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Third Department
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Report
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An Organized Compilation of the Summaries of Selected Decisions, Mostly Reversals, Released by the Third Department and Posted on the New York Appellate Digest Website January – March 2022. The Entries in the Tables of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Right Click on the Citations to Keep Your Place in the Reversal Report.

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ADMINISTRATIVE LAW, CONSTITUTIONAL LAW, ELECTRONIC MONITORING OF COMMERCIAL VEHILCES.

THE USE OF ELECTRONIC LOGGING DEVICES (ELD'S) TO MONITOR THE HOURS AND PLACES OF OPERATION OF COMMERCIAL MOTOR VEHICLES (CMV'S) AND THE INSPECTION OF ELD'S BY LAW ENFORCEMENT PERSONNEL DURING ROADSIDE SAFETY INSPECTIONS CONSTITUTE VALID ADMINSITRATIVE SEARCHES (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice McShan (too comprehensive to fairly summarize here), determined the use of electronic logging devices (ELD's) to monitor the hours and places of operation of commercial motor vehicles (CMV's), such that the data collected by the ELD's can be inspected by law enforcement personnel, does not constitute unreasonable search and seizure:

ELDs integrate with a vehicle's engine and use GPS technology to automatically record the date, time and approximate geographic location of CMVs, as well as the number of engine hours and vehicle mileage (see 49 CFR 395.26 [b]). Drivers are required to manually input identifying information and any changes in their duty status, the categories of which include, among others, on-duty, off-duty and authorized personal use (see 49 CFR 395.24 [b]; 395.26 [b]; 395.28). Upon request, information recorded by ELDs must be made available to law enforcement personnel during roadside safety inspections … .* * *

… "[O]ne would be hard-pressed to find an industry more pervasively regulated than the trucking industry." … [W]e … find that commercial trucking is a pervasively regulated industry pursuant to which an administrative search may be justified.

… [T]he regulatory scheme at issue here provides adequate assurances that the inspection of ELDs will be reasonable. …

The ELD rule likewise provides the requisite "meaningful limitation" on the discretion of officials performing the inspection so as to ensure "that the search is limited in scope to that necessary to meet the interest that legitimized the search in

the first place" … . Matter of Owner Operator Ind. Drivers Assn., Inc. v New York State Dept. of Transp., 2022 NY Slip Op 02166, Third Dept 3-31-22

Practice Point: Administrative searches are deemed constitutional in "heavily regulated industries." Commercial trucking is a heavily regulated industry. The use of electronic logging devices (ELD's) to monitor the hours and places of operation of commercial motor vehicles (CMV's) and the inspection of ELD's by law enforcement personnel during roadside safety inspections constitute valid administrative searches.

APPEALS, NO EFFORT TO PRESERVE STATUS QUO.

PETITIONERS DID NOT TAKE STEPS TO PRESERVE THE STATUS QUO AS THEY SOUGHT TO VACATE A CONSTRUCTION CONTRACT; THE CONSTRUCTION PROGRESSED TO THE POINT WHERE THE COURT MUST DISMISS THE APPEAL AS MOOT (THIRD DEPT).

The Third Department determined the petitioners' appeal of the denial of a declaratory judgment seeking to vacate the award of a construction contract by the Office of State Comptroller (OSC) must be dismissed as moot. The petitioners did not seek to maintain the status quo by injunction and the work had progressed too far:

… [T]he doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy" … . Where a change in circumstances involves the substantial completion of construction, "courts must consider several factors, including whether the challengers sought preliminary injunctive relief or otherwise attempted to preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation"… . Although injunctive relief is theoretically available, as a project can be dismantled, courts consider how far the work has progressed toward completion in determining mootness … . Matter of Bothar Constr., LLC v Dominguez, 2022 NY Slip Op 00346, Third Dept 1-20-22

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ARBITRATION, WAIVER OF CHALLENGE TO ARBITRABILITY.

RESPONDENTS' PARTICIPATION IN THE PORTION OF THE ARBITRATION WHICH DEALT WITH THE USE OF ESCROW FUNDS TO REPAIR CONDOMINIUM SWIMMING POOLS WAIVED ANY CHALLENGE TO THE ARBITRABILITY OF THE ISSUE (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined respondents waived the ability to challenge the arbitrability of damage to swimming pools in this action seeking to use escrow funds for condominium repairs. The swimming pools were not on the "punch list" of items to be repaired using the escrow funds. But respondent Katz participated in the portion of the arbitration which focused on the repair of the pools:

It is well settled that "[a] party who actively participates in arbitration without seeking a stay pursuant to CPLR 7503 (b) waives the right to a judicial determination of the arbitrability of the dispute" … . There is no dispute that Katz participated in the first three arbitration hearings, at the second of which he attempted to submit Fuller's report to address the issue regarding the swimming pools and, after the rejection of the report, he orally argued his position. The record is devoid of any request for a stay of any kind. Thus, Katz's participation foreclosed respondents' attack on the arbitrability of the pool repairs … . Matter of Kohn (Waverly Homes Dev. LLC), 2022 NY Slip Op 02177, Third Dept 3-31-22

CIVIL PROCEDURE, CONTRACT LAW, DISCLOSURE OF TAX RETURNS.

PLAINTIFF COUNTY, ACTING ON BEHALF OF THE NURSING HOME WHERE DECEDENT WAS CARED FOR, WAS ENTITLED TO DISCLOSURE OF DECEDENT'S TAX RETURNS; THE RETURNS ARE RELEVANT TO WHETHER DECEDENT'S SON BREACHED THE "RESPONSIBLE PARTY AGREEMENT" WHICH REQUIRED HIM TO USE THE DECEDENT'S INCOME TO PAY THE NURSING HOME (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, plaintiff county (on behalf of the nursing home where decedent was cared for) was entitled to disclosure of decedent's tax returns in this action against decedent's son. The action alleged the son breached the "responsible party agreement" in which the son agreed to pay the decedent's nursing home costs from the decedent's income and resources:

Unlike a typical action where the assets of a defendant are irrelevant unless and until a judgment is obtained, here … the existence and value of decedent's assets are critical to the issue of whether Jeffrey Garry [decedent's son] breached the agreement by failing to use such assets to pay for decedent's care … . …

Although "tax returns are generally not discoverable unless the party seeking them shows that they are relevant to issues in the case, indispensable to the claim and unavailable from other sources" … , we are satisfied that plaintiff made the requisite showing here, particularly given defendants' reluctance to produce responsive documents or interrogatory responses that may have otherwise provided information contained in decedent's tax returns … . County of Warren v Swan, 2022 NY Slip Op 02169, Third Dept 3-31-22

Practice Point: Although tax returns are generally not discoverable until a judgment is obtained, here the decedent's returns were deemed relevant to whether decedent's son breached the "responsible party agreement" with the nursing home which cared for decedent. The agreement required decedent's son to pay the nursing home from decedent's income and resources.

CIVIL PROCEDURE, JUDGES, SUMMARY JUDGMENT.

THE JUDGE SHOULD NOT HAVE, SUA SPONTE, GRANTED DEFENDANT PARTIAL SUMMARY JUDGMENT ON THE STRUCTURE-LOSS (FIRE-DAMAGE) CLAIM; THE PARTIES WERE NOT MADE AWARE OF THAT POSSIBILITY PRIOR TO THE RULING (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, in a decision addressing many property-insurance (fire loss) issues not summarized here, determined the judge should not have, sua sponte, granted a motion for partial summary judgment:

… Supreme Court erred in sua sponte granting LaVigne [defednant] summary judgment on her structure loss claim as no party had moved on or briefed relative to this claim. We agree. "Although a court may not generally grant summary judgment sua sponte in the absence of a motion pursuant to CPLR 3212, in certain circumstances, a court may grant such relief, even if it is not demanded, so long as there is no substantial prejudice to the adverse party. In such cases, [this Court] require[s] that the court give notice to the parties that summary judgment is being considered as a remedy, so that they may develop evidence and offer proof in support of or in opposition to the motion" … . Here, although the court did ask questions regarding the structure loss claim at oral argument, we do not find that to be sufficient notice that summary judgment was being considered and, as such, the insurance company was substantially prejudiced … . … [I]t is clear from the record that the parties were not "deliberately charting a course for summary judgment" … , and in fact were quite surprised by the Supreme Court's questions regarding summary judgment on this claim. Moreover, it appears from the record that the insurance company did not depose LaVigne. Collyer v LaVigne, 2022 NY Slip Op 01083, Third Dept 2-17-22

CIVIL PROCEDURE, TRUSTS AND ESTATES, CONCURRENT JURISDICTION, SUPREME & SURROGATE'S COURT.

PETITIONER STARTED PROCEEDINGS CONCERNING THE EXECUTOR'S HANDLING OF DECEDENT'S ASSETS IN SURROGATE'S COURT; AFTER RELIEF WAS DENIED WITHOUT PREJUDICE PETITIONER STARTED SIMILAR PROCEEDINGS IN SUPREME COURT, A COURT OF CONCURRENT JURISDICTION; THE EXECUTOR'S MOTION TO TRANSFER THAT PROCEEDING TO SURROGATE'S COURT SHOULD HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Garry, determined that Surrogate's Court, not Supreme Court, was the proper forum for this proceeding concerning respondent-executor's handling of decedent's assets. Both respondent and petitioner are decedent's children. Petitioner had commenced proceedings in Surrogate's Court, and, after the requested relief was denied without prejudice, petitioner commenced a similar proceeding in Supreme Court:

"Supreme Court and . . . Surrogate's Court have concurrent jurisdiction in matters involving decedents' estates" … . Generally, where courts share concurrent jurisdiction, "it should continue to be exercised by that one whose process was first issued. Moreover, wherever possible, all litigation involving the property and funds of a decedent's estate should be disposed of in . . . Surrogate's Court" … . Supreme Court's denial of a motion to transfer to Surrogate's Court will not be disturbed absent an abuse of discretion … . * * *

Petitioner challenges the propriety of transactions allegedly made in breach of respondent's fiduciary duty to decedent while decedent was alive, involving assets that would have become part of decedent's estate. This matter falls squarely within the purview of Surrogate's Court … . Since "all the relief requested may be obtained in . . . Surrogate's Court and . . . Surrogate's Court has already acted," we find that Supreme Court should have granted respondent's motion seeking to transfer the proceeding … . Matter of McNeil v McNeil, 2022 NY Slip Op 02173, Third Dept 3-31-22

Practice Point: Surrogate's Court and Supreme Court have concurrent jurisdiction. Here a matter concerning the executor's handling of decedent's assets was commenced in Surrogate's Court, and after relief was denied there, a second similar matter was commenced in Supreme Court. The executor's motion to transfer the second proceeding to Surrogate's Court should have been granted.

CONTRACT LAW, "MATERIAL" VS "CARDINAL" CHANGES TO A CONTRACT.

PLAINTIFF AGREED TO PROVIDE POURED, NOT PUMPED, CONCRETE AND SPECIFICALLY EXCLUDED THE INSTALLATION OF TACTILE STRIPS FROM THE SUBCONTRACT; DEFENDANT SUBSEQUENTLY REQUESTED THAT PLAINTIFF PROVIDE PUMPED CONCRETE AND INSTALL TACTILE STRIPS; THESE CHANGES WERE MATERIAL BUT NOT "CARDINAL" SUCH THAT PLAINTIFF'S PERFORMANCE WAS EXCUSED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that defendant's (Banton's) requested changes to the contract were not a "cardinal changes" such that Banton breached the contract. The plaintiff, pursuant the subcontract, provided concrete for the construction project. The original subcontract indicated plaintiff would "pour" not "pump" the concrete and would not install "tactile strips." Subsequently, Banton requested that the concrete be pumped and that tactile strips be installed. The parties then agreed to proceed with those changes:

Supreme Court found that Banton's request to modify the concrete delivery method from pouring to pumping, in light of the express subcontract exclusion, was a material change to the scope of plaintiff's work under the agreement. Although we agree with the court that this was a material change, we do not find it to be a cardinal change such that Banton can be found to have breached the contract … . A cardinal change is one that affects "'the essential identity or main purpose of the contract,' such that it 'constitutes a new undertaking'" … . The main purpose of this subcontract was to complete the concrete work for the project, and we do not find that the changes in the work requested by Banton fundamentally changed this purpose so as to constitute a cardinal change that would relieve

plaintiff of its obligation to perform under the subcontract … . This conclusion is further supported by the fact that plaintiff was ready, willing and able to implement these changes and continue to perform under the subcontract, but only if its price was met. McCarthy Concrete, Inc. v Banton Constr. Co., 2022 NY Slip Op 02168, Third Dept 3-31-22

CONTRACT LAW, BREACH OF COVENANT OF GOOD FAITH VS BREACH OF CONTRACT.

THE BREACH OF THE IMPLIED COVENANT OF GOOD FAITH SHOULD HAVE BEEN DISMISSED AS DUPLICATIVE OF THE BREACH OF CONTRACT CAUSE OF ACTION (THIRD DEPT).

The Third Department, modifying Supreme Court, determined the breach of the implied covenant of good faith should have been dismissed as duplicative of the breach of contract action:

Supreme Court … erred by denying that part of defendants' motion seeking dismissal of the cause of action alleging breach of the implied covenant of good faith and fair dealing. A review of the allegations in the amended complaint discloses that this cause of action is based upon the same set of facts and seeks similar damages as the breach of contract cause of action. In view of this, the breach of the implied covenant of good faith and fair dealing cause of action is duplicative of the breach of contract cause of action and, therefore, it should have been dismissed … . Shmaltz Brewing Co., LLC v Dog Cart Mgt. LLC, 2022 NY Slip Op 01086, Third Dept 2-17-22

CORPORATION LAW, RELIGION, ELECTION OF DIRECTORS.

THE DOCTRINE OF COLLATERAL ESTOPPEL DID NOT PRECLUDE THIS ACTION TO DETERMINE THE VALIDITY OF THE PURPORTED 2017 ELECTION OF THE BOARD OF DIRECTORS; THE PRIOR ACTION CONCERNED ONLY THE VALIDITY OF THE PURPORTED 2019 ELECTION OF THE BOARD OF DIRECTORS (THIRD DEPT).

The Third Department, reversing Supreme Court, held the doctrine of collateral estoppel did not preclude this Sullivan County action, which sought to determine whether a 2017 election of the board of directors of plaintiff religious corporation was valid. A prior action in Kings County determined a 2019 election of the board of directors of the same corporation was a nullity:

As defendants' amended petition and the order of Supreme Court … in the Kings County proceeding reflect, the issue to be determined therein was the validity of the 2019 election, not the validity of the 2017 election. Defendants sought in that proceeding to declare the 2019 election a nullity and, as a result, enjoin the individual plaintiffs, purportedly elected in 2019, from acting as the board of directors. Indeed, the court went out of its way during oral argument in that matter to so limit the issue when it stated that it "want[ed] to be very clear that [it was] making no determination in this case as to whether [defendants] have any right to control the corporation by virtue of any acts that predated the [June 2019 election.]" The court further clarified "that [it] take[s] no position on the validity of any actions that [defendants] claim[] to have taken in 2017 and thereafter," and added that the allegations relating to the 2017 election was part of "[t]he Sullivan County matter" which "is not before [it]," and that the proceeding "has nothing to do with the Sullivan County matter." More importantly, the order signed by the court was so circumscribed, and granted the amended petition "to the sole extent that it [sought] to invalidate" the 2019 election. Congregation Machne Ger v Berliner, 2022 NY Slip Op 00483, Third Dept 1-27-22

CORRECTION LAW, CRIMINAL LAW, EMPLOYMENT LAW, CERTIFICATES OF GOOD STANDING.

THE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION (DOCCS) DID NOT ADEQUATELY EXPLAIN THE STATUTORY FACTORS SUPPORTING ITS DENIAL OF PETITIONER'S REQUEST FOR A CERTIFICATE OF GOOD STANDING, WHICH WOULD ALLOW THE FORMER INMATE TO WORK AS A SCHOOL BUS DRIVER; THEREFORE THE DENIAL WAS ARBITRARY; MATTER REMITTED FOR FURTHER PROCEEDINGS (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the Department of Corrections and Community Supervision's (DOCCS's) denial of petitioner's application for a certificate of good conduct (CGC) was not supported by the agency's cursory rulings, rendering the denial arbitrary and requiring remittal for further proceedings. Petitioner, a former inmate with a sexual-offense conviction, sought the certificate of good standing in order to work as a school bus driver:

… [T]he challenged determination is a form letter with blanks to be filled in, and the Assistant Commissioner made no effort to explain his reasoning beyond checking a box next to a sentence stating that petitioner's application was being denied because "[t]he relief to be granted by the [CGC] is inconsistent with public interest." There is no question that such a "cursory letter decision," which mentions only one of the statutory factors set forth in Correction Law § 703-b and offers no discussion of the "grounds for the denial[,] precludes meaningful review of the rationality of the decision" … .

… Correction Law article 23 requires more than a naked reliance on the crime of conviction, and the Assistant Commissioner's affidavit … reflects that DOCCS "failed to comply with the statute and acted in an arbitrary manner" … . Although the record contains other information regarding the circumstances of petitioner's conviction and his subsequent history that might render the denial of his application rational, a "court is powerless to sanction the determination by substituting what it deems a more appropriate or proper basis" … . Matter of Streety v Annucci, 2022 NY Slip Op 02170, Third Dept 3-31-22

CORRECTION LAW, SEX OFFENDERS, REHABILITATION.

THE CORRECTION LAW DOES NOT REQUIRE AN INMATE RESIDENTIAL TREATMENT FACILITY (RTF) TO PROVIDE SEX OFFENDERS WHO ARE ABOUT TO BE RELEASED WITH REINTEGRATION PROGRAMS IN THE OUTSIDE COMMUNITY, AS OPPOSED TO WITHIN THE PRISON (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined the "residential treatment facility" (RTF) within the Fishkill Correctional Facility complied with the Correction Law. Plaintiffs alleged Fishkill did not provide sufficient opportunities outside the prison facility for reintegrating inmates into the community. Supreme Court agreed. The Third Department held that the Correction Law does not indicate the programs for reintegrating inmates must be offered outside the facility:

A resident in an RTF "may be permitted to leave such facility in accordance with the provisions of [Correction Law § 73]" …. To that end, DOCCS "shall be responsible for securing appropriate education, on-the-job training and employment" for RTF residents (Correction Law § 73 [2]). Furthermore, "[p]rograms directed toward the rehabilitation and total reintegration into the community of persons transferred to a residential treatment facility shall be established" (Correction Law § 73 [3]). That said, nothing in Correction Law § 73 (2) or (3) states specifically where the opportunities provided in a rehabilitative program established by DOCCS or where the education, training or employment to be secured by DOCCS must be located. In other words, there is no statutory mandate providing that DOCCS's obligations under Correction Law § 73 be outside the confines of Fishkill. Alcantara v Annucci, 2022 NY Slip Op 02163, Third Dept 3-31-22

CRIMINAL LAW, APPEALS.

THE CRIMINAL PROCEDURE LAW SPELLS OUT THE ONLY GROUNDS FOR APPEAL IN A CRIMINAL PROCEEDING; NO APPEAL LIES FROM THE DENIAL OF A MOTION TO CORRECT, AMEND OR SETTLE THE SENTENCING TRANSCRIPT; AND NO APPEAL LIES FROM ADDING A MANDATORY SURCHARGE, WHICH IS NOT PART OF A SENTENCE (THIRD DEPT).

The Third Department determined no appeal lies from an order denying defendant's motion to correct, amend or settle the sentencing transcript or from an order adding the mandatory surcharge:

As a general rule, "no appeal lies from a determination made in a criminal proceeding unless one is provided by the CPL, [which] exclusively provides for rights to appeal in criminal matters" … .A defendant's right to appeal to this Court in a criminal case is "strictly limited to those authorized by statute" … . The … order denying defendant's motion to correct, amend or settle the sentencing transcript and the uniform sentence and commitment form and adding the mandatory surcharge does not fit within the statutory authorization for appeals by a defendant as of right to this Court (see CPL 450.10 …). Defendant's reliance on case law involving the correction of trial records on direct appeals from judgments of conviction is misplaced, given that this appeal is not from the judgment of conviction, which was previously affirmed on appeal (303 AD2d at 830).

With regard to the mandatory surcharge, although it should be "levied at sentencing" (Penal Law § 60.35 [1] [a]), it is not part of the sentence that must be pronounced at the sentencing proceeding … . As such, that part of County Court's order amending the uniform sentence and commitment form by adding the mandatory surcharge did not constitute the imposition of a sentence or a modification of the sentence so as to authorize defendant's appeal therefrom (see CPL 450.10). People v Johnson, 2022 NY Slip Op 01844, Third Dept 3-17-22

Practice Point: The Criminal Procedure Law lays out all the allowed grounds for appeal in a criminal case. The denial of a motion to correct, amend or settle a sentencing transcript is not appealable. The adding of a mandatory surcharge is not part of a sentence and therefore is not appealable.

CRIMINAL LAW, JUDGES, SENTENCING.

THE LENGTH OF THE SENTENCE WAS NOT PRONOUNCED; RESENTENCING IS REQUIRED (THIRD DEPT).

The Third Department, reversing County County, determined the failure to pronounce the length of sentence required resentencing:

"CPL 380.20 requires that courts must pronounce sentence in every case where a conviction is entered. 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" … . This statutory requirement is "unyielding" … . Here, although the term of imprisonment was recited — on the record and more than once — at the time of sentencing, County Court "did not pronounce the length of the term of [imprisonment] in open court" … . People v Belcher-Cumba, 2022 NY Slip Op 00691, Third Dept 2-3-22

CRIMINAL LAW, JURISDICTIONAL DEFECTS, INDICTMENTS, SUPERIOR COURT INFORMATIONS.

BOTH THE INDICTMENT AND THE SUPERIOR COURT INFORMATION CHARGED CRIMES WITH THE ELEMENT THAT THE VICTIM WAS LESS THAN 17; BOTH HAD THE WRONG BIRTH DATE FOR THE VICTIM WHICH THEREBY ALLEGED THE VICTIM WAS MORE THAN 17; THAT IS A JURISDICTIONAL DEFECT WHICH CANNOT BE CORRECTED BY AMENDMENT (THIRD DEPT).

The Third Department, reversing the conviction and dismissing the superior court information, determined that both the indictment and the subsequent superior court information were jurisdictionally defective. Both charged sexual offenses with the victim being less than 17 years old as an element. Both had the wrong birth date for the victim, which placed the victim's age at more than 17 years old. The Third

Department noted that the indictment, which was replaced by the superior court information, was improperly amended to reflect the correct birth date:

… [T]he superior court information specifically cited and charged defendant with endangering the welfare of a child under Penal Law § 260.10 (1), which provides that "[a] person is guilty of endangering the welfare of a child when . . . [h]e or she knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old" (Penal Law § 260.10 [1]). However, the superior court information also alleged that, "[o]n or about November 13, 2016, . . . the defendant . . . did knowingly act in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old, . . . having a date of birth of 6/2/1999, by engaging in oral sexual conduct with" the victim. Inasmuch as the offense of endangering the welfare of a child requires that the victim be less than 17 years old, we find that the superior court information was jurisdictionally defective because it failed to effectively charge defendant with the commission of a crime where the date of birth indicated that the victim was 17 at the time of the offense … .

Although a trial court may permit an indictment to be amended "with respect to defects, errors or variances from the proof relating to the matters of form, time, place, names of persons and the like" (CPL 200.70 [1]), an indictment may not "be amended for the purpose of curing . . . [a] failure thereof to charge or state an offense[] or . . . [l]egal insufficiency of the factual allegations" (CPL 200.70 [2] [a], [b] …). Here, inasmuch as the first five counts of the indictment charged defendant with offenses that required the victim to be less than 17 years old, such counts suffered from the same jurisdictional defect as the superior court information in that they failed to allege a crime by stating that the victim's date of birth was June 2, 1999 — making the victim 17 years old at the time of the alleged offense on November 13, 2016. As such, County Court had no authority to grant the People's application to amend those counts, "regardless of any consistency with the People's theory before the grand jury" or lack of prejudice to defendant … . People v Solomon, 2022 NY Slip Op 02158, Third Dept 3-31-22

Practice Point: If an element of the crime is that the victim is less than 17, and the indictment and the superior court information have the wrong birth date which puts the victim's age at more than 17, the indictment and the superior court information are jurisdictionally defective and cannot be amended.

CRIMINAL LAW, MODE OF PROCEEDING ERROR, INVESTIGATOR IN JURY ROOM.

ALLOWING THE PEOPLE'S INVESTIGATOR TO GO INTO THE JURY ROOM DURING DELIBERATIONS TO SHOW THE JURORS HOW TO OPERATE A DIGITAL RECORDER WAS A MODE OF PROCEEDINGS ERROR THAT REQUIRED REVERSAL, DESPITE THE DEFENDANT'S CONSENT TO THE PROCEDURE (THIRD DEPT).

The Third Department, reversing defendant's conviction and ordering a new trial, determined the People's investigator should not have been allowed to go into the jury room during deliberations to show the jurors how to operate a digital recorder. Although the defendant consented to the procedure, the Third Department decided the error was a "mode of proceedings" error which did not require preservation:

Pursuant to CPL 310.10 (1), a deliberating jury must be "under the supervision of a court officer" or "an appropriate public servant" and, "[e]xcept when so authorized by the court or when performing administerial duties with respect to the jurors, such court officer[] or public servant[] . . . may not speak to or communicate with [the jurors] or permit any other person to do so" … . Certainly, the People's investigator cannot be said to be an appropriate public servant to interact with the jury in the deliberation room. Also troubling is the lack of a record of what occurred while the investigator was in the deliberation room. Indeed, the "right to a trial by jury in criminal cases is 'fundamental to the American scheme of justice' and essential to a fair trial. At the heart of this right is the need to ensure that jury deliberations are conducted in secret, and not influenced or intruded upon by outside factors" … . Given that the procedure that occurred here, allowing a representative of the People to interfere in the jury's secret deliberations, goes "to the essential validity of the process and [is] so fundamental that the entire trial is irreparably tainted"… , we must reverse and remit for a new trial. People v Jones, 2022 NY Slip Op 01069, Third Dept 2-17-22

CRIMINAL LAW, SENTENCING, OFF-THE-RECORD CONDITIONS, YOUTHFUL OFFENDERS.

COUNTY COURT SHOULD NOT HAVE ACCORDED ANY WEIGHT TO AN OFF-THE-RECORD "CONDITION" THAT THE PEOPLE WOULD WITHDRAW THEIR CONSENT TO THE PLEA OFFER IF YOUTHFUL OFFENDER STATUS WERE GRANTED; ALTHOUGH THE PEOPLE CAN BARGAIN FOR SUCH A CONDITION, THERE WAS NOTHING ON THE RECORD ABOUT IT; SENTENCE VACATED AND MATTER REMITTED FOR CONSIDERATION OF THE FACTORS FOR A YOUTHFUL OFFENDER ADJUDICATION (THIRD DEPT).

The Third Department, vacating the sentence and remitting the matter, determined County Court failed to consider the relevant factors for adjudicating defendant a youthful offender. Instead the court did not consider the issue at all based on its understanding the People would withdraw their consent to the plea offer if youthful offender status were granted. Although the People may bargain for the right to withdraw consent to the plea agreement is youthful offender treatment is granted, there was no such condition on the record here:

"[I]t is a settled rule of law in this [s]tate that off-the-record promises made in the plea bargaining process will not be recognized where they are flatly contradicted by the record, either by the existence of some on-the-record promise whose terms are inconsistent with those later urged or by the placement on the record of a statement by the pleading defendant that no other promises have been made to induce his [or her] guilty plea" … . The plea proceedings here were devoid of any indication that the People conditioned their consent to the plea agreement upon defendant not receiving youthful offender treatment or that defendant understood such a condition to be part of the agreement, and defendant stated during the plea colloquy that no off-the-record promises had been made to induce his guilty plea. The People further failed to reference their purported right to withdraw consent to the plea agreement when they addressed the question of youthful offender treatment at sentencing. The alleged off-the-record arrangement was unenforceable given those circumstances and, as such, "County Court should not have accorded any weight to" it … .

… County Court found that defendant was an "eligible youth" for purposes of youthful offender status (CPL 720.10 [2], [3]), the court was obliged to consider the relevant factors and determine whether it would, as a discretionary matter, adjudicate him to be a youthful offender … . People v Irizarry, 2022 NY Slip Op 02159, Third Dept 3-31-22

Practice Point: Here County Court did not consider the factors for adjudicating whether defendant should be afforded youthful offender status based upon on an off-the-record "condition," i.e., that the People would withdraw their consent to the plea offer if the defendant were granted youthful offender status. Although the People can bargain for such a condition, there was nothing on the record about it. Therefore the judge should not have given it any weight and should have considered the factors for a youthful offender adjudication.

CRIMINAL LAW, ATTORNEYS, SEX OFFENDER REGISTRATION ACT (SORA), RIGHT TO EFFECTIVE ASSISTANCE. THE 3RD DEPARTMENT, JOINING THE 2ND, HOLDS THAT A DEFENDANT HAS A RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT A SORA RISK-LEVEL PROCEEDING, DESPITE ITS CIVIL NATURE; DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE; THE JUDGE DID NOT MAKE THE REQUIRED FINDINGS OF FACT AND CONCLUSIONS OF LAW (THIRD DEPT).

The Third Department, reversing County Court, in a full-fledged opinion by Justice Garry, determined: (1) defendant was entitled to and did not receive effective assistance of counsel at the SORA risk-level proceeding (which is civil in nature). despite his decision not to appear; and (2) the SORA judge did not make the required findings of fact and conclusions of law, requiring remittal:

Despite SORA proceedings being civil in nature, not criminal … , we now join the Second Department in explicitly holding that SORA defendants have the right to the effective assistance of counsel, pursuant to the Due Process Clauses contained in the 14th Amendment of the US Constitution and article I, § 6 of the NY Constitution, because the statutory right to counsel in such proceedings (see

Correction Law § 168-n [3]) would otherwise be rendered meaningless, and because SORA determinations affect a defendant's liberty interest … .

… Although defendant waived his right to be present at the SORA hearing, he did not waive his right to contest the Board's risk level recommendation or the People's arguments and proof … . Counsel — who acknowledged at the hearing that he had "had no contact" with defendant — made no arguments, essentially agreed to the Board's recommendation, and failed to require the People to admit any proof at the hearing or County Court to provide any reasoning for its determination. … The record … reveals that counsel, who did not communicate with his client at all and "failed to litigate any aspect of the adjudication," did not provide effective representation … . As defendant was deprived of the effective assistance of counsel, upon remittal he is entitled to a new hearing with different assigned counsel. People v VonRapacki, 2022 NY Slip Op 01071, Third Dept 2-17-22

CRIMINAL LAW, EVIDENCE, WEIGHT OF THE EVIDENCE.

CRIMINAL SALE OF A CONTROLLED SUBSTANCE FIRST DEGREE AND THE RELATED CONSPIRACY CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE (THIRD DEPT).

The Third Department determined the criminal sale of a controlled substance first degree and the related conspiracy convictions were against the weight of the evidence:

In a weight of the evidence review, we first determine whether, based on all of the credible evidence, a different finding would have been unreasonable, and, if not, we then "weigh the relative probative force of the conflicting testimony and the relative strength of the conflicting inferences that may be drawn from the testimony" to determine if the verdict is supported by the weight of the evidence … . . * * *

Although the jury may have been able to infer from the intercepted communications that defendant sold cocaine to Henry on October 28, 2017, the

evidence failed to satisfy the two ounce or more weight element of criminal sale of a controlled substance in the first degree … . Under these circumstances, the evidence falls short of establishing the elements of criminal sale of a controlled substance in the first degree when viewed in a neutral light … . As defendant's conspiracy conviction is premised upon the criminal sale in the first degree charge, it too must fall based upon a review of the weight of the evidence … . People v Adams, 2022 NY Slip Op 00076, Third Dept 1-6-22

CRIMINAL LAW, JAILHOUSE PHONE CONVERSATIONS INADMISSIBLE.

A JAIL PHONE CALL IN WHICH DEFENDANT SAID HE MIGHT PLEAD GUILTY SHOULD NOT HAVE BEEN ADMITTED BECAUSE ITS PREJUDICIAL EFFECT OUTWEIGHED ANY PROBATIVE VALUE; THE PROSECUTOR'S SUMMATION REFERENCE TO THE PORTION OF THE PHONE CALL IN WHICH DEFENDANT SAID HE NEEDED A "PAID LAWYER" WAS AN IMPROPER USE OF THE RIGHT TO COUNSEL AGAINST THE DEFENDANT; NEW TRIAL ORDERED (THIRD DEPT).

The Third Department, reversing defendant's conviction and ordering a new trial, determined a jail phone call in which defendant said he might plead guilty was inadmissible. In addition the prosecutor's comment on summation that defendant said (in that jail phone call) he needed a "paid lawyer" was an improper reference to defendant's right to counsel:

[Defendant] was deprived of a fair trial based upon the admission of a jail phone call wherein he stated that he might as well "cop out to . . . the five years or whatever." The People portrayed this evidence as relevant to show defendant's consciousness of guilt. Even if relevant, evidence of consciousness of guilt is generally considered weak … . That said, defendant's statement that he contemplated taking a plea had little probative value but had a prejudicial effect on him. In this regard, "[s]ince it is widely assumed that only the guilty would consider entering a guilty plea, the knowledge that defendant wanted to plead guilty would make it difficult for the jury to accept the presumption of innocence and to evaluate the evidence fairly" … .

We also agree with defendant's argument that he was prejudiced by the prosecutor's comment on summation that defendant, in the jail phone call, stated that "[h]e need[ed] to get a paid lawyer to see if he can get lesser time." The prosecutor argued to the jury that this statement went to defendant's consciousness of guilt. A prosecutor, however, cannot use a defendant's invocation of his or her constitutional right to counsel against such defendant … . It follows that any commentary to this effect is improper. Accordingly, defendant was prejudiced by the prosecutor's summation … . People v Roberts, 2022 NY Slip Op 02157, Third Dept 3-31-22

Practice Point: Defendant, in a jail phone call, said he might plead guilty and he needed a "paid lawyer." The "might plead guilty" statement should not have been admitted because it was highly prejudicial but had little probative value. The prosecutor's reference in summation to the "need a paid lawyer" statement improperly used defendant's right to counsel against him. These were deemed reversible errors.

CRIMINAL LAW, JUDGES, RE-SENTENCING.

DEFENDANT SHOULD NOT HAVE BEEN RESENTENCED ON THE ORIGINAL CHARGE PURSUANT TO CPL 420.10 FOR FAILURE TO PAY RESTITUTION; THE JUDGE DID NOT MAKE THE STATUTORILY REQUIRED FINDINGS FOR RESENTENCING UNDER THAT STATUTE; RESENTENCE VACATED (THIRD DEPT).

The Third Department, reversing County Court, vacated defendant's resentence. Once a defendant is sentenced, the court no longer has jurisdiction over the matter. Here, after it was determined defendant had willfully failed to pay the ordered restitution, defendant was resentenced to prison on the original conviction. By statute a defendant may be resentenced for failure pay restitution, but only after the court makes a finding the defendant is unable to pay due to indigency. No such finding was made here:

CPL 420.10 (3) provides that, when a court imposes restitution as part of a defendant's sentence, the court can imprison the defendant if he or she fails to pay

restitution; such provision authorizing imprisonment for failure to pay restitution can be set forth at the time of sentencing or may be added "at any later date while the . . . restitution . . . or any part thereof remains unpaid" (CPL 420.10 [3]). Although County Court therefore retained jurisdiction under the auspices of this statute, it erred in resentencing defendant pursuant to CPL 420.10 (5). As relevant here, CPL 420.10 (5) provides that, "[i]n any case where the defendant is unable to pay a fine, restitution or reparation imposed by the court, he [or she] may at any time apply to the court for resentence." Resentencing is authorized "if the court is satisfied that the defendant is unable to pay the fine, restitution or reparation" (CPL 420.10 [5]). Here, there was no finding by the court that defendant was unable to pay the restitution due to indigency … . … [W]e refuse to equate defendant's acceptance of the global agreement [agreeing to 81/2 to 25 years in prison including time served] with the application necessary to resentence him under CPL 420.10 (5) … . County Court could have sentenced defendant to a year in prison for his failure to pay under CPL 420.10 (3) and (4), but it did not. As it erred in utilizing CPL 420.10 (5), the resentence must be vacated. People v Marone, 2022 NY Slip Op 01070, Third Dept 2-17-22

CRIMINAL LAW, JUDGES, SENTENCING, VICTIM IMPACT STATEMENT.

IN THIS SEX-OFFENSE CASE, THE SENTENCING JUDGE VIOLATED THE CRIMINAL PROCEDURE LAW BY REFUSING TO DISCLOSE THE VICTIM IMPACT STATEMENT TO THE DEFENDANT WITHOUT PLACING THE REASONS FOR NONDISCLOSURE ON THE RECORD; THE ISSUE SURVIVED THE WAIVER OF APPEAL (THIRD DEPT).

The Third Department, vacating defendant's sentence and remitting for resentencing before a different judge, determined the sentencing judge who reviewed the victim impact statement in this sexual-offense case, and who granted the victim's request to keep the victim impact statement confidential, violated CPL 390.50, which requires the judge to state the reasons, on the record, for not disclosing a victim impact statement to the defendant. The issue survived defendant's waiver of appeal:

… [W]e find that defendant's CPL 390.50 (2) (a) argument must survive the waiver of appeal as the Legislature has, without qualification or restriction, expressly mandated that "[t]he action of the court excepting information from disclosure shall be subject to appellate review" (CPL 390.50 [2] [a]), and courts "may not create a limitation that the Legislature did not enact" … . …

… [T]he record before us does not reflect any ruling by County Court with respect to the victim's request to except her statement from disclosure. We therefore must conclude that the court failed to set forth "the reasons for its action" on the record, in violation of CPL 390.50 (2) (a) … . The record also does not reflect that any consideration was given to redacting the victim's statement, leaving defendant wholly "unable to verify the accuracy of the information [therein] or meaningfully respond to it," in further contravention of the statute … . What is clear, however, is that defendant never had the opportunity to review the victim's statement and that County Court heavily relied upon it in fashioning its sentence. People v Ortiz, 2022 NY Slip Op 02041, Third Dept 3-24-22

Practice Point: If a sentencing judge wishes to withhold a victim impact statement from the defendant, the reasons for nondisclosure must be placed on the record (CPL 390.50). This issue survives a waiver of appeal.

CRIMINAL LAW, JUDGES, WAIVER OF APPEAL.

DEFENDANT'S WAIVER OF APPEAL WAS NOT VALID; THE COURT'S TERSE INQUIRY ABOUT THE APPEAL WAIVER WAS NOT CURED BY DEFENDANT'S EXECUTION OF A MORE DETAILED WRITTEN WAIVER AFTER SHE WAS SENTENCED AND MORE THAN A YEAR AFTER THE PLEA (THIRD DEPT).

The Third Department affirmed defendant's conviction but noted that the waiver of appeal was not valid:

The record reflects that County Court failed to explain the separate and distinct nature of the appeal waiver to defendant, and the court's terse inquiry, wherein defendant was asked, "Do you understand that as part of this disposition, you're

agreeing to waive your right to appeal" and that "normally . . . you have the right to appeal your plea and your sentence," was insufficient to ensure that defendant appreciated the nature and consequences of the rights that she was relinquishing … . Further, despite defendant's execution of a more detailed written waiver, such was executed after she was sentenced and more than a year after the plea was entered … .. Under these circumstances, we find that defendant did not knowingly and intelligently waive her right to appeal … . People v Crispell, 2022 NY Slip Op 01843, Third Dept 3-17-22

Practice Point: The court did not explain the separate and distinct nature of an appeal waiver, as opposed to the waiver of the right to a trial. The inadequacy of the court's explanation was not cured by the more detailed written waiver which was executed after defendant was sentenced and more than a year after the plea.

CRIMINAL LAW, JUDGES, SEX OFFENDER REGISTRATION ACT (SORA), DOWNWARD DEPARTURE.

COUNTY COURT DID NOT MAKE THE REQUIRED FINDINGS OF FACT FOR DEFENDANT'S REQUEST FOR A DOWNWARD DEPARTURE IN THIS SORA RISK LEVEL PROCEEDING; ORDER REVERSED AND MATTER REMITTED (THIRD DEPT).

The Third Department, reversing County Court, determined County Court failed to make the required findings of fact for defendant's request for a downward departure:

Defendant … argues that County Court erred in denying his request for a downward departure. Although the court did expressly deny this request in the order, it did not detail the factual findings in support of its conclusion. Thus, we are unable to ascertain the court's reasoning for denying defendant's request. Consequently, we reverse and remit for County Court to set forth its findings of fact for denying [*2]defendant's request for a downward departure as required … . People v Harvey, 2022 NY Slip Op 01073, Third Dept 2-17-22

CRIMINAL LAW, PLEA AGREEMENT AMBIGUOUS, GUILTY PLEA INVOLUNTARY.

WHEN THE TERMS OF THE PLEA AGREEMENT WERE DISCUSSED BOTH TWO AND THREE-YEAR SENTENCES WERE MENTIONED; DEFENDANT WAS SENTENCED TO THREE YEARS; DEFENDANT'S GUILTY PLEA WAS THEREFORE NOT VOLUNTARY; THE ISSUE WAS NOT PRESERVED BY A MOTION AND WAS CONSIDERED IN THE INTEREST OF JUSTICE (THIRD DEPT).

The Third Department, vacating defendant's guilty plea, determined defendant was not clearly informed of the sentence, rendering his plea involuntary. Although the issue was not preserved by a motion, the Third Department considered the appeal in the interest of justice:

… [W]hen the terms of the plea agreement were placed on the record, it was stated that the prison term to be imposed would be two years. County Court then, in discussing defendant's second felony offender status, stated that the prison term was three years but, thereafter, informed defendant that, if he violated any jail rules prior to sentencing, it would not be bound by the promise of a two-year prison term. The record does not reflect that there was any clarification or correction regarding the misstatements as to the agreed-upon sentence either during the plea colloquy or at sentencing before a three-year prison term was imposed. As "[t]he record thus fails to reveal that defendant was accurately advised of the essential terms and conditions of the plea agreement" … , we find that his plea was not knowing, voluntary and intelligent. People v Lumpkin, 2022 NY Slip Op 00477, Third Dept 1-27-22

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), SEXUAL CONTACT.

THE UNLAWFUL SURVEILLANCE CONVICTION DID NOT INVOLVE "SEXUAL CONTACT" AS DEFINED BY THE PENAL LAW; THEREFORE THE 20 POINT ASSESSMENT FOR "SEXUAL CONTACT" WAS ERROR (THIRD DEPT).

The Third Department, reversing (modifying) County Court, determined the risk factors requiring "sexual contact" and a "prior felony or sex crime" were not supported:

County Court erred in assessing points under risk factors 4 and 10. The assessment of points under risk factor 4 is warranted where a defendant has engaged in "either (i) two or more acts of sexual contact, at least one of which is an act of sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual contact, which acts are separated in time by at least 24 hours, or (ii) three or more acts of sexual contact over a period of at least two weeks" … . For purposes of risk classification, the Penal Law definition of terms is used … . The record does not reflect that defendant's crimes of conviction, for unlawful surveillance in the second degree … , involved any form of sexual contact … . In the absence of any record evidence that defendant engaged in sexual contact with any victim, 20 points should not have been assessed under risk factor 4 … . Likewise, the record lacks any evidence that defendant had a "prior felony or sex crime" within three years of the unlawful surveillance sex offenses and, thus, the court erred in assessing 10 points under risk factor 10 … . People v Wassilie, 2022 NY Slip Op 00103, Third Dept 1-6-22

EMPLOYMENT LAW, ARBITRATION, COVID, ESSENTIAL VS NONESSENTIAL EMPLOYEES.

THE CITY FIREFIGHTERS WHO, AS ESSENTIAL EMPLOYEES, WERE REQUIRED BY EXECUTIVE ORDER TO WORK DURING THE PANDEMIC, SOUGHT TIME-OFF OR MONETARY COMPENSATION EQUIVALENT TO THE TIME-OFF AFFORDED THE NONESSENTIAL CIVILIAN EMPLOYEES WHO WERE SENT HOME DURING THE PANDEMIC PURSUANT TO THE SAME THE EXECUTIVE ORDER; THE THIRD DEPARTMENT DETERMINED ARBITRATION OF THE ISSUE WAS PRECLUDED BY PUBLIC POLICY (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the city firefighters' claim to entitlement to time off from work or monetary compensation equivalent to the time-off afforded the civilian employees ordered to stay home (due to COVID) was prohibited by public policy. The firefighters were deemed essential employees and were required to report to work by Executive Order. The "nonessential" civilian employees were ordered to stay home by the same Executive Order:

… [W]e cannot agree that petitioner breached the CBA [collective bargaining agreement] by responsibly implementing the Governor's directives. To hold otherwise would create an untenable result — i.e., it would sanction a finding that petitioner breached the CBA based upon its required compliance with state public policy. Based on the very nature of the pandemic, requiring extreme public health measures as implemented through the executive orders, we conclude that arbitration of the resulting impact on respondent's members is precluded as a matter of public policy. Matter of City of Troy (Troy Uniformed Firefighters Assn., Local 86 IAFF, AFL-CIO), 2022 NY Slip Op 02174, Third Dept 3-31-22

Practice Point: Here is a rare example of the preclusion of the arbitration of an employment issue by public policy. The firefighters were ordered to work during COVID as essential employees. The nonessential civilian employees were ordered to stay home. Public policy prohibited arbitration of the question whether the firefighters were entitled to equivalent time-off or monetary compensation.

EMPLOYMENT LAW, HUMAN RIGHTS LAW.

PLAINTIFF'S "INVOLUNTARY RESIGNATION," HOSTILE WORK ENVIRONMENT AND RETALIATION ACTION PROPERLY SURVIVED SUMMARY JUDGMENT; TWO JUSTICE DISSENT (THIRD DEPT).

The Third Department over a two-justice dissent, determined plaintiff's employment discrimination and retaliation action properly survived summary judgment. Among the issues presented by the allegations was whether she "involuntarily resigned" because of the intolerably hostile work environment. Plaintiff alleged she was subjected to sexual harassment and was retaliated against after she complained about her treatment:

In our view, the broader account by plaintiff of a hostile work environment, Hawkins' [plaintiff's supervisor] behavior in placing plaintiff, but not a similarly situated man, on a PIP [performance improvement plan], and what plaintiff described as a wholly inadequate response by Russo [human resources official] to her August 2017 complaint about the situation reflect questions of fact as to whether plaintiff was subjected to a work environment so hostile that her only alternative was resignation and whether that hostility arose from a discriminatory motive … . Defendants attempted to rebut the presumption of discrimination arising from those facts via the affidavit of Hawkins, who averred in conclusory fashion that the other employee he supervised was performing better than plaintiff at the time she was placed on a PIP and that the other employee was also placed on a PIP at some point. Hawkins, however, gave no detail as to how the other employee compared to plaintiff on the performance metrics, failed to deny that the other employee was also underperforming on those metrics in July 2017 and offered no explanation as to why he did not seek to place both on a PIP at that time. Long v Aerotek, Inc., 2022 NY Slip Op 00915, Third Dept 2-10-22

EMPLOYMENT LAW, MUNICIPAL LAW, ARBITRATION, FIREFIGHTERS.

THE NUMBER OF FIREFIGHTERS WHICH MUST BE ON DUTY DURING A SHIFT IS A HEALTH AND SAFETY ISSUE, WHICH IS ARBITRABLE PURSUANT TO THE COLLECTIVE BARGANING AGREEMENT, NOT A JOB SECURITY ISSUE (WHICH IS NOT ARBITRABLE) (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the number of firefighters which must be on duty during a shift is not a job-security issue and is therefore arbitrable pursuant to the collective bargaining agreement (CBA):

Respondent contends that Supreme Court erred in concluding that its grievance concerned nonarbitrable job security clauses as the clauses relate only to minimum shift staffing requirements and do not guarantee employment to bargaining unit members during the life of the CBA, a hallmark of a no-layoff job security clause. Respondent further asserts that minimum staffing requirements set forth in … the CBA pertain to health and safety concerns and are properly the subject of arbitration.

… [T]he CBA "does not purport to guarantee a[n] [officer] his or her employment while the CBA is in effect, nor does it prohibit layoffs" … . "It also does not protect officers 'from abolition of their positions due to budget stringencies'" … . … [T]he CBA only sets forth "minimum staffing on particular shifts" … . Matter of City of Ogdensburg (Ogdensburg Firefighters Assn. Local 1799, A.F.L., C.I.O., I.A.F.F), 2022 NY Slip Op 00237, Third Dept 1-13-22

EMPLOYMENT LAW, MUNICIPAL LAW, RETIREES' MEDICARE PREMIUMS.

ELIMINATING THE LONGSTANDING PRACTICE OF REIMBURSING RETIREES' MEDICARE PART B PREMIUMS IS AN ISSUE THAT MUST BE NEGOTIATED WITH CURRENT EMPLOYEES; PERB DETERMINATION ANNULLED (THIRD DEPT).

The Third Department, annulling the determination of the Public Employment Relations Board (PERB), determined eliminating the longstanding practice of reimbursing retirees for Medicare Part B premiums was an issue that must be negotiated with current employees:

In its decision, PERB explicitly found that there was a longstanding practice of reimbursing retirees for their Medicare Part B premiums, rendering negotiation mandatory before the City could make any changes to that past practice for active employees who sought continuation of that benefit. Despite that finding, PERB determined that the improper practice charge must be dismissed because "the City took no action against current employees" since it only notified retirees about the change in the past practice. The fact that PERB only informed retirees of such a change does not mean that it did not affect current employees. PERB's reasoning in that respect fails to account for the actual hearing testimony, which established that many of petitioner's witnesses — who were active employees as of January 1, 2010 — either did not receive Medicare Part B reimbursements after that date or were given reason to believe that they would not be so reimbursed in the future despite representations throughout their employment that the practice would continue … . …

Because PERB explicitly found in its decision that "the 25-year[-]long uninterrupted practice" of reimbursing Medicare Part B premiums met the standard of a past practice that was subject to negotiation for active members of petitioner, and there is no dispute that negotiation did not occur between the City and petitioner prior to implementing the change to the reimbursement policy, the matter is remitted to PERB for a final disposition consistent with these findings. Matter of Albany Police Benevolent Assn. v New York Pub. Empl. Relations Bd., 2022 NY Slip Op 01215, Third Dept 2-24-22

EMPLOYMENT LAW, MUNICIPAL LAW, SOCIAL SERVICES LAW, BREACH OF LOYALTY.

ALTHOUGH THE PETITIONER, COUNTY COMMISSIONER OF SOCIAL SERVICES, WAS PROPERLY TERMINATED FROM HER EMPLOYMENT FOR OTHER REASONS, THE FACT THAT SHE TESTIFIED IN FAMILY COURT ABOUT THE PROPER PLACEMENT OF A JUVENILE WHICH WAS NOT AS SEVERE AS THE PLACEMENT ADVOCATED BY THE COUNTY ATTORNEY AND THE PROBATION DEPARTMENT DID NOT CONSTITUTE A BREACH OF LOYALTY (THIRD DEPT).

The Third Department, in this Article 78 action, affirmed the county's decision to terminate the employment of petitioner, who was Commissioner of Social Services for the county. The allegations of misconduct are too detailed to be summarized here. But the Third Department noted that the fact that the petitioner disagreed with the county attorney and the probation department about the appropriate placement of a juvenile, and so testified in Family Court, was not actionable misconduct:

… [P]etitioner, the Director of Probation and the County Attorney each had defined statutory roles in the Family Court proceeding … . That petitioner opted to promote a less stringent measure than her counterparts does not, as charged by respondents, constitute a breach of loyalty owed to either the County Attorney or the Director of Probation, or vice versa. … [T]o the extent that the Board relied, at all, on the Hearing Officer's findings with respect to [the relevant] charge … , its determination is not supported by substantial evidence. It therefore follows that so much of the Board's determination as sustained said specifications are annulled. Matter of Scuderi-Hunter v County of Del., 2022 NY Slip Op 01078, Third Dept 2-17-22

EQUAL ACCESS TO JUSTICE ACT, ATTORNEY'S FEES, VAPING.

ALTHOUGH THE VAPING ASSOCIATION PREVAILED IN ITS ACTION FOR A PRELIMINARY INJUNCTION STAYING THE ENFORCEMENT OF THE DEPARTMENT OF HEALTH'S REGULATIONS BANNING FLAVORED VAPING LIQUIDS, THE DEPARTMENT'S ACTION WAS "SUBSTANTIALLY JUSTIFIED;" THEREFORE THE VAPING ASSOCIATION WAS NOT ENTITLED TO ATTORNEY'S FEES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the respondent Public Health and Planning Council (within the NYS Department of Health) (the council) should not have been ordered to pay attorney's fees to petitioner Vapor Technology Association (the vaping association) pursuant to the State Equal Access to Justice Act. The respondent council had adopted emergency regulations prohibiting flavored vaping liquids targeting young people. The petitioner vaping association brought a combined Article 78 and declaratory judgment action challenging the emergency regulations as exceeding the council's regulatory authority. The Third Department granted the vaping association's request for a temporary restraining order and Supreme Court granted a preliminary injunction. The matter was rendered moot when the legislature banned the sale of the flavored electronic cigarette products. Because the vaping association had prevailed prior to the legislature's prohibition, it sought and was awarded attorney's fees:

CPLR 8601 (a) "mandates an award of fees and other expenses to a prevailing party in any civil action brought against the state, unless the position of the state was determined to be substantially justified or that special circumstances render an award unjust" … . * * *

Petitioners capably disputed respondents' arguments and obtained a temporary restraining order and a preliminary injunction barring enforcement of the emergency regulations, but a grant of temporary injunctive relief is not "an adjudication on the merits," and we need not decide who would have prevailed had this matter proceeded to a final judgment … .. Upon our review, we are satisfied that respondents articulated a reasonable factual and legal basis for their arguments that the Council and the Commissioner acted within their rule-making authority by

adopting the emergency regulations … . Thus, Supreme Court abused its discretion in finding that those arguments were not "substantially justified" within the meaning of CPLR 8601 (a), and petitioners were not entitled to an award of counsel fees and expenses as a result … .Matter of Vapor Tech. Assn. v Cuomo, 2022 NY Slip Op 02171, Third Dept 3-31-22

Practice Point: Even though a party which prevails against a state agency is generally entitled to attorney's fees pursuant to the State Equal Access to Justice Act, if the agency's actions are deemed "substantially justified" attorney's fees will not be awarded. Here the Department of Health's adoption of emergency regulations banning the sale of flavored vaping liquids (targeting young people as a market) was deemed "substantially justified" by the appellate court. The award of attorney's fees by Supreme Court was reversed.

FAMILY LAW, CONTRACT LAW, POST-ADOPTION CONTACT AGREEMENT.

THE BIOLOGICAL MOTHER AND THE ADOPTIVE MOTHER ENTERED A POSTADOPTION CONTACT AGREEMENT WHICH ALLOWED TWO SUPERVISED VISITS WITH THE BIOLOGICAL MOTHER PER YEAR; THE EVIDENCE OF THE CHILDREN'S BEHAVIOR AFTER VISITING WITH THE BIOLOGICAL MOTHER SUPPORTED FAMILY COURT'S CONCLUSION IT WAS IN THE BEST INTERESTS OF THE CHILDREN TO TERMINATE VISITATION WITH THE BIOLOGICAL MOTHER; THE DISSENT ARGUED THE EVIDENCE OF THE DAUGHTER'S, IN CONTRAST TO THE SON'S, POST-VISIT BEHAVIOR DID NOT SUPPORT TERMINATION OF VISITATION WITH THE DAUGHTER (THIRD DEPT).

The Third Department, over a two-justice partial dissent, determined Family Court properly terminated the biological mother's visitation with her children who had been adopted. The biological mother and the adoptive mother had entered a postadoption contact agreement which allowed the biological mother two supervised visits per year with her son and daughter. The evidence at the fact-finding hearing demonstrated that the son's behavior changed drastically after visits. His behavior was characterized as "out of control." There was evidence the

daughter began banging her head and had nightmares after a visit. The dissent argued the evidence supported termination of visits with the son, but did not support the termination of visits with the daughter:

The adoptive mother testified that after visiting the biological mother in December 2017, the son destroyed rooms in the house and was completely out of control for close to a month. After the July 2018 visit with the biological mother, the son "climb[ed] the walls in [his] classroom," hit his friend, hurt his sister and had difficulties regulating his behavior for several months. * * *

With respect to the dissent's reference to the policy concerns underlying postadoption contact agreements, we note that we wholeheartedly embrace and promote the policies and goals of these types of agreements and encourage open adoptions. However, it is not our intention to address the underlying policies of postadoption contact agreements, but, instead, to focus solely upon the principle governing and guiding the initiation and continuation of open contact between the children and the biological parent — the best interests of the children. Here, it is uncontroverted that the daughter displayed a persistent pattern of bizarre and harmful behavior — head banging and disrupted sleep due to nightmares — commensurate with visits with her biological mother. These behaviors continued for 1½ years. Although the daughter did not display the behaviors at the time of the visits, a time when the adoptive parents were present and the daughter's attention was directed toward other activities, the behaviors were manifested subsequent to each visit. … [W]e cannot agree that enforcing visitation with respect to one sibling but not the other serves the best interests of either. Matter of Jennifer JJ. v Jessica JJ., 2022 NY Slip Op 02043, Third Dept 3-24-22

Practice Point: The postadoption contact agreement allowing the biological mother to visit her children after adoption was properly terminated by the court because the evidence of the children's post-visit behavior supported the conclusion continued visitation was not in the best interests of the children.

FAMILY LAW, COVID, VISITATION.

MOTHER DID NOT WILLFULLY VIOLATE THE ORDER OF VISITATION; COVID MADE MEETING IN A PUBLIC PLACE DIFFICULT, THERE WAS CONFUSION ABOUT WHICH ORDER APPLIED, AND MOTHER RELIED ON HER ATTORNEY'S ADVICE (THIRD DEPT).

The Third Department, reversing Family Court, determined mother did not willfully violate an order of visitation. There was confusion about which order applied and mother relied on her attorney's advice:

The mother contends that Family Court abused its discretion when it found that she willfully violated the visitation order. Specifically, she asserts that she did not produce the child because the father unilaterally canceled visits, there was confusion over what order was in effect, and she relied upon the communications between the parties' attorneys to establish when the visitation would occur. * * *

… Family Court erred in finding that she willfully violated the order. Under these circumstances, where both parties testified as to the difficulties involved in having parenting time take place in a public venue during COVID-19, there was confusion among the parties as to which order was in effect at the time, and the mother relied on her attorney's advice, which had a sound basis … , it is clear that any violation was not willful. Matter of Damon B. v Amanda C., 2022 NY Slip Op 01082, Third Dept 2-17-22

FAMILY LAW, CUSTODY, GRANDPARENTS.

THE "SPECIAL CIRCUMSTANCES" WHICH MAY HAVE JUSTIFIED AWARDING CUSTODY OF THE CHILD TO THE GRANDPARENTS APPLIED ONLY TO FATHER AND NOT AT ALL TO MOTHER; FOR THAT REASON THE GRANDPARENTS' PETITION FOR CUSTODY OF THE CHILD SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing (modifying) Family Court, determined the grandparents' petition for custody of the child should not have been granted. Father has a criminal history and has been incarcerated. He was arrested with the child and drug paraphernalia in his car, where he was found asleep. Mother has no criminal history and no drug problems. The "special circumstances" which may have supported granting custody to the grandparents related only to father, not al all to mother. Therefore the grandparents' petition should have been denied:

The record reflects that the child was not subject to surrender, abandonment or persistent neglect nor is the mother unfit. Although the father was the subject of an indicated report relative to the incident when he fell asleep in his vehicle with drug paraphernalia near the child, a finding of neglect was not indicated as to the mother. Moreover, this was an isolated incident and not part of a pattern of persistent neglect. Although there was evidence that the father has a history of drug abuse and criminal convictions, the mother has neither. There was no evidence that the child was at risk of being harmed while in the mother's care; instead, the record demonstrates that the mother provided appropriate shelter, clothing, food and medical attention to the child. Additionally, the mother did not allow the father to have contact with the child in accordance with Family Court's orders. As Family Court found that the grandparents did not meet their burden on extraordinary circumstances as to the mother, the court erred in engaging in a best interests analysis and, instead, the custody petition should have been dismissed … . Matter of Anne MM. v Vasiliki NN, 2022 NY Slip Op 02161, Third Dept 3-31-22

Practice Point: Here "special circumstances" which may have supported granting the grandparents' petition for custody of the child with respect to father, did not apply at all to mother. Family Court should not have proceeded with a "best interests" analysis and should have denied the petition.

FAMILY LAW, FAMILY LAW, JUDGES, AUTOMATIC DISQUALIFICATION, JUDICIARY LAW.

THE FACT THAT THE ATTORNEY FOR THE CHILD (AFC) IN THIS CUSTODY MATTER HAD, AS A JUDGE, PRESIDED OVER A DIFFERENT CUSTODY MATTER INVOLVING MOTHER, BUT INVOLVING DIFFERENT CHIDREN AND A DIFFERENT FATHER, DID NOT REQUIRE AUTOMATIC DISQUALIFACTION OF THE AFC PURSUANT TO JUDICIARY LAW 17 (THIRD DEPT).

The Third Department, over a two-justice dissent, determined the attorney for the child (AFC) in the instant custody matter, who, as a judge, had presided over another custody case involving mother and different children, was not subject to automatic disqualification:

Various factual circumstances exist where disqualification of an attorney under Judiciary Law § 17 has been found. * * *

… [T]he custody case noted by the mother neither involved the subject children nor the subject children's father] Rather, it was an entirely separate proceeding involving different children and a different father. Furthermore, the mother does not allege any factual ties between these underlying proceedings and the prior custody case … . Indeed, the only common tie between them is that the mother was a litigant. … [O]nly the mother, and not her present custody claim over the subject children, had been before the AFC during his tenure as a judge.

… [T]he mother's fitness as the custodial parent presumably was an issue presented in her prior custody case. It is also an issue present here. Equating a discrete issue with a "matter" provided in Judiciary Law § 17, however, impermissibly stretches the meaning of "matter" such that it does not comport with "action, claim, . . . motion or proceeding" — the other terms in Judiciary Law § 17 … . … [I]n view of the jurisdiction of Family Court and the particular cases such court hears, a party's fitness as a custodial parent frequently arises as an issue

whether directly or indirectly. By giving an expansive view to "matter," the AFC, a former Family Court judge who had presided over countless proceedings in the past, would be disqualified from representing any party in any future case where another party in such case was previously before the AFC in one of those past proceedings — a result that would occur without regard to the nature of either the past proceeding or future case. Matter of Corey O. v Angela P., 2022 NY Slip Op 02044, Third Dept 3-24-22

Practice Point: The fact that the attorney for the child (AFC) in this custody case presided, as a judge, over another custody case involving mother, but involving different children and a different father, did not require automatic disqualification of the AFC pursuant to Judiciary Law section 17.

FAMILY LAW, JUDGES, ADOPTION OF A PARTY'S FINDINGS OF FACT.

THE WIFE'S REQUEST FOR MAINTENANCE WAS REJECTED WITHOUT EXPLANATION AND THE HUSBAND'S FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE WHOLLY ADOPTED BY SUPREME COURT; THE THIRD DEPARTMENT AWARDED MAINTENANCE ON APPEAL (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined the wife was entitled to maintenance in this divorce proceeding. The parties had been married for 44 years. The wife's income was around $31,000 and the husband's income was around $117,000. Both were retired. The Third Department noted that Supreme Court did not give any indication of its rationale for rejecting the wife's application and adopted the husband's findings of fact and conclusions of law:

"The amount and duration of a maintenance award are addressed to the sound discretion of the trial court, and will not be disturbed provided that the statutory factors and the parties' predivorce standard of living are considered" … .. "The court need not articulate every factor it considers, but it must provide a reasoned analysis of the factors it ultimately relies upon in awarding or declining to award maintenance" … .

Supreme Court wholly adopted verbatim the husband's proposed findings of fact and conclusions of law, without articulating the factors it considered or providing a reasoned analysis for its rulings on the proposed findings of fact and conclusions of law. "[F]indings of fact submitted pursuant to CPLR 4213 (a) cannot constitute the decision of the court [as] mandated by Domestic Relations Law § 236 (B) (5) (g)" … . Although Supreme Court failed to set forth its rationale for rejecting the wife's request for maintenance, "because our authority is as broad as that of the Supreme Court, we need not remit this issue" … . Louie v Louie, 2022 NY Slip Op 02172, Third Dept 3-31-22

Practice Point: Here in this divorce proceeding the judge did not give any indication of the rationale for rejecting the wife's request for maintenance and wholly adopted the husband's findings of fact and conclusions of law. Findings of fact cannot constitute a court's decision. Rather than remitting the matter, the Third Department awarded maintenance.

FAMILY LAW, MALTREATMENT FINDING.

PETITIONER-MOTHER'S APPLICATION TO HAVE THE MALTREATMENT FINDING DEEMED UNFOUNDED AND EXPUNGED PROPERLY DENIED; MOTHER WOULD NOT ALLOW HER 16-YEAR-OLD DAUGHTER INTO THE HOME; TWO-JUSTICE DISSENT (THIRD DEPT).

The Third Department, over a two-justice dissent, affirmed the NYS Office of Children and Family Services' (OCFS's) denial of petitioner-mother's application to have reports by the Central Register of Child Abuse and Maltreatment amended to be unfounded and expunged. Petitioner allegedly refused to allow her 16-year-old daughter into the home, which caused her daughter to find other places to stay. The dissent agreed with the majority's conclusion that mother's failure to exercise adequate care and supervision constituted maltreatment, but disagreed with the majority's finding that the daughter was placed in imminent risk of danger:

From the dissent:

OCFS's decision recited a plethora of facts relative to petitioner's failure to exercise the requisite degree of care or supervision. The same cannot be said regarding whether such failure harmed the child or imminently harmed the child. Rather, only in a conclusory fashion did OCFS find that petitioner's failure to exercise a minimum degree of care caused the child's physical, mental or emotional condition to be impaired or to be in imminent danger of being impaired. Indeed, OCFS's decision noted, and the record confirms, that, when the child stayed with the neighbor, the neighbor's residence was "safe" and posed "no concerns." OCFS also noted that the neighbor was approached about potentially obtaining custody of the child. Based on what OCFS found, substantial evidence, in our view, does not support the determination that the child was harmed or was in imminent risk of harm … . Matter of Tammy OO. v New York State Off. of Children & Family Servs., 2022 NY Slip Op 00706, Third Dept 2-3-22

FAMILY LAW, JUDGES, NO "DEFAULT WARNING."

IN THIS TERMINATION OF PARENTAL RIGHTS PROCEEDING, ALTHOUGH FAMILY COURT THREATENED TO FIND RESPONDENT IN DEFAULT WHEN HE DID NOT PROVIDE PROOF HE FAILED TO APPEAR BECAUSE HE WAS HOSPITALIZED, FAMILY COURT DID NOT ULTIMATELY GIVE RESPONDENT A "DEFAULT WARNING;" RESPONDENT AND HIS COUNSEL WERE PRESENT AT THE FACT-FINDING BUT WERE PRECLUDED BY THE COURT FROM PARTICIPATING; RESPONDENT HAS A RIGHT TO BE HEARD ON THE ABANDONMENT ISSUE; REVERSED AND REMITTED (THIRD DEPT).

The Third Department, reversing Family Court, determined respondent father in this termination of parental rights proceeding was not in default and that he was entitled to present a defense. To explain his failure to appear, respondent said he was hospitalized but he did not provide any proof of hospitalization when the court requested it. The court then found respondent to be in default and precluded respondent and his counsel from participating in the termination hearing:

Petitioner and the attorney for the child argue that the appeal must be dismissed because the challenged order was entered upon respondent's default. We disagree.

In its written decision, Family Court stated that it had advised respondent's counsel at the December 18, 2019 appearance that, if the requested medical documentation was not timely provided, it "would find [respondent] in default" and "the trial would be an [i]nquest." Our review of the record, however, confirms that no such warning was given. Instead, the court cautioned that if respondent failed to comply, it would "proceed with the proceeding with regard to the termination of his parental rights." This is not a default warning but notice that the hearing would go forward on January 15, 2020. However frustrating respondent's noncompliance with the court's reasonable directive to provide documentation of his hospitalization may have been, the key point here is that respondent and his counsel were in attendance at the fact-finding hearing. We fully appreciate that trial courts are vested with broad authority to maintain the integrity of their calendars. Under the circumstances presented, however, we conclude that Family Court abused its discretion in holding respondent to be in default and precluding any participation at the hearing … . Matter of Makayla NN. (Charles NN.), 2022 NY Slip Op 02165, Third Dept 3-31-22

Practice Point: Here Family Court never gave a "default warning" to respondent father when he failed to provide proof he did not appear because he was hospitalized. Father, who was present at the fact-finding, should not have been found to be in default and precluded from participating in the termination of parental rights proceeding.

FREEDOM OF INFORMATION LAW (FOIL), CERTIFICATION THERE ARE NO RESPONSIVE DOCUMENTS.

IF A GOVERNMENT AGENCY TO WHICH A FOIL REQUEST HAS BEEN MADE DOES NOT POSSESS ANY RESPONSIVE DOCUMENTS, THE AGENCY MUST PROVIDE A CERTIFICATION TO THAT EFFECT (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that if the records petitioner sought in his FOIL request do not exist or cannot be found, the respondent must so certify:

… [T]he statute commands that a government entity that does not supply any record in response to a FOIL request "shall certify that it does not have possession of such record or that such record cannot be found after diligent search" (Public Officers Law § 89 [3] [a] …). Although "[t]he statute does not specify the manner in which an agency must certify that documents cannot be located" … , respondent failed to provide any such certification … . Accordingly, "we remit the matter to Supreme Court for a determination of whether respondent has any other documents in [his] possession which are responsive to petitioner's FOIL request" … , or, if no responsive records can be found after a diligent search, for respondent to provide a proper certification as required … . Matter of Thomas v Kane, 2022 NY Slip Op 02164, Third Dept 3-31-22

Practice Point: If a government agency to which a FOIL request has been made does not possess any responsive documents, the statute requires the agency to provide a certification to that effect.

FREEDOM OF INFORMATION LAW (FOIL), ATTORNEY-CLIENT PRIVILEGE, PAROLE.

CERTAIN FOIL REQUESTS RE: THE TRAINING AND PROCEDURES OF THE BOARD OF PAROLE PROTECTED BY ATTORNEY-CLIENT PRIVILEGE; TWO DISSENTERS DISAGREED (THRID DEPT).

The Third Department, over two partial dissents, determined the FOIL request for certain documents relating to the training and procedures of the Board of Parole was properly denied as protected by the attorney-client privilege:

"[T]he attorney-client privilege protects communications between an attorney and his or her client that convey facts relevant to a legal issue under consideration, even if the information contained in the communication is not privileged" … . Regarding the minor offenders memoranda, these documents … were created by counsel and contain legal advice to the Board regarding the state of law and how the Board should conduct interviews in accord with such law. The court-decisions handouts likewise provide counsel's summary, view and impression of recent case law to the Board. Similarly, the presentation slides and the parole interviews and

decision-making handout discuss various legal standards and regulations and, as the Board's counsel noted, were provided to the Board so it could understand the requirements imposed by them and how it can comply with them. As to the remaining documents — handouts concerning Board interviews, sample decision language concerning departure from COMPAS [Correctional Offender Management Profiling for Alternative Sanctions] and hypothetical Board decisions — they also involve legal advice as to how to reach decisions on parole matters so as to be in compliance with applicable regulations…. .

From the two partial dissents:

… [M]any of the documents contain sections that are devoted solely to informing the Board of Parole of its duly codified statutory and regulatory duties in rendering parole determinations, without any fact-specific discussions or legal advice on how to apply the law to particular scenarios. Although these documents were prepared by attorneys in the course of a professional relationship, the general legal principles outlined therein are not confidential … * * *

… I disagree with the majority because it is my opinion that the proper basis to withhold these documents is the intra-agency exemption, rather than the attorney-client privilege exemption. Matter of Appellate Advocates v New York State Dept. of Corr. & Community Supervision, 2022 NY Slip Op 01354, Third Dept 3-3-22

LABOR LAW-CONSTRUCTION LAW, HOMEOWNER LIABILITY.

PLAINTIFF'S ACTIONS WERE NOT THE SOLE PROXIMATE CAUSE OF HIS FALL FROM A MAKESHIFT PLATFORM ON A LULL (FORKLIFT) USED TO REACH ELEVATED AREAS; PLAINTIFF'S MOTION FOR A DIRECTED VERDICT ON HIS LABOR LAW 240(1) CAUSE OF ACTION AGAINST THE HOMEOWNER WHO LEASED THE LULL AND DIRECTED PLAINTIFF'S WORK SHOULD HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined plaintiff's motion for a directed verdict on his Labor law 241(6) cause of action should have been granted. Plaintiff fell from a makeshift platform he placed on a lull (forklift) to

reach elevated areas of a house he was wrapping with an insulation material (Tyvek). The central question was whether plaintiff's own actions were the sole proximate cause of his fall and injuries:

… [I]t is beyond dispute that the lull was not an adequate safety device for the elevated work being performed by plaintiff at the time of his fall … . This conclusion is not changed by defendant's provision of harnesses incompatible with the lull … . Plaintiff's accident was plainly the direct result of the makeshift lull setup failing, and the parties are therefore in agreement that, unless plaintiff's choice not to use other available safety devices when installing the Tyvek was the sole proximate cause of his own injuries, plaintiff has established his Labor Law § 240 (1) claim.

Plaintiff indeed brought extension ladders and scaffolding with him to the job site, and it appears that defendant provided some ladders as well. …[T]here is simply no trial evidence to suggest that plaintiff knew he was expected to use a ladder or scaffolding to wrap the front of the house with Tyvek. It is uncontroverted that use of the lull with a makeshift platform had become commonplace at the job site in the weeks preceding plaintiff's accident, that the scaffolding was set up at the rear of the house specifically because the lull could not traverse the terrain there and that defendant's only affirmative safety-related instructions to plaintiff regarding the subject elevated work were to either use a harness or construct a platform, both of which involved use of the lull. As proof of the foregoing element is lacking, there is no rational process by which a jury could conclude that plaintiff was the sole proximate cause of his own injuries … . DeGraff v Colontonio, 2022 NY Slip Op 01074, Third Dept 2-17-22

LANDLORD-TENANT, HUD REGULATIONS.

THE NOTICE OF TERMINATION OF A LEASE DID NOT COMPLY WITH THE HUD REGULATION REQUIRING THAT THE REASONS FOR TERMINATION BE STATED WITH ENOUGH SPECIFICITY TO ALLOW THE TENANT TO MOUNT A DEFENSE; EVICTION ORDER REVERSED (THIRD DEPT).

The Third Department, reversing County Court, in a full-fledged opinion by Justice Lynch, determined the landlord did not comply with the HUD regulation requiring that a notice of termination of a lease state the reasons for the termination with enough specificity to allow the tenant to mount a defense. The issue was raised by respondent-tenant's oral general denial:

In our view, the notice of termination was deficient, as it did not set forth the factual predicates underlying the alleged violation of the lease terms, instead merely paraphrasing the lease and the underlying regulation … . No specific incident is described in the notice, nor are any specific facts. The regulatory standard of requiring "enough specificity so as to enable the tenant to prepare a defense" demands more detail as to the nature of the asserted misconduct (24 CFR 247.4 [a] [2]). Matter of Metro Plaza Apts., Inc. v Buchanan, 2022 NY Slip Op 01087, Third Dept 2-17-22

LANDLORD-TENANT, "NUISANCE LAW."

THIS ACTION WAS BROUGHT BY THE OWNERS OF RENTAL PROPERTIES IN THE DEFENDANT VILLAGE ALLEGING, AMONG OTHER CAUSES OF ACTION, VIOLATIONS OF THEIR CONSTITUTIONAL RIGHTS BY THE VILLAGE "NUISANCE LAW" WHICH WAS DECLARED UNCONSTITUTIONAL BECAUSE IT INFRINGED ON THE TENANTS' RIGHT TO CALL THE POLICE ("NUISANCE POINTS" WERE ASSESSED FOR CALLS TO THE POLICE); THE ACTION BY THE RENTAL-PROPERTY OWNERS WAS PROPERLY DISMISSED (THIRD DEPT).

The Third Department affirmed the dismissal of this action brought by owners of rental properties in the defendant village asserting, among other causes of action, violations of their constitutional rights stemming from a local law (Nuisance Law) which was declared unconstitutional:

… [This court] declar[ed] that the Nuisance Law was "overbroad and facially invalid under the First Amendment" … . As to the finding of facial invalidity under the First Amendment, this Court held that, because the Nuisance Law did not prohibit the assessment of nuisance points against a property for police involvement thereat, the law violated the right of plaintiffs' tenants to petition the government for redress of grievances by deterring them from calling the police in response to crimes committed at their properties … . * * *

… Supreme Court properly dismissed the first cause of action for malicious prosecution. * * *

As for the First Amendment claim, Supreme Court found …that plaintiffs lacked standing to assert their tenants' constitutional rights. * * *

With respect to the selective enforcement claim, nothing in the record suggests that plaintiffs were singled out for enforcement of the Nuisance Law due to the population of tenants to which they rented — i.e., individuals whose rent was paid by the Tompkins County Department of Social Services. * * *

… [P]laintiffs' due process claim, to the extent based upon defendants' alleged failure to follow the procedures set forth in the Nuisance Law, is not actionable. Pirro v Board of Trustees of the Vil. of Groton, 2022 NY Slip Op 01358, Third Dept 3-3-22

NEGLIGENCE, MEDICAL MALPRACTICE, CERTIFICATE OF MERIT.

THE FAILURE TO TIMELY FILE THE CERTIFICATE OF MERIT IN THIS MEDICAL MALPRACTICE ACTION WAS NOT A GROUND FOR DIMSISSAL OF THE COMPLAINT (THIRD DEPT).

The Third Department, reversing Supreme Court, determined, under the facts, plaintiff had not abandoned this medical malpractice action and plaintiff's failure to timely file the certificate of merit was not a ground for dismissal of the complaint:

… [P]laintiff's attorney filed an alternative certificate with the complaint that he was unable to timely procure the required consultation in view of the impending statute of limitations in accord with CPLR 3012-a (a) (2). In such an instance, the certificate of merit must be filed within 90 days of commencement, a deadline that plaintiff did not meet … . The mere failure to meet that deadline, however, does not require a dismissal of the action … . … [P]laintiff expressly identified his medical expert in the … discovery response. In his opposing affidavit, plaintiff's counsel explained that the failure to file the certificate of merit was an oversight, i.e., basic law office failure, and further affirmed that he duly consulted with the physician in accord with the requirements of CPLR 3012-a (a) (1). In any event, plaintiff did not formally move for leave to file a late certificate of merit and, therefore, whether plaintiff established good cause under CPLR 2004 for such leave is not at issue … . … [W]e find no basis to dismiss the complaint based on the certificate of merit issue. Duvernoy v CNY Fertility, PLLC, 2022 NY Slip Op 01084, Third Dept 2-17-22

NEGLIGENCE, ALL-TERRAIN VEHICLE ACCIDENT.

THE EVIDENCE SUPPORTED THE DEFENSE VERDICT IN THIS ALL-TERRAIN VEHICLE ACCIDENT CASE; TWO DISSENTERS ARGUED THE 14-YEAR-OLD DEFENDANT DRIVER ACKNOWLEDGED HIS NEGLIGENCE ON THE STAND (THIRD DEPT).

The Third Department, over a partial dissent, determined the jury verdict finding the 14-year-old defendant driver of an all-terrain vehicle (a Gator) was not negligent was supported by the evidence. The Gator overturned and the 16-year-old passenger was injured. The defendant's and plaintiff's descriptions of the accident conflicted. The dissenters argued the defendant acknowledged he was negligent when he testified:

The jury heard … conflicting testimony regarding how defendant was driving at the time of the accident, whether that driving was what led to the Gator tipping over and whether defendant had any reason to believe that his actions posed a risk of harm given the acknowledged stability of the Gator and the fact that he and plaintiff had already performed several donuts without incident. It was for the jury to resolve these factual questions and determine whether defendant "fail[ed] to use that degree of care that a reasonably prudent person would have used under the same circumstances" and engaged in conduct posing a reasonably foreseeable risk to others … . ….

From the dissent:

… [D]efendant testified that he was 14 years old on the day of the accident, that he was operating the John Deere Gator Utility Vehicle (hereinafter Gator) and performing a "donut" at the time of the accident. He described a donut as "the action of turning the wheel of the vehicle while pressing the accelerator in order to get the back wheels to spin out." He stated that he knew that the Gator was not intended as a recreational vehicle and also testified that, although he was aware of the manufacturer's safety warnings pertaining to limitations on speed, the use of seat belts and the prohibition of anyone younger than 16 years old driving the vehicle, he disregarded many of those warnings at the time of the accident. Finally, he testified that, although he had always operated the Gator safely in the past, his parents were angry with him after this accident "because [he] was driving [the

Gator] in a manner that was inconsistent with [his] entire past." When asked if this manner was unsafe, defendant simply stated "yes." Wright v O'Leary, 2022 NY Slip Op 00485, Third Dept 1-27-22

NEGLIGENCE, EDUCATION-SCHOOL LAW, COLLEGE STUDENT ASSUALTED.

SUNY ALBANY NOT PROTECTED BY GOVERNMENT IMMUNITY IN THIS CASE BROUGHT BY A STUDENT WHO ALLEGED SHE WAS ASSAULTED IN HER DORM ROOM BY A PERSON NOT AUTHORIZED TO BE IN THE DORM; THERE WERE QUESTIONS OF FACT ABOUT THE ADEQUACY OF SECURITY AND THE FORESEEABILITY OF THE ASSAULT (THIRD DEPT).

The Third Department determined defendant SUNY Albany's motion for summary judgment in this inadequate-security case was properly denied. Claimant was assaulted in her dorm room by a person who was not authorized to be in the dormitory. The Court of Claims held the school was not protected by government immunity because building security was a proprietary function (akin to a landlord's duty), as opposed to a governmental function, and therefore government immunity did not apply. There was evidence the lock on the dormitory door was not adequate and the sexual assault by an intruder was foreseeable:

As the Court of Appeals has recognized, "[a] governmental entity's conduct may fall along a continuum of responsibility to individuals and society deriving from its governmental and proprietary functions" and "any issue relating to the safety or security of an individual claimant must be carefully scrutinized to determine the point along the continuum that the [governmental entity's] alleged negligent action falls into, either a proprietary or governmental capacity" (Miller v State of New York, 62 NY2d 506, 511-512 [1984]). In Miller, a student at a state university was raped by an intruder in the laundry room in her dormitory. The Court of Appeals permitted the claim of negligence — stemming from the defendant's failure to lock the entrance doors to the dormitory — to go forward in the defendant's proprietary capacity as a landlord. As in Miller, claimant's allegations that defendants failed to, among other things, install proper security devices, including locks, clearly

implicate defendants' proprietary function as a landlord, and the Court of Claims therefore correctly rejected defendants' claim of governmental immunity. …

"Landlords have a common-law duty to take minimal precautions to protect tenants from foreseeable harm, including foreseeable criminal conduct by a third person" … . Criminal conduct is foreseeable if it is "reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location" … . P.R.B. v State of New York, 2022 NY Slip Op 00348, Third Dept 1-20-22

NEGLIGENCE, MEDICAL MALPRACTICE, DISCOVERY, FAMILY LAW, SOCIAL SERVICES LAW.

CERTAIN CHILD CUSTODY RECORDS AND CHILD PROTECTIVE SERVICES RECORDS (WHICH DO NOT RELATE TO AN INVESTIGATION) MAY BE DISCOVERABLE IN THIS MEDICAL MALPRACTICE ACTION BROUGH ON BEHALF OF AN INFANT (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined certain child custody records and Child Protective Services (CPS) records were or may be discoverable in this negligence and medical malpractice case brought on behalf of an infant. The custody records were relevant to plaintiff's standing to sue and to family dynamics which may have affected the child's health, and there may be some CPS records which are discoverable because they do not relate to an investigation, Therefore the matter was remitted for an in camera review:

Supreme Court did not address the second basis upon which defendants sought disclosure of the custody records, however, which was that they may contain information on family dynamics that impacted the infant's development and would therefore be relevant as to plaintiff's allegations, in her bill of particulars, that the infant's learning disabilities and intellectual and emotional deficits arose out of defendants' conduct. …

… [D]efendants are not entitled to disclosure of records relating to either a report of abuse or an investigation into one … . …

… [C]hild protective officials and related child welfare organizations may well possess discoverable documents that were not generated in the course of a child protective investigation but do contain information relevant to assessing whether the infant's claimed injuries were linked to defendants' actions or some other cause. C.T. v Brant, 2022 NY Slip Op 01090, Third Dept 2-17-22

NEGLIGENCE, SLIP AND FALL, NOTICE.

CONFLICTING EVIDENCE ABOUT THE ABILITY TO SEE ICE ON THE PARKING LOT RAISED A TRIABLE QUESTION OF FACT WHETHER DEFENDANTS HAD CONSTRUCTIVE NOTICE OF THE CONDITION WHICH ALLEGEDLY CAUSED PLAINTIFF'S SLIP AND FALL (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined defendants in this ice slip and fall case did not eliminate questions of fact about whether they had constructive notice of the icy condition:

Supreme Court found that plaintiffs' testimony, submitted by defendants, showed that the allegedly dangerous condition "was neither visible nor had it existed for a significant period of time," and "plaintiffs have not submitted any evidence to prove . . . constructive notice." Although [plaintiff] testified that the parking lot appeared wet, not icy, when viewed from her husband's truck, she also stated that she saw the ice once she had fallen; further, the affidavit of a witness states that "[t]he ice in the parking lot that morning was clearly visible." Thus, the record contains conflicting accounts as to the visibility of the ice. "When considering a summary judgment motion, courts must view the evidence in a light most favorable to the nonmoving party and accord that party the benefit of every reasonable inference from the record proof, without making any credibility determinations" … . Applying this standard, we find a triable issue of fact as to constructive notice. Carpenter v Nigro Cos., Inc., 2022 NY Slip Op 01857, Third Dept 3-17-22

Practice Point: Where there is conflicting evidence of constructive notice of a dangerous condition, here whether the ice which caused plaintiff's slip and fall was visible, summary judgment is not appropriate.

NEGLIGENCE, SLIP AND FALL.

PLAINTIFF RAISED A QUESTION OF FACT WHETHER THE STEPS ON WHICH SHE SLIPPED AND FELL, ALTHOUGH ON A PUBLIC RIGHT-OF-WAY, WERE SUBJECT TO A SPECIAL USE BY THE ABUTTING PROPERTY OWNER (POTENTIALLY RENDERING THE ABUTTING PROPERTY OWNER LIABLE) (THIRD DEPT).

The Third Department, reversing Supreme Court, determined plaintiff in this slip and fall case should have been allowed to present evidence of defendant synagogue's special use of steps which were part of the public right-of-way but which lead to the synagogue entrance. Plaintiff slipped on ice on the "public right-of-way" portion of the steps and broke her ankle:

… [D]efendant proffered evidence in support of its motion for summary judgment that plaintiff's fall occurred on public property, thereby shifting the burden to plaintiff to raise an issue of fact as to defendant's liability as an abutter … . With respect to its special use theory of recovery, plaintiff points to the deposition testimony of defendant's secretary and bookkeeper, who testified that she was unaware of who initially built the subject set of steps, or when, but that defendant rebuilt them prior to plaintiff's fall. Photographs submitted by both parties make clear that the subject steps are not only directly in line with the synagogue's main entrance, but match that entrance's width with near exactitude, the entrance notably being wide enough to encompass two sets of double doors. There is proof that congregants attending Sabbath services and holiday services would access the synagogue via this entrance only. In addition, photographic evidence reveals that the portion of the raised sidewalk between the two sets of steps is constructed of more decorative pavers or cobblestones, laid by defendant, setting that area apart from the otherwise concrete sidewalk, arguably improving the overall appearance of the main entrance and visually linking the two sets of steps up to the synagogue.

Viewing the evidence in the light most favorable to plaintiff and affording her the benefit of every available inference, as we must, the foregoing was adequate to raise a triable issue of fact as to whether the subject steps were constructed or

altered for defendant's benefit. Podhurst v Village of Monticello, 2022 NY Slip Op 00707, Third Dept 2-3-22

PRIVILEGE, PHYSICIAN-PATIENT, BREACH AS A TORT.

PLAINTIFF STATED A CAUSE OF ACTION FOR BREACH OF THE PHYSICIAN-PATIENT PRIVILEGE, A TORT (THIRD DEPT).

The Third Department, reversing Supreme Court, determined plaintiff stated a cause of action for breach of the physician-patient privilege (CPLR 4504(a)). Plaintiff was a resident at the State College of Veterinary Medicine at Cornell University. During her residency plaintiff was treated by defendant Witlin, a psychiatrist. In a conversation with a staff psychologist at the college, Witlin said he was "aware of [plaintiff's] deterioration" and that she "was a mess the last time [he] saw her." Plaintiff was subsequently denied a second year of residency:

"The elements of a cause of action for breach of physician-patient confidentiality are: (1) the existence of a physician-patient relationship; (2) the physician's acquisition of information relating to the patient's treatment or diagnosis; (3) the disclosure of such confidential information to a person not connected with the patient's medical treatment, in a manner that allows the patient to be identified; (4) lack of consent for that disclosure; and (5) damages" … . …

… [P]laintiff's claimed damages are not limited to those related to the decision not to reappoint her. The complaint, as amplified by the bill of particulars, alleges that plaintiff suffered mental distress and related emotional harm as a direct result of the disclosure of her confidential medical information. Because a breach of physician-patient confidentiality is actionable as a tort … , plaintiff may recover for emotional harm so long as "the mental injury is a direct, rather than a consequential, result of the breach and . . . the claim possesses some guarantee of genuineness" … . Bonner v Lynott, 2022 NY Slip Op 02175, Third Dept 3-31-22

Practice Point: Here plaintiff stated a cause of action for breach of the patient-physician privilege which sounds in tort and includes damages as an element.

PRODUCTS LIABILITY, BAILOR LIABILITY.

DEFENDANT, BASED ON ITS STATUS AS BAILOR OF THE MACHINE WHICH ALLEGEDLY INJURED PLAINTIFF, MAY BE LIABLE UNDER BREACH OF WARRANTY AND STRICT PRODUCTS LIABILITY CAUSES OF ACTION (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, in a decisions addressing many issues not summarized here, noted that breach of warranty and strict products liability causes of action can arise from a bailment. Here plaintiff alleged she was injured by a machine (called a "table") and defendant was the "owner" of the table by virtue of its status as bailor:

In light of … material issues of fact as to whether defendant owned and/or was bailor of the table, we find that Supreme Court erred in granting defendant's motion for summary judgment as to the breach of implied warranty cause of action. As "[t]here is, in fact, no substantive distinction between [the theories of breach of implied warranty and strict products liability] in the context of this case" … , we reach this same conclusion as to the strict products liability cause of action. Reese v Raymond Corp., 2022 NY Slip Op 01077, Third Dept 2-17-22

RETIREMENT AND SOCIAL SECURITY LAW, DOOR SHUT ON OFFICER'S HAND.

THE WIND BLOWING A DOOR SHUT ON PETITIONER POLICE OFFICER'S HAND DID NOT CONSTITUTE AN "ACCIDENT" WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW (THIRD DEPT).

The Third Department, over a two-justice dissent, determined petitioner police officer's injury caused by wind slamming a door on her hand was not an "accident" entitling her to disability benefits:

… "[W]hen determining whether a precipitating event was unexpected, [the Comptroller] and courts may … consider whether the injured person had direct

knowledge of the hazard prior to the incident or whether the hazard could have been reasonably anticipated so long as such a factual finding is based upon substantial evidence in the record" … . * * *

… [P]etitioner testified that, as she was walking from the bus to the booth to write her report, she observed that it was windy. Indeed, petitioner does not dispute that, on the day of the incident, it was cold and windy and that she was aware of the weather conditions. According to petitioner, the door to the booth weighed between 80 and 100 pounds and she was aware that the door would close on its own, as it did not have a closure arm attached to slow its closure. Petitioner further testified that, when she went to open the door to the booth, she felt resistance due to the wind blowing against it and she only opened the door enough for her to "squeeze" herself in. As petitioner entered the doorway, she felt a gust of wind and, concerned that the door was going to hit her as it closed, she put her right hand out behind her for protection. The wind blew the door shut behind her, slamming her right hand in the doorjamb. … [S]ubstantial evidence supports the Comptroller's determination that petitioner could have reasonably anticipated that the wind would blow the door closed on her and, therefore, the incident did not constitute an accident within the meaning of the Retirement and Social Security Law … . Matter of Rizzo v DiNapoli, 2022 NY Slip Op 00095, Third Dept 1-6-22

RETIREMENT AND SOCIAL SECURITY LAW, FALL CAUSED BY BROKEN CHAIR.

PETITIONER POLICE OFFICER'S SITTING IN A DESK CHAIR (WHICH WAS SUBSEQUENTLY FOUND TO BE BROKEN), LEANING BACK, FALLING BACKWARD AND INJURING HIS HEAD CONSTITUTED AN "ACCIDENT" WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW (THIRD DEPT).

The Third Department, reversing the Comptroller, over a dissent, annulled the determination that petitioner police officer was not injured in an "accident" within the meaning of the Retirement and Social Security Law. Petitioner alleged he sat in a desk chair, leaned back and fell over striking his head. There was evidence the chair was broken:

Petitioner's burden was to demonstrate that his disability arose out of an accident which, for purposes of the Retirement and Social Security Law, is defined as "a sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact" … . * * *

In our view, the incident as described constitutes an accident. Contrary to the findings of the Hearing Officer, whether the chair was broken prior to or during the fall is of no moment, as either way petitioner was unaware of any defect. In either situation, the collapse of a chair back would be a sudden, unexpected outcome for anyone who simply sits and leans back. Matter of Crone v DiNapoli, 2022 NY Slip Op 00481, Third Dept 1-27-22

RETIREMENT AND SOCIAL SECURITY LAW, SLIP AND FALL.

PETITIONER, A COURT OFFICER, SLIPPED AND FELL ON A WET FLOOR IN THE COURTHOUSE; THE FALL WAS AN ACCIDENT WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW (THIRD DEPT).

The Third Department, reversing the Comptroller, determined petitioner court officer suffered a compensable accident when slipped on a wet floor in the courthouse and may therefore be entitled to accidental disability retirement benefits:

Petitioner testified that she was on duty and returning to the security office at the end of her shift when she "slipped on the wet floor" in the courthouse where she was assigned. Having fallen to the ground on her back, she "felt the water on the floor" and observed that the whole area appeared to be wet as though recently mopped. She stated that she did not observe that the floor — which was light in color — was wet before her fall and, further, there had been no signs advising of the hazard. She had never seen anyone mopping in the courthouse and was wearing nonslip shoes as part of her uniform at the time of the fall.

Like the incidents deemed accidental in Matter of Knight v McGuire (62 NY2d 563 [1984] [accident where the petitioner slipped on wet pavement getting into a patrol car]) and Matter of Gasparino v Bratton (92 NY2d 836, 838-839 [1998]

[accident where the petitioner slipped in water on a bathroom floor]), the precipitating event here was not a risk of the work performed by petitioner. Her description of the incident also demonstrates that her fall was sudden and unexpected … . Matter of Como v New York State Comptroller, 2022 NY Slip Op 01223, Third Dept 2-24-22

WORKERS' COMPENSATION, ATTORNEY'S FEES.

ALTHOUGH CLAIMANT DID NOT SUCCEED IN DEMONSTRATING HER CONDITION HAD WORSENED SUCH THAT SHE WAS ENTITLED TO INCREASED BENEFITS, HER COUNSEL'S FEES SHOULD NOT HAVE BEEN RESCINDED BY THE WORKERS' COMPENSATION BOARD (THIRD DEPT).

he Third Department, reversing (modifying) the Workers' Compensation Board, determined the rescission of the award of claimant's counsel's fee on the ground that the claim was unsuccessful was arbitrary and capricious. Claimant was unable to show her condition had worsened entitling her to increased benefits:

The initial application submitted by claimant's counsel, which sets forth in detail the services rendered and the time spent in connection therewith, reflects that counsel represented claimant for a number of years, engaged in extensive correspondence with, among others, claimant, Petroski [claimant's treating physician] and the carrier, reviewed various reports, attended hearings and successfully sought and obtained a reopening of this matter. Although counsel ultimately did not succeed in obtaining an increase in claimant's loss of wage-earning capacity, the Board rescinded the fee award solely upon counsel's unsuccessful efforts in this regard. Notwithstanding the Board's broad discretion, this single-factor reasoning strikes us as arbitrary and capricious — particularly in view of the fact that claimant clearly received an economic benefit from counsel's overall representation of her. Matter of Simmons v Glens Falls Hosp., 2022 NY Slip Op 00712, Third Dept 2-3-22

WORKERS' COMPENSATION, DEPARTURE FROM PRECEDENT NOT EXPLAINED.

THE WORKERS' COMPENSATION BOARD HAD PREVIOUSLY HELD THAT, IN A HEARING-LOSS CASE, THE FAILURE TO INCLUDE THE AUDIOGRAM (HEARING TEST) WITH THE INDEPENDENT MEDICAL EXAMINATION RECORD PRECLUDES CONSIDERATION OF THE EXPERT EVIDENCE; THE AUDIOGRAM WAS NOT INCLUDED HERE AND THE BOARD DID NOT EXPLAIN ITS DEPARTURE FROM PRECEDENT (BY CREDITING THE EXPERT EVIDENCE); DETERMINATION REVERSED (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board in this hearing-loss case, determined the carrier's expert's (Arick's) failure to include the audiogram (hearing test) with the independent medical examination (IME) record required that the expert's evidence be precluded. There was precedent to that effect and the board did not explain its departure from precedent:

Arick could not explain during his testimony, however, why a copy of his audiogram was neither provided with his IME report nor present in the Board's file, and claimant's counsel continued to raise this point during the hearing, on administrative appeal to the Board and now again before this Court. As claimant argues, the Board has previously determined that where an audiogram test providing the basis for a physician's SLU [schedule loss of use] finding does not accompany the IME report and is not submitted to the Board file, that physician's IME report and findings must be precluded … . …

The Board failed to address claimant's contention regarding the omission of Arick's audiogram from his IME and the record and, as such, has not provided a rational explanation for departing from its prior decision requiring that an audiogram be submitted to the Board with the IME report (see Workers' Compensation Law § 137 [1] [a]; 12 NYCRR 300.2 [d] [4] [iii], [iv]; [12]). Inasmuch as the Board has not provided a rational basis for departing from its own precedent, its decision must be reversed … . Matter of Cala v PAL Envtl. Safety Corp., 2022 NY Slip Op 01498, Third Dept 3-10-22

Practice Point: If the Workers' Compensation Board departs from its own precedent without explanation, the determination will be reversed.

WORKERS' COMPENSATION, EXPERT OPINION.

CLAIMANT'S EXPERT PROVIDED SUFFICIENT EVIDENCE OF A CAUSAL RELATIONSHIP BETWEEN CLAIMANT FIREFIGHTER'S LUNG CANCER AND EXPOSURE TO TOXINS AT GROUND ZERO, WORKERS' COMPENSATION BOARD REVERSED (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined the evidence supported a finding that claimant firefighter's lung cancer and death were caused by exposure to toxins at Ground Zero:

The Board found the opinion of Ploss [claimant's expert] to be incredible in part because he did not "cite to any studies or other evidence to sufficiently explain his opinion regarding causation." However, Ploss opined that "[i]t is well accepted that the numerous carcinogens contained in the debris of th[e] highly polluted area known as Ground Zero could cause numerous malignancies such as cancer of the lungs." As claimant asserts, the question of whether such studies supported the doctor's findings could have been raised at the hearing, but was not. Ploss further testified that the toxic exposure at Ground Zero that decedent experienced was intense and concentrated given his prolonged exposure and lack of respiratory protection and that such exposure would have resulted in damage to decedent's bronchial tree and lung tissue. In our view, the medical opinion of Ploss was neither speculative nor a general expression of possibility and demonstrated that decedent's exposure at Ground Zero and the World Trade Center site was a contributing factor to his demise for purposes of causation. In view of the foregoing, the Board improperly rejected Ploss' uncontroverted medical opinion as to causation … . Matter of Murphy v New York State Cts., 2022 NY Slip Op 00087, Third Dept 1-6-22

WORKERS' COMPENSATION, EXPERT OPINION.

THE BOARD ACCEPTED ONE EXPERT'S OPINION AND REJECTED THE OTHER BASED ON AN ISSUE THE EXPERTS WERE NEVER ASKED ABOUT; DECISION REVERSED (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined the Board relied on an issue the experts were never asked about. One expert (Katz) found that claimant lost 3.3% of his hearing and the other (Alleva) found claimant had lost 45.3% of his hearing. The Board rejected Alleva's opinion and adopted Katz's concluding claimant had not explained how he could have done his job with a 50% hearing loss, an issue not discussed by the experts:

Although '[t]he Board's authority in assessing the credibility of witnesses includes the power to selectively adopt or reject portions of a medical expert's opinion, . . . as with any administrative determination, the Board's decision in this regard must be supported by substantial evidence" … . There is no evidence in the record that Alleva was asked to explain how claimant was able to work with a 45.3% loss of hearing. Nor is there any evidence in the record that the issue of whether claimant's hearing loss would have affected his job performance was ever raised by either party or their medical experts before the Workers' Compensation Law Judge. In light of the dearth of evidence supporting the conclusions reached by the Board, we cannot say that its decision was supported by substantial evidence in the record. Matter of Mogilevsky v New York City Tr. Auth., 2022 NY Slip Op 01088, Third Dept 2-17-22

WORKERS' COMPENSATION, EXPERT OPINION.

THE BOARD SHOULD NOT HAVE RELIED ON THE OPINION OF AN EXPERT WHO DID NOT FOLLOW THE IMPAIRMENT GUIDELINES BY REVIEWING THE UPDATED X-RAYS OF CLAIMANT'S HIP (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined the board relied on the opinion of an expert, Petroski, who did not follow the impairment guidelines by consulting the updated x-rays of claimant's hip:

Nowhere in his … report … does Petroski … indicate that he had obtained and considered and reviewed updated X rays, as required by Special Consideration No. 8 of the impairment guidelines … , in arriving at his conclusion that claimant had sustained a 0% SLU [schedule loss of use] of her left leg. … [T]he deposition testimony of Petroski also does not reflect that had he obtained and considered updated X rays in rendering his opinion about the appropriate SLU of claimant's left leg. Although Petroski stated that no new history was given at the time of or during his examination of claimant, he acknowledged that he did not recall declining to review X rays that claimant brought with her to the examination for him to review. … Inasmuch as Petroski did not obtain and consider updated X rays consistent with the impairment guidelines, the Board's determination to credit Petroski's finding that claimant sustained a 0% SLU was not supported by substantial evidence and must be reversed … . Matter of Strack v Plattsburgh City Sch. Dist., 2022 NY Slip Op 00710, Third Dept 2-3-22

WORKERS' COMPENSATION, JUDICIAL ESTOPPEL.

DEFENDANTS ARGUED PLAINTIFF WAS NOT AN EMPLOYEE IN THE WORKERS' COMPENSATION PROCEEDING; HERE THE DEFENDANTS ARGUED PLAINTIFF WAS AN EMPLOYEE AND HIS REMEDY WAS LIMITED TO WORKERS' COMPENSATION; THE DOCTRINE OF JUDICIAL ESTOPPEL PRECLUDED THE WORKERS' COMPENSATION AFFIRMATIVE DEFENSE IN THIS ACTION (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, over a dissent, determined the judicial estoppel doctrine applied and plaintiff's motion to dismiss the workers' compensation affirmative defense in this personal injury action should have been granted. Plaintiff was injured on the job. In the Workers' Compensation proceeding defendants argued plaintiff was an not an employee. In this action defendants argued he was an employee and his recovery is limited to Workers' Compensation:

… [T]he record makes clear that defendants, through Old Republic [insurance company], consistently advanced in the Workers' Compensation Law proceeding the theory that plaintiff was not its employee. Old Republic, as the workers'

compensation carrier for defendants, was subsequently discharged from this proceeding. As such, defendants achieved its desired result after asserting the lack of an employer-employee relationship. Although the record is not explicit as to the basis for the discharge of Old Republic from the Workers' Compensation Law proceeding, "[t]he policy behind judicial estoppel would not be served by limiting its application to cases where the legal position at issue was ruled upon in the context of a judgment" … .

In this action … defendants have taken a contrary position — i.e., plaintiff was employed by defendants as a special employee and, therefore, his sole remedy for compensation was to pursue workers' compensation benefits. Allowing defendants to argue in this action that plaintiff was their employee, after they had disavowed an employer-employee relationship in the Workers' Compensation Law proceeding and received a benefit from this position, would subvert the equitable policy behind the doctrine of judicial estoppel … . Walker v GlaxoSmithKline, LLC, 2022 NY Slip Op 00484, Third Dept 1-27-22

WORKERS' COMPENSATION, SHOOTING IN WORKPLACE.

ALTHOUGH THE DOCTOR WAS AT WORK AT THE HOSPITAL WHEN HE WAS SHOT DURING A MASS SHOOTING, HIS INJURY WAS NOT WORK-RELATED WITHIN THE MEANING OF THE WORKERS' COMPENSATION LAW (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, in a full-fledged opinion by Justice Reynolds Fitzgerald, determined the shooting of a doctor, Justin Timperio, although it occurred while Timperio was working at the hospital, was not a work-related injury within the meaning of the Workers' Compensation Law. Timperio had brought a negligence lawsuit against the hospital in federal court and, in the context of the hospital's motion for summary judgment, the federal court ruled the injuries did not arise from Timperio's employment. The federal ruling did not colaterally estop the Workers' Compensation Board from considering the claim in the first place (because it was not a final ruling), but the Board's ultimate conclusion the injury was work-related was reversed by the Third Department:

The undisputed facts in the record demonstrate that the attack was perpetrated by an individual who was not employed by the hospital at the time of the attack (and had not worked there for over two years), was not and never was Timperio's coworker, did not know Timperio and provided no reason for the attack prior to taking his own life. Nor did Timperio know the attacker, and there is no evidence that the attack was based upon an employment-related animus between the two individuals or that the attack had any nexus to Timperio's employment or "performance of h[is] job duties" … . Such proof was sufficient to rebut the presumption articulated in Workers' Compensation Law § 21 (1) and to establish that the assault on Timperio resulted exclusively from arbitrary, broad-sweeping and gravely maligned personal animosity and not from work-related differences with Timperio … . Matter of Timperio v Bronx-Lebanon Hosp., 2022 NY Slip Op 00711, Third Dept 2-3-22

WORKERS' COMPENSATION. EMPLOYER'S OBJECTIONS TO MEDICAL EVIDENCE.

ALTHOUGH THE EMPLOYER WAIVED ITS OWN INDEPENDENT MEDICAL EXAMINATION, THE EMPLOYER RAISED SPECIFIC, SUBSTANTIVE OBJECTIONS TO CLAIMANT'S ORTHOPEDIST'S PERMANENCY FINDINGS, INCLUDING THE ALLEGATIONS THE ORTHOPEDIST DID NOT COMPLETELY REVIEW THE MEDICAL RECORDS AND DID NOT FOLLOW THE RELEVANT GUIDELINES; THE BOARD'S FAILURE TO ADDRESS THE EMPLOYER'S OBJECTIONS REQUIRED REVERSAL AND REMITTAL (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board and remitting the matter, determined the board should have addressed the employer's specific objections to the permanency findings of claimant's orthopedist (Capiola), even though the employer did not produce its own independent medical report:

Upon administrative review, the employer renewed its objections that the credibility of the medical opinion was not based on a complete review of claimant's medical records, that claimant had not reached MMI [maximum medical improvement], that the guidelines were not followed in rendering the

medical opinion and that there was inconsistency between claimant's medical condition and his physical restrictions. …

In its decision, the Board sets forth in detail the parties' opposing positions and then adopted the findings and decision of the WCLJ [Workers' Compensation Law Judge]. Neither the decision of the Board nor that of the WCLJ sets forth any reasoning or analysis of the substantive issues raised by the employer. Although there was no opposing medical opinion and the Board "may not reject an uncontradicted opinion that is properly rendered" … , the issues raised by the employer in its application for review challenged the propriety and reliability of Capiola's permanency findings. The Board's failure to specifically address the claims raised by the employer "depriv[ed] the employer . . . of the opportunity to have the Board consider the merits of . . . issue[s] that [were] properly preserved" and precludes any meaningful review by this Court … . Matter of Ippolito v NYC Tr. Auth., 2022 NY Slip Op 01493, Third Dept 3-10-22

Practice Point: Even though the employer waived the production of its own independent medical examination in this Workers' Compensation case, the Workers' Compensation Board should have considered the employer's substantive objections to the permanency findings of the claimant's orthopedist, including allegations the orthopedist did not review all the medical records and did not follow the relevant guidelines.

ZONING, LAND USE, ENVIRONMENTAL LAW.

ALTHOUGH THE PLANS FOR THE EXPANSION OF A HOSPITAL WERE NOT YET FINALIZED, IT WAS CLEAR THAT SUCH AN EXPANSION WAS AN ANTICIPATED RESULT OF THE PROPOSED ZONING CHANGE; THEREFORE THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) PROHIBITION OF "SEGMENTATION" REQUIRED CONSIDERATION OF THE EXPANSION AS PART OF THE "HARD LOOK" AT THE CONSEQUENCES OF THE ZONING CHANGE (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined the respondents (city) did not take the requisite "hard look," required by the State Environmental Quality Review Act (SEQRA), at the environmental consequences before approving a zoning change that would allow an expansion of a hospital. Although there were no finalized plans to expand the hospital, it was clear that the zoning change was a first step in an expected expansion. Failure consider the expansion constituted a prohibited form of "segmentation:"

As to the segmentation claim, although the City Council was not presented with any impending, specific development proposals, rezoning parcel 1 was the "first step" in the process of eventually developing parcel 1 … . In essence, before Saratoga Hospital could move forward with any development and expansion, it needed to acquire the "right" to do so … . The zoning map amendment for parcel 1 provided just that; it would be the green light to reignite development plans. … [T]he potential development of the parcel here was not so attenuated from the zoning map amendment that reviewing an expansion of the hospital constituted permissible segmentation … . Thus, the City Council was "obligated to consider the impacts to be expected from such future development at the time of rezoning, even absent a specific site plan for the project proposal" … . Matter of Evans v City of Saratoga Springs, 2022 NY Slip Op 01079, Third Dept 2-17-22