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An Organized Compilation of the Summaries of Selected Decisions Released by the Fourth Department April 1 - June 30, 2021, Which Were Posted on the New York Appellate Digest Website in April, May and June, 2021. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header of Any Page to Return There. Right Click on the Citations to Keep Your Place in the Pamphlet.

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APPEALS, COVID, CONSTITUTIONAL LAW.

SUPREME COURT HAD FOUND COVID-19 RESTRICTIONS ON LIVE MUSIC PERFORMANCE UNCONSTITUTIONAL; THE APPEAL WAS DEEMED MOOT AND THE MERITS WERE NOT REACHED (FOURTH DEPT).

The Fourth Department determined the New York State Liquor Authority's (SLA's) appeal of Supreme Court's ruling that the SLA's COVID-19 guidance imposed upon a tavern (Sportsmen's) were unconstitutional was moot. Neither party had argued the appeal should be dismissed as moot:

[SLA's] guidance, which Sportsmen's was required to abide by pursuant to certain executive orders, prohibited advertised and ticketed main-draw music shows at licensed bars or restaurants and restricted live music at such establishments to only that which was incidental to the dining experience and not the draw itself. …

… [A]lthough the issue of the lawfulness of the prior challenged guidance implemented as part of the extraordinary response to the COVID-19 pandemic is substantial and novel, that issue is not likely to recur … . Moreover, "the issue is not of the type that typically evades review" … . Indeed, as the parties have acknowledged, the guidance at issue here prohibiting advertised and ticketed main-draw music shows has been reviewed on the merits by at least two other courts … . Matter of Sportsmen's Tavern LLC v New York State Liq. Auth., 2021 NY Slip Op 03957, Fourth Dept 6-17-21

CIVIL PROCEDURE, NEGLIGENCE, EDUCATION-SCHOOL LAW.

PLAINTIFF BROUGHT A PERSONAL INJURY ACTION AGAINST A SCHOOL DISTRICT AND AN INDIVIDUAL UNDER THE CHILD VICTIMS ACT ALLEGING SEXUAL ABUSE BY A GUIDANCE COUNSELOR IN THE 1980'S; SUPREME COURT PROPERLY ALLOWED PLAINTIFF'S SUIT TO GO FORWARD UNDER A PSEUDONYM (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Smith, determined Supreme Court properly allowed plaintiff to proceed under a pseudonym in her personal injury action against the school district and an individual defendant pursuant to the Child Victims Act (CBA). Plaintiff alleged she was sexually abused in the 1980's by a guidance counselor at her high school:

… [P]laintiff alleged that she was employed by the county in which these allegations arose, that her job may be in jeopardy as a result of the allegations, and that she experienced "emotional distress, suicidal thoughts, depression, anxiety, feelings of worthlessness, and many other psychological damages, painful feelings, emotions, nightmares, flashbacks, as well as physical manifestations of these problems" that would recur if her name was publicized.

… [T]he record establishes that plaintiff has disclosed her name to defendants, thereby minimizing any prejudice arising from her use of a pseudonym for the purposes of discovery and investigation, and defendants have not asserted any other prejudice that they will sustain therefrom. An additional factor supporting the court's determination is that plaintiff did not seek, nor did the court order, that the records in the case be sealed or that public access be denied. Thus, the public's interest in open court proceedings is preserved … . Although the School and defendant Amherst Central School District are governmental entities, which supports plaintiff's position, defendant John Koch … is an individual, which favors defendants' position. Thus, there is no clear advantage to either side with respect to that factor. PB-7 Doe v Amherst Cent. Sch. Dist., 2021 NY Slip Op 02969, Fourth Dept 5-7-21

CONTRACT LAW, TRUSTS.

THE COMPLAINT STATED CAUSES OF ACTION FOR CONSTRUCTIVE TRUST AND PROMISSORY ESTOPPEL; THE UNJUST ENRICHMENT ELEMENT OF THE CONSTRUCTIVE TRUST WAS NOT PRECLUDED BY A CONTRACT SIGNED BY PLAINTIFF AS A TRUSTEE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, over a partial dissent, determined the complaint stated a cause of action for a constructive trust, the unjust enrichment element of the constructive trust was not precluded by a contract, and the alleged promise to take care of plaintiff in return for an interest in an LLC was clear and unambiguous enough to support a cause of action for promissory estoppel:

According to plaintiff, defendant [plaintiff's daughter] had promised that, if plaintiff created the LLC and gave her a 90% membership interest in the LLC and control as sole manager, she would "help [plaintiff] manage his businesses and real property interests, help take care of [plaintiff and his wife], help ensure their financial well-being, and visit them often." After plaintiff's wife died, defendant allegedly ended all direct communication with plaintiff and gave "sporadic and cursory" attention to plaintiff's business and real property interests, prompting him to commence this action. * * *

Inasmuch as the amended complaint alleged a confidential or fiduciary relation, a promise, and a transfer made in reliance on that promise, the issue concerning the [constructive trust] cause of action is whether the amended complaint adequately alleged unjust enrichment.

"[I]n order to sustain an unjust enrichment claim, '[a] plaintiff must show that (1) the other party was enriched, (2) at [the plaintiff's] expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered' " … . … Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded" … .

Here, there is a written contract that covers the particular subject matter, i.e., the LLC's operating agreement. That agreement, however, was executed by defendant and plaintiff in his role as trustee. … Inasmuch as plaintiff, individually, was not a party to the operating agreement, his first cause of action, insofar as it was asserted by him, individually, is not precluded by the written contract … . Van Scoter v Porter, 2021 NY Slip Op 02692, Fourth Dept 4-30-21

CRIMINAL LAW, ATTORNEYS.

COUNTY COURT DID NOT CONDUCT AN ADEQUATE INQUIRY INTO DEFENDANT'S COMPLAINTS ABOUT DEFENSE COUNSEL, CONVICTION REVERSED; TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, over a two-justice dissent, determined County Court should have conducted a minimal inquiry to address defendant's complaints about defense counsel. The dissenters argued County Court had, in fact, conducted an adequate inquiry:

… [W]e conclude that defendant's complaints were sufficiently serious to trigger the court's duty to inquire … . Indeed, the complaints suggested on their face the possibility of a complete breakdown of communication with defense counsel, either owing to or exacerbated by defense counsel's alleged unwillingness to respond to any of defendant's repeated inquiries over nearly 12 months of representation; were evidenced by defendant's apparent confusion over the status of the separate indictments; and were never refuted by defense counsel, who remained silent in response to defendant's repeated in-court complaints … . Further, the court itself appeared to acknowledge that defendant's complaints, if true, established that there was "a problem" with the representation.

Thus, the court had a duty to conduct a minimal inquiry, which the court failed to do … .

From the dissent:

… [T]his is not a case where the court "erred by failing to ask even a single question about the nature of the disagreement or its potential for resolution" … . Instead, because the court "repeatedly allowed defendant to air his concerns about defense counsel" and reasonably concluded after listening to those concerns that they "were insufficient to demonstrate good cause for substitution of counsel" … , we would affirm. People v Robinson, 2021 NY Slip Op 03939, Fourth Dept 6-17-21

CRIMINAL LAW, ATTORNEYS.

IN THE FACE OF DEFENDANT'S AND DEFENSE COUNSEL'S REQUEST FOR NEW COUNSEL, COUNTY COURT COMMITTED REVERSIBLE ERROR BY DENYING THE REQUEST WITHOUT MAKING A MINIMAL INQUIRY (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined the court should have conducted in inquiry to evaluate defendant's complaints about his attorney and his request for new counsel:

… [T]he court committed reversible error by failing to conduct an inquiry following defense counsel's submission of a letter seeking to be relieved from the case and in light of defendant's responses to that letter. In particular, the record establishes that defense counsel—prompted by defendant's prior specific complaints about her failure to file motions, seek relevant evidence through discovery such as surveillance video of the incident, investigate specified witnesses, and engage in meaningful consultation and preparation—expressed a breakdown in trust and communication based on her interactions and appearances with defendant and sought to be relieved from representing defendant on the ground that she was unable to handle his case … . … "[D]efendant's request on its face suggested a serious possibility of irreconcilable conflict with his lawyer, as evidenced by the [acknowledgment] of counsel that a complete breakdown of communication and lack of trust had developed in their relationship" … . "[W]here[, as here,] potential conflict is acknowledged by counsel's admission of a breakdown in trust and communication,

the trial court is obligated to make a minimal inquiry" … . People v Darwish, 2021 NY Slip Op 03936, Fourth Dept 6-17-21

CRIMINAL LAW, ATTORNEYS.

THE PROSECUTOR VIOLATED THE CRIMINAL PROCEDURE LAW BY REFUSING TO INFORM THE GRAND JURY THE DEFENDANT REQUESTED THE TESTIMONY OF TWO WITNESSES; HOWEVER THE PROSECUTORIAL MISCONDUCT DID NOT WARRANT DISMISSAL OF TWO COUNTS OF THE INDICTMENT; COUNTY COURT REVERSED (FOURTH DEPT).

The Fourth Department, reversing County Court, in a People's appeal, determined the district attorney violated the Criminal Procedure Law by refusing to tell the grand jury defendant had requested that two witnesses give testimony, but the violation did not warrant dismissal of two counts of the indictment. The decision includes a detailed discussion of the district attorneys duties and discretion with respect to a defendant's request for witness testimony before a grand jury:

… [A] prosecutor may not "suppress[a] defendant's request to call . . . witness[es] nor strip[ ] the grand jury of its discretion to grant or deny that request" … . Instead, "[a]lthough [a] prosecutor [cannot] avoid presenting [a requested] witness's name for a vote, the prosecutor [is] free, in the role of advisor to the grand jury, to explain that the witness [does] not have relevant information [or] primarily offer[s] inadmissible hearsay testimony, and if unpersuasive in this effort, the prosecutor [may seek] a court order quashing the subpoena or limiting the witness's testimony as provided in CPL 190.50 (3)" … . … [T]he court properly determined that the People, despite their stated concerns about the admissibility of the proposed testimony, violated their statutory obligation by refusing to present to the grand jury defendant's request that two of the vehicle's other occupants be called as witnesses.
* * *

We … conclude that "this was not one of the rare cases of prosecutorial misconduct entitling a defendant to the exceptional remedy of dismissal, because there is no showing that, in the absence of the complained-of misconduct, the grand jury might

have decided not to indict the defendant" … . … [T]he People did not engage in an overall pattern of willful and pervasive misconduct; instead, the failure to present defendant's request for witnesses to the grand jury constituted an isolated instance of misconduct involving, at worst, the erroneous handling of an evidentiary matter, which "do[es] not merit invalidation of the indictment" … . People v Wilcox, 2021 NY Slip Op 02893, Fourth Dept 5-7-21

CRIMINAL LAW, EVIDENCE, JUDGES.

WHERE A MOTION TO VACATE A CONVICTION IS BASED UPON EVIDENCE OUTSIDE THE RECORD AND EVIDENCE IN THE RECORD, ALL OF THE EVIDENCE IS ADMISSIBLE IN THE HEARING ON THE MOTION; COUNTY COURT SHOULD NOT HAVE RESTRICTED THE PRESENTATION OF DEFENDANT'S ALLEGATIONS OF INEFFECTIVE ASSISTANCE TO ONLY THOSE WHICH WERE OUTSIDE THE RECORD (FOURTH DEPT).

The Fourth Department, reversing the denial of defendant's motion to vacate his conviction, determined County Court should not have restricted the hearing to only the allegations of ineffective assistance that could not have been raised on direct appeal. Where a motion to vacate a conviction is based on evidence outside the record, as well as evidence on the record, all the evidence is admissible:

A "claim of ineffective assistance of counsel constitutes a single ground or issue upon which relief is requested . . . [Such] a claim . . . 'is ultimately concerned with the fairness of the process as a whole' " … and must be " 'viewed in totality' " … . Although "[a] single error may qualify as ineffective assistance . . . when the error is sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" … , a defendant may also establish that he or she received ineffective assistance of counsel by arguing that the cumulative effect of multiple errors rendered defense counsel's performance ineffective, even if those errors, "considered separately, may not have constituted ineffective assistance"… . Where, as here, a defendant alleges errors of defense counsel based on both matters appearing in the record and matters dehors the record, i.e., a " 'mixed claim,' " a "CPL 440.10 proceeding is the appropriate forum for reviewing the claim of

ineffectiveness in its entirety" … . People v Mack, 2021 NY Slip Op 03982, Fourth Dept 6-17-21

CRIMINAL LAW, EVIDENCE.

ALTHOUGH ONE OF THREE STATEMENTS MADE TO A DETECTIVE AFTER DEFENDANT HAD INVOKED HIS RIGHT TO COUNSEL WAS NOT SPONTANEOUS, ITS ADMISSION WAS HARMLESS ERROR; THE DISSENT ARGUED ALL THREE STATEMENTS SHOULD HAVE BEEN SUPPRESSED AND THE CONSTITUTIONAL ERROR WAS NOT HARMLESS (FOURTH DEPT).

The Fourth Department, over a dissent, determined that two of three statements made after defendant had invoked his right to counsel were spontaneous and properly admitted. The third statement was deemed a response to the functional equivalent of interrogation, but its admission was harmless error. The dissent argued that all three statements should have been suppressed and the constitutional error was not harmless:

[The] statements were made by defendant after the interrogation ceased and while a detective was sitting next to him, completing the arrest paperwork. After the detective asked him certain pedigree questions, defendant asked "How's Annie doing?," referring to decedent's wife. The detective replied that she was "hurt" and said that she "lost the person she loved the most in life." The detective then asked defendant if he wanted another coffee or soda and, after defendant responded that he would like another cup of coffee, he started crying. The detective whispered "good response" and told him "that's remorse." There was a brief interruption when another detective opened the door to the interview room and discussed lunch plans with the first detective, and the first detective then asked defendant if he was hungry. Defendant responded "yeah," and then stated "it wasn't supposed to happen like that" and that he "didn't mean for any of that to happen" (first statement). After the detective responded "I understand," defendant stated "I just wanted to prank 'em just like jig 'em" (second statement). After the detective responded with several statements including that "remorse is what we wanted to see" and that the police did

not think that defendant's intentions were to kill anyone, defendant said "I should've just stuck around. Maybe I coulda [sic] done something" (third statement). * * *

With respect to the third statement, we agree with defendant that it was not spontaneous because it was made in response to the functional equivalent of express questioning by the detective … . People v Bowen, 2021 NY Slip Op 03685, Fourth Dept 6-11-21

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE ERRORS WERE DEEMED HARMLESS, A POLICE OFFICER SHOULD NOT HAVE BEEN ALLOWED TO IDENTIFY DEFENDANT IN A SURVEILLANCE VIDEO AND POLICE OFFICERS SHOULD NOT HAVE BEEN ALLOWED TO PROVIDE HEARSAY EVIDENCE AS MOLINEUX "BACKGROUND INFORMATION" (FOURTH DEPT).

The Fourth Department determined it was error to allow a police officer to identify the defendant in a surveillance video, and it was error to allow police officers to testify about what they learned from others (hearsay) about defendant's involvement in the shooting. Although the errors were deemed harmless because of the overwhelming evidence, these two rulings are significant. The court noted there is no Molineux exception for hearsay for so-called background information:

"A lay witness may give an opinion concerning the identity of a person depicted in a surveillance if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the

than is the jury" … . Here, "there was no basis for concluding that the [officer] was more likely than the jury to correctly determine whether . . . defendant was depicted in the video" … . The officer was not familiar with defendant, and there was no evidence showing that defendant had changed his appearance before trial … .

… [T]he court erred in permitting the People to elicit testimony from police officers regarding what they learned from others about defendant's involvement in the shooting. The challenged testimony was hearsay that was not admissible under any

cognizable exception to the hearsay rule. The People essentially argue that this testimony was admissible under People v Molineux (168 NY 264 [1901]) to complete the narrative with background information. We reject that argument and reiterate that "there is no Molineux exception to the rule against hearsay" … . There is also no general exception to the hearsay rule for testimony relating to background conduct, information, or explanation of a subject matter or event … . People v Harlow, 2021 NY Slip Op 03933, Fourth Dept 6-17-21

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE POLICE IN THIS STREET STOP CASE MAY HAVE HAD CAUSE FOR A LEVEL ONE INQUIRY (A CAN IN A PAPER BAG), THEY IMMEDIATELY ENGAGED IN LEVEL TWO INVASIVE QUESTIONING FOCUSED ON DEFENDANT'S POSSIBLE VIOLATION OF THE OPEN CONTAINER LAW; DEFENDANT'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, vacating defendant's guilty plea, over a two-justice dissent, determined defendant's motion to suppress based upon the illegal street stop should have been granted. The police may have been justified in a level one (DeBour) inquiry based upon an apparent violation of the open-container law (a can in a paper bag), but the police immediately moved to a level two encounter with invasive questioning about the container in the paper bag:

At the first level of a police-civilian encounter, i.e., a request for information, a police officer may approach an individual "when there is some objective credible reason for that interference not necessarily indicative of criminality" (De Bour, 40 NY2d at 223), and "[t]he request may 'involve[] basic, nonthreatening questions regarding, for instance, identity, address or destination' " … ."The next degree, the common-law right to inquire, is activated by a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion in that a [police officer] is entitled to interfere with a citizen to the extent necessary to gain explanatory information, but short of a forcible seizure" (De Bour, 40 NY2d at 223).

Here, even assuming, arguendo, that the officers possessed a level one right to approach defendant and his companion … the officers nonetheless immediately "engaged in a level two intrusion, i.e., 'a more pointed inquiry into [the] activities [of defendant and his companion]' . . . , by asking 'invasive question[s] focusing on the possible criminality of the subject' " … . Notably, the officers did not see defendant or his companion drinking from whatever item was in the paper bag, and there were no other attendant circumstances indicative of criminal behavior that would warrant the more pointed inquiry at the outset … . People v Wright, 2021 NY Slip Op 03675, Fourth Dept 6-11-21

CRIMINAL LAW, EVIDENCE.

THE ARGUMENT THAT THE PROBATION OFFICER'S SEARCH OF DEFENDANT'S RESIDENCE WAS UNLAWFUL AND UNREASONABLE BECAUSE IT WAS BASED SOLELY ON AN UNCORROBORATED ANONYMOUS TIP WAS NOT PRESERVED FOR APPEAL, THE DISSENT DISAGREED; DEFENDANT DID NOT DEMONSTRATE DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE THE ISSUE (FOURTH DEPT).

The First Department, over a dissent, determined the issue whether the probation officer's search of defendant's residence was improperly based solely on an anonymous tip was not preserved for appeal. In addition, the defendant did not demonstrate defense counsel was ineffective for failing to preserve the issue. The dissent argued the record did not support the motion court's finding the warrantless search was lawful and reasonable:

Contrary to defendant's contention, he did not preserve that issue for our review through either that part of his omnibus motion seeking to suppress the evidence or his posthearing memorandum. A question of law with respect to a ruling of a suppression court is preserved for appeal when "a protest thereto was registered, by the party claiming error, at the time of such ruling . . . or at any subsequent time when the court had an opportunity of effectively changing the same . . . , or if in response to a protest by a party, the court expressly decided the question raised on appeal" (CPL 470.05 [2] …). In his omnibus motion, defendant sought, inter alia,

suppression of the evidence seized during the search on the ground that the evidence "was taken in violation of . . . defendant's constitutional rights" inasmuch as it was done without "a search warrant or probable cause." Those "broad challenges" are insufficient to preserve defendant's present contention … . In defendant's posthearing memorandum, he argued that the search was invalid because there was no warrant or consent to search, that the search was not rationally related to the duties of the officer, and that the parole officers were acting as police officers when conducting the search. He did not raise his present contention that the People were required to prove that the information provided to the officer satisfied the Aguilar-Spinelli test in order for the search to be lawful, even though he was then aware of the basis for the search … . Nor did the court expressly decide that issue … . People v Murray, 2021 NY Slip Op 02896, Fourth Dept 5-7-21

CRIMINAL LAW, EVIDENCE.

THE STAIRWAY TO THE ATTIC, WHERE DRUGS WERE FOUND, WAS NOT PART OF THE APARTMENT DESCRIBED IN THE SEARCH WARRANT AND THE PEOPLE DID NOT DEMONSTRATE THE STAIRWAY WAS A COMMON AREA; DEFENDANT'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department determined defendant's motion to suppress evidence found in a stairway leading to the attic should have been granted because the warrant did not authorize the search of that area and the People did not demonstrate the stairway was a common area:

… [T]he warrant at issue authorized a search of "865 woodlawn upper apt. buffalo, n.y. 2 ½ story wood frame house white with white trim. attached garage and common areas," and drugs and drug packaging materials were found by the police behind a doorway on stairs leading to the attic. The doorway to the attic was in a hallway outside of the upper apartment and, as a result, the attic cannot be considered a part of the upper apartment itself … . …

The question thus becomes whether the area where the drugs and packaging materials were found constitutes a common area. Common areas of multi-unit

buildings are those areas ” ‘accessible to all tenants and their invitees’ ” … . Here, the contraband was found by the police on the stairs leading to the attic, and a police officer testified at the suppression hearing that there was a closed door leading to the attic from the second floor common area. The officer in question was not present when the door was opened by other officers who executed the warrant, and he did not know whether the door had been locked. When asked whether “the door could have been locked and needed to be breached,” the officer answered, “That is entirely possible.” The People did not call any of the officers who were present when the door to the attic was opened, forcibly or otherwise, nor did they call the landlord or anyone who resided at the property.

Defendant testified that the door to the attic was closed and locked, and that, during the execution of the warrant, the door was broken down by the police. If the door was indeed locked, it cannot be said that the attic was accessible to all tenants and their invitees. People v Moore, 2021 NY Slip Op 03975, Fourth Dept 6-17-21

CRIMINAL LAW, JUDGES.

DURING THE BATSON PROCEDURE, THE PROSECUTOR’S RACE-NEUTRAL EXPLANATION FOR A PEREMPTORY JUROR CHALLENGE WAS NOT SUPPORTED BY THE RECORD AND SHOULD NOT HAVE BEEN ACCEPTED BY THE COURT, NEW TRIAL ORDERED; TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the race-neutral explanation for the prosecutor’s peremptory challenge to a juror was not borne out by the record. A new trial was ordered. The prosecutor argued the prospective juror referred to police conduct as “harsh.” But the prospective juror was apparently commenting on general differences between living in Rochester and Brooklyn, not the police:

We conclude that reversal is required because the race-neutral reason proffered by the prosecutor and accepted by the court is not borne out by the record … . Although the record need not conclusively establish that a prospective juror actually harbors bias in order for a bias-based peremptory challenge to withstand review under

Batson … , a proffered race-neutral reason cannot withstand a Batson objection where it is based on a statement that the prospective juror did not in fact make … . Here, the record does not support the prosecutor's characterization of the prospective juror's statements. We therefore reverse the judgment and grant a new trial on count one of the indictment … . People v Coleman, 2021 NY Slip Op 03695, Fourth Dept 6-11-21

CRIMINAL LAW.

CRIMINAL POSSESSION OF A WEAPON SECOND DEGREE IS AN ARMED FELONY FOR SENTENCING PURPOSES IF THE FIREARM IS LOADED AND OPERABLE (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Centra, diverging from the First Department, determined criminal possession of a weapon second degree can constitute possession of a deadly weapon within the definition of an armed felony if the firearm is loaded and operable:

We disagree with the reasoning in Ochoa [182 AD3d 410, 1st Dept 2020] only to the extent that it held that all convictions of criminal possession of a weapon in the second degree for possessing a loaded firearm are not armed felonies. It is apparent that where a defendant possesses a firearm that is actually loaded with ammunition and is capable of being fired, he or she possesses a deadly weapon and is guilty of an armed felony offense. We conclude that it is appropriate to look at the particular facts of each case to determine whether the defendant is guilty of an armed felony. For example, a person is guilty of robbery in the first degree under Penal Law § 160.15 (2) when he or she commits a robbery while armed with a deadly weapon, which, as noted, includes a switchblade knife or a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged (§ 10.00 [12]). To determine if the defendant committed an armed felony, courts look to the definition of deadly weapon as that phrase is used in the definition of armed felony, which excludes knives. Thus, where a defendant is convicted of robbery in the first degree for the use of a knife, that is not an "armed felony" … . Where, however, the robbery is committed with a loaded, operable firearm, it is an

"armed felony" (see People v Jiminez, 165 AD2d 692, 692-693 [1st Dept 1990] …). In Jiminez, the Court held that "[s]ince defendant pleaded guilty to committing first degree robbery while armed with a pistol he was properly sentenced as an armed felony offender" … , despite the fact that a first-degree robbery conviction is not always an armed felony. Just as courts look to the definition of deadly weapon as that phrase is used in the definition of armed felony to determine that knives are excluded therefrom, so too should courts look to whether the firearm fits within that definition, i.e., a firearm that is actually loaded and capable of being fired. People v Meridy, 2021 NY Slip Op 02894, Fourth Dept 5-7-21

CRIMINAL LAW.

DEFENDANT'S REQUEST TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF ATTEMPTED STRANGULATION SECOND DEGREE SHOULD HAVE BEEN GRANTED; NEW TRIAL ON THAT CHARGE ORDERED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction of strangulation second degree, determined the request to instruct the jury to consider the lesser included offense of attempted strangulation second degree should have been granted. There was a reasonable view of the evidence which would have allowed the jury to find the victim did not suffer physical injury:

… [T]he disputed issue is whether there is a reasonable view of the evidence supporting a determination of guilt on the lesser count but not the higher count. Strangulation in the second degree requires proof that the victim suffered stupor, loss of consciousness, or physical injury or impairment (Penal Law § 121.12). Inasmuch as there was no evidence that the complainant suffered stupor or loss of consciousness, defendant's guilt of this offense rested entirely on the evidence that the complainant sustained a physical injury. Viewing the evidence in the light most favorable to defendant … , we conclude that a reasonable view of the evidence would have supported a determination that the complainant did not sustain a physical injury and thus that defendant was guilty of only the lesser offense and not the greater … . People v Swift, 2021 NY Slip Op 03785, Fourth Dept 6-11-21

CRIMINAL LAW.

SENTENCE MUST BE PRONOUNCED ON EACH COUNT OF THE CONVICTION; SENTENCE VACATED AND REMITTED FOR RESENTENCING (FOURTH DEPT).

The Fourth Department, vacating defendant's sentence and remitting for resentencing, noted that sentence must be pronounced for each count of the conviction:

… County Court erred in failing to "pronounce sentence on each count" of the conviction (CPL 380.20). Although the certificate of conviction states that defendant was sentenced on each count to concurrent terms of incarceration of nine years with five years of postrelease supervision, the court, at sentencing, "failed to impose a sentence for each count of which defendant was convicted" … . People v Brady, 2021 NY Slip Op 03951, Fourth Dept 6-17-21

CRIMINAL LAW.

THE EVIDENCE OF ESCAPE IN THE FIRST DEGREE WAS LEGALLY INSUFFICIENT; DEFENDANT WAS NOT YET IN CUSTODY WHEN HE DROVE AWAY AS A POLICE OFFICER ATTEMPTED TO PULL HIM FROM HIS CAR (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction of escape in the first degree, determined defendant was not yet in custody when he drove away as a police officer attempted to pull him from his car:

… [D]efendant contends that the evidence is legally insufficient to support the conviction of escape in the first degree. We agree. Here, a police officer informed defendant that he was under arrest and attempted to pull him from the driver's seat of a vehicle, at which time defendant drove off, dragging officers across a parking lot. Under these circumstances, we conclude that defendant was not in custody at the time of the alleged escape … . People v Bagley, 2021 NY Slip Op 02964, Fourth Dept 5-7-21

CRIMINAL LAW.

THERE WAS PROBABLE CAUSE TO ARREST PLANTIFF FOR TRESPASS AFTER SHE WAS ASKED TO LEAVE THE RESTAURANT BY RESTAURANT STAFF; THEREFORE PLAINTIFF'S FALSE ARREST CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department determined plaintiff's cause of action for false arrest should have been dismissed in this excessive-force, civil-rights-violation action against two police officers. Plaintiff got into an argument with restaurant staff and was asked to leave by the staff, who then called the police. The police broke plaintiff's arm when attempting to handcuff her. The excessive force, civil-rights-violation causes of action properly survived defendants' summary judgment motions. But there was probable cause to arrest plaintiff for trespass, requiring dismissal of the false arrest cause of action:

"[T]he existence of probable cause is an absolute defense to a false arrest claim" … . This is so even if probable cause exists with respect to an offense other than the one actually invoked at the time of arrest … . Here, although plaintiff lawfully entered the restaurant premises as a customer, her license to remain was revoked when she was asked to leave after she began arguing with the staff. When plaintiff refused to leave the restaurant property at the request of its staff, she committed a trespass … . Inasmuch as plaintiff committed an ongoing trespass in defendants' presence (see CPL 140.10 [1] [a]), defendants had probable cause to arrest plaintiff for that violation … . Snow v Rochester Police Officer Christopher Schreier, 2021 NY Slip Op 02638, Fourth Dept 4-30-21

EDUCATION-SCHOOL LAW, DEFAMATION.

FORMER STUDENT'S ALLEGATIONS DEFENDANT COLLEGE BREACHED ITS AGREEMENT THAT IT WOULD NOT DISCLOSE ITS DISCIPLINARY PROCEEDINGS AGAINST THE STUDENT TO SCHOOLS TO WHICH THE STUDENT APPLIED FOR ADMISSION PROPERLY SURVIVED THE COLLEGE'S MOTION TO DISMISS; ADOPTING AND APPLYING THE HEIGHTENED STANDARD FOR DEFAMATION BY IMPLICATION, THE DEFAMATION CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, modifying Supreme Court, determined defendant college breached its agreement with plaintiff-student regarding the disclosure of information about the school's disciplinary proceedings alleging sexual misconduct. After finding the student had violated the code of student conduct the student was expelled. The student was then acquitted of criminal charges stemming from the same allegations. The student and the school entered an agreement prohibiting the school from disclosing information about the disciplinary proceedings to schools to which the student applied for admission. The complaint alleged the school breached that agreement and included a cause of action for defamation by implication. The breach of contract causes of action properly survived the motion to dismiss, but the defamation cause of action should have been dismissed:

" 'Defamation by implication' is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements" (id. at 380-381). We now join the other Departments in adopting the heightened legal standard for a claim of defamation by implication … . Under that standard, "[t]o survive a motion to dismiss a claim for defamation by implication where the factual statements at issue are substantially true, the plaintiff must make a rigorous showing that the language of the communication as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference" … . …

The disclosure that plaintiff was found responsible in a student disciplinary proceeding for sexual misconduct and assault as defined in a student code of conduct does not imply that there was a criminal proceeding … . …

… [A]lthough plaintiff may wish that additional information from the College would have provided further context for the truthful information that was conveyed, the disclosure to Buffalo State did not imply anything false about plaintiff … . Bisimwa v St. John Fisher Coll., 2021 NY Slip Op 02962, Fourth Dept 5-7-21

ELECTION LAW.

THE DESIGNATING PETITION WAS PERMEATED BY FRAUD AND SHOULD HAVE BEEN INVALIDATED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the designating petition was permeated by fraud and should have been invalidated:

… [P]etitioner submitted clear and convincing evidence demonstrating that several subscribing witnesses attested to many signatures on the designating petition that they had not actually witnessed, and thus we agree with petitioner that the candidate's designating petition is permeated with fraud. The parties correctly agree that the candidate was required to obtain signatures from 600 voters registered in the Democratic Party … . Numerous subscribing witnesses, acting on the candidate's behalf, gathered 1,657 signatures, approximately 700 of which the Board invalidated. Petitioner challenged the signatures collected by five subscribing witnesses, who collected the overwhelming majority of the signatures on the designating petition; indeed, only slightly less than 200 valid signatures were collected by all of the other people who circulated petitions for the candidate. Supreme Court concluded that numerous signatures collected by those five subscribing witnesses were fraudulently procured for various reasons, including that there was no such voter, the voter had died, the voter had signed the designating petition more than once, or the voter was not the person who signed the designating petition. …

It is well settled that, "where the court finds misrepresentations in numerous instances, as it finds here, and nothing is [established] in rebuttal, it may well indulge in the presumption that there were many other misrepresentations and irregularities which time did not permit to be uncovered … . " Matter of Saunders v Mansouri, 2021 NY Slip Op 03157, Fourth Dept 5-18-21

ELECTION LAW.

THE FAILURE TO INCLUDE THE DATE OF THE PRIMARY ELECTION IN THE CERTIFICATE OF AUTHORIZATION DID NOT INVALIDATE IT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the fact that the date of the primary election was not stated on the certificate of authorization did not invalidate it:

… [T]he statute at issue here, Election Law § 6-120 (3), does not specifically prescribe that the date of the primary election be specified in the certificate of authorization … . We therefore conclude that there was substantial compliance with section 6-120 (3) inasmuch as the omission of the date of the primary election was " 'neither a defect invalidating the certificate nor a matter presenting an opportunity for prejudice or possibility of fraud' " … . Further, "[t]here is no question that the objectives of Election Law § 6-120 (3) were met here, as no issue was raised as to whether the subject authorization expressed the will of the party committee of the political subdivision involved" … . Matter of Kowal v Bargnesi, 2021 NY Slip Op 03014, Fourth Dept 5-11-21

FAMILY LAW, DIVORCE.

HUSBAND'S PROCEEDS FROM THE SALE OF STOCK DID NOT LOSE THEIR SEPARATE-PROPERTY CHARACTER WHEN THEY WERE BRIEFLY PLACED IN THE PARTIES' JOINT BANK ACCOUNT BEFORE BEING USED FOR THE DOWNPAYMENT FOR THE MARITAL RESIDENCE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined funds from the husband's sale of stock were his separate property, even though the funds were briefly placed in a joint account before using them for the down payment on the marital residence:

… [D]efendant offered uncontroverted testimony, supported by documentary evidence, that he placed funds acquired from the sale of stocks he had purchased prior to the marriage into the parties' joint bank account because it was his only checking account and he could not access the funds directly from the platform from which he sold the stock … . The funds remained in the account for only a matter of weeks before defendant withdrew a majority of them to pay a portion of the down payment for the marital home … . Thus, defendant established that the account was used "only as a conduit" for the sale of his stock … . The funds therefore maintained their character as separate property, and defendant is entitled to a credit for his portion of the down payment … . LaPoint v Claypoole, 2021 NY Slip Op 03947, Fourth Dept 6-17-21

FAMILY LAW, DIVORCE.

THE JUDGE'S MAINTENANCE AWARD MAY NOT HAVE BEEN PROPERLY BASED UPON THE FACTORS ENUMERATED IN DOMESTIC RELATIONS LAW 236; MATTER REMITTED (FOURTH DEPT).

The Fourth Department, vacating the maintenance award and remitting for recalculation, determined Supreme Court did not set forth the factors for the maintenance calculation as required by Domestic Relations Law 236:

Defendant husband appeals from a judgment of divorce that, inter alia, directed him to pay plaintiff wife $750 a week in maintenance for a period of 17 years. On appeal, he contends that Supreme Court erred in awarding maintenance for a period of time in excess of the recommendation set forth in the advisory schedule in Domestic Relations Law § 236 (B) (6) (f) (1) without adequately demonstrating its reliance on the relevant statutory factors enumerated in section 236 (B) (6) (e) (see § 236 [B] [6] [f] [2]). We agree and further conclude that the court erred in awarding plaintiff maintenance without sufficiently setting forth the relevant factors enumerated in section 236 (B) (6) (e) that it relied on in reaching its determination. Although the court need not specifically cite the factors enumerated in that section, its analysis must show that it at least considered the relevant factors in making its determination

… . The determination must also "reflect[] an appropriate balancing of [the wife's] needs and [the husband's] ability to pay" … .

… [T]he court stated that it awarded plaintiff $750 per week—an amount deviating from the statutory guidelines—for a duration in excess of the statutory guidelines based on the length of the marriage, the parties' disproportionate earning capacities, and defendant's tax debt. However, although the statutory guidelines use the length of the marriage to calculate the duration of the maintenance award … , the length of the parties' marriage is not a factor enumerated in section 236 (B) (6) (e). Further, the court did not state what factors it considered, in addition to actual earnings, in determining the parties' earning capacities … . Moreover, the court did not determine whether defendant's substantial tax debt would impede his ability to pay plaintiff's maintenance award … . Thus, the court failed to show that it considered any of the factors enumerated in section 236 (B) (6) (e) (1) in making its determination of both the amount and duration of the maintenance award. Gutierrez v Gutierrez, 2021 NY Slip Op 02662, Fourth Dept 4-30-21

FRAUD, CONTRACT LAW.

PLAINTIFF RAISED GROUNDS TO INVALIDATE A RELEASE IN THIS TRAFFIC ACCIDENT CASE BASED ON FRAUD (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff in this traffic accident case raised grounds to invalidate a release plaintiff had signed based upon fraud:

Defendants met their initial burden of establishing that they were released from any claims by submitting the release executed by plaintiff … . The burden thus shifted to plaintiff to show that the release was voidable based on fraud … . Plaintiff submitted an affidavit in which she averred that, in the midst of negotiating a settlement of her personal injury claim for pain and suffering, a representative of Morgan's insurer told her that, "under New York Law, [plaintiff] would not be able to sue . . . because [she] did not have any major surgeries or life-threatening injuries." Plaintiff further averred that, based on those representations, she agreed to sign the release in exchange for $1,500. Accepting plaintiff's allegations as true … , we

conclude that plaintiff sufficiently alleged grounds on which to invalidate the release … . Cain-Henry v Shot, 2021 NY Slip Op 02961, Fourth Dept 5-7-21

INSURANCE LAW, CONTRACT LAW.

THE AMBIGUITY IN THE HOME INSURANCE POLICY WAS NOT CLEARED UP BY EXTRINSIC EVIDENCE AND MUST BE RESOLVED AGAINST THE INSURER; THE INSURER SHOULD NOT HAVE DISCLAIMED COVERAGE FOR WATER DAMAGE CAUSED BY FROZEN PIPES (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the insurer should not have disclaimed coverage for water damage caused by frozen pipes in plaintiffs' seasonal home. The case turned on the whether the plaintiffs took "reasonable care" (within the meaning of the policy) to maintain the heat in the house:

… [P]laintiffs established as follows: the home's heating system was recently installed, was regularly maintained, and had never required repairs; Robert P. McAleavey (plaintiff) winterized the property by setting the internal temperature to approximately 50 degrees in the late fall of 2017; plaintiff checked on the home approximately 15 times during the winter of 2017-2018; during those visits, plaintiff ensured that the temperature was appropriate, that no windows were broken, that the toilets flushed, and that the water ran; and plaintiff last visited the house on January 11 or 12, 2018, at which point the interior temperature was "comfortable." Although plaintiff was unable to visit the property between mid-January and late February 2018 due to a broken leg and his resulting hospitalization, plaintiffs' submissions established that, during such period, they had no notice or reason to suspect that anything was wrong with the premises or the heating system. Moreover, plaintiffs' neighbors and realtor periodically checked on the property's exterior.

In our view, the term "reasonable care" as used in the policy is ambiguous inasmuch as it is susceptible of at least two reasonable interpretations, at least one of which supports plaintiffs' contention that they exercised reasonable care, and this ambiguity was not resolved by extrinsic evidence … .

” ‘[U]nder [these] circumstances, the ambiguity must be resolved against the insurer which drafted the contract’ ” … . We thus conclude that plaintiff’s loss is specifically covered under the policy and that the exclusion relied on by defendant does not unambiguously apply in this case … . McAleavey v Chautauqua Patrons Ins. Co., 2021 NY Slip Op 03954, Fourth Dept 6-17-21

INSURANCE LAW.

QUESTIONS OF FACT ABOUT WHETHER THE INSURER IS ESTOPPED FROM DENYING COVERAGE TO A PARTY LISTED AS AN ADDITIONAL INSURED IN A CERTIFICATE OF INSURANCE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined there were questions of fact about plaintiff’s reliance on a certificate of insurance and whether the certificate was issued by the carrier or its agent. Although a certificate of insurance is not a contract, the carrier may be estopped from denying coverage if the party named as an additional insured in the certificate relied on the certificate and the certificate was issued by the insurer or its agent:

“It is well established that a certificate of insurance, by itself, does not confer insurance coverage, particularly [where, as here,] the certificate expressly provides that it is issued as a matter of information only and confers no rights upon the certificate holder [and] does not amend, extend or alter the coverage afforded by the policies” … . “A certificate of insurance is only evidence of a carrier’s intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists” … .

” ‘Nevertheless, an insurance company that issues a certificate of insurance naming a particular party as an additional insured may be estopped from denying coverage to that party where the party reasonably relies on the certificate of insurance to its detriment’ ” … ” ‘For estoppel based upon the issuance of a certificate of insurance to apply, however, the certificate must have been issued by the insurer itself or by an agent of the insurer’ ” … . County of Erie v Gateway-Longview, Inc., 2021 NY Slip Op 02631, Fourth Dept 4-30-21

LABOR LAW-CONSTRUCTION LAW.

COMPARATIVE NEGLIGENCE IS A DEFENSE TO A LABOR LAW 241 (6) CAUSE OF ACTION (FOURTH DEPT).

The Fourth Department noted that comparative negligence is a defense to a Labor Law 241 (6) cause of action. Here plaintiff alleged he slipped and fell on ice and snow in a parking lot which functioned as a passageway and Supreme Court granted plaintiff's motion for summary judgment. The Fourth Department found defendant had raised a question of fact about whether it had discharged its duty to keep the passageway clear by salting it and sent the matter back for a trial:

… [G]iven the need for a trial on liability and, if necessary, a new trial on damages, we note our agreement with defendant that the court erred in granting plaintiff's request to preclude defendant from introducing at the prior damages trial any evidence of plaintiff's comparative fault with respect to the Labor Law § 241 (6) cause of action. The court determined that defendant was precluded from offering evidence of plaintiff's comparative fault at trial because that issue had been decided when the court granted plaintiff's motion. Contrary to the court's determination, however, consideration of comparative fault is still required even "[w]hen a defendant's liability is established as a matter of law before trial" because the jury must still "determine whether the plaintiff was negligent and whether such negligence was a substantial factor" in causing his or her injuries … , "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" … . Baum v Javen Constr. Co., Inc., 2021 NY Slip Op 03678, Fourth Dept 6-11-21

LIEN LAW, TRUSTS.

IN THIS LIEN LAW DISPUTE OVER PAYMENT PURSUANT TO CONSTRUCTION CONTRACTS, DEFENDANTS DID NOT DEMONSTRATE AS A MATTER OF LAW THAT THE RESTORATION OF IMPROPERLY DIVERTED TRUST ASSETS WITH NON-TRUST ASSETS LIMITED DEFENDANTS' DAMAGES (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court in this Lien-Law construction-contract action, over a dissent, determined defendants did not demonstrate as a matter of law that the improper diversion of trust assets was cured by the restoration of trust assets with non-trust assets:

"[T]he primary purpose of [Lien Law] article 3-A and its predecessors . . . [is] to ensure that those who have directly expended labor and materials to improve real property [or a public improvement] at the direction of the owner or a general contractor receive payment for the work actually performed" … . "Use of trust assets for any purpose other than the expenditures authorized in Lien Law § 71 before all trust claims have been paid or discharged constitutes an improper diversion of trust assets, regardless of the propriety of the trustee's intentions" … . Under Lien Law article 3-A, a trust beneficiary may maintain an action "to recover trust assets from anyone to whom they have been diverted with notice of their trust status" … . * * *

… [T]he court erred in granting defendants' motion in part by limiting the potential damages in the diversion causes of action to a maximum of $104,205.99 based on Top Capital's [defendant's] alleged restoration of trust assets through payments made with non-trust assets … . Plaintiffs allege that approximately $1.4 million in trust assets was improperly diverted by defendants. The court, in limiting the potential recovery on the diversion causes of action, credited not just Top Capital but all defendants for the approximately $1.3 million Top Capital paid DiMarco [plaintiff] from non-trust assets after the trust fund was depleted. That was error because defendants failed to establish their entitlement to a restoration defense as a matter of law. Contrary to defendants' assertion, the Court of Appeals has rejected the argument that a defendant can cure an improper diversion of trust assets, and therefore avoid liability for that diversion, by a subsequent payment from non-trust

assets … . DiMarco Constructors, LLC v Top Capital of N.Y. Brockport, LLC, 2021 NY Slip Op 02680, Fourth Dept 4-30-21

MEDICAL MALPRACTICE, ATTORNEYS.

THE LANGUAGE IN THE HIPAA FORM, INDICATING PLAINTIFF'S PHYSICIAN MAY BUT IS NOT OBLIGATED TO SPEAK WITH DEFENDANT'S ATTORNEY, WAS PROPERLY APPROVED BY SUPREME COURT IN THIS MEDICAL MALPRACTICE ACTION (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Troutman, over a dissent, determined Supreme Court properly approved language in the HIPAA form informing plaintiff's physicians that they may but are not obligated to speak with defendant's attorney:

Defendant offered … to accept revised authorizations that included the following language:

"the purpose of the requested interview with the physician is solely to assist defense counsel at trial. The physician is not obligated to speak with defense counsel prior to trial. The interview is voluntary."

… [D]efendant moved … to compel plaintiff to provide revised authorizations. The court granted the motion … , directing plaintiff … to provide revised HIPAA-compliant authorizations containing defendant's proposed language, unemphasized and in the same size font as the rest of the authorization. * * *

Here, the wording that was approved by the court is identical to the wording that previously met with the approval of the Second Department in Porcelli v Northern Westchester Hosp. Ctr. (65 AD3d 176, 178 [2d Dept 2009]), it is similar to the language contained in the [Office of Court Administration's] standard form, and there is no dispute that it is consistent with the applicable law. Sims v Reyes, 2021 NY Slip Op 02971, Fourth Dept 5-7-21

MEDICAL MALPRACTICE.

THE MEDICAL MALPRACTICE ACTION AGAINST A FIRST-YEAR RESIDENT, WHO DID NOT EXERCISE INDEPENDENT JUDGMENT IN FOLLOWING THE DIRECTION OF HIS SUPERVISORS TO DISCONTINUE A MEDICATION, SHOULD HAVE BEEN DISMSSED; THE DISSENT DISAGREED (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, over a dissent, determined the medical malpractice action against Dr. Drummond, a first-year resident, should have been dismissed because he did not exercise any independent medical judgement but merely followed the direction of his supervisors when medication was discontinued:

Defendants met their initial burden on the motion by presenting the affidavit of an expert who opined that, as a first-year resident, Dr. Drummond could not and did not make any medical decisions independently and that he properly wrote the discharge instruction to discontinue the medication only after discussing and confirming that decision with the appropriate supervisors, a practice that complied with the applicable standard of care … . Defendants also submitted the deposition testimony of Drs. Drummond and Bath, which established that Dr. Drummond consulted with Dr. Bath prior to decedent's discharge and confirmed with him that the decision had been made to discontinue the medication. Plaintiff failed to raise a triable issue of fact in opposition … . Based on that conclusion, we likewise agree with defendants that the court erred in denying that part of the motion seeking summary judgment dismissing the complaint and any cross claims against Kaleida Health insofar as the complaint asserts a claim of vicarious liability based on the alleged conduct of Dr. Drummond … . Bieger v Kaleida Health Sys., Inc., 2021 NY Slip Op 03772, Fourth Dept 6-11-21

MENTAL HYGIENE LAW, CRIMINAL LAW.

SUPREME COURT SHOULD NOT HAVE DENIED PETITIONER-SEX-OFFENDER'S REQUEST TO REPRESENT HIMSELF IN THE MENTAL HYGIENE LAW ARTICLE 10 CIVIL COMMITMENT PROCEEDING (FOURTH DEPT).

The Fourth Department, reversing the Mental Hygiene Law article 10 civil commitment of petitioner as a dangerous sex offender, determined Supreme Court should not have denied petitioner's request to represent himself:

We have recognized that a respondent in a Mental Hygiene Law article 10 proceeding "can effectively waive his or her statutory right to counsel" once the court "conducts a searching inquiry to ensure that the waiver is unequivocal, voluntary, and intelligent" … . In the instant case, respondent made a timely and unequivocal request to proceed pro se, the court conducted the requisite searching inquiry, and respondent repeatedly evinced an understanding of each of the court's warnings to him regarding the possible consequences of proceeding pro se … . The court, however, denied the request because it believed that respondent "[had] a good chance of prevailing" but did not believe that respondent "[had] a chance . . . of prevailing if [the court] let [respondent] go pro se."

On the record before us, we conclude that the court's sole rationale for denying the request was its belief that respondent lacked legal training and an understanding of the law, but that is not an appropriate basis on which to deny a request to proceed pro se … . "[M]ere ignorance of the law cannot vitiate an effective waiver of counsel as long as the defendant was cognizant of the dangers of waiving counsel at the time it was made" … . Matter of State of New York v Michael M., 2021 NY Slip Op 02636, Fourth Dept 4-30-21

MUNICIPAL LAW, EMPLOYMENT LAW, CRIMINAL LAW.

PETITIONER, WHO HAD WORKED FOR THE TOWN FOR 32 YEARS, TOOK $181 FROM PETTY CASH AND LEFT A NOTE INDICATING SHE OWED MONEY TO THE FUND; THE LARCENY AND THEFT CHARGES WERE ANNULLED; TERMINATION WAS TOO SEVERE A PUNISHMENT; MATTER REMITTED (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the theft and larceny charges against petitioner should be annulled and termination of petitioner's employment with the town was too severe a penalty. Petitioner took $181 from petty cash but left a note indicating she owed money to the fund:

We agree with petitioner that the determination of guilt on charges 1 and 2, which charged her respectively with theft and larceny, is not supported by substantial evidence. A person "commits larceny when, with intent to deprive another of property or to appropriate the same to him[- or her]self or to a third person, he [or she] wrongfully takes, obtains or withholds such property from an owner thereof" (Penal Law § 155.05 [1]). "Theft" is a synonym of "larceny" (Black's Law Dictionary 1780 [11th ed 2019]). We conclude that petitioner's actions, particularly the creation and placement of the note, are inconsistent with an intent to deprive or appropriate (see § 155.00 [3], [4] …). …

… [I]n light of petitioner's 32 years of service to the Town, her impending retirement, and the absence of grave moral turpitude … , we conclude that the penalty of termination is " 'so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness' " … . Matter of Gray v LaFountain, 2021 NY Slip Op 02624, Fourth Dept 4-30-21

MUNICIPAL LAW.

THE CITY OF ROCHESTER LOCAL LAW WHICH PURPORTED TO TRANSFER THE POWER TO DISCIPLINE POLICE OFFICERS TO THE POLICE ACCOUNTABILITY BOARD (PAB) IS INVALID AND CANNOT BE ENFORCED (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice NeMoyer, determined the City of Rochester Local Law which transferred the power to discipline police officers from the police chief to the Police Accountability Board (PAB) is invalid and cannot be enforced:

… [t]he challenged Local Law No. 2 necessarily falls insofar as it takes police discipline out of collective bargaining because, in that respect, it conflicts with the general law mandating collective bargaining over police discipline (see Civil Service Law § 204 [2] …). As the Court of Appeals has explained, "a local law is inconsistent [with the general law] where local laws prohibit what would be permissible under State law"… , and by creating a permanent administrative apparatus for disciplining police officers that is impervious to alteration or modification at the bargaining table, Local Law No. 2 necessarily and structurally prohibits something that … is statutorily mandated for the City of Rochester: collective bargaining of police discipline. The court therefore properly invalidated Local Law No. 2 insofar as it imbues PAB with disciplinary authority over Rochester police officers without regard to collective bargaining. Matter of Rochester Police Locust Club, Inc. v City of Rochester, 2021 NY Slip Op 03787, Fourth Dept 6-11-21

MUNICIPAL LAW.

THE DISCIPLINARY PROCEEDINGS AGAINST A TOWN POLICE OFFICER ARE CONTROLLED BY THE TOWN LAW AND THE TOWN POLICE MANUAL, NOT THE CIVIL SERVICE LAW AND COLLECTIVE BARGAINING AGREEMENT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the disciplinary proceedings against a town police officer are controlled by the Town Law and the town police manual, not by the Civil Service Law and the collective bargaining agreement (CBA):

… [W]e agree with respondents that the disciplinary procedures set forth in the police manual are controlling, we further agree with respondents that the court erred in directing them to resolve petitioner's disciplinary proceedings pursuant to Civil Service Law § 75 and the CBA … . To the extent that the police manual contains references to Civil Service Law § 75, it is well settled that section 75 did not repeal or modify Town Law § 155 … . Indeed, "Civil Service Law § 76 (4) states that '[n]othing contained in section [75] or [76] of this chapter shall be construed to repeal or modify any general, special or local' preexisting laws" … , and Town Law § 155, which gives towns the power and authority to adopt rules regarding police discipline, was enacted prior to Civil Service Law §§ 75 and 76 … . Thus, where, as here, a town board has adopted disciplinary rules pursuant to Town Law § 155, those rules are controlling and Civil Service Law § 75 and any collective bargaining agreement are inapplicable … . Matter of Town of Tonawanda Police Club, Inc. v Town of Tonawanda, 2021 NY Slip Op 02959, Fourth Dept 5-7-21

NEGLIGENCE, CIVIL PROCEDURE.

IN THIS SLIP AND FALL CASE WHERE COGNITIVE IMPAIRMENT WAS ALLEGED, DEFENDANTS SHOULD NOT HAVE BEEN PRECLUDED FROM CONDUCTING A NEUROPSYCHOLOGICAL EXAMINATION (NPE) OF PLAINTIFF (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendants were entitled to a neuropsychological examination (NPE) of the plaintiff pursuant to CPLR 3121:

… [W]e agree with defendants that the preclusion order sought by plaintiff is not warranted inasmuch as the NPE is material and necessary to defend against plaintiff's claims that he sustained head injuries and cognitive impairment "' . Here, plaintiff placed his mental and physical condition in controversy by alleging in the verified complaint, as amplified by the verified bills of particulars, that he injured, inter alia, his head, neck, spine, left wrist and left elbow and suffered "emotional and psychological pain . . . with related mental anguish, stress, and anxiety" as a result of the accident. Furthermore, defendants' submissions in opposition to the motion established, inter alia, that plaintiff's neurologist and psychologist had both ordered neuropsychological evaluations of plaintiff that had not been conducted, and that the requested NPE differs significantly from neurologic and neurosurgical examinations. In particular, defendants submitted an affidavit from the neuropsychologist who would conduct the NPE, who averred that he would utilize a different methodology, would administer a different battery of psychological tests, and would complete more detailed cognitive testing to determine the existence of any mood or behavioral deficits resulting from plaintiff's alleged injuries, whereas the testing done by neurologists and neurosurgeons generally focuses on physical abnormalities and physical manifestations of those abnormalities. Pokorski v FDA Logistics, 2021 NY Slip Op 03770, Fourth Dept 6-11-21

NEGLIGENCE, EDUCATION-SCHOOL LAW.

PLAINTIFF WAS INJURED DURING A WATER POLO GAME IN GYM CLASS; HIS NEGLIGENT SUPERVISION ACTION AGAINST THE SCHOOL DISTRICT PROPERLY SURVIVED SUMMARY JUDGMENT (FOURTH DEPT).

The Fourth Department determined a student's negligent supervision cause of action against the school district stemming from injuries during a water polo game in gym class properly survived summary judgment. Plaintiff alleged his head hit the bottom of the pool:

… [D]efendants failed to meet their initial burden inasmuch as their own submissions on the motion raise triable issues of fact whether they engaged in negligent supervision and whether that negligence was a proximate cause of plaintiff's injuries. While defendants' submissions established that the physical education teacher who supervised water polo had modified the typical rules thereof to prevent contact, defendants' papers raise issues of fact whether those rules were enforced, the water polo game as modified was safe and age-appropriate, and the supervision of the game was reasonable under the circumstances. Among other things, defendants submitted the deposition of the physical education teacher, wherein he provided conflicting testimony as to whether he actually allowed contact during the water polo game and whether he allowed students to take the ball from each other. His testimony therefore created an issue of fact whether defendants had notice of students engaging in dangerous conduct similar to the conduct that caused plaintiff's injuries and, thus, whether such conduct was preventable … . Zalewski v East Rochester Bd. of Educ., 2021 NY Slip Op 02700, Fourth Dept 4-30-21

NEGLIGENCE, EMPLOYMENT LAW.

QUESTION OF FACT WHETHER THE DRIVER OF DEFENDANT'S TRUCK IN THIS TRAFFIC ACCIDENT CASE WAS AN INDEPENDENT CONTRACTOR OR AN EMPLOYEE FOR WHOM DEFENDANT WOULD BE LIABLE PURSUANT TO RESPONDEAT SUPERIOR (FOURTH DEPT).

The Fourth Department, reversing Supreme Court in this traffic accident case, determined there was a question of fact about the liability of the delivery company under respondeat superior. Supreme Court determined the driver was an independent contractor and the company was therefore not liable:

An entity that retains an independent contractor generally is not liable for the independent contractor's negligent acts … . Whether a relationship between a delivery company and its drivers " 'is that of employees or independent contractors involves a question of fact as to whether there is evidence of either control over the results produced or over the means used to achieve the results' " … . Here, defendant's own evidentiary submissions established that defendant rented the delivery truck that was involved in the accident, was empowered to install its own signage on the truck, designed the delivery routes, set the times for the deliveries, and required drivers to submit incident reports following any accidents, thereby raising a question of fact with respect to the nature of the employment relationship … . Raymond v Hillebert, 2021 NY Slip Op 03684, Fourth Dept 6-11-21

NEGLIGENCE, EVIDENCE.

DEFENDANT DID NOT DEMONSTRATE WHEN THE AREA WHERE PLAINTIFF FELL WAS LAST CLEANED OR INSPECTED; THEREFORE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant in this slip and fall case did not demonstrate it lacked constructive notice of the water on the

floor as a matter of law. Defendant did not submit any proof demonstrating when the area was last cleaned or inspected:

To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" … . A "defendant cannot satisfy its burden merely by pointing out gaps in the plaintiff's case, and instead must submit evidence concerning when the area was last cleaned and inspected prior to the accident" … . While defendant submitted evidence that it hired a contractor who was generally expected to clean up any hazards, such as water on the floor, it did not submit evidence establishing when the area of plaintiff's fall was last inspected … . As a result, " '[a] triable issue of fact exists as to when the [area of plaintiff's fall] was last inspected in relation to the accident and, thus, whether the alleged hazardous condition . . . existed for a sufficient length of time prior to the incident to permit . . . defendant to remedy that condition' " … . Furthermore, "[t]he fact that plaintiff did not notice water on the floor before [s]he fell does not establish defendant['s] entitlement to judgment as a matter of law on the issue whether that condition was visible and apparent" … . Arghittu-Atmekjian v TJX Cos., Inc., 2021 NY Slip Op 02689, Fourth Dept 4-30-21

NEGLIGENCE, MUNICIPAL LAW, EMPLOYMENT LAW.

THE ERIE COUNTY SHERIFF'S OFFICE (ECSO) IS NOT A SEPARATE ENTITY APART FROM THE COUNTY; THE COUNTY MAY BE SUED FOR THE ACTIONS OF CIVILIAN EMPLOYEES OF THE SHERIFF'S OFFICE PURSUANT TO RESPONDEAT SUPERIOR; HERE PLAINTIFF ALLEGED PLAINTIFF'S DECEDENT DIED IN HIS CAR AWAITING RESCUE DURING A SNOWSTORM (FOURTH DEPT).

The Fourth Department determined the Erie County Sheriff's Office (ECSO) is not a separate entity apart from the county, and the county may be liable for the acts of the sheriff's office's civilian employees pursuant to respondeat superior. The lawsuit alleged the defendants failed to timely rescue plaintiff's decedent who died in his car during a snowstorm:

A sheriff's office has no legal identity separate from its corresponding county, "and thus an 'action against the Sheriff's [Office] is, in effect, an action against the [corresponding] County itself' " … . …

Although a "county may not be held responsible for the negligent acts of the Sheriff and his [or her] deputies on the theory of respondeat superior" … , we conclude that a county may be vicariously liable for the negligent acts of the sheriff's civilian employees given the general rule that a sheriff's office does not exist separately from its corresponding county … . Moreover, and contrary to defendants' further contention, the County is not entitled to immunity under Executive Law § 25 because that statute was not pleaded as an affirmative defense in the answer (see CPLR 3018 [b] …). Abate v County of Erie, 2021 NY Slip Op 03940, Fourth Dept 6-17-21

NEGLIGENCE.

DEFENDANT PROPERTY OWNER DEMONSTRATED IT DID NOT CREATE OR HAVE ACTUAL NOTICE OF THE DANGEROUS CONDITION (A DEFECTIVE RAILING ON A SECOND-STORY BALCONY); HOWEVER, THERE WAS A QUESTION OF FACT WHETHER A LETTER FROM THE VILLAGE CODE ENFORCEMENT OFFICER SHOULD HAVE TRIGGERED AN INSPECTION OF THE PROPERTY (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined defendant's motion for summary judgment dismissing the cause of action alleging defendant created or had actual notice of the dangerous condition should have been granted. The facts are not described, but apparently a railing on plaintiff's second-story balcony gave way and he fell to the ground. However, the cause of action alleging defendant had constructive notice of the dangerous condition properly survived summary judgment. The defendant received a letter from the village code enforcement officer which did not specifically address the condition of the plaintiff's balcony but was sufficient to trigger an inspection of the property:

Defendant met its initial burden on its motion of establishing that it did not create or have actual or constructive notice of the alleged defect in the second-story balcony

… . In support of the motion, defendant submitted the deposition of plaintiff, who testified that he lived in the apartment for approximately 15 years prior to the accident and was unaware of a problem with the balcony railing. Defendant also submitted evidence establishing that it had received no complaints with respect to the condition of the railing and that it made no repairs to the railing prior to the accident.

In opposition to the motion, plaintiff raised an issue of fact whether defendant had constructive notice of the alleged defect in the balcony railing by submitting a letter written by the Village of Springville Code Enforcement Officer and sent to defendant. The letter, dated 10 days before the accident, stated that "the porch" with respect to the subject property was "falling apart" and needed "immediate attention," and asked defendant to schedule a time for the Officer to inspect the property. Although defendant's reply papers included an affidavit from the Code Enforcement Officer explaining that the letter referred to a first-story porch and not the second-story balcony, a person reading the Officer's letter without any clarification would not have known specifically which porch the Officer had observed in disrepair. "The duty of landowners to inspect their property is measured by a standard of reasonableness under the circumstances" … , and we conclude that there is an issue of fact whether the information in the letter should have aroused defendant's suspicion so as to trigger such a duty to inspect … . Maracle v Colin C. Hart Dev. Co., Inc., 2021 NY Slip Op 02939, Fourth Dept 5-7-21

NEGLIGENCE.

DEFENDANT'S ALLEGED FAILURE TO MAINTAIN ITS TRUCK LED TO AN ACCIDENT IN WHICH A VAN DRIVEN BY PLAINTIFF'S EMPLOYEE STRUCK DEFENDANT'S EMPLOYEE; A LAWSUIT BY DEFENDANT'S EMPLOYEE AGAINST PLAINTIFF CULMINATED IN A $900,000 SETTLEMENT; PLAINTIFF ALLEGED THE RESULTING INCREASED INSURANCE PREMIUMS FORCED PLAINTIFF OUT OF BUSINESS; THE LOSS OF PLAINTIFF'S BUSINESS WAS NOT A FORESEEABLE CONSEQUENCE OF DEFENDANT'S ALLEGED FAILURE TO MAINTAIN ITS TRUCK (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the defendant's negligence was not a proximate cause of the damages suffered by plaintiff. Two wheels fell off defendant's dump truck. Plaintiff's (Able Medical's) employee struck one of the wheels and then struck defendant's employee, the truck driver. Defendant's employee sued the plaintiff and the matter was settled for $900,000. Plaintiff alleged the increase in insurance premiums resulting from the accident and settlement forced plaintiff to go out of business:

… [P]laintiffs' theory of causation is based on a lengthy chain of events spanning the course of two and a half years. In their complaint, plaintiffs alleged that defendant failed to maintain its truck, that rear wheels fell off of the truck causing a motor vehicle accident, that the accident resulted in a lawsuit, and that the settlement of the lawsuit ultimately resulted in an increase in insurance premiums for plaintiffs, which caused plaintiffs to close their business. On its motion, defendant established that those alleged economic injuries were not a foreseeable consequence of defendant's alleged negligent maintenance of its truck and, thus, the connection between defendant's activities and plaintiffs' economic losses is too tenuous and remote to permit recovery … . Able Med. Transp., Inc. v Paragon Envtl. Constr., Inc., 2021 NY Slip Op 02687, Fourth Dept 4-30-21

NEGLIGENCE.

QUESTION OF FACT WHETHER AN UNGUARDED, UNILLUMINATED SEAWALL AT THE BACK OF DEFENDANTS' YARD CONSTITUTED AN ACTIONABLE DANGEROUS CONDITION; PLAINTIFF, AT NIGHT, FELL OVER THE WALL DOWN TO THE BEACH BELOW (FOURTH DEPT).

The Fourth Department determined there was a question of fact whether the unguarded seawall in defendants' backyard constituted a dangerous condition. Plaintiff was at defendants' party and walked to the back of the yard to relieve himself when he fell over the wall, which was 20 feet above the lake:

Defendants' backyard is approximately 20 feet above the lake, separated by a natural cliff that runs along the shoreline. Built into the face of the cliff is the 15-foot-high seawall, which consists of two levels, with an upper and a lower platform, and a cement staircase built into the center of the seawall that permits access from the backyard to the lower platform. Defendants' backyard includes a cement sidewalk that leads to the top of the seawall's staircase. Plaintiff fell off the seawall down to the beach below and sustained various injuries. * * *

… [D]efendants failed to eliminate all triable issues of fact whether the alleged hazard posed by the cliff and seawall, given the lighting conditions at the time of the accident, "was visible and obvious or presented a latent, dangerous condition" … . Stempien v Walls, 2021 NY Slip Op 02683, Fourth Dept 4-30-21

NEGLIGENCE.

THE MAJORITY CONCLUDED PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT IN THIS FATAL VEHICLE-PEDESTRIAN ACCIDENT CASE BECAUSE DECEDENT'S ALLEGED CONTRIBUTORY NEGLIGENCE DOES NOT BAR SUMMARY JUDGMENT; THE DISSENT ARGUED THERE WAS A QUESTION OF FACT WHETHER DECEDENT'S NEGLIGENCE WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT (FOURTH DEPT).

The Fourth Department, over a dissent, determined plaintiff was entitled to summary judgment in this fatal vehicle-pedestrian accident case. The majority held that any negligence on the part of plaintiff's decedent constituted comparative negligence which is no longer a bar to summary judgment. The dissent argued there was a question of fact whether decedent's actions constituted the sole proximate cause of the accident, which would preclude summary judgment:

We respectfully disagree with the dissent that the evidence submitted by plaintiff failed to establish proximate causation. The only facts that defendants cite for the proposition that plaintiff failed to meet his burden arise from decedent's actions, i.e., crossing outside a marked crosswalk and wearing dark clothing as daylight faded. The Court of Appeals has made clear, however, "that a plaintiff's comparative negligence is no longer a complete defense and its absence need not be pleaded and proved by the plaintiff, but rather is only relevant to the mitigation of plaintiff's damages" … . Thus, "to obtain partial summary judgment on defendant's liability[, a plaintiff] does not have to demonstrate the absence of his [or her] own comparative fault" … .

… [P]laintiff was therefore not required to establish that decedent was not negligent, rather he was required to demonstrate that defendant was negligent and that such negligence was a proximate cause of decedent's injuries … .

From the dissent:

Even assuming … the majority is correct that the issue of proximate cause was raised by plaintiff and that plaintiff met his burden with respect to that element, I conclude that defendants raised a triable issue of fact in opposition. Defendants presented

evidence that plaintiff's decedent was crossing … outside of a designated crosswalk, at dusk, with headphones and dark clothing on and without looking for oncoming traffic. … [D]efendants contend that decedent violated Vehicle and Traffic Law § 1152 (a). Consequently, even though defendants were negligent as a matter of law based on an unexcused violation of Vehicle and Traffic Law § 1146 (a), on this record, a jury could find that decedent's actions were the sole proximate cause of the accident … . Lowes v Anas, 2021 NY Slip Op 03973, Fourth Dept 6-17-21

PRODUCTS LIABILITY.

THE DEFECTIVE-DESIGN CAUSE OF ACTION AGAINST THE SELLERS OF A TRUCK WHICH DID NOT HAVE A BACK-UP ALARM SHOULD NOT HAVE BEEN DISMISSED; THE PURCHASER OF THE TRUCK TESTIFIED HE WAS NOT AWARE THE OPTION WAS AVAILABLE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the defective-design cause of action against the defendant sellers of a truck should not have been dismissed. The truck was purchased by plaintiff's employer who testified he did not know a back-up alarm was an available option. Plaintiff was run over as the truck backed up:

Where, as here, a plaintiff buyer claims that a product without an optional safety feature is defectively designed because the feature was not included as a standard feature, the product is not defective if "(1) the buyer is thoroughly knowledgeable regarding the product and its use and is actually aware that the safety feature is available; (2) there exist normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment; and (3) the buyer is in a position, given the range of uses of the product, to balance the benefits and the risks of not having the safety device in the specifically contemplated circumstances of the buyer's use of the product" … . Here, defendants submitted the deposition testimony of plaintiff's employer, who testified that, at the time he bought the truck that was involved in the accident, he "didn't know" that a backup alarm was available as an option, thereby raising an issue of fact whether he was actually aware of its

availability … . Mariani v Guardian Fences of WNY, Inc., 2021 NY Slip Op 02906, Fourth Dept 5-7-21

REAL PROPERTY LAW.

PLAINTIFF DEMONSTRATED DEFENDANTS' CONSTRUCTION OF A FENCE VIOLATED A VALID RESTRICTIVE COVENANT IN THE PARTIES' DEEDS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff's motion for summary judgment should have been granted. Plaintiff alleged defendants violated a restrictive covenant in the parties' deeds by constructing a fence along the property line:

Plaintiff and defendants own adjoining properties in Wayne County with views of Sodus Bay, and those properties can be traced to one original grantor, nonparty Sodus Bay Heights Land Co., Inc. (Land Company). The Land Company created a subdivision and, between the years of 1924 and 1937, it sold numerous parcels in accordance with its planned development. Plaintiff and defendants obtained title to their property through chains of title that date back to owners who purchased their property directly from the Land Company. Both properties are subject to two relevant restrictive covenants that run with the land. The first stated "[t]hat no line fence shall be erected on said lot without the written consent of the [Land Company], or its successors or assigns." The second stated "[t]hat no unnecessary trees or other obstructions shall be permitted on said lot which shall hide the view of other residents in Sodus Bay Heights." * * *

Generally, "[r]estrictive covenants will be enforced when the intention of the parties is clear and the limitation is reasonable and not offensive to public policy"… , and it is well settled that the party seeking to enforce such a restriction "must prove, by clear and convincing evidence, the scope, as well as the existence, of the restriction" … . Here, plaintiff established as a matter of law the scope and the existence of a restriction against fences. Dodge v Baker, 2021 NY Slip Op 02891, Fourth Dept 5-7-21

REAL PROPERTY TAX LAW.

A TAX FORECLOSURE PROCEEDING IS AN IN REM ACTION AGAINST THE PROPERTY, NOT THE PROPERTY OWNER; THEREFORE THE ACTION WAS NOT A NULLITY DESPITE THE DEATH OF THE OWNER (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the tax foreclosure proceeding was not a nullity and did not violate due process. The foreclosed restaurant belonged to plaintiff's husband, who died in 2006. The treasurer of Ontario County followed all the proper procedures for notification of the tax foreclosure proceedings. Tax foreclosure is an in rem action to which there are no parties. So the argument that the action could not be brought against the deceased owner of the restaurant was rejected:

… [B]y statute, mortgagors are necessary party defendants to mortgage foreclosure actions (see RPAPL 1311 [1]). In contrast, a petition in a tax foreclosure proceeding relates only to the property and not any particular person (see RPTL 1123 [2] [a]). The distinction between in rem tax foreclosure proceedings and mortgage foreclosure actions with respect to the "parties" is critical. While an action or proceeding cannot be commenced against a dead person who, by necessity, is a named party to the action … , a tax foreclosure proceeding is not commenced against any person; it is commenced against the property itself. The owners are not necessary "parties" to the tax foreclosure proceeding; they are only "[p]arties entitled to notice" of the proceeding (RPTL 1125 [1] [a]; see RPTL 1123 [1], [2] [a]; cf. RPAPL 1131). As a result, the tax foreclosure proceeding was properly commenced even though decedent had died … , and there was no need to substitute someone for the dead owner (see CPLR 1015). Hetelekides v County of Ontario, 2021 NY Slip Op 02697, Fourth Dept 4-30-21

REAL PROPERTY TAX LAW.

NON-OWNER DID NOT HAVE STANDING TO MOVE TO VACATE AN ERIE COUNTY TAX FORECLOSURE SALE; THE RIGHT TO PAY THE DELINQUENT TAXES HAD BEEN EXTINGUISHED (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the tax foreclosure sale of property owned by Black Rock to appellant should not have been vacated. Respondent, Fedder, moved to vacate the sale. After County Court granted Fedder's motion, the delinquent taxes were paid, the County issued a certificate of redemption to Black Rock, which then sold the property to Fedder:

… [T]his is not a mortgage foreclosure action, where the "equity of redemption" permits property owners "to redeem their property by tendering the full sum" owed before a valid sale is effectuated … . Here, instead, the right to pay the delinquent taxes by virtue of the equity of redemption was extinguished several months prior to Fedder's motion by order to show cause, according to the ECTA [Erie County Tax Act], the public notice of foreclosure, and the terms of the judgment of foreclosure (see ECTA §§ 11-10.0, 11-12.0; see also RPTL art 11 …). … [T]he purported redemption, the issuance of the certificate of redemption, and the purported sale and transfer of title from Black Rock to Fedder are nullities … . …

Fedder did not have standing to seek equitable relief in this case. Pursuant to ECTA § 7-10.0, the court could not set aside the sale to appellant "except upon a proceeding brought therefor by the owner of such real property within three months from the date of such sale." Here, no such proceeding was brought. Instead, Fedder, a nonowner, filed a motion by order to show cause in this foreclosure action, and Black Rock, the owner, was not a party to the motion. In light of the " 'clear legislative intent' " of section 7-10.0 …, Fedder did not have standing to seek rescission of the sale. Matter of Foreclosure of Tax Liens, 2021 NY Slip Op 02681, Fourth Dept 4-30-21

TRUSTS AND ESTATES.

DECEDENT, WHO DIED TESTATE IN 2004, WAS AWARDED COMPENSATION BY CONGRESS IN 2015 BECAUSE HER HUSBAND HAD BEEN HELD IN IRAN AS A HOSTAGE FROM 1979 TO 1981; BECAUSE THE COMPENSATION WAS AWARDED AFTER HER DEATH, IT DOES NOT PASS BY WILL, BUT RATHER BY THE LAWS OF INTESTACY (FOURTH DEPT).

The Fourth Department, reversing Surrogate's Court, in a full-fledged opinion by Justice Centra, determined the funds awarded by Congress to the decedent, after the decedent's death, do not pass by decedent's will, but rather by the laws of intestacy. Decedent, who died in 2004, was the wife of a man held hostage in Iran from 1979 to 1981. In 2015 Congress awarded compensation to the hostages' families:

Regarding property acquired by an estate after the death of the testator, case law is sparse, but is consistent with the language in EPTL 3-3.1 providing that only property that a testator is entitled to devise "at the time of his [or her] death" may be distributed pursuant to the terms of the will … . We are particularly persuaded by the decision in Shaw Family Archives Ltd. , which involved a dispute over ownership interest in Marilyn Monroe's right of publicity after her death. The court determined that New York law did not permit a testator to dispose by will of property that she did not own at the time of her death … . The court cited to EPTL 3-3.1 and held that "[t]he corollary principle recognized by the courts is that property not owned by the testator at the time of his [or her] death is not subject to disposition by will" … .

We agree with the reasoning in Shaw Family Archives Ltd. that the New York rule is grounded in the testator's lack of capacity to devise property he or she does not own at the time of death … . Matter of Keough, 2021 NY Slip Op 03948, Fourth Dept 6-17-21

TRUSTS AND ESTATES.

QUESTIONS OF FACT PRECLUDED SURROGATE'S FINDING THAT THREE JOINT BANK ACCOUNTS WERE PART OF THE ESTATE AS OPPOSED TO JOINT ACCOUNTS WITH RIGHT OF SURVIVORSHIP (FOURTH DEPT).

The Fourth Department, reversing (modifying) Surrogate's Court, determined there were questions of fact about whether three joint bank accounts passed to respondent outside the estate or were part of the estate. The was no evidence of a signature card which included "right of survivorship" language. Respondent argued decedent intended the bank accounts to be gifts to the respondent, but the language of the will raised questions of fact about decedent's intent:

Absent the necessary survivorship language, the statutory presumption contained in Banking Law § 675 does not apply, even if the documents creating the account provide that it is a "joint" account … . Here, on her motion, respondent failed to establish that the statutory presumption created under Banking Law § 675 is applicable because she failed to submit signature cards or ledgers of the accounts that included the required survivorship language. …

Respondent averred in an affidavit that decedent placed her name on the accounts with the stated intention of gifting them to her. Respondent also submitted related account documents, including bank documents for all four accounts that reference both respondent and decedent's names and include survivorship or joint tenancy language. Thus, respondent submitted evidence establishing that the four accounts were joint accounts with right of survivorship, and the burden then shifted to petitioners. …

… [P]etitioners submitted decedent's will, which left the estate to the three children. Thus, the intent of decedent, as evidenced by her will, is inconsistent with respondent's contention that the three bank accounts were gifts to respondent or joint tenancies with survivorship rights … . … [P]etitioners submitted respondent's deposition testimony that those three accounts were funded solely by decedent, that one of the … accounts was used as decedent's primary checking account, and that payments out of that account were for only decedent's benefit. … [R]espondent, who became joint owner of those three accounts when decedent was in her mid to late

eighties, testified that she helped decedent with her banking. Matter of Najjar (Sanzone), 2021 NY Slip Op 03777, Fourth Dept 6-11-21