NEW YORK APPELLATE DIGEST, LLC

Third Department
Quarterly Report
April – June 2021

An Organized Compilation of the Summaries of Selected Decisions Released by the Third Department April 1 – June 30, 2021 and Posted on the New York Appellate Digest Website April, May and June 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. Right Click on the Citations to Keep Your Place in the Quarterly.

Copyright 2021 New York Appellate Digest, LLC.

Contents

ARBITRATION, CIVIL PROCEDURE, EMPLOYMENT LAW. 7

THERE WERE PARALLEL DISCIPLINARY PROCEEDINGS STEMMING FROM PETITIONER'S ALLEGED ABUSE OF A PSYCHIATRIC PATIENT; THE ARBITRATOR'S FINDING THAT PETITIONER DID NOT ABUSE THE PATIENT WAS ENTITLED TO PRECLUSIVE EFFECT IN THE PARALLEL PROCEEDING (THIRD DEPT). 7

ARBITRATION, EMPLOYMENT LAW, COLLECTIVE BARGAINING AGREEMENT....... 8

THE ARBITRATOR EXCEEDED HIS AUTHORITY UNDER THE COLLECTIVE BARGAINING AGREEMENT BY DISMISSING TWO CHARGES BECAUSE OF THEIR PUPORTED FACIAL DEFICIENCIES AND FAILING TO ASSESSS THE EVIDENCE IN SUPPORT OF THE CHARGES (THIRD DEPT).. 8

ARBITRATION, EMPLOYMENT LAW, VIOLATION OF PUBLIC POLICY. 9

THE MILD PENALTY IMPOSED BY THE ARBITRATOR ON AN EMPLOYEE WHO SEXUALLY HARASSED A FELLOW EMPLOYEE VIOLATED PUBLIC POLICY; MATTER REMITTED FOR IMPOSITION OF A PENALTY BY A NEW ARBITRATOR (THIRD DEPT)... 9

CIVIL PROCEDURE, ATTACHMENT, DEBTOR-CREDITOR. 10

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). 10

CIVIL PROCEDURE, CPLR 3215. 11

WHERE THE ORDER DISMISSING A COMPLAINT PURSUANT TO CPLR 3215 AFTER A SEVEN-YEAR DELAY IN SEEKING A DEFAULT JUDGMENT DID NOT SPECIFICALLY SET FORTH CONDUCT DEMONSTRATING A GENERAL PATTERN OF DELAY THE SAVINGS CLAUSE OF CPLR 205 APPLIES AND THE ACTION MAY BE RE-COMMENCED WITHIN SIX MONTHS OF THE DISMISSAL (THIRD DEPT).................... 11

CIVIL PROCEDURE, NOT-FOR-PROFIT CORPORATIONS. 12

THE ACTION CONTESTING THE AMENDMENT TO THE BY-LAWS OF A NOT-FOR-PROFIT CORPORATION WHICH OWNS RECREATIONAL LAND AND COLLECTS DUES FROM LOT OWNERS MUST BE BROUGHT AS AN ARTICLE 78 PROCEEDING, NOT AN ACTION FOR A DECLARATORY JUDGMENT; THE ACTION IS THEREFORE TIME-BARRED (THIRD DEPT). 12

CIVIL PROCEDURE, PROOF OF SERVICE. ... 13

THE PROCESS SERVER DID NOT TIMELY FILE PROOF OF SERVICE; THEREFORE SERVICE ON DEFENDANT WAS NEVER COMPLETE AND THE DEFAULT JUDGMENT IS A NULLITY; SUPREME COURT CAN CURE THE NONJURISDICTIONAL DEFECT BY ORDERING DEFENDANT TO BE SERVED AND THE DEFENDANT MAY THEN INTERPOSE AN ANSWER (THIRD DEPT). ... 13

CIVIL PROCEDURE. LONG-ARM JURISDICTION. ... 14

NEW YORK DOES NOT HAVE LONG-ARM JURISDICTION OVER A MICHIGAN MANUFACTURER OF ALLEGEDLY DEFECTIVE UNMANNED AERIAL VEHICLES (UAV'S) PURCHASED BY SUNY STONY BROOK FOR THE DELIVERY OF MEDICAL SUPPLIES IN MADAGASCAR; TWO-JUSTICE DISSENT (THIRD DEPT). ... 14

CIVIL RIGHTS LAW (RIGHT OF PRIVACY). ... 15

PLAINTIFF WAS CONVICTED OF THE MURDER OF HIS FATHER AND THE ATTEMPTED MURDER OF HIS MOTHER; THE FILM ABOUT THE CRIMES DOES NOT VIOLATE PLAINTIFF'S RIGHT TO PRIVACY UNDER CIVIL RIGHTS LAW 50 AND 51 (THIRD DEPT). ... 15

CONTRACT LAW, INSURANCE LAW, CIVIL PROCEDURE. ... 16

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). ... 16

CRIMINAL LAW, ACCUSATORY INSTRUMENTS. ... 17

THE SUPERIOR COURT INFORMATION WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT DID NOT INCLUDE AN OFFENSE CHARGED IN THE FELONY COMPLAINT OR A LESSER INCLUDED OFFENSE (THIRD DEPT). ... 17

CRIMINAL LAW, ATTORNEYS. ... 18

DEFENSE COUNSEL EXPLAINED HIS STRATEGIES BEHIND WAIVING THE HUNTLEY HEARING AND REFRAINING FROM CONSULTING AND PRESENTING EXPERTS IN THE DEFENDANT'S FIRST DEGREE RAPE TRIAL; THEREFORE DEFENDANT'S MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS WAS PROPERLY DENIED (THIRD DEPT). ... 18

CRIMINAL LAW, CONCURRENT SENTENCES. ... 19

SENTENCES FOR THE SALE OF TWO DRUGS IN THE SAME TRANSACTION SHOULD HAVE BEEN IMPOSED CONCURRENTLY (THIRD DEPT). ... 19

CRIMINAL LAW, EVIDENCE, APPEALS. 20

THERE WAS INSUFFICIENT EVIDENCE DEFENDANT PARTICIPATED IN THE MUGGING, INSUFFICIENT EVIDENCE THE VICTIM SUFFERED PHYSICAL INJURY, AND INSUFFICENT EVIDENCE DEFENDANT CONSTRUCTIVELY POSSESSED THE VICTIM'S WALLET AND CELL PHONE (THIRD DEPT). 20

CRIMINAL LAW, INCLUSORY CONCURRENT COUNTS. 21

VEHICULAR MANSLAUGHTER AND ASSAULT CONVICTIONS DISMISSED AS INCLUSORY CONCURRENT COUNTS OF AGGRAVATED VEHICULAR HOMICIDE AND AGGRAVATED VEHICULAR ASSAULT (THIRD DEPT). 21

CRIMINAL LAW, JURISDICTION. 21

WARREN COUNTY DID NOT HAVE "PARTICULAR EFFECT" JURISDICTION OVER CRIMINAL OFFENSES ALLEGED TO HAVE BEEN COMMITTED IN SARATOGA COUNTY (THIRD DEPT). 21

CRIMINAL LAW, SERIOUS PHYSICAL INJURY. 22

ALTHOUGH THE VICTIM WAS SHOT AND THE BULLET PASSED THROUGH HIS LEG, THE PROOF REQUIREMENTS FOR SERIOUS PHYSICAL INJURY WERE NOT MET; ASSAULT SECOND CONVICTIONS REDUCED TO ASSAULT THIRD (THIRD DEPT). . 22

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA). 23

ALTHOUGH THE EVIDENCE SUPPORTED A LEVEL TWO RISK LEVEL CLASSIFICATION, COUNTY COURT DID NOT ADDRESS DEFENDANT'S REQUEST FOR A DOWNWARD DEPARTURE; REVERSED AND REMITTED (THIRD DEPT). 23

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA). 24

CRITERIA FOR RECLASSIFICATION OF THE SORA RISK-LEVEL EXPLAINED (THIRD DEPT). 24

CRIMINAL LAW, TRAFFIC STOPS, CANINE SNIFFS. 25

UNDER THE CIRCUMSTANCES OF THE TRAFFIC STOP, THE CORRECT STANDARD TO APPLY TO THE CANINE SNIFF OF DEFENDANT'S PERSON WAS REASONABLE SUSPICION, NOT PROBABLE CAUSE; THE SUPPRESSION MOTION WAS PROPERLY DENIED; THE DISSENT DISAGREED (THIRD DEPT). 25

EDUCATION-SCHOOL LAW, CONSTITUTIONAL LAW. 26

ALL EIGHT OF THE SCHOOL DISTRICTS EXAMINED VIOLATED THE CONSTITUTIONAL REQUIRMENT TO PROVIDE A SOUND EDUCATION TO THE AT-RISK STUDENT POPULATIONS (THIRD DEPT). 26

EDUCATION-SCHOOL LAW, NEGLIGENCE, ASSUMPTION OF THE RISK. 27

14-YEAR-OLD PLAINTIFF ASSUMED THE RISK OF COLLIDING WITH RETRACTED BLEACHERS DURING A BASKETBALL PRACTICE DRILL IN WHICH BOUNDARY LINES WERE TO BE IGNORED; THE DISSENT DISAGREED (THIRD DEPT). 27

EMPLOYMENT LAW, RESPONDEAT SUPERIOR, ASSAULT BY EMPLOYEES. 28

CLAIMANT-INMATE'S ACTION AGAINST THE STATE ALLEGING HE WAS BEATEN BY CORRECTIONS OFFICERS SHOULD NOT HAVE BEEN DISMISSED; THERE WERE QUESTIONS OF FACT ABOUT WHETHER THE OFFICERS WERE ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT AT THE TIME OF THE BEATING (THIRD DEPT). 28

ENVIRONMENTAL LAW, MUNICIPAL LAW. 29

PURSUANT TO ECL 23-2711, THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION DID NOT HAVE THE AUTHORITY TO ISSUE A MINING PERMIT BECAUSE THE TOWN LAW PROHIBITED MINING (THIRD DEPT). 29

ENVIRONMENTAL LAW, ZONING, LAND USE. 30

OWNERS OF BUSINESSES IN THE VICINITY OF THE PROPOSED CONSTRUCTION ALLEGED DECREASED PARKING SPACES, INCREASED TRAFFIC CONGESTION AND THE BLOCKING OF SCENIC VIEWS AS REASONS FOR OVERTURNING THE SEQRA NEGATIVE DECLARATION ALLOWING THE CONSTRUCTION; THE BUSINESS OWNERS DID NOT HAVE STANDING TO CONTEST THE DECLARATION (THIRD DEPT). 30

FAMILY LAW, CIVIL PROCEDURE, DEFAULT. 31

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).. 31

FAMILY LAW, GENETIC MARKER TEST. 32

THE EVIDENCE DID NOT DEMONSTRATE THE DEVELOPMENT OF A PARENT-CHILD RELATIONSHIP BETWEEN RAYMOND F AND THE CHILD; THEREFORE RAYMOND F'S REQUEST FOR A GENETIC MARKER TEST SHOULD NOT HAVE BEEN DENIED (THIRD DEPT). 32

FREEDOM OF INFORMATION LAW (FOIL).. 33

DOCUMENTS CREATED AND HELD BY A PRIVATE ENTITY PURSUANT TO THE REGULATIONS OF A STATE AGENCY ARE NOT “RECORDS” WHICH THE STATE AGENCY MUST DISCLOSE PURSUANT TO THE FREEDOM OF INFORMATION LAW, DESPITE THE FACT THAT THE AGENCY CAN DEMAND PRODUCTION OF THE DOCUMENTS (THIRD DEPT).. 33

INSURANCE LAW, ADMINISTRATIVE LAW, CONSTITUTIONAL LAW. 34

THE DEPARTMENT OF FINANCIAL SERVICES’ AMENDMENT TO AN INSURANCE REGULATION DESIGNED TO PROTECT CONSUMERS OF LIFE INSURANCE AND ANNUITY PRODUCTS IS VOID FOR VAGUENESS (THIRD DEPT). 34

MEDICAL MALPRACTICE, NEGLIGENCE.. 35

THE DOCTOR ORDERED A CERTAIN DOSAGE OF MEDICATION BE ADMINISTERED FOR “1” MINUTE TO ADDRESS SYMPTOMS OF A STROKE, BUT A NURSE MISTAKENLY PROGRAMMED THE MACHINE TO ADMINISTER THE MEDICATION FOR “11” MINUTES; THE ACTION SOUNDS IN MEDICAL MALPRACTICE, NOT ORDINARY NEGLIGENCE (THIRD DEPT). 35

MENTAL HYGIENE LAW, CRIMINAL LAW, SEX OFFENDERS....................................... 36

ALTHOUGH THE RESPONDENT-SEX-OFFENDER WAS PROPERLY ALLOWED TO REPRESENT HIMSELF IN THE CIVIL COMMITMENT PROCEEDING, HE SHOULD NOT BE ALLOWED TO CROSS-EXAMINE THE WITNESSES WHO WERE VICTIMS OF HIS SEX OFFENSES (THIRD DEPT). 36

NEGLIGENCE, TRAFFIC ACCIDENTS, DISCOVERY. 37

PLAINTIFF ALLEGED THE INCREASED TRAFFIC RELATED TO AN EVENT AT DEFENDANT COUNTRY CLUB CREATED A DANGEROUS CONDITION CONTRIBUTING TO A COLLISION WITH A VEHICLE ATTEMPTING TO ENTER THE COUNTRY CLUB PREMISES; PLAINITIFFS WERE ENTITLED TO DISCOVERY FROM THE COUNTRY CLUB REGARDING CROWD CONTROL, MARKETING, EVENT PLANNING, SAFETY PLANS, ETC. (THIRD DEPT).. 37

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), HARVESTING TREES. 38

QUESTION OF FACT WHETHER DEFENDANT HAD A GOOD FAITH BELIEF THAT HE OWNED THE LAND WHERE TREES WERE HARVESTED; THEREFORE THE ISSUE WHETHER THE TREBLE DAMAGES ASPECT OF RPAPL 861 APPLIES MUST BE DETERMINED AT TRIAL (THIRD DEPT)... 38

REAL PROPERTY TAX LAW, FORECLOSURE SALE. 39

AS LONG AS BOTH THE CERTIFIED AND FIRST-CLASS-MAIL LETTERS NOTIFYING A MORTGAGEE OF A TAX FORECLOSURE SALE ARE NOT RETURNED, THE MORTGAGEE IS DEEMED TO HAVE BEEN PROPERLY SERVED PURSUANT TO REAL PROPERTY TAX LAW 1125 (THIRD DEPT). 39

RETIREMENT AND SOCIAL SECURITY LAW. 40

A POLICE OFFICER WAS ASKED BY HER SUPERVISOR TO PICK UP A LARGE BREAKFAST ORDER FOR THE PRECINCT; PETITIONER SLIPPED AND FELL ON ICE IN THE PARKING LOT WHEN RETURNING WITH THE ORDER; PETITIONER WAS “IN SERVICE” WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW WHEN SHE FELL (THIRD DEPT). 40

TRUSTS AND ESTATES, STATUTES OF LIMITATIONS, FIDUCIARY TOLLING RULE. 41

THE FIDUCIARY TOLLING RULE TOLLED THE STATUTE OF LIMITATIONS IN THIS CONSTRUCTIVE TRUST ACTION AGAINST AN EXECUTOR (WHO WAS REMOVED BY THE COURT) UNTIL THE SUCESSOR FIDUCIARY WAS APPOINTED (THIRD DEPT). 41

UNEMPLOYMENT INSURANCE. 41

THE TRANSFER OF CERTAIN ASPECTS OF SELLER’S BUSINESS TO BUYER DID NOT MEET THE CRITERIA IN LABOR LAW 581; THEREFORE THE TRANSFER DID NOT TRIGGER THE TAKEOVER OF THE SELLER’S UNEMPLOYMENT INSURANCE EXPERIENCE ACCOUNT (THIRD DEPT). 41

WORKERS’ COMPENSATION, 9-11 TOXIN INJURY. 43

CLAIMANT, A POLICE OFFICER WHO WORKED AT A VEHICLE CHECKPOINT FOR TRAFFIC TO AND FROM GROUND ZERO AFTER THE WORLD TRADE CENTER WAS DESTROYED, PARTICIPATED IN THE CLEANUP WITHIN THE MEANING OF WORKERS’ COMPENSATION LAW SECTION 28; THEREFORE HIS CLAIM (BASED UPON TOXIN-RELATED INJURY) SHOULD NOT HAVE BEEN DISMISSED AS UNTIMELY (THIRD DEPT). 43

WORKERS’ COMPENSATION. 44

CLAIMANT SHOULD HAVE BEEN GIVEN THE OPPORTUNITY TO CROSS EXAMINE THE CONSULTANTS WHOSE REPORTS WERE THE BASIS FOR THE DENIAL OF CLAIMANT’S REQUEST FOR SURGERY (THIRD DEPT). 44

ARBITRATION, CIVIL PROCEDURE, EMPLOYMENT LAW.

THERE WERE PARALLEL DISCIPLINARY PROCEEDINGS STEMMING FROM PETITIONER'S ALLEGED ABUSE OF A PSYCHIATRIC PATIENT; THE ARBITRATOR'S FINDING THAT PETITIONER DID NOT ABUSE THE PATIENT WAS ENTITLED TO PRECLUSIVE EFFECT IN THE PARALLEL PROCEEDING (THIRD DEPT).

The Third Department, reversing the determination of the Administrative Law Judge (ALJ) in this employment disciplinary matter, determined the prior finding by the arbitrator in a parallel proceeding that petitioner did not abuse the psychiatric patient was entitled to preclusive effect:

Petitioner's sole contention on appeal is that the ALJ erred in not giving preclusive effect to the arbitrator's determination that petitioner's conduct did not constitute physical abuse. We agree. "The underlying purpose of the doctrines of res judicata and collateral estoppel is to prevent repetitious litigation of disputes which are essentially the same" … . … [R]espondent contends that the issue decided by the arbitrator was not the identical issue before the ALJ. …

Respondent's "Report of Investigation Determination" and OMH's [Office of Mental Health's] notice of discipline were issued four days apart and both referenced the same case number and charged petitioner with physically abusing the service recipient. Although neither the notice of discipline nor the arbitrator's decision specifically cite the relevant portion of the Social Services Law associated with physical abuse, the arbitrator specifically took notice of said provision at the disciplinary hearing … . … [T]he arbitrator and the ALJ both reviewed the same videos of the underlying incident and petitioner's interview. Although the arbitrator and the ALJ both agreed that petitioner pushed the service recipient's head down into the restraint bed, the arbitrator concluded that petitioner was "cradling the neck of [the service recipient] at that time" such that his conduct did not constitute physical abuse. … [T]his was the same factual issue the ALJ later confronted. Matter of Anonymous v New York State Justice Ctr. for the Protection of People with Special Needs, 2021 NY Slip Op 03510, Third Dept 6-2-21

ARBITRATION, EMPLOYMENT LAW, COLLECTIVE BARGAINING AGREEMENT.

THE ARBITRATOR EXCEEDED HIS AUTHORITY UNDER THE COLLECTIVE BARGAINING AGREEMENT BY DISMISSING TWO CHARGES BECAUSE OF THEIR PUPORTED FACIAL DEFICIENCIES AND FAILING TO ASSESSS THE EVIDENCE IN SUPPORT OF THE CHARGES (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the arbitrator's dismissal of two of the disciplinary charges against a corrections officer (Norde) based solely on alleged defects in the charges, as opposed to the relevant evidence, exceeded the arbitrator's authority under the collective bargaining agreement (CBA):

… [R]espondent complied with the CBA by pleading in the notice of discipline that the exception [to the usual time limits] applied, and by citing and quoting the language of the specific criminal statute that Norde had allegedly violated; respondent would then need to prove the elements of that statute at the hearing to establish the basis of the timeliness exception … . Accordingly, by requiring respondent to prove the underlying crime in the notice to support the CBA's time exception, the arbitrator essentially added a term to the CBA and, thus, exceeded his authority … . …

… [T]he arbitrator modified the CBA and exceeded his authority by dismissing the first two charges as facially deficient due to an alleged lack of particularization in the notice of discipline. As the charges in the notice were sufficiently stated, the arbitrator should have rendered a determination as to Norde's guilt based on the evidence presented at the hearing. Matter of New York State Corr. Officers & Police Benevolent Assn., Inc. (New York State Dept. of Corr. & Community Supervision), 2021 NY Slip Op 03504, Third Dept 6-3-21

ARBITRATION, EMPLOYMENT LAW, VIOLATION OF PUBLIC POLICY.

THE MILD PENALTY IMPOSED BY THE ARBITRATOR ON AN EMPLOYEE WHO SEXUALLY HARASSED A FELLOW EMPLOYEE VIOLATED PUBLIC POLICY; MATTER REMITTED FOR IMPOSITION OF A PENALTY BY A NEW ARBITRATOR (THIRD DEPT).

The Third Department determined the mild penalty imposed by the arbitrator in this place-of-employment sexual harassment case violated public policy. The matter was remitted for imposition of a penalty by a different arbitrator. The employee, Dominie, committed several egregious acts of sexual harassment targeting another employee which led to his pleading guilty to harassment second degree. The arbitrator reinstated Dominie's employment without conditions:

… [T]he situation here does not involve a single act of misconduct as in Barnard College. In defined contrast, we have a series of four separate, escalating and outrageous sexual harassment incidents. The events are particularly troublesome considering that Dominie engaged in annual sexual harassment training since 2013 and, when confronted by his supervisors after the two January 2017 incidents, promised not to re-offend. The events that followed were even more egregious and rise to the level of criminal conduct, as memorialized in Dominie's guilty plea to the harassment charge. Given the extremely inappropriate nature of Dominie's conduct, we conclude that the arbitrator's decision violates public policy. The award fails to account for the rights of other employees to a non-hostile work environment and conflicts with the employer's obligation to eliminate sexual harassment in the workplace … . The fact that the victimized coworker no longer worked in the office is hardly a mitigating factor. Nor is the penalty consistent with the arbitrator's "significant concern" that Dominie failed to acknowledge his own wrongdoing. As such, we find that Supreme Court properly vacated the award as violative of the public policy prohibiting sexual harassment. We also conclude that the court was authorized to remit the matter to a different arbitrator for the imposition of a new penalty (see CPLR 7511 [d]). Matter of New York Off. for People with Dev.al Disabilities (Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO), Third Dept 4-29-21

CIVIL PROCEDURE, ATTACHMENT, DEBTOR-CREDITOR.

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

CIVIL PROCEDURE, CPLR 3215.

WHERE THE ORDER DISMISSING A COMPLAINT PURSUANT TO CPLR 3215 AFTER A SEVEN-YEAR DELAY IN SEEKING A DEFAULT JUDGMENT DID NOT SPECIFICALLY SET FORTH CONDUCT DEMONSTRATING A GENERAL PATTERN OF DELAY THE SAVINGS CLAUSE OF CPLR 205 APPLIES AND THE ACTION MAY BE RE-COMMENCED WITHIN SIX MONTHS OF THE DISMISSAL (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the initial foreclosure action was not dismissed for failure to prosecute and, therefore, the savings provision of CPLR 205 applied. The court noted that the seven-year delay in seeking a default judgment which resulted in the dismissal did not constitute "neglect to prosecute:"

For purposes of the savings provision of CPLR 205 (a), "[w]here a dismissal is one for neglect to prosecute the action made pursuant to [CPLR 3216] or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation" … . Here, the first action was dismissed as abandoned pursuant to CPLR 3215 (c). In making this determination, Supreme Court noted that plaintiff waited almost seven years before moving for a default after defendant failed to answer and that plaintiff failed to establish a reasonable excuse for the delay in seeking the default. Therefore … Supreme Court's order dismissing the first action did not set forth on the record conduct that "demonstrate[d] a general pattern of delay" … . As such, under these circumstances, the second action does not fall outside the savings provision … . * * *

… [T]he Second Department recently ruled that the savings provision was still applicable to a subsequent action when the prior action was dismissed pursuant to CPLR 3215 (c) for failure to move for a judgment against a defendant for "almost seven years" because the trial court did not include findings of specific conduct

demonstrating a general pattern of delay in proceeding with litigation … . U.S. Bank N.A. v Jalas, 2021 NY Slip Op 03506, Third Dept 6-3-21

CIVIL PROCEDURE, NOT-FOR-PROFIT CORPORATIONS.

THE ACTION CONTESTING THE AMENDMENT TO THE BY-LAWS OF A NOT-FOR-PROFIT CORPORATION WHICH OWNS RECREATIONAL LAND AND COLLECTS DUES FROM LOT OWNERS MUST BE BROUGHT AS AN ARTICLE 78 PROCEEDING, NOT AN ACTION FOR A DECLARATORY JUDGMENT; THE ACTION IS THEREFORE TIME-BARRED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the amendment to the by-laws defendant not-for-profit corporation which owns land underneath a man-made lake must be contested in an Article 78 action, not a declaratory judgment action. Therefore the four-month Article 78 statute of limitations applied and the action was time-barred. The underlying dispute involved the assessment of annual dues for lots which had been exempt from dues. Plaintiffs are the owners of those lots:

Supreme Court concluded that the action being challenged was a legislative act, which cannot be challenged in a CPLR article 78 proceeding but must be maintained in a declaratory judgment action. However, the cases addressing legislative acts deal with challenges to "governmental activity," rather than the activity of nonpublic corporations … . This is an important distinction as the rule prohibiting the use of CPLR article 78 proceedings to challenge acts of legislative bodies "is derived from the separation-of-powers doctrine," and so "has no application to the quasi-legislative acts of administrative agencies" … . Similarly, it does not apply to the actions or decisions of nonpublic corporations. * * *

Whether defendant's alleged interest in plaintiffs' property is based on the imposition of restrictive covenants or the possibility of a lien if plaintiffs fail to pay dues on multiple lots, any such alleged interest would be based on the amended bylaws. Accordingly, though all of plaintiffs' causes of action are couched in declaratory judgment language, they can be distilled to challenges to defendant's

enactment of the amended bylaws that could have been raised in a CPLR article 78 proceeding and are therefore subject to a four-month statute of limitations … . Indeed, other courts have held that a challenge to a corporation's amendment of its bylaws must be raised via a CPLR article 78 proceeding commenced within four months of such amendment … . Doyle v Goodnow Flow Assn., Inc., 2021 NY Slip Op 02580, Third Dept 4-29-21

CIVIL PROCEDURE, PROOF OF SERVICE.

THE PROCESS SERVER DID NOT TIMELY FILE PROOF OF SERVICE; THEREFORE SERVICE ON DEFENDANT WAS NEVER COMPLETE AND THE DEFAULT JUDGMENT IS A NULLITY; SUPREME COURT CAN CURE THE NONJURISDICTIONAL DEFECT BY ORDERING DEFENDANT TO BE SERVED AND THE DEFENDANT MAY THEN INTERPOSE AN ANSWER (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the default judgment was a nullity because the process server did not timely file the affidavit of service. The defect is not jurisdictional and can be cured. But the default judgment cannot be reinstated retroactively. Once properly served the defendant may submit an answer:

… [P]laintiff's process server effectuated service by delivery and mail (see CPLR 308 [2]) on November 17, 2017. Plaintiff's proof of service, however, was not filed with the clerk of the court until December 11, 2017, more than 20 days after the delivery and mailing. Accordingly, the filing was untimely and, as such, service of process was never completed (see CPLR 308 [2] …).

… [F]ailure to timely file proof of service is only a procedural irregularity, as opposed to a jurisdictional defect, and a court may, sua sponte, issue an order curing said irregularity (see CPLR 2001, 2004 …). "A court may not, however, make that relief retroactive to a defendant's prejudice by placing the defendant in default as of a date prior to the order, nor may a court give effect to a default judgment that, prior to the curing of the irregularity, was a nullity requiring vacatur" … . Here, no such curative order was ever sought from or issued by Supreme Court and, therefore, defendant's time to answer never began to run such that the resulting default

judgment was a nullity requiring vacatur … . Miller Greenberg Mgt. Group, LLC v Couture, 2021 NY Slip Op 02566, Third Dept 4-29-21

CIVIL PROCEDURE. LONG-ARM JURISDICTION.

NEW YORK DOES NOT HAVE LONG-ARM JURISDICTION OVER A MICHIGAN MANUFACTURER OF ALLEGEDLY DEFECTIVE UNMANNED AERIAL VEHICLES (UAV'S) PURCHASED BY SUNY STONY BROOK FOR THE DELIVERY OF MEDICAL SUPPLIES IN MADAGASCAR; TWO-JUSTICE DISSENT (THIRD DEPT).

The Third Department, over a two-justice dissent, determined New York did not have long-arm jurisdiction of the Michigan manufacturer of unmanned aerial vehicles (UAV"s) purchased by SUNY Stony Brook for use in Madagascar (delivering medical supplies to remote locations). Stony Brook returned the UAV's as defective but defendant did not replace them or issue a refund:

… [D]efendant did not "purposefully avail[] itself of 'the privilege of conducting activities within [New York],' by . . . transacting business in New York," thus invoking the benefits and protections of New York's laws … . The various communications between the parties were twofold: first, to discuss the ongoing issues with the UAVs that SUNY Stony Brook purchased and, second, to create a relationship and to submit grants for projects that would take place entirely and solely outside of New York. Regardless of the quantity of defendant's communications with SUNY Stony Brook, these communications did not result in more sales in New York or seek to advance defendant's business contacts within New York … . Rather, the business transacted — specifically the sale of the UAVs to SUNY Stony Brook for use in Madagascar — was a one-time occurrence that resulted after the professor commenced employment with SUNY Stony Brook in 2015 and then contacted the CEO … . The visit by the CEO to New York in 2017 was for the purpose of discussing issues regarding the completed purchase of the UAVs, rather than seeking additional business from SUNY Stony Brook or other entities in New York … . The UAVs were shipped to Madagascar and subsequently returned to defendant in Michigan. The grant that SUNY Stony Brook and defendant applied for was not intended to benefit New York, but rather other countries. Given

these facts, we find that defendant could not reasonably have expected to defend this action in New York and, thus, Supreme Court properly dismissed the complaint for lack of personal jurisdiction. State of New York v Vayu, Inc., 2021 NY Slip Op 04068, Third Dept 6-24-21

CIVIL RIGHTS LAW (RIGHT OF PRIVACY).

PLAINTIFF WAS CONVICTED OF THE MURDER OF HIS FATHER AND THE ATTEMPTED MURDER OF HIS MOTHER; THE FILM ABOUT THE CRIMES DOES NOT VIOLATE PLAINTIFF'S RIGHT TO PRIVACY UNDER CIVIL RIGHTS LAW 50 AND 51 (THIRD DEPT).

The Third Department, reversing Supreme Court, in a comprehensive decision well-worth reading, determined defendant, the creator of a docudrama about Christopher Porco's murder and attempted murder convictions, did not violate Porco's right to privacy under Civil Rights Law sections 50 and 51. The statutes allow the depiction of newsworthy events, but the statutes could be violated by fictional material. The Third Department determined the "dramatized" or "fictional" aspects of the film did not violate the statutes, in part because the audience is notified that the film is "based on a true story" and includes dramatized and fictionalized material:

… [T]he film is a dramatization that at times departed from actual events, including by recreating dialogue and scenes, using techniques such as flashbacks and staged interviews, giving fictional names to some individuals and replacing others altogether with composite characters. The film nevertheless presents a broadly accurate depiction of the crime, the ensuing criminal investigation and the trial that are matters of public interest. More importantly, the film makes no effort to present itself as unalloyed truth or claim that its depiction of plaintiffs was entirely accurate, instead alerting the viewer at the outset that it is only "[b]ased on a true story" and reiterating at the end that it is "a dramatization" in which "some names have been changed, some characters are composites and certain other characters and events have been fictionalized." In our view, the foregoing satisfied defendant's initial burden of showing that the film addressed matters of public interest through a blend of fact and fiction that was readily acknowledged, did not mislead viewers into believing that its related depictions of plaintiffs was true and was not, as a result, "so

infected with fiction, dramatization or embellishment that it cannot be said to fulfill the purpose of the newsworthiness exception" … . Porco v Lifetime Entertainment Servs., LLC, 2021 NY Slip Op 04072, Third Dept 6-24-21

CONTRACT LAW, INSURANCE LAW, CIVIL PROCEDURE.

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

CRIMINAL LAW, ACCUSATORY INSTRUMENTS.

THE SUPERIOR COURT INFORMATION WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT DID NOT INCLUDE AN OFFENSE CHARGED IN THE FELONY COMPLAINT OR A LESSER INCLUDED OFFENSE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the superior court information (SCI) was jurisdictionally defective because it did not include an offense charged in the felony complaint or a lesser included offense:

… [D]efendant pleaded guilty, as charged in the SCI, to attempted robbery in the second degree under Penal Law §§ 110.00 and 160.10 (1), a different crime from robbery in the first degree (see Penal Law § 160.15 [2]), which was charged in the felony complaint. To be guilty of the offense charged in the SCI, defendant must have attempted to “forcibly steal[] property” and done so “when . . . aided by another person actually present” (Penal Law § 160.10 [1]). However, the crime of robbery in the first degree in the felony complaint charged defendant with “forcibly steal[ing] property” while “he or another participant in the crime . . . [i]s armed with a deadly weapon” (Penal Law § 160.15 [2]). “As charged here, [attempted] robbery in the second degree requires an element not required by robbery in the first degree — namely, that defendant be ‘aided by another person actually present’” … . Thus, inasmuch as it is possible to commit the crime charged in the felony complaint — robbery in the first degree — without committing the crime charged in the SCI — attempted robbery in the second degree — the crime charged in the SCI is not a lesser included offense of the former … .

Given that the SCI here did not contain either an offense charged in the underlying felony complaint or a lesser included offense thereof, the SCI upon which defendant's plea was based was jurisdictionally defective … . People v McCall, 2021 NY Slip Op 03083, Third Dept 5-13-21

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL EXPLAINED HIS STRATEGIES BEHIND WAIVING THE HUNTLEY HEARING AND REFRAINING FROM CONSULTING AND PRESENTING EXPERTS IN THE DEFENDANT'S FIRST DEGREE RAPE TRIAL; THEREFORE DEFENDANT'S MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS WAS PROPERLY DENIED (THIRD DEPT).

The Third Department, over a dissent, determined that defense counsel, at the hearing on defendant's motion to vacate his conviction on ineffective assistance grounds, adequately explained the strategic reasons for waiving the Huntley hearing and not consulting experts in this first degree rape case. Defendant was charged with having sex with a woman who was incapable of consent due to intoxication. Defendant was not read his Miranda rights until well into the police interrogation:

In support of his belief that the admission of the statements would be beneficial, counsel explained that defendant had maintained throughout the interview that the victim was an active and willing participant in the sexual encounter and that, if the statements were suppressed, the jury would only hear about the changes that defendant had made to his story when, as expected, he testified at trial and was cross-examined about them … . In contrast, if the entire interview were put into evidence with appropriate redactions, the defense would benefit from having the jury repeatedly hear defendant's exculpatory version of events and be assured that almost all of his account had remained consistent over time. Counsel further believed that any damage caused by the jury seeing defendant walk back aspects of his story could be ameliorated, reasoning that jurors could be persuaded to sympathize with a "desperate" and "confused" defendant who wavered on a few points after prolonged, increasingly hostile questioning, but remained "adamant that everything that had just happened was consensual and [that the victim] was awake for it." …

… [A]lthough defendant complains that counsel failed to consult with experts or present their testimony to rebut proof related to the victim's sexual assault examination, her degree of intoxication and the presence of defendant's genetic material in her anus, the hearing evidence reflected that counsel "had a strategic reason for [that] failure" … . … A finding that the victim was alert and willing would have … resulted in defendant's acquittal on all charges, and counsel made the tactical decision to focus on that issue to the exclusion of murkier battles over whether the alleged anal sexual conduct had occurred or whether some of the conclusions drawn by the People's experts were open to question. Counsel explained that he chose that course because of emotionally charged testimony from the victim, the sexual assault nurse examiner and others, all of whom he realized posed a real danger of inflaming the sympathies of the jury against defendant. As such, counsel viewed it as essential to present a narrowly tailored defense that kept the jury "singl[ed] in on" concrete facts pointing to the victim as an active participant in the sexual encounter. People v Sposito, 2021 NY Slip Op 02441, Third Dept 4-21-21

CRIMINAL LAW, CONCURRENT SENTENCES.

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, EVIDENCE, APPEALS.

THERE WAS INSUFFICIENT EVIDENCE DEFENDANT PARTICIPATED IN THE MUGGING, INSUFFICIENT EVIDENCE THE VICTIM SUFFERED PHYSICAL INJURY, AND INSUFFICENT EVIDENCE DEFENDANT CONSTRUCTIVELY POSSESSED THE VICTIM'S WALLET AND CELL PHONE (THIRD DEPT).

The Third Department, reversing defendant's convictions, determined the convictions were not supported by legally sufficient evidence and were against the weight of the evidence. The victim said he was mugged by three men and his wallet and cell phone were stolen. The police were able to track the cell phone and, based on the tracking device, stopped a car 30 to 40 minutes after the mugging. There were four men, including defendant, in the car. The other three men in the car pled guilty. The wallet and cell phone were found in the car. The evidence that defendant participated in the mugging was insufficient, the evidence the victim suffered physical injury was insufficient, and the evidence defendant constructively possessed the wallet and cell phone was insufficient:

… [W]e find that the People failed to prove, beyond a reasonable doubt, defendant's identity as one of the perpetrators of the robbery and assault. * * *

Given the paucity of proof regarding the victim's injuries, we agree with defendant that the evidence fails to establish that the victim suffered a physical injury within the meaning of Penal Law § 10.00 (9) … . * * *

… [T]he … circumstantial evidence falls short of proving, beyond a reasonable doubt, that defendant constructively possessed the wallet and the credit and debit cards contained therein or that any such possession was knowing. Although the testimony demonstrated that the wallet was found somewhere in the back seat, there was no other evidence connecting defendant to the stolen property or demonstrating his awareness of its presence inside the vehicle. … [T]he victim asserted that there

were three black males involved in the robbery and assault and there were four black males in the vehicle when it was stopped some 30 to 40 minutes afterward, leaving open the possibility that one of the passengers entered the vehicle after the robbery and assault … . People v Green, 2021 NY Slip Op 02841, Third Dept 5-6-21

CRIMINAL LAW, INCLUSORY CONCURRENT COUNTS.

VEHICULAR MANSLAUGHTER AND ASSAULT CONVICTIONS DISMISSED AS INCLUSORY CONCURRENT COUNTS OF AGGRAVATED VEHICULAR HOMICIDE AND AGGRAVATED VEHICULAR ASSAULT (THIRD DEPT).

The Third Department determined several counts should have been dismissed as inclusory concurrent counts in this vehicular homicide prosecution:

… [D]efendant's convictions for vehicular manslaughter in the first degree, reckless driving and driving while intoxicated under counts 7, 12, 13 and 14 of the indictment must be dismissed as inclusory concurrent counts of his convictions for aggravated vehicular homicide (see CPL 300.30 [4]; 300.40 [3] [b]; Penal Law §§ 125.13 [3]; 125.14 [3], [5]; Vehicle and Traffic Law §§ 1212, 1192 [2], [3] …). Similarly, defendant's conviction for vehicular assault in the first degree under count 9 of the indictment must be dismissed as an inclusory concurrent count of aggravated vehicular assault (see CPL 300.30 [4]; 300.40 [3] [b]; Penal Law §§ 120.04 [3]; 120.04-a [3] …). People v Ferguson, 2021 NY Slip Op 02563, Third Dept 4-29-21

CRIMINAL LAW, JURISDICTION.

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, SERIOUS PHYSICAL INJURY.

ALTHOUGH THE VICTIM WAS SHOT AND THE BULLET PASSED THROUGH HIS LEG, THE PROOF REQUIREMENTS FOR SERIOUS PHYSICAL INJURY WERE NOT MET; ASSAULT SECOND CONVICTIONS REDUCED TO ASSAULT THIRD (THIRD DEPT).

The Third Department determined that although the victim had been shot, the evidence of serious physical injury was insufficient. The court reduced the assault second convictions to assault third:

The victim asserted that the bullet entered through the back of the leg just below the kneecap and exited through the front of the leg just above the kneecap. * * *

There was no evidence that the victim lost consciousness after being shot or that a vital organ was damaged. Nor was there any proof, lay or medical, indicating that the victim's injuries caused a substantial risk of death or were life threatening" … . Similarly, the evidence failed to show "that the victim suffered from a protracted impairment of health or protracted loss or impairment of the function of a bodily organ" … . Although there was testimony regarding the long-term effects of the gunshot wound, no corresponding medical documentation was submitted as proof of the link between the impairment and the initial injury … . Further, although the victim testified that he had two circular scars from the bullet, this testimony alone is not sufficient to support a finding of serious disfigurement … . To prove that the victim's scars were a serious disfigurement would have required the People to make a record of it, via either a photograph or a detailed description; here, however, the testimony establishes "no more than that the victim had two scars" … .

Although the evidence "falls short of satisfying the statutory definition of serious 'physical injury'" … , there is no dispute that the victim sustained a "physical injury" (Penal Law § 10.00 [9]). People v Smith, 2021 NY Slip Op 02564, Third Dept 4-29-21

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

ALTHOUGH THE EVIDENCE SUPPORTED A LEVEL TWO RISK LEVEL CLASSIFICATION, COUNTY COURT DID NOT ADDRESS DEFENDANT'S REQUEST FOR A DOWNWARD DEPARTURE; REVERSED AND REMITTED (THIRD DEPT).

The Third Department, reversing County Court, determined the level two risk level classification was supported by the evidence, but the matter must be reversed and remitted because County Court did not address defendant's request for a downward departure:

Defendant … contends that County Court abused its discretion in denying his request for a downward departure to a risk level one classification. The record discloses that defendant made such request early in the hearing, in the event that the court placed defendant in the risk level two classification, and submitted a psychological

treatment summary in support thereof. Although the summary was received into evidence and reviewed by the court, the court did not address defendant's request but proceeded to consider the substantive risk factors, ultimately concluding that defendant should be placed in the risk level two classification. Significantly, as the record does not contain any findings or conclusions with respect to defendant's request, we are unable to ascertain the court's reasoning for implicitly denying it. Consequently, we "reverse and remit so that County Court may 'determine whether or not to order a departure from the presumptive risk level indicated by the offender's guidelines factor score' and to set forth its findings of fact and conclusions of law as required" … . People v Conrad, 2021 NY Slip Op 02194, Third Dept 4-8-21

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

CRITERIA FOR RECLASSIFICATION OF THE SORA RISK-LEVEL EXPLAINED (THIRD DEPT).

The Third Department explained the criteria for an application for risk-level reclassification under SORA:

Turning to the August 2019 order denying defendant's application for reclassification, it was his burden "to establish by clear and convincing evidence that the requested modification [was] warranted, and the trial court's determination will not be disturbed absent an abuse of discretion" … . County Court correctly rejected defendant's efforts to relitigate various issues addressed in the 2018 order, as an application for reclassification is not "a vehicle for reviewing whether [a] defendant's circumstances were properly analyzed in the first instance to arrive at his [or her] risk level" … . The sole new development pointed to by defendant was his evaluation by a psychiatrist after the issuance of the 2018 order, and he provided a letter in which the psychiatrist made preliminary findings that defendant neither met the diagnostic criteria for pedophilia nor merited a risk level three classification. The psychiatrist's final report was not submitted for review, however, and the limited findings offered in the letter were rendered without a review of the raw data underlying the 2015 report and were based upon an account of defendant's sexual history and offenses that "markedly differ[ed]" from the one referenced in it. The

Board accordingly opposed a modification on the ground that defendant had not met his burden of proof and, under the circumstances presented, County Court did not abuse its discretion in agreeing with that assessment … . People v Stein, 2021 NY Slip Op 03086, Third Dept 5-13-21

CRIMINAL LAW, TRAFFIC STOPS, CANINE SNIFFS.

UNDER THE CIRCUMSTANCES OF THE TRAFFIC STOP, THE CORRECT STANDARD TO APPLY TO THE CANINE SNIFF OF DEFENDANT'S PERSON WAS REASONABLE SUSPICION, NOT PROBABLE CAUSE; THE SUPPRESSION MOTION WAS PROPERLY DENIED; THE DISSENT DISAGREED (THIRD DEPT).

The Third Department, over a concurrence and a dissent, determined the canine sniff after a traffic stop was justified by reasonable suspicion. The concurrence argued the court could not reach the proper standard for the canine sniff because the motion court did not rule on it. The dissent argued the probable cause standard should apply:

Defendant correctly asserts that the canine's contact sniff of his person intruded upon his personal privacy as secured under both the Fourth Amendment of the US Constitution and article 1, § 12 of the NY Constitution … . The question presented is whether the search ran afoul of either constitutional provision and what standard applies to make that assessment — an issue of first impression for this Court.

Considering the context of a vehicle traffic stop and how events unfolded, we conclude that a reasonable suspicion standard should apply, not one of probable cause … . A canine sniff is a minimal intrusion compared to a full-blown search of a person, intended only to detect the possession of narcotics … . Without prompting from [officer] Bracco, the canine twice was "in odor" of its own accord, providing a reasonable and articulable basis for Bracco to suspect that defendant possessed narcotics on his person. Given the necessity for prompt action, it was not unreasonable for Bracco to allow the canine to approach defendant. There was contact between the canine and defendant's person, but the record suggests that contact was brief and the canine quickly alerted. In these circumstances, we conclude

that the search was valid and the suppression motion properly denied. People v Butler, 2021 NY Slip Op 03222, Third Dept 5-20-21

EDUCATION-SCHOOL LAW, CONSTITUTIONAL LAW.

ALL EIGHT OF THE SCHOOL DISTRICTS EXAMINED VIOLATED THE CONSTITUTIONAL REQUIRMENT TO PROVIDE A SOUND EDUCATION TO THE AT-RISK STUDENT POPULATIONS (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Lynch, determined the plaintiffs established a violation of the constitutional requirement to provide a sound education to the at-risk student population in all of the school districts named in the action—Jamestown, Kingston, Mount Vernon, Newburgh, Niagara Falls, Port Jervis, Poughkeepsie, and Utica:

… [P]laintiffs in this case have demonstrated a … set of coalescing circumstances with respect to the at-risk student population in the subject school districts sufficient to establish a constitutional violation. Each of the subject school districts had a high percentage of at-risk students during the stipulated academic years — those who came from impoverished backgrounds, had disabilities, or whose primary language was one other than English. The compelling evidence demonstrated that, in order to place a sound basic education within the reach of such students, they require early interventions, more time on task and other supplemental programming, as well as support from adequate numbers of guidance counselors, social workers or other similar professionals. Despite these enhanced needs, the districts lacked a combined total of over $1.1 billion in funding … , necessitating further cuts to already diminished staff and essential services. Most unfortunately, the performance of the students in these districts suffered as a result. Working from the premise … that all children can succeed when given appropriate instructional, social and health services, we find — based upon the evidence of inadequate inputs, poor outputs and a causal connection to defendant's school financing system — that plaintiffs have established a constitutional violation with respect to the at-risk student population in each of the subject school districts. Maisto v State of New York, 2021 NY Slip Op 03350, Third Dept 5-27-21

EDUCATION-SCHOOL LAW, NEGLIGENCE, ASSUMPTION OF THE RISK.

14-YEAR-OLD PLAINTIFF ASSUMED THE RISK OF COLLIDING WITH RETRACTED BLEACHERS DURING A BASKETBALL PRACTICE DRILL IN WHICH BOUNDARY LINES WERE TO BE IGNORED; THE DISSENT DISAGREED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the defendant school district's motion for summary judgment in this negligent supervision case should have been granted. The 14-year-old plaintiff was participating in a basketball practice drill in which the boundary lines of the court were to be ignored. When plaintiff attempted to retrieve a ball that went over the boundary line she was pushed into the retracted bleachers. The Third Department held plaintiff assumed the risk of injury during that form of practice:

"The primary assumption of risk doctrine . . . encompasses risks involving less than optimal conditions" … . The opinion of plaintiff's expert that the drill could have been safer by utilizing the boundary lines of the basketball court and having more space was insufficient to raise an issue of fact given that the failure to do so did not unreasonably increase the inherent risks of the drill or playing basketball … . Plaintiff's expert likewise failed to cite to any specific industry standard violated by defendants … . Furthermore, there is no indication in the record that the boundary lines of the basketball court acted as, or were intended to be, a safety mechanism to prevent a player's collision with the bleachers. Because plaintiff did not satisfy her burden, defendants' motion should have been granted … . Secky v New Paltz Cent. Sch. Dist., 2021 NY Slip Op 04071, Second Dept 6-24-21

EMPLOYMENT LAW, RESPONDEAT SUPERIOR, ASSAULT BY EMPLOYEES.

CLAIMANT-INMATE'S ACTION AGAINST THE STATE ALLEGING HE WAS BEATEN BY CORRECTIONS OFFICERS SHOULD NOT HAVE BEEN DISMISSED; THERE WERE QUESTIONS OF FACT ABOUT WHETHER THE OFFICERS WERE ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT AT THE TIME OF THE BEATING (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Clark, reversing the Court of Claims, over a two-justice dissent, determined the claimant-inmate's action alleging claimant was beaten by corrections officers after lodging a complaint against one of the officers (Poupore) should not have been dismissed. The Court of Claims ruled the state could not be liable for the beating because the officers were not acting within the scope of their employment:

… [T]he undisputed evidence demonstrated that the incident took place at Clinton Correctional Facility, that the correction officers involved were on duty and that claimant's encounter with Poupore by the stairway was occasioned by claimant having been called downstairs for an interview with Wood [Poupre's supervisor] … . … [T]estimony from defendant's witnesses demonstrated that pat frisks are routinely conducted prior to inmate interviews and that Poupore was instructed to pat frisk claimant prior to his interview. Accepting claimant's version of events as true, Poupore struck claimant during the course of that employer-sanctioned pat frisk, which then led to the involvement of additional correction officers. If claimant's account is credited, Poupore's intentional tortious act of punching claimant in the head was not so divorced from the performance of his pat-frisk duties so as to preclude a finding that he was acting within the scope of employment. Nor can we conclude as a matter of law that the ensuing altercation was wholly outside the scope of the additional correction officers' duties. Galloway v State of N.Y., 2021 NY Slip Op 02855, Third Dept 5-6-21

ENVIRONMENTAL LAW, MUNICIPAL LAW.

PURSUANT TO ECL 23-2711, THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION DID NOT HAVE THE AUTHORITY TO ISSUE A MINING PERMIT BECAUSE THE TOWN LAW PROHIBITED MINING (THIRD DEPT).

The Third Department, reversing Supreme Court, over an extensive dissent, determined the mining permit issued by the Department of Environmental Conservation (DEC) must be annulled pursuant to Environmental Conservation Law (ECL) 23-2711 because the local law prohibiting mining. The permit purported to allow the expansion of an existing mining operation:

ECL 23-2703 (3) provides that, in the event that an application for a permit is received from an applicant whose mine falls within an area described in the statute, the agency may not process the application if the local zoning laws prohibit same. ECL 23-2703 (3) is not vague or ambiguous; it is concise and clear. Contrary to all other permit applications received by DEC, an application received from an area protected under ECL 23-2703 (3) must be put on hold until the status of the local laws is determined … . There is no qualification on what type of permit applications must be put on hold; rather, by its certain language, the statute applies to all applications. … . …

ECL 23-2703 (3) clearly recognizes that the local laws of the municipality are determinative as to whether an application can be processed. Here, where it is unchallenged that the Town's laws prohibit zoning [SIC mining?], DEC cannot process the application, let alone issue the permit. It cannot do by fiat what is prohibited under the law. Therefore, the act of issuing the permits here, in contravention of ECL 23-2703 (3), was arbitrary and capricious. Matter of Town of Southampton v New York State Dept. of Envtl. Conservation, 2021 NY Slip Op 03351, Third Dept 5-27-21

ENVIRONMENTAL LAW, ZONING, LAND USE.

OWNERS OF BUSINESSES IN THE VICINITY OF THE PROPOSED CONSTRUCTION ALLEGED DECREASED PARKING SPACES, INCREASED TRAFFIC CONGESTION AND THE BLOCKING OF SCENIC VIEWS AS REASONS FOR OVERTURNING THE SEQRA NEGATIVE DECLARATION ALLOWING THE CONSTRUCTION; THE BUSINESS OWNERS DID NOT HAVE STANDING TO CONTEST THE DECLARATION (THIRD DEPT).

The Third Department upheld the negative SEQRA (State Environmental Quality Review Act) declaration approving the construction of a mixed use structure which would reduce the number of parking spaces available in Oneonta. The fact that the petitioners owned businesses in the vicinity of the new construction did not confer standing to contest the negative declaration:

Although petitioners have established that their businesses are within close proximity to the project site, that fact alone does not confer automatic standing in the SEQRA context … . Petitioners' allegations largely hinged on economic business concerns occasioned by an alleged decrease in available parking … , and their claim relating to traffic impacts "fail[s] to demonstrate an environmental injury different from that suffered by the public at large" … . Although the obstruction of a scenic view may constitute an environmental injury within the zone of interests sought to be protected by SEQRA … , the concerns espoused by certain petitioners regarding potential adverse scenic impacts to their businesses were undeveloped and otherwise too speculative to establish standing in these circumstances … . We also note that the project site is located in a "mixed use" district (MU-1) — which permits the type of development contemplated — and, according to the full environmental assessment form, there are no officially designated scenic or aesthetic resources located within five miles … . Matter of Peachin v City of Oneonta, 2021 NY Slip Op 02863, Third Detp 5-6-21

FAMILY LAW, CIVIL PROCEDURE, DEFAULT.

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, GENETIC MARKER TEST.

THE EVIDENCE DID NOT DEMONSTRATE THE DEVELOPMENT OF A PARENT-CHILD RELATIONSHIP BETWEEN RAYMOND F AND THE CHILD; THEREFORE RAYMOND F'S REQUEST FOR A GENETIC MARKER TEST SHOULD NOT HAVE BEEN DENIED (THIRD DEPT).

The Third Department, reversing Family Court, determined Raymond F's request for a genetic marker test should not have been denied. The evidence did not demonstrate a parent-child relationship such that Raymond F should be equitably estopped from denying paternity:

The application of the doctrine of equitable estoppel does not involve the equities between adult participants to the paternity proceedings … . "Rather, in the context of a paternity proceeding, it is the child's justifiable reliance on a representation of paternity that is considered and, therefore, the doctrine of equitable estoppel will be applied only where its use furthers the best interests of the subject child" … . …

The trial testimony established that the mother and Trini G., the mother's boyfriend with whom she and her children lived for nine years (from the time the child was two to three months old), "co-parented" all of the children by contributing financially to their care and feeding, bathing and playing with them. Trini G. referred to the child as "stepson" and the child called him "daddy." The record established that Reymond F. had no contact with the child since birth, except during sporadic visits between Reymond F. and his two older children. Reymond F. testified that he did not do "anything" with the child during these visits, was not called "dad" and did not call the child "son." He further testified that he never called the child on the phone, never gave him gifts and never checked on his educational or medical issues. The mother testified that, while she did not encourage the child to have a relationship with Reymond F., the child knew that Reymond F. was his biological father. Matter of Montgomery County Dept. of Social Servs. v Trini G., 2021 NY Slip Op 03489, Third Dept 6-3-21

FREEDOM OF INFORMATION LAW (FOIL).

DOCUMENTS CREATED AND HELD BY A PRIVATE ENTITY PURSUANT TO THE REGULATIONS OF A STATE AGENCY ARE NOT "RECORDS" WHICH THE STATE AGENCY MUST DISCLOSE PURSUANT TO THE FREEDOM OF INFORMATION LAW, DESPITE THE FACT THAT THE AGENCY CAN DEMAND PRODUCTION OF THE DOCUMENTS (THIRD DEPT).

The Third Department, reversing Supreme Court, determined documents created and held by a private entity (Union) pursuant to a state agency's (New York Department of Labor's) regulations regarding apprenticeship programs are not "records" which the Department of Labor is required to produce under the Freedom of information Law (FOIL):

… [R]espondent [New York Department of Labor] did not delegate a duty to the Union nor did the Union perform any essential service on respondent's behalf. The mere fact that respondent has the discretionary regulatory authority to ask the Union for the requested documents does not, ipso facto, render all documents that are created and maintained by the Union with respect to its apprenticeship programs subject to disclosure (see Public Officers Law § 86 [4]). Practically speaking, to so hold would render any document that was created or maintained by a private entity in order to comply with a corresponding agency regulation requiring the production and retention thereof a "record" subject to disclosure under FOIL (see Public Officers Law § 86 [4]) … . …

Although we recognize that "FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government" … , we do not find the definition of "record" to be so broad and all-encompassing as to bring within its ambit any document that a private entity might create and maintain pursuant to a state agency's regulation under the guise that said records are held "for" that agency (see Public Officers Law §§ 86 [4]; 87 [2]; 89 [3] [a] …). Matter of Broach & Stulberg, LLP v New York State Dept. of Labor, 2021 NY Slip Op 03509, Second Dept 6-3-21

INSURANCE LAW, ADMINISTRATIVE LAW, CONSTITUTIONAL LAW.

THE DEPARTMENT OF FINANCIAL SERVICES' AMENDMENT TO AN INSURANCE REGULATION DESIGNED TO PROTECT CONSUMERS OF LIFE INSURANCE AND ANNUITY PRODUCTS IS VOID FOR VAGUENESS (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Egan, reversing Supreme Court, determined the Department of Financial Services' (DFS's) amendment to an Insurance Regulation was void for vagueness:

The amendment was promulgated to address concerns with respect to the growing complexities involved with life insurance and annuity products, the corresponding need for consumers to increasingly rely on the advice of professionals in order to comprehend the widening market of products available and to mitigate abuses with respect to the compensation of agents and brokers (hereinafter collectively referred to as producers [see 11 NYCRR 224.3 (c)]) who have incentive to manipulate consumers into purchasing financial products that result in higher commissions but ultimately fail to meet their needs. * * *

… [W]hile the consumer protection goals underlying promulgation of the amendment are laudable, as written, the amendment fails to provide sufficient concrete, practical guidance for producers to know whether their conduct, on a day-to-day basis, comports with the amendment's corresponding requirements for making recommendations and compiling and evaluating the relevant suitability information of the consumer … . Although the amendment provides certain examples of what a recommendation does not include (i.e., "general factual information to consumers, such as advertisements, marketing materials, general education information" and "use of . . . interactive tool[s]" (11 NYCRR 224.3 [e] [2]), the remaining definitional language is so broad that it is difficult to discern what statements producers could potentially make that would not be reasonably interpreted by the consumer to constitute advice regarding a potential sales transaction and therefore fall within the purview of the amendment (see 11 NYCRR 224.3 [e] [1], [2]). Matter of Independent Ins. Agents & Brokers of N.Y., Inc. v New York State Dept. of Fin. Servs., 2021 NY Slip Op 02574, Third Dept 4-29-21

MEDICAL MALPRACTICE, NEGLIGENCE.

THE DOCTOR ORDERED A CERTAIN DOSAGE OF MEDICATION BE ADMINISTERED FOR "1" MINUTE TO ADDRESS SYMPTOMS OF A STROKE, BUT A NURSE MISTAKENLY PROGRAMMED THE MACHINE TO ADMINISTER THE MEDICATION FOR "11" MINUTES; THE ACTION SOUNDS IN MEDICAL MALPRACTICE, NOT ORDINARY NEGLIGENCE (THIRD DEPT).

The Third Department determined Supreme Court properly ruled this case sounded in medical malpractice, not ordinary negligence, and explained the difference. Plaintiff had been given the wrong dosage of tPA upon arrival at the hospital to address symptoms of a stroke. Due to a mistake, the machine was programmed to administer a quantity of the drug for "11" minutes, instead of the "1" minute ordered by the doctor. The mistake was noticed after three minutes:

… [T]he case is one of medical malpractice only. "Conduct may be deemed malpractice, rather than negligence, when it constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician" … . "The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of the facts" … . As relevant here, plaintiffs' claims are based upon allegations that defendants acted negligently in their medical care and treatment of plaintiff — i.e., defendants' actions or omissions with respect to the proper dosing of tPA, the progression of the stroke with or without the proper administration of tPA, the medical benefits and risks of tPA based on the proper or improper administration of the medication, and the potential loss of the opportunity to attain tPA's benefits based on its improper administration. Although it is undisputed that a nurse inadvertently mis-administered the tPA by erroneously programming the pump, she was assisting the physician by administering the prescribed medication and was an integral part of the process of rendering medical treatment to the patient. The nurse's error does not transform this case to one of simple negligence rather than medical malpractice … . Holland v Cayuga Med. Ctr. at Ithaca, Inc., 2021 NY Slip Op 03896, Third Dept 6-17-21

MENTAL HYGIENE LAW, CRIMINAL LAW, SEX OFFENDERS.

ALTHOUGH THE RESPONDENT-SEX-OFFENDER WAS PROPERLY ALLOWED TO REPRESENT HIMSELF IN THE CIVIL COMMITMENT PROCEEDING, HE SHOULD NOT BE ALLOWED TO CROSS-EXAMINE THE WITNESSES WHO WERE VICTIMS OF HIS SEX OFFENSES (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Clark, reversing Supreme Court, determined the respondent-sex-offender in this civil commitment proceeding, who was properly allowed to represent himself with a Mental Hygiene Legal Service (MHLS) attorney as stand-by counsel, should not be allowed to cross-examine the witnesses who had been victims of the respondent's offenses. The cross-examination should be done by stand-by counsel:

… [A]llowing respondent to personally conduct the cross-examinations of the victim witnesses could thwart or impair petitioner's ability to sustain its burden of proof by causing the witnesses to back out of testifying or by causing a "chilling effect" on their testimony. Moreover, petitioner has a compelling interest in protecting the victim witnesses from any possible retraumatization resulting from respondent personally conducting cross-examinations of them.

Upon balancing the foregoing Mathews factors, we find that, to the extent that respondent has a due process right to self-representation, such right does not entitle him to personally conduct the cross-examinations of the victim witnesses whom he was adjudicated or alleged to have victimized. Thus, notwithstanding respondent's pro se status, the cross-examinations of the victim witnesses must be conducted by respondent's standby counsel (MHLS) or, should respondent prefer, other court-appointed counsel. Matter of State of N.Y. v John T., 2021 NY Slip Op 02862, Third Dept 5-6-21

NEGLIGENCE, TRAFFIC ACCIDENTS, DISCOVERY.

PLAINTIFF ALLEGED THE INCREASED TRAFFIC RELATED TO AN EVENT AT DEFENDANT COUNTRY CLUB CREATED A DANGEROUS CONDITION CONTRIBUTING TO A COLLISION WITH A VEHICLE ATTEMPTING TO ENTER THE COUNTRY CLUB PREMISES; PLAINITIFFS WERE ENTITLED TO DISCOVERY FROM THE COUNTRY CLUB REGARDING CROWD CONTROL, MARKETING, EVENT PLANNING, SAFETY PLANS, ETC. (THIRD DEPT).

The Third Department determined plaintiffs' motion to compel discovery from defendant country club was properly granted. Plaintiffs were injured in a collision when defendant driver made a left turn across plaintiffs' lane of travel to enter the country club premises to attend a special event. Plaintiffs alleged that defendant country club did not take adequate measures to control the increased traffic generated by the event, thereby creating a dangerous condition:

Plaintiffs' complaint alleges a cause of action for negligence based on, as relevant here, breach of a special duty of care by defendant. The crux of plaintiffs' theory of liability against defendant is that it organized and hosted an event that it knew or should have known would generate a large amount of traffic to the site, but failed to account for the impact of same, and said failure was a proximate cause of plaintiffs' injuries. A review of plaintiffs' demands evinces that they generally sought information regarding crowd control, marketing/advertisement materials, ticket sales, minutes concerning the planning of the event, copies of emergency management plans, safety plans and copies of any and all reports of past medical emergencies at the event. For the most part, the demands were concerned with the event held in 2019, as well as those held in the preceding five years. A review of the record reveals that the discovery sought is aimed at determining whether defendant created a dangerous condition by holding a large event, thus increasing vehicular and pedestrian traffic, with notice of the danger and failing to take appropriate precautions … . Rote v Snyder, 2021 NY Slip Op 03508, Third Dept 6-3-21

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), HARVESTING TREES.

QUESTION OF FACT WHETHER DEFENDANT HAD A GOOD FAITH BELIEF THAT HE OWNED THE LAND WHERE TREES WERE HARVESTED; THEREFORE THE ISSUE WHETHER THE TREBLE DAMAGES ASPECT OF RPAPL 861 APPLIES MUST BE DETERMINED AT TRIAL (THIRD DEPT).

The Third Department determined there was a question of fact whether defendant had a good faith belief that the land on which trees were harvested was his own property. Therefore whether plaintiff was entitled to treble damages pursuant to Real Property Actions and Proceedings Law (RPAPL) 861 must be determined at trial:

"[T]he current version of RPAPL 861 was enacted . . . in an effort to deter the illegal taking of timber by increasing the potential damages for that activity" … . If a person violates RPAPL 861 by cutting another person's trees without the other's consent, or by causing such cutting to occur, "an action may be maintained against such person for treble the stumpage value of the tree or timber or [$250] per tree, or both and for any permanent and substantial damage caused to the land or the improvements thereon as a result of such violation" … . However, if a defendant in such an action "establishes[,] by clear and convincing evidence, that when the defendant committed the violation, he or she had cause to believe the land was his or her own, . . . then he or she shall be liable for the stumpage value or [$250] per tree, or both" … . Thus, "a trespasser's good faith belief in a legal right to harvest timber does not insulate that person from the imposition of statutory damages, but merely saves him or her from having to pay the plaintiff treble damages" … . "Whether treble damages pursuant to RPAPL 861 are warranted is generally a factual determination" … . Although Gregory Miller testified that he intended to remove trees only from his own property, the record reflects that he did not have a survey of the property and relied on a determination of the boundary lines based on his own measurements. We conclude that a factual question exists, as Gregory Miller has failed at this stage of the proceedings to prove by clear and convincing evidence that he had a good faith belief that he owned the land at issue … . Holser v Geerholt, 2021 NY Slip Op 02578, Third Dept 4-29-21

REAL PROPERTY TAX LAW, FORECLOSURE SALE.

AS LONG AS BOTH THE CERTIFIED AND FIRST-CLASS-MAIL LETTERS NOTIFYING A MORTGAGEE OF A TAX FORECLOSURE SALE ARE NOT RETURNED, THE MORTGAGEE IS DEEMED TO HAVE BEEN PROPERLY SERVED PURSUANT TO REAL PROPERTY TAX LAW 1125 (THIRD DEPT).

The Third Department, over a dissent, determined that plaintiff property owner, pursuant to Real Property Tax Law (RPTL) 1125, was properly notified of the tax foreclosure proceedings, despite plaintiff's allegation that the certified letter was delivered to a post office box, not the street address. RPTL 1125 deems service accomplished if the letters are not returned:

Defendants were required to send the notice of the tax foreclosure proceeding to plaintiff "by certified mail and ordinary first class mail" (RPTL 1125 [1] [b] [i] …). The record contains documentary evidence demonstrating that the petition and notice of foreclosure were sent via certified mail and first class mail to plaintiff at "4153 Broadway" in Kansas City, Missouri — the address for plaintiff as listed on the mortgage … .The record also discloses that neither of these mailings was returned. Accordingly, defendants satisfied their burden of demonstrating that they complied with RPTL 1125.

In opposition thereto, plaintiff submitted, among other things, the tracking information sheet for the certified mailing sent by the County. This sheet indicated that the certified mailing was delivered to an unspecified post office box, as opposed to 4153 Broadway, in Kansas City, Missouri. To that end, plaintiff asserts that a material issue of fact exists as to whether it received notice of the tax foreclosure proceeding. The petition and notice of foreclosure sent to plaintiff, however, "shall be deemed received unless both the certified mailing and the ordinary first class mailing are returned by the United States [P]ostal [S]ervice within [45] days after being mailed" (RPTL 1125 [1] [b] [i] …). James B. Nutter & Co. v County of Saratoga, 2021 NY Slip Op 04074, Third Dept 6-24-21

RETIREMENT AND SOCIAL SECURITY LAW.

A POLICE OFFICER WAS ASKED BY HER SUPERVISOR TO PICK UP A LARGE BREAKFAST ORDER FOR THE PRECINCT; PETITIONER SLIPPED AND FELL ON ICE IN THE PARKING LOT WHEN RETURNING WITH THE ORDER; PETITIONER WAS “IN SERVICE” WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW WHEN SHE FELL (THIRD DEPT).

The Third Department determined the petitioner, a police officer, was in service when she slipped on ice and her application for accidental disability benefits should not have been denied on that ground. The matter was sent back for a determination when the fall was an “accident” within the meaning of the Retirement and Social Security Law:

Respondent’s determination that petitioner was not in service because she was performing “a personal activity” at the time of her 2011 injury is not supported by substantial evidence. Petitioner testified that, on the day of the incident, her supervisor asked if the desk duty officers were going to get breakfast. According to petitioner, the supervisor then requested that someone contact a patrol officer that was on the road and have him or her pick up breakfast for the precinct. … A fellow officer that was in the precinct at the time volunteered to go and asked petitioner to accompany him to help carry the large order. According to petitioner, her supervisor then gave her permission to go and he paid for the breakfast order. Upon her return to the precinct with the breakfast order, she slipped on ice while walking in the parking lot. In our view, by going out to pick up a breakfast order for the precinct at the behest of her supervisor, petitioner was performing a work duty rather than engaged in a personal activity … . Matter of Arroyo v DiNapoli, 2021 NY Slip Op 03895, Third Dept 6-17-21

TRUSTS AND ESTATES, STATUTES OF LIMITATIONS, FIDUCIARY TOLLING RULE.

THE FIDUCIARY TOLLING RULE TOLLED THE STATUTE OF LIMITATIONS IN THIS CONSTRUCTIVE TRUST ACTION AGAINST AN EXECUTOR (WHO WAS REMOVED BY THE COURT) UNTIL THE SUCESSOR FIDUCIARY WAS APPOINTED (THIRD DEPT).

The Third Department, reversing Surrogate's Court, determined the constructive trust action based upon alleged self-dealing by an executor who was removed by the court was not time-barred. The fiduciary tolling rule applied:

Under the fiduciary tolling rule, a claim alleging wrongful conduct by an individual in his or her fiduciary capacity does not accrue until there is an open repudiation of the fiduciary obligation or a judicial settlement of the fiduciary's account … . This rule tolls the statute of limitations "for all misconduct committed by the fiduciary prior to repudiation of its obligation or termination of the [fiduciary] relationship" … since, absent either repudiation or removal, the aggrieved parties "were entitled to assume that the [fiduciary] would perform his [or her fiduciary] responsibilities" … , and it is highly unlikely that a sitting fiduciary would assert a constructive trust claim against himself or herself. … Under this rule, the toll continues until a successor fiduciary is appointed … . Matter of George, 2021 NY Slip Op 03231, Third Dept 5-20-21

UNEMPLOYMENT INSURANCE.

THE TRANSFER OF CERTAIN ASPECTS OF SELLER'S BUSINESS TO BUYER DID NOT MEET THE CRITERIA IN LABOR LAW 581; THEREFORE THE TRANSFER DID NOT TRIGGER THE TAKEOVER OF THE SELLER'S UNEMPLOYMENT INSURANCE EXPERIENCE ACCOUNT (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that the HOP's purchase of certain aspects of a competing business, Playground, did not trigger HOP's takeover of Playground's unemployment insurance experience account:

The statute provides that where a business has been transferred from one employer to another, either in whole or in part, the transferee shall take over and continue the unemployment insurance experience account of the transferor (see Labor Law § 581 [4] [a] …). A transfer, however, will not be deemed to have occurred "if the transferee has not assumed any of the transferring employer's obligations, has not acquired any of the transferring employer's good[]will, has not continued or resumed the business of the transferring employer either in the same establishment or elsewhere, and has not employed substantially the same employees as those of the transferring employer" … . To negate a transfer, all four of these requirements must be met … . …

… [U]ndisputed evidence was presented that, in connection with its purchase of assets from Playground, HOP did not assume any of Playground's obligations, did not continue or resume operation of Playground's screening room … and did not retain any of Playground's employees. The sole basis upon which the Board concluded that a transfer had occurred was HOP's alleged acquisition of Playground's goodwill. The record, however, does not support the Board's finding in this regard.

The asset purchase agreement did not identify goodwill as an asset encompassed by the agreement, nor was it specifically mentioned on the list of property set forth on schedule 2.1 of the agreement. Matter of HOP N.Y. Entertainment, LLC (Commissioner of Labor), 2021 NY Slip Op 03093, Third Dept 5-13-21

WORKERS' COMPENSATION, 9-11 TOXIN INJURY.

CLAIMANT, A POLICE OFFICER WHO WORKED AT A VEHICLE CHECKPOINT FOR TRAFFIC TO AND FROM GROUND ZERO AFTER THE WORLD TRADE CENTER WAS DESTROYED, PARTICIPATED IN THE CLEANUP WITHIN THE MEANING OF WORKERS' COMPENSATION LAW SECTION 28; THEREFORE HIS CLAIM (BASED UPON TOXIN-RELATED INJURY) SHOULD NOT HAVE BEEN DISMISSED AS UNTIMELY (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined claimant police officer did participate in the cleanup operations at ground zero and his claim should not have been disallowed as untimely pursuant to Workers' Compensation Law section 28. Claimant worked at a vehicle checkpoint for traffic to and from ground zero and alleged injury from toxins in the environment:

… [C]laimant worked at a vehicle checkpoint and he testified that he was assigned to control traffic at the intersection of West and Canal Streets from January 31, 2002 to February 6, 2002. Claimant further testified that his duties at the checkpoint included stopping traffic and clearing routes for emergency and construction vehicles travelling to and from ground zero. According to claimant, he assisted getting vehicles through the checkpoint, "[w]hether it was construction, whether it was [f]ire department [or] family members." By providing such assistance, we find that claimant's activities had a tangible connection to the rescue, recovery and cleanup operations at the WTC [World Trade Center] site … . As such, and in light of the liberal construction afforded this remedial statute, we conclude that the Board's determination that Workers' Compensation Law article 8-A does not apply because claimant did not participate in the rescue, recovery and cleanup operations at ground zero is not supported by substantial evidence and, therefore, the claim should not have been disallowed as untimely under Workers' Compensation Law § 28 … . Matter of Bodisch v New York State Police, 2021 NY Slip Op 03889, Third Dept 6-17-21

WORKERS' COMPENSATION.

CLAIMANT SHOULD HAVE BEEN GIVEN THE OPPORTUNITY TO CROSS EXAMINE THE CONSULTANTS WHOSE REPORTS WERE THE BASIS FOR THE DENIAL OF CLAIMANT'S REQUEST FOR SURGERY (THIRD DEPT).

The Third Department, reversing (modifying) the Workers' Compensation Board, determined claimant should be afforded the opportunity to cross-examine the consultants (Cash and Storrs) whose reports were the basis for the denial of claimant's request for surgery:

The … request for surgery was not made until after the WCLJ [Workers' Compensation Law Judge] ordered [the] depositions, but was nevertheless considered by the WCLJ, who upheld the denial even though claimant did not have any opportunity to submit contradictory medical evidence or cross-examine the carrier's consultants. Matter of Ozoria v Advantage Mgt. Assn., 2021 NY Slip Op 03090, Third Dept 5-13-21

Copyright © 2021 New York Appellate Digest, LLC.