NEW YORK APPELLATE DIGEST, LLC

Year In Review 2021
New York State Court of Appeals

An Organized Compilation of Summaries of the Decisions Released by the New York State Court of Appeals and Posted on the New York Appellate Digest Website in 2021. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Document.

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APPEALS, CIVIL PROCEDURE, DISCIPLINARY HEARINGS (INMATES).

THE NOTICE OF APPEAL WAS TIMELY SERVED BUT WAS NOT TIMELY FILED WITH THE CLERK OF THE COURT; THE 3RD DEPARTMENT DISMISSED THE APPEAL; THE APPELLATE COURT HAS THE DISCRETION TO ALLOW A LATE FILING; MATTER REMITTED (CT APP).

The Court of Appeals, reversing the Appellate Division, determined that, although the pro se inmate-petitioner did not timely file the notice of appeal, the notice was timely served and the Third Department could have exercised discretion to allow a late filing. The matter was remitted because the Third Department's decision was silent about the reasons for dismissing the appeal:

… [P]etitioner argues that the Appellate Division should have applied a pro se inmate "mailbox rule" to deem the notice of appeal timely filed upon delivery to prison authorities for forwarding to the appropriate court.

CPLR 5515 (1) provides that an appeal is taken when, in addition to being duly served, the notice of appeal is "fil[ed] . . . in the office where the judgment or order of the court of original instance is entered." The CPLR further clarifies that "papers required to be filed shall be filed with the clerk of the court in which the action is triable" (CPLR 2102 [a]). Thus, by its express terms, the CPLR indicates that filing occurs when the clerk's office receives the notice of appeal. Indeed, "filing" has long been understood to occur only upon actual receipt by the appropriate court clerk … . A "mailbox rule" for filing would also contravene the clear distinctions between filing and service drawn by the legislature inasmuch as the CPLR directs that, unlike filing, "service by mail shall be complete upon mailing" (CPLR 2103 [b] [2]). .. * * *

… [T]he legislature has given courts the authority to excuse untimely filing under certain circumstances. CPLR 5520 provides that, "[i]f an appellant either serves or files a timely notice of appeal . . . , but neglects through mistake or excusable neglect to do another required act within the time limited, the court from or to which the appeal is taken . . . may grant an extension of time for curing the omission" (CPLR 5520 [a]). Matter of Miller v Annucci, 2021 NY Slip Op 04954, CtApp 9-9-21

CIVIL PROCEDURE, PUBLIC HEALTH LAW, PRIVATE RIGHT OF ACTION.

PUBLIC HEALTH LAW SECTION 18 (2) (E) DOES NOT CREATE A PRIVATE RIGHT OF ACTION FOR THE VIOLATION OF THE REQUIREMENT THAT NO MORE THAN $ .75 PER PAGE CAN BE CHARGED FOR MEDICAL RECORDS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Singas, over a concurrence, determined there is no private right of action for a violation of Public Health Law section 18 (2) (e), which limits the charge for copies of medical records to $ .75 per page. Defendant charged plaintiff $1.50 per page:

Applying the Sheehy factors here, we conclude that no private cause of action exists for violations of Public Health Law § 18 (2) (e). The first factor is satisfied. Ortiz [plaintiff] is clearly part of a class that section 18 was designed to protect. The original law and its subsequent amendment were intended to increase patient access to medical records, and prevent medical providers from overcharging patients for copies of their medical records … . …

Turning to the second factor, it is unclear whether a private right of action would promote the legislative purpose. * * * … [G]iven the substantial fines the Commissioner and the Attorney General can impose, the additional deterrent effect of a private right of action is difficult to ascertain.

Even assuming the second factor is satisfied, though, the final factor—consistency with the legislative scheme—is clearly not. … [E]nforcement mechanisms already exist for section 18. First, the Commissioner and Attorney General's ability to impose substantial fines against providers that overcharge for copies of records acts as a deterrent … . Second, the Attorney General's duty to seek injunctive relief upon the request of the Commissioner provides a legal mechanism for ending any widespread practices violating section 18. Finally, an individual patient's ability to commence an article 78 proceeding to enforce the law's provisions provides recourse for individual patients who are unable to access their records due to illegally high costs. Ortiz v Ciox Health LLC, 2021 NY Slip Op 06425, Ct App 11-18-21

CIVIL PROCEDURE, FORUM NON CONVENIENS.

THIS ACTION INVOLVED THE NAZIS' CONFISCATION OF A DEGAS PAINTING OWNED BY A GERMAN CITIZEN WHO SUBSEQUENTLY MOVED TO SWITZERLAND AND THEN FRANCE; SUPREME COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE ACTION ON FORUM NON CONVENIENS GROUNDS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Cannataro, over a dissent, determined the action involving a Degas painting confiscated by the Nazis from a German citizen, who then moved to Switzerland and France, was properly dismissed on forum non coveniens grounds. The dismissal presented a matter requiring the exercise of discretion by Supreme Court, which was not abused:

CPLR 327 (a) provides that "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just." Generally, "a decision to grant or deny a motion to dismiss on forum non conveniens grounds is addressed to a court's discretion" … and, if the courts below considered the various relevant factors in making such a determination, "there has been no abuse of discretion reviewable by this [C]ourt," even if we would have weighed those factors differently … . * * *

… [T]he record reflects that the courts below painstakingly considered the relevant factors, including the public policies at issue, and determined that the balance of factors militated in favor of dismissal … . Thus, plaintiffs' argument that this is one of the "relatively uncommon" cases in which forum non conveniens can be resolved, and denied, as a matter of law ultimately fails … . Inasmuch as the courts below considered the various relevant factors, "there has been no abuse of discretion reviewable by this [C]ourt" … . Estate of Kainer v UBS AG, 2021 NY Slip Op 07056, CtApp 12-16-21

CIVIL PROCEDURE, CORPORATION LAW, JURISDICTION.

A FOREIGN CORPORATION WHICH REGISTERS TO DO BUSINESS IN NEW YORK CONSENTS TO THE SERVICE OF PROCESS IN NEW YORK BUT DOES NOT CONSENT TO THE GENERAL JURISDICTION OF NEW YORK (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Singas, over a two-judge dissent, determined that a corporation registered to do business in New York consents to the service of process in New York, but not to general jurisdiction in New York. The underlying lawsuit stemmed from a car accident in Virginia. Both Ford and Goodyear were sued. Neither the car or the tire were made or sold in New York:

Aybar [the New York resident who drove the car] purchased the vehicle in New York from a third party. Ford did not sell the vehicle in this state in the first instance, nor did Ford design or manufacture the vehicle here. Similarly, Goodyear designed, manufactured, and initially sold the tire in other states. It is undisputed that Ford was incorporated in Delaware and maintains its principal place of business in Michigan and that Goodyear was incorporated and has its principal place of business in Ohio. At all relevant times, Ford and Goodyear were registered with the New York Secretary of State as foreign corporations authorized to do business in this state and had appointed in-state agents for service of process in accordance with the Business Corporation Law. * * *

We have never conflated statutory consent to service with consent to general jurisdiction, and the fact remains that, under existing New York law, a foreign corporation does not consent to general jurisdiction in this state merely by complying with the Business Corporation Law's registration provisions. Aybar v Aybar, 2021 NY Slip Op 05393, Ct App 10-7-21

CIVIL PROCEDURE, DEBTOR-CREDITOR, JUDGMENT DEBTOR'S REMEDIES.

A JUDGMENT DEBTOR CANNOT BRING AN ACTION IN TORT AGAINST THE CREDITOR OR THE MARSHAL ALLEGING DAMAGES STEMMING FROM THE SEIZURE OF PROPERTY TO BE APPLIED TO THE DEBT; THE JUDGMENT DEBTOR'S REMEDIES ARE CONFINED TO THOSE DESCRIBED IN CPLR 5239 AND 5240 (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a two-judge dissent, and an additional single-judge dissent, determined a judgment debtor cannot bring a action in tort against the creditor or the marshal stemming from the seizure of the judgment debtor's property. Any such claim must be made pursuant to CPLR 5239, 5240:

"[G]eneral provisions that permit 'any interested person'—including a judgment debtor—to secure remedies for wrongs arising under the statutory scheme" are set out in CPLR 5239 and 5240 … . CPLR 5239 provides that "[p]rior to the application of property or debt by a sheriff or receiver to the satisfaction of a judgment, any interested person may commence a special proceeding against the judgment creditor or other person with whom a dispute exists to determine rights in the property or debt." In such a proceeding, "[t]he court may vacate the execution or order, void the levy, direct the disposition of the property or debt, or direct that damages be awarded" … . Section 5240 in turn lays out the court's power to, "at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure." … CPLR 5240 grants the courts broad discretionary power to control and regulate the enforcement of a money judgment under article 52 to prevent 'unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts'" … . … CPLR 5240 provides courts with the ability to craft flexible and equitable responses to claims that arise with respect to enforcement of valid money judgments. Plymouth Venture Partners, II, L.P. v GTR Source, LLC, 2021 NY Slip Op 07055, CtApp 12-16-21

CIVIL PROCEDURE, MUNICIPAL LAW, SMALL CLAIMS.

PURSUANT TO NEW YORK CITY CIVIL COURT ACT 1808, COLLATERAL ESTOPPEL OR ISSUE PRECLUSION DOES NOT APPLY TO SMALL CLAIMS ACTIONS, BUT RES JUDICATA OR CLAIM PRECLUSION DOES APPLY TO SMALL CLAIMS ACTIONS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over an extensive dissent, interpreting New York Civil Court Act section 1808, determined a judgment in a small claims action is subject to the transactional approach to claim preclusion. Plaintiff won a small claims case seeking overtime wages. Then plaintiff brought another action in federal court seeking additional damages for the failure to pay overtime wages under federal and state law. The Second Circuit asked for clarification of the meaning of section 1808, which could be interpreted to prohibit the application of both issue preclusion and claim preclusion to small claims actions. Under the statute, collateral estoppel or issue preclusion does not apply to small claims actions, but res judicata or claim preclusion does:

We now conclude that, under NY City Civ Ct Act § 1808, small claims judgments do not have collateral estoppel or issue preclusive effect (with one exception), but such judgments may have the traditional res judicata or claim preclusive effect in a subsequent action involving a claim between the same adversaries arising out of the same transaction or series of transactions at issue in a prior small claims court action. * * *

… [T]he claim preclusion rule extends beyond attempts to relitigate identical claims. We have consistently applied a "transactional analysis approach" in determining whether an earlier judgment has claim preclusive effect, such that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" … . * * *

Collateral estoppel, or issue preclusion, is related to, but distinct from, the doctrine of res judicata. Collateral estoppel prevents "'a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . . whether or not the . . . causes of

action are the same'" … . Simmons v Trans Express Inc., 2021 NY Slip Op 03484, CtApp 6-3-21

CIVIL PROCEDURE. VENUE, MEDICAL MALPRACTICE.

ALTHOUGH DEFENDANT DOCTOR PRACTICED IN THE BRONX FOR PART OF EACH WEEK, THE PRINCIPAL OFFICE OF HIS BUSINESS AND HIS RESIDENCE WERE IN WESTCHESTER COUNTY, WHERE PLAINTIFF WAS TREATED; SUPREME COURT PROPERLY GRANTED DEFENDANTS' MOTION TO CHANGE THE VENUE FROM BRONX TO WESTCHESTER COUNTY (CT APP).

The Court of Appeals, reversing the Appellate Division, over an extensive two-judge dissent, determined Supreme Court had properly granted defendants' motion for a change of venue from Bronx County to Westchester County in this medical malpractice action. The defendant doctor (Goldstein) was described by plaintiff as an "individually-owned business" with a "principal office" in Bronx County. Dr. Goldstein treats some patients in Bronx County. But plaintiff was treated by Dr. Goldstein in Westchester County, where defendant business (Westmed) is located and where Dr. Goldstein resides:

Under CPLR 503(d), "[a] partnership or an individually-owned business shall be deemed a resident of any county in which it has its principal office, as well as the county in which the partner or individual owner suing or being sued actually resides." * * *

While … registration documents confirmed … that Dr. Goldstein also worked in the Bronx, the venue statute does not deem an individually-owned business a resident of every county where it has an office or transacts business. To conclude otherwise would read the phrase "principal office" out of the statute. Lividini v Goldstein, 2021 NY Slip Op 05618, CtApp 10-14-21

CONSUMER LAW, CONTRACT LAW, LAW BOOKS.

PLAINTIFFS, ATTORNEYS PRACTICING LANDLORD-TENANT LAW, ALLEGED DEFENDANT PUBLISHER OF "NEW YORK LANDLORD-TENANT LAW" OMITTED OR INACCURATELY PRESENTED SOME OF THE RELEVANT STATUTES AND REGULATIONS AND THEREFORE VIOLATED GENERAL BUSINESS LAW 349 (DECEPTIVE BUSINESS PRACTICES); THE COMPLAINT FAILED TO ADEQUATELY ALLEGE DEFENDANT'S ACT OR PRACTICE WAS MATERIALLY MISLEADING (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a dissent, determined plaintiffs did not state a cause of action for deceptive business practices (General Business Law (GBL) 349) against the defendant-publisher of a legal resource book, "New York Landlord-Tenant Law" (commonly called the "Tanbook"). Plaintiffs, attorneys who practice landlord-tenant law, alleged the Tanbook, which is published annually, purported to include all the relevant statutes and regulations but, in fact, omitted or inaccurately presented some statutes and regulations. The Court of Appeals found that the complaint adequately alleged a cause of action that was consumer-oriented, but did not adequately allege defendant's act or practice was misleading in a material way:

… [P]laintiffs' cause of action is based on purchases of yearly editions of the Tanbook, under a sales agreement that charged extra for any updates of the year's materials contained in the corresponding edition. Plaintiffs' allegations are limited to omissions and inaccuracies in a section of the Tanbook they knew was subject to legislative amendment, which they concede were corrected in the 2017 edition after the errors were brought to defendant's attention, and which were specifically contemplated by defendant's express disclaimer of the currentness of the Tanbook's contents. Under the circumstances, plaintiffs, or any reasonable consumer, could not have been materially misled to believe that defendant guaranteed Part III of the Tanbook was complete and accurate at any given time. Thus, because plaintiffs failed to adequately plead this element, their GBL § 349 cause of action was properly dismissed. Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc., 2021 NY Slip Op 03485, CtApp 6-3-21

CONTRACT LAW, DEBTOR-CREDITOR, SECURITIES, USURY.

A LOAN AGREEMENT WHICH ALLOWS THE LENDER TO CONVERT THE BALANCE TO SHARES OF STOCK AT A FIXED DISCOUNT CAN VIOLATE THE USURY STATUTE, WHICH WOULD THEREBY RENDER THE AGREEMENT VOID AB INITIO (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a partial dissent. answered two questions posed by the Second Circuit in the affirmative. "1. Whether a stock conversion option that permits a lender, in its sole discretion, to convert any outstanding balance to shares of stock at a fixed discount should be treated as interest for the purpose of determining whether the transaction violates N.Y. Penal Law § 190.40, the criminal usury law. 2. If the interest charged on a loan is determined to be criminally usurious under N.Y. Penal Law § 190.40, whether the contract is void ab initio pursuant to N.Y. Gen. Oblig. Law § 5-511:"

GeneSYS ID, Inc. ("GeneSYS") is a publicly held corporation that produces various types of medical supplies. Adar Bays, LLC is a limited liability company based in Florida. On May 24, 2016, Adar Bays loaned GeneSYS $35,000. In exchange, GeneSYS gave Adar Bays a note with eight percent interest that would mature in one year. The note included an option for Adar Bays to convert some or all of the debt into shares of GeneSYS stock at a discount of 35% from the lowest trading price for GeneSYS stock over the 20 days prior to the date on which Adar Bays requested a conversion. Adar Bays could exercise its option starting 180 days after the note was issued and could do so all at once or in separate partial conversions. …

Six months and four days after the note was issued … Adar Bays requested conversion of $5,000 of debt into 439,560 shares of stock. GeneSYS refused … seeking to renegotiate the loan. … GeneSYS was trading for $0.024 per share, the conversion price was $0.011. Adar Bays … sued GeneSYS in the … Southern District of New York for breach of contract. GeneSYS filed a motion to dismiss arguing the contract was void because the loan's rate of interest, including both the stated interest and conversion option, exceeded the criminal usury rate of 25%. Adar Bays, LLC v GeneSYS ID, Inc., 2021 NY Slip Op 05616 CtApp 10-14-21

CORRECTION LAW, EMPLOYMENT LAW, HUMAN RIGHTS LAW.

PLAINTIFF STATED A CAUSE OF ACTION UNDER THE CORRECTION LAW BY ALLEGING HIS APPLICATION FOR REEMPLOYMENT AFTER COMPLETION OF HIS SENTENCE (60 DAYS INCARCERATION) WAS DENIED SOLELY BECAUSE OF HIS PRIOR CONVICTION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a concurring opinion, reversing the Appellate Division, determined plaintiff's complaint stated a cause of action for discrimination under the Correction Law, which prohibits discrimination based upon criminal convictions in the context of applications for employment. Plaintiff had kept his employer informed of a criminal charge against him which had not yet gone to trial and was told he would not lose his job if he was sentenced to incarceration. Plaintiff was sentenced to 60 days and his employment was terminated:

The statutes do not categorically preclude consideration of a prospective employee's criminal history and expressly permit the denial of employment or licensing if there is (1) a "direct relationship" between the previous criminal offense and the specific employment or license, or (2) if granting the request for employment or a license "would involve an unreasonable risk" to the property, safety, or welfare "of specific individuals or the general public" (Correction Law § 752). Thus, under the statutory scheme, reliance on a previous criminal offense when denying an application for employment or a license is not necessarily unlawful … . Whether an exception applies depends on factors identified in Correction Law § 753 such as, among other things, the relationship between the specific employment duties and the criminal offense as well as the amount of time that has elapsed since the offense occurred … . Under these provisions, when filling positions, public and private employers must treat job applicants with prior convictions equitably "while also protecting society's interest in assuring performance [of job duties] by reliable and trustworthy persons" … . * * *

… [P]laintiff alleged that he was terminated for job abandonment soon after he was incarcerated. Applying our liberal standard, the complaint … may be read to allege that, after he completed his sentence, he applied for reemployment … and [defendant] denied the application solely because of the prior conviction. Sassi v Mobile Life Support Servs., Inc., 2021 NY Slip Op 05449, CtApp 10-12-21

CRIMINAL LAW, ADMINISTRATIVE LAW, OFFICE OF VICTIMS SERVICES, ATTORNEY'S FEES.

2016 REGULATIONS RESTRICTING ATTORNEY'S FEES FOR CLAIMS MADE TO THE OFFICE OF VICTIM SERVICES (OVS) ARE CONSISTENT WITH THE STATUTORY LANGUAGE (EXECUTIVE LAW) AND RATIONAL (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a two-judge dissent and a concurrence, reversing the Appellate Division, determined that the Office of Victim Services (OVS) regulations limiting attorney's fees for crime victim claimants were consistent with the statutory language and rational:

OVS regulations formerly provided that claimants had a "right to be represented . . . at all stages of a claim" … and, "[w]henever an award [was] made to a claimant who [was] represented by an attorney, [OVS was required to] approve a reasonable fee commensurate with the services rendered, up to $1,000," unless the request for attorneys' fees was premised on a claim "submitted without legal or factual basis" … . OVS acknowledges that this meant that attorneys' fees, if reasonable, were available at all stages of a claim. However, effective January 13, 2016, OVS amended 9 NYCRR § 525.9 to provide that "[a]ny claimant . . . may choose to be represented before [OVS], at any stages of a claim, by an attorney-at-law . . . and/or before the Appellate Division upon judicial review of the office's final determination," but "only those fees incurred by a claimant during: (1) the administrative review for reconsideration of such decision . . . ; and/or (2) the judicial review of the final decision of [OVS] . . . may be considered for reimbursement" … .

OVS issued a regulatory impact statement indicating that the "purpose of th[e] rule change [wa]s to limit attorneys' fees pursuant to article 22 of the Executive Law." OVS stated that the amendments were "designed to conform the regulations to the enacting statute," explaining that the prior regulations permitted claimants to recover attorneys' fees that "far exceed[ed]" the "reasonable expenses" specified under Executive Law § 626 (1). OVS indicates that Victim Assistance Programs (VAPs) are federally funded with a state match, and it emphasized in its regulatory impact statement that it "fund[ed] 228 [VAPs] across New York State, distributing in excess of $35 million to these programs to assist and advocate on behalf of victims and claimants." The required services provided by the VAPs include,

among other things, "assist[ing] victims and/or claimants in completing and submitting OVS applications and assist[ing] claimants through the claim process." OVS determined that the legislature did not intend that attorneys' fees incurred in relation to assistance within the scope of services provided by VAPs would be considered reasonable under the statute. Matter of Juarez v New York State Off. of Victim Servs., 2021 NY Slip Op 01091, CtApp 2-18-21

CRIMINAL LAW, APPEALS, WAIVER OF APPEAL.

A VALID WAIVER OF APPEAL PRECLUDES AN APPEAL ALLEGING THE VIOLATION OF DEFENDANT'S RIGHT TO AN OPPORTUNITY TO MAKE A PERSONAL STATEMENT AT SENTENCING (CT APP).

The Court of Appeals, in a brief memorandum decision, over an extensive two-judge dissent, determined a waiver of appeal precluded an appeal alleging the violation of defendant's right to an opportunity to make a personal statement at sentencing:

… [D]efendant's contention that his CPL 380.50(1) right to an opportunity to make a personal statement at sentencing was violated is not reviewable because such a claim did not survive the valid appeal waiver. Although the statutory right is "deeply rooted" and "substantial," its value is largely personal to defendant … . Defendant's claim does not fall among the narrow class of nonwaivable defects that undermine "the integrity of our criminal justice system . . . [or] implicate . . . a public policy consideration that transcends the individual concerns of a particular defendant to obtain appellate review" … . Moreover, despite defendant's arguments to the contrary, a valid unrestricted waiver of appeal elicited during a plea proceeding can preclude appellate review of claims that have "not yet reached full maturation," including those arising during sentencing … , nor is this challenge to presentence procedures reviewable under the illegal sentence exception … . People v Brown, 2021 NY Slip Op 02867, CtApp 5-6-21

CRIMINAL LAW, APPEALS, SENTENCING.

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

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

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

CRIMINAL LAW, APPEALS, PREDICATE FELONY STATEMENTS.

DEFENDANT FAILED TO CHALLENGE THE PREDICATE FELONY STATEMENT IN THE LOWER COURT; THEREFORE THE ALLEGED ERROR WAS NOT PRESERVED FOR APPEAL (CT APP).

The Court of Appeals, reversing the Appellate Division, determined the alleged error in the CPL 400.21 predicate felony statement was not preserved for appeal:

Because defendant failed to challenge the CPL 400.21 predicate felony statement filed by the People in the court of first instance, her claim that her sentence was

illegal due to the failure to include the tolling periods in that document did not present a question of law for purposes of appellate review … . Defendant's claim was not reviewable under the narrow illegal sentence exception to the preservation requirement because it was not "readily discernible from the trial record" that the sentence the court imposed was not within the permissible range … . People v Lashley, 2021 NY Slip Op 06938, CtApp 12-14-21

CRIMINAL LAW, APPEALS, SIDEBAR CONFERENCES, PRESERVATION.

UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE, AN OBJECTION WAS NECESSARY TO PRESERVE THE ERROR RELATED TO DEFENDANT'S ABSENCE FROM A SIDEBAR CONFERENCE ABOUT A PROSPECTIVE JUROR; DEFENDANT SUBSEQUENTLY WAIVED HIS RIGHT TO BE PRESENT AND WAS GIVEN THE OPPORTUNITY TO OBJECT TO HIS ABSENCE FROM THE PRE-WAIVER SIDEBAR (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a three-judge dissent, determined the defendant's absence from a sidebar conference regarding a prospective juror did not require reversal. Subsequent to the the sidebar, defendant waived his right to be present at sidebar conferences and was given the opportunity to object to the pre-waiver sidebar. Under these circumstance, the Court of Appeals held, although normally not required, an objection was necessary to preserve the error for appeal:

When a defendant is not present at a sidebar conference wherein the court actively solicits answers from a prospective juror which relate to issues of bias or hostility, People v Antommarchi (80 NY2d 247 [1992]) requires a new trial in the absence of defendant's waiver of the right to be present. Defendant's protest in the trial court is generally not required. The purpose of the Antommarchi rule, as derived from CPL 260.20, is to provide defendant the opportunity to personally assess the juror's facial expressions and demeanor in order to provide meaningful input on the prospective juror's retention or exclusion from the jury. The question presented on this appeal is whether defendant, having explicitly waived his Antommarchi right to be present at sidebars in the middle of the voir dire proceeding involving a prospective juror who was ultimately struck when codefendant exercised a

peremptory strike, is entitled to a new trial based on his absence from a pre-waiver sidebar conference with that same prospective juror. We conclude that the claimed error, under these unique circumstances, required defendant's protest in the trial court given his acquiescence in the post-waiver voir dire of the prospective juror after being invited to express any objection that he may have had regarding the pre-waiver sidebar conference. People v Wilkins, 2021 NY Slip Op 06936, CtApp 12-14-21

CRIMINAL LAW, ATTORNEYS, INEFFECTICE ASSISTANCE, REPUGNANT VERDICTS.

DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE VERDICT AS REPUGNANT (CT APP).

The Court of Appeals reversed People v Jennings, 2021 NY Slip Op 00944 [191 AD3d 1429], Fourth Dept 2-11-21. The facts were not described:

On review of submissions pursuant to section 500.11 of the Rules, order reversed, and case remitted to the Appellate Division, Fourth Department, for consideration of the facts and issues raised but not determined on the appeal to that Court. Counsel's failure to challenge the verdict as repugnant did not render the representation ineffective because the issue was not clear-cut and dispositive given the jury charge … . People v Jennings, 2021 NY Slip Op 06428, Ct App 11-18-21

CRIMINAL LAW, NYC'S RIGHT OF WAY LAW, CONSTITUTIONAL LAW, MUNICIPAL LAW, NEGLIGENCE, VEHICLE AND TRAFFIC LAW.

NYC'S RIGHT OF WAY LAW CRIMINALIZES ORDINARY NEGLIGENCE WHEN A VEHICLE STRIKES A PEDESTRIAN OR A BICYCLIST WHO HAS THE RIGHT OF WAY; THE LAW IS NOT VOID FOR VAGUENESS, PROPERLY IMPOSES ORDINARY NEGLIGENCE AS THE MENS REA, AND IS NOT PREEMPTED BY OTHER LAWS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a concurring opinion, determined New York City's "Right of Way Law," which criminalizes ordinary negligence when a vehicle strikes a pedestrian or bicyclist who has the right of way, is constitutional and is not preempted by other laws. Both defendants were convicted under the Right of Way Law (NYC Administrative Code 19-190), a misdemeanor. The defendants unsuccessfully argued (1) the law is void for vagueness; (2) ordinary negligence cannot constitute the mens rea for a criminal act; and (3) the law is preempted by the Penal Law and the Vehicle and Traffic Law:

Article 15 of the Penal Law lists and defines four "culpable mental states"—"intentionally," "knowingly," "recklessly," and "criminal negligence" … . However, strict liability is also contemplated by article 15: "[t]he minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which [such person] is physically capable of performing," and, "[i]f such conduct is all that is required for commission of a particular offense, . . . such offense is one of 'strict liability'" … .
* * *

The provisions of the Penal Law "govern the construction of and punishment for any offense defined outside" of the Penal Law, "[u]nless otherwise expressly provided, or unless the context otherwise requires" (Penal Law § 5.05 [2]). The two key provisions at issue, Penal Law § 15.00 (Culpability; definitions of terms) and § 15.05 (Culpability; definitions of culpable mental states), expressly provide otherwise by making clear that they are "applicable to this chapter" only. Further contradicting defendants' interpretation of article 15 is the legislature's own use of an ordinary negligence mens rea for offenses defined outside the Penal Law. For

example … Vehicle and Traffic Law § 1146 and Agriculture and Markets Law § 370—which were enacted after the relevant provisions in article 15 of the Penal Law—both employ an ordinary negligence standard for imposing criminal liability. People v Torres, 2021 NY Slip Op 05448, CtApp 10-12-21

CRIMINAL LAW, CONSTITUTIONAL LAW, SPECIAL PROSECUTOR.

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

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

Given that the purpose of enacting the Special Needs Act was to "bolster the ability of the state to respond more effectively to abuse and neglect of vulnerable persons" … , it is apparent that the Legislature would wish that as much of Executive Law § 552 aimed at protecting that class of victims as can be preserved remain in effect. Nor would excising the offending provisions leave the remainder without any beneficial impact. Therefore, while the subdivisions of the statute that provide the special prosecutor with the discretionary authority to bring criminal cases … must be struck as unconstitutional … , the portion of Executive Law § 552 (1) that provides the special prosecutor with non-prosecutorial functions should remain in force. Likewise, we leave intact Executive Law § 552 (2) (a) (ii), which empowers the special prosecutor "to cooperate with and assist district attorneys and other local law enforcement officials in their efforts against . . . abuse or neglect of vulnerable persons," without interfering with those efforts (emphasis

added). Cooperation with the local District Attorney furthers the overarching goal of the Legislature—providing resources to address crimes of abuse and neglect committed against vulnerable persons—without infringing on that constitutional officer's essential authority. People v Viviani, 2021 NY Slip Op 01934, CtApp 3-30-21

CRIMINAL LAW, RIGHT TO COUNSEL, PSYCHIATRIC EXAM.

A PSYCHIATRIC EXAM IS A CRITICAL STAGE OF A PROSECUTION AT WHICH DEFENDANT HAS THE RIGHT TO COUNSEL; THE EXCLUSION OF DEFENSE COUNSEL FROM THE EXAM WAS NOT HARMLESS ERROR; CONVICTION REVERSED (CT APP).

The Court of Appeals, reversing defendant's manslaughter conviction, determined the exclusion of defense counsel from the psychiatric exam by the People's expert was not harmless error:

After defendant provided timely notice that he intended to present psychiatric evidence at trial, he was twice interviewed by a clinical psychologist engaged by the People (see CPL 250.10 [2], [3]). Although defense counsel was present at the first examination, the expert denied defense counsel admittance to the second examination. Over defense counsel's objection that defendant's right to counsel had been violated, the expert's testimony was admitted at trial. On defendant's appeal, the Appellate Division affirmed, holding that defendant's constitutional right to counsel had been violated but that the error was harmless … . …

In Matter of Lee v County Ct. of Erie County (27 NY2d 432 [1971]), we held that defendants' Sixth Amendment right to counsel applies at pre-trial psychiatric examinations "to make more effective [a defendant's] basic right of cross-examination" … In Lee, we cited to United States v Wade's (388 US 218 [1967]) definition of a critical stage of the prosecution as "'any stage of the prosecution, formal or informal, in court or out, where' 'the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective

assistance of counsel at the trial itself" … . We thus held that pretrial psychiatric examinations are a critical stage of the prosecution.

… The People—not the defendant—bear the burden of showing that "there was no reasonable possibility that the trial court's admission" of that part of the expert's testimony based on the uncounseled examination "affected the jury's verdict" … . Under the circumstances of this case, the expert's testimony at trial was based in part on the examination undertaken in violation of defendant's constitutional right to counsel, and we cannot say that the error was harmless … . People v Guevara, 2021 NY Slip Op 04955, CtApp 9-9-21

CRIMINAL LAW, APPEALS, SEX OFFENDER REGISTRATION ACT (SORA), CORRECTION LAW.

DEFENDANT'S CHALLENGE TO CERTIFICATION AS A SEX OFFENDER WAS FIRST RAISED IN THE APPELLATE DIVISION AND WAS NOT PRESERVED FOR CONSIDERATION BY THE COURT OF APPEALS; THE ILLEGAL SENTENCE EXCEPTION TO THE PRESERVATION REQUIREMENT DOES NOT APPLY BECAUSE SORA CERTIFICATION IS NOT PART OF THE SENTENCE (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Cannataro, over a two-judge dissent, determined the challenge to the legality of defendant's certification as a sex offender, first raised on appeal to the Appellate Division, was not preserved and the illegal sentence exception to the preservation requirement did not apply:

Defendant thereafter pleaded guilty to … burglary in the first degree as a sexually motivated felony … . … [T]he court … advised defendant that he would have to register pursuant to SORA upon his release from prison. * * *

On appeal to the Appellate Division, defendant argued for the first time that his certification as a sex offender was unlawful because his crime of conviction is not an enumerated registerable sex offense under Correction Law § 168-a (2) (a). * * *

The Appellate Division agreed with defendant that under the "clear and unambiguous" language of Correction Law § 168-a (2) (a) "burglary in the first degree as a sexually motivated felony is not a registerable sex offense under SORA" … . * * *

"We have recognized 'a narrow exception to the preservation rule' where a court exceeds its powers and imposes a sentence that is illegal in a respect that is readily discernible from the trial record" … . However, "not all claims arising during a sentencing proceeding fall within the exception" … . * * *

… [S]ex offender certification is effectuated by the court pursuant to Correction Law § 168-d and is not addressed in either the Criminal Procedure Law or Title E of the Penal Law. … SORA certification is not part of a sentence and the illegal sentence exception to the preservation requirement does not apply to challenges to certification as a sex offender. People v Buyund, 2021 NY Slip Op 06529, CtApp 11-23-21

CRIMINAL LAW, SIMPLIFIED TRAFFIC INFORMATIONS.

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

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

The Appellate Term for the Ninth and Tenth Judicial Districts has adopted a rule of criminal procedure under which, absent special circumstances, the People cannot reprosecute a defendant by filing a new simplified traffic information after the original simplified traffic information was dismissed for facial insufficiency under

CPL 100.40 (2) for failure to provide a requested supporting deposition in a timely manner. Because that rule has no basis in the Criminal Procedure Law and contravenes our holding in People v Nuccio (78 NY2d 102 [1991]), we reverse. * * *

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

The Criminal Procedure Law does not prohibit reprosecution upon a facially sufficient accusatory instrument after such a dismissal, whether by information or by simplified traffic information with a supporting deposition. Accordingly, the People were entitled to reprosecute the traffic violation after dismissal of the first simplified traffic information. People v Epakchi, 2021 NY Slip Op 02018, CtApp 4-1-21

CRIMINAL LAW, VACATE CONVICTION, INEFFECTIVE ASSISTANCE.

GENERAL CRITERIA FOR DENYING, WITHOUT HOLDING A HEARING, A MOTION TO VACATE A CONVICTION ON INEFFECTIVE-ASSISTANCE GROUNDS (CT APP).

The Court of Appeals, without discussing the facts, laid out the criteria for denying a motion to vacate a conviction on ineffective-assistance grounds without holding a hearing:

… [A] court may deny a CPL 440.10 motion without conducting a hearing if "[t]he motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts" … . Here, County Court did not abuse its discretion in denying

defendant's CPL 440.10 motion without a hearing because, under the circumstances presented, defendant failed to sufficiently allege "'a reasonable probability that, but for counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial'" … . Moreover, defendant failed to otherwise "show that the nonrecord facts sought to be established . . . would entitle him to relief" … . People v Dogan, 2021 NY Slip Op 04956, CtApp 9-14-21

CRIMINAL LAW, APPEALS, WEIGHT OF THE EVIDENCE, LEGALLY INSUFFICIENT EVIDENCE.

THE SECOND DEPARTMENT HAD REVERSED DEFENDANT'S MURDER CONVICTION, STATING IT WAS REVERSING ON WEIGHT OF THE EVIDENCE GROUNDS FOR THE SAME REASONS IT WAS REVERSING ON LEGAL SUFFICIENCY GROUNDS; THAT CONSTITUTED AN ERROR OF LAW REVIEWABLE BY THE COURT OF APPEALS; THE COURT OF APPEALS DETERMINED THERE WAS LEGALLY SUFFICIENT EVIDENCE TO SUPPORT CONVICTION; THE MATTER WAS REMITTED FOR PROPER ASSESSMENT OF THE WEIGHT OF THE EVIDENCE (CT APP).

The Court of Appeals, reversing People v Romualdo, 2020 NY Slip Op 06559 [188 AD3d 928], Second Dept 11-12-20, remitted the matter for a proper assessment of the weight of the evidence. The Court of Appeals has the authority to review a weight of the evidence determination when the appellate court failed to consider the issue or did so using an incorrect legal principle. "The Appellate Division's statement that it was reversing on weight of the evidence grounds for the 'same reasons' that it was reversing on legal sufficiency grounds constituted an error of law …":

The Appellate Division reversed defendant's [murder] conviction, describing its holding as "on the law and on the facts," and dismissed the indictment on both legal sufficiency and weight of the evidence grounds … . Both of those determinations were based upon the Appellate Division's conclusion that "the People presented no evidence placing the defendant at or near the scene of the crime, or linking him in any way to the victim, during the critical time frame in

which the murder was believed to have occurred"… . Both holdings were erroneous as a matter of law. * * *

… [A] rational jury could have inferred from the medical evidence presented at trial that the victim was sexually assaulted immediately prior to her death. Inasmuch as defendant's semen was found on the victim's genitalia, the semen had not transferred to the victim's clothing, which was still in a state of disarray when her body was found, defendant lived in close proximity to the crime scene, and defendant falsely denied knowing or having sex with the victim, a rational jury could conclude that defendant was present at the time of the victim's death and killed the victim during the course of, or immediately after, sexually assaulting her … . Therefore, the evidence was legally sufficient to support defendant's conviction. … People v Romualdo, 2021 NY Slip Op 06430, Ct App 11-18-21

CRIMINAL LAW, TRAFFIC STOPS, CANINE SNIFFS, APPEALS, EVIDENCE.

THE TRAFFIC STOP WAS PRETEXTUAL, OSTENSIBLY BASED ON A BURNED-OUT LICENSE-PLATE LIGHT; BUT THERE WAS SUPPORT IN THE RECORD FOR THE CANINE SNIFF BASED UPON A FOUNDED SUSPICION OF CRIMINAL ACTIVITY; THEREFORE THE MATTER WAS BEYOND REVIEW BY THE COURT OF APPEALS (CT APP).

The Court of Appeals, over an extensive three-judge dissent, determined there was sufficient evidence in the record to support the finding that the canine sniff was justified by a founded suspicion that criminal activity was afoot. The traffic stop was pretextual, ostensibly based on a burned-out license-plate light:

In the course of a stop predicated on the observation of traffic violations … defendant consented to a search of the backseat of his vehicle. Instead of conducting that search, the police officer walked his canine around the exterior of the vehicle and, in mere seconds, the canine alerted to the trunk. Defendant argues that law enforcement lacked founded suspicion that criminal activity was afoot and, thus, unlawfully conducted the exterior canine sniff search.

A canine sniff search of a vehicle's exterior is lawful if police possess a founded suspicion that criminal activity is afoot … . Determinations regarding the existence of a founded suspicion of criminality involve mixed questions of law and fact … . Therefore, our review is "limited to whether there is evidence in the record supporting the lower courts' determinations" … . …

Based on the evidence presented at the suppression hearing, including the officers' observations prior to and during the stop, there is record support for the determination that a founded suspicion of criminal activity existed here and, thus, the issue is beyond further review … .

From the dissent:

Mr. Blandford's case illustrates a troubling aspect of police behavior: law enforcement can pursue someone they suspect of criminal behavior without a founded suspicion of criminality, wait for the right moment to stop that person for a minor traffic infraction, and then serve up a stew of flavorless facts to transform a stop in which they have no intrinsic interest into the search they sought before they had any evidentiary basis to suspect wrongdoing. Although this case illustrates that problem, its resolution should be much simpler than resolution of the systemic problem: here, the officers did not possess information sufficient to justify the canine search. People v Blandford, 2021 NY Slip Op 05619, CtApp 10-14-21

CRIMINAL LAW, BRADY MATERIAL, APPEALS.

THE BRADY MATERIAL, A WITNESS STATEMENT REVEALED AFTER TRIAL, WOULD NOT HAVE ALTERED THE RESULT OF THE TRIAL; DEFENDANT'S CONVICTION SHOULD NOT HAVE BEEN REVERSED (CT APP).

The Court of Appeals, reversing the Appellate Division, determined the Brady material, a witness statement, revealed after trial would not have altered the result of the trial and therefore reversal of the conviction was not warranted:

"To make out a successful Brady claim, 'a defendant must show that (1) the evidence is favorable to the defendant because it is either exculpatory or

impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material'" … . Where, as here, the defendant made a specific request for the evidence in question, "[w]e must examine the trial record, evaluat[e] the withheld evidence in the context of the entire record, and determine in light of that examination whether there is a reasonable possibility that the result of the trial would have been different if the evidence had been disclosed" … . …

The undisclosed witness's description of the shooter and his flight path did not differ in any material respect from that of the eyewitness who identified defendant in court as the perpetrator. Moreover, the jury's verdict was supported by considerable other evidence, including the testimony of a cooperating witness who planned the crime with defendant, provided a weapon and cellphone for defendant's use, observed defendant approach and leave the site of the shooting at the time it occurred, and described the manner in which the weapon was destroyed after the shooting; testimony by the spouse of the cooperating witness confirming defendant's involvement; the testimony of additional witnesses who described the perpetrator's clothing and his movements following the shooting; telephone records; and surveillance videos showing defendant's proximity, clothing, and behavior immediately after the crime. People v McGhee, 2021 NY Slip Op 01836, CtApp 3-25-21

CRIMINAL LAW, CREDIT CARD NUMBERS, GRAND LARCENY.

USING ANOTHER'S CREDIT CARD ACCOUNT NUMBER TO MAKE PURCHASES, WITHOUT PHYSICAL POSSESSION OF THE CARD, SUPPORTS A GRAND LARCENY CONVICTION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a two-judge dissent, determined that using a credit card number without physically possessing the credit card itself supported the grand larceny conviction:

The primary question presented by this appeal is whether the definition of credit card for purposes of Penal Law § 155.00 (7) includes the credit card account number, such that the People need not prove that a defendant physically possessed

the tangible credit card in order to support a conviction of grand larceny based upon credit card theft. Here, defendant's conviction of grand larceny in the fourth degree was based on defendant's theft of the victim's credit card account number to purchase goods, although there was no evidence that defendant possessed the physical card itself. We conclude that the definition of credit card in General Business Law § 511 (1), as supplemented by General Business Law § 511-a, is the controlling definition as designated by Penal Law § 155.00 (7) and, as a result, the evidence is legally sufficient to support defendant's conviction of grand larceny for stealing an intangible credit card account number. People v Badji, 2021 NY Slip Op 00897, CtApp 2-11-21

CRIMINAL LAW, EAVESDROPPING, JURISDICTION.

KINGS COUNTY SUPREME COURT HAD JURISDICTION TO ISSUE EAVESDROPPING WARRANTS FOR DEFENDANT'S CELL PHONES BASED UPON WHERE THE INTERCEPTION WAS TO BE MADE (NEW YORK); THE CELL PHONES NEED NOT BE (AND WERE NOT) LOCATED IN NEW YORK (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a two-judge dissent, determined that Kings County Supreme Court had jurisdiction to issue eavesdropping warrants for defendant's cell phones based up where the interception was to be made (New York). The cell phones need not be (and were not) located in New York:

The issue raised on defendant's appeal is whether a Kings County Supreme Court Justice had jurisdiction to issue eavesdropping warrants for defendant's cell phones, which were not physically present in New York, for the purpose of gathering evidence in an investigation of enterprise corruption and gambling offenses committed in Kings County. To resolve defendant's jurisdictional challenge, we must decide whether the eavesdropping warrants were "executed" in Kings County within the meaning of Criminal Procedure Law § 700.05 (4). We hold that eavesdropping warrants are executed in the geographical jurisdiction where the communications are intentionally intercepted by authorized law

enforcement officers within the meaning of CPL article 700. People v Schneider, 2021 NY Slip Op 03486, CtApp 6-3-21

CRIMINAL LAW, DRUG OVERDOSE, MANSLAUGHTER, CRIMINALLY NEGLIGENCE HOMICIDE.

DEFENDANT WAS CHARGED WITH MANSLAUGHTER SECOND BASED ON THE DEATH OF A PERSON TO WHOM DEFENDANT SOLD HEROIN; THE GRAND JURY EVIDENCE DID NOT SUPPORT EITHER THE "RECKLESS" ELEMENT OF MANSLAUGHTER SECOND OR THE "CRIMINAL NEGLIGENCE" ELEMENT OF CRIMINALLY NEGLIGENT HOMICIDE (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Fahey, determined the grand jury evidence did not support the "reckless" element of manslaughter second degree or the "criminal negligence" element of criminally negligent homicide. The charges arose from defendant's sale of heroin to the decedent, who died of an overdose:

Both recklessness and criminal negligence "require that there be a 'substantial and unjustifiable risk' that death or injury will occur; that the defendant engage in some blameworthy conduct contributing to that risk; and that the defendant's conduct amount to a 'gross deviation' from how a reasonable person would act" … . "The only distinction between the two mental states is that recklessness requires that the defendant be 'aware of' and 'consciously disregard' the risk while criminal negligence is met when the defendant negligently fails to perceive the risk" … . … [T]he underlying conduct for both offenses is the same and involves some degree of risk creation … . … [T]he " 'nonperception' of a risk, even if death results, is not enough"—rather, the defendant must have "engaged in some blameworthy conduct creating or contributing to a substantial and unjustifiable risk of death" … . * * *

The evidence demonstrated that defendant knew that the heroin he sold the decedent was strong and required caution. That the heroin was potent, however,

does not equate to a substantial and unjustifiable risk that death would result from the use of the heroin. The coroner, the decedent's ex-girlfriend, and the other individual who purchased heroin from defendant all testified that it was common knowledge among heroin users that different samples or preparations of heroin had different potencies and that the strength of heroin could vary a great deal among samples. The People's evidence demonstrated that the decedent, his ex-girlfriend, and the other individual all used the same sample of heroin purchased from defendant before July 22 and survived those encounters. People v Gaworecki, 2021 NY Slip Op 05392, Ct App 10-7-21

CRIMINAL LAW, EXPERT EVIDENCE, FALSE CONFESSIONS, CROSS-RACIAL IDENTIFICATION.

EXPERT TESTIMONY ON FALSE CONFESSION AND CROSS-RACIAL IDENDITIFICATION/MISIDENTIFICATION PROPERLY PRECLUDED; THREE-JUDGE DISSENT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a three-judge dissent, determined the trial judge, after a Frye hearing, properly precluded expert testimony of Dr. Redlich on false confessions. In addition, the trial court properly precluded expert testimony on cross-racial identification/misidentification:

On this record, the trial court did not abuse its discretion in finding that the proffered testimony would not have aided the jury. Although Dr. Redlich is an impressively credentialed researcher, properly qualified by the trial court as an expert in her field, the trial court found that her testimony at the Frye hearing revealed her difficulty in linking her research on the possible causes of false confessions to the case at hand. Despite her review of the witnesses' testimony at the Huntley hearing, she did not explain how her testimony was at all relevant to the circumstances presented by defendant's interrogation, even by crediting defendant's account of the events … . For instance, defendant flatly denied ever making the second, more detailed, confession—so, expert testimony regarding dispositional and situational factors that create a risk of a false confession has no relevance to the oral or written version of that statement. Moreover, defendant

maintained that the first handwritten statement was the product of outright coercion—including a physical assault the night before and the deprivation of food and medicine—rather than resulting from psychological coercion of police interrogation that creates the risk of false confession, consistent with a recondite theory of which Dr. Redlich would have testified. There is a difference between the classically, inherently coercive interrogation that produces an involuntary confession—an issue that the jury is well-equipped to understand … —and the phenomenon of false confessions involving the interplay of situational and dispositional factors that produce a coercive compliant false confession from an innocent suspect, an occurrence that the jury may find counterintuitive. People v Powell, 2021 NY Slip Op 06424, CtApp 11-18-21

CRIMINAL LAW, MIRANDA, PEDIGREE EXCEPTION.

IF QUESTIONING A DEFENDANT ABOUT WHERE HE/SHE LIVES SERVES AN ADMINISTRATIVE PURPOSE AND IS NOT A DISGUISED ATTEMPT TO OBTAIN INCRIMINATING INFORMATION, DEFENDANT'S ANSWER IS SUBJECT TO THE PEDIGREE EXCEPTION TO THE MIRANDA REQUIREMENT; DNA EVIDENCE GATHERED BY THE FORENSIC STATISTICAL TOOL (FST) SHOULD NOT HAVE BEEN ADMITTED WITHOUT HOLDING A FRYE HEARING (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing the Appellate Division, over a two-judge dissent, determined: (1) under the facts, the defendant's answer to the police officer's question regarding where he lived fell within the "pedigree exception" to the Miranda requirement (and therefore was not suppressible); and (2), the DNA evidence generated by the forensic statistical tool (FST) should not have been admitted without holding a Frye hearing:

We hold that the pedigree exception will not apply even if the pedigree question is reasonably related to police administrative concerns where, under the circumstances of the case, a reasonable person would conclude based on an objective analysis that the pedigree question was a "disguised attempt at investigatory interrogation" … . …

… [T]the pedigree questions were not a disguised attempt at investigatory interrogation … . … [T]he police asked defendant his name, date of birth, and where he lived immediately after their entry to the apartment, before the apartment had been searched and before any contraband had been found. The detective further testified that it is standard practice for all adults found at a location where a search warrant is executed to be handcuffed and asked these pedigree questions, regardless of whether contraband is found during the search. That defendant's response ultimately turned out to be incriminating does not alter the conclusion that, at the time it was asked, the question was not a disguised attempt at investigatory interrogation by the police … . * * *

Williams [35 NY3d 24] contains our reasoning on the Frye issue with respect to the FST. …

… "FST is a proprietary program exclusively developed and controlled by OCME [New York City Office of Chief Medical Examiner]," and … the approval of the DNA Subcommittee was "no substitute for the scrutiny of the relevant scientific community" … . People v Wortham, 2021 NY Slip Op 06530, CtApp 11-23-21

CRIMINAL LAW, JURIES, DISPLAY OF STATUTORY TEXT.

THE CONSENT OF BOTH PARTIES IS NOT REQUIRED FOR THE DISPLAY OF STATUTORY TEXT ON A VISUALIZER WHEN A JUDGE RESPONDS TO A JURY'S REQUEST FOR SUPPLEMENTAL INSTRUCTION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined the consent of the parties is not required for the display of the relevant statutory text on a visualizer during the judge's response to a jury's request for supplemental instruction. Consent of the parties is required for allowing the jury to be provided with copies of the statutory text, but not for the display of the text during the supplemental instruction:

When a deliberating jury requests supplemental instruction, Criminal Procedure Law § 310.30 requires the court to provide a meaningful response. When the jury's request concerns a relevant criminal statute, the law also permits the court to

provide the jury with copies of the statutory text, but only with the consent of both parties. This case asks us to decide whether consent of the parties is required before the court, during a readback of the requested law and relevant definitions, may simultaneously display the corresponding text using a visualizer … . We conclude that consent is not required … . …

During deliberations, the jury sent a note asking for "definitions of the law" and later clarified that they were requesting the elements and relevant definitions of the charged crimes. The jury also asked that this information be displayed on the visualizer.

The judge informed counsel that he would comply with this request and project the relevant statutory text so the jury could see it while the judge read the text aloud. Although defense counsel did not object to the material selected for the readback, he did object to the process of displaying the text for the jury, arguing that "placing [the text] on the visualizer is really [no] different from handing them a written copy." He asserted that once jurors are handed "instructions in written form, whether it is visually or physically, that they then start having the ability to interpret based on how they see the words, [and] what punctuation may or may not be there . . . ." The judge overruled the objection and proceeded as he had described to the parties. A short time later, the jury convicted defendant on two counts and acquitted him on one count of criminal possession of a weapon. People v Williams, 2021 NY Slip Op 06426, Ct App 11-18-21

CRIMINAL LAW, IDENTIFICATION, APPEALS.

THE SUPPRESSION COURT SHOULD HAVE ORDERED A RODRIGUEZ HEARING; THE APPELLATE DIVISION SHOULD NOT HAVE RELIED ON TRIAL TESTIMONY TO OVERCOME THE SUPPRESSION COURT'S ERROR (CT APP).

The Court of Appeals, reversing (modifying) the Appellate Division, determined defendant was entitled to a Rodriguez hearing on whether a witness's identification of the defendant was confirmatory. The Court of Appeals noted that the Appellate

Division should not have relied on trial testimony to overcome the suppression court's error:

Supreme Court erred in denying defendant's pretrial request for a hearing pursuant to People v Rodriguez (79 NY2d 445 [1992]), as the prosecutor here offered only bare assurances that the witness was familiar with defendant. Further, the Appellate Division erroneously relied on testimony adduced at trial to overcome the suppression court's error.

"Thus, the case should be remitted to Supreme Court for a hearing to determine whether the [photographic] identification procedure was confirmatory. If, after that hearing, the court concludes that the People have not sustained their burden, a Wade hearing should be held and further proceedings, including a new trial, should be had as the circumstances may warrant. If the court concludes that a Wade hearing is not required, the judgment[] should be amended to reflect that result" … . People v Carmona, 2021 NY Slip Op 05390, Ct App 10-7-21

CRIMINAL LAW, YOUTHFUL OFFENDERS.

ALTHOUGH DEFENDANT WAS CONVICTED OF AN ARMED FELONY, THE JUDGE SHOULD HAVE CONSIDERED WHETHER DEFENDANT IS ELIGIBLE FOR YOUTHFUL OFFENDER TREATMENT (CT APP).

The Court of Appeals, reversing the Appellate Division, determined the judge should have determined whether defendant, who had been convicted of an armed felony, was eligible for youthful offender treatment:

"[W]hen a defendant has been convicted of an armed felony . . . and the only barrier to his or her youthful offender eligibility is that conviction, the court is required to determine on the record whether the defendant is an eligible youth by considering the presence or absence of the factors set forth in CPL 720.10 (3)" … . Here, the People concede that the sentencing court failed to make any appropriate on-the-record determination. We accept the People's concession and, accordingly, the case should be remitted for consideration of youthful offender treatment. People v Hargrove, 2021 NY Slip Op 06427, Ct App 11-18-21

CRIMINAL LAW, JURY INSTRUCTIONS, SEX TRAFFICKING.

THE SEX TRAFFICKING STATUTE HAS TWO LINKED BUT DISTINCT ELEMENTS WHICH WERE PROPERLY EXPLAINED TO THE JURY IN THE INITIAL JURY INSTRUCTIONS; HOWEVER THE SUPPLEMENTAL INSTRUCTION IN RESPONSE TO A JURY NOTE ERRONEOUSLY COLLAPSED THE STATUTE TO A SINGLE ELEMENT; NEW TRIAL ORDERED ON THE SEX TRAFFICKING COUNTS (CT APP).

The Court of Appeals, in a brief memorandum, vacating the sex trafficking convictions and ordering a new trial, over two lengthy concurrences and a dissent, determined the supplemental jury instruction failed to explain to the jury that the sex trafficking statute has two linked but distinct elements which must be proven to convict. The positions taken by the concurrences differ and are too nuanced to fairly summarize here:

The sex trafficking statute is comprised of two distinct but linked elements, namely the offender must advance or profit from prostitution by one of the enumerated coercive acts (see Penal Law § 230.34). The trial court's supplemental instruction, in response to a jury note, erroneously severed the required link between those elements. Accordingly, defendant's sex trafficking convictions should be vacated, and a new trial held on those counts … . * * *

From Judge Singas's Concurrence:

Collapsing sex trafficking into a single-element crime would cast too small a net, unjustifiably limiting the jurisdiction of this State to prosecute only those cases where the entire crime occurred in New York. Just as significantly, treating the statute's two elements as unlinked could unjustifiably authorize prosecution of crimes in New York for extraterritorial conduct having no impact on the public safety of the state. Accordingly, we would hold that the sex trafficking statute is comprised of two discrete yet connected elements, to wit, the offender must advance or profit from prostitution through coercive acts taken in furtherance of his or her prostitution enterprise. People v Lamb, 2021 NY Slip Op 07057, CtApp 12-16-21

CRIMINAL LAW, EXPERT EVIDENCE, JUVENILES, ADOLESCENT BRAIN DEVELOPMENT.

IN AFFIRMING THE MURDER CONVICTION OF A 14-YEAR-OLD, THE COURT OF APPEALS HELD THE TRIAL COURT PROPERLY EXCLUDED EXPERT TESTIMONY ABOUT ADOLESCENT BRAIN DEVELOPMENT AND BEHAVIOR (CT APP).

The Court of Appeals, in a brief memorandum, affirmed the murder conviction of a 14-year-old noting that the trial court properly excluded expert testimony about the brain development and behavior of an adolescent without a Frye hearing:

Defendant sought to introduce testimony by an expert witness, concerning the science of adolescent brain development and behavior, to assist the jury in determining whether the People had met their burden of disproving justification. The trial court denied defendant's request, without conducting a Frye hearing … .

"[T]he admissibility and limits of expert testimony lie primarily in the sound discretion of the trial court" … . The criterion to be applied is "whether the proffered expert testimony would aid a lay jury in reaching a verdict" … . Under the particular facts of this case, the trial court did not abuse its discretion in denying defendant's request to permit the proposed expert witness testimony. People v Anderson, 2021 NY Slip Op 02735, CtApp 5-4-21

CRIMINAL LAW, JUROR MISCONDUCT, MENTAL HYGIENE LAW, SEX OFFENDERS.

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

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

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

CRIMINAL LAW, RIGHT TO COUNSEL.

DEFENDANT'S WAIVER OF APPEAL WAS UNENFORCEABLE; "DIFFICULTIES" BETWEEN DEFENDANT AND TWO ATTORNEYS ASSIGNED TO REPRESENT HIM DID NOT AMOUNT TO DEFENDANT'S FORFEITURE OF HIS RIGHT TO COUNSEL, AS THE TRIAL JUDGE HAD RULED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing the Appellate Division, determined defendant's waiver of appeal was not valid and the trial judge had violated defendant's right to counsel by essentially forcing defendant to represent himself after several attorneys had withdrawn. Of all the

attorneys who had withdrawn, only two cited difficulties with the defendant. The cited "difficulties" were defendant's "raised voice" and "lack of cooperation." There were no allegations of threats or abusive conduct. The other attorneys had withdrawn citing a conflict of interest, illness and leaving the state:

… [D]efendant's waiver in the case before us did not contain "clarifying language . . . that appellate review remained available for certain issues" … . Indeed, the written appeal waiver and the colloquy utterly failed to indicate that some rights to appeal would survive the waiver. Moreover, the written waiver implied that defendant was completely waiving his right "to prosecute [an] appeal as a poor person, and to have an attorney assigned" if indigent.

Defendant's appeal waiver thus mischaracterized the nature of the waiver of appeal by suggesting that the waiver included an absolute bar to the taking of a first-tier direct appeal and the loss of attendant rights to counsel and poor person relief … .
* * *

There may be circumstances where a defendant who refuses to cooperate with successive assigned attorneys is ultimately deemed to have forfeited the right to assigned counsel, although such an individual must be afforded the opportunity to retain counsel. … There is record evidence of only two attorneys who asked to be relieved due to difficulties with defendant. … County Court's own orders relieving Miosek, Taylor, Carlson, and Scott cited conflict of interest, illness, or departure from the state, not attorney-client animosity. Such factors were beyond defendant's control. People v Shanks, 2021 NY Slip Op 05450, CtApp 10-12-21

CRIMINAL LAW, SEARCH AND SEIZURE, STANDING TO CONTEST.

DEFENDANT WAS A DINNER GUEST IN HIS FRIEND'S APARTMENT WHEN THE POLICE RAIDED IT; OBSERVATIONS MADE DURING THE RAID LED TO A SEARCH WARRANT FOR THE APARTMENT; DEFENDANT ALLEGED HE RECEIVED MAIL AT THE APARTMENT; THE MAJORITY CONCLUDED DEFENDANT'S MOTION TO SUPPRESS DID NOT SUFFICIENTLY ALLEGE STANDING TO CONTEST THE SEARCH AND THE MOTION WAS PROPERLY DENIED WITHOUT A HEARING (CT APP).

The Court of Appeals, over an extensive, two-judge dissent, determined defendant's suppression motion was properly denied without holding a hearing. The majority concluded defendant did not sufficiently allege standing to contest to search. Defendant was a dinner guest in his friend's apartment at the time it was raided by the police. Evidence observed by the police during the raid was used to procure the search warrant:

CPL 710.60 (1) requires that a motion for suppression of physical evidence must state the ground or grounds of the motion and must contain sworn allegations of fact. CPL 710.60 (3) permits summary denial of a suppression motion where the motion papers do not provide adequate sworn allegations of fact … . The suppression court did not abuse its discretion in denying, without an evidentiary hearing, that branch of defendant's motion which was to suppress the physical evidence recovered upon the search of the apartment pursuant to a search warrant that had been executed after his arrest, because the allegations in the motion papers were insufficient to warrant a hearing.

… In denying defendant's motion, the suppression court stated that "defendant has failed to sufficiently allege standing to challenge the search of the subject premises," which is the gravamen of our holding today. Defendant's remaining arguments addressed by the dissent, including the assertion that dinner guests have an expectation of privacy in the home of their hosts, are academic.

From the dissent:

Mr. Ibarguen's [defendant's] motion papers allege that he was a lawful invitee whose mail was delivered to that apartment and Mr. Ibarguen testified to having been at dinner at his friends' house "all night." Those facts support his claim that as a social guest, he held a legitimate expectation of privacy in at least some part of the searched apartment enabling him to challenge the legality of the warrantless search and suppress evidence recovered therein. People v Ibarguen, 2021 NY Slip Op 05617, CtApp 10-14-21

CRIMINAL LAW, SEARCH AND SEIZURE, BACKPACK.

NO PROOF DEFENDANT'S BACKPACK WAS WITHIN DEFENDANT'S REACH WHEN IT WAS SEIZED AND SEARCHED; THEREFORE THE SEARCH WAS NOT A VALID SEARCH INCIDENT TO ARREST (CT APP).

The Court of Appeals, reversing the Appellate Division, in a brief memorandum decision, determined the search of defendant's backpack could not be justified as a search incident to arrest because there was no evidence the backpack was within defendant's reach when it was seized and searched:

The People failed to establish that the warrantless search of defendant's backpack was a valid search incident to arrest … . The record does not contain evidence supporting a determination that the backpack was in defendant's "immediate control or 'grabbable area'" … . There is a lack of testimony in the record indicating where the bag was in relation to defendant immediately prior to the search. Because Supreme Court denied defendant's suppression motion without reaching the People's alternative argument raised in opposition, we remit the matter to Supreme Court … . People v Mabry, 2021 NY Slip Op 03348, CtApp 5-27-21

CRIMINAL LAW, SEARCH AND SEIZURE, VEHICLES.

THE SEARCH WARRANT DID NOT AUTHORIZE THE SEARCH OF DEFENDANT'S VEHICLES; SEIZED ITEMS PROPERLY SUPPRESSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a three-judge dissent, determined that the search warrant did not authorize the search of defendant's vehicles and the items seized were properly suppressed:

The requirement that warrants must describe with particularity the places, vehicles, and persons to be searched is vital to judicial supervision of the warrant process … . Warrants "interpose the detached and independent judgment of a neutral Magistrate between the interested viewpoint of those engaged in ferreting out crime and potential encroachments on the sanctity and privacy of the individual" … . To further that role, our constitution assigns to the magistrate the tasks of evaluating whether probable cause exists to initiate a search and defining the subjects to be searched … .

The particularity requirement protects the magistrate's determination regarding the permissible scope of the search. Thus, to be valid, a search warrant must be "specific enough to leave no discretion to the executing officer" … . So important is the role of the neutral and detached magistrate that we have in the past parted ways from federal constitutional jurisprudence when we believed that an emerging rule of federal constitutional law "dilute[s] . . . the requirements of judicial supervision in the warrant process" …

… The application contained no mention of the existence of the vehicles ultimately searched, much less evidence connecting them to any criminality. Indeed, the observed pattern, as described in the affidavit, was for Mr. Gordon [defendant] to proceed from the residence to the street and back, without detouring to any vehicles parked at the residence. … "[N]o observation was reported as to any movement of persons between the house and the [vehicles]" … that would substantiate a belief that the vehicles searched were utilized in the alleged criminal activity.

Nor do we believe that the warrant for Mr. Gordon's "person" or "premises"—in the context of the factual allegations averred by the detectives—authorized a search of the vehicles. … [T]he mere presence of a vehicle seen at the sight of premises wherein the police suspect criminal activity to be occurring does not by itself provide probable cause to search the vehicle … . People v Gordon, 2021 NY Slip Op 01093, CtApp 2-18-21

CRIMINAL LAW, SEARCH AND SEIZURE, PREMISES DESCRIPTION.

THE WARRANT CORRECTLY DESCRIBED THE PREMISES TO BE SEARCHED AS A SINGLE FAMILY RESIDENCE BASED UPON THE INFORMATION AVAILABLE TO THE POLICE; DEFENDANT'S ALLEGATION THE RESIDENCE WAS ACTUALLY THREE SEPARATE APARTMENTS WAS NOT SUPPORTED BY SWORN AFFIDAVITS; THE MOTION TO SUPPRESS WAS PROPERLY DENIED WITHOUT A HEARING (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, determined the defendant's motion to suppress, alleging the premises to be searched was not adequately described in the warrant, was properly denied without a hearing. The warrant described a single family residence. Defendant alleged each of the three floors was a separate apartment. The Court of Appeals looked only at the evidence supporting the warrant and held the evidence available to the police established the building was a single residence. The defendant did not submit any sworn affidavits in support of the "three apartments" argument, so the motion court properly denied the motion without holding a hearing:

The warrant's description of the place to be searched as "a private residence," located at a unique, specified street address, was not facially deficient; given a commonsense reading, the warrant clearly commanded a search of "a" single residence, not a multi-unit building, at the marked street address. Because the warrant was facially sufficient, the case does not implicate the U.S. Supreme Court's ruling in Groh v Ramirez that courts may not rely on documents not incorporated and attached to the warrant in order to provide particularity that the warrant, on its face, lacks (see 540 US at 557-558). The motion court did not rely on the unincorporated warrant application materials to cure a facial deficiency in

the warrant, which Groh forbids. Rather, the court considered those materials for a different purpose—to determine whether the warrant's description of the place to be searched as a single private residence was supported by the information available to the detective who applied for the warrant and the court that issued the warrant. * * *

In People v Mendoza, we held that a suppression motion's "factual sufficiency should be determined with reference to the face of the pleadings, the context of the motion and defendant's access to information" (82 NY2d at 422; see also People v Jones, 95 NY2d 721, 729 [2001]). Although [defendant] lacked access to the materials that were before the warrant court, he had ready access to information about the actual conditions of the premises at the time of the search, but failed to provide it in support of his suppression motion. For example, he, his mother, or any other resident of the premises could have provided sworn affidavits or other evidence as to the separateness of the alleged residences on the three floors; the existence of unrelated tenants on the second floor; the obviousness to a visitor that the building contained separate residences—such as allegations that each unit had separate locking entry doors—or a variety of other types of evidence plainly known to residents of the house. People v Duval, 2021 NY Slip Op 00896, CtApp 2-11-21

CRIMINAL LAW, TRAFFIC STOP, PROBABLE CAUSE, APPEALS.

THE PEOPLE DID NOT DEMONSTRATE PROBABLE CAUSE FOR THE TRAFFIC STOP; THE 911 CALL WAS NOT PUT IN EVIDENCE AND THE RELIABILITY OF THE CALLER AND THE BASIS FOR THE CALLER'S KNOWLEDGE WERE NOT DEMONSTRATED; THE FACT THAT THE RELEVANT EVIDENCE WAS PRESENTED AT TRIAL WAS IRRELEVANT (CT APP).

The Court of Appeals, reversing the Appellate Division, determined the People did not present sufficient evidence at the suppression hearing. Probable cause for the traffic stop was based on a 911 call. But no evidence was presented to demonstrate the reliability of the caller or the basis for the caller's knowledge. The fact that the

relevant evidence was presented at trial did not matter. The appeal focuses on the evidence presented at the suppression hearing:

… [T]he officer's only justification for the stop was the dispatcher's report that a 911 caller had asserted that one of the vehicle's occupants possessed a "long gun." Initially, defendant claims that the stop was invalid because possession of a "long gun" is lawful in New York. We reject that claim as meritless (see Penal Law 265.00 [22]). However, the People failed to introduce the 911 recording, failed to introduce any evidence indicating whether the 911 caller was an identified citizen informant or an anonymous tipster, and failed to offer any explanation of the basis of the caller's knowledge. In sum, the People put forward no relevant information concerning the circumstances surrounding the call at the hearing. Contrary to the People's suggestion that an appellate court can consider evidence subsequently admitted at trial to justify affirmance of an order denying suppression, "the propriety of the denial must be judged on the evidence before the suppression court" … . Therefore, on the record of the suppression hearing, "whether evaluated in light of the totality of the circumstances or under the Aguilar-Spinelli framework, the reliability of the tip was not established" … . People v Walls, 2021 NY Slip Op 04949, CtApp 9-2-21

CRIMINAL LAW, TRANSLATORS, ACCUSATORY INSTRUMENTS.

THE USE OF TRANSLATORS TO DOCUMENT INFORMATION IN AN ACCUSATORY INSTRUMENT DID NOT RENDER THE INSTRUMENTS FACIALLY INSUFFICIENT BY ADDING A LAYER OF HEARSAY (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a two-judge dissent, determined that the use of translators in documenting information in an accusatory instrument did not create an additional layer of hearsay. The three accusatory instruments at issue, therefore, were deemed facially sufficient. Two of the accusatory instruments did not refer to the use of a translator, and the third did:

… "[I]n evaluating the sufficiency of an accusatory instrument," a court does "not look beyond its four corners (including supporting declarations appended thereto)" (… see CPL 100.15 [3]; 100.40 [1] [c] …). Courts must "not rely on external

factors to create jurisdictional defects not evident from the face of the" accusatory instrument … . Instead, "[w]hether the allegation of an element of an offense is hearsay, rendering the information defective, is to be determined on a facial reading of the accusatory instrument" … ..

Defects that do not appear on the "the face of the" accusatory instrument are "latent deficienc[ies]" that do not require dismissal … . * * *

We conclude that, when evaluating the facial sufficiency of an accusatory instrument, no hearsay defect exists where … the four corners of the instrument indicate only that an accurate, verbatim translation occurred, and the witness or complainant adopted the statement as their own by signing the instrument after the translation … . People v Slade, 2021 NY Slip Op 02866, CtApp 5-6-21

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW, ADMINISTRATIVE LAW, DEFAULT JUDGMENTS.

THE TRAFFIC AND PARKING VIOLATIONS BUREAU (TPVA) IS A CRIMINAL COURT WHICH CANNOT ISSUE A DEFAULT JUDGMENT WHEN A DEFENDANT FAILS TO APPEAR FOR A TRAFFIC-INFRACTION TRIAL; IN CONTRAST, A TRAFFIC VIOLATIONS BUREAU (TVB) IS AN ADMINISTRATIVE AGENCY, NOT A CRIMINAL COURT, AND MAY ISSUE A DEFAULT JUDGMENT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined the Suffolk County Traffic and Parking Violations Bureau (TPVA) is a criminal court which cannot issue a default judgment when a defendant who has pled not guilty does not show up for a traffic-infraction trial. On the other hand, a Traffic Violations Bureau (TVA) is not a criminal court and may issue a default judgment:

Defendants in these cases were prosecuted in district court … . Each defendant timely appeared before the TPVA, pleaded not guilty, and requested a trial. They were each given a document indicating the date and time of the trial with a warning of the repercussions for failure to appear: "THE COURT MAY ISSUE A WARRANT FOR YOUR ARREST OR PROCEED IN YOUR ABSENCE AND

YOU WILL BE LIABLE FOR ANY SENTENCE AND/OR FEES IMPOSED, INCLUDING INCARCERATION, AND other penalties permitted by law." Despite the warning notice, defendants failed to timely appear on their respective trial dates. No attempt was made by the People to try defendants in absentia. Rather, a judicial hearing officer of the TPVA rendered default judgments against them and imposed fines. …

The issue before us is whether a TPVA judicial hearing officer is authorized under the Vehicle and Traffic Law to render a default judgment against a defendant charged with a traffic infraction who first enters a timely not guilty plea but then fails to appear for trial. We answer that question in the negative. …

Unlike TPVAs, … the TVB is not a criminal court … . It is … an administrative tribunal where, in cities having a population of one million or more, traffic infractions may be disposed of in an administrative hearing held before a hearing officer appointed by the Commissioner of Motor Vehicles … . In contrast to trials conducted before TPVAs, hearings before the TVB are not governed by the CPL … . People v Iverson, 2021 NY Slip Op 03347, CtApp 5-27-21

EMPLOYMENT LAW, DISCRIMINATION, HUMAN RIGHTS LAW, MUNICIPAL LAW.

WHERE PLAINTIFF'S EMPLOYER IS A BUSINESS ENTITY, HERE BLOOMBERG L.P., AN OWNER OR OFFICER OF THE COMPANY, HERE MICHAEL BLOOMBERG, IS NOT AN EMPLOYER WITHIN THE MEANING OF THE NYC HUMAN RIGHTS LAW; THE EMPLOYMENT DISCRIMINATION ACTION AGAINST MICHAEL BLOOMBERG WAS PROPERLY DISMISSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over an extensive dissent, determined Michael Bloomberg, in his status as "owner" and officer of the company, Bloomberg L.P., is not an "employer" within the meaning of the NYC Human Rights Law, and therefore cannot be liable for harassment of the plaintiff

(Doe) by her supervisor, Ferris. Bloomberg L.P. can be vicariously liable as the employer, but Michael Bloomberg cannot:

Plaintiff, an employee of Bloomberg L.P. using the pseudonym "Margaret Doe," brought suit against defendants Bloomberg L.P., her supervisor Nicholas Ferris, and Michael Bloomberg, asserting several causes of action arising from alleged discrimination, sexual harassment, and sexual abuse. The question before us is whether Bloomberg, in addition to Bloomberg L.P., may be held vicariously liable as an employer under the New York City Human Rights Law (Administrative Code of City of NY, title 8 [City HRL]) based on his status as "owner" and officer of the company. We hold that Bloomberg is not an "employer" within the meaning of the City HRL and accordingly, we affirm the dismissal of plaintiff's claims that seek to hold Bloomberg vicariously liable for Ferris's offending conduct. * * *

The language in the City HRL … requires no external limiting principle exempting employees from individual suit as employers. … [W]here a plaintiff's employer is a business entity, the shareholders, agents, limited partners, and employees of that entity are not employers within the meaning of the City HRL. … [T]hose individuals may incur liability only for their own discriminatory conduct, for aiding and abetting such conduct by others, or for retaliation against protected conduct (Administrative Code of City of NY § 8-107 [1], [6], [7]). This rule [is] consistent with the principles of vicarious and limited liability governing certain business structures (see e.g. Partnership Law §§ 26, 121-303; Limited Liability Company Law § 609; Business Corporation Law § 719). Doe v Bloomberg, L.P., 2021 NY Slip Op 00898, CtApp, 2-11-21

ENVIRONMENTAL LAW, CONSTITUTIONAL LAW, FOREVER WILD.

THE CONSTRUCTION OF SNOWMOBILE TRAILS IN THE ADIRONDACK PARK IS PROHIBITED BY THE "FOREVER WILD" PROVISION IN THE NEW YORK STATE CONSTITUTION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over an extensive two-judge dissent, determined the construction of snowmobile trails in the

Adirondack Park would violate the "forever wild" provision of the New York State Constitution:

… [W]e must determine whether the state's plan for the construction of approximately 27 miles of Class II community connector trails designed for snowmobile use in the Forest Preserve is permissible under the New York Constitution. The plan requires the cutting and removal of thousands of trees, grading and leveling, and the removal of rocks and other natural components from the Forest Preserve to create snowmobile paths that are nine to 12 feet in width. We conclude that construction of these trails violates the "forever wild" provision of the New York State Constitution (art XIV, § 1) and therefore cannot be accomplished other than by constitutional amendment. * * *

The Forest Preserve is a publicly owned wilderness of incomparable beauty. Located in two regions of the Adirondack and Catskill Mountains, the Forest Preserve—with its trees, rivers, wetlands, mountain landscape, and rugged terrain—is a respite from the demands of daily life and the encroachment of commercial development. It has been this way for over a century because our State Constitution mandates:

"The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed." …

This unique "forever wild" provision was deemed necessary by its drafters and the people of the State of New York to end the commercial destruction and despoliation of the soil and trees that jeopardized the state's forests and, perhaps most importantly, the state watershed. Protect the Adirondacks! Inc. v New York State Dept. of Envtl. Conservation, 2021 NY Slip Op 02734, CtApp 5-4-21

FAMILY LAW, CONTRACT LAW, ACKNOWLEDGMENTS ON NUPTIAL AGREEMENTS.

CASE 1: THE ACKNOWLEDGMENT OF SIGNATURES ON A NUPTIAL AGREEMENT MUST BE CONTEMPORANEOUS, BUT NOT NECESSARILY SIMULTANEOUS, WITH THE SIGNING; HERE A SEVEN-YEAR DELAY WAS TOO LONG; CASE 2: A DEFECT IN THE ACKNOWLEDGMENTS, HERE THE LAWYERS' FAILURE TO STATE THE SIGNERS WERE PERSONALLY KNOWN TO THEM, DID NOT INVALIDATE THE AGREEEMENT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined: (1) Pursuant to Domestic Relations Law (DRL) 236 (B) (3), the acknowledgment of signatures on a nuptial agreement must be contemporaneous, but not necessarily simultaneous, with the signing: and (2) if the signing is contemporaneous, but the acknowledgment is defective, the nuptial agreement remains enforceable. Here, in the Anderson case, the husband's signature was not acknowledged until seven years after the signing (shortly before filing for divorce). In that circumstance the agreement would have to be reaffirmed to be enforceable. In the Koegel case, the lawyers' acknowledgments failed indicate the undisputed fact that the signers were personally known to them. The defect in the acknowledgments did not affect the validity of the agreement and there was no need for reaffirmation:

[Re: Anderson:] A document that depends on an untimely acknowledgment is the legal and functional equivalent of an unacknowledged document. However, in a case involving such a document, the parties are not without a remedy. When there is an excessive delay rendering an acknowledgment ineffective and the agreement therefore unenforceable, the parties are free to reaffirm their agreement, again based on the information available to them at that time. To comply with DRL § 236 (B) (3), reaffirmation would require that both parties must again sign and acknowledge the agreement. The rule thus places the parties on a fair and equal footing in deciding whether to be bound by the agreement—either initially or at some future date if the agreement is unenforceable because of the delay. * * *

[Re: Koegel:] We … hold that the defect … presented in this appeal may be overcome with adequate evidence that the statutory requirements were met, even if the acknowledgment is not properly documented in the first instance. This limited

remedy avoids invalidating a nuptial agreement when the parties have done all that the DRL requires of them. In other words, the signature and acknowledgment may satisfy the statutory mandates if extrinsic evidence supports "that the acknowledgment was properly made in the first instance" even if the certificate fails to "include the proper language" due to the notary's or other official's error … . Anderson v Anderson, 2021 NY Slip Op 07058, CtApp 12-16-21

FORECLOSURE, ACCELERATION OF THE DEBT, VOLUNTARY DISCONTINUANCES.

A MORTGAGE DEBT CAN BE ACCELERATED ONLY BY AN UNEQUIVOCAL OVERT ACT, I.E., COMMENCING A FORECLOSURE ACTION OR A DOCUMENT MAKING IT CLEAR THE ENTIRE DEBT IS IMMEDIATELY DUE (NOT THAT IT WILL BE DUE IN THE FUTURE); A MORTGAGE DEBT CAN BE DE-ACCELERATED BY A VOLUNTARY DISCONTINUANCE, EVEN IF ITS PURPOSE IS TO STOP THE STATUTE OF LIMITATIONS FROM RUNNING (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a partial dissent and a concurrence, clarified how courts should handle two recurring issues in the sea of foreclosures which have inundated the courts: (1) how is the mortgage debt accelerated such that the entire amount becomes due and the six-year statute of limitations for a foreclosure action starts running; and (2) how is the debt de-accelerated such that the statute of limitations for a foreclosure action stops running and the borrower can resume monthly installment payments? The Court of Appeals held that acceleration of the debt must be done by an unequivocal overt act. In the Vargas case, the foreclosure action did not refer to the correct loan, which had been modified and did not therefore accelerate the debt. In the Wells Fargo case, the letter did not ask for immediate payment of the entire debt and therefore did not accelerate the debt. As for de-acceleration, that can be accomplished by voluntarily discontinuing the foreclosure action:

There are sound policy reasons to require that an acceleration be accomplished by an "unequivocal overt act." * * *

[Re: Acceleration, the Vargas case] … [W]here the deficiencies in the [foreclosure] complaints were not merely technical or de minimis and rendered it unclear what debt was being accelerated—the commencement of these [foreclosure] actions did not validly accelerate the modified loan … . * * *

[Re: Acceleration, the Wells Fargo case] … [T]he letter did not seek immediate payment of the entire, outstanding loan, but referred to acceleration only as a future event, indicating the debt was not accelerated at the time the letter was written. * * *

[Re: De-acceleration or Revocation of the Acceleration] … [W]hen a bank effectuated an acceleration via the commencement of a foreclosure action, a voluntary discontinuance of that action—i.e., the withdrawal of the complaint—constitutes a revocation of that acceleration. In such a circumstance, the noteholder's withdrawal of its only demand for immediate payment of the full outstanding debt, made by the "unequivocal overt act" of filing a foreclosure complaint, "destroy[s] the effect" of the election … . …

We reject the theory … that a lender should be barred from revoking acceleration if the motive of the revocation was to avoid the expiration of the statute of limitations on the accelerated debt. A noteholder's motivation for exercising a contractual right is generally irrelevant. Freedom Mtge. Corp. v Engel, 2021 NY Slip Op 01090, CtApp 2-18-21

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

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

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

What is necessary to rebut the presumption that a RPAPL 1304 notice was mailed will depend, in part, on the nature of the practices detailed in the affidavit. Moreover, contextual considerations may also factor into the analysis. For example, here, [the bank] points out that residential notes and mortgages are negotiable instruments that often change hands at various points during their duration, which may impact the timing of the creation and mailing of RPAPL 1304 notices—a contextual factor a court could consider in assessing whether a

purported deviation from routine procedure was material. We reject defendants' argument that a single deviation from any aspect of the routine office procedure necessarily rebuts the presumption of mailing. Such a standard would undermine the purpose of the presumption because, in practice, it would require entities to retain actual proof of mailing for every document that could be potentially relevant in a future lawsuit. CIT Bank N.A. v Schiffman, 2021 NY Slip Op 01933, CtApp 3-30-21

INSURANCE LAW, CONTRACT LAW, SECURITIES.

THE $140 MILLION PAID BY BEAR STEARNS TO THE SEC TO SETTLE AN ACTION ALLEGING THE FACILITATION OF LATE TRADING WAS NOT A "PENALTY IMPOSED BY LAW" AND THEREFORE WAS A COVERED LOSS UNDER THE TERMS OF THE INSURANCE POLICIES (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge DiFiore, over an extensive dissent, determined the funds paid to the Security and Exchange Commission (SEC) to settle an action alleging Bear Stearns "facilitated late trading" and "deceptive market timing activity" did not constitute a "penalty imposed by law" and therefore was a covered loss under the insurance policies:

… [U]nder relevant New York law, penalties have consistently been distinguished from compensatory remedies, damages, and payments otherwise measured through the harm caused by wrongdoing. Thus, at the time the parties contracted, a reasonable insured would likewise have understood the term "penalty" to refer to non-compensatory, purely punitive monetary sanctions. In this case, the question therefore distills to whether the disputed $140 million settlement payment meets that standard. …

… Bear Stearns demonstrated that the $140 million disgorgement payment was calculated based on wrongfully obtained profits as a measure of the harm or damages caused by the alleged wrongdoing that Bear Stearns was accused of facilitating. This can be contrasted with the $90 million payment denominated a "penalty," which was not derived from any estimate of harm or gain flowing from

the improper trading practices. J.P. Morgan Sec. Inc. v Vigilant Ins. Co., 2021 NY Slip Op 06528, CtApp 11-23-21

MEDICAID, MUNICIPAL LAW, PUBLIC HEALTH LAW, SOCIAL SERVICES LAW.

FUNDS FOR PERSONAL CARE SERVICES ARE MEDICAID FUNDS SUBJECT TO THE AUDIT AND RECOUPMENT AUTHORITY OF THE CITY OF NEW YORK HUMAN RESOURCES ADMINISTRATION; APPELLATE DIVISION REVERSED (CT APP)..

The Court of Appeals, reversing the Appellate Division, determined funds paid for personal care were Medicaid funds which were subject to the audit and recoupment authority of the City of New York Human Resources Administration (HRA). The facts are explained in the Appellate Division decision:

For the reasons stated in the dissenting opinion below (Matter of People Care Inc. v City of New York, 175 AD3d 134, 147-152 [1st Dept 2020] [Richter, J.P., dissenting]), we conclude that the funds for personal care services paid to petitioner People Care, Inc. under the Health Care Reform Act (Public Health Law §§ 2807-v [1] [bb] [i], [iii]) are Medicaid funds subject to the audit and recoupment authority of the City of New York Human Resources Administration (HRA) in accordance with the parties' 2001 contract. Matter of People Care Inc. v City of N.Y. Human Resources Admin., 2021 NY Slip Op 01834, CtApp 3-25-21

MUNICIPAL LAW, LANDLORD-TENANT, WATER BILLS.

PLAINTIFF LANDLORD, PURSUANT TO THE VILLAGE WATER DEPARTMENT'S RULES, CAN NOT BE HELD PERSONALLY LIABLE FOR THE TENANT'S UNPAID WATER BILLS (CT APP).

The Court of Appeals, reversing Supreme Court, determined plaintiff landlord was not personally responsible for the tenant's unpaid water bills. The village water department's rules provided only a lien on the property and cutting off water as remedies:

The Water Department Rules and Regulations of the Village of Herkimer, on which the Village relies, do not authorize a claim against plaintiff for personal liability upon nonpayment of water rents. To the extent the Rules and Regulations determine the Village's remedies for unpaid water bills, they refer to "a lien on the premises where the water is used" (Rule No. 8; see also Village Law § 11-1118 [providing that unpaid water rents constitute a lien on real property]) and to shutting off water supply, upon notice (see Rule No. 9; see also Village Law § 11-1116 [providing that a village may enforce observance of its water use rules and regulations by cutting off water supply]). Herkimer County Indus. Dev. Agency v Village of Herkimer, 2021 NY Slip Op 01835, CtApp 3-25-21

NEGLIGENCE, ZONE OF DANGER.

GRANDMOTHER WHO WITNESSED DEBRIS FROM THE FACADE OF A BUILDING INJURE HER TWO-YEAR-OLD GRANDDAUGHTER IS "IMMEDIATE FAMILY" WITHIN THE MEANING OF "ZONE OF DANGER" JURISPRUDENCE; GRANDMOTHER CAN THEREFORE MAINTAIN AN ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over two concurrences, reversing the Appellate Division, determined that a grandmother who witnessed the death of her grandchild is "immediate family" such that she

may recover damages for emotional distress under the “zone of danger” theory (negligent infliction of emotional distress):

This case begins with the heart-breaking death of a child. Our responsibility is to determine whether plaintiff-grandparent Susan Frierson, who was in close proximity to the decedent-grandchild at the time of the death-producing accident, may pursue a claim for bystander recovery under a “zone of danger” theory.

We have applied the settled “zone of danger” rule to “allow[] one who is . . . threatened with bodily harm in consequence of the defendant’s negligence to recover for emotional distress” flowing only from the “viewing [of] the death or serious physical injury of a member of [that person’s] immediate family” … . Unsettled at this juncture, however, are “the outer limits” of the phrase “immediate family” … . Once again, we are not asked to fix permanent boundaries of the “immediate family.” Instead, our task simply is to determine whether a grandchild may come within the limits of her grandparent’s “immediate family,” as that phrase is used in zone of danger jurisprudence.

We conclude that the grandchild comes within those limits. Consistent with our historically circumspect approach expanding liability for emotional damages within our zone of danger jurisprudence, our increasing legal recognition of the special status of grandparents, shifting societal norms, and common sense, we conclude that plaintiff’s grandchild is “immediate family” for the purpose of applying the zone of danger rule.

On May 17, 2015, plaintiff Susan Frierson and her two-year-old granddaughter, decedent Greta Devere Greene, were in front of a building when they were suddenly struck by debris that fell from the facade of that edifice. Emergency measures taken to save Greta’s life failed, and she died the next day. Greene v Esplanade Venture Partnership, 2021 NY Slip Op 01092, CtApp 2-18-21

TRUSTS AND ESTATES, WORKERS' COMPENSATION.

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

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

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

The legislature's 2009 amendments to Workers' Compensation Law §§ 15 (3) (u) and 25 (1) (b)—which provide that SLU awards may be "payable" in a lump sum upon request of the injured employee …—changed the allowable methods of payment for SLU awards. However, the Estate's contention that these amendments implicitly provide a claimant's estate a new entitlement to the value of an SLU award upon a claimant's death, or otherwise direct that an SLU award "accrues" at that time for purposes of an estate's recovery—issues that are distinct from the permissible methods of payment for such awards …—cannot be reconciled with the fact that the legislature did not amend Workers' Compensation Law § 15 (4) (d) when it authorized lump sum payments. An estate's entitlement to an SLU award upon a claimant's death remains governed by Workers' Compensation Law

§ 15 (4) (d), which was left untouched by the 2009 amendments. Matter of Estate of Youngjohn v Berry Plastics Corp., 2021 NY Slip Op 02017, CtApp 4-1-21

WORKERS' COMPENSATION.

WORKERS' COMPENSATION DEATH BENEFIT CLAIMS CANNOT BE TRANSFERRED TO THE SPECIAL FUND ON OR AFTER JANUARY 1, 2014, EVEN IF THE DISABILITY CLAIM FOR THE SAME INJURY HAD BEEN TRANSFERRED BEFORE THE CUT-OFF (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Rivera, over a two-judge dissent, determined Workers' Compensation death benefit claims which accrued on orf after January 1, 2014, cannot be transferred to the Special Fund for Reopened Cases (Special Fund) even if the disability claim for the same injury had been transferred prior to the cut-off:

Under Workers' Compensation Law (WCL) § 25-a (1-a), no liability for claims submitted on or after January 1, 2014, may be transferred to the Special Fund for Reopened Cases (the Special Fund). The common issue presented in these appeals is whether WCL § 25-a (1-a) forecloses the transfer of liability for a death benefits claim submitted on or after the cut-off, regardless of the prior transfer of liability for a worker's disability claim arising out of the same injury. Based on the plain statutory language, which broadly applies to all claims submitted after the deadline, and our established precedent that a death benefits claim accrues at the time of death and "is a separate and distinct legal proceeding" from the worker's original disability claim … , we conclude that liability for the death benefits claims at issue here could not be transferred to the Special Fund. Matter of Verneau v Consolidated Edison Co. of N.Y., Inc., 2021 NY Slip Op 06531, CtApp 11-23-21

ZONING, LAND USE, APPEALS, ADMINISTRATIVE LAW.

ONCE THE APPELLATE DIVISION DECIDED THE NYC DEPARTMENT OF BUILDINGS ACTED RATIONALLY IN APPROVING THE USE OF A BUILDING AS A HOMELESS SHELTER ITS JUDICIAL REVIEW WAS DONE; THE APPELLATE DIVISION SHOULD NOT HAVE REMITTED THE MATTER FOR A HEARING ON THE SAFETY OF THE BUILDING (CT APP).

The Court of Appeals, reversing the Appellate Division, determined the Appellate Division did not have the authority to send the matter back for a hearing after finding the NYC Department of Buildings (DOB) acted rationally when it approved the use of a building as a homeless shelter:

The Appellate Division erred in remitting to Supreme Court for a hearing on whether the building's use as a homeless shelter was "consistent with general safety and welfare standards." In this CPLR article 78 proceeding, the scope of judicial review does not extend past the question of whether the challenged determinations were irrational, which is a question of law (see CPLR 7803[3] …). Upon concluding that an authorized agency has reviewed a matter applying the proper legal standard and that its determination has a rational basis, a court cannot second guess that determination by granting a hearing to find additional facts or consider evidence not before the agency when it made its determination … . Accordingly, it was improper for the Appellate Division to remit for plenary judicial proceedings to address "general safety and welfare" issues, thereby contravening the applicable standard of judicial review in this context and inviting inconsistent enforcement of the Building Code. Matter of West 58th St. Coalition, Inc. v City of New York, 2021 NY Slip Op 03346, CtApp 5-27-21