., 2021 NY Slip Op 01935, CtApp 3-30-21

NEGLIGENT HIRING, ETC.

PLAINTIFF ALLEGED SHE WAS SEXUALLY ASSAULTED BY DEFENDANT'S EMPLOYEE; PLAINTIFF'S NEGLIGENT HIRING, TRAINING, SUPERVISION AND RETENTION CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED; THE MOTION TO DISMISS BASED ON DOCUMENTARY EVIDENCE WAS UNTIMELY BECAUSE THE THEORY WAS NOT ASSERTED IN THE ANSWERS; THE MOTION TO DIMSISS FOR FAILURE TO STATE A CAUSE OF ACTION WAS SUPPORTED ONLY BY INADMISSIBLE HEARSAY (FIRST DEPT).

The First Department, reversing Supreme Court, determined: (1) defendant security company's (Kent's) motion to dismiss the negligent hiring, training, supervision and retention cause of action pursuant to CPLR 3211 (a)(1) was untimely because the defendant did not assert a defense based on documentary evidence in its answers; and (2) the defendant's motion to dismiss for failure to state a claim because the affidavit submitted by defendant's director of operations was not sworn to have been made on his personal knowledge and did not lay a proper foundation for the admissibility of the documents referred to in the affidavit as business records. Plaintiff, Erin, alleged a security guard employed by defendant (Kent) sexually assaulted her at a hotel where Kent provided security services:

… [T]he affidavit of Kent's director of operations was not sworn to have been made on his own personal knowledge, and therefore was of no probative value as to the issues of fact that he addressed … . Moreover, although "an affidavit from an individual, even if the person has no personal knowledge of the facts, may properly serve as the vehicle for the submission of acceptable attachments which provide evidentiary proof in admissible form, like documentary evidence" … , the affidavit must nevertheless "constitute a proper foundation for the admission of the records"… . Because Kent's director of operations did not establish that the documents annexed to his affidavit fell within the business records exception to the hearsay rule (CPLR 4518[a]), those documents were inadmissible … .

Contrary to defendant's argument, plaintiffs do have a well-pled negligent hiring claim cognizable at law. Plaintiffs' allegations are sufficient to put Kent on notice

of their claim that Kent negligently hired, trained, supervised, and retained the guard who, plaintiffs allege, sexually assaulted Erin, and that Kent knew or should have known of the guard's propensity to commit sexual assault. Moreover, plaintiffs can amplify these allegations in their bill of particulars … . Doe v Intercontinental Hotels Group, PLC, 2021 NY Slip Op 02063, First Dept 4-1-21

SLIP AND FALL, CIVIL PROCEDURE.

PLAINTIFF, AN EXTERMINATOR, WAS IN THE ATTIC OF DEFENDANT'S HOUSE; THE ATTIC HAD NO FLOOR AND THE PLAINTIFF WALKED ON THE BEAMS OR JOISTS; THE PLAINTIFF TESTIFIED HE STEPPED ON A SMALLER PIECE OF WOOD LYING ACROSS THE BEAMS, IT GAVE WAY AND HIS LEG WENT THROUGH THE CEILING; THE 2ND DEPARTMENT, OVER A TWO-JUSTICE DISSENT, DETERMINED THERE WAS NO EVIDENCE THE SMALLER BOARD WAS A LATENT DEFECT OR THAT DEFENDANT HAD NOTICE OF ANY DEFECT, SET ASIDE THE PLAINTIFF'S VERDICT AND DISMISSED THE COMPLAINT (SECOND DEPT).

The Second Department, reversing Supreme Court, over a two-justice dissent, determined defendant's motion to set aside the plaintiff's verdict and dismiss the complaint should have been granted. Plaintiff, an exterminator, went into defendant's attic which apparent had no floor, only the beams or joists. Plaintiff testified that there were some smaller boards lying across the joints. According to the plaintiff, when he stepped on one of the smaller boards it gave way and his leg went through the ceiling:

"[T]he issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question" … . However, in order to meet his prima facie burden of proof at trial, the plaintiff was required to submit sufficient evidence to enable the jury to decide this critical issue in a logical manner, based on the inferences to be drawn from the evidence, rather than through sheer speculation or guesswork … . Here, the evidence showed that the main beams were part of the structure of the house, but the function of the smaller pieces of wood was never really made clear, except that the plaintiff offered that they may have been intended

to hold the insulation in place. In fact, the jury heard next to nothing about the smaller piece of wood that allegedly caused the plaintiff to fall. There were no pictures of it, no testimony regarding its dimensions, no evidence as to whether such a smaller piece of wood would ordinarily be safe to walk on, no evidence as to whether the smaller piece of wood even appeared reasonably safe to walk on, and no evidence that the smaller piece of wood was in a rotted, deteriorated, or otherwise unsafe condition, other than the plaintiff's testimony that it looked "discolored" and "pretty damp."

Viewing the evidence in the light most favorable to the plaintiff, and affording him every favorable inference which may properly be drawn from the facts presented, there was simply no rational basis upon which the jury could determine, without speculating, that the smaller piece of wood that allegedly caused the plaintiff to fall constituted a latent hazard due to its alleged rotted condition … . Saintume v Lamattina, 2021 NY Slip Op 02004, Second Dept 3-31-21

SLIP AND FALL.

IN A SLIP AND FALL CASE, PROOF OF A GENERAL CLEANING AND INSPECTION POLICY DOES NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE DANGEROUS CONDITION (SECOND DEPT).

The Second Department determined defendant's motion for summary judgment in this slip and fall case should not have been granted. Evidence of a general cleaning and inspection policy does not demonstrate the lack of constructive notice of the dangerous condition:

The defendant also failed to show, prima facie, that it did not have constructive notice of the condition that the plaintiff alleged caused her to fall. "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" … . Although the defendant submitted the transcript of the deposition testimony of the individual who was the managing partner of the restaurant at the time of the accident, the manager testified only as to the restaurant's

general cleaning and inspection policy and not about any inspections that may have occurred prior to the plaintiff's fall. Piotrowski v Texas Roadhouse, Inc., 2021 NY Slip Op 02000, Second Dept 3-31-21

TRUSTS AND ESTATES.

THE PETITIONER'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE OBJECTIONS TO PROBATE ALLEGING LACK OF DUE EXECUTION AND UNDUE INFLUENCE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Surrogate's Court, determined the petitioner's motion for summary judgment dismissing the objections to probate alleging lack of due execution and undue influence should have been granted. The objectants were the children of decedent's son, who were excluded from any distribution from the estate. With respect to lack of due execution, the court wrote:

"The proponent of a will has the burden of proving that the propounded instrument was duly executed in conformance with the statutory requirements" … . "Where the will is drafted by an attorney and the drafting attorney supervises the will's execution, there is a presumption of regularity that the will was properly executed in all respects" … . Although the evidence here did not establish that the execution of the will was supervised by an attorney, "a presumption of compliance with the statutory requirements also arises where a propounded will contains an executed attestation clause and a self-proving affidavit" … . Further, "even where the memory of both attesting witnesses is failed or imperfect, a will nevertheless may be admitted to probate" … .

Here, the petitioner established, prima facie, that the 2010 will was duly executed pursuant to EPTL 3-2.1 by submitting a copy of the 2010 will with its executed attestation clause and self-proving affidavit … . At their depositions, both attesting witnesses, who were employees of the drafting attorney's law office, identified their signatures as witnesses to the 2010 will … . Both attesting witnesses testified as to the office's general practice for will executions, which met the statutory

requirements. In opposition, the objectants failed to raise a triable issue of fact. Matter of Michels, 2021 NY Slip Op 01978, Second Dept 3-31-21

WORKERS' COMPENSATION, TRUSTS AND ESTATES.

THE 2009 AMENDMENTS TO THE WORKERS' COMPENSATION LAW ALLOWED LUMP SUM PAYMENTS OF SCHEDULE LOSS OF USE (SLU) AWARDS; CLAIMANT DIED BEFORE THE SLU AWARD WAS MADE; CLAIMANT'S ESTATE IS NOT ENTITLED TO THE LUMP SUM AWARD (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a concurring opinion, determined that the 2009 amendments allowing lump sum schedule loss of use (SLU) awards did not entitle claimant's estate to the lump sum award. The estate was entitled only to the portion of the award that would have been due to the claimant for the period prior to his death:

In December 2014, decedent claimant Norman Youngjohn sustained injuries when he slipped on ice and fell in a parking lot at work while employed by Berry Plastics Corporation. After decedent sought workers' compensation benefits, a claim was established for injuries to his right shoulder and left elbow, and he was awarded temporary benefits. In September 2016, decedent notified the Workers' Compensation Board that his injuries had become permanent, and the workers' compensation insurance carrier (the Carrier) subsequently notified the Board that decedent's injuries were amenable to a schedule loss of use (SLU) award (see generally Workers' Compensation Law § 15 [3]). However, in March 2017, before resolution of his claim for permanent partial disability benefits, decedent suffered a fatal heart attack unassociated with his work-related injuries. * * *

The legislature's 2009 amendments to Workers' Compensation Law §§ 15 (3) (u) and 25 (1) (b)—which provide that SLU awards may be "payable" in a lump sum upon request of the injured employee …—changed the allowable methods of payment for SLU awards. However, the Estate's contention that these amendments implicitly provide a claimant's estate a new entitlement to the value of an SLU award upon a claimant's death, or otherwise direct that an SLU award "accrues" at that

time for purposes of an estate's recovery—issues that are distinct from the permissible methods of payment for such awards …—cannot be reconciled with the fact that the legislature did not amend Workers' Compensation Law § 15 (4) (d) when it authorized lump sum payments. An estate's entitlement to an SLU award upon a claimant's death remains governed by Workers' Compensation Law § 15 (4) (d), which was left untouched by the 2009 amendments. Matter of Estate of Youngjohn v Berry Plastics Corp., 2021 NY Slip Op 02017, CtApp 4-1-21