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Fourth Department
Quarterly Reversal
Report
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An Organized Compilation of Selected Decisions, Mostly Reversals, Released by the Fourth Department and Posted on the New York Appellate Digest Website January – March 2022. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Quarterly Reversal Report.

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CIVIL PROCEDURE, FAMILY LAW, EXCLUSION OF MEDIA FROM HEARING.

A LOCAL ONLINE NEWS OUTLET SHOULD NOT HAVE BEEN EXCLUDED FROM A FAMILY COURT HEARING REGARDING WHETHER A DEPUTY COUNTY ATTORNEY SHOULD BE DISQUALIFIED FROM A NEGLECT PROCEEDING ON CONFLICT OF INTEREST GROUNDS; THE OUTLET IS ENTITLED TO A TRANSCRIPT OF THE HEARING (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined appellant, an online local news outlet, should not have been excluded from an attorney-disqualification hearing and was entitled to a transcript of the hearing. The respondent in a neglect proceeding had moved to disqualify the deputy county attorney on conflict of interest grounds. Appellant's owner deemed the motion newsworthy because the

deputy county attorney had just been elected City-Court Judge. When appellant's owner attempted to attend the disqualification hearing he was denied entry:

… "[T]he general public may be excluded from any hearing under [Family Court Act] article [10] and only such persons and the representatives of authorized agencies admitted thereto as have an interest in the case" (§ 1043). In making that determination, however, "[a]ny exclusion of courtroom observers must . . . be accomplished in accordance with 22 NYCRR 205.4 (b)" … . That rule provides that "[t]he general public or any person may be excluded from a courtroom [in Family Court] only if the judge presiding in the courtroom determines, on a case-by-case basis based upon supporting evidence, that such exclusion is warranted in that case" … . The rule further provides certain nonexclusive factors that a Family Court judge may consider in exercising his or her discretion, and requires that the judge make findings prior to ordering any exclusion … .

… [T]he court abused its discretion in excluding appellant from the hearing on the underlying disqualification motion. … [T]he court violated 22 NYCRR 205.4 (b) by failing to make findings prior to ordering the exclusion, and … there is no indication … that the court rendered its determination based on … evidence or considered any of the relevant factors in exercising its discretion. Moreover, … the court lacked an adequate basis to exclude appellant from the hearing on the disqualification motion … . * * *

… [T]he release of the transcript is consistent with Family Court Act § 166 and 22 NYCRR 205.5. … [T]he statute provides in relevant part that although "[t]he records of any proceeding in the family court shall not be open to indiscriminate public inspection[,] . . . the court in its discretion in any case may permit the inspection of any papers or records" … . The statute thus "does not render Family Court records confidential, but merely provides that they are not open to indiscriminate public inspection" … . The statute makes clear that Family Court "has the discretionary statutory authority to permit the inspection of any record by anyone at any time … .Matter of Rajea T. (Niasia J.), 2022 NY Slip Op 01940, Fourth Dept 3-18-22

Practice Point: Although the general public can be excluded from Family Court Article 10 proceedings, the judge exercising the discretion to exclude an observer must make certain findings in accordance with 22 NYCRR 205-4 (b). Family Court here made no findings and abused its discretion by excluding the news outlet. The court proceeding concerned whether the county attorney handling the

neglect case should be disqualified on conflict of interest grounds, and did not concern the underlying allegations of neglect. The news outlet is entitled to a transcript of the hearing.

CIVIL PROCEDURE, ORDER-DECISION CONFLICT.

WHERE AN ORDER CONFLICTS WITH A DECISION, THE DECISION CONTROLS (FOURTH DEPT).

The Fourth Department, modifying Supreme Court in this post-judgment matrimonial case, determined the decision controls the discrepancy between the order and the decision:

… [B]oth parties expressly agreed in the oral stipulation that plaintiff's benefits would be distributed "[i]n accordance with the Majauskas formula." That oral stipulation was an unambiguous expression of the parties' intent to follow Majauskas, …

… [T]he amended order conflicts with the court's written decision insofar as the … amended order purports to award defendant 23.86% of a former spouse survivor annuity under 5 USC § 8341 (h) (1). The stated percentage represents defendant's share of plaintiff's gross monthly annuity, as calculated by the court pursuant to the Majauskas formula, but the court in its decision made no award to defendant of a former spouse survivor annuity, which, had it been awarded, would have expressly conflicted with the parties' agreement. Where, as here, there is a conflict between the decision and the order, the decision controls, and we therefore modify the amended order accordingly … . Reukauf v Kraft, 2022 NY Slip Op 01898, Fourth Dept 3-18-22

Practice Point: If there is a conflict between an order and a decision, the decision controls.

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CIVIL PROCEDURE, PRELIMINARY INJUCTION, UNDERTAKING.

ALTHOUGH THE PRELIMINARY INJUNCTION IN THIS BREACH OF CONTRACT ACTION WAS PROPERLY IMPOSED, SUPREME COURT SHOULD HAVE REQUIRED THE POSTING OF AN UNDERTAKING (FOURTH DEPT).

The Fourth Department, modifying Supreme Court, determined that, although the preliminary injunction in this breach of contract action was properly imposed, Supreme Court should have provided for an undertaking:

… [T]he court erred in granting the preliminary injunction without providing for an undertaking. With certain exceptions that are not applicable here, prior to the court granting a preliminary injunction, a plaintiff must post an undertaking in an amount fixed by the court (see CPLR 6312 [b] …), and that requirement may not be waived … . TDA, LLC v Lacey, 2022 NY Slip Op 00779. Fourth Dept 2-4-22

CIVIL PROCEDURE, PROPOSED AMENDMENTS TO COMPLAINT PATENTLY DEVOID OF MERIT.

PLAINTIFF'S MOTION TO AMEND THE COMPLAINT SHOULD NOT HAVE BEEN GRANTED; THE WAS NO ALLEGATION THE PARTY TO BE ADDED AS A DEFENDANT HAD ANY INTEREST IN THE PROPERTY IN DISPUTE; AND THE CIVIL CONSPIRACY CAUSE OF ACTION PLAINTIFF SOUGHT TO ADD IS NOT RECOGNIZED IN NEW YORK; THEREFORE THE PROPOSED AMENDMENTS WERE PATENTLY DEVOID OF MERIT (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined the motion to amend the complaint to add a defendant (Fu) and a cause of action for civil conspiracy should not have been granted. Plaintiff did not allege that Fu had any interest in the property in dispute. And New York does not recognize civil conspiracy as a tort:

It is well settled that leave to amend a pleading shall be freely given, provided the amendment is not palpably insufficient, does not prejudice or surprise the opposing

party, and is not patently devoid of merit . . . , and the decision to permit an amendment is within the sound discretion of the court" … . Initially, plaintiff clarified in the amended complaint that the first cause of action, which is asserted against all defendants and seeks to set aside the deed and mortgage, was brought under RPAPL article 15. Pursuant to RPAPL article 15, an action may be maintained against any "person [who] . . . may have an . . . interest in the real property which may in any manner be affected by the judgment" (RPAPL 1511 [2]). Here, plaintiff failed to allege in the amended complaint any interest that Fu may have in the property and, thus, she is not a proper party to that cause of action … . Furthermore, New York does not recognize civil conspiracy to commit a tort, such as fraud or conversion, as an independent cause of action … . Therefore, the proposed amendments with respect to Fu are patently devoid of merit. Landco H & L, Inc. v 377 Main Realty, Inc., 2022 NY Slip Op 01695, Fourth Dept 3-11-22

Practice Point: New York does not recognize civil conspiracy as a tort. This case is an example of what it means to find proposed amendments to a complaint "patently devoid of merit."

CONTRACT LAW, TWO CONTRACTS NOT INTERTWINED, ONE CANNOT BE CITED AS A DEFENSE TO THE OTHER.

DEFENDANT'S AGREEMENT TO PURCHASE PLAINTIFF'S BUSINESS WAS NOT ENTWINED WITH AN EMPLOYMENT AGREEMENT BETWEEN PLAINTIFF AND DEFENDANT WHICH INCLUDED A COVENANT NOT TO COMPETE; THEREFORE PLAINTIFF'S ALLEGED BREACH OF THE COVENANT NOT TO COMPETE WAS NOT A DEFENSE TO DEFENDANT'S BREACH OF THE PURCHASE AND SALE AGREEMENT (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined an employment contract between plaintiff and defendant, which included a covenant not to compete, was not entwined with the separate sales agreement in which defendant promised to pay $200,000 for plaintiff's business. Therefore plaintiff was entitled to summary judgment on the sales contract because defendant defaulted after making the first payment:

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"Generally, breach of a related contract will not in the ordinary course defeat summary judgment on [a promissory] note[]" … . Nonetheless, that "rule does not apply where the contract and instrument are intertwined" and inseparable … . Whether two agreements are inextricably intertwined is a question of law for the court to decide because it involves a matter of contract interpretation … .

Here, the sales contract and employment agreement are not inextricably intertwined such that plaintiff's purported breach of the noncompetition covenants in the latter constitute a defense to defendant's default on the promissory note … . Saulsbury v Durfee, 2022 NY Slip Op 00566, Fourth Dept 1-28-22

CORRECTION LAW, CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT, SEXUALLY VIOLENT OFFENDER DESIGNATION.

BECAUSE OF UNAMBIGUOUS STATUTORY LANGUAGE, DEFENDANT'S MICHIGAN CONVICTION WAS DEEMED A "SEXUALLY VIOLENT OFFENSE" EVEN THOUGH THE SAME CONDUCT IN NEW YORK WOULD NOT QUALIFY AS A "SEXUALLY VIOLENT OFFENSE;" STRONG TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the result, while admittedly unfair, is required by unambiguous statutory language. For predicate felony purposes, a Michigan conviction was deemed a "sexually violent offense," even though the same conduct would not constitute a "sexually violent offense" if committed in New York:

A " '[s]exually violent offender' means a sex offender who has been convicted of a sexually violent offense" (Correction Law § 168-a [7] [b]). A " '[s]exually violent offense,' " among other things, is "a conviction of an offense in any other jurisdiction which includes all of the essential elements of any [New York] felony [enumerated in section 168-a (3) (a)] *or conviction of a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred"* (§ 168-a [3] [b] [emphasis added]). It is undisputed that defendant was convicted of a felony in Michigan "for which [he] is required to register as a sex offender in [that] jurisdiction" (id.). Defendant's Michigan conviction thus constitutes a " '[s]exually violent offense' " as defined

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by the second of the two disjunctive clauses that comprise section 168-a (3) (b). It follows that defendant was properly designated a sexually violent offender, even though he would not qualify as such had he committed the same conduct in New York … . People v Talluto, 2022 NY Slip Op 00575, Fourth Dept 1-28-22

CRIMINAL LAW, BASIS OF AN AGREEMENT TO A LONG SENTENCE REMOVED BY AN APPEAL IN ANOTHER CASE, GUILTY PLEA VACATED.

DEFENDANT MAY HAVE PLED GUILTY AND ACCEPTED A 16-YEAR SENTENCE IN MONORE COUNTY BECAUSE HE WAS ALREADY SENTENCED TO 14 – 24 YEARS FOR ANOTHER OFFENSE IN ONTARIO COUNTY; ON APPEAL THE ONTARIO COUNTY SENTENCE WAS REDUCED TO FOUR YEARS; MONROE COUNTY GUILTY PLEA VACATED (FOURTH DEPT).

The Fourth Department, vacating defendant's guilty plea, determined defendant may have pled guilty and accepted a 16-year sentence in Monroe County because he was already serving a 14-24 year sentence for another offense in Ontario County. Subsequently, on appeal, the Fourth Department reduced the Ontario County sentence to four years:

"The critical question is whether the removal or reduction of the preexisting sentence nullified a benefit that was expressly promised and was a material inducement to the guilty plea" … . Here, when defendant pleaded guilty in Monroe County, the court expressly informed him that the aggregate 16-year term of imprisonment would run concurrently with the aggregate 14-to-24-year term already imposed in Ontario County, and thus the plea would result in no or relatively little additional prison time … . Once the Ontario County sentence was reduced as a result of our determination on the prior appeal to a term of four years, defendant lost the benefit previously conferred by the concurrent nature of the Monroe County plea, and "we cannot say defendant would have accepted the plea bargain . . . had it not been for his [14-to-24]-year sentence in the [Ontario County] case, now reduced to [four years]" … . People v Ringrose, 2022 NY Slip Op 00569, Fourth Dept 1-28-22

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CRIMINAL LAW, BATSON CHALLENGE, NEW TRIAL ORDERED.

IN RESPONSE TO A BATSON INQUIRY, THE PROSECUTOR'S REASON FOR STRIKING THE PROSPECTIVE JUROR IN FACT RELATED TO ANOTHER PROSPECTIVE JUROR FOR WHOM DEFENDANT HAD EXERCISED A PEREMPTORY CHALLENGE; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing defendant's convictions and ordering a new trial, determined that, in response to a Batson inquiry, the prosecutor's reason for striking the prospective juror did not, in fact, relate to the correct prospective juror. Rather, the prosecutor's reason related to another prospective juror for whom the defendant had exercised a peremptory challenge:

… [T]he prosecutor stated that the reason that he exercised a peremptory challenge on the prospective juror at issue was due to "her answer as to why she wanted to sit on the jury." Specifically, the prosecutor explained that the prospective juror expressed an "odd interest in the defendant's right to remain silent, right to testify," and that "[t]he way she answered the question . . . was very strange." However, … the statements the prosecutor attributed to the prospective juror at issue were, in fact, made by a prospective juror upon whom defendant exercised a peremptory strike. Because "a proffered race-neutral reason cannot withstand a Batson objection where it is based on a statement that the prospective juror did not in fact make" … , "an equal protection violation was established" … .People v Douglas, 2022 NY Slip Op 01919, Fourth Dept 3-18-22

Practice Point: If, pursuant to a Batson inquiry, the prosecutor refers to answers given by the wrong prospective juror, a new trial will be ordered.

CRIMINAL LAW, EXCESSIVE SENTENCE.

CONSECUTIVE SENTENCES WHICH AMOUNTED TO A LIFE SENTENCE WITHOUT PAROLE WERE NOT WARRANTED (FOURTH DEPT).

The Fourth Department, ordering the consecutive sentences to run concurrently, determined a de facto life sentence without parole was not warranted:

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Defendant's conviction stems from his conduct in firing a shotgun at police officers while inside his girlfriend's home and not allowing the girlfriend's daughter to leave the home. * * *

… [T]he sentence is unduly harsh and severe. Although defendant's crimes were undoubtedly serious and could easily have resulted in death or injury to the officers, no one was injured or killed during the shootout. We conclude that the de facto life sentence without parole is not warranted here. We therefore modify the judgment as a matter of discretion in the interest of justice by directing that the sentences on the counts of attempted aggravated murder shall run concurrently with each other … . People v Youngblood, 2022 NY Slip Op 00751, Fourth Dept 2-4-22

CRIMINAL LAW, PLEA AGREEMENTS.

THE IMPOSITION OF A FINE WAS NOT PART OF THE PLEA AGREEMENT; ALTHOUGH THE ISSUE WAS NOT PRESERVED, THE FINE WAS VACATED IN THE INTEREST OF JUSTICE (FOURTH DEPT).

The Fourth Department, reversing (modifying) County Court, determined the imposition of a fine was not part of the plea agreement and vacated that part of the sentence:

Defendant's … contention that his guilty plea was not knowingly, intelligently, and voluntarily entered is actually a contention that County Court erred in imposing a $1,000 fine that was not part of the negotiated plea agreement without affording him an opportunity to withdraw his plea … . Although defendant failed to preserve his contention for our review by failing to object to the imposition of the fine or by moving to withdraw his plea or to vacate the judgment of conviction (see id.), we exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c] …). … [T]he court improperly enhanced defendant's sentence by imposing "a fine that was not part of the negotiated plea agreement" … . … [W]e conclude that it is "appropriate to vacate the provision of the defendant's sentence imposing a fine, so as to conform the sentence imposed to the promise made to the defendant in exchange for his plea of guilty" … . People v Wilson, 2022 NY Slip Op 00593, Fourth Dept 1-28-22

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CRIMINAL LAW, RESITITION, CAP FOR LOST WAGES.

RESTITUTION IN EXCESS OF THE STATUTORY CAP FOR LOST WAGES WAS IMPROPERLY AWARDED BECAUSE "LOST WAGES" DOES NOT FIT ANY OF THE EXCEPTIONS TO THE CAP RESTRICTION (FOURTH DEPT).

The Fourth Department, modifying County Court, determined the restitution amount which exceeded the statutory cap did not fit into any of the statutory exceptions to the cap restriction. The victim was improperly awarded an amount for lost wages:

… [T]he court erred in imposing restitution and reparation in excess of the statutory cap for the second victim's past lost earnings because, under the plain meaning of the statute, that form of loss does not fall within the exception to the statutory cap pursuant to Penal Law § 60.27 (5) (b) … . In particular, contrary to the court's determination, inasmuch as past lost earnings are wages, salary, or other income that the second victim could have, but did not, earn (see Black's Law Dictionary [11th ed 2019], lost earnings), the excess amount ordered as restitution and reparation for that loss does not constitute reimbursement for "the return of the [second] victim's property" or equivalent thereof (§ 60.27 [5] [b] …). People v Witherow, 2022 NY Slip Op 01691, Fourth Dept 3-11-22

Practice Point: Restitution for lost wages was improperly awarded because "lost wages" does not fit any of the statutory exceptions to the restitution-cap restriction.

CRIMINAL LAW, RESTITUTION SURCHARGE.

THE CRITERIA FOR IMPOSING THE MAXIMUM RESTITUTION SURCHARGE OF 10% WERE NOT MET (FOURTH DEPT).

The Fourth Department, reversing (modifying) County Court, determined the criteria for imposing the maximum restitution surcharge of 10% were not met:

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… [T]he judgment … is … modified as a matter of discretion in the interest of justice by reducing the surcharge to 5% of the amount of restitution … . * * *

… [T]he court erred in imposing the 10% surcharge because there was no " 'filing of an affidavit of the official or organization designated pursuant to [CPL 420.10 (8)] demonstrating that the actual cost of the collection and administration of restitution . . . in [this] particular case exceeds five percent of the entire amount of the payment or the amount actually collected' " … . People v Webber, 2022 NY Slip Op 01904, Fourth Dept 3-18-22

Practice Point: Before the maximum restitution surcharge of 10% can be imposed, an affidavit must be filed demonstrating the actual cost of collection.

CRIMINAL LAW, CONSTRUCTIVE POSSESSION.

THERE WAS NO PROOF DEFENDANT EXERCISED DOMINION AND CONTROL OVER THE AREA WHERE THE DRUGS WERE FOUND; DEFENDANT'S MERE PRESENCE IN THE VICINITY OF THE DRUGS DID NOT PROVE HIS POSSESSION OF THE DRUGS (FOURTH DEPT).

The Fourth Department, reversing defendant's possession of a controlled substance conviction and dismissing the indictment, determined defendant's constructive possession of the drugs was not demonstrated. There was no proof defendant exercised dominion and control over the area in which the drugs were found, as opposed to merely being present in the vicinity of the drugs:

Where there is no evidence that the defendant actually possessed the controlled substance, the People are required to establish that the defendant "exercised 'dominion or control' over the property by a sufficient level of control over the area in which the contraband is found or over the person from whom the contraband is seized" … . The People may establish constructive possession by circumstantial evidence … , but a defendant's mere presence in the area in which contraband is discovered is insufficient to establish constructive possession … . People v Mighty, 2022 NY Slip Op 01923, Fourth Dept 3-18-18

Practice Point: If a defendant does not physically possess the drugs, to prove constructive possession, the People must demonstrate the defendant exercised

dominion and control over the area where the drugs were found, perhaps by proving defendant resided there, for example.

CRIMINAL LAW, CORRECT SENTENCE.

COUNTY COURT COULD NOT CORRECT AN ILLEGAL SENTENCE WITHOUT FORMALLY RESENTENCING THE DEFENDANT (FOURTH DEPT).

The Fourth Department, vacating the sentence on one count of the indictment, determined County Court should not have corrected a sentencing mistake without formally resentencing the defendant:

… [T]he sentence originally imposed on the count of criminal possession of a weapon in the third degree was illegal and the court erred in attempting to correct it without formally resentencing defendant at a proceeding at which he was present or securing defendant's waiver of the right to be present at such a proceeding … . We therefore modify the judgment by vacating the sentence imposed on count two of the indictment, and we remit the matter to County Court for resentencing on that count, at which time defendant must be permitted to appear. People v Abergut, 2022 NY Slip Op 00791, Fourth Dept 2-4-22

CRIMINAL LAW, DEFENSE CROSS-EXAMINATION SHOULD NOT HAVE BEEN CURTAILED.

THE CROSS-EXAMINATION OF A DETECTIVE ABOUT STATEMENTS ATTRIBUTED TO THE VICTIM IN THIS SEXUAL-OFFENSE PROSECUTION SHOULD NOT HAVE BEEN CURTAILED BY THE JUDGE; THE ERROR WAS NOT HARMLESS WITH RESPECT TO SEVERAL COUNTS, BUT WAS DEEMED HARMLESS WITH RESPECT TO OTHER COUNTS (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction on several counts, determined the judge's curtailing of the cross-examination of a detective concerning statements attributed the the victim in this sexual-offense prosecution was not harmless error as to those (reversed) counts:

” ‘Once a proper foundation is laid, a party may show that an adversary’s witness has, on another occasion, made oral or written statements which are inconsistent with some material part of the trial testimony, for the purpose of impeaching the credibility and thereby discrediting the testimony of the witness’ ” … . “To lay the foundation for contradiction, it is necessary to ask the witness specifically whether he [or she] has made such statements; and the usual and most accurate mode of examining the contradicting witness, is to ask the precise question put to the principal witness” … . Here, defendant laid a proper foundation by eliciting testimony from the victim that was inconsistent with the detective’s written report purporting to record the victim’s statement, and the court therefore should have permitted cross-examination of the detective regarding that inconsistency … . …

The testimony of the victim was the only direct evidence supporting count one of the indictment, charging criminal sexual act in the third degree, counts three and four of the indictment, charging sexual abuse in the third degree, and counts six and eight of the indictment, charging endangering the welfare of a child. We conclude that the admissible evidence of guilt with respect to those counts is not overwhelming, and that there is a reasonable possibility that the error in curtailing defense counsel’s cross-examination of the detective may have contributed to defendant’s conviction. People v Kilgore, 2022 NY Slip Op 01709, Fourth Dept 3-11-22

Practice Point: It was error for the judge to curtail the cross-examination of a detective about statements attributed to the victim in this sexual offense prosecution. The error was deemed reversible with respect to some counts, and harmless with respect to others.

CRIMINAL LAW, DNA EVIDENCE, FRYE HEARING.

AT THE FRYE HEARING, THE PEOPLE DEMONSTRATED THE ADMISSIBILITY OF THE RESULTS OF DNA ANALYSIS USING THE STRMIX DNA ANALYSIS PROGRAM (FOURTH DEPT).

The Fourth Department, affirming defendant’s conviction, determined the Frye hearing sufficiently demonstrated the admissibility of the results of DNA analysis using the STRmix DNA analysis program (STRmix program):

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… [T]he People introduced evidence that biological samples were recovered from several locations at the scene of the incident and that those samples were analyzed using the STRmix program, which indicated that defendant's DNA was contained in those samples. Before trial, the People provided defendant with notice of the results of the tests and the program used to conduct them and, at defendant's request, the court ordered a Frye hearing concerning that program …. The People introduced evidence at the hearing that the STRmix program had been the subject of numerous peer-reviewed journal articles and had been evaluated and approved by the National Institute of Standards and Technology and by the Erie County Central Police Services Forensic Laboratory before it began using the STRmix program. In addition, the People established that the STRmix program was being used by numerous forensic testing agencies and laboratories in New York, California, the United States Army, Australia, and New Zealand, and that it had been approved by the DNA Subcommittee of the New York State Forensic Science Committee. People v Bullard-Daniel, 2022 NY Slip Op 01707, Fourth Dept 3-11-22

Practice Point: The Frye hearing in this case demonstrated the results of the DNA analysis done using the STRmix DNA analysis program constituted admissible evidence.

CRIMINAL LAW, IDENTIFICATION OF DEFENDANT IN VIDEO.

A DETECTIVE WAS PROPERLY ALLOWED TO IDENTIFY DEFENDANT IN A SURVEILLANCE VIDEO; TESTIMONY ABOUT THE "BLINDED" PHOTO ARRAY IDENTIFICATION PROCEDURE WAS PROPERLY ALLOWED; THE DEFENSE CROSS-EXAMINATION ABOUT A WITNESS'S CRIMINAL HISTORY SHOULD NOT HAVE BEEN CURTAILED; ANY ERRORS DEEMED HARMLESS (FOURTH DEPT).

The Fourth Department, finding any evidentiary errors harmless, determined: (1) a detective was properly allowed to identify the defendant in a surveillance video because the People demonstrated the detective had prior contacts with the defendant; (2) testimony about the "blinded" photo identification procedure was properly allowed; and (3) the defense cross-examination about a witness's criminal history should not have been curtailed by the judge:

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We conclude that the court did not abuse its discretion in permitting the challenged testimony because the People presented evidence establishing that the police detective was familiar with defendant based on several prior contacts with defendant over the course of several years. Thus, there "was some basis for concluding that the [police detective] was more likely to identify defendant correctly than was the jury" … . …

Testimony about a photo array procedure, and the array itself, may be admitted where, inter alia, the procedure is " 'blinded,' " that is, where the person administering the array procedure does not know the suspect's position in the array (CPL 60.25 [1] [c] [ii]; see CPL 60.30). Here, although the array viewed by the witness was created by the police detective who administered the procedure, the specific procedure conducted was nevertheless blind because the police detective placed three different arrays in envelopes, which he shuffled before having the witness pick one. This procedure is sufficient, in our view, to ensure that, at the time the witness was viewing the array, the police detective did not know the position of defendant in that array … . …

"[C]urtailment [of cross-examination] will be judged improper when it keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony" … . … [W]e conclude that the court erred in limiting defense counsel's cross-examination regarding the underlying facts of a witness's prior drug conviction that occurred two months before the shooting at issue here, inasmuch as those facts bore on the witness's credibility and were not remote or cumulative … . People v Griffin, 2022 NY Slip Op 01698, Fourth Dept 3-11-22

Practice Point: Because the detective had prior contact with the defendant, the detective was properly allowed to identify defendant in a surveillance video.

Practice Point: Testimony about the "blinded" photo array identification procedure was properly allowed.

Practice Point: The defense cross-examination about the witness's criminal history should not have been curtailed.

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CRIMINAL LAW, IDENTIFICATION, STREET STOPS.

THE POLICE MISTAKENLY BELIEVED THE MAN IN A MOTEL ROOM (DEFENDANT) WAS A SUSPECT IN A SHOOTING; AN INFORMANT HAD TOLD THE POLICE THE MAN IN THE ROOM WAS FROM ROCHESTER, HIS NICKNAME WAS "JAY" AND HE "HAD A WARRANT;" WHEN THE MAN LEFT THE ROOM, THE POLICE STOPPED HIS TAXI; THE PEOPLE DID NOT DEMONSTRATE THE LEGALITY OF THE STOP (FOURTH DEPT).

The Fourth Department, reversing the denial of defendant's suppression motion and dismissing the indictment, determined the People did not demonstrate the legality of the defective's order to stop the taxi in which defendant was a passenger. An informant told the police a man in a motel room was from Rochester, his nickname was "Jay," and he "had a warrant." The detective believed the man in the motel room was a suspect in a shooting which occurred a month before. Surveillance was set up and the detective was told a man had left the room and gotten into a taxi. The defective, who did not see the man leave the room, ordered the stop of the taxi: It turned out that defendant was not the shooting suspect. He was charged with possession of a controlled substance:

At the suppression hearing, a police detective testified that he directed the stop of the taxi based on a belief that defendant was in fact a different man whom authorities had identified as a suspect in a shooting that had occurred over a month earlier. …

The detective conceded that he had never seen a still photo of the suspect, that the video of the shooting that he did view lacked detail, and that he was unaware of whether the suspect's actual height, weight, skin tone, or other specific discernable characteristic were on the arrest warrant for the shooting suspect. Further, the informant never identified the man in the motel room as the shooter, and the vague description given, i.e., that the man was from Rochester, that his nickname was the ubiquitous "Jay," and that he "had a warrant", is too generalized to support the reasonable suspicion required for the officers' stop of the taxi … . … This is also not a case in which the "proximity of the defendant to the site of the crime[and] the brief period of time between the crime and the discovery of the defendant near the location of the crime" added to the totality of circumstances supporting the detective's reasonable suspicion … . People v Singleton, 2022 NY Slip Op 01893, Fourth Dept 3-18-22

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Practice Point: The police mistakenly thought the man in a motel room (defendant) was a shooting suspect based upon vague and general allegations made by an informant. When he left the motel room, the defendant's taxi was stopped and he was subsequently charged with possession of a controlled substance. The People did not demonstrate the legality of the stop.

CRIMINAL LAW, ILLEGAL FRISK AND SEARCH.

THE SEARCH OF DEFEFNDANT'S VEHICLE BY PAROLE OFFICERS WAS NOT COMPLETELY UNRELATED TO AN ILLEGAL FRISK BY A POLICE OFFICER WHICH REVEALED THE CAR KEYS; COCAINE FOUND IN THE VEHICLE SHOULD HAVE BEEN SUPPRESSED; INDICTMENT DISMISSED (FOURTH DEPT).

The Fourth Department, reversing County Court's denial of a suppression motion and dismissing the indictment, determined the search of defendant parolee's vehicle after an illegal frisk revealed the keys was not justified. Parole officers accompanied a police investigator to a health facility where defendant was known to be as part of a police, not a parole, investigation. The illegal frisk occurred when defendant left the health facility and before the parole officers learned defendant had driven there in violation of his parole terms. Therefore the search of defendant's vehicle could not be justified as a distinct and completely unrelated "parole" investigation:

The testimony further establishes that the parole officers' suspicion of a parole violation and their investigation thereof arose only after defendant's parole officer requested that the police investigator hand over the fruit of the unlawful search and seizure, i.e., the keys, and the police investigator left the scene. The parole officers began their investigation—pressing the fob, questioning defendant, waiting for the purported owner of the vehicle to emerge from the building, and viewing surveillance footage—as a direct result of the unlawful seizure of the keys from defendant's person. Indeed, defendant's parole officer did not learn of defendant's possible connection to the vehicle until he pressed the fob, which activated the lights of the vehicle. Inasmuch as the investigation by the parole officers was precipitated by the police investigator's unlawful seizure of the keys from defendant, the subsequent discovery of the contraband in the vehicle was not

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"based solely on information obtained prior to and independent of the illegal [search and seizure]" … . Thus, the court's determination that the parole officers' investigation was independent of the unlawful seizure of the keys is not supported by the record. People v Smith, 2022 NY Slip Op 00790, Fourth Dept 2-4-22

CRIMINAL LAW, INEFFECTIVE ASSISTANCE, PROOF OF EXTREME EMOTIONAL DISTURBANCE.

DEFENSE COUNSEL INEFFECTIVE; IN THIS MURDER CASE IN WHICH THE EXTREME EMOTIONAL DISTURBANCE (EED) DEFENSE WAS RAISED, DEFENDANT'S MILITARY SERVICE RECORDS, SOCIAL SECURITY DISABILITY RECORDS AND PTSD DIAGNOSIS SHOULD HAVE BEEN PRESENTED AND A PSYCHIATRIC EXPERT SHOULD HAVE BEEN CONSULTED; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing County Court and ordering a new trial, determined defendant's motion to vacate his conviction on ineffective assistance grounds should have been granted. Defendant presented an extreme emotional disturbance (EED) defense in this murder case. But the defense consisted only of his and his girlfriend's testimony. Defense counsel did not request defendant's Social Security disability records which showed a post-traumatic-stress-disorder (PTSD) diagnosis related to three tours of duty in Iraq and did not consult an expert about defendant's PTSD:

Defense counsel testified at the CPL article 440 hearing that, in preparing for trial, she requested and received defendant's military records, which indicated that defendant had been diagnosed with PTSD, but she did not request or review records relating to defendant's Social Security disability benefits, even though defendant informed her that he received such benefits. She also accompanied defendant to an interview conducted by the People's expert, who concluded that defendant was not "suffering from active PTSD symptoms during the shooting," but she did not seek an independent expert opinion. Rather than introducing expert or medical evidence, defense counsel attempted to establish an EED defense through the testimony of defendant and his girlfriend. Although defense counsel did not clearly recall the details of the case, and her file had been destroyed, she

thought that she might have opted not to introduce defendant's military records at trial because she was uncertain how to lay a foundation for their admissibility.

We conclude on this record that defendant met his burden of establishing that he received less than meaningful representation. People v Jackson, 2022 NY Slip Op 00785, Fourth Dept 2-4-22

CRIMINAL LAW, JUDGE MUST PRONOUNCE SENTENCE.

THE JUDGE'S FAILURE TO PRONOUNCE THE DEFINITE TERM COMPONENT OF DEFENDANT'S SENTENCE REQUIRED VACATION OF THE SENTENCE AND REMITTAL FOR RESENTENCING; THE ISSUE SURVIVES A WAIVER OF APPEAL (FOURTH DEPT).

The Fourth Department, vacating defendant's sentence and remitting for resentencing, determined the definite term component of the sentence was not pronounced by the court:

CPL 380.20 provides that a court "must pronounce sentence in every case where a conviction is entered." That statutory requirement is "unyielding" … . A violation of CPL 380.20 "may be addressed on direct appeal notwithstanding [any] valid waiver of the right to appeal or the defendant's failure to preserve the issue for appellate review" … . "When the sentencing court fails to orally pronounce a component of the sentence, the sentence must be vacated and the matter remitted for resentencing in compliance with the statutory scheme" … .

Here, although the certificate of conviction states that defendant was sentenced to a split sentence of a definite term of time served in jail and five years of probation, which is consistent with the sentencing promise made during the plea proceeding, the court failed to orally pronounce during the sentencing proceeding the definite term component of defendant's sentence as required by CPL 380.20 … . People v Adams, 2022 NY Slip Op 01921, Fourth Dept 3-18-22

Practice Point: Every component of a sentence must be "pronounced" by the judge in open court or the sentence will be vacated.

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CRIMINAL LAW, JUDGE SHOULD NOT HAVE RELIED ON EVIDENCE PRESENTED IN A DIFFERENT PROCEEDING.

THE JUDGE SHOULD NOT HAVE RELIED ON EVIDENCE GIVEN AT A MATERIAL WITNESS HEARING, FROM WHICH DEFENDANT WAS PROPERLY EXCLUDED, AT A SUBSEQUENT SIROIS HEARING AT WHICH THE WITNESS DID NOT TESTIFY (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined the judge should not have relied upon evidence given at a material witness hearing, from which the defendant was properly excluded, at a subsequent Sirois hearing at which the material witness did not testify:

At [the material witness] hearing, the witness … testified that she had been threatened by defendant, the codefendant, and others in an attempt to prevent her from testifying at trial. Although the court granted the People's application for a material witness order and set bail to ensure the witness's availability, the next day the People requested a Sirois hearing and sought a determination that the witness had been made constructively unavailable to testify at trial by threats attributable to defendant … . …

A defendant generally has no constitutional right to be present at a material witness hearing … ; however, a "[d]efendant's absence from [a Sirois] hearing[] could have a substantial effect on his [or her] ability to defend" … . Here, although there is no dispute that the initial material witness hearing was not intended to address any Sirois or other evidentiary issues … , the court erred in relying on the unchallenged testimony taken therein in making its Sirois determination … . Indeed, the court effectively, and erroneously, incorporated the material witness hearing into the subsequent Sirois hearing by expressly relying on that testimony and on its own observations of the witness's demeanor in making its determination. People v Phillips, 2022 NY Slip Op 01710, Fourth Dept 3-11-22

Practice Point: The judge relied on the witness's testimony at a material witness hearing, at which defendant was not present, for his ruling in a Sirois hearing, at which the witness did not testify. Defendant was thereby deprived of his right to confront the witnesses against him at the Sirois hearing. New trial ordered.

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CRIMINAL LAW, MENTAL HYGIENE LAW, SEX OFFENDERS, CIVIL CONFINEMENT.

THE STATE DID NOT DEMONSTRATE DEFENDANT WAS UNABLE TO CONTROL SEXUAL URGES, AS OPPOSED HAVING DIFFICULTY CONTROLLING SEXUAL URGES; THEREFORE CONFINEMENT IS NOT AN APPROPRIATE REMEDY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined petitioner did not demonstrate defendant was unable to control his sexual urges, as opposed to having difficulty controlling them. Therefore confinement of the defendant was not an appropriate remedy:

… [A] " '[d]angerous sex offender requiring confinement' " is a sex offender "suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that [he or she] is likely to be a danger to others and to commit sex offenses if not confined" (Mental Hygiene Law § 10.03 [e]). The statutory scheme "clearly envisages a distinction between sex offenders who have difficulty controlling their sexual conduct and those who are unable to control it. The former are to be supervised and treated as 'outpatients' and only the latter may be confined" … . In other words, only where the offender is "presently 'unable' to control his [or her] sexual conduct" may he or she be confined under section 10.03 (e) … .

… [P]etitioner failed to meet its burden of proving, by clear and convincing evidence, that he is "presently 'unable' to control his sexual conduct" and is thus a dangerous sex offender requiring confinement … . Contrary to petitioner's contention, the record does not establish that respondent touched an unknown adult female without her knowledge on an unknown date; rather, the record reflects only the possibility that such an act might have taken place. The balance of respondent's alleged SIST [strict and intensive supervision and treatment] violations are technical missteps that do not evince an " 'inability' " to control sexual misconduct … . … [T]he report of petitioner's expert failed to meaningfully address respondent's successful integration into the community while on SIST. At most, petitioner established that respondent "was struggling with his sexual urges, not that he was unable to control himself" … , and that is legally insufficient to justify confinement under Mental Hygiene Law § 10.03 (e) … . Matter of State of New York v Scott M., 2022 NY Slip Op 00595, Fourth Dept 1-28-22

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CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), SUA SPONTE ASSESSMENT.

THE JUDGE SHOULD NOT HAVE, SUA SPONTE, WITHOUT NOTICE TO THE DEFENDANT, ASSESSED 12 POINTS FOR FAILURE TO ACCEPT RESPONSIBILITY; DEFENDANT ACCEPTED RESPONSIBILITY BY PLEADING GUILTY (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the judge should not have, sua sponte, without prior notice to the defendant, assessed 12 points for failure to accept responsibility in this SORA risk level proceeding. The Fourth Department noted defendant pled guilty to statutory rape. Although defendant stated he thought the 16-year-old victim was 18, the guilty plea was an adequate acceptance of responsibility:

… [I]t is well established that " '[a] defendant has both a statutory and constitutional right to notice of points sought to be assigned to him or her so as to be afforded a meaningful opportunity to respond to that assessment' " … . As a result, "a court's sua sponte departure from the Board's recommendation at the hearing, without prior notice, deprives the defendant of a meaningful opportunity to respond" … . …

… [T]he court erred in assessing him 10 points under risk factor 12, for failure to accept responsibility, given that he pleaded guilty and admitted his guilt … . …

… [D]efendant was not afforded a meaningful opportunity to argue against the override [recommended by the board] or in favor of a downward departure … . People v Ritchie, 2022 NY Slip Op 01635, Fourth Dept 3-10-22

Practice Point: In a SORA risk assessment proceeding, the judge cannot, sua sponte, without notice to the defendant, assess points in a category not recommended by the board.

Practice Point: In a SORA risk assessment proceeding, where a defendant has pled guilty, an assessment of 12 points for failure to accept responsibility is not warranted.

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CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT, WHO WAS CONVICTED OF STATUTORY RAPE (NO FORCE) WHEN HE WAS 18 IN 1996, SHOULD HAVE BEEN CLASSIFIED A LEVEL ONE, NOT LEVEL TWO, RISK (FOURTH DEPT).

The Fourth Department, reversing (modifying) County Court, determined defendant, who was convicted of statutory rape (no force) in 1996, should have classified as a level one risk, not level two:

Defendant appeals from an order classifying him as a level two sex offender stemming from his 1996 conviction in Virginia for the statutory rape of a 14-year-old female "without the use of force." Defendant was 18 years old at the time of the offense, which the Board of Examiners of Sex Offenders characterized as an "isolated incident." Defendant successfully completed both sex offender treatment and substance abuse treatment, and he has not been convicted of any other sex crime. Under these circumstances, we agree with defendant, in the exercise of our own discretion, that his presumptive level two classification overestimates his "dangerousness and risk of sexual recidivism" … . We therefore modify the order by determining that defendant is a level one risk … . People v Stevens, 2022 NY Slip Op 00581, Fourth Dept 1-28-22

CRIMINAL LAW, STANDING TO CHALLENGE CELL SITE LOCATION INFORMATION WARRANT.

PURSUANT TO A US SUPREME COURT DECISION WHICH CAME DOWN AFTER DEFENDANT'S CONVICTION, DEFENDANT HAS STANDING TO CHALLENGE THE CELL SITE LOCATION INFORMATION (CSLI) WARRANT, MATTER REMITTED (FOURTH DEPT).

The Fourth Department, reserving decision and remitting the matter, determined that, based upon a US Supreme Court decision which came down after defendant's

conviction, defendant has standing to challenge the cell site location information (CSLI) warrant:

We agree with defendant … that he has standing to challenge the CSLI search warrant. At the time of the court's decision, controlling caselaw in this Department held that the acquisition of CSLI was not a search under the State or Federal Constitution because a defendant's use of a phone "constituted a voluntary disclosure of his [or her] general location to [the] service provider, and a person does not have a reasonable expectation of privacy in information voluntarily disclosed to third parties" … . Following defendant's conviction, the United States Supreme Court decided Carpenter v United States, 138 S Ct 2206, 2217 [2018]), which held that "an individual maintains a legitimate expectation of privacy in the record of his [or her] physical movements as captured through CSLI" … . As a result of the Carpenter decision, defendant is entitled to a determination on the merits regarding his challenges to the CSLI search warrant. People v Ozkaynak, 2022 NY Slip Op 01700, Fourth Dept 3-11-22

Practice Point: The US Supreme Court ruling that defendants have standing to challenge a cell site location information (CDLI) warrant came down after defendant's conviction in this case. The matter was remitted for a determination of defendant's suppression motion.

CRIMINAL LAW, STREET STOPS, ANONYMOUS TIP.

THE PEOPLE DID NOT DEMONSTRATE THE ANONYMOUS TIP PROVIDED PROBABLE CAUSE TO BELIEVE DEFENDANT WAS IN THE VEHICLE PURSUED AND STOPPED BY THE POLICE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the Peopled failed to demonstrate the arresting officers had probable cause to pursue and stop the vehicle form which defendant attempted to flee. The officers were observing the vehicle because of an anonymous tip:

The United States Supreme Court has "recognized . . . [that] there are situations in which an anonymous tip, sufficiently corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop' " … . However, "[s]ince an anonymous tip 'seldom demonstrates the informant's basis of

knowledge or veracity,' it can only give rise to reasonable suspicion if accompanied by sufficient indicia of reliability" … . The anonymous tip must be reliable, not only "in its assertion of illegality," but also "in its tendency to identify a determinate person" … . …

The evidence at the suppression hearing established that police officers were dispatched based on an anonymous tip that defendant was in a specific vehicle at a specific location. However, when police responded to the area, neither defendant nor the vehicle was present. Over 3½ hours later, officers observed the vehicle and two individuals inside. The only officer to testify at the suppression hearing admitted that he could not determine whether the occupants of the vehicle were male or female, let alone whether one of them was defendant. Further, the vehicle was not registered to defendant. Nevertheless, the officers activated their emergency lights and attempted to stop the vehicle. People v Ponce, 2022 NY Slip Op 01706, Fourth Dept 3-11-22

Practice Point: An anonymous tip can provide probable cause for a street stop if accompanied by sufficient indicia of reliability, both as to illegality and the identity of the person. Here the People did not demonstrate the anonymous tip was sufficiently reliable.

CRIMINAL LAW, STREET STOPS.

THE PRESENCE OF DEFENDANT'S VEHICLE IN A HIGH CRIME AREA AND FURTIVE MOVEMENTS INSIDE THE VEHICLE DID NOT JUSTIFY THE SEIZURE OF DEFENDANT'S VEHICLE BY BLOCKING IT WITH THE POLICE CAR (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the police did not have the requisite "reasonable suspicion" to justify the seizure of defendant's vehicle by blocking it with the police car:

… [T]he police lacked reasonable suspicion to justify the seizure of the vehicle, and therefore County Court erred in refusing to suppress both the physical property seized from defendant and the vehicle, as well as inculpatory statements made by defendant during booking following his arrest. … [W]e conclude that the police

officers effectively seized defendant's vehicle when they parked their patrol vehicle in such a manner that, for all practical purposes, prevented defendant from driving his vehicle away … . Furthermore, we conclude that the People did not have "reasonable suspicion that defendant had committed, was committing, or was about to commit a crime" to justify their seizure of the vehicle inasmuch as the seizure was based only on defendant's presence in a vehicle parked in a high crime area, and on the police officers' observation of furtive movements inside the vehicle … . People v Jennings, 2022 NY Slip Op 00755, Fourth Dept 2-4-22

CRIMINAL LAW, TRAFFIC STOPS, AUTHORIZATION TO DETAIN.

AFTER A VALID TRAFFIC STOP BASED ON THE LICENSE PLATES NOT MATCHING THE VEHICLE, DEFENDANT PRESENTED HIS TEMPORARY REGISTRATION AND EXPLAINED THE PLATES HAD BEEN TRANSFERRED FROM A DIFFERENT VEHICLE; AT THAT POINT THE AUTHORIZATION TO DETAIN DEFENDANT CEASED; THE SEIZED DRUGS SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT).

The Fourth Department, reversing defendant possession of a controlled substance conviction and dismissing the indictment, determined the police, after making a valid traffic stop of defendant's vehicle, did not have the authority to detain him after he presented his temporary registration and explained that the license plates had been transferred from another vehicle:

… [T]he justification for the officer's initial detention ceased once defendant showed the officer the temporary registration that had been issued for the vehicle and explained that the license plates on the vehicle had recently been transferred from another vehicle … .. We further conclude that the record does not support the court's determination that the circumstances following the initial stop provided the officer with probable cause to believe that defendant was violating Vehicle and Traffic Law § 507 (2) … . Indeed, the record does not support the court's finding that, when defendant produced a learner's permit upon being asked to produce his driver's license, the officer asked defendant to exit the vehicle due to the lack of a valid driver's license. Thus, inasmuch as "the initial justification for seizing and detaining defendant . . . was exhausted" at the time of defendant's removal from the vehicle, the evidence seized during the ensuing search of defendant's person, as

well as the statements that he made to the police thereafter, should have been suppressed … .People v Betsey-Jones, 2022 NY Slip Op 01924, Fourth Dept 3-18-22

Practice Point: Here the police stopped defendant because the license plates did not match the color and make of defendant's vehicle in the DMV database. Once the the defendant showed the officer his temporary registration and explained the license plates had been transferred from a different vehicle, the justification for the detention of the defendant ceased. Any statements made and evidence seized after that point should have been suppressed.

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW, BREATH TEST REFUSAL NOT AN OFFENSE.

"REFUSING A BREATH TEST" IS NOT A COGNIZABLE OFFENSE; A CONVICTION IS THEREFORE A FUNDAMENTAL ERROR WHICH MUST BE CORRECTED ON APPEAL EVEN IF THE ISSUE IS NOT BRIEFED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction of "refusing a breath test," explained that it is not a cognizable offense. The court noted that it was obligated to correct this fundamental error which cannot be waived, even though the issue was not briefed on appeal:

… [T]he purported traffic infraction to which defendant pleaded guilty under count two of the indictment—refusing the breath test mandated by Vehicle and Traffic Law § 1194 (1) (b)—is not a cognizable offense for which a person may be charged or convicted in a criminal court … . People v Adams, 2022 NY Slip Op 00562, Fourth Dept 1-28-22

Same issue in People v Harris, 2022 NY Slip Op 00568, Fourth Dept 1-28-22

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CRIMINAL LAW, YOUTHFUL OFFENDERS, ARMED FELONIES.

MANSLAUGHTER FIRST DEGREE IS NOT AN "ARMED FELONY" WITHIN THE MEANING OF CRIMINAL PROCEDURE LAW 720.10; COUNTY COURT WAS REQUIRED TO DETERMINE WHETHER DEFENDANT SHOULD BE AFFORDED YOUTHFUL OFFENDER STATUS; MATTER REMITTED (FOURTH DEPT).

The Fourth Department, remitting the matter to County Court, determined County Court was required to decide whether defendant in this Manslaughter First Degree case should be afforded youthful offender status:

… [W]e note that defendant's "waiver of his right to appeal was invalid . . . and, in any event, [would] not bar his contention that [County] Court failed to properly consider youthful offender treatment" … . On the merits, … the court erred in determining that he was ineligible for youthful offender status. … [M]anslaughter in the first degree is not an "armed felony" for purposes of CPL 720.10 (2) (a) (ii) … . Thus, defendant's eligibility for youthful offender status did not turn … on the existence of a statutory mitigating factor enumerated in CPL 720.10 (3) … . Inasmuch as defendant is otherwise eligible for youthful offender status on this conviction (see CPL 720.10 [1], [2]), the court was obligated to make a discretionary youthful offender determination before imposing sentence (see CPL 720.20 [1] …). We therefore hold the case, reserve decision, and remit the matter to County Court to make and state for the record a determination whether defendant should be afforded youthful offender status … . People v Graham, 2022 NY Slip Op 00784, Fourth Dept 2-4-22

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FAMILY LAW, CHILD-SUPPORT CALCULATION.

THE SUPPORT MAGISTRATE SHOULD NOT HAVE DEVIATED FROM THE PRESUMPTIVE SUPPORT OBLIGATION CALCULATED PURSUANT TO THE CHILD SUPPORT STANDARDS ACT (CSSA) BASED UPON THE EXPENSES INCURRED BY MOTHER WHEN THE CHILDREN WERE WITH HER; THE EXPENSES DID NOT QUALIFY AS "EXTRAORDINARY EXPENSES" (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the support magistrate should not have deviated from the presumptive support obligation calculated pursuant to the Child Support Standards Act (CSSA):

… [T]he Support Magistrate determined that, because the children spent approximately 50% of the parenting time with the mother and because the mother incurred expenses for the children's "food, clothing, shelter, utilities, cell phones, transportation[,] and extracurricular activities" during the times they were with her, she should be granted a variance from the presumptive support obligation. That was error. Although "extraordinary expenses incurred by the non-custodial parent in exercising visitation" with a child not on public assistance may support a finding that the presumptive support obligation is unjust or inappropriate … , "[t]he costs of providing suitable housing, clothing and food for [a child] during custodial periods do not qualify as extraordinary expenses so as to justify a deviation from the presumptive amount" … , "nor is the cost of entertainment, including sports, an extraordinary visitation expense for purposes of calculating child support" … . Matter of Livingston County Support Collection Unit v Sansocie, 2022 NY Slip Op 01914, Fourth Dept 3-18-22

Practice Point: Mother's expenses for the children when they stayed with her did not qualify as "extraordinary expenses." Therefore the support magistrate should not have deviated from the presumptive support obligation calculated pursuant to the Child Support Standards Act (CSSA).

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FAMILY LAW, INSUFFIENCT EVIDENCE OF NEGLECT.

THE NEGLECT FINDING WAS NOT SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE, CRITERIA EXPLAINED (FOURTH DEPT).

The Fourth Department, reversing Family Court's neglect finding, determined the finding was not supported by the preponderance of the evidence:

"[A] party seeking to establish neglect must show, by a preponderance of the evidence … , first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" … .. In considering whether the requisite minimum degree of care was provided, "[c]ourts must evaluate parental behavior objectively: would a reasonable and prudent parent have so acted, or failed to act, under the circumstances then and there existing" … . Here, the evidence at the fact-finding hearing establishes that the mother acknowledged her mental health issues and had been compliant with treatment following her discovery that she was pregnant … ; and that she was engaged in a supportive housing program that would allow her to care for the child, thereby limiting any extended need for foster care … . Matter of Isabella S. (Nicole S.), 2022 NY Slip Op 01897, Fourth Dept 3-18-22

Practice Point: Although the specific allegations of neglect are not described in this decision, the criteria for a neglect finding are clearly explained.

FAMILY LAW, MODIFICATION OF CUSTODY.

IN THIS MODIFICATION OF CUSTODY PROCEEDING, FATHER PRESENTED SUFFICIENT EVIDENCE OF A CHANGE OF CIRCUMSTANCES TO WARRANT A HEARING ON THE BEST INTERESTS OF THE CHILD (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined respondent-father had presented sufficient evidence of a change in circumstances to warrant a hearing on the best interests of the child:

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Where … " 'a respondent moves to dismiss a modification proceeding at the conclusion of the petitioner's proof, the court must accept as true the petitioner's proof and afford the petitioner every favorable inference that reasonably could be drawn therefrom' " … . Here, the father testified that, at the time the order of custody and visitation was entered into and for a short time thereafter, the mother and the father were communicating effectively and, in addition to scheduled visitation, were able to agree to further overnight and weekend visitation. That arrangement subsequently changed, however, and the father could not get the mother to agree to any visitation time apart from his scheduled day. The father further testified that communication with the mother regarding additional visitation time essentially ended after he moved to a new home 30 miles away. Taking the father's testimony as true and considering the circumstances of the father's move and the development of "extreme acrimony between the parties," we conclude that the father met his burden of showing a change in circumstances warranting an inquiry into the best interests of the child … . Matter of Cooley v Roloson, 2022 NY Slip Op 00534, Fourth Dept 1-28-22

FORECLOSURE, STANDING, ATTORNEY'S FAILURE TO APPEAR FOR A MOTION ARGUMENT IS NOT A DEFAULT.

DEFENDANT NEVER PHYSICALLY POSSESSED THE NOTE UNDERLYING THE MORTGAGE AND WAS NEVER ASSIGNED THE NOTE; THEREFORE DEFENDANT DOES NOT HAVE STANDING TO FORECLOSE ON THE MORTGAGE; AN ATTORNEY'S FAILURE TO APPEAR AT A FULLY BRIEFED MOTION ARGUMENT IS NOT A DEFAULT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant does not own the note underlying the mortgage and therefore has no right to foreclose. The Fourth Department noted that an attorney's failure to appear at a full briefed motion argument does not constitute a default:

… [D]efendant lacks noteholder standing because the promissory note upon which defendant relies is neither endorsed in blank nor specially endorsed to defendant … . … [E]ven had the note been endorsed in blank or specially endorsed to defendant, defendant's admitted failure to physically possess the original note would independently preclude it from foreclosing as a noteholder … . …

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Nor does defendant have assignee standing. The affidavits submitted on defendant's behalf do not aver that the subject note was ever assigned to defendant … . …

… [A]n action to quiet title pursuant to RPAPL article 15 is a proper procedural vehicle for determining defendant's standing to foreclose (see RPAPL 1501 [1], [5] …). Hummel v Cilici, LLC, 2022 NY Slip Op 01690, Fourth Dept 3-11-22

Practice Point: An attorney's failure to appear at a fully briefed motion argument is not a default.

Practice Point: A party who never physically possessed the note underlying the mortgage does not have standing to foreclose.

JUDGES, ADOPTION OF DECISION DRAFTED BY COUNSEL.

THE JUDGE ADOPTED A DECISION DRAFTED BY COUNSEL AS THE FINAL DETERMINATION OF THE CASE AND THEREBY VITIATED THE PURPOSE SERVED BY JUDICIAL OPINIONS; THE FOURTH DEPARTMENT VACATED THE JUDGMENT (FOURTH DEPT).

The Fourth Department, vacating the judgment, determined the judge erred by adopting a proposed decision drafted by counsel as the final determination of the case:

… [T]he court erred in adopting, almost verbatim, the proposed decision drafted by petitioners' counsel as the final determination in this case … . "When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions" … . Even assuming, arguendo, that [respondent] CME could or should have objected to the court's error, we would exercise our discretion to correct that error notwithstanding CME's failure to object. We therefore vacate the judgment in its entirety and remit the matter to Supreme Court for consideration and determination of any pending issue or motion. Bruckel v Town of Conesus, 2022 NY Slip Op 00580, Fourth Dept 1-28-22

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LABOR LAW-CONSTRUCTION LAW, PRIME VS GENERAL CONTRACTOR LIABILITY.

DEFENDANT WAS A PRIME, NOT A GENERAL, CONTRACTOR AND DEMONSTRATED HE DID NOT EXERCISE SUPERVISION OR CONTROL OVER PLAINTIFF'S WORK; THEREFORE DEFENDANT WAS NOT LIABLE UNDER LABOR LAW 240(1) AND 241(6); HOWEVER, DEFENDANT DID EXERCISE SOME CONTROL OVER WORK-SITE SAFETY AND THEREFORE MAY BE LIABLE UNDER LABOR LAW 200 (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined defendant prime contractor, Kilian, did not supervise or control plaintiff's work and therefore was not liable on the Labor Law 240(1) and 241(6) causes of action stemming from plaintiff's fall down an open stairway at a house under construction. The Fourth Department noted the difference between a general contractor and a prime contractor. Here, Kilian (the prime contractor) demonstrated he did not exercise supervision or control over plaintiff's work. However, Kilian did exercise some control over work-site safety and therefore may be liable under Labor Law 200 for the dangerous condition (open stairwell):

"A general contractor will be held liable under [Labor Law §§ 240 (1) and 241 (6)] if it was responsible for coordinating and supervising the entire construction project and was invested with a concomitant power to enforce safety standards and to hire responsible contractors" … . Here, Collins, not Kilian, hired plaintiff's employer to perform work on the project, and Kilian established through the documentary evidence and deposition testimony that he exercised no control or supervision over plaintiff's work and had no authority to enforce safety standards against plaintiff … . Thus, Kilian established as a matter of law that he was not a general contractor subject to liability pursuant to Labor Law §§ 240 (1) or 241 (6), and plaintiff failed to raise a triable issue of fact … . …

… [T]o the extent that the section 200 claim against Kilian is based on the theory that he was negligent with respect to the dangerous condition of the stairwell, we conclude that Kilian failed to establish as a matter of law that he did not have control over the work site or that he lacked actual or constructive notice of the dangerous condition, i.e., the unguarded, open stairwell … . Clifton v Collins, 2022 NY Slip Op 00780, Fourth Dept 2-4-22

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LABOR LAW-CONSTRUCTION LAW, PRIOR FINDINGS BY WORKERS' COMPENSATION BOARD, COLLATERAL ESTOPPEL.

THE WORKERS' COMPENSATION BOARD RULED THE PLAINTIFF DID NOT HAVE "POST-CONCUSSION SYNDROME" OR A "CONCUSSION CONDITION;" PLAINTIFF WAS THEREFORE ESTOPPED FROM CLAIMING THOSE INJURIES IN THIS LABOR LAW ACTION (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined the ruling by the Workers' Compensation Board that plaintiff did not have "post-concussion syndrome" or a "concussion condition" collaterally estopped plaintiff from claiming those injuries in this Labor Law action:

We agree with defendant that the court erred in denying its motion insofar as it effectively sought summary judgment dismissing plaintiff's claims for damages related to PCS or a concussion condition as barred by the doctrine of collateral estoppel, but we conclude that plaintiff's claims for damages related to headaches and the alleged concussion itself are not so barred. The quasi-judicial determinations of administrative agencies, such as the Workers' Compensation Board (Board), "are entitled to collateral estoppel effect where the issue a party seeks to preclude in a subsequent civil action is identical to a material issue that was necessarily decided by the administrative tribunal and where there was a full and fair opportunity to litigate before that tribunal" … and a determination whether a plaintiff actually sustained a physical injury causally related to an accident … , the Board in this case specifically found that plaintiff did not have "post-concussion syndrome" or a "concussion condition" that were causally related to the second work accident. Szymkowiak v New York Power Auth., 2022 NY Slip Op 01702, Fourth Dept 3-11-22

Practice Point: Here the Workers' Compensation Board's ruling plaintiff did not have "post-concussion syndrome" or a "concussion condition" precluded claims for those injuries in the plaintiff's Labor Law action pursuant to the doctrine of collateral estoppel.

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LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF FELL THROUGH A SKYLIGHT HOLE WHEN ATTEMPTING TO REMOVE PLYWOOD WHICH WAS COVERING THE HOLE; PLAINTIFF WAS PROPERLY AWARDED SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION (FOURTH DEPT).

The Fourth Department determined plaintiff's motion for summary judgment on his Labor Law 240 (1) cause of action was properly granted. Plaintiff fell through a skylight hole while attempting to remove plywood which was covering the hole:

Plaintiff submitted his own deposition testimony, in which he testified that, at the time of his injury, he was removing the plywood covering of the skylight hole as part of his work of preparing to install the final roofing. Plaintiff further testified that, upon removing the plywood, he fell through the skylight hole, and he was given no safety device to protect him from falling. Even assuming, arguendo, that the plywood cover constituted a safety device … , we note that "the availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures" … . While the plywood cover "may have provided proper protection when it was in place over the opening, . . . once it was removed plaintiff was exposed to an elevation-related risk which required additional precautionary measures or devices" … . Tanksley v LCO Bldg. LLC, 2022 NY Slip Op 00567, Fourth Dept 1-28-22

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LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF WAS IN A TRENCH WHEN HE WAS STRUCK BY THE BUCKET OF AN EXCAVATOR WHICH WAS ON THE EDGE OF THE TRENCH ABOVE HIM IN THIS LABOR LAW 240 (1), 241 (6) AND 200 ACTION; THERE WERE QUESTIONS OF FACT ABOUT WHETHER THE INJURY WAS THE RESULT OF THE USUAL AND ORDINARY DANGERS OF A CONSTRUCTION SITE AS OPPOSED TO A RISK CONTEMPLATED BY THE LABOR LAW (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiffs' motion for summary judgment on the Labor Law 240 (1) and 241 (6) causes of action should not have been granted. Plaintiff was in a trench when he was struck by the bucket of an excavator which was on the edge of the trench above him:

Plaintiffs' own submissions created a triable issue of fact concerning the manner in which the accident occurred … , specifically whether plaintiff was injured due to a risk contemplated by the statute or, alternatively, by " 'the usual and ordinary dangers of a construction site' " … . …

… [T]he court erred in granting plaintiffs' motion with respect to liability on the Labor Law § 241 (6) cause of action insofar as it is premised upon alleged violations of 12 NYCRR 23-9.4 (c) and 23-9.5 (a). The issue of fact concerning the manner in which the accident occurred precludes a determination as a matter of law whether either of those regulations were violated … . Malvestuto v Town of Lancaster, 2022 NY Slip Op 00577, Fourth Dept 1-28-22

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MEDICAL MALPRACTICE, PUBLIC HEALTH LAW, EXPERT AFFIDAVITS INSUFFICIENT.

IN THIS MEDICAL MALPRACTICE/PUBLIC HEALTH LAW ACTION AGAINST A NURSING HOME, DEFENDANTS' EXPERTS' OPINIONS WERE NOT SUPPORTED BY THE SUBMISSION OF DECEDENT'S MEDICAL RECORDS, RENDERING THE OPINIONS SPECULATIVE; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the defendant nursing home's motion for summary judgment in this medical malpractice, Public Health Law action should not have been granted. The defendant's experts' opinions were not supported by the submission of decedent's medical records:

… [D]efendant's experts proffered opinions about decedent's care at the nursing home facility that were not based on facts in the record because defendant failed to submit any of decedent's medical records, certified or otherwise, to support those opinions. Additionally, those opinions were not based on facts personally known to the experts. Thus, the experts' affidavits are " 'speculative or unsupported by any evidentiary foundation' " … . Ritts v Gowanda Rehabilitation & Nursing Ctr., 2022 NY Slip Op 00578, Fourth Dept 1-28-22

NEGLIGENCE, MUNICIPAL LAW, LATE NOTICE OF CLAIM.

CLAIMANTS' APPLICATION TO FILE A LATE NOTICE OF CLAIM AGAINST THE COUNTY IN THIS TRAFFIC ACCIDENT CASE SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined claimants' application to file a late notice of claim against the county in this traffic accident case should not have been granted. Claimants alleged ice and snow had been allowed to accumulate on the road causing the driver to lose control and strike a tree. Claimants' eight-year-old son was injured. The Fourth Department, in a

comprehensive discussion, went through each "late-notice-of-claim" factor and found only one (county not prejudiced by the delay) favored the claimants:

… [O]f all the relevant circumstances evaluated—infancy, reasonable excuse, actual knowledge, and substantial prejudice—only one, lack of substantial prejudice, favored granting claimants' application. Despite the well-settled principle that "actual knowledge of the claim is the factor that is accorded 'great weight' in determining whether to grant leave to serve a late notice of claim" … and instead "weigh[ed] heavily" the lack of substantial prejudice, even though claimants' showing in that regard, while adequate, was not particularly strong. Under these circumstances—which include the nearly 22-month period between the accident and claimants' application for leave to serve a late notice of claim, the improper weighing of the substantial prejudice factor at the expense of the actual knowledge factor, and claimants' failure to demonstrate a nexus between the son's infancy and the delay or to otherwise proffer a reasonable excuse for the delay—we conclude that the court abused its discretion in granting that part of the application seeking leave to serve a late notice of claim on the County … . Matter of Antoinette C. v County of Erie, 2022 NY Slip Op 00776, Fourth Dept 2-4-22

NEGLIGENCE, MUNICIPAL LAW, SPECIAL USE OF ROAD NOT DEMONSTRATED.

PLAINTIFF FAILED TO RAISE A QUESTION OF FACT WHETHER AN ALLEGED DEFECT IN THE ROAD WAS CAUSED BY DEFENDANT'S SPECIAL USE OF THE ROAD; TWO DISSENTERS DISAGREED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined defendant demonstrated it did not create a dangerous condition in the street by a special use. Plaintiff alleged defendant created the dangerous condition by storing heavy materials in the street. Plaintiff alleged a steel beam fell on his foot from a forklift when the forklift struck a defect in the road (Simmons Avenue):

"Generally, liability for injuries sustained as a result of a dangerous condition on a public sidewalk or street is placed on the municipality, and not on the owner or lessee of abutting property, unless the landowner or lessee has either affirmatively

created the dangerous condition, voluntarily but negligently made repairs, caused the condition to occur through a special use, or violated a statute or ordinance expressly imposing liability on the landowner or lessee for a failure to maintain the abutting street" … . Defendant met its initial burden on the motion by establishing, as relevant here, that "[it] neither owned nor made special use of [Simmons Avenue], and that [it] had no connection to the condition" that caused the accident … .

From the dissent:

In our view, defendant failed to establish as a matter of law that it did not make special use of Simmons Avenue or affirmatively create the defective condition on Simmons Avenue that allegedly caused plaintiff's injuries. Beck v City of Niagara Falls, 2022 NY Slip Op 00563, Fourth Dept 1-28-22

OPEN MEETINGS LAW, EDUCATION-SCHOOL LAW, EMPLOYMENT LAW.

THE SCHOOL BOARD DID NOT VIOLATE THE OPEN MEETINGS LAW WHEN IT CONSULTED WITH ITS ATTORNEY IN A CLOSED SESSION BEFORE DECIDING NOT TO RENEW PLAINTIFF FOOTBALL COACH'S EMPLOYMENT; THERE IS AN EXCEPTION TO THE OPEN MEETINGS LAW FOR LEGAL ADVICE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiff high school football coach was not entitled to summary judgment on the cause of action alleging the school board violated the Open Meetings Law by deciding not to renew plaintiff's employment after a closed meeting. The Open Meetings Law did not apply to the board's closed-door consultation with its attorney:

It is well settled that "[e]very meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with [section 105]" (Public Officers Law § 103 [a] …). While an executive session may be called to discuss, inter alia, "matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person" (§ 105 [1] [f]), the public

body may do so only upon a majority vote of its membership and after "identifying the general area or areas of the subject or subjects to be considered" (§ 105 [1]). However, section 108 (3) clarifies that "[n]othing contained in [the Open Meetings Law] shall be construed as extending the provisions hereof to . . . any matter made confidential by federal or state law." Because "communications made pursuant to an attorney-client relationship are considered confidential under the [CPLR] . . . , communications between a . . . board . . . and its counsel, in which counsel advises the board of the legal issues involved in [a] determination . . . , are exempt from the provisions of the Open Meetings Law" … .

There is no dispute that, during the closed session … , the Board and the District superintendent met with the District's counsel seeking legal advice "regarding the [p]laintiff's legal employment status, employment rights, [and] the process for appointing school employees." We thus agree with defendants that the attorney-client exemption applies and that the court erred in determining that there was a violation of the Open Meetings Law … . Sindoni v Board of Educ. of Skaneateles Cent. Sch. Dist., 2022 NY Slip Op 00772, Fourth Dept 2-4-22

PERSONAL PROPERTY, CONVERSION.

DEFENDANTS' OWN SUBMISSIONS DEMONSTRATED (1) PLAINTIFF OWNED THE PROPERTY LEFT IN THE HOUSE PURCHASED BY DEFENDANTS, (2) PLAINTIFF HAD REMOVED SOME OF THE PROPERTY, AND (3) PLAINTIFF ASKED FOR MORE TIME TO REMOVE MORE PROPERTY; THOSE FACTS NEGATED DEFENDANTS' ALLEGATION PLAINTIFF HAD ABANDONED THE PROPERTY; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSING THE CONVERSION CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendants' motion for summary judgment dismissing the conversion cause of action should not have been granted. Defendants' own submissions demonstrated plaintiff's ownership of the property, his removal of some of the property, and his request for more time to remove the rest. The property was in a house where plaintiff used to live, but

which was purchased by the defendants. Defendants disposed of the remaining property, arguing plaintiff had abandoned it. Plaintiff then sued for conversion:

If the property can be deemed abandoned, then plaintiff's possessory interest was forfeited and defendants' actions were authorized, i.e., there can be no cause of action for conversion … . "The abandonment of property is the relinquishing of all title, possession or claim to or of it—a virtual intentional throwing away of it. It is not presumed. Proof supporting it must be direct or affirmative or reasonably beget the exclusive inference of the throwing away" … . …

… [D]efendants' … own submissions establish that plaintiff was the owner of the personal property left on the premises, that he attempted to remove some of the property during the 30-day period, and that he made requests for additional time to retrieve his property…. . Cretaro v Huntington, 2022 NY Slip Op 01935, Fourth Dept 3-18-22

Practice Point: Here defendants purchased a house formerly owned by plaintiff and gave plaintiff 30 days to remove plaintiff's personal property from the house. Defendants' disposed of the property, arguing that plaintiff had abandoned it. Defendants' own submissions demonstrated plaintiff owned the property, removed some of the property and asked for time to remove more. Defendants' own submissions, therefore, demonstrated plaintiff had not abandoned the property. Defendants' motion to dismiss plaintiff's conversion cause of action should not have been granted.