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ADMINISTRATIVE LAW, EVIDENCE, WOMEN-OWNED BUSINESS ENTERPRISE.

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The Third Department, annulling the determination of the Division of Minority and Women's Business Development of the Department of Economic Development (the Division), found the petitioner had demonstrated it met the criteria for certification as a woman-owned business enterprise (WBE). In its contrary ruling, the Division erroneously ignored the evidence presented at the hearing before the Administrative Law Judge (ALJ) which had ruled in favor of the petitioner:

Petitioner contends that the determination should be annulled because the Director refused to consider the testimonial evidence introduced at the administrative hearing in assessing the regulatory factors, and we agree. … [F]ollowing a determination denying an application for certification as a WBE, the applicant is, upon written request, entitled to an administrative hearing before an independent hearing officer … . The hearing officer must thereafter conduct the hearing based upon the information included in the request for a hearing as it relates to the information that was provided by the applicant with its certification application, and each party must be accorded a full opportunity to present evidence, including calling witnesses and cross-examining other parties and their witnesses … . The hearing officer may also "request additional information and take other actions necessary to make an informed decision" … , which ultimately must be based upon his or her "consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and as supported by and in accordance with substantial evidence" … .

The proof adduced at the administrative hearing was highly relevant to the issue of whether petitioner met the criteria for WBE certification. Matter of Scherzi Sys., LLC v White, 2021 NY Slip Op 05143, Third Dept 9-30-21

ADMINISTRATIVE LAW, EXHAUSTION OF REMEDIES, FUTILITY EXCEPTION.

PETITIONER WAITED EIGHT MONTHS WITHOUT RECEIVING A DECISION ON THE ADMINISTRATIVE APPEAL OF THE DENIAL OF HIS GRIEVANCE BEFORE FILING AN ARTICLE 78 CONTESTING THE DENIAL; PETITIONER WAS ENTITED TO THE "FUTILITY EXCEPTION" TO THE REQUIREMENT THAT HE EXHAUST ALL ADMINISTRATIVE REMEDIES BEFORE TURNING TO THE COURTS (THIRD DEPT).

The Third Department determined petitioner-inmate was entitled to the "futility exception" to the requirement that administrative remedies be exhausted before bringing an Article 78 proceeding to contest the administrative ruling. Petitioner brought a grievance alleging the Department of Corrections and Community Supervision (DOCCS) should not have reduced his pay for work in the mess hall because of his refusal to participate in certain prison programs. After the superintendent denied relief petitioner appealed to the Central Office Review Committee (CORC) but eight months passed without a decision. Then petitioner brought the Article 78:

… [P]etitioner filed his administrative appeal with CORC on December 12, 2018 and commenced this proceeding on August 19, 2019. He waited more than eight months without having received a decision — which is seven months after CORC's 30-day limit had expired — before he commenced this proceeding. To the extent that the regulations are unclear regarding whether CORC's failure to decide an appeal within 30 days constitutes a constructive denial, a grievant is placed in a catch-22 situation — if he or she files a CPLR article 78 proceeding before receiving a decision from CORC, DOCCS may seek dismissal based on the defense of failure to exhaust administrative remedies, but, if the grievant does not commence a court proceeding within four months after the 30-day decision period, he or she risks the

possibility of DOCCS seeking dismissal based on a statute of limitations defense … . This untenable position, which arises from the confluence of CORC's failure to comply with the regulation's time frame for deciding administrative appeals and the lack of clarity in a different DOCCS regulation, creates substantial prejudice to a grievant such as petitioner … . Under the circumstances, we find that exhaustion should be excused based on the futility exception. Matter of McMillian v Krygier, 2021 NY Slip Op 04638, Third Dept 8-5-21

APPEALS, TIME LIMITS FOR CROSS-APPEALS.

UNDER THE NEW APPELLATE PRACTICE RULES FOR CROSS-APPEALS, DEFENDANTS ABANDONED THIER APPEAL BECAUSE THEY DID NOT FILE THEIR BRIEF WITHIN SIX MONTHS OF FILING THE NOTICE OF APPEAL; THE COURT OPTED TO WAIVE DEFENDANTS' NONCOMPLIANCE AND DEEMED THE CROSS APPEAL PROPERLY BEFORE THE COURT (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Lynch, discussed the applicability of the new practice rules for appeals to cross-appeals:

… [T]he new practice rules pertaining to cross appeals specify that "[t]he party that first perfects the appeal shall be denominated the appellant-respondent" (Rules of App Div, All Depts [22 NYCRR] § 1250.9 [f] [1] [iii]). Until such time as either party has perfected, the identity of a party as either an appellant-respondent or a respondent-appellant remains to be determined. Having filed a notice of cross appeal on June 2, 2020, defendants had until December 2, 2020 to perfect their appeal or otherwise seek an extension. Defendants failed to do either. For this reason, plaintiff maintains that the cross appeal was effectively abandoned and technically plaintiff is correct. The rules, read as a whole, require each party to preserve its position until such time as one of the parties actually perfects its appeal. That said, the rules require the parties to "consult and make best efforts to stipulate to a briefing schedule" (Rules of App Div, All Depts [22 NYCRR] § 1250.9 [f] [1] [i]), and there is no indication in this record or the briefs that such consultation occurred here. In any event, since this is our first decision addressing implementation of the new practice rules relating to cross appeals, we opt to waive defendants' noncompliance and deem

the cross appeal properly before us (see Rules of App Div, All Depts [22 NYCRR] § 1250.1 [g]). New York Mun. Power Agency v Town of Massena, 2021 NY Slip Op 04268, Third Dept 7-8-21

CIVIL PROCEDURE, DISCOVERY, CHILD-VICTIMS ACT.

IN THIS CHILD-VICTIMS-ACT SEXUAL-ABUSE (NEGLIGENT-SUPERVISION) ACTION AGAINST THE CATHOLIC DIOCESE OF ALBANY, PLAINTIFFS' DISCOVERY REQUEST FOR THE FILES OF SEVERAL NONPARTY PRIESTS WAS PROPERLY GRANTED ON THE GROUND THE FILES MAY REVEAL A "HABIT" OR "CUSTOM" REGARDING HOW THE DIOCESE HANDLED SUSPECTED CHILD-SEXUAL-ABUSE (THIRD DEPT).

The Third Department determined plaintiffs' discovery request for the files of several nonparty priests in this Child-Victims-Act sexual-abuse (negligent-supervision) action against defendant Catholic Diocese of Albany was properly granted. The discovery was relevant to whether the diocese followed a "habit" or "custom" in dealing with priests suspected of sexually abusing children:

Although the Diocese raises several arguments concerning the appropriateness of habit evidence in this context — namely, that it is prejudicial and that the circumstances surrounding allegations of abuse vary and do not yield habitual responses from the Diocese — these arguments conflate plaintiffs' requirement on their motion to compel with plaintiffs' future requirements to introduce the files into evidence. For now, on their motion to compel discovery, plaintiffs are merely required to show that their discovery request is reasonably calculated to yield material and necessary information … . Whether plaintiffs can actually demonstrate "a sufficient number of instances" of the Diocese's repetitive conduct in order to introduce the subject files into evidence as habit evidence is plaintiffs' future burden … . Melfe v Roman Catholic Diocese of Albany, N.Y., 2021 NY Slip Op 04179, Third Dept 7-1-21

CIVIL PROCEDURE, LACHES.

GARAGEKEEPER'S LIEN DECLARED NULL AND VOID UNDER THE DOCTRINE OF LACHES (THIRD DEPT).

The Third Department determined that the garagekeeper's lien action was properly declared null and void under the doctrine of laches. The respondent did not start the Lien Law action for six months, during which storage charges of $55-a-day were accruing:

"A garagekeeper's lien is authorized by Lien Law § 184 (1) and the purpose of this statute is to provide the repair shop with security for the labor and material it expends which enhance the value of the vehicle" … . "The statute is in derogation of common law and thus is strictly construed" … . "Laches is defined as an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party" … . We are unpersuaded by respondent's claim that the doctrine of laches is inapplicable to the circumstances of this case as the claim is purely statutory and does not lie in equity. Petitioner, by posting a $15,000 bond as collateral for respondent's claim, has attempted in good faith to discharge the lien. We note that this action to enforce the lien is equitable, not legal, in nature … . … [I]t is clear from the record that petitioner was unaware of the existence of the lien until more than six months after storage charges began to accrue, and it was prejudiced by respondent's assertion of such claim after such a prolonged period of delay. "It is well settled that where neglect in promptly asserting a claim for relief causes prejudice to one's adversary, such neglect operates as a bar to a remedy and is a basis for asserting the defense of laches" … . Matter of Santander Consumer USA, Inc. v Steve Jayz Automotive Inc., 2021 NY Slip Op 04998, Third Dept 9-16-21

CONTRACT LAW, STATUTE OF FRAUDS, PART PERFORMANCE.

THE COMPLAINT STATED A CAUSE OF ACTION FOR BREACH OF CONTRACT; THE COMPLAINT ALLEGED THE AGREEMENT TO CONVEY A FARM TO A PARTNERSHIP WAS SUBJECT TO AN EXCEPTION TO THE STATUTE OF FRAUDS FOR PART PERFORMANCE (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined the complaint stated a cause of action for breach of contract. The complaint alleged the agreement to convey a farm to a partnership was subject to an exception to the statute of frauds for part performance:

"General Obligations Law § 5-703 (4) has carved out an exception to the statute of frauds to permit courts of equity to compel the specific performance of agreements in cases of part performance" … . "A party's partial performance of an alleged oral contract will be deemed sufficient to take such contract out of the statute of frauds only if it can be demonstrated that the acts constituting partial performance are unequivocally referable to said contract" … .

In his complaint, plaintiff alleges that he drastically changed his behavior after the agreement, including leaving his studies at Cornell University to devote his full attention to the partnership. Plaintiff also claims that he moved onto the subject premises, that he contributed financially to the business, which was struggling under burdensome mortgage payments, and that defendant referred to him as his business partner and co-owner of the farm. Plaintiff also made substantial improvements to both his residence on the farm, in which he resided full time, and to the farm itself. Given that all of these actions are unequivocally referable to the alleged oral agreement, we find that dismissal of the complaint under CPLR 3211 (a) (5) based upon the statute of frauds was improper … . Leonard v Cummins, 2021 NY Slip Op 04269, Third Dept 7-8-21

CRIMINAL LAW, CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTION.

THE DENIAL OF DEFENDANT'S REQUEST FOR A CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTION REQUIRED REVERSAL (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined County Court should not have denied defendant's request for a circumstantial evidence jury instruction:

… [T]here was no direct evidence identifying defendant as the shooter or as having possessed a loaded firearm. Indeed, there was no DNA or fingerprint evidence linking defendant to the Colt .45 caliber handgun that was recovered near the scene or the shell casing and projectiles that were found to have been fired from that gun … . Further, the surveillance footage — which only distantly captured the incident — did not depict defendant with a firearm. Nor was it possible to discern from the footage who shot the victim. …

Despite denying defendant's request for a circumstantial evidence charge, County Court nonetheless gave a modified version of the charge. This modified version, however, was wholly inadequate. Most importantly, the modified version failed to include a critical component of the circumstantial evidence charge — namely, "'that it must appear that the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence'" … . Given that County Court improperly denied defendant's request for a circumstantial evidence charge and that the modified charge was insufficient, "the jury could not have known of its duty to apply the circumstantial evidence standard to the prosecution's entire case" … . People v Taylor, 2021 NY Slip Op 04258, Third Dept 7-8-21

CRIMINAL LAW, JUDGES, SENTENCING.

THE SENTENCING JUDGE'S REMARKS ABOUT THE DEFENDANT MIMICKED 19TH CENTURY POLYGENISM, A DEBUNKED RACIST IDEOLOGY; SENTENCE VACATED AND REDUCED (THIRD DEPT).

The Third Department, vacating defendant's sentence, in a full-fledged opinion by Justice Lynch, determined the judge's racist remarks at the time of sentencing required vacation of the sentence, which the Third Department reduced from 15-years-to-life to five years:

The court, practically right out of the gate, stated, "[Defendant], I feel sorry for you. Because I know that if we were to look in your mind we would find that your brain, your frontal lobes, your decision making processes are probably retarded in growth." The court then inexplicably and shockingly reiterated, "Because we have learned through medicine, through science, that physical mental abuse especially at a young age will stunt the growth of the frontal lobes which prevents people from making decisions." The court finally reinforced its own beliefs when it stated, "[T]he sentence here is in a way to make you safe from hurting yourself or others, because I appreciate the fact that your brain is not developed, through no fault of your own."

In fashioning an appropriate sentence, the trial court is required to weigh and consider societal protection, rehabilitation and deterrence, as well as the circumstances that gave rise to the conviction" … . Factors that have zero role in this process are the skin color of the defendant and racist views — a premise that should not have to be explicitly stated. The commentary focusing on defendant's brain growth mimics 19th century polygenism, a racist ideology that focused on the claimed inferiority of black people based upon now debunked theories of reduced brain size … . It is shocking that any court, in 2018, would refer to this black defendant's brain, frontal lobes and retardation of growth in concluding that defendant's brain was not developed. Defendant is not a child or an adolescent, but was a 41-year-old grown black man at the time of sentencing. County Court's statements are textbook language that has been used since the late 19th century and even today to justify racist ideologies and beliefs that black people are an inferior

race. We find the court's commentary dehumanizing and offensive. People v Johnson, 2021 NY Slip Op 04162, Third Dept 7-1-21

CRIMINAL LAW, PUBLIC SAFETY EXCEPTION TO MIRANDA.

DEFEFNDANT'S STATEMENTS WERE ADMISSIBLE PURSUANT TO THE PUBLIC SAFETY EXCEPTION TO THE MIRANDA REQUIREMENT (THIRD DEPT).

The Third Department determined the statements defendant made while handcuffed were admissible because the statements were made in response to questions posed for safety reasons and not to elicit an incriminating response:

County Court also properly denied defendant's motion to suppress the statement that he made to law enforcement while being patted down. Although defendant was handcuffed, in custody and had not been advised of his Miranda rights when he was asked by Haven whether the handgun that was retrieved from his back pocket was loaded, said inquiry was not made to elicit an incriminating response, but was made for the purpose of alleviating the inherent risk of securing a potentially loaded weapon and protecting the safety of defendant, responding officers and those other individuals present during the execution of the warrant … . Accordingly, [the] question fell squarely within the public safety exception to the Miranda requirement and, therefore, suppression of defendant's statement was appropriately denied … . People v Rashid, 2021 NY Slip Op 04390, Second Dept 7-15-21

CRIMINAL LAW, SENTENCING, LESS THAN STATUTORILY REQUIRED.

THE SENTENCE AGREED TO IN THE PLEA BARGAIN AND IMPOSED BY THE COURT WAS ILLEGAL BECAUSE IT WAS LESS THAN STATUTORILY REQUIRED; THE SENTENCE WAS VACATED AND THE MATTER REMITTED TO GIVE DEFENDANT THE OPPORTUNITY TO WITHDRAW THE PLEA (THIRD DEPT).

The Third Department determined defendant's sentence was illegal because it was less than statutorily required. Because the plea agreement included the illegal sentence, the sentence was vacated and the matter was remitted to give the defendant the opportunity to withdraw his plea:

Defendant had previously been convicted of driving while intoxicated in violation of Vehicle and Traffic Law § 1192 (3) in 2019. Inasmuch as that conviction was within five years of the instant plea of guilty to driving while intoxicated, Vehicle and Traffic Law § 1193 (1-a) (a) requires the additional penalty of either five days in jail or 30 days of community service. As no such penalty was imposed by the court, the sentence imposed is less than is statutorily required and, therefore, is illegal.

"Where the plea bargain includes a sentence which is illegal because the minimum imposed is less than that required by law, . . . the proper remedy is to vacate the sentence and afford the defendant, having been denied the benefit of the bargain, the opportunity to withdraw the plea" … . Accordingly, the matter must be remitted to County Court for resentencing in accordance with the governing sentencing statute, with the opportunity for defendant to withdraw from the plea agreement … . People v Gary, 2021 NY Slip Op 05052, Third Dept 9-23-21

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA),

APPEALS. THE RECORD WAS NOT SUFFICIENT FOR THE APPEAL OF THE SORA RISK LEVEL CLASSIFICATION; MATTER REMITTED (THIRD DEPT).

The Third Department, reversing County Court, determined the appeal of the Sex Offender Registration Act (SORA) risk level classification could not be heard because the record was not sufficient. The matter was remitted:

"Although the short form order utilized by County Court contains the ordered language required to constitute an appealable paper, the written order fails to set forth the findings of fact and conclusions of law required by Correction Law § 168-n (3)" … . "The hearing transcript is similarly deficient as it does not contain clear and detailed oral findings to support County Court's risk level classification" … . The scant record before us is not sufficiently developed to enable this Court to make its own factual findings and legal conclusions — particularly with respect to the number of victims and the points assessed under risk factor three. Accordingly, County Court's order is reversed, and this matter is remitted for further proceedings. People v Kwiatkowski, 2021 NY Slip Op 04934, Third Dept 9-2-21

CRIMINAL LAW, SPEEDY TRIAL.

THE FOUR-YEAR PRE-INDICTMENT DELAY IN THIS RAPE CASE DID NOT VIOLATE DEFENDANT'S CONSTITUTIONAL SPEEDY-TRIAL RIGHTS; TWO JUSTICE DISSENT (SECOND DEPT).

The Third Department, over a two-justice dissent, determined the four-year pre-indictment delay in this rape case did not violate defendant's constitutional speedy trial rights. The dissent disagreed:

… [T]he preindictment delay of four years was lengthy and the reasons for the delay proffered by the People certainly left something to be desired. However, the People's

submissions established that the investigation was ongoing, that they were acting in good faith and that there were valid reasons for portions of the delay. Additionally, the charge of rape in the first degree can only be characterized as serious … . Furthermore, there was no period of pretrial incarceration and there is no indication that the defense was prejudiced by the delay. In fact, defendant became aware of the accusations against him shortly after the offense occurred. In our view, the seriousness of the offense, the fact that defendant was not incarcerated pretrial and the absence of any demonstrated prejudice outweigh the four-year delay and the shortcomings in the People's reasons therefor … . People v Regan, 2021 NY Slip Op 04161, Second Dept 7-1-21

CRIMINAL LAW, YOUTHFUL OFFENDERS, MOTION TO VACATE SENTENCE.

THE 2012 SENTENCE IMPOSED WITHOUT CONSIDERING WHETHER DEFENDANT SHOULD BE AFFORDED YOUTHFUL OFFENDER STATUS WAS NOT ILLEGAL OR UNAUTHORIZED UNDER THE LAW IN EFFECT AT THE TIME; THEREFORE A MOTION TO VACATE THE SENTENCE ON THAT GROUND IS NOT AVAILABLE (THIRD DEPT).

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Aarons, determined the defendant's motion to vacate his 2012 conviction because the sentencing court did not consider whether he should be afforded youthful offender status should not have been granted. At the time the law was changed to require consideration of youthful offender status the defendant's case was not on appeal and the law-change was not made retroactive such that it could be considered in a collateral proceeding (motion to vacate):

… [T]his appeal does not concern the legality of the sentence imposed after a determination had been made whether a defendant should or should not be accorded youthful offender status or, indeed, the legality of any aspect of defendant's 2012 sentence. Rather, the appeal centers on the failure to determine, in 2012, whether defendant should have been given youthful offender status — a finding that ultimately goes to the judgment of conviction. Accordingly, … CPL 440.20 — a

statute that empowers a court to set aside an unauthorized, illegal or invalid sentence — does not authorize the relief granted by Supreme Court … . …

… [I]n limiting the application of the new interpretation of CPL 720.20 (1) to "cases still on direct review," the Court of Appeals expressly indicated that it was not available to permit "collateral attacks on sentences that have already become final" (People v Rudolph, 21 NY3d at 502). Thus, as a result of the Rudolph decision, convicted defendants gained the right to argue on direct appeal their entitlement to a resentencing at which the court will make a youthful offender determination. The Rudolph decision, however, did not authorize that relief in a collateral proceeding pursuant to CPL 440.20. In foreclosing retroactive application of the new rule announced in Rudolph to collateral proceedings, the Court of Appeals necessarily rejected the view that sentences imposed under its prior precedent were illegal, unauthorized or invalid. People v Vanderhorst, 2021 NY Slip Op 05141, Third Dept 9-30-21

CRIMNAL LAW, SEARCHES AND SEIZURES, CLOSED CONTAINERS, GRABBLE AREA.

THE WARRANTLESS SEARCHES OF CLOSED CONTAINERS WERE NOT JUSTIFIED BY THE ITEMS BEING IN DEFENDANT'S "GRABBABLE" AREA OR BY "EXIGENT CIRCUMSTANCES;" CONVICTION REVERSED (THIRD DEPT).

The Third Department, reversing defendant's conviction, over a concurrence, determined the skimmer (a forgery device) was the product of an illegal warrantless search and should have been suppressed:

"To justify a warrantless search of a closed container incident to arrest, the People must satisfy two requirements: The first imposes spatial and temporal limitations to ensure that the search is not significantly divorced in time or place from the arrest" … . Specific to this "place" requirement, the item searched must be conducted within the immediate control or grabbable area of the suspect … . "The second, and equally important, predicate requires the People to demonstrate the presence of exigent circumstances" … . …

… [T]he trooper testified that he removed the fanny pack and backpack from the apartment when he left and then placed defendant — who was in handcuffs — in the patrol vehicle. Thereafter, the trooper made a cursory search of the fanny pack and backpack on the hood of the vehicle. At the time of the search, defendant was incapable of grabbing the items as he was handcuffed and inside the trooper's vehicle. The fanny pack and backpack were in the exclusive control of the trooper and defendant could not possibly gain possession of them or destroy any evidence in them … . …

[T]he record reflects that defendant's demeanor and actions were not threatening, he had been pat-frisked earlier in the apartment, he was cooperative and offered no resistance when he was handcuffed and … the circumstances of defendant's arrest did not give rise to a reasonable belief that the fanny pack or backpack contained a weapon or dangerous instrument. … [T]he trooper's testimony at the suppression hearing did not demonstrate exigent circumstances. People v Crosse, 2021 NY Slip Op 04636, Third Dept 8-5-21

ELECTION LAW, POLLING PLACES.

SUPREME COURT PROPERLY ANNULLED THE ELECTION BOARD'S DESIGNATION OF AN EARLY VOTING POLLING PLACE BECAUSE THE BOARD DID NOT DEMONSTRATE THE LOCATION MET THE ELECTION LAW REQUIREMENTS MANDATING A LOCATION ACCESSIBLE TO CITY RESIDENTS (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Garry, determined Supreme Court properly annulled the determination of the Rensselaer County Board of Elections designating an early voting polling pace pursuant to Election Law section 8-600. The 3rd Department also granted the motion to intervene in the Article 78 proceeding brought by the NAACP and three minority and/or disabled residents who argued for a polling place accessible to city residents dependent on public transportation:

… [I]n designating early voting polling places, the Board "shall have at least one polling place" in the City (as Rensselaer County's most populous municipality) and,

because the City has public transportation, "such polling place shall be situated along such transportation routes" (Election Law § 8-600 [2] [a]). Election Law § 8-600 (2) (e) further states that any early voting polling place "shall be located so that voters in the county have adequate and equitable access, taking into consideration population density, travel time to the polling place, proximity to other early voting poll sites, public transportation routes, commuter traffic patterns and such other factors the board of elections deems appropriate" (see 9 NYCRR 6211.1 [c]). * * *

… [W]e conclude that the Board did not adequately address "whether the early voting site[s are] on or near public transportation" (9 NYCRR 6211.1 [c] [2] [iv]). The failure to address that mandatory factor "precludes meaningful review of the rationality of" the Board's siting determination, renders the decision arbitrary and capricious and, by itself, warrants annulment … . The Board failed to meaningfully address most of the other factors as well. Accordingly, Supreme Court properly granted the petition and annulled the Board's determination designating early voting polling places for the 2021 election … . Matter of People of the State of New York v Schofield, 2021 NY Slip Op 04785, Third Dept 8-26-21

ELECTION LAW.

IN THIS ELECTION LAW CASE, THE SIGNATORIES' NAMES WERE PRINTED ON THE DESIGNATING PETITION BUT WERE INSCRIBED ON THE VOTER REGISTRATION FORMS; SUPREME COURT PROPERLY ACCEPTED PROOF THAT THE SIGNATORIES WHOSE NAMES WERE PRINTED WERE IN FACT THE SAME AS THOSE WHOSE SIGNATURES WERE ON THE REGISTRATION FORMS (FOURTH DEPT).

The Fourth Department determined Supreme Court properly received evidence that signatories whose names were printed on the independent nominating petition were in fact the same as those whose signatures were inscribed on the voter registration forms:

It is well settled that [t]o prevent fraud and allow for a meaningful comparison of signatures when challenged, a signature on a designating petition should be made in

the same manner as on that signatory's registration form" … . Nevertheless, where there is "credible evidence from the signatories or from any of the subscribing witnesses attesting to the fact that the individuals who signed the registration forms were the same individuals whose signatures appeared on the independent nominating petition," the signatures are valid, notwithstanding a discrepancy with the voter registration forms … . Here, respondents submitted affidavits from 21 of the 47 signatories with printed signatures in which they attested that they were the same individuals whose signatures appeared on the independent nominating petition. Based on those affidavits, which the court properly received in evidence, we conclude that the court did not err in determining that petitioner failed to meet her burden of proof with respect to the invalidity of those 21 signatures … . Matter of Maclay v Dipasquale, 2021 NY Slip Op 05013, Fourth Dept 9-16-21

ELECTION LAW.

THE STATUTE OF LIMITATIONS FOR SERVICE OF THE PETITION TO INVALIDATE A CERTIFICATE OF NOMINATION RAN OUT ON JULY 12; THE FACT THAT THE ORDER TO SHOW CAUSE ORDERED SERVICE BY JULY 19 DID NOT EXTEND THE STATUTE OF LIMITATIONS BEYOND JULY 12 (THIRD DEPT).

The Third Department determined the petition to invalidate a certificate of nomination was properly dismissed as untimely. The fact that the order to show cause directing service of the petition by a date which was beyond the statute of limitation was of no consequence:

… Election Law § 16-102 (2) provides … that "[a] proceeding with respect to a primary, convention, meeting of a party committee, or caucus shall be instituted within [10] days after the holding of such primary or convention or the filing of the certificate of nominations made at such caucus or meeting of a party committee." A special proceeding, in turn, is commenced by the filing of a petition … . Notably, "[a] petitioner raising a challenge under Election Law § 16-102 must commence the proceeding and complete service on all the necessary parties within the period prescribed by Election Law § 16-102 (2). In order to properly complete service, actual delivery must occur no later than the last day upon which the proceeding may

be commenced" … . As the certificate of nomination … was filed on July 2, 2021, the last day upon which to commence this proceeding was July 12, 2021.

Even accepting as true that the petition was timely filed on July 12, 2021, the fact remains … that none of the named respondents was served with the petition prior to the expiration of the statute of limitations. To the extent that petitioners rely upon the service provisions embodied in the order to show cause, which permitted service by various means on or before July 19, 2021, such reliance is misplaced. A court cannot extend the time within which to commence an action or proceeding (see CPLR 201 „„). Matter of Facteau v Clinton County Bd. of Elections, 2021 NY Slip Op 04743, Third Dept 8-18-21

ENVIRONMENTAL LAW, ZONING, LAND USE.

THE PLANNING BOARD TOOK THE REQUISITE HARD LOOK REQUIRED BY THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) WHEN IT APPROVED THE DEVELOPMENT WHICH INCLUDED APARTMENTS AND A COSTCO RETAIL FACILITY; SUPREME COURT SHOULD NOT HAVE ANNULLED THE APPROVAL AS ARBITRARY AND CAPRICIOUS (THIRD DEPT).

The Third Department, reversing Supreme Court, in an exhaustive analysis which cannot be fairly summarized here, determined the Planning Board took the required hard look, pursuant to the State Environmental Quality Review Act (SEGRA), at all the aspects of the proposed development project. Therefore the Planning Board's approval of the project should not have been annulled as arbitrary and capricious. The development included apartments and a Costco Wholesale retail facility. With regard to the compatibility issues, the court wrote:

In essence, although the Costco store may, to some, not be the most compatible use, the Planning Board properly viewed it in the context of the entire project. As such, the Planning Board considered not only the fact that the Costco store is a permitted use that complied with all of the design standards contained in Local Law No. 4, but also the other tangible benefits of the project, which directly aligned with the purpose of the Local Law. These factors included pedestrian and bicycle accommodations

and improvements. Also, the Planning Board considered access management and transit improvements in design and layout, including the reduction of lanes … , the construction of a new roundabout to process traffic more efficiently, the reconfiguration of a major intersection to reduce vehicular speed and a new CDTA bus stop, which CDTA confirmed would ease congestion, improve safety and result in a "marked improvement for customers" in the area. The Planning Board proposed the construction of a new connector road … , and numerous project design features to prevent noise and visual and other impacts. All told, the Planning Board discharged its duty and took the requisite hard look as to compatibility and satisfied its obligations under SEQRA … . Matter of Hart v Town of Guilderland, 2021 NY Slip Op 04273, Third Dept 7-8-21

FAMILY LAW, ABUSE, NEGLECT, SUMMARY JUDGMENT.

FATHER ACKNOWLEDGED IMPREGNATING THE OLDEST CHILD; SUMMARY JUDGMENT ON THE ABUSE AND NEGLECT ALLEGATIONS AGAINST FATHER WAS PROPER; HOWEVER THERE WERE QUESTIONS OF FACT ABOUT WHEN MOTHER LEARNED OF THE PREGNANCY AND WHETHER SHE KNEW WHO THE FATHER WAS; SUMMARY JUDGMENT ON THE ABUSE AND NEGLECT ALLEGATIONS AGAINST MOTHER SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing (modifying) Family Court, determined summary judgment on the abuse and neglect allegations against father was properly granted, but summary judgment on the abuse and neglect allegations against mother should not have been granted. Father acknowledged he impregnated the oldest child (who was eleven at the time of the birth). But there were questions of fact about whether mother knew who the father was and whether she know the child was pregnant and therefore in need of medical care:

Although it is a drastic procedural device rarely used in Family Court proceedings, Family Court may grant summary judgment in an abuse and neglect proceeding if no triable issue of fact exists … . On a motion for summary judgment, the moving party bears the burden of establishing its prima facie entitlement to judgment as a

matter of law … . If this burden is met, the burden shifts to the party opposing the motion to demonstrate the existence of a material issue of fact … . In resolving a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party … .

* * * Viewing the evidence in the light most favorable to the mother and according her the benefit of every favorable inference, we cannot conclude as a matter of law that the mother knew or should have known of the father's sexual abuse and impregnation of the oldest child or that the mother fostered or allowed the children to live in a sexually charged household.

* * * Although the mother provided some testimony as to when she learned of the pregnancy,[FN9] her testimony changed during the course of the lengthy hearing and a determination as to which, if any, of her accounts was credible is inappropriate on a motion for summary judgment … . Matter of Kai G. (Amanda G.), 2021 NY Slip Op 04682, Third Dept 8-12-21

FAMILY LAW, ANNULMENT OF MARRIAGE.

HUSBAND DID NOT DEMONSTRATE HIS WIFE FRAUDULENTLY INDUCED HIM TO MARRY HER TO OBTAIN UNITED STATES CITIZENSHIP; THE MARRIAGE SHOULD NOT HAVE BEEN ANNULLED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the husband did not demonstrate he was fraudulently induced to marry his wife. Husband argued his wife, who was from the Philippines, induced him to marry her in order to become a United States citizen. Supreme Court annulled the marriage. The Third Department held the husband did not meet his burden of proof:

Where the consent of either spouse to a marriage was obtained by fraud, the marriage is voidable by way of an annulment action (see Domestic Relations Law §§ 7 [4]; 140 [e] …). To obtain an annulment, the plaintiff spouse must prove that the defendant spouse knowingly made a material false representation to the plaintiff spouse with the intent of inducing the plaintiff spouse's consent to marriage, that the

misrepresentation was of such a nature as to deceive an ordinarily prudent person, that the plaintiff spouse justifiably relied on the misrepresentation in consenting to marriage and that, once aware of the false representation, cohabitation ceased … . …

The husband's case of fraud in the inducement was premised upon his claim that the wife induced him to marry through false representations of love and affection for the sole purpose of obtaining an immigration benefit. The husband, however, failed to prove that claim at trial, as his proof fell far short of demonstrating a fraudulent premarital intent on the part of the wife. The husband's proof primarily consisted of testimony establishing premarital and marital discord between the parties. Although the husband sought to attribute that discord to a fraudulent premarital intent, he ultimately failed to demonstrate "that the marital break was due to any cause other than the general discontent and incompatibility of the parties" … . Indeed, the husband's own proof demonstrated that, during their marital spats, the wife indicated her desire to leave the marriage and return to her family and friends in the Philippines. The fact that she remained in the United States after the parties ceased cohabitating is insufficient to demonstrate that, prior to the marriage, the wife had the intent to induce the husband to marry with the sole objective of obtaining an immigration benefit. In determining otherwise, Supreme Court erred by not holding the husband to his burden of proof, relying too heavily upon the wife's belated filing of a family offense petition in another county and taking a negative inference against the wife for purportedly exploring relief under the Violence Against Women Act. Travis A. v Vilma B., 2021 NY Slip Op 04996, Third Dept 9-16-21

FAMILY LAW, CUSTODY.

ALTHOUGH IT WAS A VERY CLOSE CASE, THE EVIDENCE DID NOT SUPPORT A CHANGE IN CUSTODY SUCH THAT THE COUPLE'S SON, WHO HAS BEEN DIAGNOSED WITH AUTISM, WOULD RELOCATE WITH FATHER TO MASSACHUSETTS, DESPITE FATHER'S BEING MORE FINANCIALLY SECURE THAN MOTHER; FAMILY COURT DID NOT GIVE PROPER WEIGHT TO THE SON'S WISHES (THIRD DEPT).

The Third Department, reversing Family Court, determined, in a very close case where both parents love and want the best for their children (who have been diagnosed with autism), father did not demonstrate a sound basis for modifying the custody arrangement to allow relocation with his son to Massachusetts:

… [I]t is clear that the son is very strongly bonded to the mother. Indeed, he has lived with the mother for the last six years since the father moved to Massachusetts, except for short periods of visitation with the father. Moreover, the son has had very little visitation with the father since the 2019 holiday season due largely to the COVID-19 pandemic. Additionally, although the father cites the living conditions at the mother's home as the motivation for initially seeking custody, we find this questionable given that he testified that the condition of the mother's home has long been problematic and that, despite this, he relocated to Massachusetts and left both children in her care. Although … issues with the hot water heater were no doubt problematic, that matter was remedied prior to trial. Even more troubling, however, is the father's strong opposition to the son changing schools because the son has difficulty with change, yet he feels it is in the son's best interests to relocate him to Massachusetts away from the mother and the life he has established with her. Although relocation would certainly enhance the son's life, as his living conditions would improve due to the father being more financially secure, this is only one factor in our analysis … . Finally, although not dispositive, given the advanced age of the son [born 2005], as well as testimony regarding how intelligent he is, we find that Family Court did not give proper weight to his wishes … . Matter of Daniel G. v Marie H., 2021 NY Slip Op 04178, Third Dept 7-1-21

FAMILY LAW, JUDGES, DELEGATION OF AUTHORITY.

FAMILY COURT SHOULD NOT HAVE DELEGATED TO FATHER ITS AUTHORITY TO SUPERVISE MOTHER'S PARENTING TIME AND TELEPHONE AND ELECTRONIC CONTACT WITH THE CHILDREN (THIRD DEPT).

The Third Department determined Family Court should not have delegated to father its authority to supervise mother's parenting time and telephone and electronic contact:

Family Court improperly delegated its authority over the mother's supervised parenting time and telephone and electronic contact with the children to the father. "Unless [parenting time] is inimical to the children's welfare, the court is required to structure a schedule which results in frequent and regular access by the noncustodial parent. In so doing, the court cannot delegate its authority to determine [parenting time] to either a parent or a child" … . Family Court ordered that the mother's supervised parenting time "shall be arranged as to time, place, circumstances and supervisor as determined by the [f]ather" and that the mother shall have telephone, Facetime and/or other similar contact with the children "as permitted by the [f]ather."

Although the father has sole custody of the children and, in such capacity, has discretion in the selection of an appropriate supervisor, Family Court failed to provide parameters with respect to the frequency of the supervised parenting time to which the mother is entitled and … failed to consider the logistical concerns in ensuring that she has frequent and regular access to the children … . Matter of Jessica HH. v Sean HH., 2021 NY Slip Op 04165, Third Dept 7-1-21

FAMILY LAW, NEGLECT, EVIDENCE.

FAMILY COURT RELIED ON HEARSAY (WHAT MOTHER TOLD THE CASEWORKER) IN THIS NEGLECT PROCEEDING AGAINST FATHER, NEGLECT FINDINGS REVERSED (THIRD DEPT).

The Third Department, reversing Family Court, determined the court improperly relied upon hearsay to make neglect findings and the evidence was otherwise insufficient. Mother's neglect petitions were disposed of after she admitted neglect. The instant proceeding concerned the neglect petitions against father (the respondent) to which mother was not a party. The caseworker testified about what mother had told her:

… [P]etitioner's caseworker testified as to what the mother had told her based upon their conversations. In this regard, the caseworker stated that the mother told her that, while the middle and youngest children were with her, she had been drinking heavily, that the mother believed that she may have assaulted one of the children and that, after respondent took the children for a while, he came back to her with some vodka, which she drank. As respondent and the attorney for the children correctly argue, Family Court improperly relied on this hearsay testimony — i.e., what the mother told the caseworker — in reaching its determination … , and the error in doing so was not harmless … . Matter of Aiden J. (Armando K.), 2021 NY Slip Op 04637, Third Dept 8-5-21

FAMILY LAW, NEGLECT.

THE EVIDENCE OF ALTERCATIONS IN THE PRESENCE OF THE CHILDREN AND ALCOHOL CONSUMPTION DID NOT SUPPORT THE NEGLECT FINDINGS (THIRD DEPT).

The Third Department, reversing Family Court, determined the neglect findings were not supported by the record:

With respect to the April 2018 incident, petitioner did not sufficiently demonstrate the presence of the children during the altercation that occurred. Given that "a finding of imminent danger is contingent on the child[ren] being present," the evidence relating to that incident was not relevant and was insufficient to support a finding of neglect … .With respect to the January 2019 incident, it is undisputed that all of the children except the oldest child were asleep during the altercation; as such, the evidence presented could not support a finding of neglect as to the younger children. As to the oldest child, it is true that "a single act of domestic violence may be sufficient to establish neglect if the child is present for such violence and is visibly upset and frightened by it" … . However, the proof at the fact-finding hearing failed in this regard because it was not established that the oldest child was visibly upset or frightened. Thus, petitioner failed to demonstrate that the oldest child was in imminent risk of emotional or physical impairment … . Moreover, the oldest child's out-of-court statements that the father gave her two to three shots of alcohol were not corroborated by the other evidence presented by petitioner, and the mere "repetition of an accusation by a child does not corroborate that child's prior account" … . To the contrary, even petitioner's witnesses conceded that such a level of alcohol consumption was not supported by their observations of the oldest child's demeanor and her .01 blood alcohol content. With respect to the allegations of alcohol abuse while caring for the children, "[t]here was insufficient evidence that [respondents] 'misused alcoholic beverages to the extent that [they] lost self-control of [their] actions,' or that the physical, mental, or emotional condition of the children had been impaired or was in imminent danger of becoming impaired" … . Matter of Josiah P. (Peggy P.), 2021 NY Slip Op 04936, Third Dept 9-2-21

FORECLOSURE, APPEALS.

IN THIS FORECLOSURE ACTION PLAINTIFF'S ATTORNEY DID NOT FILE AN AFFIRMATION AS REQUIRED BY AN ADMINSTRATIVE ORDER; THE MAJORITY DID NOT ADDRESS THE ISSUE BECAUSE IT SHOULD HAVE BEEN RAISED IN A PRIOR APPEAL WHICH DEFENDANT DID NOT PERFECT; THE DISSENT ARGUED THE ISSUE COULD AND SHOULD BE CONSIDERED ON THIS APPEAL (THIRD DEPT).

The Third Department, over a dissent, determined defendant in this foreclosure action could not raise the plaintiff's failure to comply with an Administrative Order (AO) because it could have been raised on a prior appeal which was not perfected. The dissent argued the court could and should address the "AO" issue on this appeal:

From the dissent:

… [A] plaintiff's attorney is required to affirm after conferring with a representative of the plaintiff and upon the attorney's "own inspection and other reasonable inquiry" that the pleadings and submissions "contain no false statements of fact or law." …

… [P]laintiff's attorney was required to file the affidavit conforming with AO/431/11 and AO/208/13, an issue that was directly raised in defendant's motion to vacate and could have been addressed by this Court had defendant perfected his appeal from the court's April 2018 order. In an instance such as this, this Court "has the authority to entertain a second appeal in the exercise of [our] discretion, even where a prior appeal on the same issue has been dismissed for failure to prosecute" … . Given that the filing of an attorney affirmation is mandatory and, at the latest, must be filed five business days before a scheduled auction … , I believe we should exercise our discretion and address the issue of noncompliance (id.). To assure the integrity of the foreclosure process, which is the entire objective of the Administrative Orders, we should modify the order by requiring a continued stay of any auction sale pending the submission of a compliant attorney affirmation. HSBC Bank USA, N.A. v Sage, 2021 NY Slip Op 04583, Third Dept 7-29-21

FREEDOM OF INFORMATION LAW (FOIL).

RESPONDENT DID NOT CONSTRUCTIVELY DENY PETITIONER'S FOIL REQUEST BY EXTENDING ITS SELF-IMPOSED DEADLINES FOR RESPONDING TO THE REQUEST (THIRD DEPT).

The Third Department, reversing Supreme Court, over a dissent, determined respondent NYS Department of Transportation did not constructively deny petitioner's FOIL request by extending the time for a response. Therefore petitioner's Article 78 proceeding was premature and was rendered moot by petitioner's ultimate response to the request:

Generally, an agency must respond to a written request for records within a reasonable time and "there is no specific time period in which the agency must grant access to the records" … . The response protocol for an agency to follow is set forth in Public Officers Law § 89 (3) (a). An agency must respond within five business days and has various options — to either provide the records, deny the request or, as pertinent here, to "furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied" … . Respondent exercised that third option through the extension notices. Matter of Save Monroe Ave., Inc. v New York State Dept. of Transp., 2021 NY Slip Op 04639, Third Dept 8-4-21

LABOR LAW-CONSTRUCTION LAW, LADDERS.

THE FACT THAT THE LADDER SLID OR SHIFTED AND FELL WARRANTED SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION; PLAINTIFF DID NOT NEED TO DEMONSTRATE THE LADDER WAS DEFECTIVE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action in this ladder-fall

case. Plaintiff alleged the ladder slid or shifted and then fell. In that circumstance plaintiff does not have to demonstrate the ladder was defective and any comparative negligence on plaintiff's part should not be considered:

Defendants argue that the statutory requirement was not met because plaintiff testified that there was no defect in the extension ladder and that it felt secure. Although defendants have produced evidence that the ladder may not have been defective, the adequacy of the ladder is not a question of fact when it "slips or otherwise fails to perform its function of supporting the worker" … . …

Although defendants cite to numerous actions on the part of plaintiff in support of this contention, including that plaintiff did not (1) use an alternative safety device or scaffold to install the guidewires, (2) have supervision or ask for assistance when using the ladder or (3) clear the snow upon which the feet of the ladder were placed, these arguments merely raise a question as to plaintiff's comparative negligence, which will not relieve defendants from liability … . Begeal v Jackson, 2021 NY Slip Op 05000, Third Dept 9-16-21

MUNICIPAL LAW, ABANDONED ROADS, 42 USC 1983-EQUAL PROTECTION.

THERE ARE QUESTIONS OF FACT ABOUT WHETHER THE ROAD LEADING TO PETITIONER'S PROPERTY WAS PROPERLY CERTIFIED "ABANDONED" SUCH THAT THE MUNICIPALITY IS NOT RESPONSIBLE FOR ITS MAINTENANCE; AND PETITIONER STATED AN EQUAL-PROTECTION CLAIM UNDER 42 USC 1983 (THIRD DEPT).

The Third Department, reversing Supreme Court, over a two-justice dissent, determined there were questions of fact whether the road (Van Slyke Road) leading to petitioner's property should have been certified "abandoned" such that the town did not have to maintain it. The two dissenters argued petitioner did not state an equal-protection claim alleging selective enforcement under 42 USC 1983:

Petitioners assert that there are many other roads in the Town that have no outlet — with no or few residences situated on them — that are maintained by the Town.

Specifically, petitioners point to Snell Road and Hunt Road as being roughly equivalent to Van Slyke Road. Like Van Slyke Road, these roads are dead ends, are comprised of compressed dirt and gravel, and have only one residence. Unlike Van Slyke Road, the Town maintains these roads. … [V]iewing these allegations liberally, petitioners have stated an equal protection claim under 42 USC § 1983, * * *

… [W]e find that triable issues of fact exist as to the use and condition of Van Slyke Road such that neither party is entitled to summary judgment on the abandonment claim … . Matter of Fernandez v Town of Benson, 2021 NY Slip Op 04584, Third Dept 7-29-21

MUNICIPAL LAW, EMPLOYMENT LAW, FAILURE TO NEGOTIATE FIREFIGHTERS' SALARY.

THE 3RD DEPARTMENT ANNULLED THE DETERMINATION OF THE PUBLIC EMPLOYMENT RELATIONS BOARD (PERB) WHICH FOUND THAT THE FIREFIGHTERS DID NOT DEMONSTRATE THE CITY FAILED TO NEGOTIATE BEFORE UNILATERALLY IMPOSING A SALARY REDUCTION (THIRD DEPT).

The Third Department, reversing the Public Employment Relations Board (PERB), determined the city did not fulfill its obligation to negotiate a change in salary for its firefighters:

PERB acknowledged petitioners' claims that the City made a unilateral determination to end the past practice of paying night differential, check-in pay and holiday pay in calculating regular wages and benefits to current employees should they receive General Municipal Law § 207-a (2) benefits in the future, but rejected those contentions upon the ground that petitioners had only documented the City's intent to discontinue those payments with regard to retirees to whom it owed no duty to bargain. … The parties … orally stipulated at the hearing … that "those affected [by the City's unilateral change in benefits] are those in the unit as of the alleged unilateral change," necessarily referring to current employees who are members of the bargaining units rather than the retirees who are not … . The parties later

reinforced that point by stipulating that the unilateral change was made "in a uniform[] fashion to all members of both bargaining units," again using language necessarily referring to current employees to whom the City owes a duty to bargain. In the absence of any indication that counsel lacked authority to enter into those unambiguous factual stipulations or that some cause sufficient to invalidate a contract existed for setting the stipulations aside, they are binding … . Thus, as the parties stipulated that the City's unilateral actions impacted current employees in the bargaining units, PERB's finding that the record was barren of proof on that point is not supported by substantial evidence, and it follows that PERB's determination must be annulled … . Matter of Uniformed Fire Officers Assn. of the City of Yonkers v New York State Pub. Empl. Relations Bd., 2021 NY Slip Op 05144, Third Dept 9-30-21

NEGLIGENCE, MEDICAL MALPRACTICE, PHYSICIAN-PATIENT RELATIONSHIP.

ALTHOUGH DEFENDANTS DID NOT SEE THE PLAINTIFF, THERE IS A QUESTION OF FACT WHETHER A PATIENT-PHYSICIAN RELATIONSHIP WAS CREATED BASED UPON ANOTHER DOCTOR'S ORDER THAT PLAINTIFF BE SEEN BY THOSE DEFENDANTS WITHIN ONE OR TWO DAYS (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the defendants' motions for summary judgment in this medical malpractice action should not have been granted. One of the issues was whether defendants, who had never seen plaintiff, could be found to have had a patient-physician relationship based upon the failure to schedule an appointment within the time-frame ordered by another doctor:

… [P]laintiff acknowledges that she never received treatment from or spoke with Connolly or Retina Associates. Instead, plaintiff relies on a notation in her medical records from Twin Tiers stating that Rosenberg initially requested that she be evaluated by Retina Associates within one to two days and that a later appointment was scheduled only after Connolly apparently informed Twin Tiers that she "could wait to be seen until next week." Moreover, after allegedly giving this advice

regarding timing, Retina Associates scheduled the appointment beyond that acceptable time frame — for 13 days later. * * *

Viewing the evidence in a light most favorable to plaintiff, a triable factual question exists regarding whether the notation in Twin Tiers' chart — attributing a comment to Connolly regarding scheduling of treatment — is sufficient to establish an implied physician-patient relationship between plaintiff and Connolly or Retina Associates … . Marshall v Rosenberg, 2021 NY Slip Op 04180, Third Dept 7-1-21

NEGLIGENCE, RES IPSA LOQUITUR, COLLAPSED CHAIR.

THE RES IPSA LOQUITUR DOCTRINE APPLIED TO A PLASTIC CHAIR IN THE RECREATIONAL ROOM OF DEFENDANT CORRECTIONAL FACILITY; THE CHAIR COLLAPSED WHILE CLAIMANT WAS SITTING IN IT; THE ISSUE WAS WHETHER DEFENDANT HAD EXCLUSIVE CONTROL OVER THE CHAIR; COURT OF CLAIMS REVERSED (THIRD DEPT).

The Third Department, reversing the Court of Claims, determined the doctrine of res ipsa loquitur applied to a plastic chair in the recreational room of a state correctional facility. Claimant alleged the back legs of the chair broke off at the same time causing him to fall to the concrete floor:

… [T]he evidence of defendant's exclusive control, under the circumstances of this case, was sufficiently established … . Indeed, "[a]s a species of circumstantial proof, . . . res ipsa [loquitor] does not depend on a showing that the instrumentality causing the harm was within the defendant's exclusive control; it is enough that the degree of dominion be such that the defendant can be identified with probability as the party responsible for the injury produced" … .

… [D]efendant was "under an affirmative duty to use reasonable care in making sure that the chair it provided was safe for the purpose for which it was to be used. That [claimant] had temporary possession of the chair does not negate the inference that its sudden collapse, under normal usage, was most likely caused by defendant's negligence" … . Moreover, defendant, who no doubt had sole and exclusive

possession of the chair immediately after the accident, failed to offer any evidence to support an inference of any other possible explanation for the accident … . Draper v State of New York, 2021 NY Slip Op 04163, Third Dept 7-1-21

NUISANCE, NEGLIGENCE, WATER RUN-OFF.

PLAINTIFF ALLEGED STORM WATER RUNOFF FROM DEFENDANT'S PROPERTY FLOODED PLAINTIFF'S PROPERTY; THE NEGLIGENCE CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED AS DUPLICATIVE OF THE NUISANCE CAUSE OF ACTION BECAUSE NUISANCE MAY INVOLVE INTENTIONAL CONDUCT (THIRD DEPT).

The Third Department, in a decision too detailed to fairly summarize here, determined Supreme Court properly denied summary judgment in this dispute about responsibility for storm water runoff which allegedly flooded plaintiff's property. Supreme Court, however, erred in dismissing plaintiff's negligence cause of action as duplicative of the nuisance cause of action:

The effect of defendant's actions was to eliminate what was described as a retention pond on the cemetery land, causing the water to back up onto plaintiff's property, which, prior to the placement of fill, had never experienced flooding. Since the fill was placed, plaintiff's property flooded on four occasions, and plaintiff, after the first flood in February 2009, placed defendant on notice of the flood and the resulting damages and asked for its assistance to remedy the problem. Defendant denied responsibility for the flooding and took no remedial efforts to prevent further flooding. Although the causes of action for negligence and private nuisance arise out of the same undisputed facts, it cannot be said that the private nuisance claim arises solely out of the negligence claim. To the contrary, the facts as alleged in plaintiff's complaint and bills of particulars demonstrate a viable theory of private nuisance based upon intentional conduct, i.e., that defendant eventually knew or should have known that its actions in placing the fill caused substantial interference and nevertheless continued it … . WFE Ventures, Inc. v GBD Lake Placid, LLC, 2021 NY Slip Op 04683, Third Dept 8-12-21

RETIREMENT AND SOCIAL SECURITY LAW, POLICE OFFICERS, COMPENSABLE ACCIDENT.

PETITIONER-POLICE-OFFICER'S SLIP AND FALL ON BLACK ICE WAS A COMPENSABLE ACCIDENT UNDER THE RETIREMENT AND SOCIAL SECURITY LAW BECAUSE THE METEOROLOGICAL CONDITIONS WERE SUCH THAT THE PRESENCE OF BLACK ICE COULD NOT HAVE BEEN ANTICIPATED (THIRD DEPT).

The Third Department, reversing (modifying) the hearing officer's ruling, determined the petitioner-police-officer's slip and fall on black ice was a compensable "accident" within the meaning of the Retirement and Social Security Law:

Petitioner testified that, while patrolling his assigned area on the evening in question, he observed a group of youths congregating in a local parking lot. Consistent with his patrol duties, petitioner pulled into what he described as the poorly illuminated parking lot with the intention of instructing the group to disperse. As petitioner exited his vehicle, he slipped on what he later described as black ice and sustained injuries. Petitioner testified that, although it was cold and blustery at the time of his fall, it was not raining or snowing, and he did not recall any precipitation occurring in the days prior to the incident. As petitioner was focused on "[o]bserving the scene," he also did not recall looking down at the surface of the parking lot prior to exiting his patrol vehicle. * * *

Absent some indication of meteorological conditions that would be amenable to the presence or formation of black ice, respondent's determination — that petitioner could have reasonably anticipated the slippery condition that he encountered at the time of his fall — is not supported by substantial evidence … . Matter of Castellano v DiNapoli, 2021 NY Slip Op 05148, Third Dept 9-30-21

TAX LAW, CIGARETTES, SEARCHES AND SEIZURES.

THE OPENING OF A CARTON OF CIGARETTES AS PART OF A SEARCH OF THE CARGO IN PETITIONER'S TRUCK WAS NOT SUPPORTED BY PROBABLE CAUSE; THE TAX TRIBUNAL'S ASSESSMENT OF A $1,259,250 PENALTY FOR POSSESSION OF CIGARETTES WITHOUT TAX STAMPS ANNULLED (THIRD DEPT).

The Third Department, reversing the Tax Appeals Tribunal, determined the search of petitioner's truck which led to the discovery of cigarettes with no tax stamp was not supported by probable cause. Therefore the determination that petitioner owed a $1,259, 250 penalty was annulled:

Petitioner is a member of the Seneca Nation of Indians, a Native American tribe recognized by the US Bureau of Indian Affairs. ERW Wholesale is petitioner's tobacco wholesale business, licensed by the Seneca Nation of Indians operating on the Cattaraugus Reservation. In December 2012, ERW sold 150 cases (9,000 cartons) of Native American brand cigarettes to Oien'Kwa Trading, a Native American-owned business located on the St. Regis Mohawk Reservation. Oien'Kwa Trading immediately sold the cigarettes to Saihwahenteh, a Native American-owned business located on the Ganienkeh territory. Oien'Kwa Trading hired ERW to deliver the cigarettes directly to Saihwahenteh. Sean Snyder, an ERW employee, was employed as the truck driver. * * *

… [T]he validity of a search is subject to a two-prong test — arrest and probable cause — neither of which is satisfied here. As to the first prong, the record reveals that Snyder, the driver and sole occupant of the truck that was searched, was never arrested. With respect to probable cause, the record demonstrates a complete lack thereof. When Snyder was stopped, he was completely cooperative with the trooper and forthrightly explained that he was transporting cigarettes from a Native American reservation to a Native American territory, and he immediately gave the trooper an envelope containing the pertinent documents, namely the registration, invoices and bill of lading. Although the trooper testified that Snyder appeared nervous when he was initially pulled over, this conduct in and of itself is insufficient to justify a search … . Once back at the vehicle inspection checkpoint, Snyder readily

exited his vehicle and turned his keys over to the trooper; he was never asked if the cigarettes were stamped. When the trooper employed the bolt cutters and the investigator entered the cargo area, the investigator found that the cargo was exactly as Snyder had told them — cases of cigarettes. The investigator's search of the cargo area, including opening a case and then a carton, in order to inspect a single pack of cigarettes for a tax stamp was not precipitated by a complaint, tip, investigation or statements from Snyder, any of which might have provided probable cause. On the contrary, the investigator testified that the search proceeded only after he conferred with the trooper who believed that the cigarettes were Native American brand and, as such, were not stamped. The transportation of cigarettes from a Native American reservation to a Native American territory does not, in and of itself, give rise to a reasonable inference of criminality … . Matter of White v State of N.Y. Tax Appeals Trib., 2021 NY Slip Op 04394, Third Dept 7-15-21

UNEMPLOYMENT INSURANCE, COVID-PANDEMIC BENEFITS.

CLAIMANT, WHO WAS NOT EMPLOYED AT THE TIME COVID-PANDEMIC-RELATED UNEMPLOYMENT BENEFITS BECAME AVAILABLE, WAS NOT ELIGIBLE TO RECEIVE THE COVID-PANDEMIC BENEFITS (THIRD DEPT).

The Third Department determined claimant was not entitled to COVID-pandemic-related unemployment insurance benefits because she was not employed at the time the benefits became available:

Claimant was ineligible for regular unemployment insurance benefits given her failure to work during the relevant period and contended that she was unable and unavailable to work due to one of the qualifying factors for pandemic unemployment assistance, namely, that she was "unable to reach [her] place of employment because [she was] advised by a health care provider to self-quarantine due to concerns related to COVID-19" (15 USC § 9021 [a] [3] [A] [ii] [I] [ff]). … The statutory directive that an applicant be "unable to reach the place of employment" presupposes that he or she has a place of employment to reach, however, removing from its scope individuals such as claimant who were not working or scheduled to start working at the time they were directed to self-quarantine (15 USC § 9021 [a] [3] [A] [ii] [I]

[ff]). The Board read the statutory language in that manner and in accord with guidance from the United States Department of Labor — the federal agency tasked with providing operating instructions for the joint federal-state pandemic unemployment insurance program (see 15 USC § 9032 [b]) and from which we take judicial notice — that an individual "must have an attachment to the labor market and must have experienced a loss of wages and hours or [be] unable to start employment following a bona fide job offer" in order to obtain pandemic unemployment assistance … . Thus, as "'the federal agency expressly concurs in the state's interpretation of the statute, and the interpretation is a permissible construction of the statute,' the interpretation is entitled to deference," and it follows that substantial evidence supports the Board's finding that claimant was not entitled to pandemic unemployment assistance … . Matter of Mangiero (Commissioner of Labor), 2021 NY Slip Op 05062, Third Dept 9-23-21

UNEMPLOYMENT INSURANCE, LABOR LAW, TRANSFER OF OBLIGATIONS.

THE PURCHASE OF A CHECK CASHING BUSINESS DID NOT TRANSFER THE UNEMPLOYMENT INSURANCE OBLIGATIONS OF THE SELLER TO THE PURCHASER; THE LABOR LAW 581 CRITERIA FOR THE TRANSFER OF UNEMPLOYMENT INSURANCE OBLIGATIONS WERE NOT MET (THIRD DEPT).

The Third Department, reversing the Unemployment Insurance Appeal Board, determined the unemployment insurance obligations of PTL Check Cashing Corp. were not transferred to PLS Check Cashiers of New York Inc. when PLS entered an asset purchase agreement with PTL in order to acquire PTL's license to operate at PTL's former location in the Bronx:

"Labor Law § 581 establishes an experience-rating system that allows for variations in the unemployment insurance contribution rates from the standard rate of qualified employers in certain situations" … . Under the statute, when a business is transferred either whole or in part from one employer to another, the transferee shall take over and continue the unemployment insurance experience account of the transferor … . A transfer, however, will not be deemed to have occurred if (1) the transferee has

not assumed any of the transferor's obligations, (2) the transferee has not acquired any of the transferor's goodwill, (3) the transferee has not continued or resumed the transferor's business either in the same establishment or elsewhere, and (4) the transferee has not employed substantially the same employees as those of the transferor … . …

It is undisputed that PLS did not assume any of PTL's financial obligations and did not hire any of its employees. Moreover, while PLS operated from the same Bronx location, its business included a variety of financial services and was not limited to check cashing, which was PTL's sole business. Significantly, the ability to operate from the Bronx location was necessary in order for PLS to obtain a license from the Department of Financial Services given the geographic limitations applicable to businesses that offer check cashing services. Although the asset purchase agreement listed other property included in the sale, PLS's president testified that the tangible assets were disposed of and the only asset that was of value was the opportunity to acquire the license to operate from the Bronx location. Notwithstanding the fact that goodwill was generally referenced as property included in the sale, PLS did not use PTL's brand, logo or phone number and had its own customer base, negating any expectation that it would be patronized by PTL's customers. In view of the foregoing, substantial evidence does not support the Board's finding that a transfer of business occurred under Labor Law § 581 (4) such that PLS acquired the unemployment insurance experience rating of PTL … . Matter of PLS Check Cashiers of N.Y. Inc. (Commissioner of Labor), 2021 NY Slip Op 05142, Third Dept 9-30-29

UNEMPLOYMENT INSURANCE.

CLAIMANT, AN AGENT LICENSED TO SELL LIFE INSURANCE, ANNUITIES AND OTHER INVESTMENT PRODUCTS, WAS NOT AN EMPLOYEE OF THE BROKER-DEALER AND THEREFORE WAS NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS (THIRD DEPT).

The Third Department determined claimant agent was not an employee of broker-dealer AXA and therefore was not entitled to Unemployment Insurance benefits:

AXA Advisors LLC is a broker-dealer registered to sell life insurance policies and annuities, stocks, mutual funds and other investment products. Claimant began working for AXA under a three-year "training allowance" agreement in 1993. After that agreement terminated in 1996, claimant entered into a new agreement as a licensed agent, and he continued working in that capacity until AXA terminated the agreement in 2015. * * *

The record reflects that, under the 1996 agreement, claimant did not have a set work schedule or work location, he was not assigned a sales territory and did not have to turn in any reports. Claimant was not supervised, could work from home and could use his own computer. Claimant had to pay for the cost of his liability insurance and was not paid for any expenses. AXA required reimbursement from claimant for the cost of business cards and stationery and claimant had to pay for the use of AXA's clerical staff and office space. Claimant was responsible for developing his own client base and, although AXA would sometimes provide a sales lead, claimant testified that he did not have to pursue it. Claimant determined what products best suited his clients' needs and he could sell the products of AXA's competitors. AXA did provide claimant with promotional materials, and claimant was paid by commission, with the commission rate set by AXA or whichever company offered the product that he sold to the client. Matter of Lee (AXA Advisors LLC–Commissioner of Labor), 2021 NY Slip Op 04518, Third Dept 7-22-21

UNJUST ENRICHMENT VS CONSTRUCTION TRUST.

DIFFERENCES BETWEEN AN ACTION TO IMPOSE A CONSTRUCTIVE TRUST AND AN ACTION ALLEGING UNJUST ENRICHMENT EXPLAINED (THIRD DEPT).

The Third Department explained the differences between an action to impose a constructive trust and an action alleging unjust enrichment, here in the context of a couple's investment in building a new house and the allegation one party put in 800 hours of unpaid labor which benefitted the other party. The court held the constructive trust action was properly dismissed, but the unjust enrichment action should not have been dismissed:

Although the equitable claims of constructive trust and unjust enrichment are elementally related and involve overlapping proof, certain essential elements differ. "[A] constructive trust may be imposed when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest" … . "The elements of a constructive trust are a confidential relationship, a promise, a transfer in reliance on that promise and unjust enrichment" … .As relevant here, with respect to the promise element, it may be express or implied, as determined by the circumstances … . "Finally, a person . . . is unjustly enriched when retention of the benefit received would be unjust considering the circumstances of the transfer and the relationship of the parties" … .

Importantly, and as relevant here, "the constructive trust doctrine serves as a fraud-rectifying remedy rather than an intent-enforcing one" … . By contrast, an action based on unjust enrichment, which would only result in a money judgment rather than a judicially imposed lien, requires the plaintiff to establish 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" … . Clark v Locey, 2021 NY Slip Op 04176, Third Dept 7-1-21

WORKERS' COMPENSATION, EVIDENCE.

THE WORKERS' COMPENSATION BOARD DID NOT HAVE SUFFICIENT EVIDENCE TO MAKE ITS OWN DETERMINATION TO APPORTION SOME OF CLAIMANT'S DISABILITY TO A 1976 INJURY (THIRD DEPT).

The Third Department, reversing the Worker's Compensation Board, determined the Board did not have sufficient evidence to determine the extent to which a 1976 injury accounted for some of claimant's disability:

We recognize that the Board's medical guidelines "provide 'useful criteria' and the Board makes the ultimate determination of a claimant's degree of disability, but that determination must be supported by substantial evidence" … . Moreover, "although the Board may reject medical evidence as incredible or insufficient, it may not fashion its own medical opinion" … . Here, there are no operative or pathological

reports from any surgeries related to the 1976 injury in the record. Nor is there any medical evidence regarding the degree of disability, if any, that had resulted from the 1976 injury and/or surgery and the record reflects that claimant was fully employed with no restrictions at the time of the 2016 injury. Further, even assuming, without deciding, that an evaluation of the 1976 injury under the 1996 guidelines is appropriate for the purposes of determining whether that injury would have resulted in an SLU [schedule loss of use] award, there is no medical opinion that the 1976 injury would have resulted in an SLU award at the time of the injury or under the subsequently published 1996 guidelines. Matter of Hughes v Mid Hudson Psychiatric Ctr., 2021 NY Slip Op 04939, Third Dep 9-2-21

WORKERS' COMPENSATION, INJURED WALKING TO WORK PLACE.

THE UNAVAILABILIITY OF PARKING FOR WORK REQUIRED THAT CLAIMANT CROSS A DANGEROUS ROAD TO GET TO HIS WORKPLACE; THE INJURIES SUFFERED WHEN CLAIMANT WAS STRUCK BY A VEHICLE WERE THEREFORE COMPENSABLE (THIRD DEPT).

The Third Department determined the unavailability of parking for work created a special hazard. Therefore claimant's being struck by a vehicle while walking to his place of employment resulted in a compensable injury:

… [C]laimant, a food service worker at Montefiore-Nyack Hospital, sustained serious injuries when he was struck by a motor vehicle while walking towards the hospital entrance prior to the start of his work shift. * * *

… [T]he Board could reasonably determine that a special hazard existed due to the unavailability of parking along the eastern side of Route 9W, requiring claimant to, at a certain spot without a crosswalk, cross Route 9W — a dangerous public roadway — to access the loading dock entrance, which, significantly, was not used by the public and regularly used by claimant … . Further, based upon the regular use of the loading dock entrance by claimant and other food service workers, combined with the close proximity of the accident to the loading dock area, there was a close association of the access route with the premises, as far as going and coming are

concerned, permitting the conclusion that the accident happened as an incident and risk of employment. Matter of Cadme v FOJP Serv. Corp., 2021 NY Slip Op 04525, Third Dept 7-22-21

ZONING, APPEALS, FAILURE TO FILE ORDER.

THE FINDING BY THE BOARD OF ZONING APPEALS WAS NEVER FILED AS REQUIRED BY THE GENERAL CITY LAW; THEREFORE THE 60-DAY TIME LIMIT FOR CONTESTING THE RULING NEVER STARTED TO RUN (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the 60-day statute of limitation for contesting a ruling of the board of zoning appeals (BZA) never started to run because the ZBA's finding was never filed:

General City Law § 81-a (5) (a) imposes an affirmative duty on administrative officials charged with the enforcement of a local zoning law or ordinance in mandating that "[e]ach order, requirement, decision, interpretation or determination . . . shall be filed. . . within five business days from the day it is rendered, and shall be a public record" … . General City Law § 81-a (5) (b) states that "[a]n appeal shall be taken within [60] days after the filingof any order, requirement, decision, interpretation or determination of the administrative official, by filing with such administrative official and with the board of appeals a notice of appeal, specifying the grounds thereof and the relief sought" (… see Code of the City of Ithaca § 325-40 [B] [1] [e]). Upon review of the record, it is impossible to ascertain exactly when the Planning Board determined that variances were not necessary. However, it is undisputed that no determination of such finding was ever filed. As General City Law § 81-a (5) (b) plainly provides that the time period for commencing a review proceeding is to be measured from the filing, and there was no filing, the time period for the administrative appeal never began to run … . Matter of Grout v Visum Dev. Group LLC, 2021 NY Slip Op 04997, Third Dept 9-16-21