NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Newsletter
June 27 – July 1, 2022

An Organized Compilation of the Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts June 27 – July 1, 2022, and Posted on the New York Appellate Digest Website on Monday July 4, 2022, Distilled to Practice Points, One or Two Sentences Each. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Newsletter.

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ADMINISTRATIVE LAW, PUBLIC HEALTH LAW, MEDICAL MARIHUANA.

THE DEPARTMENT OF HEALTH'S FAILURE TO CONSIDER THE FINANCIAL ASPECT OF PETITIONER'S APPLICATION TO DISPENSE MEDICAL MARIHUANA RENDERED ITS DETERMINATION ARBITRARY AND CAPRICIOUS (THIRD DEPT).

Matter of Hudson Health Extracts, LLC v Zucker, 2022 NY Slip Op 04207, Third Dept 6-30-22

Practice Point: Here the Public Health Law required an assessment of the financial condition of each applicant for a license to dispense medical marihuana. The failure to consider the petitioner's financial condition, which was stronger than that of other applicants, rendered the Department of Health's determination of petitioner's eligibility arbitrary and capricious.

APPEALS, NOTICE OF APPEAL.

IF AN APPELLATE ISSUE IS NOT LISTED IN THE NOTICE OF APPEAL, THE ISSUE IS NOT BEFORE THE APPELLATE COURT (FOURTH DEPT).

Pearl St. Parking Assoc. LLC v County of Erie, 2022 NY Slip Op 04235, Fourth Dept 7-1-22

Practice Point: When a party appeals from an order, only those portions of the order listed in the notice of appeal are before the court. If a portion of the order is not listed, the appellate court will not consider it.

ARCHITECTURAL MALPRACTICE.

THERE WAS AN "UNWARNED" THREE-FOOT DROP ON THE OTHER SIDE OF A DOOR IN A REMOTE AREA OF THE HOSPITAL; PLAINTIFF, A HOSPITAL WORKER, WAS INJURED BY THE THREE-FOOT DROP; THE ARCHITECTURAL MALPRACTICE CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND NO DUTY WAS OWED TO THE PLAINTIFF; THE CONSTRUCTION COMPANY JUSTIFIABLY RELIED ON THE ARCHITECT'S SPECIFICATIONS AND COULD NOT BE HELD LIABLE (FOURTH DEPT).

Dentico v Turner Constr. Co. & SBRA, Inc., 2022 NY Slip Op 04237, Fourth Dept 7-1-22

Practice Point: There were questions of fact about whether the architectural firm was liable for injuries caused by a three-foot drop on the other side of a door. The causes of action should not have been dismissed on the ground no duty was owed to the plaintiff. Plaintiff was a hospital worker and the door was in a remote area of the hospital. The construction company was not liable because it justifiably relied on the architectural specifications.

ATTORNEYS, LEGAL MALPRACTICE, STATUTE OF LIMITATIONS, INSANITY TOLL.

QUESTIONS OF FACT ABOUT WHETHER THE INCAPACITATED PERSON (IP) WAS "INSANE" WITHIN THE MEANING OF THE CPLR WHEN HE WAS REPRESENTED BY THE DEFENDANT ATTORNEY MUST BE DETERMINED AT THE LEGAL MALPRACTICE TRIAL; IF THE IP WAS INSANE, THE MALPRACTICE STATUTE OF LIMITATIONS WILL BE TOLLED; IF NOT THE MALPRACTICE ACTION IS UNTIMELY (FIRST DEPT).

Matter of Verdugo v Smiley & Smiley, LLP, 2022 NY Slip Op 04138, First Dept 6-28-22

Practice Point: There is an "insanity" statute-of -imitations toll in the CPLR. Here there a question of fact whether an incapacitated person was insane when he was represented by defendant attorney such that the legal malpractice statute of limitations was tolled.

CIVIL PROCEDURE, CORPORATION LAW, CHILD VICTIMS ACT.

IN THIS "CHILD VICTIMS ACT" ACTION ALLEGING SEXUAL ABUSE IN THE 1950'S BY EMPLOYEES OF THE NOW DISSOLVED YMCA NIAGARA FALLS, THERE ARE QUESTIONS OF FACT WHETHER THE DE FACTO MERGER DOCTRINE APPLIES RENDERING YMCA BUFFALO LIABLE FOR THE TORTS OF YMCA NIAGARA FALLS (FOURTH DEPT).

Dutton v Young Men's Christian Assn. of Buffalo Niagara, 2022 NY Slip Op 04238, Fourth Dept 7-1-22

Practice Point: In this Child Victims Act action alleging sexual abuse in the 1950's by employees of the now dissolved YMCA Niagara Falls, there are questions of fact about whether the de facto merger doctrine makes defendant YMCA Buffalo liable for the torts of YMCA Niagara Falls. The decision is comprehensive and

discusses every conceivable aspect of the de facto merger doctrine as it applies to not-for-profit corporations.

CIVIL PROCEDURE, LATE ANSWER, MOTION TO COMPEL ACCEPTANCE.

PLAINTIFF SERVED THE COMPLAINT ON NOVEMBER 27, 2018; DEFENDANT ATTEMPTED TO SERVE AN ANSWER, WHICH WAS REJECTED, ON JANUARY 9, 2019; DEFENDANT'S EXCUSE WAS "THE DELAY WAS CAUSED BY THE INSURANCE CARRIER;" THAT EXCUSE WAS INSUFFICIENT AND DEFENDANT'S MOTION TO COMPEL PLAINTIFF TO ACCEPT THE ANSWER SHOULD HAVE BEEN DENIED (SECOND DEPT).

Goldstein v Ilaz, 2022 NY Slip Op 04154, Second Dept 6-29-22

Practice Point: Here the defendant attempted to serve an answer, which was rejected, about a month and a half after plaintiff served the complaint. Defendant moved to compel the plaintiff to accept the answer. Defendant's excuse was that the "delay was caused by the insurance carrier" with no further explanation. The Second Department deemed the excuse insufficient and ruled that the motion to compel acceptance of the answer should not have been granted.

CIVIL PROCEDURE, TRAFFIC ACCIDENTS, JOINT TRIAL.

PLAINTIFF'S TWO SEPARATE TRAFFIC ACCIDENTS SHOULD BE TRIED TOGETHER BECAUSE PLAINTIFF ALLEGED THE INJURIES FROM THE FIRST ACCIDENT WERE EXACERBATED BY THE SECOND ACCIDENT (SECOND DEPT).

Frank v Y. Mommy Taxi, Inc., 2022 NY Slip Op 04151, Second Dept 6-29-22

Practice Point: Here two separate traffic accidents should be tried together because plaintiff alleged the second accident exacerbated his injuries from the first accident.

COURT OF CLAIMS, HARNESS RACING ACCIDENT.

THE NYS GAMING COMMISSION'S DUTIES TO INSPECT HORSES AND EQUIPMENT BEFORE A HARNESS RACE ARE PROPRIETARY, NOT GOVERMENTAL, IN NATURE; THEREFORE ORDINARY NEGLIGENCE PRINCIPLES APPLY AND THE IMMUNITY DEFENSE IS NOT AVAILABLE; DURING THE RACE A HORSE FELL AND CLAIMANT'S HORSE COLLIDED WITH THE FALLEN HORSE; THERE ARE QUESTIONS OF FACT ABOUT THE SAFETY OF THE FALLEN HORSE'S EQUIPMENT AND WHETHER THE HORSE EXHIBITED INDICATIONS HE WAS LAME; THERE ARE QUESTIONS OF FACT ABOUT THE APPLICABILTY OF THE ASSUMPTION OF THE RISK DOCTRINE; REGULATIONS RE: THE INSPECTION OF HORSES AND EQUIPMENT ALLOWED CONSTRUCTIVE NOTICE OF THE DANGEROUS CONDITION TO BE IMPUTED (THIRD DEPT).

Bouchard v State of New York, 2022 NY Slip Op 04202, Third Dept 6-30-22

Practice Point: This opinion has valuable discussions of; (1) how to analyze whether a government is exercising a governmental function (to which the "special relationship" and "governmental immunity" doctrines apply) or a proprietary

function (to which ordinary negligence principles apply); (2) the assumption of the risk doctrine; and (3) the imputation of constructive notice when there are regulations mandating inspections which allegedly would have revealed the dangerous condition. Here claimant was injured during a harness race when his horse collided with a fallen horse. The complaint alleged the NYS Gaming Commission did not inspect the fallen horse and the fallen horse's equipment prior to the race as required by the relevant regulations.

CRIMINAL LAW, INDICTMENT RENDERED DUPLICITOUS.

THE ONE COUNT INDICTMENT WAS RENDERED DUPLICITOUS BY THE BILL OF PARTICULARS AND WAS DISMISSED AFTER TRIAL; THE APPELLATE COURT NOTED THAT EVEN IF THE EVIDENCE HAD BEEN NARROWED AT TRIAL, DISMISSAL WOULD STILL BE REQUIRED BECAUSE DEFENDANT DID NOT HAVE PRETRIAL NOTICE OF THE CHARGES (FOURTH DEPT).

People v Baek, 2022 NY Slip Op 04263, Fourth Dept 7-1-22

Practice Point: Here the one count indictment was rendered duplicitous by the bill of particulars which alleged two sexual acts. Even if the evidence had been narrowed at trial, reversal still would have been necessary because defendant did not have pretrial notice of the charges.

CRIMINAL LAW, INEFFECTIVE ASSISTANCE, DEPORTATION.

DEFENDANT'S COUNSEL WAS INEFFECTIVE IN THAT COUNSEL'S EXPLANATION OF THE IMMIGRATION CONSEQUENCES OF THE GUILTY PLEA WAS WRONG; MATTER REMITTED FOR A HEARING ON WHETHER THERE IS A REASONABLE POSSIBILITIY DEFENDANT WOULD NOT HAVE PLED GUILTY HAD HE BEEN PROPERLY INFORMED (FOURTH DEPT).

People v Go, 2022 NY Slip Op 04258, Fourth Dept 7-1-22

Practice Point: Defendant moved to vacate his conviction by guilty plea on ineffective assistance grounds. Defendant demonstrated that his attorney's explanation of the immigration consequences of the plea was wrong. Therefore County Court should have held a hearing on whether there is a reasonable possibility defendant would not have pled guilty had he been correctly informed.

CRIMINAL LAW, INVALID WAIVER OF INDICTMENT.

HERE DEFENDANT PLED GUILTY TO A SUPERIOR COURT INFORMATION (SCI) AFTER HE HAD BEEN INDICTED; THE WAIVER OF INDICTMENT WAS INVALID AND THE SCI WAS DISMISSED; THE ERROR IS JURISDICTIONAL AND NEED NOT BE PRESERVED BY OBJECTION (THIRD DEPT).

People v Michalski, 2022 NY Slip Op 04190, Third Dept 6-30-22

Practice Point: Here the defendant was already indicted when he waived indictment and pled guilty to a superior court information (SCI). That was a jurisdictional error which need not be preserved by objection.

CRIMINAL LAW, SPEEDY TRIAL.

THE MAJORITY HELD THAT THE SIX-YEAR DELAY BETWEEN WHEN THE PEOPLE WERE AWARE OF THE DNA EVIDENCE LINKING DEFENDANT TO THE RAPE AND DEFENDANT'S ARREST DID NOT DEPRIVE DEFENDANT OF DUE PROCESS; THE DISSENT DISAGREED (FOURTH DEPT).

People v Stefanovich, 2022 NY Slip Op 04241, Fourth Dept 7-1-22

Practice Point: There was a six-year delay between when the People became aware of DNA evidence linking defendant to the crime and defendant's arrest. The majority held the delay did not deny defendant of due process. The dissenter argued the People demonstrated only that the delay was the result of "inadvertence," which is an insufficient reason.

CRIMINAL LAW, APPEALS, JUDGES.

COUNTY COURT DISMISSED THE PROMOTING PRISON CONTRABAND COUNT; THE PEOPLE APPEALED; COUNTY COURT THEN STAYED ITS DISMISSAL, HELD A TRIAL, AND DEFENDANT WAS CONVICTED; AFTER THE CONVICTION THE PEOPLE'S APPEAL WAS DISMISSED AS MOOT; THE DEFENDANT APPEALED; THE JUDGE HAD NO AUTHORITY TO STAY THE DISMISSAL AND GO TO TRIAL ON THAT COUNT; THE CONVICTION WAS THEREFORE VACATED (THIRD DEPT).

People v Felli, 2022 NY Slip Op 04192, Third Dept 6-30-22

Practice Point: With certain exceptions in CPL 460.40, the dismissal of a count cannot be stayed when the People appeal the dismissal. Here the judge dismissed a count, the People appealed, the judge then stayed the dismissal, held a trial, defendant was convicted of the count, and the People's appeal was dismissed as moot. Because the judge had no authority pursuant to CPL 460.40 to stay the dismissal and go to trial on the dismissed count, the conviction was vacated.

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CRIMINAL LAW, JUDGES, SELF-REPRESENTATION.

THE TRIAL JUDGE PROPERLY TERMINATED DEFENDANT'S SELF-REPRESENTATION DURING THE TRIAL BASED ON DEFENDANT'S BEHAVIOR; THE TRIAL JUDGE PROPERLY DECLINED TO EXCUSE A JUROR WHO, DURING DELIBERATIONS, SAID HE DID NOT WANT TO CONTINUE; DEFENDANT WAS NOT EXCLUDED FROM A MATIERAL STAGE OF THE PROCEEDING WHEN THE TRIAL JUDGE DISCUSSED HIS MENTAL CONDITION WITH COUNSEL (FIRST DEPT).

People v Williams, 2022 NY Slip Op 04135, First Dept 6-28-22

Practice Point: Here defendant's agitated behavior during the trial was a proper ground for terminating his self-representation. The judge's discussion with counsel, outside defendant's presence, of defendant's mental health was not a material stage of the proceedings. The judge properly refused to exclude a juror who, during deliberations, said he did not want to continue.

CRIMINAL LAW, MOTION TO VACATE CONVICTION.

HERE THE DEFENDANT, IN HIS MOTION TO VACATE HIS CONVICTION, RAISED ISSUES ABOUT THE EXTENT OF HIS COOPERATION AND WHETHER NEW DEFENSE COUNSEL ADEQUATELY INVESTIGATED THE PROSECUTOR'S WITHDRAWAL OF THE COOPERATION AGREEMENT; THE PEOPLE'S RESPONSE DID NOT ADDRESS THESE SUBSTANTIVE ISSUES; THEREFORE COUNTY COURT SHOULD HAVE HELD A HEARING (THIRD DEPT).

People v Buckley, 2022 NY Slip Op 04197, Third Dept 6-30-22

Practice Point: If a motion to vacate the conviction raises substantive issues which are corroborated is some way (here with an affidavit by defendant's prior attorney), and these substantive issues are not adequately dealt with in the People's responding papers, a hearing must be held.

CRIMINAL LAW, PLEA ALLOCUTION.

DEFENDANT'S STATEMENTS DURING THE PLEA ALLOCUTION NEGATED ELEMENTS OF THE CHARGED OFFENSE; THE JUDGE SHOULD HAVE CONDUCTED AN INQUIRY OR GIVEN THE DEFENDANT THE OPPORTUNITY TO WITHDRAW HIS PLEA; THIS ISSUE FALLS WITHIN AN EXCEPTION TO THE PRESERVATION REQUIREMENT (THIRD DEPT).

People v Reese, 2022 NY Slip Op 04194, Third Dept 6-30-22

Practice Point: When a defendant makes statements during the plea allocution which negate an element of the charged offense, the judge must make an inquiry or give the defendant the opportunity to withdraw the plea. The error need not be preserved for appeal.

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CRIMINAL LAW, RESTITUTION.

THE AMOUNT OF RESTITUTION WAS NOT PROVEN BY A PREPONDERANCE OF THE EVIDENCE; ALTHOUGH UNPRESERVED THE ISSUE WAS CONSIDERED IN THE INTEREST OF JUSTICE (FOURTH DEPT).

People v Piasta, 2022 NY Slip Op 04243, Fourth Dept 7-1-22

Practice Point: Here the amount of restitution was not proven by a preponderance of the evidence. The recipient of the restitution was not identified on the record. Although the errors were not preserved, they were considered in the interest of justice. The matter was remitted for a hearing.

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

THE 20-YEAR DURATION OF REGISTRATION AND VERIFICATION OF A LEVEL ONE SEX OFFENDER STARTS ANEW WHEN THE OFFENDER, ALREADY REGISTERED IN ANOTHER STATE, MOVES TO NEW YORK AND NOTIFIES THE DIVISION OF CRIMINAL JUSTICE SERVICES (SECOND DEPT).

People v Corr, 2022 NY Slip Op 04183, Second Dept 6-29-22

Practice Point: A level one sex offender who was registered in another state before moving to New York does not get credit for the duration of the out-of-state registration.

CRIMINAL LAW, SUGGESTIVE PHOTO-ARRAY.

THE PHOTO ARRAY WAS UNDULY SUGGESTIVE; THE VICTIM WAS FIXATED ON THE UNIQUE WHITE AND BLACK PATTERN ON THE SHIRT WORN BY THE ROBBER; IN THE PHOTO ARRAY A SHIRT WITH A BLACK AND WHITE DESIGN WAS VISIBLE IN THE DEFENDANT'S PHOTO, BUT THE FILLERS WERE ALL WEARING SOLID COLOR SHIRTS (SECOND DEPT).

People v Sulayman, 2022 NY Slip Op 04132, First Dept 6-28-22

Practice Point: Here the victim told the police the robber wore an "unusual shirt" with a black and white pattern. In the photo array from which the victim identified the defendant, the defendant was the only one with a black-and-white patterned shirt. All the fillers had solid color shirts. The array was deemed unduly suggestive and a new trial was ordered.

CRIMINAL LAW, TERRORISTIC THREAT.

DEFENDANT WAS CONCERNED HIS INCARCERATED BROTHER WAS BEING HARASSED BY CORRECTIONS OFFICERS; HE CALLED THE DEPARTMENT OF CORRECTIONS AND THREATENED TO "BLOW AN OFFICER'S HEAD OFF" "IF THEY TOUCH MY BROTHER;" DEFENDANT'S "MAKING A TERRORISTIC THREAT" CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE (THIRD DEPT).

People v Santiago, 2022 NY Slip Op 04196, Third Dept 6-30-22

Practice Point: Here defendant's statement he would "blow an officer's head off" "if they touch my brother" did not cause the investigators who heard the statement to expect or fear the imminent commission of the offense, which is an element of "making a terroristic threat." Defendant's conviction was therefore against the weight of the evidence. The decision cautions against interpreting the "terroristic threat" statute loosely.

CRIMINAL LAW, TRAFFIC ACCIDENTS, CRIMINAL NEGLIGENCE.

THE UNEXPLAINED FAILURE TO SEE A VEHICLE BEFORE COLLIDING WITH IT, WITHOUT MORE, DOES NOT RISE TO THE LEVEL OF CRIMINAL NEGLIGENCE; THE EVIDENCE OF CRIMINAL NEGLIGENCE WAS LEGALLY INSUFFICIENT (THIRD DEPT).

People v Faucett, 2022 NY Slip Op 04195, Third Dept 6-30-22

Practice Point: This case includes a detailed description of the criteria for criminal negligence. In the context of a traffic accident, the defendant's unexplained failure to see the other vehicle until it was too late, without more, does not constitute criminal negligence.

FAMILY LAW, FAMILY OFFENSE, INTIMATE RELATIONSHIP.

THE RELATIONSHIP BETWEEN PETITIONER AND RESPONDENT IN THIS FAMILY OFFENSE PROCEEDING MET THE DEFINITION OF "INTIMATE RELATIONSHIP" SUCH THAT FAMILY COURT HAD SUBJECT MATTER JURISDICTION (SECOND DEPT).

Matter of Charter v Allen, 2022 NY Slip Op 04167, Second Dept 6-29-22

Practice Point: This case demonstrates that an "intimate relationship" which gives Family Court subject matter jurisdiction in a family offense proceeding need not be a sexual relationship.

FAMILY LAW, MODIFICATION OF CUSTODY.

THE EVIDENCE SUPPORTED FATHER'S PETITION FOR A MODIFICATION OF CUSTODY, REQUIRING A "BEST INTERESTS OF THE CHILD" HEARING; THE APPELLATE COURT ORDERED A "BEST INTERESTS" HEARING, INCLUDING A LINCOLN HEARING, AND ORDERED THE APPOINTMENT OF A NEW ATTORNEY FOR THE CHILD BECAUSE THE PRESENT ATTORNEY HAD EXPRESSED AN OPINION ON THE APPROPRIATE CUSTODY ARRANGEMENT (THIRD DEPT).

Matter of Thomas SS. v Alicia TT., 2022 NY Slip Op 04213, Third Dept 6-30-22

Practice Point: This case is an example of evidence which is deemed sufficient to support a modification of custody such that a "best interests of the child" hearing should be held. Here, as part of the "best interests" fact-finding, the Third Department ordered that a Lincoln hearing be held and that a different attorney for the child be appointed because the present attorney had expressed an opinion on custody.

FAMILY LAW, NEGLECT.

WHEN HER CHILDREN WERE ASLEEP, MOTHER WENT INTO THE BATHROOM, DRANK BRANDY, AND FELL ASLEEP; THERE WAS INSUFFICIENT EVIDENCE OF A THREAT OF IMMINENT HARM TO THE CHILDREN OR THAT THE CHILDREN SUFFERED ANY EMOTIONAL HARM; NEGLECT FINDING REVERSED (THIRD DEPT).

Matter of Hakeem S. (Sarah U.), 2022 NY Slip Op 04214, Third Dept 6-30-22

Practice Point: Children are not neglected unless there is a threat of imminent harm or actual harm. Here mother went into the bathroom, drank brandy and fell asleep while her children were asleep. The neglect finding was reversed.

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FAMILY LAW, VISITATION.

TERMINATION OF MOTHER'S SUPERVISED VISITATION IS A "DRASTIC REMEDY" WHICH MUST BE SUPPORTED BY "SUBSTANTIAL PROOF" CONTINUED VISITATION "WOULD BE HARMFUL TO THE CHILD;" THE PROOF HERE DID NOT MEET THOSE CRITERIA (THIRD DEPT).

Matter of William V. v Christine W., 2022 NY Slip Op 04199, Third Dept 6-3022

Practice Point: The termination of supervised visitation is a "drastic remedy" which requires "substantial proof" continued visitation "would be harmful to the child." The proof was lacking in this case.

FAMILY LAW, IMMIGRATION LAW, SPECIAL IMMIGRANT JUVENILE STATUS.

FAMILY COURT SHOULD HAVE MADE THE FINDING THAT PETITIONER'S REUNIFICATION WITH HER FATHER IN THE IVORY COAST WAS NOT VIABLE TO ENABLE HER TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) AND REMAIN IN THE US (SECOND DEPT).

Matter of Sara D. v Lassina D., 2022 NY Slip Op 04119, First Dept 6-28-22

Practice Point: Family Court can be petitioned to make findings which will allow a juvenile to apply for special immigrant juvenile status in order to avoid deportation to the juvenile's home country. Here the court was asked to make findings that reunification with the petitioner's parents is not viable. The First Department found that father had neglected petitioner and she therefore could not be returned to his care.

LABOR LAW-CONSTRUCTION LAW, PROXIMATE CAUSE.

IF PLAINTIFF, A FOREMAN, HAD THE AUTHORITY TO STOP WORK BECAUSE OF RAIN, THEN HIS CONTINUING TO WORK MAY HAVE BEEN THE SOLE PROXIMATE CAUSE OF HIS FALL; IF PLAINTIFF HAD BEEN INSTRUCTED TO WORK IN THE RAIN, THEN THE WET PLYWOOD MAY HAVE BEEN THE SOLE PROXIMATE CAUSE OF HIS FALL; BECAUSE OF THE CONFLICTING OR ABSENCE OF EVIDENCE ON THESE ISSUES, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED; TWO JUSTICE DISSENT (THIRD DEPT).

Sutherland v Tutor Perini Bldg. Corp., 2022 NY Slip Op 04228, First Dept 6-30-22

Practice Point: Here the plaintiff was a foreman on a construction site. He was working in the rain when he slipped and fell on wet plywood. If plaintiff had the authority to stop work because of the rain, he may be deemed the sole proximate cause of his fall. If plaintiff was ordered to work in the rain, then the slippery plywood may be deemed to be the sole proximate cause of his fall. Because there was conflicting and/or a lack of evidence on these issues, plaintiff's motion for summary judgment should not have been granted.

LANDLORD-TENANT, LIABILITY FOR SHOOTING.

ALTHOUGH THE SPECIFIC CRIME, I.E., THE SHOOTING OF PLAINTIFF'S DECEDENT IN DEFENDANTS' BUILDING, MAY NOT HAVE BEEN FORESEEABLE, THE RELEVANT QUESTION IS WHETHER THE DOOR SECURITY WAS DEFICIENT AND THEREFORE WAS A CONCURRENT FACTOR IN THE SHOOTING (SECOND DEPT).

Carmona v Sea Park E., L.P., 2022 NY Slip Op 04149, Second Dept 6-29-22

Practice Point: In the Second Department, a landlord can be liable for a crime committed in the landlord's building if the door security system was deficient and

was therefore a concurrent factor in the happening of the crime. The plaintiff need not demonstrate the specific crime, here the shooting of plaintiff's decedent, could have been foreseen by the landlord.

MEDICAL MALPRACTICE, EMOTIONAL DISTRESS, BIRTH.

MOTHER'S CAUSES OF ACTION FOR EMOTIONAL DISTRESS WOULD NOT BE AVAILABLE IF HER BABY WAS BORN ALIVE; THERE WERE QUESTIONS OF FACT ABOUT WHETHER THE BABY WAS BORN ALIVE OR STILLBORN; THEREFORE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

Khanra v Mogilyansky, 2022 NY Slip Op 04160, Second Dept 6-29-22

Practice Point: Whether mother can recover for emotional distress in this medical malpractice action depended upon whether her baby was born alive or stillborn. There can be no recovery for mother's emotional distress if the baby was born alive. Because there were questions of fact about whether the baby was born alive, the defendants' motion for summary judgment should not have been granted.

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MUNICIPAL LAW, NYC DEPARTMENT OF HOMELESS SERVICES, LANDLORD-TENANT.

THE CONTRACTUAL ARRANGEMENTS MADE WITH APARTMENT OWNERS AND SERVICE PROVIDERS BY THE NYC DEPARTMENT OF HOMELESS SERVICES (DHS) DID NOT CREATE "ILLUSORY TENANCIES" SUCH THAT THE PREVIOUSLY HOMELESS TENANTS WERE ENTITLED TO VACANCY LEASES WHEN THE DHS CONTRACTS WERE TERMINATED (SECOND DEPT).

Sapp v Clark Wilson, Inc., 2022 NY Slip Op 04184, Second Dept 6-29-22

Practice Points: The previously homeless tenants were not entitled to vacancy leases when the relevant contracts with the NYC Department of Homeless Services [DHS} were terminated. The tenants argued the contractual arrangements between the apartment owners and DHS created "illusory tenancies." An "illusory tenancy" is created, for example, when a party leases a rent-stabilized apartment for the sole purpose of subletting it for a profit. Here the leases served a legitimate purpose, the provision of transitional housing.

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MUNICIPAL LAW, NEGLIGENCE, LATE NOTICE OF CLAIM.

THE NOTICE OF CLAIM WAS SERVED ONLY FIVE DAYS LATE WHICH WAS DEEMED TIMELY NOTICE OF THE NATURE OF THE ACTION AND A SHOWING OF THE ABSENCE OF PREJUDICE; THE CITY DID NOT AFFIRMATIVELY DEMONSTRATE PREJUDICE; THE ABSENCE OF AN ADEQUATE EXCUSE WAS NOT FATAL; LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED (SECOND DEPT).

Matter of Gabriel v City of Long Beach, 2022 NY Slip Op 04169, Second Dept 6-29-22

Practice Point: Here the notice of claim was served only five days late. The city was thereby deemed to have had timely notice of the nature of the claim and the petitioner was deemed to have demonstrated a lack of prejudice. The fact that the petitioner did not have an adequate excuse was not a fatal defect. Leave to file a late notice of claim should have been granted.

MUNICIPAL LAW, SLIP AND FALL, TREE WELLS.

UNDER THE NYC ADMINISTRATIVE CODE, ABUTTING PROPERTY OWNERS ARE LIABLE FOR THE CONDITION OF SIDEWALKS BUT NOT CITY OWNED TREE WELLS, UNLESS THEY AFFIRMATIVELY CREATE THE DANGEROUS CONDITION, NEGLIGENTLY REPAIR THE AREA, OR CREATE THE DANGEROUS CONDITION BY A SPECIAL USE; HERE PLAINTIFF SLIPPED AND FELL BECAUSE OF THE CONDITION OF THE TREE WELL, NOT THE SIDEWALK, AND NONE OF THE OTHER LIABILITY THEORIES APPLIED (SECOND DEPT).

Ivry v City of New York, 2022 NY Slip Op 04157, Second Dept 6-29-22

Practice Point: Under the NYC Administrative Code, abutting property owners can be liable for a slip and fall due to the condition of the sidewalk, but not a city-owned tree well.

SLIP AND FALL, ASSAULT AND BATTERY.

PLAINTIFF'S DEPOSITION TESTIMONY THAT HE DID NOT RECALL HOW OR WHERE HE SLIPPED AND FELL AND DID NOT RECALL A FIGHT OR BEING HIT WERE FATAL TO THE SLIP AND FALL AND ASSAULT CAUSES OF ACTION (SECOND DEPT).

Barnett v Fusco, 2022 NY Slip Op 04147, Second Dept 6-29-22

Practice Point: In a slip and fall case, the failure to recall the cause of the fall requires dismissal. In an assault and battery case, the failure to recall the fight or being hit requires dismissal.

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TAX LAW, INCOME TAX, NEW JERSEY RESIDENT.

PETITIONER LIVED IN NEW JERSEY AND COMMUTED TO NEW YORK CITY FOR WORK; ALTHOUGH PETITIONERS OWNED A VACATION HOME IN NORTHFIELD, NEW YORK, AND SPENT THREE WEEKS A YEAR THERE, THE NORTHFIELD HOME DID NOT MEET THE DEFINITION OF A PERMANENT PLACE OF ABODE FOR PURPOSES OF THE TAX LAW; THEREFORE THE TAX TRIBUNAL SHOULD NOT HAVE CONCLUDED PETITIONERS OWED NEW YORK STATE INCOME TAX (THIRD DEPT).

Matter of Obus v New York State Tax Appeals Trib., 2022 NY Slip Op 04206, Third Dept 6-30-22

Practice Point: Here the petitioners apparently spent more than 183 days a year in New York, presumably because one of the petitioners commuted from their New Jersey home to work in New York City. But petitioners did not spend more than three weeks per year in their vacation home in Northfield, New York. Therefore, the Northfield vacation home should have been found to be petitioners' "permanent place of abode" for the purpose of requiring petitioners to pay New York State income tax.

TAX LAW, WITHHOLDING, RESPONSIBLE PERSON.

PETITIONER HELD HIMSELF OUT AS THE FINANCIAL DECISION-MAKER OF THE BUSINESS AND THE TAX TRIBUNAL PROPERLY FOUND PETITIONER WAS PERSONALLY LIABLE FOR UNPAID EMPLOYEE WITHHOLDING TAXES; THE TWO DISSENTERS ARGUED THAT PETITIONER WAS NOT THE FINANCIAL DECISION-MAKER AND WAS PUT IN CHARGE ONLY TO ALLOW THE BUSINESS TO BE CERTIFIED AS A MINORITY BUSINESS-ENTERPRISE; THE IRS IN A PARALLEL PROCEEDING HAD ABSOLVED PETITIONER OF LIABILITY (THIRD DEPT).

Matter of Black v New York State Tax Appeals Trib., 2022 NY Slip Op 04200, Third Dept 6-30-22

Practice Point: Even though there was evidence petitioner was put in charge of the business solely to allow it to be certified as a minority business enterprise, the Third Department upheld the Tax Tribunal's determination that petitioner was a "responsible person" liable for unpaid employee withholding taxes. The two dissenters argued petitioner was not a "responsible person" and should be absolved of liability, which was the result in the parallel IRS proceeding. The result in this case was dictated by the standard for appellate review of an administrative determination. As long as there is evidence in the record which supports the Tax Tribunal's ruling, the ruling will be deemed rational and upheld.

ZONING, SPECIAL USE PERMIT.

THE PLANNING BOARD'S GRANT OF A SPECIAL USE PERMIT AND SITE PLAN APPROVAL FOR CONSTRUCTION OF A BARN TO BE USED TO HOST SEASONAL PARTIES SHOULD NOT HAVE BEEN ANNULLED; THE PLANNING BOARD CONSIDERED ALL THE FACTORS REQUIRED BY THE TOWN CODE AND FOUND THERE WOULD BE NO SIGNIFICANT IMPACT ON TRAFFIC OR NOISE (THIRD DEPT).

Matter of Barnes Rd. Area Neighborhood Assn. v Planning Bd. Of the Town of Sand Lake, 2022 NY Slip Op 04205, Third Dept 6-30-22

Practice Point: Here the respondent requested a special use permit and a site plan approval for the construction of a barn to host seasonal parties. The planning board issued the special permit and the approval. Supreme Court annulled the planning board's determination. The Third Department reversed, finding that the planning board had properly considered the environmental impact and the factors listed in the town code. Therefore the board's decision was not arbitrary or capricious.