NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
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. 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 Report.

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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).

The Third Department, reversing the Commissioner of Health, determined the Commissioner's failure to consider petitioner's strong financial condition in connection with petitioner's application to dispense medical marihuana products pursuant to the Public Health Law rendered the Commissioner's determination arbitrary and capricious:

We agree with petitioner that the scoring methodology used by DOH [Department of Health] to assess the financial standing portion of petitioner's application was arbitrary and capricious. "An [agency's] action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" … . * * *

To the extent that DOH failed to undertake the required financial review, its determination regarding the financial standing portion of petitioner's application is arbitrary and capricious and must be annulled … . 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).

The Fourth Department, reversing (modifying) Supreme Court, determined summary judgment was precluded by questions of fact in this action stemming from defendants' blocking of a tunnel leading to plaintiffs' parking garage. Plaintiffs alleged they own the rights to the easement created for the construction of the tunnel. The tunnel goes under the Rath Erie County Office Building and was apparently blocked by county officials for security reasons. The decision addresses declaratory judgment, breach of contract, trespass and appeal issues. Only the appeal issue is summarized here. If an appellate issue is not listed in the notice of appeal, the issue is not before the appellate court:

… [P]laintiffs' contention on the cross appeal that the court erred in denying that part of the motion seeking a permanent injunction is not properly before us. In their notice of cross appeal, plaintiffs indicate that they are cross-appealing from the order "to the extent that the [c]ourt reached a determination as set forth in paragraph 'e' finding that the actions taken by . . . [d]efendants . . . constitute a taking." It is well settled that, where a party files a notice of cross appeal indicating that it is appealing from a specific part of an order, that party "is limited by its notice of cross appeal to arguing only with respect to the" part of the order listed in the notice … . 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).

The Fourth Department, reversing (modifying) Supreme Court, determined the architectural malpractice cause of action should not have been dismissed. Plaintiff, a hospital maintenance groundskeeper, was injured by a three-foot drop on the other side of a door for which there were no warning signs. Although the door was in a remote area of the hospital, Supreme Court should not have concluded the defendant architectural firm (SBRA) did not owe a duty to the hospital worker who was showing the area to a coworker. The cause of action against the construction company, however, was properly dismissed because the construction company was justified in relying upon SBRA's specifications:

… SBRA had the initial burden of establishing that it "used the degree of care in design that a reasonably prudent architect would use to avoid an unreasonable risk of harm to anyone likely to be exposed to the danger" … . Initially, we conclude that the court erred in determining that plaintiff was not an intended user of the area where the incident occurred and thus that SBRA had no duty to plaintiff with respect to the design of that area. The evidence established that plaintiff was an employee of the hospital who was using the door in its ordinary manner, i.e., to reach the location on the other side of the door while he was showing that location to a coworker. Moreover, the coworker's deposition testimony was submitted by SBRA in support of its motion and established that there was a three-foot differential to the floor upon exiting the door and there were no warning signs, no locks on the door, and no railings. Thus, we conclude that SBRA failed to establish as a matter of law that it had no duty to plaintiff … or that it was not negligent in the design of the relevant portion of the building … . 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).

The First Department determined questions about the incapacitated person's (IP's) sanity should be part of the legal malpractice trial. If the IP is determined to have been "insane" at the time he was represented by defendant attorney, the statute of limitations for the legal malpractice action would have been tolled, if not, the action was not timely:

The parties do not dispute that [defendant attorney] established prima facie that this action asserting breach of fiduciary duty and related causes of action (the malpractice action) was commenced after the applicable statutes of limitations had expired. However, plaintiff raised an issue of fact whether the statutes of limitations were tolled for "insanity" (… CPLR 208[a]). Viewed in the light most favorable to plaintiff, the record presents issues of fact as to the IP's ability to protect his legal rights and his overall ability to function in society at the time his claims against [defendant attorney] accrued … . 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).

The Fourth Department, reversing Supreme Court, determined this "Child Victims Act" action against YMCA Buffalo, alleging sexual abuse in the 1950's by employees at the now dissolved YMCA Niagara Falls, should not have been dismissed. The decision is comprehensive and cannot be fairly summarized here. There exist triable issues of fact whether the de facto merger doctrine applies rendering YMCA Buffalo liable for the torts of YMCA Niagara Falls:

… [A]s a general rule, "a corporation which acquires the assets of another is not liable for the torts of its predecessor" ,,, . There are exceptions, however, and thus "[a] corporation may be held liable for the torts of its predecessor if (1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations" … . Plaintiff relies exclusively on the second exception, which implicates the de facto merger doctrine … . The de facto merger doctrine is "based on the concept that a successor that effectively takes over a [corporation] in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased," which "is consistent with the desire to ensure that a source remains to pay for the victim's injuries" … . 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).

The Second Department, reversing Supreme Court, determined defendant did not offer a reasonable excuse for serving a late answer (which was rejected) in this slip and fall case. Therefore, defendant's motion to compel plaintiff to accept the answer should not have been granted. Defendant was served with the complaint on November 27, 2018, and defendant attempted to serve the answer on January 9, 2019:

The bare allegation by the defendant's attorney that the delay was caused by the defendant's insurance carrier is insufficient to excuse the delay in answering the complaint … . The absence of a reasonable excuse for the defendant's default renders it unnecessary to determine whether she demonstrated the existence of a potentially meritorious defense … . 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).

The Second Department, reversing Supreme Court, determined plaintiff's two separate traffic accidents should be tried jointly because plaintiff claimed the second accident exacerbated the injuries from the first accident:

… [I]n view of the plaintiff's allegations that certain injuries which he sustained in the first automobile accident were exacerbated by the second automobile accident, in the interest of justice and judicial economy, and to avoid inconsistent verdicts, the two actions should be tried jointly … . The respondents failed to demonstrate prejudice to a substantial right if the actions are tried jointly … . Although the plaintiff moved to consolidate the two actions, the appropriate procedure is a joint trial, particularly since the actions involve different defendants … . 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).

The Third Department, in a comprehensive decision which should be consulted on the issues of governmental immunity, assumption of the risk and constructive notice, reversing Supreme Court, determined the New York State Gaming Commission was exercising a proprietary, not governmental, function when its employees inspected a harness-racing horse's (Mister Miami's) equipment and failed to scratch the horse, which exhibited indications he was "lame," from the upcoming race. Claimant was injured when, during the race, claimant's horse collided with Mister Miami after Mister Miami fell. Because the state's alleged negligence stemmed from a proprietary function, ordinary negligence principles applied and there was no need to show a special relationship between claimant and the state, and the governmental immunity affirmative defense was not available. There were questions of fact whether the assumption-of-the-risk doctrine applied because the state may have acted to unreasonably increase the risk. As for notice, the regulations requiring the state to inspect the horses and equipment allowed the state's constructive notice of the dangerous condition to be imputed:

… [T]he duties of [the state's] officials are fundamentally intertwined with the operation of each and every race and, while such tasks may tangentially relate to the overall function of ensuring fair and honest gambling in this state, they are more specifically directed to the goal of ensuring the safety of the participants in

those races … . … [I]t is apparent that at least part of the Commission's role in harness racing is to work hand in hand with the private racing industry to further the state's goal of "deriv[ing] a reasonable revenue for the support of government" … . * * *

… [W]e find that there are triable issues as to whether Commission officials adequately performed their duties and whether their alleged failures unreasonably increased the risk beyond a level generally inherent in harness track racing … . …

Because [the inspection] duties were imposed upon the Commission officials by regulation, constructive notice of Mister Miami's health and equipment issues that would have been observable during those inspections may be imputed … . 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).

The Fourth Department, reversing the conviction and dismissing the indictment, determined the one count indictment was rendered duplicitous by the bill of particulars. The court noted that, even if the scope of the evidence had been narrowed at trial, reversal still would have been necessary because defendant did not have pretrial notice of the charges:

Because the sole count of the indictment charged only one offense, as required by CPL 200.30 (1) … , the indictment on its face was not duplicitous. It is well settled, however, that indictments charging one offense per count can be rendered duplicitous by, among other things, a bill of particulars alleging more than one offense per count … . Here, the bill of particulars alleged that defendant engaged in two separate and distinct acts of nonconsensual sexual intercourse with the victim. The second such act allegedly occurred more than three hours after the first act. Thus, while the indictment charged only one criminal act, the jury heard evidence at trial of two criminal acts, with no specification from the court or the prosecutor as to which act they were to consider when rendering a verdict.

Even if the trial evidence narrowed the scope of defendant's allegedly illegal conduct, and here it did not, that "is irrelevant. Defendant was entitled to pretrial notice of the charges so that he would be able to adequately prepare a defense" … . 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).

The Fourth Department, reversing County Court, determined defendant demonstrated his attorney gave him the wrong advice about the chances he would be deported based on his guilty plea and sent the matter back for hearing on whether the is a reasonable possibility defendant would not have pled guilty if he had been properly informed:

In support of [defendant's motion to vacate his conviction], defendant's attorney on the motion averred that defense counsel had given advice that was consistent with an assumption that the crime that defendant was pleading guilty to was a crime of moral turpitude within the meaning of the Immigration and Nationality Act (INA), for which an immigration judge could grant a cancellation of removal, when in actuality defendant was pleading guilty to an aggravated felony under the INA that would almost certainly result in deportation…. . 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).

The Third Department reversed defendant's judgment by guilty plea and dismissed the superior court information (SCI). A defendant cannot be prosecuted by an SCI after indictment (defendant here had already been indicted. The error is jurisdictional and need not be preserved by objection. The issue is not forfeited by a guilty plea:

As the Court of Appeals has observed, "[g]iven the objective and the plain language of CPL 195.10 (2) (b), the conclusion is inescapable that waiver cannot be accomplished after indictment . . ., even where it is the defendant who orchestrates the scenario" … .

Here, at the point in time when defendant agreed to be prosecuted by way of an SCI, defendant already had been indicted and the matter was scheduled for trial. Although the indictment subsequently was dismissed, there is no indication in the record that the dismissal was occasioned by a defect in the indictment itself (see CPL 210.20) or that Supreme Court authorized resubmission of the charge to the grand jury (see CPL 210.45 [9]), and it does not appear that a new felony complaint was filed. "Therefore, defendant was not placed on a formal preindictment procedural track" … . Under these circumstances, the waiver of indictment is invalid and the resulting SCI must be dismissed … . 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).

The Fourth Department, over a dissent, determined defendant was not entitled to reversal of the rape conviction based on the six-year preindictment delay. The dissenter would have reversed, finding the delay deprived defendant of due process:

In determining whether defendant was deprived of due process, we must consider the factors set forth in People v Taranovich (37 NY2d 442 [1975]), which are: "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay" … . * * *

There is no indication that the "delay was caused by any bad faith on the part of the People" … . Instead, the delay was largely caused by the efforts of the People and law enforcement "to acquire substantial corroborating evidence in order to prove defendant's guilt beyond a reasonable doubt" … . Nevertheless, it is true, as defendant points out, that extensive periods of delay may fairly be attributed to neglect by the People and law enforcement in the investigation. But even assuming, arguendo, that [this] factor weighs in defendant's favor, three of the five factors favor the People, and we thus conclude that the court did not err in denying that part of defendant's omnibus motion seeking to dismiss the indictment on due process grounds.

From the dissent:

The People … failed to present a valid reason for the delay … . As of September 2006, when the prosecution was made aware of DNA evidence linking defendant to the crime, the prosecutor possessed all information necessary to charge defendant, and the record reveals no reason, plan, or deliberate decision to delay defendant's arrest until it was eventually made in January 2013. Instead, the record

reflects that the explanation for the over six-year delay was simply inadvertence, which is an insufficient reason as a matter of law … . 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).

The Third Department, vacating defendant's promoting-prison-contraband conviction, determined the trial judge, who had initially dismissed the promoting-prison-contraband count, subsequently stayed the dismissal and promoting-prison-contraband count went to trial with other charges. Apparently the judge stayed the dismissal of the charge because the People had appealed the dismissal. After the trial, the People's appeal was dismissed as moot. Then the defendant appealed and argued the judge did not have the statutory authority to stay the dismissal and go to trial on the dismissed count:

We agree with defendant that County Court improperly stayed its dismissal order. The People had appealed to this Court pursuant to CPL 450.20 (1). In pertinent part, that provision authorizes the People to appeal, as of right, from an order that dismissed an accusatory instrument or a count thereof pursuant to CPL 210.20. Except as provided for in CPL 460.40, the taking of an appeal from a judgment,

sentence or order does not automatically stay the execution thereof. With respect to appeals by the People to an intermediate appellate court, an automatic stay results only in the case of an appeal pursuant to CPL 450.20 (1-a) "from an order reducing a count or counts of an indictment or dismissing an indictment and directing the filing of a prosecutor's information" or an appeal pursuant to CPL 450.20 (1) "from an order dismissing a count or counts of an indictment charging murder in the first degree" (CPL 460.40 [2]). Plainly, none of those circumstances are present. * * *

… [T]here was no statutory authorization for a stay of County Court's dismissal order. Without a stay, the bench trial should not have included the charge of promoting prison contraband in the first degree, and, thus, there should have been no occasion for defendant to be convicted of the lesser included offense of promoting prison contraband in the second degree. Accordingly, we vacate that conviction. 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.

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).

The Frist Department, in a full-fledged opinion by Justice Webber, determined defendant, who was representing himself at the time, was not deprived of his right to be present at a material stage of the proceeding when the judge, outside defendant's presence, discussed whether defendant, who apparently was in an agitated state, should be examined by a psychiatrist. Ultimately no examination was ordered. The First Department held the trial judge properly terminated defendant's self-representation based on his behavior during the trial. In addition, the First Department concluded that a juror who apparently stated he did not wish to continue participating in the deliberations, was not grossly unqualified:

… [T]he record supports a determination that defendant's conduct prevented the fair and orderly exposition of the issues and was disruptive to the proceedings … . During the examination of the People's witnesses, defendant was repeatedly told by the court to "calm down," to not get agitated, to not argue and be combative with the witnesses, and to not argue with the court regarding its rulings. The record also reflects instances where the court explained its rulings to defendant, defendant stated he understood and would then immediately engage in the same conduct. Moreover, during his testimony, the court repeatedly admonished defendant to stop making arguments to the jury. When asked twice by the court to sit down, he refused to do so. Defendant also repeatedly ignored the direction of the court officer to sit down. Instead, defendant remained standing, continued his argument and questioned the court's ruling. Defendant also made reference to his over one-year period of pretrial detention as well as that he had a teenage son. 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).

The Third Department, reversing Court Court, determined defendant had raised several issues in the motion to vacate the conviction which were not addressed by the People's response. Some of the issues were corroborated in an affidavit from defendant's prior attorney. Therefore a hearing was necessary:

… [W]e agree with defendant that he is entitled to a hearing on whether counsel was ineffective in connection with defendant's alleged failure to fully cooperate under the terms of the 2016 cooperation agreement. A hearing is required on a CPL article 440 motion "if the submissions show that the nonrecord facts sought to be established are material and would entitle the defendant to relief" … . In that regard, defendant averred that he consistently gave a truthful account of the burglary and had fully cooperated in the prosecution of [a codefendant] as required by the 2016 cooperation agreement, and his motion papers included a September 2016 supporting deposition from his sister and an affidavit from [his former attorney] to support those claims. Defendant also alleged specific deficiencies in counsel's performance, namely, that counsel failed to investigate whether the Special Prosecutor's withdrawal of the 2016 cooperation agreement was impermissibly "premised on bad faith, invidiousness, . . . dishonesty" or

unconstitutional considerations and, moreover, failed to discuss the possibility of demanding a hearing on that issue with defendant … . 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).

The Third Department, reversing defendant's conviction by guilty plea, determined the defendant made statements during the plea allocution which negated elements of criminal possession of a weapon. At that point, the sentencing judge should have made an inquiry. This issue falls within an exception to the preservation requirement:

Penal Law § 265.03 (3) requires the possession of a "loaded firearm," meaning "an operable gun with either live ammunition in the gun or held on [the defendant's] person" with the gun … . … [D]efendant negated that element at sentencing when he stated that the handgun in question was in his bedstand drawer, not on his person, and that it "wasn't loaded." At that point, it was incumbent upon County Court to either "conduct a further inquiry or give . . . defendant an opportunity to withdraw the plea" … . 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.

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).

The Fourth Department reversed the determination of the amount of restitution and remitted for a hearing. The error was not preserved and was considered in the interest of justice. The court further noted that the recipient of the restitution was not put on the record:

… [T]he People failed to establish the victim's actual out-of-pocket loss by a preponderance of the evidence. The restitution amount ordered by the court deviated from the loss claimed by the restaurant manager in his testimony, and the sole evidence supporting the actual amount of out-of-pocket loss calculated by the court was an undetailed, vague letter ostensibly from the restaurant franchisee's insurer listing an amount of loss—the calculation and accuracy of which was, by their own representation at the hearing, unknown to the People … . 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).

The Second Department, in a full-fledged opinion by Justice Brathwaite Nelson, in a matter of first impression, determined that the 20-year duration of registration and verification of a level one sex offender starts anew when a sex offender registered in another state moves to New York:

The defendant contends that the 20-year period set forth in Correction Law § 168-h(1) must be diminished by the period of time that he was registered as a sex offender in another state. We disagree and hold that the "initial date of registration" referred to in that statutory provision means the initial date of the offender's registration with the Division of Criminal Justice Services pursuant to New York's Sex Offender Registration Act (Correction Law art 6-C; hereinafter SORA). 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).

The First Department, reversing defendant's conviction and ordering a new trial, determined the photo array from which the victim identified defendant was unduly suggestive:

The hearing court should have granted defendant's motion to suppress the victim's identification of defendant in a photo array. The photo array was unduly suggestive because defendant was the only person shown wearing "distinctive clothing . . .which fit the description" of the suspect … . Moreover, the distinctive clothing was an outstanding feature of the identifying witness's description of the robber … The victim told the police that he "fixated" on the "unusual shirt" the r0bber was wearing during the incident, a white shirt with a distinctive black design. In the photo array, the visible part of defendant's shirt closely matched the robber's shirt as described by the victim. The fillers, on the other hand, all wore shirts that, to the extent visible in the photos, were solid-colored shirts without any markings or designs. 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).

The Third Department, reversing defendant's "making a terroristic threat" conviction, determined the conviction was against the weight of the evidence, Defendant's brother was incarcerated. Defendant was concerned that his brother was being harassed by corrections officers. Defendant allegedly called the Department of Corrections and Community Supervision and said he would "blow an officer's head off" "if they touch my brother:"

…"[A] person is guilty of making a terroristic threat when[,] with intent to . . . affect the conduct of a unit of government by murder, . . . he or she threatens to commit . . . a specified offense and thereby causes a reasonable expectation or fear of the imminent commission of such offense" (Penal Law § 490.20 [1]). Penal Law article 490 was enacted following the September 11, 2001 attacks and was "specifically designed to combat the evils of terrorism" … . Accordingly, "[t]he concept of terrorism has a unique meaning and its implications risk being trivialized if the terminology is applied loosely in situations that do not match our collective understanding of what constitutes a terrorist act" … ….

… [T]he evidence fails to establish that defendant "cause[d] a reasonable expectation or fear of the imminent commission" of an offense under the factual circumstance presented here (Penal Law § 490.20 [1]). Neither the first investigator nor the supervisor took any actions to warn the correctional facility or any other agency or individuals of the threat. While a notice was eventually issued, this was not done until well after the initial threat was made. None of the witnesses provided any testimony that they or anyone else had a reasonable expectation or fear that the threat would be imminently carried out, nor did their actions indicate any such belief. 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).

The Third Department, reversing defendant's criminally negligent homicide conviction and dismissing the indictment, determined defendant's failure to see the victim's vehicle on the side of the highway until it was too late did not rise to the level of criminal negligence (legally insufficient evidence). The victim was in a pickup truck with a sign on the back warning drivers that roadwork was being done ahead:

"A person is guilty of criminally negligent homicide when, with criminal negligence, he [or she] causes the death of another person" … . "A defendant acts with criminal negligence in this context when the defendant 'fails to perceive a substantial and unjustifiable risk' that death will result" … . "That 'risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation'" … . "[C]riminal liability cannot be predicated on every act of carelessness resulting in death[;] . . . the carelessness required for criminal negligence is appreciably more serious than that for ordinary civil negligence, and that . . . carelessness must be such that its seriousness would be apparent to anyone who shares the community's general sense of right and wrong" … . As such, a defendant must "engage[] in some blameworthy conduct creating or contributing to a substantial and unjustifiable risk of death" … . Importantly, "nonperception of a risk, even if death results, is not enough" … . …

… [T]he Court of Appeals has held that "[t]he unexplained failure of a driver to see the vehicle with which he [or she] subsequently collided does not, without more, support a conviction for the felony of criminally negligent homicide" … . 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).

The Second Department, reversing Family Court, determined the family-offense petition should not have been dismissed for lack of subject matter jurisdiction. The Second Department determined the respondent met the "intimate relationship" criteria which provided Family Court with subject matter jurisdiction:

"[T]he determination as to whether persons are or have been in an 'intimate relationship' within the meaning of Family Court Act § 812(1)(e) is a fact-specific determination which may require a hearing" … . Although Family Court Act § 812(1)(e) expressly excludes a "casual acquaintance" and "ordinary fraternization between two individuals in business or social contexts" from the definition of "intimate relationship," "the legislature left it to the courts to determine on a case-by-case basis what qualifies as an intimate relationship within the meaning of Family Court Act § 812(1)(e) based upon consideration of factors such as 'the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship'" …. .

… [T]he record demonstrated that the petitioner knew the respondent for more than 20 years, and the respondent and the petitioner's sister held themselves out as husband and wife. During that period of time, the petitioner and the respondent engaged in general social activities at each other's homes, attended holiday and birthday celebrations together, and traveled together. The petitioner's sister and the respondent had a daughter together who identified the petitioner as her aunt. The petitioner resided in one of the units of a three-family home. The petitioner's sister, the respondent, and their daughter, who was approximately 18 years old at the time of the hearing, resided in one of the other units of that three-family home. The home was owned by the mother of the petitioner and the petitioner's sister. Under the circumstances, the Family Court should have denied the respondent's application to dismiss the petition for lack of subject matter jurisdiction (see Family Ct Act § 812[1]). 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).

The Third Department, reversing (modifying) Family Court, determined father had demonstrated a change in circumstances sufficient to support a modification of the custody arrangement. The original custody order provided that the 50/50 custody sharing would change to mother's having primary custody when the child started school. Father explained that mother's primary custody was necessary because his

work prevented him from taking the child to and from school. However, father had since changed jobs and moved to the school district where the child attended to school. The Third Department ordered a "best interests of the child" hearing, including a Lincoln hearing, and ordered the appointment of a different attorney for the child because the present attorney had expressed an opinion about the appropriate custody arrangement:

"A party seeking to modify a prior order of custody must show that there has been a change in circumstances since the prior order and, then, if such a change occurred, that the best interests of the child would be served by a modification of that order" … . According to the father's petition, the sole reason for the parties' initial agreement to decrease the father's parenting time during the school year was because, at the time of the agreement, the father's work schedule prevented him from transporting the child to and from school. According to the father's hearing testimony, that circumstance had since changed. The father testified that, while the 50/50 custody arrangement was still in effect, he obtained a new job with a higher salary and more flexible hours, and bought a house in what was at that time the child's school district, such that the school transportation issue had been alleviated. 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).

The Third Department, reversing Family Court, over a dissent, determined the neglect finding against mother was not supported by evidence of a threat of imminent harm to the children. While the children were sleeping, mother went into the bathroom, drank brandy and fell asleep:

… [W]e find that petitioner failed to establish that respondent's ill-advised conduct placed the children at risk of anything beyond, "at most, possible harm" … . To this point, respondent testified that her youngest children were in age-appropriate sleeping arrangements that presented no inherent danger resulting from respondent's inebriated state … . Further, although there was a period when the children were no longer supervised by respondent when she was taken to the hospital, the testimony reveals that shelter staff were watching the children until petitioner's supervisor arrived and took custody of them, and there is no indication that they were in any danger during this period of time … .

… [T]he record is devoid of any proof that the children were upset or suffered any emotional harm at any point during the incident … . 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.

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).

The Third Department determined the evidence did not support the "drastic remedy" of terminating mother's supervised visitation with the child:

Although Family Court found that both the mother and the father "testified credi[]bly that relations between the mother and child ha[d] deteriorated" — a determination that was borne out by the testimony — the "denial of visitation to a noncustodial parent is a drastic remedy" … and the record does not contain "substantial proof" that continued supervised visitation "would be harmful to the child" … . We are mindful of the father's testimony that the child had returned home from a visit with bent glasses and marks on his leg. However, Family Court did not make any factual findings regarding these allegations, and the maternal grandfather — who drove the child home from that visit — denied ever observing the child's glasses to be "messed up" or witnessing marks on the child's legs. On this record, there is an insufficient basis to conclude that the bent glasses and marks observed by the father were caused by the mother's conduct. Moreover, while the mother herself acknowledged that there were issues in the relationship between her and the child, she indicated that this stemmed from the child's difficult behavior and her concern about the child making racist comments in front of his three-year-old half-sibling. There was also testimony regarding the positive aspects of their relationship and the maternal grandfather, who did all the driving, corroborated that the child generally seemed content during visits. Notwithstanding the father's testimony to the contrary, we conclude that the evidence presented was not sufficiently compelling and substantial to justify a wholesale suspension of the mother's supervised visitation … . 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).

The First Department, reversing (modifying) Family Court, determined Family Court should have found reunification with petitioner's father in the Ivory Coast was not viable. Petitioner, 16 years old, sought findings from Family Court which would allow her to apply for special immigrant juvenile state (SIJS) and remain in the United States:

Family Court erred in not making any findings of fact as to reunification with petitioner's father. Exercising our power to review the record and to make our own factual determinations … , we find that the record supports a finding that reunification of petitioner with her father, respondent Lassina D., is not viable due to neglect within the meaning of Family Court Act § 1012 (f)(i) (A)—(B). Petitioner's testimony shows that the father did not meet the minimal degree of care since he did not provide for her medical and emotional needs while she was in the Ivory Coast, and has not contributed to her financial support or maintained regular contact with her since she has been in the United States … Her uncontroverted testimony also supports a finding of neglect based on the father's excessive use of corporal punishment … .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).

The First Department, in a full-fledged opinion by Justice Kennedy in this Labor Law 241 (6) action, over a two-justice dissenting opinion, determined conflicting testimony about whether plaintiff, who was a foreman, had the authority to stop work because of rain, or was instructed to work in the rain, raised a question of fact about the cause of the accident. Plaintiff slipped on wet plywood and fell as he was passing steel rebar to workers below:

The deposition testimony raised issues of fact as to whether plaintiff's injuries were proximately caused by a slippery condition in violation of Industrial Code (12 NYCRR) § 23-1.7(d), or whether the sole proximate cause was plaintiff's decision, as a foreman, to work on a plywood surface exposed to the elements while it was raining … . * * *

… [T]he evidence is inconclusive as to whether plaintiff's decision to work in the rain, rather than simply following his general foreman's instructions about what work to perform, was the sole proximate cause of his slip-and-fall accident. … [T]his case is distinguishable from the line of cases relied upon by the dissent that conclude that a plaintiff is not the proximate cause of an accident when there is undisputed evidence that they were following the instructions of a foreman. Here, plaintiff was also a foreman with specific duties and potential control over the work that he and his crew were performing. Whether he could or should have ceased work based on his own authority, as a foreman, his extensive work experience and conditions of the site, there are issues of fact that cannot be resolved on this record. 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).

The Second Department determined the defendants (the building owner, the building manager, and the security company) were not entitled to summary judgment in this wrongful death case stemming from a shooting in the building. Although the specific crime, i.e., the shooting of plaintiff's decedent, may not have been foreseeable by the defendants, the relevant question was whether the building's door security was deficient and was therefore a concurrent factor in shooting:

… [U]nder this Department's jurisprudence, "[t]he test in determining summary judgment motions involving negligent door security should . . . not focus on whether the crime committed within the building was 'targeted' or 'random,' but whether or not, and to what extent, an alleged negligently maintained building entrance was a concurrent contributory factor in the happening of the criminal occurrence" … .

… [W]hile the precise nature and manner of [the shooter's] crime could not necessarily have been anticipated, the alleged longstanding inoperability of the front door intercom system, involving a front door that was unlocked remotely from an off-premises security booth, along with the alleged failure of the security

officers to properly screen visitors, and the chronic problem of piggy-backing, "made it foreseeable that some form of criminal conduct could occur to the detriment of one or more of the residents therein, at some point in time" … . In examining whether there are triable issues of fact as to issues of foreseeability and proximate cause requiring a trial, "a jury could conceivably conclude" that the alleged condition of the front door security equipment that included the inoperable intercom system, along with the failure of the security officers to engage in proper screening of visitors, would result in the improper piggy-back "entry of intruders into the [subject apartment] building for the commission of criminal activities against known or unknown specific tenants" … . 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).

The Second Department, reversing Supreme Court, determined the defendants' motion for summary judgment in this medical malpractice action should not have been granted because there was a question of fact whether the baby was born alive or was stillborn:

The plaintiffs commenced this action to recover damages … for emotional distress allegedly sustained by the plaintiff Kristina Khanra as a result of the defendants' medical malpractice, which caused her to deliver a stillborn baby. The hospital records indicated that, upon removal from the womb by caesarean section, it was

observed that the infant was "floppy," had "no spontaneous respirations," and had "no heart rate." The defendants … moved for summary judgment dismissing the first three causes of action insofar as asserted against them, which were premised, among other things, upon Kristina Khanra's emotional distress, on the ground that the plaintiffs could not recover for any alleged emotional distress because the infant was born alive. …

The defendants established their prima facie entitlement to judgment as a matter of law … , by tendering evidence that the infant born to Kristina Khanra by emergency cesarean section was born alive, as a heartbeat was generated 20 minutes after the infant was removed from the womb, as a result of continuous resuscitative efforts … . However, in opposition, the plaintiffs raised a triable issue of fact as to whether the infant was in fact stillborn, as the infant had no respiratory response, the infant's Apgar score was zero at 1 minute, 5 minutes, 10 minutes, and 15 minutes after the infant was removed from the womb, the infant otherwise had no indicia of life, and the infant was declared deceased approximately two hours after being removed from a ventilator … . 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.

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).

The Second Department, over a dissent, determined that the previously homeless appellants who had been placed in apartments did not demonstrate the arrangement constituted an "illusory tenancy" such that the appellants were entitled to vacancy leases. The owners of the apartments were entitled to possession after their contracts with the NYC Department of Homeless Services (DHS] were terminated:

… "[A]n illusory tenancy is defined generally as a residential leasehold created in a person who does not occupy the premises for his or her own residential use and subleases it for profit, not because of necessity or other legally cognizable reason"… . An illusory tenancy scheme exists, for example, where the "prime tenant" rents a rent-stabilized apartment, which it never intends to occupy, and then subleases it for an amount in excess of the legal rent so as to make a profit … . * * *

The leases in the present case did not lack a legitimate purpose. The subject premises were leased to, and by, both CAMBA and We Always for the "legally cognizable reason" of providing transitional housing in accordance with the terms of the Cluster Transitional Residence Program run by the City … The leases entered into by CAMBA and We Always both specified that the agreement was entered into "for the sole purpose of providing transitional housing and services in connection with the DHS Agreement," and the leases expired by their terms upon termination of the DHS [NYC Department of Homeless Services] Agreement (if not terminated earlier). * * *

… [T]he owners demonstrated, prima facie, that the appellants were not entitled to vacancy leases and related relief because illusory tenancies were not created to

deprive them of the benefits of rent stabilization. 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.

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).

The Second Department, reversing Supreme Court, determined the petitioner for leave to file a late notice of claim should have been granted. The notice of claim was served five days after the expiration of the 90-day time-limit. The court deemed that to constitute timely knowledge of the claim. The city did not demonstrate prejudice. The absence of an excuse was not a fatal defect:

… [T]he petitioner served the notice of claim upon the respondents five days after the 90-day period for service had expired and commenced the instant proceeding the next day. Under such circumstances, the respondents acquired actual knowledge of the essential facts constituting the claim within a reasonable time after the expiration of the 90-day statutory period … . Since the respondents acquired timely knowledge of the essential facts constituting the petitioner's claim, the petitioner met his initial burden of showing a lack of prejudice … .

… [T]he respondents "failed to come forward with particularized evidence showing that the late notice had substantially prejudiced [their] ability to defend the claim on the merits" … . Rather, the respondents' counsel made only conclusory assertions that the petitioner's five-day delay in serving the notice of claim had hindered the respondents' ability to conduct a prompt and thorough investigation of the subject incident, which "were insufficient to rebut the petitioner's initial showing of lack of prejudice" … .

Although the petitioner failed to offer a reasonable excuse for his failure to timely serve the notice of claim, "the absence of a reasonable excuse is not fatal to the petition where there was actual notice and absence of prejudice" … . 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).

The Second Department, reversing Supreme Court, determined the defendant property owner and manager could not be held liable for the condition of a tree will within a city sidewalk. Therefore there motion for summary judgment in this slip and fall case should have been granted:

Administrative Code of the City of New York § 7-210, which became effective September 14, 2003, shifted tort liability for injuries arising from a defective sidewalk from the City to the abutting property owner … . However, "section 7-210 does not impose civil liability on property owners for injuries that occur in city-owned tree wells" … . Thus, "liability may be imposed on the abutting landowner in such instances only where she or he has 'affirmatively created the dangerous condition, negligently made repairs to the area, [or] caused the dangerous condition to occur through a special use of that area'" … . 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).

The Second Department, reversing Supreme Court, determined plaintiff's deposition testimony that he didn't recall how or where he slipped and fell, and, with respect to his assault cause of action, did not recall the fight or being hit, was fatal to the complaint:

In a slip-and-fall case, a plaintiff's inability to identify the cause of the fall is fatal to the cause of action, because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation … . Here, with regard to that branch of their motion which was for summary judgment dismissing the cause of action alleging negligence, the defendants established, prima facie, that the plaintiff could not identify the cause of his alleged fall without engaging in speculation … . …

"To sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact" … . Here, the plaintiff testified at his deposition that he could not recall a physical altercation at the premises on the date of the alleged incident and did not "recall being hit." 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.

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).

The Third Department, reversing the Tax Appeals Tribunal, determined petitioners' vacation home in Northfield, New York, was not a "permanent place of abode" such that petitioner's were obligated to pay New York State income tax. Petitioners lived in New Jersey and petitioner Nelson Obus commuted to New York City for work. Apparently the commuting was the basis for finding petitioners spent more than 183 days in New York in the relevant tax years. But petitioner did not commute to work from the vacation house and spent no more than three weeks a year there:

… [T]here are objective facts that tend to support the determination of the Tribunal, including that petitioners had "free and continuous access" to the Northville home … . That said, petitioners fall outside of the purview of the target class of taxpayers who were intended to qualify as statutory residents … . It is not disputed that, at most, petitioners utilized the Northville home for three weeks

during each tax year for either skiing or to visit the racetrack in the City of Saratoga Springs, Saratoga County.,,, The Northville home was not used for access to Obus' job in New York City and was not suitable for such purposes, given that it is over a four-hour drive each way … . In fact, a year-round tenant occupies an attached apartment, who Obus informs of his presence prior to his arrival. Moreover, petitioners do not keep personal effects in the Northville home, instead bringing with them what they will need for their visits. Based on these undisputed facts, petitioners have not utilized the dwelling in a manner which demonstrates that they had a residential interest in the property … . Thus, even though the Northville home could have been used in a manner such that it could constitute a permanent place of abode within the meaning of Tax Law § 605, because petitioners did not use it in this manner, it does not constitute a permanent place of abode … , and a contrary finding by the Tribunal is inconsistent with the legislative intent underlying the statute … . 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).

The Third Department, over a two-justice dissent, determent the Tax Tribunal properly found that petitioner was a "responsible person" such that he can be held personally liable for unpaid employee withholding taxes. According to the dissent, petitioner held himself out as the business's (NECC's) financial decision-maker as part of an agreement with the 51% shareholder, Anthony Nastasi (the actual financial decision-maker) in order that the business would be certified as a minority business-enterprise and be eligible for certain state contracts as a result. In a parallel proceeding brought against petitioner by the IRS, petitioner was absolved of liability:

Notwithstanding evidence that could support a contrary determination, it is undisputed that petitioner was president, the majority shareholder, had check signing authority, was involved in daily field operations and derived a substantial part of his income from NECC. Additionally, petitioner intentionally held himself out to third parties, as well as to the Division of Taxation itself, as the contact person and responsible person for New York taxes by signing state tax returns and checks accompanying the returns, executing a sales tax certificate of authority listing himself as the corporation's responsible person, filling out the Division's "Responsible Person Questionnaire," and maintaining communication with the Department. Accordingly, respondent's determination that petitioner is a responsible person has a rational basis, is supported by substantial evidence and must be upheld … . 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).

The Third Department, reversing Supreme Court, determined the planning board's granting of a special use permit and approval of respondent's site plan was not arbitrary and capricious and should not have been annulled:

Respondent Kenneth Bailey applied for a special use permit and site plan approval so that he could construct a barn on his property that would operate as a seasonal party venue. Following hearings, respondent Planning Board of the Town of Sand Lake (hereinafter the Board) issued resolutions adopting a negative declaration under the State Environmental Quality Review Act (see ECL art 8 [hereinafter SEQRA]) and granting Bailey's application with conditions. Petitioners — a neighborhood association and individual members thereof — commenced this proceeding seeking to annul the Board's resolutions. * * *

The Board's resolutions reflect that it considered the relevant criteria as set forth in Town of Sand Lake Zoning Code § 250-80. The Board noted the various uses permitted as of right by the zoning code and found that these uses "may be more

intense and affecting" than Bailey's proposed party venue. The Board relied on the engineering report in concluding that there would be no significant impact to traffic or noise. The record also discloses that the Board entertained comments derived from multiple public hearings. In view of the foregoing, and taking into account that "[a] municipality 'retains some discretion to evaluate each application for a special use permit, to determine whether applicable criteria have been met and to make commonsense judgments in deciding whether a particular application should be granted'" … . 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.