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An Organized Compilation of the Substantive Decisions Released by the New York State Court of Appeals and Posted on the New York Appellate Digest Website January – June 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 Report.

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ANIMAL LAW, CONSTITUTIONAL LAW, HABEAS CORPUS.

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The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over two dissenting opinions, determined an elephant at the Bronx Zoo (Happy) was not entitled to the protection of a writ of habeas corpus. The petition sought Happy's transfer from the zoo to an elephant sanctuary:

For centuries, the common law writ of habeas corpus has safeguarded the liberty rights of human beings by providing a means to secure release from illegal custody. The question before us on this appeal is whether petitioner Nonhuman Rights Project may seek habeas corpus relief on behalf of Happy, an elephant residing at the Bronx Zoo, in order to secure her transfer to an elephant sanctuary. Because the writ of habeas corpus is intended to protect the liberty right of human beings to be free of unlawful confinement, it has no applicability to Happy, a nonhuman animal who is not a "person" subjected to illegal detention. Thus, while no one disputes that elephants are intelligent beings deserving of proper care and compassion, the courts below properly granted the motion to dismiss the petition

for a writ of habeas corpus … . Matter of Nonhuman Rights Project, Inc. v Breheny, 2022 NY Slip Op 03859, CtApp 6-14-22

Practice Point: So far, sentient non-humans (like Happy, an elephant in the Bronx Zoo) are not entitled to the protection against "illegal custody" afforded by a writ of habeas corpus.

JUNE 14, 2022

APPEALS, FAMILY LAW.

NO APPEAL FROM DEFAULT JUDGMENT. THE MAJORITY HELD THE APPELLATE DIVISION PROPERLY REFUSED TO HEAR APPELLANT FATHER'S APPEAL IN THIS TERMINATION OF PARENTAL RIGHTS PROCEEDING BECAUSE FATHER WAS IN DEFAULT (NO APPEAL LIES FROM A DEFAULT); THE DISSENT ARGUED FATHER WAS NOT IN DEFAULT BECAUSE HE APPEARED BY COUNSEL (CT APP).

The Court of Appeals, affirming the Appellate Division, over a strong dissent, determined the Appellate Division properly concluded it could not hear the appellant father's appeal in this termination-of-parental-rights proceeding because he was in default (no appeal lies from a default judgment). The dissent argued father appeared by counsel and therefore was not in default:

Before this Court, appellant does not dispute the Appellate Division's determination that his failure to appear constituted a default.

From the dissent:

The only reviewable issue before us is whether the Appellate Division properly dismissed appellant father's appeal from a Family Court order terminating his parental rights on the ground that appellant defaulted. That decision was in error because appellant appeared through counsel during the fact-finding and dispositional hearings, as acknowledged by Family Court, and in accordance with

the Family Court Act and the CPLR (see Family Ct Act § 165; CPLR 3215 [a]). Matter of Irelynn S., 2022 NY Slip Op 01869, Ct App 3-17-22

Practice Point: No appeal lies from a default judgment. The dissent argued: A party who appears by counsel, as appellant father did in these termination-of-parental-rights proceedings, is not in default.

MARCH 17, 2022

APPEALS, CIVIL PROCEDURE, LABOR LAW-CONSTRUCTION LAW. APPEALABLE ORDERS.

THE APPELLATE DIVISION INITIALLY REVERSED SUPREME COURT AND HELD PLAINTIFF WAS NOT ENTITLED TO SUMMARY JUDGMENT IN THIS LABOR LAW 240(1) LADDER-FALL CASE; THERE WAS A DEFENSE VERDICT AFTER TRIAL; THE ORDER DENYING SUMMARY JUDGMENT IS NOT APPEALABLE TO THE COURT OF APPEALS (CT APP).

The Court of Appeals determined the Appellate Division order denying summary judgment in this Labor Law 240(1) ladder-fall case did not "affect the final judgment" after trial. Therefore the order was not appealable to the Court of Appeals:

The 2018 Appellate Division order may be reviewed on appeal from a final paper only if, pursuant to CPLR 5501 (a), the nonfinal order "necessarily affects" the final judgment. "It is difficult to distill a rule of general applicability regarding the 'necessarily affects' requirement" … and "[w]e have never attempted, and we do not now attempt, a generally applicable definition" … . That said, to determine whether a nonfinal order "necessarily affects" the final judgment, in cases where the prior order "str[uck] at the foundation on which the final judgment was predicated" we have inquired whether "reversal would inescapably have led to a vacatur of the judgment" … . This is not such a case. In other cases, we have asked whether the nonfinal order "necessarily removed [a] legal issue from the case" so that "there was no further opportunity during the litigation to raise the question decided by the prior non-final order" … .

In resolving plaintiff's summary judgment motion, the Appellate Division held that factual questions existed as to whether a statutory violation occurred and as to proximate cause, or more specifically as to whether plaintiff's own acts or omissions were the sole proximate cause of the accident … . That nonfinal order did not remove any issues from the case. Rather, the question of proximate cause and liability was left undecided. The parties had further opportunity to litigate those issues and in fact did so during the jury trial. Bonczar v American Multi-Cinema, Inc., 2022 NY Slip Op 02835, CtApp 4-28-22

Practice Point: A nonfinal order is not appealable to the Court of Appeal unless it "affects the final judgment." If questions of fact remain after the nonfinal order is issued, the order does not "affect the final judgment" and is not appealable. Here the nonfinal order was the Appellate Division's denial of plaintiff's summary judgment motion. The order left open factual questions resolved at trial. Therefore the order did not "affect the final judgment."

APRIL 28, 2022

ATTORNEYS, CRIMINAL LAW, NO OBLIGATION TO INFORM CLIENT OF SUSPENSION OR PENDING SUSPENSION.

ALTHOUGH DEFENDANT'S ATTORNEY WAS SUSPENDED BY THE SECOND CIRCUIT BEFORE DEFENDANT'S TRIAL AND SUSPENDED IN NEW YORK JUST AFTER DEFENDANT'S TRIAL, DEFENDANT'S DEPRIVATION-OF-HIS-RIGHT-TO-COUNSEL AND INEFFECTIVE-ASSISTANCE ARGUMENTS WERE REJECTED; THE ATTORNEY WAS NOT OBLIGATED TO INFORM DEFENDANT OF HIS SUSPENSION OR THE PENDING SUSPENSION PROCEEDINGS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutmam, affirmed defendant's conviction. The court noted: (1) defendant's attorney had been suspended by the Second Circuit before defendant's trial; (2) defendant's attorney was still licensed in New York at the time of the defendant's trial and conviction; (3) defendant's attorney was suspended in New York two weeks after defendant's

conviction; (4) the New York suspension was made "retroactive" to the date of the Second Circuit suspension (before defendant's trial); (5) the attorney was not obligated to inform defendant of the suspension by the Second Circuit; and (6) the failure to inform defendant was considered pursuant to defendant's ineffective-assistance argument on appeal. Defendant's motion to vacate his conviction and his appeal were deemed properly rejected by the lower courts:

… [T]he imposition of reciprocal discipline is not a foregone conclusion, nor is the nature or length of any reciprocal discipline imposed certain. Defendant's proposed rule would deprive attorneys of the due process to which they are entitled in pending reciprocal disciplinary proceedings. * * *

No statute, court order, or New York Rule of Professional Conduct affirmatively required [defendant's attorney] to disclose the Second Circuit's suspension or the pending reciprocal disciplinary proceedings in New York to defendant. * * *

We decline to create a bright-line rule invariably requiring attorneys to affirmatively disclose the imposition of foreign discipline or pending reciprocal discipline proceedings to their clients in every case, where no court order or ethical rule requires such disclosure. …

Instead, we conclude that an attorney's failure to disclose the imposition of foreign discipline and pending reciprocal disciplinary proceedings can adequately be assessed in the context of an ineffective assistance of counsel claim … . People v Burgos, 2022 NY Slip Op 01868, Ct App 3-17-22

Practice Point: There is no statute or rule which requires an attorney to disclose to his or her client a suspension from practice in a foreign jurisdiction or ongoing suspension proceedings in New York State.

MARCH 17, 2022

CIVIL PROCEDURE, SECURITIES, RECOMMENCEMENT OF LAWSUIT AFTER DISMISSAL.

ONLY THE ORIGINAL PLAINTIFF CAN TAKE ADVANTAGE OF CPLR 205 (A) WHICH ALLOWS RE-COMMENCEMENT OF A LAWSUIT WITHIN SIX MONTHS OF A DISMISSAL WHICH WAS NOT ON THE MERITS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a dissenting opinion, determined the plaintiff, HSBC, could not take advantage of the six-month extension for commencing an action after a dismissal which was not on the merits (CPLR 205(a)) because HSBC was not the original plaintiff:

When a timely-commenced action has been dismissed on certain non-merits grounds, CPLR 205 (a) allows "the plaintiff" in that action "or, if the plaintiff dies," the "executor or administrator" of the plaintiff's estate, six months to commence a new action based on the same transaction or occurrence. The new action will be deemed timely based on the commencement of the prior action. Here, after the dismissal of a prior action brought by two certificateholders … —and after the statute of limitations expired—plaintiff HSBC Bank USA, National Association, in its capacity as trustee of a residential mortgage-backed securities (RMBS) trust, commenced this action against the sponsor, invoking CPLR 205 (a). Because HSBC was not "the original plaintiff" in the prior dismissed action … , we agree with the courts below that HSBC could not invoke CPLR 205 (a) to avoid dismissal of this time-barred claim … .* * *

HSBC is not "the plaintiff" in the prior action and the benefit of CPLR 205 (a) is unavailable to save its untimely complaint. … [T]his conclusion is consistent with the public policy underpinning the savings statute. CPLR 205 (a) is a remedial statute that … is "'designed to insure to the diligent suitor'" an opportunity to have a claim heard on the merits … when the suitor has "initiated a suit in time" … but the claim was dismissed on some technical, non-merits-based ground. While the savings statute undoubtedly has a "broad and liberal purpose" … to "ameliorate the potentially harsh effect of the [s]tatute of [l]imitations" … , "[t]he important consideration is that, by invoking judicial aid [in the first action], a litigant gives timely notice to [the] adversary of a present purpose to maintain [its] rights before the courts" … . Where, as here, the litigant commencing the second action is not the original plaintiff, application of CPLR 205 (a) would protect the rights of a

dilatory—not a diligent—suitor. By failing to bring the action within the statute of limitations, HSBC signaled that it had no intention to pursue its claims in court. CPLR 205 (a) does not apply and HSBC's failure to commence an action within the statute of limitations is fatal. ACE Sec. Corp. v DB Structured Prods., Inc., 2022 NY Slip Op 03927, CtApp 6-16-22

Practice Point: Only the original plaintiff can take advantage of CPLR 205 (a) which allows re-commencement of a lawsuit within six months of a dismissal which was not on the merits.

JUNE 16, 2022

CONSTITUTIONAL LAW, FANTASY SPORTS, GAMBLING.

"INTERACTIVE FANTASY SPORT" (IFS) IS NOT "GAMBLING;" THE STATUTES AUTHORIZING AND REGULATING IFS ARE NOT, THEREFORE, UNCONSTITUTIONAL (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a comprehensive three-judge dissent, determined the 2016 statutes authorizing and regulating "interactive fantasy sport" (IFS) do not violate the New York Constitution's prohibition of "gambling:"

… IFS contests are not prohibited gambling activities because contestants use significant skill to select their rosters, creating fantasy teams, and therefore have influence over the outcome of the fantasy contests between IFS participants. … [T]he historic prohibition on "gambling" in article I, § 9 does not encompass skill-based competitions in which participants who exercise substantial influence over the outcome of the contest are awarded predetermined fixed prizes by a neutral operator. * * *

… [T]he prohibition on "gambling" in article I, § 9 [of the NYS Constitution] encompasses either the staking of value on a game in which the element of chance predominates over the element of skill or the risking of value through bets or wagers on contests of skill where the pool of wagered value is awarded upon some future event outside the wagerer's influence or control. However, games in which

skill predominates over chance and skill-based competitions for predetermined prizes in which the participants have influence over the outcome do not constitute "gambling." … .

From the dissent:

Since 1894, New York's Constitution has prohibited "lotter[ies] . . . poolselling, bookmaking, or any other kind of gambling." Everyone knows that sports betting is gambling. Betting on how many touchdowns a particular player will score is gambling. … Aggregating several bets involving different players into a point total that is pitted against point totals of other bettors does not transform gambling into something else. White v Cuomo, 2022 NY Slip Op 01954, Ct App 3-22-22

Practice Point: Statutes authorizing "interactive fantasy sport" IFS are not unconstitutional because such skill-based competitions do not constitute "gambling" in which the element of chance, as opposed to skill, predominates.

MARCH 22, 2022

CRIMINAL LAW, APPEALS, INVALID WAIVER OF APPEAL.

THE WAIVER OF APPEAL WAS INVALID; THE PLEA COURT CONFLATED THE RIGHT TO APPEAL WITH THE RIGHTS FORFEITED BY A GUILTY PLEA; CASE REMITTED TO THE APPELLATE DIVISION FOR CONSIDERATION OF THE SUPPRESSION CLAIM (CT APP).

The Court of Appeals, reversing the Appellate Division and remitting the case for consideration of the suppression claim, upon the People's concession, determined the waiver of appeal was invalid:

… [O]rder reversed and case remitted to the Appellate Division, Second Department, for further proceedings. Under the totality of the circumstances and upon the People's concession that the appeal waiver was invalid because the plea court conflated the right to appeal with those rights automatically forfeited by a guilty plea, defendant's appeal waiver did not foreclose consideration of his suppression claim … . People v Johnson, 2022 NY Slip Op 00909, CtApp 2-10-22

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FEBRUARY 10, 2022

CRIMINAL LAW, APPEALS, VALIDITY OF GUILTY PLEA.

DEFENDANT, AT THE TIME OF THE PLEA, AGREED TO A SENTENCE OF 20 DAYS OF COMMUNITY SERVICE; AT SENTENCING, AFTER DEFENDANT HAD COMPLETED THE COMMUNITY SERVICE, THE PROSECUTOR AND DEFENSE COUNSEL ACKNOWLEDGED THAT THE BARGAINED-FOR SENTENCE WAS A ONE-YEAR CONDITIONAL DISCHARGE; ON APPEAL DEFENDANT ARGUED HE NEVER AGREED TO THE CONDITIONAL DISCHARGE AND HIS GUILTY PLEA WAS THEREFORE NOT VOLUNTARY; THE MAJORITY HELD THE ISSUE WAS NOT PRESERVED FOR APPEAL (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DeFiore, over an extensive three-judge dissent, determined defendant's argument that his plea was invalid because he was not informed that a one-year conditional discharge (CD) would be imposed, was not preserved for appeal. Defendant argued only the community-service sentence was agreed to at the time of the plea and the subsequent imposition of the conditional discharge rendered the plea involuntary:

Defendant challenges the voluntariness of his guilty plea, asserting that the court in its plea colloquy failed to advise him that the 20 days of community service to be imposed would be a condition of a sentence of a one-year conditional discharge. At the outset of the sentencing proceeding, the defense counsel and prosecutor affirmatively acknowledged to the court that the bargained-for sentence to be imposed was a conditional discharge. Prior to imposition of that sentence, defendant who had the practical ability to do so, failed to protest or otherwise seek to withdraw his guilty plea. As a result, defendant's claim that the court's imposition of an alleged new sentence rendered his guilty plea involuntary is unpreserved for our review. * * *

From the dissent:

Defendant … pleaded guilty to a reduced charge in exchange for a noncarceral sentence of 20 days of community service, along with a mandatory surcharge and

temporary suspension of his driver's license. When defendant appeared after completing his community service and without further criminal incident, the sentencing should have been in accord with the prosecutor and defendant's agreement. Instead, the court imposed additional year-long conditions that were not agreed to and never mentioned during the plea colloquy or prior to sentencing. As a consequence, defendant's plea is invalid … . People v Bush, 2022 NY Slip Op 01956, Ct App 3-22-22

Practice Point: Here defense counsel, at the outset of sentencing, acknowledged that the bargained-for sentence was a one-year conditional discharge. On appeal, the defendant argued that, at the time of the plea, he agreed only to a sentence of 20 days of community service, rendering his guilty plea involuntary. The majority held the issue was not preserved for appeal because defendant was alerted to the conditional-discharge sentence at the time of sentencing and did not move to withdraw his plea. The three-judge dissent agreed with defendant's argument that his plea was involuntary.

MARCH 22, 2022

CRIMINAL LAW, APPEALS, VALIDITY OF GUILY PLEA.

THE VALIDITY OF A GUILTY PLEA IS NOT PROPERLY RAISED IN THE COURT OF APPEALS AFTER THE AFFIRMANCE OF A LEGAL SENTENCE BY THE APPELLATE DIVISION; WHERE THE SENTENCE IS LEGAL, AN EXCESSIVE-SENTENCE CLAIM IS BEYOND THE SCOPE OF THE COURT OF APPEALS (CT APP).

The Court of Appeals, over an extensive two-judge dissenting opinion, determined (1) the validity of a guilty plea is not properly raised in the Court of Appeals after the appellate division has affirmed the defendant's legal sentence, and (2) where a sentence is legal, an excessive-sentence claim is beyond the scope of the Court of Appeals:

Defendant's challenge to the validity of his plea is not properly raised on this appeal from an Appellate Division order affirming a sentence, pursuant to 22

NYCRR § 670.11 (b) (see CPL 450.30 [1]; 470.35 [1]; People v Pagan, 19 NY3d 368, 370-371 [2012]). Defendant's sentence—an authorized prison term with post-release supervision—is not illegal, and any excessive sentence claim is beyond the scope of this Court's review (see People v Veale, 78 NY2d 1022, 1023-1024 [1991]). The many dissenting opinions cited by the dissent provide no support for a different result (see dissenting op at 6, 8-11). People v Laboriel, 2022 NY Slip Op 03863, CtApp 6-14-22

Practice Point: The affirmance of a legal sentence by the appellate division does not give the Court of Appeals the authority to review the validity of a guilty plea.

Practice Point: If a sentence is legal, an excessive-sentence claim is beyond the scope of the Court of Appeals.

JUNE 14, 2022

CRIMINAL LAW, ATTORNEYS, REQUEST FOR COUNSEL.

THE MAJORITY CONCLUDED (1) THE RECORD SUPPORTED THE FINDING THAT DEFENDANT DID NOT MAKE AN UNEQUIVOCAL REQUEST FOR COUNSEL, AND (2) WHETHER A REQUEST FOR COUNSEL IS UNEQUIVOCAL IS A MIXED QUESTION OF LAW AND FACT WHICH IS NOT REVIEWABLE BY THE COURT OF APPEALS (CT APP).

The Court of Appeals, over a two-judge extensive dissenting opinion, determined (1) the record supported the finding that the defendant's request for counsel was not unequivocal and (2) whether the request was unequivocal presents a mixed question of law and fact which is not reviewable by the Court of Appeals:

Once a defendant in custody unequivocally requests the assistance of counsel, the right to counsel may not be waived outside the presence of counsel … . But "[a] suggestion that counsel might be desired; a notification that counsel exists; or a query as to whether counsel ought to be obtained will not suffice" to unequivocally invoke the indelible right to counsel … . Furthermore, "[w]hether a particular request is or is not unequivocal is a mixed question of law and fact that must be

determined with reference to the circumstances surrounding the request including the defendant's demeanor, manner of expression and the particular words found to have been used by the defendant" … .

Here, there is support in the record for the lower courts' determination that defendant—whose inquiries and demeanor suggested a conditional interest in speaking with an attorney only if it would not otherwise delay his clearly-expressed wish to speak to the police—did not unequivocally invoke his right to counsel while in custody. That mixed question of law and fact is therefore beyond further review by this Court … .

From the dissent:

Here, Mr. Dawson [defendant] unequivocally invoked his right to counsel — the record supports no other conclusion. As is clear from the quoted portion of the colloquy with the detective, he twice said he wanted to call his lawyer, and the detective twice expressly stated that he understood Mr. Dawson had asked to call counsel and therefore the detective could no longer speak to Mr. Dawson. Additionally, the detective then told Mr. Dawson to wait while the detective retrieved Mr. Dawson's phone so he could call counsel. People v Dawson, 2022 NY Slip Op 02772, CtApp 4-26-22

Practice Point: Whether a defendant's request for counsel in "unequivocal," thereby requiring police interrogation to cease, is a mixed question of law and fact. As long as there is support in the record for the lower court's finding the request was not unequivocal, the issue cannot be reviewed by the Court of Appeals.

APRIL 26, 2022

CRIMINAL LAW, SIDE-BAR CONFERENCE, DEFENDANT'S PRESENCE.

THE COURT OF APPEALS, WITHOUT EXPLANATION, REVERSED THE FOURTH DEPARTMENT WHICH HAD REVERSED DEFENDANT'S CONVICTION ON THE GROUND THE DEFENDANT WAS NOT PRESENT DURING A SIDEBAR CONFERENCE CONCERNING THE BIAS OF A PROSPECTIVE JUROR; THE MATTER WAS SENT BACK TO THE FOURTH DEPARTMENT FOR CONSIDERATION OF OTHER ISSUES AND FACTS RAISED IN THE APPEAL BUT NOT CONSIDERED BY THE FOURTH DEPARTMENT (CT APP).

The Court of Appeals, without explanation, reversed the Fourth Department which had reversed defendant's conviction on the ground defendant was not present during a side bar conference concerning the bias of a prospective juror: People v McKenzie-Smith, 2022 NY Slip Op 03308, CtApp 5-19-22

From the Fourth Department Decision (Reversed Without Explanation by the Court of Appeals):

A … prospective juror was peremptorily excused by defendant's counsel, however, and, during a sidebar conference at which defendant was not present, that juror was questioned "to search out [her] bias, hostility or predisposition to believe or discredit the testimony of potential witnesses" (Antommarchi, 80 NY2d at 250). Consequently, we conclude that, "absent a knowing and voluntary waiver by defendant of his right to be present at that sidebar conference, his conviction cannot stand" … . The only evidence in the record concerning a waiver consists of a conversation between the court, defendant's counsel and codefendant's counsel that occurred after the prospective juror was excused, in which codefendant's counsel indicated that he had just discussed with codefendant the right to approach the bench during such conferences, and defendant's counsel merely assented. Inasmuch as the discussion was vague and prospective, and there is no indication that defendant or defendant's counsel were waiving defendant's Antommarchi rights retrospectively, that conversation is insufficient to establish that defendant waived those rights concerning the questioning of the prospective juror at issue here. We therefore reverse the judgment of conviction and grant a new trial. People v Mckenzie-Smith, 2020 NY Slip Op 05653, Fourth Dept 10-9-20

Practice Point: The Fourth Department had reversed defendant's conviction on the ground the defendant was not present at a sidebar conference when the bias of a prospective juror was discussed. Here the Court of Appeals reversed without explanation and sent the case back to the Fourth Department for consideration of other issues raised in the appeal.

MAY 19, 2022

CRIMINAL LAW, DEFENDANT'S REQUEST TO REPRESENT HIMSELF.

DEFENDANT'S STATEMENT "I WOULD LOVE TO GO PRO SE" WAS NOT A DEFINITIVE REQUEST TO REPRESENT HIMSELF AND THEREFORE THE STATEMENT DID NOT TRIGGER THE NEED FOR A SEARCHING INQUIRY BY THE JUDGE (CT APP).

The Court of Appeals, in a brief memorandum decision over an extensive two-judge dissent, determined defendant's statement "I would love to go pro se" was not a definitive commitment to self-representation and therefore did not trigger an inquiry by the judge:

… [D]efendant did not clearly and unequivocally request to proceed pro se. During a colloquy with the trial court, defendant referenced the unsuccessful application to relieve his assigned counsel made at his prior appearance, and he renewed that application, claiming that counsel was "ineffective." The court denied the application and rejected defendant's renewed attempt to read aloud from what defendant had previously referred to as "my testimony." Upon review of the record as a whole, defendant's retort, "I would love to go pro se," immediately after the court's denial of his applications "d[id] not reflect a definitive commitment to self-representation" that would trigger a searching inquiry by the trial court … . People v Duarte, 2022 NY Slip Op 00960, Ct App 2-15-22

FEBRUARY 15, 2022

CRIMINAL LAW, EVIDENCE, DNA, FRYE HEARINGS, HARMLESS ERROR.

ALTHOUGH THE FAILURE TO CONDUCT A FRYE HEARING TO DETERMINE THE ADMISSIBILITY OF THE ANALYSIS OF DNA EVIDENCE USING THE FORENSIC STATISTICAL TOOL WAS ERROR, THE MAJORITY CONCLUDED IT WAS HARMLESS ERROR BECAUSE OF VIDEO EVIDENCE CIRCUMSTANTIALLY CONNECTING DEFENDANT TO THE GUN FOUND BY THE POLICE; THREE-JUDGE DISSENT ON WHETHER THE ADMISSION OF THE DNA EVIDENVE CONNECTING DEFENDANT TO THE GUN WAS HARMLESS (CT APP).

The Court of Appeals, over a three-judge dissenting opinion, held the acknowledged DNA-evidence error was harmless. All the judges agreed that a Frye hearing should have been held to determine the admissibility of the DNA analysis using the Forensic Statistical Tool. The issue was whether the defendant or others at the scene of the assault (a deli store) possessed a gun which was found on a display shelf by a police officer. DNA evidence connected the gun to the defendant. The majority concluded the video footage which showed defendant placing an item on the shelf where the gun was found rendered the DNA-evidence error harmless:

It was an abuse of discretion for the trial court to admit the results of DNA analysis conducted using the Forensic Statistical Tool without first holding a Frye hearing … . Here, however, this error was harmless. The evidence of defendant's guilt was overwhelming. Video footage from a security camera inside the store was entered into evidence at trial, including footage from one camera trained on a display shelf which captured a group of men holding defendant against the shelf. The other men then scatter, leaving the video frame, at which point defendant places an item on the shelf directly in front of him before he too runs out of the frame. After approximately two minutes and fifteen seconds, during which no one approaches the shelf or the area where defendant placed the item, a police officer looks at the space on the shelf where the item was placed, walks over, and removes a gun. Rather than "mere physical proximity," the video shows that only defendant could have placed the item—the gun recovered minutes later—on the shelf, not "any of the several others in the same area" (dissenting op at 8). Therefore, there is no

significant probability that the jury would have acquitted defendant had it not been for this error … . People v Easley, 2022 NY Slip Op 02770 CtApp 4-26-22

Practice Point: All the judges at the Court of Appeals agreed the admissibility of DNA evidence gathered using the Forensic Statistical Tool should have been determined in a Frye hearing. But the judges disagreed on whether the error in admitting the DNA evidence was harmless. The DNA evidence apparently connected the defendant to a gun found by the police. The majority concluded video evidence which demonstrated defendant placed an object in the area where the gun was found rendered the DNA error harmless. Three judges disagreed in an extensive opinion.

APRIL 26, 2022

CRIMINAL LAW, EVIDENCE, DNA, TRUEALLELE CASESWORK.

THE DNA EVIDENCE GENERATED BY THE TRUEALLELE CASEWORK SYSTEM WAS PROPERLY ADMITTED IN EVIDENCE; THE DEFENSE WAS NOT ENTITLED TO THE TRUEALLELE SOFTWARE CODE EITHER IN CONNECTION WITH THE FRYE HEARING OR TO CONFRONT THE WITNESSES AGAINST DEFENDANT; THE CONCURRENCE STATED WHETHER THE CODE WOULD BE AVAILABLE TO THE DEFENSE UNDER A PROTECTIVE ORDER REMAINED AN OPEN QUESTION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a three-judge concurring opinion, determined that the trial judge, after a Frye hearing, properly admitted DNA evidence generated by the TrueAllele Casework System. The arguments that the defense was entitled to the TrueAllele software source code in connection with the Frye hearing and in order to confront the witnesses against the defendant were rejected. The concurrence stated that it remains an open question whether a protective order could be used to supply the defense with the source code:

This appeal primarily concerns the admissibility of DNA mixture interpretation evidence generated by the TrueAllele Casework System. We conclude that

Supreme Court did not abuse its discretion in finding, following a Frye hearing, that TrueAllele's use of the continuous probabilistic genotyping approach to generate a statistical likelihood ratio—including the use of peak data below the stochastic threshold—of a DNA genotype is generally accepted in the relevant scientific community. We also hold that there was no error in the court's denial of defendant's request for discovery of the TrueAllele software source code in connection with the Frye hearing or for the purpose of his Sixth Amendment right to confront the witness against him at trial.

From the concurring opinion:

Although the prosecutor failed to establish that, at the time of the Frye hearing, TrueAllele's methodology was properly validated by disinterested parties with access to the source code, and defendant was denied an opportunity to review the source code because of the developer's proprietary claims, the error, considered alone or with the other alleged constitutional error, was harmless on the facts of this case.

Even though the majority rejects defendant's claim to the source code on the facts of this case, it remains an open question in this Court whether a defendant should be granted access to a proprietary source code under a protective order. This familiar method of ensuring a defendant's right to present a defense would safeguard commercial interests. It provides no help to this defendant, but it is squarely within a court's authority to grant such an order in an appropriate future case. People v Wakefield, 2022 NY Slip Op 02771, CtApp 4-26-22

Practice Point: The Court of Appeal holds that DNA evidence generated by the TrueAllele Casework System is admissible. The defense was not entitled to the TrueAllele software code either for the Frye hearing or in order the confront the witnesses against the defendant. It is an open question whether the defense could gain access to the software code by way of a protective order (suggested by the concurring opinion).

APRIL 26, 2022

CRIMINAL LAW, EVIDENCE, SCREENSHOTS OF TEXT MESSAGES.

HERE SCREENSHOTS OF TEXT MESSAGES WHICH HAD BEEN DELETED FROM THE VICTIM'S PHONE WERE SUFFICIENTLY AUTHENTICATED TO BE ADMISSIBLE, EVEN IF THE BEST EVIDENCE RULE APPLIED; THE MESSAGES OF A SEXUAL NATURE ALLEGEDLY WERE SENT BY THE DEFENDANT, A VOLLEY BALL COACH, TO THE VICTIM, A 15-YEAR-OLD PLAYER ON THE TEAM (CT APP).

The Court of Appeals, reversing the Appellate Division, determined the trial court did not abuse its discretion by admitting in evidence screen shots of text messages of a sexual nature allegedly sent by the defendant, a high-school volley ball coach, to the 15-year-old victim, a player on the team. The victim had deleted the messages, but her boyfriend had taken screenshots of some of the messages and those screenshots were allowed in evidence. On appeal the Second Department reversed the conviction on the ground that the screenshots had not been properly authenticated:

"[T]echnologically generated documentation [is] ordinarily admissible under standard evidentiary rubrics" and "this type of ruling may be disturbed by this Court only when no legal foundation has been proffered or when an abuse of discretion as a matter of law is demonstrated" … . This Court recently held that for digital photographs, like traditional photographs, "the proper foundation [may] be established through testimony that the photograph accurately represents the subject matter depicted" … . We reiterated that "[r]arely is it required that the identity and accuracy of a photograph be proved by the photographer" … . which would be the boyfriend here. Rather, "any person having the requisite knowledge of the facts may verify" the photograph "or an expert may testify that the photograph has not been altered" … .

Here, the testimony of the victim—a participant in and witness to the conversations with defendant—sufficed to authenticate the screenshots. She testified that all of the screenshots offered by the People fairly and accurately represented text messages sent to and from defendant's phone. The boyfriend also identified the screenshots as the same ones he took from the victim's phone on November 7. Telephone records of the call detail information for defendant's subscriber number

corroborated that defendant sent the victim numerous text messages during the relevant time period. Moreover, even if we were to credit defendant's argument that the best evidence rule applies in this context, the court did not abuse its discretion in admitting the screenshots. People v Rodriguez, 2022 NY Slip Op 03307, CtApp 5-19-22

Practice Point: Text messages of a sexual nature were allegedly sent by the defendant, a volley ball coach, to a 15-year-old player on the team. The original messages were deleted, but the victim's boyfriend had taken screenshots of some of the messages. The screenshots were deemed authenticated and admitted by the trial court. The Second Department reversed, applying the best evidence rule. The Court of Appeals reversed the Second Department, finding that, even if the best evidence rule applied, the trial court did not abuse its discretion by finding the screenshots had been sufficiently authenticated.

MAY 19, 2022

CRIMINAL LAW, EVIDENCE.

EXCLUDING EVIDENCE WHICH CONTRADICTED AN IMPORTANT PROSECUTION-WITNESS'S ACCOUNT OF HIS ACTIONS RIGHT UP UNTIL THE TIME OF THE SHOOTING, AND THREE 911 CALLS WHICH QUALIFIED AS PRESENT SENSE IMPRESSIONS, DEPRIVED DEFENDANT OF HIS RIGHT TO PUT ON A DEFENSE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Singas, reversing the Appellate Division in this murder case, determined evidentiary rulings excluding evidence which impeached an important witness and 911 calls admissible as present sense impressions deprived defendant of his right to present a defense. R.M. was a crucial prosecution witness. R.M. claimed to have been with his girlfriend, R.J. right up until the time of the shooting. But R.J. would have testified she was not with R.M. that day:

R.J.'s proffered testimony was probative of R.M.'s ability to observe and recall details of the shooting. At trial, R.M. testified that he was with R.J. until "seconds"

before he witnessed the shooting, and that he was at the scene to walk R.J. home. Upon the People's questioning, R.M. explained in detail his relationship with R.J., resulting in many pages of testimony as to where he met up with her that evening, the amount of time they spent together, and when they parted ways. This testimony, introduced and relied upon by the People, made R.J. an integral part of R.M.'s account of why he was in a position to witness the shooting, and placed her with him mere seconds before it occurred. Since the People's own theory of the case placed R.J. on the scene the instant before the shooting, her testimony cannot be characterized as collateral. …

The court also erred in excluding the three 911 calls. The calls were admissible as present sense impressions. The present sense impression exception to the hearsay rule applies to statements that are "(1) made by a person perceiving the event as it is unfolding or immediately afterward" and "(2) corroborated by independent evidence establishing the reliability of the contents of the statement" … . "[D]escriptions of events made by a person who is perceiving the event as it is unfolding" are "deemed reliable . . . because the contemporaneity of the communication minimizes the opportunity for calculated misstatement as well as the risk of inaccuracy from faulty memory" … . People v Deverow, 2022 NY Slip Op 03362, CtApp 5-24-22

Practice Point: Here an important prosecution witness claimed he was with his girlfriend right up until seconds before the shooting he allegedly witnessed. The girlfriend's testimony that she was not with the witness that day should not have been excluded as collateral. In addition, three 911 calls which qualified as present sense impressions should not have been excluded. The Court of Appeals held these evidentiary errors deprived defendant of his right to put on a defense.

MAY 24, 2022

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CRIMINAL LAW, FRAUDULENT ACCOSTING.

THE ACCUSATORY INSTRUMENT CHARGING THE DEFENDANT WITH "FRAUDULENT ACCOSTING" WAS FACIALLY SUFFICIENT; IT WAS ENOUGH TO ALLEGE THAT DEFENDANT SPOKE FIRST TO PERSONS PASSING AROUND HIM ON THE SIDEWALK ASKING FOR DONATIONS FOR THE HOMELESS; THERE WAS NO NEED TO ALLEGE DEFENDANT WAS AGGRESSIVE OR PERSISTENT OR TARGETED AN INDIVIDUAL (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over an extensive three-judge dissent, determined the accusatory instrument charging defendant with "fraudulent accosting" was facially sufficient. Defendant set up a couple of milk crates as a table in the sidewalk and asked people for donations to the homeless as they walked around the table. Defendant unsuccessfully argued the term "accost" required an element of aggressiveness or persistence directed toward an individual:

A person is guilty of fraudulent accosting when he or she "accosts a person in a public space with intent to defraud him of money or other property by means of a trick, swindle or confidence game" (Penal Law § 165.30 [1]). * * *

During the relevant period in 1952, when the legislature created the offense of fraudulent accosting … contemporary dictionaries defined "accost" to mean either to "approach," to "speak to first," or to "address" … .No dictionary cited from the relevant time period limits the term to an aggressive or persistent physical approach … . People v Mitchell, 2022 NY Slip Op 03360, Ct App 5-24-22

Practice Point: Here, to determine the meaning of the word "accost" as used in the "fraudulent accosting" statute, the Court of Appeals referred only to definitions of the word in dictionaries extant in 1952, when the statute was enacted. and ignored more recent definitions.

MAY 24, 2022

CRIMINAL LAW, IMMIGRATION LAW, MISDEMEANOR JURY TRIALS.

DEFENDANT DID NOT DEMONSTRATE CONVICTION OF THE B MISDEMEANORS WITH WHICH HE WAS CHARGED WOULD RESULT IN DEPORTATION; THEREFORE DEFENDANT WAS NOT ENTITLED TO A JURY TRIAL (CT APP).

The Court of Appeals, over an extensive two-judge dissent, determined that the defendant did not demonstrate the misdemeanors with which he was charged triggered a right to a jury trial because conviction would result in deportation:

Defendant was originally charged with public lewdness, two counts of forcible touching, and two counts of sexual abuse in the third degree after police officers observed him masturbating on a subway platform and pressing himself against two women on a subway car. The People thereafter filed a prosecutor's information reducing the two class A misdemeanor charges of forcible touching to attempted forcible touching, so that the top charges against defendant were Class B misdemeanors obviating his right to a jury trial under state statute … . After a bench trial, defendant was convicted of public lewdness and acquitted of all other charges. …

While the Appellate Term first improperly conducted the deportability analysis based only on the crime of conviction, that court went on to correctly analyze defendant's deportability based on all the charges he faced (see Suazo, 32 NY3d at 508). It remained, however, "the defendant's burden to overcome the presumption that the crime charged is petty and establish a Sixth Amendment right to a jury trial" (id. at 507). … [D]efendant's conclusory allegation that he was deportable if convicted "on any of the charged B misdemeanors," supported by a bare citation to 8 USC § 1227 (a) (2) (A) (ii), under which an alien is deportable if "convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct," was insufficient to establish his right to a jury trial. People v Garcia, 2022 NY Slip Op 03359, CtApp 5-24-22

Practice Point: Generally B misdemeanors do not warrant a jury, as opposed to a bench, trial. However, if conviction will result in deportation, the defendant has a right to a jury trial. Here the Court of Appeals held the defendant did not

demonstrate conviction of the B misdemeanors with which he was charged triggered deportation.

MAY 24, 2022

CRIMINAL LAW, PUBLIC HEALTH LAW, SYNTHETIC MARIJUANA.

THE MISDEMEANOR COMPLAINT DID NOT ALLEGE SUFFICIENT FACTS TO DETERMINE WHETHER THE SYNTHETIC CANNABINOID DEFENDANT WAS CHARGED WITH POSSESSING WAS ONE OF THE SYNTHETIC CANNABINOIDS DESIGNATED AS CONTROLLED SUBSTANCES BY THE PUBLIC HEALTH LAW (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Singas, reversing the Appellate Term and dismissing the accusatory instrument, determined the accusatory instrument did not allege that the synthetic cannabinoid defendant was charged with possessing was a controlled substance pursuant to the Public Health Law:

Defendant … was charged with criminal possession of a controlled substance in the seventh degree for allegedly possessing an illegal synthetic cannabinoid. The Public Health Law's controlled substance schedules criminalize possession of some, but not all, synthetic cannabinoids. Because the misdemeanor [complaint] to which defendant pleaded guilty failed to allege a sufficient factual basis to conclude that the substance defendant possessed was illegal, that count was facially deficient and should be dismissed. * * *

The Public Health Law's statutory framework, which criminalizes only a subset of synthetic cannabinoids, renders it difficult for both the public and law enforcement alike to reasonably conclude whether a synthetic cannabinoid is a controlled substance without additional facts … . Given this particular statutory framework, the misdemeanor count in this accusatory instrument contains a fundamental defect because it does not sufficiently allege that defendant committed a crime. …

The instrument's factual assertions gave no basis for concluding that the substance defendant possessed was a controlled substance; that is, an illegal synthetic cannabinoid as listed with precision in Public Health Law § 3306 (g), as opposed to one of the many synthetic cannabinoid substances that are not criminalized in the schedule. People v Ron Hill, 2022 NY Slip Op 03930, CtApp 6-16-22

Practice Point: There are many synthetic cannabinoids in addition to those designated controlled substances by the Public Health Law. Here the misdemeanor complaint did not allege enough facts to determine whether the synthetic cannabinoid allegedly possessed by the defendant was on the Public-Health-Law list. The complaint was therefore facially deficient.

JUNE 16, 2022

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), SARA APPLIES TO THOSE UNDER POSTRELEASE SUPERVISION.

THE SEXUAL ASSAULT REFORM ACT (SARA), PROHIIBITING CERTAIN SEX OFFENDERS FROM RESIDING WITHIN 1000 FEET OF A SCHOOL, APPLIES TO SEX OFFENDERS WHO ARE UNDER POSTRELEASE SUPERVISION (PRS); THE DISSENT ARGUED SARA, BY ITS TERMS, APPLIES ONLY TO THOSE ON PAROLE OR CONDITIONALLY RELEASED (CT APP).

The Court of Appeals, over an extensive two-judge dissent, determined the residency requirement of the Sexual Assault Reform Act (SARA) is a mandatory condition of postrelease supervision (PRS) for sex offenders subject to SARA. The dissent argued the applicable statutes do not mention postrelease supervision (PRS) and, by their terms, apply only to defendants who are on parole or conditionally released:

In 1998, the legislature enacted the Sentencing Reform Act, amending the Penal Law to largely "abolish parole" for most felony offenses, including serious sexual offenses, and institute determinate terms of imprisonment to be followed by periods of postrelease supervision … . …[T]the legislature added Penal Law § 70.45 (3)—entitled "[c]onditions of post-release supervision"—which provides

that the Board of Parole "shall establish and impose conditions of post-release supervision in the same manner and to the same extent as it may establish and impose conditions in accordance with the executive law upon persons who are granted parole or conditional release." Further, Penal Law § 70.40 was amended to add references to postrelease supervision; namely Penal Law § 70.40 (1) (b) provides that "conditions of release including those governing postrelease supervision, shall be such as may be imposed by the [Parole Board] in accordance with the provisions of the executive law." … . …

The SARA residency restriction bars offenders convicted of certain sex offenses from residing within 1,000 feet of a school (see Executive Law § 259-c [14] …). Specifically, it provides that, when certain offenders are "released on parole or conditionally released pursuant to subdivision one or two of this section," the Parole Board "shall require, as a mandatory condition of such release, that such sentenced offender shall refrain from knowingly entering into or upon any school grounds … . …

Penal Law §§ 70.45 (3) and 70.40 (1) (b), when read together with SARA, mandate that the SARA residency restriction be applied equally to offenders released on parole, conditional release, or subject to a period of postrelease supervision. Matter of Alvarez v Annucci, 2022 NY Slip Op 01957 Ct App 3-22-22

Practice Point: The Court of Appeals rejected the argument that the Sexual Assault Reform Act (SARA), which prohibits certain sex offenders from residing within 1000 feet of a school, does not apply to those under postrelease supervision (PRS).

MARCH 22, 2022

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW, DWI, TWO-HOUR RULE.

THE SO-CALLED TWO-HOUR RULE, REQUIRING THE REQUEST FOR A DWI BREATH TEST BE MADE AND THE REFUSAL WARNINGS BE GIVEN WITHIN TWO HOURS OF ARREST, DOES NOT APPLY TO THE ADMINISTRATIVE LICENSE REVOCATION HEARINGS HELD BY THE DEPARTMENT OF MOTOR VEHICLES (DMV); THEREFORE THE FACT THAT THE PETITIONER WAS ASKED TO TAKE THE BREATH TEST AND WAS GIVEN THE REFUSAL WARNINGS THREE HOURS AFTER ARREST DID NOT PRECLUDE THE DMV FROM CONSIDERING PETITIONER'S TEST REFUSAL (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFore, over a dissenting opinion, determined the so-called two-hour rule does not apply to a driver's license revocation administrative hearing after a DWI arrest. Within two hours of arrest the police can warn the driver that a refusal to submit to the blood-alcohol breath test is admissible at trial. If the request to submit to the test is made and the refusal warnings are given more than two hours after arrest, however, the refusal is not admissible at trial. Here the petitioner refused the DWI breath test three hours after arrest, after the refusal warnings were given. He argued the two-hour rule should apply and the refusal should not be considered at the Department of Motor Vehicle's (DMV's) administrative license revocation hearing:

Petitioner's reliance on the statutory interpretation analysis in People v Odum [31 NY3d 344] as support for a motorist's substantive right to refuse a chemical test without consequence is misplaced. Odum addressed the admissibility at trial of the results of a chemical test administered more than two hours after the defendant's arrest, and whether the refusal warnings, including the inaccurate warning regarding the use of any refusal at a criminal trial, as given to him rendered his consent to the test involuntary. We emphasized that the 1973 statute authorizing the admissibility of evidence of a test refusal at a criminal trial was in derogation of common law and concluded as a result that the statutory provision authorizing such admission—Vehicle and Traffic Law § 1194 (2) (f)—had to be strictly construed to include the two-hour rule … . In stark contrast, the limitation on the scope of the revocation hearing in section 1194 (2) (c) is not in derogation of the common law and is a subsequently enacted provision that specifically governs the

issues that may be considered at an administrative hearing … . Matter of Endara-Caicedo v Vehicles, 2022 NY Slip Op 00959, CtApp 2-15-22

FEBRUARY 15, 2022

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW, SPEEDY TRIAL, TRAFFIC INFRACTIONS.

THE AMENDMENT TO THE SPEEDY TRIAL STATUTE WHICH EXTENDED THE STATUTE'S COVERAGE TO TRAFFIC INFRACTIONS JOINTLY CHARGED WITH CRIMES OR VIOLATIONS IS NOT TO BE APPLIED RETROACTIVELY (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined the amendment to the speedy trial statute (CPL 30.30 (1) (e)) which made the statutory time-limits applicable to traffic infractions jointly charged with crimes or violations should not be applied retroactively. The amendment went into effect while defendant's appeal to the Appellate Term was pending. The Court of Appeals held that the defendant's motion to dismiss the accusatory instrument (which jointly charged misdemeanors and traffic infractions) on speedy-trial grounds should not have been granted by the Appellate Term:

Defendant was charged in 2014 in a single accusatory instrument with three misdemeanor counts and three traffic infractions under various sections of the Vehicle and Traffic Law. Approximately 17 months later, defendant moved to dismiss the accusatory instrument on speedy trial grounds pursuant to CPL 30.30. The court denied the motion, concluding that the statute did not apply to jointly charged traffic infractions and that the People did not exceed the 90-day statutory time limit applicable to the misdemeanor counts. Thereafter, a jury convicted defendant of two misdemeanors and two infractions and acquitted him of the remaining counts. …

The Appellate Term granted defendant's motion to dismiss the accusatory instrument, including the traffic infractions, concluding that the People exceeded

the statutory time limit to state their readiness for trial on the misdemeanor counts and that the amendment applied retroactively … . * * *

… [B]ecause the amended statute was not in effect when the criminal action against defendant was commenced, CPL 30.30 (1) (e) has no application to defendant's direct appeal from that judgment of conviction. People v Galindo, 2022 NY Slip Op 03928, Ct App 6-16-22

Practice Point: The amendment to the speedy trial statute which extended the statute's coverage to include traffic infractions jointly charged with crimes or violations is not to be applied retroactively. Here the amendment became effective while defendant's appeal to the Appellate Term was pending. The Appellate Term should not have ruled the amendment applied to the defendant's accusatory instrument, which jointly charged misdemeanors and traffic infractions.

JUNE 16, 2022

DEBTOR-CREDITOR, CIVIL PROCEDURE, FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

ONLY AN EXPRESS ACKNOWLEDEMENT OF THE MORTGAGE DEBT PURSUANT TO GENERAL OBLIGATIONS LAW 17-105 COULD REVIVE OR TOLL THE STATUTE OF LIMITATIONS IN THIS FORECLOSURE ACTION; THE REFERENCES TO THE MORTGAGE DEBT IN FINANCIAL STATEMENTS AND TAX RETURNS PROVIDED TO THE MORTGAGOR BY THE MORTGAGEE WERE NOT ENOUGH (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, over an extensive two-judge dissent, determined that the statute of limitations on the underlying foreclosure action was not tolled based upon acknowledgments of the mortgage debt in financial statements and tax returns. Rather, pursuant to General Obligations Law 17-105, only and express promise to pay the debt would revive an otherwise expired statute of limitations:

The primary question presented by this appeal is which section of article 17 of the General Obligations Law governs the tolling or revival of the statute of limitations period in an action pursuant to Real Property Actions and Proceedings Law (RPAPL) § 1501 (4). RPAPL § 1501 (4) allows a party to cancel a mortgage where the limitations period for commencing a foreclosure action has expired. We hold that General Obligations Law section 17-105, not section 17-101, governs whether the statute of limitations has been tolled or revived in such an action. * * *

Under General Obligations Law § 17-105 (1), the Partnership's (mortgagee's) actions in this case could only toll or revive the statute of limitations for the Council (mortgagor) to bring a foreclosure action if the Partnership made an "express" "promise to pay the mortgage debt." Accordingly, the Appellate Division correctly concluded that the Partnership's delivery of its financial statements and tax returns to Council did not meet the requirements of section 17-105 (1) because they were not express promises to pay the mortgage debt (189 AD3d at 28). Batavia Townhouses, Ltd. v Council of Churches Hous. Dev. Fund Co., Inc., 2022 NY Slip Op 03361, CtApp 5-24-22

Practice Point: Here references to the mortgage debt in financial statements and tax returns provided to the mortgagor by the mortgagee did not revive or toll the statute of limitations on the underlying foreclosure action. Pursuant to General Obligations Law 17-105, only an express acknowledgement of the mortgage would revive the action.

MAY 24, 2022

ELECTION LAW, RE-DISTRICTING MAP.

THE 2022 CONGRESSIONAL AND STATE SENATE REDISTRICTING MAPS DECLARED VOID BECAUSE THEY WERE DRAWN WITH AN UNCONSTITUTIONAL PARTISAN INTENT (CT APP).

The Court of Appeals declared the 2022 congressional and state senate redistricting maps void, finding they were drawn with "an unconstitutional partisan intent." "Opinion by Chief Judge DiFiore. Judges Garcia, Singas and Cannataro concur.

Judge Troutman dissents in part in an opinion, in which Judge Wilson concurs in part in a dissenting opinion, in which Judge Rivera concurs in part. Judge Rivera dissents in a separate dissenting opinion, in which Judge Wilson concurs:"

In 2014, the People of the State of New York amended the State Constitution to adopt historic reforms of the redistricting process by requiring, in a carefully structured process, the creation of electoral maps by an Independent Redistricting Commission (IRC) and by declaring unconstitutional certain undemocratic practices such as partisan and racial gerrymandering. No one disputes that this year, during the first redistricting cycle to follow adoption of the 2014 amendments, the IRC and the legislature failed to follow the procedure commanded by the State Constitution. A stalemate within the IRC resulted in a breakdown in the mandatory process for submission of electoral maps to the legislature. The legislature responded by creating and enacting maps in a nontransparent manner controlled exclusively by the dominant political party — doing exactly what they would have done had the 2014 constitutional reforms never been passed. On these appeals, the primary questions before us are whether this failure to follow the prescribed constitutional procedure warrants invalidation of the legislature's congressional and state senate maps and whether there is record support for the determination of both courts below that the district lines for congressional [*2]races were drawn with an unconstitutional partisan intent. We answer both questions in the affirmative and therefore declare the congressional and senate maps void. As a result, judicial oversight is required to facilitate the expeditious creation of constitutionally conforming maps for use in the 2022 election and to safeguard the constitutionally protected right of New Yorkers to a fair election. Matter of Harkenrider v Hochul, 2022 NY Slip Op 02833, CtApp 4-27-22

Practice Point: The Fourth Department's determination the 2022 redistricting maps unconstitutionally favored democrats was here upheld by a divided Court of Appeals.

APRIL 27, 2022

EMPLOYMENT LAW, LABOR LAW, KICKBACKS.

LABOR LAW 198-B, WHICH PROHIBITS WAGE KICKBACKS, DOES NOT PROVIDE A FREESTANDING PRIVATE RIGHT OF ACTION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over an extensive two-judge dissent, determined Labor Law 198-b, which prohibits wage kickbacks, does not provide a freestanding private right of action:

Labor Law § 198-b prohibits "kickbacks" by making it unlawful for any person to "request, demand, or receive" part of an employee's wages or salary on the condition that "failure to comply with such request or demand will prevent such employee from procuring or retaining employment." Violation of the statute is a misdemeanor offense (see Labor Law § 198-b [5]). Labor Law § 218 also provides for administrative enforcement of section 198-b by the Commissioner of the Department of Labor. The statute empowers the Commissioner to grant affected employees restitution and liquidated damages in addition to imposing civil penalties. * * *

… [W]e apply a three-factor test to determine whether the legislative intent favors an implied right: "'(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme'" … . * * *

The statutory scheme … expressly provides two robust enforcement mechanisms, "indicating that the legislature considered how best to effectuate its intent and provided the avenues for relief it deemed warranted" … . Konkur v Utica Academy of Science Charter Sch., 2022 NY Slip Op 00911, CtApp 2-10-22

FEBRUARY 10, 2022

EMPLOYMENT LAW. CIVIL SERVICE COLLECTIVE BARGAINING, HEALTH BENEFITS.

ANSWERING A CERTIFIED QUESTION FROM THE SECOND CIRCUIT, THE COURT OF APPEALS DETERMINED THE RELEVANT PROVISIONS OF THE CIVIL SERVICE COLLECTIVE BARGAINING AGREEMENTS (CBA'S) DID NOT PROVIDE RETIREES WITH A VESTED RIGHT SUCH THAT THE HEALTH INSURANCE BENEFITS AWARDED AT RETIREMENT WOULD NOT BE REDUCED BY THE PROVISIONS OF SUBSEQUENT CBA'S (CT APP).

The Court of Appeals, addressing certified questions from the US Court of Appeals, Second Circuit, determined the relevant provisions of the civil-service collective bargaining agreements (CBA's) did not create a vested right in the health insurance benefits afforded retirees. In other words, the CBA's did not provide that the coverage of health insurance premiums vested at retirement such that reductions in coverage in subsequent CBA's would not apply:

… [N]one of the CBA provisions identified by the Second Circuit in the first certified question establish a vested right to lifetime fixed premium contributions, either singly or in combination. Donohue v Cuomo, 2022 NY Slip Op 00910, CtApp 2-10-22

FEBRUARY 10, 2022

INSURANCE LAW, EXPIRATION OF COVERAGE.

AFTER MAKING THE LIFE INSURANCE PREMIUM PAYMENTS FOR 15 YEARS ON THE PREMIUM DUE DATE (JANUARY 14), PAYMENT WAS NOT TIMELY THE EXPIRATION OF THE 31-DAY GRACE PERIOD; COVERAGE WAS PROPERLY DENIED; TWO DISSENTERS ARGUED THE POLICY WAS AMBIGUOUS AND SHOULD BE INTERPRETED SUCH THAT THE GRACE PERIOD HAD NOT EXPIRED AT THE TIME OF DEATH (CT APP).

The Court of Appeals, affirming the Appellate Division, over a two-judge dissent, determined the decedent's life insurance policy was unambiguous about the date premiums were due–January 14 or at the end of the 31-day grace period thereafter. After paying the premiums by January 14 for 15 years, the premium was not paid on time in 2018. The insured died on February 26, 2018, just days after the grace period expired. The insurer denied the claim arguing the coverage had lapsed. The Court of Appeals agreed with the insurer. The dissent argued the policy was ambiguous because it also stated the term of the policy was annual and the very first payment was made on January 31, which would place the decedent's death within the grace period:

Plaintiff is not entitled to benefits under the policy. The terms of the policy clearly and unambiguously tie the due date of the annual premium to the date of issue, January 14, 2002, and expressly state that January 14 is the premium due date. That the insurance policy uses the term "annual" but the premium payment period—which runs from January 14th, the "Date of Issue" and "premium due date"—may not cover a full year creates no ambiguity in light of the clear policy language identifying January 14th as the "premium due date" … . Furthermore, any claimed ambiguity in the definition of "policy date" is irrelevant inasmuch as the policy does not tie the premium due date to the "policy date" but, rather, the date of issue, which is January 14th. Because the insured failed to pay the 2018 premium by January 14, 2018 or within the 31-day grace period, the policy lapsed prior to the insured's death. Bonem v William Penn Life Ins. Co. of N.Y., 2022 NY Slip Op 00908. CtApp 2-10-22

FEBRUARY 10, 2022

INSURANCE LAW, MEDICAL MALPRACTICE.

WHEN A MUTUAL INSURANCE COMPANY WHICH ISSUES PROFESSIONAL LIABILITY POLICES TO MEDICAL PROFESSIONALS DEMUTUALIZES, THE CASH-CONSIDERATION PROCEEDS, ABSENT AGREEMENTS TO THE CONTRARY, ARE DISTRIBUTED TO THE EMPLOYEE, NOT THE EMPLOYER WHICH PAID THE PREMIUMS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, determined that when a mutual insurance company which issued professional liability policies to medical professionals demutualizes, where the employer paid the premiums, the distribution of cash consideration goes to the employee, not the employer:

Medical Liability Mutual Insurance Company (MLMIC), formerly a mutual insurance company, issued professional liability insurance policies to the eight medical professionals who are litigants in the eight cases before us on these appeals. The premiums for those policies were paid by their employers. In October 2018, MLMIC demutualized and was acquired by National Indemnity Company. Pursuant to its "Plan of Conversion"—approved by the New York State Department of Financial Services—MLMIC sought to distribute $2.502 billion in cash consideration to "Eligible Policyholders."

The question presented is as follows: when an employer pays premiums to a mutual insurance company to obtain a policy for its employee, and the insurance company demutualizes, who is entitled to the proceeds from demutualization: the employer or the employee? We answer that, absent contrary terms in the contract of employment, insurance policy, or separate agreement, the employee, who is the policyholder, is entitled to the proceeds. Columbia Mem. Hosp. v Hinds, 2022 NY Slip Op 03306, CtApp 5-19-22

Practice Point: Here the employer paid the premiums to a mutual insurance company for medical malpractice insurance for its employees (doctors). When the company demutualizes, absent some contractual provision to the contrary, the cash consideration, here $2.5 billion, is distributed to the employees (doctors), not the employer.

MAY 19, 2022

LABOR LAW-CONSTRUCTION LAW, CLEANING WORK.

WHETHER "CLEANING" IS A COVERED ACTIVITY UNDER LABOR LAW 240(1) DEPENDS ON WHETHER THE CLEANING WORK IS "ROUTINE;" "ROUTINE" CLEANING WORK IS NOT COVERED (CT APP).

The Court of Appeals, reversing the Appellate Division, determine plaintiff should not have been awarded summary judgment on the Labor Law 240(1) cause of action and defendant's summary judgment motion should have been granted. The issue was whether plaintiff was injured doing "cleaning" work covered by the Labor Law. The Court of Appeals held plaintiff was doing "routine" work, which therefore did not qualify as "cleaning" under Labor Law 240(1). The facts were not explained:

Labor Law § 240 (1) requires certain contractors and property owners to provide adequate safety devices when workers engage in particular tasks involving elevation-related risks. To recover under section 240 (1) for an injury caused by a failure to provide such safety devices, plaintiffs must first show that they were engaged in one of that section's enumerated activities including, among others, "cleaning." To determine whether an activity is "cleaning" within the meaning of the statute, courts apply a four-factor analysis (see Soto v J. Crew Inc., 21 NY3d 562, 568 [2013]). The first factor considers whether the work is "routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises" (id. [emphasis added]). This factor does not involve a fact-specific assessment of a plaintiff's regular tasks—it instead asks whether the type of work would be expected to recur with relative frequency as part of the ordinary maintenance and care of a commercial property (see id. at 569).

Here, plaintiff's work was "routine" within the meaning of the first factor, which therefore weighs against concluding that he was "cleaning." "[V]iewed in totality," the Soto factors do not "militate in favor of placing the task" in the category of "cleaning" (id. at 568-569). Healy v EST Downtown, LLC, 2022 NY Slip Op 02836, CtApp 4-28-22

Practice Point: Injury while "cleaning" is not covered under Labor Law 240(1) if it is "routine."

APRIL 28, 2022\

LABOR LAW-CONSTRUCTION LAW, INDUSTRIAL CODE PROVISION NOT SPECIFIC ENOUGH.

THE INDUSTRIAL CODE PROVISION REQUIRING THAT POWER BUGGIES BE OPERATED BY TRAINED, COMPETENT, DESIGNATED PERSONNEL DOES NOT SET FORTH A SPECIFIC STANDARD OF CONDUCT SUCH THAT IT GIVES RISE TO A NON-DELEGABLE DUTY UNDER LABOR LAW 241(6); PLAINTIFF WAS INJURED WHEN AN UNTRAINED OPERATOR LOST CONTROL OF A POWER BUGGY (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over an extensive three-judge dissent, reversing the Appellate Division, determined the Industrial Code provision which provides "[n]o person other than a trained and competent operator designated by the employer shall operate a power buggy" was not a concrete specification sufficient to give rise to a non-delegable duty under Labor Law 241(6). Plaintiff was injured when a worker who was not designated or trained to operate a power buggy lost control. A power buggy is a small self-powered vehicle operated by one person and used to move material on construction sites:

… [W]e have repeatedly reaffirmed the rule that to state a claim under section 241 (6), plaintiff must allege that defendant violated an Industrial Code regulation "that sets forth a specific standard of conduct and [is] not simply a recitation of common-law safety principles" … . …

The regulation relied on by plaintiff provides that "[n]o person other than a trained and competent operator designated by the employer shall operate a power buggy" (12 NYCRR 23-9.9 [a]). In assessing whether that regulation is specific enough to support a Labor Law § 241 (6) claim, we examine the text without reference to the underlying facts … . With respect to 12 NYCRR 23-9.9 (a), we agree with the

majority and dissent below that the "trained and competent operator" requirement "is general, as it lacks a specific requirement or standard of conduct" … . We disagree, however, with the Appellate Division majority's conclusion that the additional direction that "trained and competent" individuals must also be "designated" somehow transforms the provision from a general standard of conduct to a "specific, positive command" … . Toussaint v Port Auth. of N.Y. & N.J., 2022 NY Slip Op 01955, Ct App 3-22-22

Practice Point: If an Industrial Code provision does not set forth a specific standard of conduct, it does not give rise to a non-delegable duty under Labor Law 241(6). Here the Industrial Code provision which required that power buggies be operated only by "trained," "competent," "designated" personnel was not actionable. Plaintiff was struck by a power buggy when an untrained operator lost control.

MARCH 22, 2022

LABOR LAW-CONSTRUCTION LAW, SUMMARY JUDGMENT.

QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT IN THIS LABOR LAW 240(1) LADDER-FALL CASE; APPELLATE DIVISION REVERSED; EXTENSIVE THREE-JUDGE DISSENTING OPINION (CT APP).

The Court of Appeals, reversing the Appellate Division, over a three-judge dissenting opinion, determined plaintiff in this Labor Law 240(1) ladder-fall case should not have been awarded summary judgment. Plaintiff used an A-frame ladder in a closed position because of limited space. While rerouting pipes in the ceiling, plaintiff received an electric shock and fell to the floor. The majority found questions of fact were raised about whether the ladder failed to protect plaintiff and whether other safety devices should have been provided:

An "accident alone" is insufficient to establish a violation of Labor Law § 240 (1) or causation … . Moreover, Labor Law § 240 (1) is designed to protect against "harm directly flowing from the application of the force of gravity to an object or person" … . We agree with the dissent below that plaintiff was not entitled to partial summary judgment on his Labor Law § 240 (1) claim … . Indeed, questions

of fact exist as to whether "the ladder failed to provide proper protection," whether "plaintiff should have been provided with additional safety devices," and whether the ladder's purported inadequacy or the absence of additional safety devices was a proximate cause of plaintiff's accident … . Cutaia v Board of Mgrs. of the 160/170 Varick St. Condominium, 2022 NY Slip Op 02834, CtApp 4-28-22

Practice Point: Here plaintiff was apparently electrocuted while standing on a closed A-frame ladder and fell to the floor. The happening of the accident alone did not establish that the ladder failed to protect plaintiff or that other safety equipment should have been provided to plaintiff. Therefore plaintiff was not entitled to summary judgment on his Labor Law 240(1) cause of action. There was a three-judge dissenting opinion.

APRIL 28, 2022

LANDLORD-TENANT, MUNICIPAL LAW, NYC LOFT LAW.

THE NYC LOFT BOARD PROPERLY REMITTED THE MATTER FOR FURTHER PROCEEDINGS IN THIS ACTION CONCERNING A SETTLEMENT AGREEMENT IN WHICH THE TENANTS PURPORTED TO WITHDRAW THEIR APPLICATION FOR LOFT LAW COVERAGE (CT APP).

The Court of Appeals, reversing the Appellate Division, determined the NYC Loft Board properly remitted the matter for further proceedings in this proceeding involving a settlement agreement in which the tenants purported to withdraw their application for Loft Law coverage:

… [T]he matter [is] remitted to the Appellate Division with directions to remand to the New York City Loft Board for further proceedings in accordance with this memorandum.

In accordance with its regulations (see 29 RCNY § 1-06 [j] [5]), the Loft Board reviewed and rejected the parties' proposed settlement agreement as perpetuating an illegal living arrangement. The rationality of that determination is not before us … . Under these limited circumstances, it was not irrational for the Board to

remand for further proceedings, thereby declining to give effect to a provision of the settlement agreement in which tenants purported to withdraw their application for Loft Law coverage. Matter of Callen v New York City Loft Bd., 2022 NY Slip Op 00957, Ct App 2-15-22

FEBRUARY 15, 2022

LANDLORD-TENANT, NYC LOFT LAW, HOLDOVER PROCEEDING.

PURSUANT TO THE LOFT LAW AND THE REAL PROPERTY LAW, THE LANDLORD WAS ENTITLED TO TERMINATE THE TENANCY AND REGAIN POSSESSION OF THE LOFT IN A HOLDOVER PROCEEDING (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over an extensive two-judge dissent, reversing the Appellate Division, determined the the Loft Law did not prohibit the landlord, Aurora, from terminating the tenancy and regaining possession of the loft by a holdover proceeding. The opinion and the dissenting opinion are comprehensive and cannot be fairly summarized here:

Aurora Associates LLC, the owner of Loft 3B at 78 Reade Street in Manhattan, commenced this holdover proceeding to recover possession and terminate the tenancy of the current occupant. Summary judgment was granted to the tenant on the ground that Aurora could not terminate his tenancy because the loft unit was subject to rent stabilization. We must decide whether a loft unit located in an interim multiple dwelling covered by the provisions of the Loft Law but exempt from the rent regulation provisions of that statute by operation of a sale of the prior tenant's rights and improvements is otherwise subject to rent stabilization. We hold that it is not … . * * *

As the Housing Court Judge explained, "[T]he core of the parties' dispute is the rent regulatory status of the subject premises" because "[I]f the subject premises is unregulated, termination of a tenancy pursuant to Real Property Law … 232-a is a remedy available to Petitioner," and "[i]f the subject premises is rent-stabilized, RPL … 232-a is not a remedy available to Petitioner." * * *

Here, the prior owner purchased rights and improvements in a particular unit in this Loft Law-eligible building, removing that unit from the Loft Law's rent regulation provisions, entitling Aurora to charge a market rent and, pursuant to Real Property Law … 232-a, to regain possession of the apartment by means of a holdover proceeding. Matter of Aurora Assoc. LLC v Locatelli, 2022 NY Slip Op 00958, CtApp 2-15-22

FEBRUARY 15, 2022

MENTAL HYGIENE LAW, PLACEMENT OF CHILD WITH DEVELOPMENTAL DISABILITIES.

BECAUSE OF A LACK OF PLACEMENT OPTIONS, A CHILD REMOVED FROM SCHOOL WHEN SHE BECAME UNMANAGEABLE REMAINED IN A HOSPITAL EMERGENCY ROOM FOR WEEKS; THE PETITION SOUGHT HER RELEASE FROM THE EMERGENCY ROOM; THE APPEAL WAS DEEMED MOOT BECAUSE THE NYS OFFICE OF PEOPLE WITH DEVELOPMENTAL DISABILITIES HAD FOUND SUITABLE PLACEMENT AND INSTITUTED A PROGRAM TO ENSURE THE PROBLEM WOULD NOT RECUR (CT APP).

The Court of Appeals, dismissing the appeal as moot, over an extensive dissent, determined the exception to the mootness doctrine should not be applied because the problem at the heart of the petition had been adequately addressed by the NYS Office for People with Developmental Disabilities (OPWDD). The subject child had been removed from school and sent to a hospital emergency room because she had become unmanageable. The child ended up staying in the emergency room for weeks because suitable placement was not available. The habeas corpus petition sough her release from the emergency room. During the weeks the child was in the emergency room programs were instituted to facilitate prompt suitable placement of children facing similar circumstances:

… [D]uring the pendency of petitioner's appeal to this Court, OPWDD developed a new program, Crisis Services for Individuals with Intellectual and/or Developmental Disabilities ([CSIDD] 14 NYCRR 635-16.1 et seq.), aimed at

preventing persons with developmental disabilities from experiencing a crisis that may result in hospitalization and thereby reducing the likelihood of these issues recurring. At oral argument before this Court, counsel for OPWDD and DOH represented that the services provided by CSIDD are now available throughout the entirety of the State of New York, and particularly in the region where the child resided. Matter of Mental Hygiene Legal Serv. v Delaney, 2022 NY Slip Op 02578, CtApp 4-21-22

Practice Point: An appeal may be dismissed as moot if the appellate court is presented with evidence the underlying issue has been adequately addressed while the appeal was pending. Here a child removed from school because she became unmanageable had been held in a hospital emergency room for weeks because suitable placement was not available. At the time of oral argument, the child had been placed and a program to prevent recurrence of the problem had been instituted.

APRIL 21, 2022

MUNICIPAL LAW, REGULATION OF "BOWS" VS "FIREARMS.

THE TOWN LAW STATUTE WHICH AUTHORIZES A TOWN TO REGULATE THE DISCHARGE OF "FIREARMS" DOES NOT AUTHORIZE A TOWN TO REGULATE THE DISCHARGE OF "BOWS" (CT APP).

The Court of Appeals, affirming the Appellate Division, determined the Town Law does not authorize the Town of Smithtown to regulate the discharge of "bows" pursuant to its authority to regulate "firearms:"

Town Law § 130 (27) specifically authorizes certain towns to prohibit the discharge of "firearms" through ordinances that may be more restrictive than other laws where such discharge may be hazardous to the general public, and requires that notice be provided to the Department of Environmental Conservation of any ordinance "changing the five hundred foot [setback] rule" (Town Law § 130 [27]; see Environmental Conservation Law § 11-0931 [4] [a] [2]). While the term "firearm" is undefined in the Town Law, construing it in accordance with its

"usual and commonly understood meaning" … , the term "firearm" does not encompass a "bow" … and we are unpersuaded that the Legislature intended otherwise when it used the term in the Town Law. Accordingly, Town Law § 130 (27) does not authorize Smithtown to regulate the discharge of bows. Hunters for Deer, Inc. v Town of Smithtown, 2022 NY Slip Op 00907, CtApp 2-10-22

FEBRUARY 10, 2022

MUNICIPAL LAW, NEGLIGENCE, LIABILTY FOR NO-KNOCK WARRANT.

THE TARGETS OF A NO-KNOCK WARRANT ARE OWED A "SPECIAL DUTY" SUCH THAT A MUNICIPALITY MAY BE LIABLE FOR THE NEGLIGENCE OF THE POLICE OFFICERS EXECUTING THE WARRANT (CT APP).

The Court of Appeals, in a comprehensive opinion by Judge Singas, over a two-judge dissent, determined the police owe a "special duty" to those targeted by a no-knock warrant such that liability may be imposed on a municipality for the negligence of the police during execution of the warrant.. Here plaintiff alleged he was shot by a police officer who entered the apartment where he was sleeping.. The certified question from the Second Circuit asked if the "special duty" requirement applies in this situation, or whether it is triggered only when the municipality fails to protect the plaintiff from injury by a third party who is not a municipal employee. The opinion lays out the confusing interplay between the "special duty" requirement and the "governmental-function immunity" affirmative defense, which can defeat a plaintiff's action even if a "special duty" is deemed to exist. The dissent argued the "special duty" requirement itself is invalid and the "ordinary negligence" standard should apply to governmental actors:

Our precedent dictates that a plaintiff must establish a special duty when suing a municipality in negligence. However, because the underlying premise of the certified question appears to be that a special duty could not be established in a scenario like the one presented, we take this opportunity to clarify that this is not the case: a special duty may be established where the police plan and execute a no-knock search warrant on a targeted residence. Although we have not yet had an occasion to address application of the special duty rule to the execution of no-

knock search warrants, that situation fits within the existing parameters of our special duty precedent.

From the dissent:

The majority's principal error, which infects its entire analysis, is embodied in the following statement: "Consistent with our precedent and the purpose of the special duty rule, we reiterate that plaintiffs must establish that a municipality owed them a special duty when they assert a negligence claim based on actions taken by a municipality acting in a governmental capacity" … . That statement: (1) is not consistent with our precedent, in which we have repeatedly evaluated negligence claims against governmental actors by asking whether an ordinary duty exists; and (2) improperly incorporates the governmental/proprietary distinction from immunity law into negligence law … . Ferreira v City of Binghamton, 2022 NY Slip Op 01953, CtApp 3-22-22

Practice Point: This opinion lays out in detail the confusing interplay between the "special duty" requirement for a negligence suit against a municipality and the "governmental-function immunity" affirmative defense which can defeat a negligence suit even where a special duty is deemed to exist. Here the Court of Appeals determined those targeted by a no-knock warrant are owed a special duty such that a party injured in the warrant-execution may sue the municipality for the negligence of a police officer. The dissent argued the "special duty" requirement is itself invalid and an ordinary negligence standard should apply.

MARCH 22, 2022

REAL PROPERTY TAX LAW, LANDLORD-TENANT, NET LESSEES.

THE TENANT (A NET LESSEE), WHICH WAS OBLIGATED BY THE TERMS OF THE LEASE TO PAY PROPERTY TAXES, CAN CHALLENGE A PROPERTY-TAX ASSESSMENT BY FILING A GRIEVANCE PURSUANT TO REAL PROPERTY TAX LAW (RPTL) 524 (3); THE APPELLATE DIVISION HAD RULED ONLY THE PROPERTY OWNER COULD CHALLENGE THE ASSESSMENT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, reversing the Appellate Division, determined a tenant who is obligated to pay property taxes can properly file a grievance contesting a property-tax assessment:

RPTL 524 (3) presents an ambiguity. The clause "person whose property is assessed" is not defined in the RPTL, and it lends itself to more than one reasonable interpretation … . * * *

… [W]e … hold that a grievance complaint filed with the assessor or board of assessment review at the administrative level by a net lessee who is contractually obligated to pay real estate taxes on the subject property satisfies RPTL 524 (3). Matter of DCH Auto v Town of Mamaroneck, 2022 NY Slip Op 03929, CtApp 6-16-22

Practice Point: Clearing up an ambiguity in Real Property Tax Law RPTL section 524, the Court of Appeals held that a tenant (a net lessee), which is obligated by the terms of the lease to pay the property taxes, can file a grievance challenging the property-tax assessment. The Appellate Division had held only the property owner could challenge an assessment.

JUNE 16, 2022

RESIDENTIAL MORTGAGE-BACKED SECURITIES, REPURCHASE OF DEFECTIVE LOANS.

THE "SOLE REMEDY REPURCHASE PROTOCOL" IN THIS RESIDENTIAL MORTGAGE-BACKED SECURITIES CASE REQUIRES NOTICE OF EACH INDIVIDUAL DEFECTIVE LOAN BEFORE THE DEFENDANT IS REQUIRED TO REPURCHASE IT; OF THE 783 NONCONFORMING LOANS, 480 WERE NOT SPECIFICALLY IDENTIFIED; THE DEFENDANT WAS NOT OBLIGATED TO REPURCHASE THE UNIDENTIFIED LOANS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, reversing the Appellate Division, over an extensive partial dissent, determined that the "sole remedy repurchase protocol" contract provision of the residential-mortgage-backed-securities agreements requires notice of each defective loan before the obligation to repurchase is triggered:

Pursuant to the pooling and service agreement (PSA) establishing the trust, [defendant] DLJ made certain representations and warranties, including that each loan was underwritten in accordance with the originators' underwriting standards and applicable law, that certain provided documentation was true and accurate, and that none of the loans were "high cost" or "predatory." … [T]he PSA contains a "sole remedy" provision granting U.S. Bank, as trustee, the limited authority to seek a remedy for any breach by DLJ of these representations and warranties through a contractually established "repurchase protocol" requiring DLJ to cure, repurchase, or substitute a nonconforming mortgage loan within 90 days of notice or independent discovery of such breaching loan. * * *

… [T]he trustee's expert reviewed 1,059 of the loans in the trust—including both previously noticed and unnoticed loans—and identified 783 allegedly nonconforming loans. Only 303 of these loans had been specifically identified by the trustee in its pre-suit letters; the remaining 480 loans were not listed in the schedules of breaching loans provided to DLJ prior to commencement of the action. * * *

A simple reading of the [agreement] demonstrates that the trustee's assertion that loan-specific notice is not required is inconsistent with the contractual language of

the repurchase protocol. The parties structured the repurchase protocol entirely through the lens of individual "mortgage loans"—clearly contemplating a loan-by-loan approach to the agreed-upon sole remedy for breach. U.S. Bank N.A. v DLJ Mtge. Capital, Inc., 2022 NY Slip Op 01866, Ct App 3-17-22

Practice Point: The plain language of a contract will be enforced. Here in this residential mortgage-backed securities case, under the terms of the contract, the defendant was not required to repurchase nonconforming loans about which it was not specifically notified. Of the 783 allegedly nonconforming loans, defendant was specifically notified of only 303.

MARCH 17, 2022

TOXIC TORTS, ASBESTOS.

THE OVER $3,000,000 VERDICT IN THIS TOXIC TORT CASE REVERSED; THE PROOF THAT DEFENDANT'S TALCUM POWDER, WHICH ALLEGEDLY CONTAINED ASBESTOS, CAUSED PLAINTIFF'S DECEDENT'S LUNG CANCER WAS DEEMED INSUFFICIENT; THE STANDARD FOR PROOF OF CAUSATION IN TOXIC TORT CASES DISCUSSED IN DEPTH (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Garcia, over an extensive dissenting opinion, determined the proof of plaintiff's decedent's exposure to asbestos in defendant's talcum powder was not sufficient to demonstrate the powder caused decedent's mesothelioma (lung cancer). The opinion reviews the toxic-tort caselaw with respect to the sufficiency of proof of causation. That discussion is too comprehensive to fairly summarize here:

Although we have recognized that in any given case it may be "difficult, if not impossible, to quantify a plaintiff's past exposure" to a toxin … , our standard itself is not "impossible" for plaintiffs to meet … . We must, as always, strike a balance between the need to exclude "unreliable or speculative information" as to causation with our obligation to ensure that we have not set "an insurmountable standard that would effectively deprive toxic tort plaintiffs of their day in court" …

. The requirement that plaintiff establish, using expert testimony based on generally accepted methodologies, sufficient exposure to a toxin to cause the claimed illness strikes the appropriate balance … . The fault here is not in our standard, but in plaintiff's proof. Nemeth v Brenntag N. Am.. 2022 NY Slip Op 02769, CtApp 4-26, 2022

Practice Point: This Court of Appeals opinion reviews and analyzes the causation proof-requirements for toxic tort cases. Here the proof that asbestos in talcum powder caused plaintiff's decedent's lung cancer was deemed insufficient.

APRIL 26, 2022

WORKERS' COMPENSATION.

A SUBSEQUENT INJURY TO THE SAME BODY "MEMBER" WHICH WAS THE SUBJECT OF A PRIOR SCHEDULE LOSS OF USE (SLU) AWARD NEED NOT BE REDUCED BY THE PERCENTAGE LOSS OF THE PRIOR AWARD (CT APP).

The Court of Appeals, in a full-fledged opinion addressing two cases by Judge Cannataro, over an extensive dissent in each case, determined that, under Workers' Compensation Law section 15, a subsequent injury to the same body "member" may be fully compensable, notwithstanding a prior injury involving the same body "member:"

The common issue in these appeals is whether, under Workers' Compensation Law (WCL) § 15, a claimant's schedule loss of use (SLU) award must always be reduced by the percentage loss determined for a prior SLU award to a different subpart of the same body "member" enumerated in section 15. We hold that separate SLU awards for different injuries to the same statutory member are contemplated by section 15 and, when a claimant proves that the second injury, "considered by itself and not in conjunction with the previous disability" (WCL § 15 [7]), has caused an increased loss of use, the claimant is entitled to an SLU award commensurate with that increased loss of use. .Matter of Johnson v City of New York, 2022 NY Slip Op 02579, CtApp 4-21-22

Practice Point: A schedule loss of use (SLU) award for injury to a body "member" need not be reduced based on a prior SLU award for injury to the same body "member" if the claimant proves the second injury has caused an increased loss of use.

APRIL 21, 2022