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Fourth Department
Quarterly Reversal
Report
April – June 2022

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ADMINISTRATIVE LAW, EVIDENCE.

THE CITY COMMISSIONER ORDERED THE DEMOLITION OF A GRAIN ELEVATOR, A CITY LANDMARK, WHICH HAD BEEN DAMAGED BY WIND; SUPREME COURT PROPERLY ORDERED A HEARING ON WHETHER THE COMMISSIONER HAD A RATIONALE BASIS FOR ORDERING DEMOLITION BUT IMPROPERLY PROHIBITED THE PETITIONER FROM PRESENTING EVIDENCE THAT DEMOLITION WAS NOT NECESSARY; NEW HEARING ORDERED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court and ordering another hearing, determined that the petitioner was entitled to present evidence at the hearing about the Buffalo Commissioner of the City's Department of Permit and Inspections Services' (Commissioner's) ruling that a grain elevator, a City landmark, which was damaged by wind, must be demolished. Supreme Court had confined the hearing to whether the Commissioner had a rational basis for ordering demolition and did not allow the petitioner to submit evidence. Petitioner had submitted with the petition "an unsworn and unsigned expert affidavit from a licensed architect who opined that the Grain Elevator could be adequately repaired and did not need to be demolished:"

We agree with petitioner … that, while petitioner is not entitled to a de novo hearing on the Commissioner's determination … , the court erred in refusing to consider petitioner's proposed evidence inasmuch as it should have afforded petitioner the opportunity to submit " 'any competent and relevant proof . . . bearing on the triable issue here presented and showing that any of the underlying material on which the [Commissioner] based [his] determination has no basis in fact' . . . , or that the determination was irrational or arbitrary" … . Matter of Campaign for Buffalo History, Architecture & Culture, Inc. v City of Buffalo, 2022 NY Slip Op 02927, Fourth Dept 4-29-22

Practice Point: The City Commission ordered the demolition of a city landmark which had been damaged by wind. Petitioner opposed demolition. At the hearing to determine whether there was a rationale basis for the Commissioner's decision,

the petitioner was entitled to present evidence demolition was not required. Because Supreme Court did not allow petitioner to present evidence, a new hearing was necessary.

CIVIL PROCEDURE, REAL PROPERTY LAW, JOINT VENTURE, LIS PENDENS.

PLAINTIFF WAS SEEKING THE PROCEEDS OF A JOINT VENTURE, WHICH, UNDER PARTNERSHIP LAW, INVOLVES PERSONAL PROPERTY, NOT REAL PROPERTY; PLAINTIFF HAD NO INTEREST IN THE REAL PROPERTY WHICH WAS TO BE USED AS AN INN OPERATED AS A JOINT VENTURE; THERFORE THE LIS PENDENS FILED BY PLAINTIFF SHOULD HAVE BEEN CANCELLED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined there was no relationship between plaintiff's action seeking the assets of a joint venture and the ownership of the real property associated with the joint venture (to be used as an inn). Therefore defendants' motion to cancel the lis pendens should have been granted:

"A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property" (CPLR 6501). Because the provisional remedy of a notice of pendency is an " 'extraordinary privilege' " … , the Court of Appeals has held that to be entitled to that remedy, there must be a "direct relationship" between the relief sought in the complaint and the title to or possession of the disputed property … . In making that determination, a court must use "a narrow interpretation," and its "analysis is to be limited to the pleading's face" … . …

Supreme Court erred in denying their motion insofar as it sought to cancel the notice of pendency because there was no direct relationship between title to or possession of the property and the relief sought by plaintiff. We therefore modify the order accordingly. Reviewing the complaint on its face, we conclude that plaintiff seeks merely to enforce her purported 50% share in the joint venture and does not assert an interest in the property itself. Indeed, the complaint alleges that

title to the property was, at all relevant times, held by Properties LLC, of which plaintiff was not a member. It is well settled that " 'the legal consequences of a joint venture are equivalent to those of a partnership' " … , and thus a joint venturer's interest in a joint venture constitutes an interest in only personal property, not real property, thereby precluding recourse to a notice of pendency … . Renfro v Herrald, 2022 NY Slip Op 03593, Fourth Dept 6-3-22

Practice Point: Partnership law applies to joint ventures. Here the joint venture was the operation of an inn. Plaintiff sought the assets of the joint venture, which involves only personal property, not real property. Plaintiff had no interest in the real property (the inn). Therefore the lis pendens filed by the plaintiff should have been cancelled.

CRIMINAL LAW, APPEALS, MOTION TO VACATE CONVICTION.

THE TWO-JUSTICE DISSENT ARGUED THAT THE MAJORITY ERRONEOUSLY AFFIRMED THE DENIAL OF THE MOTION TO VACATE THE CONVICTION ON A GROUND NOT RELIED UPON BY THE MOTION COURT (FOURTH DEPT).

The Fourth Department affirmed the summary denial of defendant's motion to vacate his conviction on ineffective assistance grounds. Defendant argued his counsel was ineffective because counsel did not object to defendant's being forced to wear a stun belt. The two-justice dissent noted that the ground on which the majority based its decision, i.e., that defense counsel's failure to object did not rise to ineffective assistance, was not the ground relied on by the motion court. Therefore, the dissent argued, the appellate court could not affirm on that ground:

From the dissent:

The court summarily denied the motion, concluding in relevant part that defendant is not entitled to relief on his ineffective assistance of counsel claim because we determined on direct appeal that he was not deprived of effective assistance of counsel … . The majority affirms that ruling on another ground, one not argued by the People on appeal—namely, that defense counsel's failure to object to the stun

belt, standing alone, was not such an egregious or prejudicial error as to compromise defendant's right to a fair trial. Because the court did not deny defendant's motion on the ground relied upon by the majority, we are precluded from affirming on that ground (see People v Concepcion, 17 NY3d 192, 197-198 [2011]; People v LaFontaine, 92 NY2d 470, 473-474 [1998], rearg denied 93 NY2d 849 [1999]). People v Bradford, 2022 NY Slip Op 02897, Fourth Dept 4-29-22

Practice Point: Although the argument was made in the dissent in this case, it is worth noting that there is authority for the position that an appellate court cannot affirm on a ground not relied upon by the lower court.

CRIMINAL LAW, CONSECUTIVE VS CONCURRENT SENTENCES.

ROBBERY WAS THE FELONY UPON WHICH THE FELONY ASSAULT WAS PREDICATED; THEREFORE THE SENTENCES FOR ASSAULT FIRST AND ROBBERY FIRST MUST RUN CONCURRENTLY (FOURTH DEPT).

The Fourth Department determined the sentences for assault first and robbery first should not have been imposed consecutively:

… [T]he court erred in directing that the sentence on the count of assault in the first degree run consecutively to the sentence imposed on the count of robbery in the first degree because the robbery was the predicate felony for the felony assault (see Penal Law § 70.25 [2] …). Inasmuch as "[t]he felony upon which felony assault is predicated is a material element of that crime," the sentence imposed on the count of assault in the first degree must run concurrently with the sentence imposed on the count of robbery in the first degree … . People v Brown, 2022 NY Slip Op 02655, Fourth Dept 4-22-22

Practice Point: When one felony (here robbery first) is a predicate felony for another (here assault first), the sentence for the two crimes must run concurrently.

CRIMINAL LAW, DEPRAVED INDIFFERENCE MURDER, PLEA COLLOQUY.

THE PLEA COLLOQUY IN WHICH DEFENDANT STATED HE CARED FOR THE THREE-YEAR-OLD VICTIM NEGATED AN ESSENTIAL ELEMENT OF DEPRAVED INDIFFERENCE MURDER; PLEA VACATED (FOURTH DEPT).

The Fourth Department, vacating defendant's plea to depraved indifference murder, determined the plea colloquy negated an essential element of the offense:

… [W]e agree with defendant that, although his admissions during the plea allocution established the mens rea element of recklessness … , his recitation of the facts underlying the charge of murder in the second degree pursuant to Penal Law § 125.25 (2) "cast significant doubt upon his guilt insofar as it negated the [second mens rea] element of depraved indifference" … . In response to the court's question whether defendant did not care if harm happened to the victim or how the risk to the victim turned out, defendant stated through defense counsel that "[h]e did care for [the victim]." We conclude that defendant's statement negated the element of depraved indifference because the second mens rea element of the crime required that defendant "did not care whether [the] victim lived or died" … or, in other words, that he did "not care how the risk turn[ed] out" … . Defendant, however, conveyed during the factual recitation the exact opposite of the requisite mental state, i.e., that he did, in fact, care for the victim. People v Bovio, 2022 NY Slip Op 03591, Fourth Dept 6-3-22

Practice Point: The defendant, during the plea colloquy for depraved indifference murder, stated that he cared for the three-year-old victim. That statement negated the element of depraved indifference murder which requires that the defendant "not care if the victim lived or died." The plea was vacated.

CRIMINAL LAW, INEFFECTIVE ASSISTANCE.

DEFENDANT PLED GUILTY TO ATTEMPTED GANG ASSAULT, WHICH IS A LEGAL IMPOSSIBILITY AT TRIAL; DEFENDANT WAS ENTITLED TO A HEARING ON WHETHER HIS PLEA WAS RENDERED INVOLUNTARY BY COUNSEL'S INACCURATE ADVICE ABOUT THE POSSIBILITY OF CONVICTION; MATTER REMITTED (FOURTH DEPT).

The Fourth Department determined there should be a hearing on whether defendant's plea to attempted gang assault was involuntary. Defendant contended the plea was based on inaccurate advice from counsel. "Attempted gang assault" is a legal impossibility for trial purposes:

… [W]e agree with defendant that "attempted gang assault in the second degree is a legal impossibility for trial purposes. . . , as 'there can be no attempt to commit a crime which makes the causing of a certain result criminal even though wholly unintended' " … . Based on that law and our review of the record, we further agree with defendant that the advice of defense counsel regarding the possibility of a conviction at trial of attempted gang assault in the second degree was erroneous.

Nevertheless, "[i]t is well settled that permission to withdraw a guilty plea rests largely within the court's discretion" … . "Whether a plea was knowing, intelligent and voluntary is dependent upon a number of factors 'including the nature and terms of the agreement, the reasonableness of the bargain, and the age and experience of the accused' . . . That the defendant allegedly received inaccurate information regarding [the possibility of a conviction at trial and the resulting impact upon] his possible sentence exposure is another factor which must be considered by the court, but it is not, in and of itself, dispositive" … . "Where . . . the record raises a legitimate question as to the voluntariness of the plea, an evidentiary hearing is required" … . People v Davis, 2022 NY Slip Op 03610, Fourth Dept 6-3-22

Practice Point: "Attempted gang assault" is a legal impossibility at trial. Here defendant was entitled to a hearing on whether his plea to attempted gang assault was involuntary because of counsel's inaccurate advice about the possibility of conviction at trial.

CRIMINAL LAW, INEFFECTIVE ASSISTANCE.

DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILURE TO INTERVIEW A POTENTIALLY EXCULPATORY WITNESS; MOTION TO VACATE THE MURDER CONVICTION SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing County Court, determined defendant's motion to vacate his conviction on ineffective assistance grounds should have been granted. Defense counsel did not interview a witness who, based on the witness's testimony at the hearing on the motion to vacate, would have testified defendant was not at the scene of the shooting:

… [W]e conclude that defendant met his burden of establishing that defense counsel's failure to interview the potentially exculpatory witness constituted ineffective assistance of counsel, inasmuch as the record before us reflects "the absence of strategic or other legitimate explanations for defense counsel's allegedly deficient conduct" … . The failure by defendant's trial counsel to interview the witness cannot be characterized as a legitimate strategic decision because, "without collecting that information, [defense] counsel could not make an informed decision as to whether the witness['s] evidence might be helpful at trial" … . To the extent that the defense team deemed the witness not credible due to his criminal record or history, that alone "does not excuse trial counsel's failure to investigate since a witness's unsavory background[ ] does not render his or her testimony incredible as a matter of law" … . Further, we conclude that, "even if the witness['s] criminal record[] provided a strategic basis for choosing not to present [his] testimony, it does not provide an excuse for [defense] counsel's failure to investigate [him] as [a] possible witness[ ]" … . Moreover, the witness's testimony at the CPL article 440 hearing was wholly consistent with the theory pursued by trial counsel, namely that defendant was not present at the shooting and that the crime was instead committed by an individual seeking to rob the victims' residence, and the proposed witness would have provided the only eyewitness testimony at trial as to the shooting. People v Williams, 2022 NY Slip Op 03625, Fourth Dept 6-3-22

Practice Point: Here defense counsel was made aware of a potentially exculpatory witness and did not interview him. The fact that defense counsel felt the witness was not credible did not excuse the failure to investigate. Defendant's motion to vacate his conviction on ineffective assistance grounds was granted by the appellate court.

CRIMINAL LAW, ROBBERY, LESSER INCLUDED OFFENSES.

ROBBERY THIRD AND ASSAULT SECOND CONVICTIONS REVERSED AS LESSER INCLUDED OFFENSES OF ROBBERY SECOND (FOURTH DEPT).

The Fourth Department, reversed the robbery third and assault second convictions as lesser included offenses of robbery second:

… [R]obbery in the third degree is a lesser included offense of robbery in the second degree … . Moreover, although not raised by the parties, we note that assault in the second degree under section 120.05 (6) is a lesser included offense of robbery in the second degree under section 160.10 (2) (a) … . We therefore modify the judgment by reversing those parts convicting defendant of robbery in the third degree and assault in the second degree and dismissing counts one and three of the indictment … . People v Coleman, 2022 NY Slip Op 03842, Fourth Dept 6-9-22

Practice Point: Here the robbery third and assault second convictions were reversed as lesser included offense of robbery second.

CRIMINAL LAW, SENTENCING.

DEFENDANT SHOULD NOT HAVE BEEN SENTENCED AS A SECOND FELONY OFFENDER BASED UPON A PRIOR FEDERAL DRUG CONSPIRACY CONVICTION; THE ISSUE FALLS WITHIN A NARROW EXCEPTION TO THE PRESERVATION REQUIREMENT (FOURTH DEPT).

The Fourth Department determined defendant should not have been sentenced as a second felony offender based upon a prior federal drug conspiracy conviction:

… [T]his case "falls within the narrow exception to [the] preservation rule permitting appellate review when a sentence's illegality is readily discernible from the . . . record" … . Here, the record establishes that the predicate felony was based on defendant's previous conviction in federal court of conspiracy to possess with intent to distribute 500 grams or more of cocaine (21 USC § 846; see § 841 [a] [1]; [b]). However, "under New York's 'strict equivalency' standard for convictions rendered in other jurisdictions, a federal conviction for conspiracy to commit a drug crime may not serve as a predicate felony for sentencing purposes" … . People v Lopez, 2022 NY Slip Op 02925, Fourth Dept 4-29-22

Practice Point: A defendant cannot be sentenced as a second felony offender based upon a prior federal drug conspiracy conviction. The issue fell within an exception to the preservation requirement.

CRIMINAL LAW, ASSAULT, PHYSICAL INJURY.

THE EVIDENCE OF "PHYSICAL INJURY" WAS LEGALLY INSUFFICIENT; ASSAULT SECOND CONVICTION REVERSED (FOURTH DEPT).

The Fourth Department, reversing defendant's assault second conviction, determined the evidence the police officer sustained "physical injury" was legally insufficient:

" 'Physical injury' means impairment of physical condition or substantial pain" (Penal Law § 10.00 [9]). Although pain is subjective, the Court of Appeals has

cautioned that "the Legislature did not intend a wholly subjective criterion to govern" … . "Factors relevant to an assessment of substantial pain include the nature of the injury, viewed objectively, the victim's subjective description of the injury and his or her pain, whether the victim sought medical treatment, and the motive of the offender" … . Here, the officer testified that he experienced "quite a bit of pain" to his "left upper thigh/groin area" after struggling with defendant when he resisted arrest and that his pain was a 6 or 7 out of 10 on the pain scale. There was only a vague description of the injury, and no medical records for the officer were introduced in evidence … . In addition, there was no testimony that the officer took any pain medication for the injury … and the officer did not miss any work or testify that he was unable to perform any activities because of the pain. People v Bunton, 2022 NY Slip Op 03856, Fourth Dept 6-9-22

Practice Point: Here there was only a vague description of pain and no medical records were introduced. The assault conviction was not supported by legally sufficient evidence the police officer suffered "physical injury."

CRIMINAL LAW, BAIL-SETTING, HABEAS CORPUS.

ALTHOUGH BAIL-SETTING IS NOT APPEALABLE, WHETHER THE BAIL-SETTING COURT COMPLIED WITH THE CONSTITUTIONAL OR STATUTORY STANDARDS INHIBITING EXCESSIVE BAIL IS A PROPER SUBJECT FOR A HABEAS CORPUS PETITION; HERE THE BAIL-SETTNG COURT DID NOT COMPLY WITH CPL 510.30; MATTER REMITTED (FOURTH DEPT).

The Fourth Department, remitting the matter, determined that, although bail-setting is not appealable, the habeas corpus petition was the proper vehicle for a review of whether the constitutional or statutory standards inhibiting excessive bail were met. Here it was alleged the bail-setting court did not comply with CPL 510.30 by explaining its finding that remand was the least restrictive option:

… [A]fter considering all of the relevant factors under CPL 510.30 (1), the bail-setting court determined that remand was the least restrictive condition. We conclude that the bail-setting court failed to comply with the statutory mandate of CPL 510.10 (1) because it failed to "explain its choice of release, release with

conditions, bail or remand on the record or in writing." We therefore reverse the judgment, reinstate the petition, and grant the petition in part, and we remit the matter to the bail-setting court for further proceedings to satisfy the requirements of CPL 510.10 (1) … . People ex rel. Steinagle v Howard, 2022 NY Slip Op 02901, Fourth Dept 4-29-22

Practice Point: Although bail-setting is not appealable, a habeas corpus petition can be used to argue the bail-setting court did not comply with the constitutional or statutory standards inhibiting excessive. Here the court's failure to explain its choice to remand the defendant violated CPL 510.30.

CRIMINAL LAW, BURGLARY, PARTIAL FINGERPRINT, APPEALS.

THERE WAS NO EVIDENCE LINKING DEFENDANT TO A BURGLARY EXCEPT A PARTIAL FINGERPRINT FOUND AT THE SCENE WHICH ONLY MATCHED 15 TO 22.5% OF THE CHARACTERISTICS OF DEFENDANT'S INKED PRINT; THE BURGLARY CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE (FOURTH DEPT).

The Fourth Department, reversing defendant's burglary conviction, determined the evidence that a partial fingerprint from the burglary scene matched the defendant was too weak to support the conviction. The conviction was therefore against the weight of the evidence:

On cross-examination, the fingerprint examiner agreed that her opinion is subjective, that two examiners may reach different opinions when examining the same set of prints, and that verification by a second examiner, particularly blind verification, significantly increases the accuracy of fingerprint analysis. She further testified that every individual fingerprint has approximately 80 to 120 classifiable characteristics, and that every characteristic between two prints must be identical for them to be considered a match. Here, because of the limited nature of the partial print, she was only able to match 18 characteristics, meaning that it matched 15% to 22.5% of the characteristics of defendant's inked print. Further, there was no evidence presented at trial that a second examiner had made a positive verification that the partial print was made by defendant. No other evidence was

introduced at trial linking defendant to the crime. People v Jones, 2022 NY Slip Op 03590, Fourth Dept 6-3-22

Practice Point: Here a partial fingerprint matched only 15 to 22.5% of the characteristics of defendant's inked print and the "match" was not verified by a second examiner conducting a blind verification. There was no other evidence linking defendant to the burglary. The conviction was deemed against the weight of the evidence.

CRIMINAL LAW, CONSTRUCTIVE POSSESSION.

THE PROOF DEFENDANT CONSTRUCTIVELY POSSESSED A FIREARM FOUND IN THE CEILING OF A HOUSE WHERE DEFENDANT WAS A GUEST WAS LEGALLY INSUFFICIENT; DNA EVIDENCE MAY HAVE DEMONSTRATED DEFENDANT POSSESSED THE FIREARM AT SOME POINT IN TIME, BUT IT DID NOT DEMONSTRATE CONSTRUCTIVE POSSESSION AT THE TIME THE FIREARM WAS SEIZED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, over a dissent, determined the proof defendant constructively possessed a firearm was legally insufficient. The firearm was in the drop ceiling of a living room in which defendant was present as a guest. DNA evidence may have demonstrated defendant possessed the firearm at a point in time, but did not demonstrate constructive possession at the time the firearm was seized:

A defendant's mere presence in the house where the weapon is found is insufficient to establish constructive possession, and it is undisputed here that defendant had no connection to the apartment other than being there for a brief period of time for the purpose of gambling … . Further, the People failed to establish that defendant "exercised dominion or control over the [handgun] by a sufficient level of control over the area in which [it was] found" … .

… [D]efendant's contemporaneous text messages did not evince defendant's consciousness of guilt and, in any event, "mere knowledge of the presence of the handgun would not establish constructive possession" … . Further, although

evidence that defendant's DNA profile matched that of the major contributor to DNA found on the handgun and that other individuals in the apartment were excluded as contributors thereto would support an inference that defendant physically possessed the gun at some point in time … , we conclude that it was not sufficient to support an inference that defendant had constructive possession of the weapon at the time that it was discovered … . People v King, 2022 NY Slip Op 03606, Fourth Dept 6-3-22

Practice Point: Here DNA evidence suggested the defendant possessed the firearm at some point. But defendant's presence as a guest in the room where the firearm was found was not sufficient evidence of constructive possession of the firearm. Conviction reversed.

CRIMINAL LAW, GUILTY PLEAS, INDUCED BY PROMISE NOT FULFILLED.

ALTHOUGH THE ISSUE WAS NOT PRESERVED, DEFENDANT'S GUILTY PLEA WAS VACATED BECAUSE IT WAS INDUCED BY THE JUDGE'S PROMISE THAT ALL THE COURT'S ORDERS COULD BE APPEALED; IN FACT, THE DEFENDANT'S CONTENTION THAT TWO COUNTS OF THE INDICTMENT WERE DUPLICITOUS COULD NOT BE RAISED ON APPEAL (FOURTH DEPT).

The Fourth Department, vacating defendant's sentence in the interest of justice, determined the defendant's guilty plea was induced by the judge's promise that defendant could appeal from all the court's orders. In fact, however, by pleading guilty defendant could not appeal the order rejecting his argument that the first two counts of the indictment were duplicitous:

We agree … with defendant that his plea was not knowingly, voluntarily, and intelligently entered. Although defendant failed to preserve that contention for our review … , we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c]). "A trial court is constitutionally required to ensure that a defendant, before entering a guilty plea, has a full understanding of what the plea entails and its consequences" … , and where "a guilty plea has been induced by an unfulfilled promise, the plea must be

vacated or the promise must be honored" … . Here, the court repeatedly promised defendant, who was proceeding pro se, that he would retain the right to appeal from all of its orders. The court reiterated that promise during the plea colloquy and did not advise defendant that he was forfeiting any challenge by pleading guilty. We conclude, however, that "[b]y pleading guilty, defendant forfeited his . . . contention that the first two counts of the indictment were duplicitous" … . Consequently, "[i]nasmuch as the record establishes that defendant, in accepting the plea, relied on a promise of the court that could not, as a matter of law, be honored, defendant is entitled to vacatur of his guilty plea" … . People v Mothersell, 2022 NY Slip Op 02661, Fourth Dept 4-22-22

Practice Point: Here the defendant's guilty plea was induced by the judge's promise all the court's orders could be appealed. In fact, the guilty plea precluded raising on appeal defendant's contention two indictment counts were duplicitous. Even though the issue was not preserved for appeal, the Fourth Department vacated the guilty plea.

CRIMINAL LAW, MISTRIAL, DOUBLE JEOPARDY.

AFTER THE TRIAL HAD BEGUN AND WITNESSES HAD TESTIFIED, THE JUDGE BECAME ILL AND SOUGHT A COVID TEST; AFTER THE NEGATIVE TEST-RESULT, THE JUDGE, SUA SPONTE, WITHOUT DEFENDANT'S CONSENT, DECLARED A MISTRIAL; THE JUDGE'S FAILURE TO CONSIDER A CONTINUANCE OR THE SUBSTITUTION OF ANOTHER JUDGE WAS AN ABUSE OF DISCRETION; THE DOUBLE-JEOPARDY PROHIBITION PRECLUDED RETRIAL (FOURTH DEPT).

The Fourth Department granted defendant's petition for a writ of prohibition barring retrial on the ground of double jeopardy. A jury was selected and three witnesses had testified when the trial judge became ill and scheduled a COVID test (which came back negative). The judge ultimately, sua sponte, declared a mistrial without defendant's consent. Because there were alternatives to a mistrial, a continuance, for example, the double-jeopardy prohibition precluded retrial:

… [T]here was no manifest necessity for the mistrial, and the court therefore abused its discretion in granting it sua sponte … . The record establishes that the court did not consider the alternatives to a mistrial, such as a continuance … or substitution of another judge … . "[I]f the judge acts so abruptly as to not permit consideration of the alternatives . . . or otherwise acts irrationally or irresponsibly . . . or solely for convenience of the court and jury . . . , retrial will be barred" … . "The court has the duty to consider alternatives to a mistrial and to obtain enough information so that it is clear that a mistrial is actually necessary" … . Matter of McNair v McNamara, 2022 NY Slip Op 03825, Fourth Dept 6-9-22

Practice Point: Here the judge became ill after the trial had begun and declared a mistrial without defendant's consent and without considering a continuance or the substitution of another judge. There was no manifest necessity for the mistrial. The double-jeopardy prohibition therefore precluded retrial.

CRIMINAL LAW, MOLINEUX EVIDENCE NOT NEEDED TO PROVE INTENT.

MOLINEUX EVIDENCE OF A PRIOR BURGLARY OF THE ROBBERY-VICTIM'S HOME TO SHOW THE INTENT TO COMMIT ROBBERY AND GRAND LARCENY SHOULD NOT HAVE BEEN ADMITTED; THE INTENT TO COMMIT ROBBERY AND GRAND LARCENY WAS DEMONSTRATED BY THE VICTIM'S TESTIMONY RENDERING EVIDENCE OF THE PRIOR BURGLARY TOO PREJUDICIAL (FOURTH DEPT).

The Fourth Department, reversing defendant's robbery and grand larceny convictions, determined Molineux evidence of a burglary of the robbery-victim's home three days before the robbery should not have been admitted to show intent. The intent to rob was demonstrated by the victim's testimony, rendering proof of the prior burglary more prejudicial than probative:

… [E]vidence that defendant may have been involved in an earlier burglary of the victim's home was not necessary for the jury to infer that, three days later, defendant had the intent to rob the victim. Rather, defendant's intent to forcibly steal property can be inferred from the victim's testimony that defendant, while wielding a baseball bat, directed him to comply with the demands of an

unidentified masked gunman to turn over money and property. Under those circumstances, any probative value of the evidence of the prior burglary "is outweighed by its potential for prejudice" … . For the same reason, defendant's "intent to deprive another of property" … as required for a conviction of grand larceny in the fourth degree (§ 155.30 [1], [5]), or intent "to place another person in reasonable fear of physical injury, serious physical injury or death" as required for a conviction of menacing in the second degree (§ 120.14 [1]) could likewise be easily inferred from the victim's testimony describing defendant's conduct during the alleged crimes. People v Dejesus, 2022 NY Slip Op 03584, Fourth Dept 6-3-22

Practice Point: Evidence of defendant's commission of an uncharged crime (Molineux evidence) to show defendant's intent to commit the charged offenses will be deemed too prejudicial if the intent element of the charged offenses is demonstrated by the victim's testimony.

CRIMINAL LAW, MOLINEUX, MODUS OPERANDI.

THE SEXUAL ABUSE ALLEGATIONS FROM THE 1990'S WERE NOT SUFFICIENTLY SIMILAR TO THE CHARGED OFFENSES AND THEREFORE DID NOT MEET THE "MODUS OPERANDI" CRITERIA UNDER MOLINEUX TO PROVE IDENTITY; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing defendant's convictions and ordering a new trial, determined the Molineux evidence allowed by County Court did not meet the "modus operandi" criteria:

Before trial, County Court granted the People's motion seeking to introduce testimony that defendant sexually abused his eldest son in the 1990s, on the ground that the earlier, uncharged conduct was admissible under the modus operandi exception to the Molineux rule … . …

Modus operandi evidence is a means of establishing the defendant's identity as the perpetrator … . Here, even assuming, arguendo, that defendant's identity as the person who committed the crimes was not conclusively established … , we conclude that the similarities between the uncharged acts and the charged crimes

were not "sufficiently unique to make the evidence of the uncharged crimes probative of the fact that [defendant] committed the [crimes] charged" … .People v Mountzouros, 2022 NY Slip Op 03840, Fourth Dept 6-9-22

Practice Point: If the identity of the perpetrator is an issue and the manner in which the charged crime was committed is unique, evidence of defendant commission of an uncharged crime involving the same unique "modus operandi" may be admissible under Molineux. Here sexual abuse allegations from the 1990's were not sufficiently similar to the charged offenses. The uncharged-crime evidence should not have been admitted. New trial ordered.

CRIMINAL LAW, PAST RECOLLECTION RECORDED, JURY INSTRUCTIONS.

A PROSECUTION WITNESS'S WRITTEN STATEMENT DID NOT MEET THE CRITERIA FOR PAST RECOLLECTION RECORDED AND SHOULD NOT HAVE BEEN ADMITTED; THE JUDGE'S USE OF THE PHRASE "POTENTIALLY AIDS" INSTEAD OF "INTENTIONALLY AIDS" IN THE ACCOMPLICE LIABILITY JURY INSTRUCTION PREJUDICED THE DEFENDANT; ALTHOUGH THE JURY INSTRUCTION ERROR WAS NOT PRESERVED, THE ISSUE WAS CONSIDERED IN THE INTEREST OF JUSTICE (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction and ordering a new trial, determined: (1) a written statement by a prosecution witness should not have been admitted as "past recollection recorded;" and (2) the jury instruction on accomplice liability prejudiced defendant. The jury-instruction error was not preserved but was considered in the interest of justice:

"The foundational requirements for the admissibility of a past recollection recorded are: (1) the witness must have observed the matter recorded; (2) the recollection must have been fairly fresh at the time when it was recorded; (3) the witness must currently be able to testify that the record is a correct representation of his or her knowledge and recollection at the time it was made; and (4) the witness must lack sufficient present recollection of the information recorded" … .

"

… [T]he prosecution witness in question did not testify that his written statement accurately represented his knowledge and recollection when made. To the contrary, the witness testified that the statement was not accurate when given because he was under the influence of narcotics at that time … . Moreover, because the statement was made more than six months after the alleged events recorded therein, the recollection was not "fairly fresh" when recorded … . …

Penal Law § 20.00 provides that a "person is criminally liable for [the conduct of another] when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct" ,,, . … [W]e conclude that the court's use of the phrase "potentially aids" rather than "intentionally aids" significantly prejudiced defendant, who was alleged to have aided and abetted the principal by driving him to and from the crime scene…. . People v Gardner, 2022 NY Slip Op 02911, Fourth Dept 4-29-22

Practice Point: Here the written statement did not meet the criteria for admissibility as past recollection recorded. The witness testified the statement was not accurate when given because he was high and the statement was not "fresh" because it was made six months after the events described in it.

CRIMINAL LAW, REASONABLE SUSPICION, PAT-DOWN SEARCH.

THE MAJORITY HELD THE DEFENDANT'S ACTIONS INSIDE THE STOPPED VEHICLE RAISED A REASONABLE SUSPICION DEFENDANT WAS ARMED, JUSTIFYING A PAT DOWN SEARCH; THE DISSENT ARGUED THE DEFENDANT'S ACTIONS WERE EQUIVOCAL AND INNOCUOUS (FOURTH DEPT).

The Fourth Department, over a dissent, determined the police officer's observations of defendant inside the stopped vehicle were sufficient to raise a reasonable suspicion the defendant was armed, which justified the pat down search. The dissent argued that the proof presented at the suppression hearing did not meet the "reasonable suspicion" standard.

Although the dissent suggests otherwise, the fact that the officer's view of defendant was obscured to some extent when defendant was partially concealed inside the vehicle and was observed surreptitiously reaching toward his waistband constitutes a "circumstance that supports a reasonable suspicion that [defendant was] armed or pose[d] a threat to [officer] safety" … .

From the dissent:

"Reasonable suspicion 'may not rest on equivocal or "innocuous behavior" that is susceptible of an innocent as well as a culpable interpretation' " … . Inasmuch as defendant's nervousness and movements were susceptible of an innocent interpretation, particularly in light of his status as the vehicle's only black occupant, and inasmuch as defendant was, according to the officer's testimony, "fully compliant" with the officers' instruction to exit the vehicle, I agree with defendant that his conduct while in the vehicle was insufficient to establish reasonable suspicion necessary for law enforcement to conduct a pat frisk of his person … . People v Ginty, 2022 NY Slip Op 02899, Fourth Dept 4-29-22

Practice Point: Although only the dissent felt this analysis applied here, a person's "equivocal" or "innocuous" behavior, like nervousness or shaking, does not support a "reasonable suspicion" that a person is armed.

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), CONTINUOUS COURSE OF SEXUAL MISCONDUCT.

THE PEOPLE DID NOT PROVE THE ALLEGED ACTS OF SEXUAL MISCONDUCT OCCURRED AT LEAST 24 HOURS APART; THEREFORE THE PEOPLE DID NOT PRESENT PROOF SUPPORTING A 20 POINT ASSESSMENT FOR A "CONTINUOUS COURSE OF SEXUAL MISCONDUCT:" LEVEL THREE REDUCED TO LEVEL TWO (FOURTH DEPT).

The Fourth Department, reducing the defendant's risk level from three to two, determined the People did not prove defendant engaged in a "continuous course of sexual misconduct" which requires that the acts be at least 24 hours apart:

The court erred … in assessing 20 points under risk factor 4 for having engaged in a continuous course of sexual misconduct. Points may be assessed under risk factor 4 if, as relevant here, the People establish by clear and convincing evidence that defendant engaged in "two or more acts of sexual contact, at least one of which is an act of sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual contact, which acts are separated in time by at least 24 hours" … . Here, "[a]lthough the People presented evidence that defendant engaged in acts of sexual contact with the victim on more than one occasion, they failed to establish 'when these acts occurred relative to each other' " … , and thus failed "to demonstrate that such instances were separated in time by at least 24 hours" … . People v Ellis, 2022 NY Slip Op 02654, Fourth Dept 4-22-22

Practice Point: A 20-point SORA assessment for a continuous course of sexual misconduct requires proof the acts took place at least 24 hours apart. Here there was no proof of when the acts occurred relative to each other, therefore the 20-point assessment was struck.

CRIMINAL LAW, SPEEDING, CRIMINAL NEGLIGENCE.

DEFENDANT WAS CONVICTED OF ASSAULT THIRD BASED UPON HIS LOSING CONTROL OF THE CAR AND CRASHING, INJURING A PASSENGER; THE "CRIMINAL NEGLIGENCE" ELEMENT OF ASSAULT THIRD WAS NOT SUPPORTED BY THE EVIDENCE; CONVICTION REVERSED UNDER A "WEIGHT OF THE EVIDENCE" ANALYSIS (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction and dismissing the indictment, determined the criminal-negligence element of assault third was not proven. Defendant was driving with a passenger when he crossed into the oncoming lane, pulled back into his lane, lost control and crashed, injuring the passenger:

In cases involving criminal negligence arising out of automobile accidents involving excess rates of speed, such as here, "it takes some additional affirmative act by the defendant to transform 'speeding' into 'dangerous speeding' " … . With respect to the issue of defendant's rate of speed, the trial testimony from the

prosecution's expert witness that defendant was driving at the excessive speed of approximately 92 miles per hour at the time of the incident was speculative … . The expert's calculation of the vehicle's speed was based on the assumption of "100 percent braking," but there was no evidence that defendant braked at all before his vehicle collided with the mailbox, tree and utility pole and came to a stop. Moreover, the People's version of the events, that defendant deliberately attempted to "flatten out the curve" by crossing the double line of the curve, does not rise to the level of moral blameworthiness to constitute criminal negligence … . People v Palombi, 2022 NY Slip Op 02896, Fourth Dept 4-29-22

Practice Point: In the context of an assault third charge alleging a car accident was the result of defendant's "criminal negligence," proof of speeding, as opposed to proof of "dangerous speeding," will not support a conviction. This case is a good example of "legally sufficient evidence" resulting in a conviction which is determined on appeal to be "against the weight of the evidence." The expert evidence presented to show the speed at which defendant was driving was speculative and based upon an unproved assumption. That evidence was deemed too weak to support a conviction, thereby rendering the conviction "against the weight of the evidence."

CRIMINAL LAW, STATE-OF-MIND EVIDENCE, RAPE.

THE MAJORITY CONCLUDED THAT, IF IT WAS ERROR TO ADMIT TESTIMONY THAT THE RAPE VICTIM WAS AWARE DEFENDANT HAD BEEN INCARCERATED, THE ERROR WAS HARMLESS; TWO DISSENTERS ARGUED THE EVIDENCE HAD NO PROBATIVE VALUE BECAUSE THE VICTIM'S STATE OF MIND WAS NOT IN ISSUE AND ITS INTRODUCTION WAS THERFORE HIGHLY PREJUDICIAL (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined that, if it was error to admit testimony that the rape victim was aware defendant had been incarcerated, the error was harmless. The dissenters argued that the victim's state of mind, i.e., awareness of defendant's prior incarceration, was irrelevant because the victim was immediately overpowered and pushed to the floor upon opening the door for the defendant:

From the dissent:

The evidence … had no probative value under the circumstances of this case and should have been excluded as prejudicial … . People v Hartsfield, 2022 NY Slip Op 02908, Fourth Dept 4-29-22

Practice Point: The two dissenters argued that evidence the rape victim was aware defendant had been incarcerated should not have been admitted because it was irrelevant and highly prejudicial. The evidence was irrelevant because the victim's state of mind was not in issue.

CRIMINAL LAW, STREET STOPS, REASONABLE SUSPICION, FRISK.

THE POLICE DID NOT HAVE A REASONABLE SUSPICION DEFENDANT WAS ARMED AND THEREFORE SHOULD NOT HAVE ATTEMPTED TO FRISK HIM; THE POLICE DID NOT HAVE PROBABLE CAUSE TO ARREST DEFENDANT WHEN HE THREW HIS COAT AT AN OFFICER AND RAN BECAUSE THE POLICE WERE NOT AUTHORIZED TO ATTEMPT THE FRISK; INDICTMENT DISMISSED; AN APPELLATE COURT CANNOT CONSIDER A THEORY WHICH WOULD SUPPORT DENIAL OF SUPPRESSION BUT WHICH WAS NOT RAISED BY THE PEOPLE BELOW (FOURTH DEPT).

The Fourth Department, dismissing the indictment, over a two-justice dissent, determined the police did not have a reasonable suspicion defendant was armed and therefore should not have attempted to frisk him when he got out of the vehicle. The fact that defendant threw his coat at the officer and ran did not justify defendant's arrest for obstructing governmental administration because the police conduct (the attempted frisk) was not authorized:

… [T]he police proceeded to an attempted frisk by approaching the passenger side of the truck, opening the door, and directing defendant to exit the truck so that, as they informed defendant, they could perform a frisk of his person … . The attempted frisk was unlawful, however, because the record establishes that the police did not have " 'knowledge of some fact or circumstance that support[ed] a

reasonable suspicion that . . . [defendant was] armed or pose[d] a threat to [their] safety' " … . Furthermore, even though defendant, despite being instructed to leave his coat in the truck, grabbed the coat, threw it onto one of the officers, and fled in the grassy area by the side of the interstate highway, instead of submitting to the frisk of his person, the police lacked probable cause to arrest defendant for obstructing governmental administration in the second degree based on his alleged obstruction of the officers' attempted frisk, because that police conduct was not authorized … . Moreover, while the officers had also indicated to defendant that they were going to perform a search of the truck, the People did not rely below on the theory that defendant was properly arrested for obstructing a lawful search of the truck, nor, as the dissent states, did the court "explicitly base[] its decision on that theory." We thus conclude that, as "an appellate court[, we] may not uphold a police action on a theory not argued before the suppression court" … . People v Hodge, 2022 NY Slip Op 03821, Fourth Dept 6-9-22

Practice Point: Here the police did not have a reasonable suspicion that the defendant was armed and therefore should not have attempted to frisk him. The fact that the defendant threw his coat at an officer and ran did not provide probable cause for arrest because the police conduct (attempting to frisk him) was not authorized. An appellate court cannot consider a theory which would support the denial of suppression but with was not raised below.

CRIMINAL LAW, TRAFFIC STOPS.

THE POLICE DID NOT HAVE PROBABLE CAUSE TO BELIEVE DEFENDANT HAD COMMITTED OR WAS COMMITTING A CRIME WHEN THEY BLOCKED DEFENDANT'S VEHICLE WITH THE POLICE VEHICLE, WHICH CONSTITUTES A SEIZURE; PLEA VACATED AND SUPPRESSION MOTION GRANTED (FOURTH DEPT).

The Fourth Department, vacating defendant's plea and granting defendant's suppression motion, determined the police did not have probable cause to seize defendant's vehicle by blocking its exit with the police vehicle:

Police officer testimony at the suppression hearing established that, at the time the officers stopped their vehicle in front of defendant's vehicle, they had observed defendant's presence in a vehicle at 1:00 p.m. in the parking lot of an apartment complex known for drug activity and where officers believed defendant did not reside, and they were aware that defendant had a history of drug-related convictions. Such evidence does not provide a reasonable suspicion that defendant had committed, was committing, or was about to commit a crime … . People v King, 2022 NY Slip Op 03595, Fourth Dept 6-3-22

Practice Point: Blocking defendant's vehicle with a police vehicle is a seizure which requires probable cause to believe defendant has committed or is committing a crime.

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW.

REFUSING TO TAKE A DWI BREATH TEST IS NOT AN OFFENSE (FOURTH DEPT).

The Fourth Department, reversing the conviction and dismissing the count, noted that refusing to take a DWI breath test is not an offense:

… [W]e note that defendant's "refusal to submit to a breath test did not establish a cognizable offense" … . People v Alim, 2022 NY Slip Op 02671, Fourth Dept 4-22-22

Practice Point: Refusing to take a DWI breath test is not a crime.

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW.

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Practice Point: Refusing to take a DWI breath test is not a crime.

DISCIPLINARY HEARINGS (INMATES).

THE EVIDENCE DID NOT SUPPORT THE DETERMINATION PETITIONER-INMATE WAS GUILTY OF "CREATING A DISTURBANCE" (THIRD DEPT).

The Third Department, annulling the disciplinary determination, held the evidence did not demonstrate petitioner-inmate was guilty of "creating a disturbance:"

Pursuant to the relevant regulations, an incarcerated individual "shall not engage in conduct which disturbs the order of any part of the facility" (7 NYCRR 270.2 [B] [5] [iv]). Such disruptive conduct includes, as relevant here, "loud talking in a mess hall, program area or corridor" (7 NYCRR 270.0 [B] [5] [iv]). The misbehavior report, which was the sole evidence relied upon by the Hearing Officer, provided, in relevant part, that petitioner was observed "arguing" with another incarcerated individual "in the dorm hallway . . ., which drew the attention of the [incarcerated individuals] nearby." The misbehavior report does not reflect that petitioner was screaming … or otherwise speaking in a loud or boisterous manner … , nor does it establish that petitioner's behavior triggered an affirmative response on the part of the incarcerated individuals observing the alleged argument … . Similarly, petitioner was found not guilty of fighting, and there were no other established disciplinary infractions that would give rise to a reasonable inference that his conduct was disruptive … . In short, as the misbehavior report fails to identify the manner in which petitioner's conduct disturbed the order of the facility, we cannot say that respondent's determination is supported by substantial evidence … . Matter of Hogan v Thompson, 2022 NY Slip Op 02470, Third Dept 4-14-22

ELECTION LAW, CONSTITUTIONAL LAW.

THE 2022 CONGRESSIONAL REDISTRICTING MAP FAVORED DEMOCRATS IN VIOLATION OF ARTICLE III OF THE NYS CONSTITUTION (FOURTH DEPT).

The Fourth Department, over a two-justice concurrence and a two-justice partial dissent, determined the NYS 2022 congressional redistricting map was drawn to favor democrats in violation of Article III of the NYS Constitution:

… [W]e agree with petitioners and the court that the congressional map was unconstitutional in that it violated article III, § 4 (c) (5), which provides as relevant here that "[d]istricts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties." * * *

We conclude that evidence of the largely one-party process used to enact the 2022 congressional map, a comparison of the 2022 congressional map to the 2012 congressional map, and the expert opinion and supporting analysis of Sean P. Trende, met petitioners' burden of establishing that the 2022 congressional map was drawn to discourage competition and favor democrats in violation of article III, § 4 (c) (5). First, democratic leaders in the legislature drafted the 2022 congressional redistricting map without any republican input, and the map was adopted by the legislature without a single republican vote in favor of it. Second, under the 2012 congressional map there were 19 elected democrats and 8 elected republicans and under the 2022 congressional map there were 22 democrat-majority and 4 republican-majority districts. Matter of Harkenrider v Hochul, 2022 NY Slip Op 02648, Fourth Dept 4-22-22

FAMILY LAW, ATTORNEYS, APPEALS.

ALTHOUGH FATHER FAILED TO APPEAR, HIS COUNSEL APPEARED AND FATHER WAS THEREFORE NOT IN DEFAULT; BECAUSE FATHER WAS NOT IN DEFAULT, APPEAL IS NOT PRECLUDED (FOURTH DEPT).

The Fourth Department, vacating the portions of the order entered on default, determined father's failure to appear was not a default because his counsel appeared. Because father was not in default, appeal is not precluded:

We agree with the father that Family Court erred in entering the order upon his default based on his failure to appear in court. The record establishes that the father "was represented by counsel, and we have previously determined that, [w]here a party fails to appear [in court on a scheduled date] but is represented by counsel, the order is not one entered upon the default of the aggrieved party and appeal is not precluded" … . Matter of Akol v Afet, 2022 NY Slip Op 03641, Fourth Dept 6-3-22

Practice Point: When counsel appears in Family Court, the party represented by counsel is not in default. An appeal is available to a party not in default.

FAMILY LAW, CUSTODY, ADOPTION.

ALTHOUGH FATHER, WHO HAD BEEN IN THE MILITARY, HAD NOT PROCURED HOUSING FOR HIMSELF AND HIS UNDER-SIX-MONTH-OLD SON, HE DEMONSTRATED HE WAS WILLING AND ABLE TO CARE FOR THE CHILD; THEREFORE HIS CONSENT TO ADOPTION BY PETITIONERS-RESPONDENTS WAS REQUIRED AND CUSTODY WAS PROPERLY AWARDED TO HIM; THE DISSENT ARGUED FATHER'S FAILURE TO PROCURE HOUSING RENDERED HIM UNABLE TO CARE FOR THE CHILD (FOURTH DEPT).

The Fourth Department, over a dissent, determined father demonstrated he is willing and able to enter a full relationship with his under-six-year-old child and,

therefore, his consent to adoption by the petitioners-respondents was required and he was properly awarded custody of the child. The dissent argued father, who was in the military, made no attempt to procure housing for himself and the child and, therefore, did not demonstrate he was able to care for the child:

We … disagree with our dissenting colleague and conclude that the father established his ability to assume custody of the child. Contrary to the position of the dissent and petitioners, custody and housing are separate and distinct concepts. A parent who lacks housing for a child is not legally precluded from obtaining custody. Certainly, active military members should not lose custody of a child due to their service to our country. Many parents enlist the aid of family members to help them provide housing, including single parents who serve in the military. That temporary inability to provide housing should not preclude them from asserting their custodial rights to the children where, as here, they have established their intent to embrace their parental responsibility. Matter of William, 2022 NY Slip Op 03831, Fourth Dept 6-9-22

Practice Point: The Fourth Department noted that custody and housing are separate and distinct concepts. Although father, who had been in the military, had not procured housing for himself and the child, he demonstrated he was willing and able to care for the child. Therefore his consent to adoption by the petitioners-respondents was required and custody was properly awarded to him.

FAMILY LAW, NEGLECT, CRITERIA FOR ORDERS OF PROTECTION.

IN THIS NEGLECT PROCEEDING AGAINST STEPMOTHER, THE STATUTORY REQUIREMENTS FOR THE ISSUANCE OF ORDERS OF PROTECTION IN FAVOR OF THE CHILDREN WERE NOT MET (FOURTH DEPT).

The Fourth Department, vacating the five-year orders of protection in favor of the children (re: respondent stepmother) in this neglect proceeding, determined the statutory criteria for issuance of the orders of protection were not met:

… [T]he stepmother contends that the court erred in issuing orders of protection in favor of the children with a duration of five years. We agree, and we therefore

reverse the orders of protection … . In an article 10 proceeding, the court may issue an order of protection, but such order shall expire no later than the expiration date of "such other order made under this part, except as provided in subdivision four of this section" (Family Ct Act § 1056 [1]). Subdivision (4) of section 1056 allows a court to issue an independent order of protection until a child's 18th birthday, but only against a person "who was a member of the child's household or a person legally responsible . . . , and who is no longer a member of such household at the time of the disposition and who is not related by blood or marriage to the child or a member of the child's household." Here, the orders of protection do not comply with Family Court Act § 1056 (1) and (4) because no other dispositional orders were issued with respect to the children at the time the court issued the orders of protection and the stepmother, although no longer living in the home, remains married to the children's mother … . Moreover, the court erred in issuing the dispositional orders of protection without first holding a dispositional hearing. "The Family Court Act directs that a dispositional hearing be held as a condition precedent to the entry of a dispositional order such as the order of protection granted by Family Court here" … . Matter of Kayla K. (Emma P.-T.), 2022 NY Slip Op 02668, Fourth Dept 4-22-22

FORECLOSURE, STATUTE OF LIMITATIONS, PARTIAL PAYMENT.

THE STATUTE OF LIMITATIONS IN THIS FORECLOSURE ACTION STARTED ANEW WHEN DEFENDANT MADE A PARTIAL PAYMENT; DEFENDANT WAIVED THE LACK OF STANDING DEFENSE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the statute of limitations in the foreclosure action had been restarted by partial payment and defendants had waived the argument that the plaintiff did not have standing:

The partial payment exception "requires proof that 'there was a payment of a portion of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder' "… . "If the exception is established, the statute of limitations begins to run anew from the date of the partial payment" … . * * *

"Having failed to interpose an answer which asserted the defense [of lack of standing] or to file a timely pre-answer motion raising that defense," [defendant] waived his contention on his cross appeal that plaintiff lacked standing to commence the action … . Citibank, N.A. v Gifford, 2022 NY Slip Op 02650, Fourth Dept 4-22-22

Practice Point: Partial payment of a debt after the statute of limitations has run may start the statute running anew. Failure to raise the lack of standing defense in the answer or a motion to dismiss waives it.

INSURANCE LAW, PROPERTY, "DETERIORATION" EXCLUSION.

THE PROPERTY-INSURANCE EXCLUSION FOR "DETERIORATION" APPLIED TO THE BULGING WALL CAUSED BY THE DETERIORATION OF BRICKS, PRECLUDING COVERAGE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the "deterioration" exclusion in the property insurance policy applied to a bulging wall, precluding coverage:

Defendant met its initial burden on its motion by establishing as a matter of law that plaintiff's loss is not covered under the policy because it resulted from "deterioration," which condition was specifically excluded from coverage, and plaintiff failed to raise an issue of fact in opposition … . Unambiguous policy provisions are to be given their plain and ordinary meaning … , and the plain meaning of the exclusion in question "was to relieve the insurer of liability when its insured sought reimbursement for costs incurred in correcting . . . deterioration of the subject [premises]" … . Here, both defendant's expert and plaintiff's expert opined that the wall bulged due to deterioration of the bricks from exposure to moisture and freeze-thaw cycles. The only difference was that defendant's expert opined that the wall had been deteriorating over an extended period of time, whereas plaintiff's expert opined that the deterioration occurred over two months. Either way, the damage was the result of deterioration, and thus the policy exclusion applies and defendant is entitled to summary judgment … . S & J Props.

of Watertown, LLC v Main St. Am. Group, 2022 NY Slip Op 03837, Fourth Dept 6-9-22

Practice Point: Here the bulging wall was caused by the deterioration of bricks. The "deterioration" exclusion in the policy applied and precluded coverage.

INSURANCE LAW, REINSURANCE.

THE "FOLLOW THE SETTLEMENTS" DOCTRINE DOES NOT APPLY TO A REINSURER WHERE THE PAYMENTS MADE BY THE PRIMARY INSURER WERE CLEARLY BEYOND THE SCOPE OF THE ORIGINAL POLICY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the defendant reinsurer was not required to indemnify the plaintiff primary insurer because the primary insurer was not obligated to make the pay-out under its umbrella policy. The so-called "follow the settlements" doctrine did not apply because the payments made by the plaintiff were clearly beyond the scope of the original policy:

Where it applies, the follow-the-settlements doctrine "ordinarily bars challenge by a reinsurer to the decision of [the cedent] to settle a case for a particular amount" … . Specifically, under that doctrine, "a reinsurer is required to indemnify for payments reasonably within the terms of the original policy, even if technically not covered by it. A reinsurer cannot second guess the good faith liability determinations made by its reinsured . . . The rationale behind this doctrine is two-fold: first, it meets the goal of maximizing coverage and settlement and second, it streamlines the reimbursement process and reduces litigation" … There are, however, limitations to the doctrine. The follow-the-settlements doctrine "insulates a reinsured's liability determinations from challenge by a reinsurer unless they are fraudulent, in bad faith, or the payments are clearly beyond the scope of the original policy or in excess of [the reinsurer's] agreed-to exposure" … . Utica Mut. Ins. Co. v Abeille Gen. Ins. Co., 2022 NY Slip Op 03815, Fourth Dept 6-9-22

Practice Point: Here the "follow the settlements" doctrine did not apply to a reinsurer who refused to cover payments made by the primary insurer because those payments were clearly beyond the scope of the original policy.

JUDGES, OBLIGATION TO ISSUE A DECISION, APPEALS.

TO FACILITATE APPELLATE REVIEW THE JUDGE WHO AWARDED PLAINTIFFS SUMMARY JUDGMENT, ATTORNEY'S FEES AND COSTS SHOULD HAVE WRITTEN A DECISION EXPLAINING THE BURDENS OF PROOF AND REASONING; ISSUING ORDERS WITHOUT AN EXPLANATORY DECISION IS AN "UNACCEPTABLE PRACTICE;" PLAINTIFFS DID NOT SHOW THEIR INTERPRETATION OF THE CONTRACT WAS THE ONLY REASONABLE ONE; THE FRAUDULENT MISREPRESENTATION CAUSE OF ACTION CANNOT BE BASED UPON AN ALLEGED INTENT TO BREACH THE CONTRACT AND WAS NOT SUFFICIENTLY PLED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined (1) to facilitate appellate review, the court should have written a decision explaining the burdens of proof and its reasoning in granting plaintiffs summary judgment and awarding attorney's fees and costs; (2) the plaintiffs did not demonstrate the contract was unambiguous and therefore were not entitled to summary judgment on the breach of contract claims; and (3) summary judgment should not have been awarded on plaintiffs' fraudulent misrepresentation cause of action. A fraudulent misrepresentation cause of action cannot be based upon an alleged intent to breach a contract:

Although the court granted plaintiffs' motion insofar as it sought summary judgment, it failed to address the burdens of proof or any specific cause of action. In addition, the court awarded costs and attorneys' fees without providing the basis therefor. As noted, this case involved a motion for summary judgment and for costs, attorneys' fees, and sanctions, and the court chose not to write. This is an unacceptable practice … .. To maximize effective appellate review, we must remind our colleagues in the trial courts to provide their reasoning instead of simply issuing orders. …

… [P]laintiffs did not meet their initial burden on those parts of the motion seeking summary judgment … inasmuch as plaintiffs failed to submit sufficient evidence to establish that their interpretation of the relevant contracts is the only reasonable interpretation thereof. …

… "[F]ar from being collateral to the contract, the purported misrepresentation was directly related to a specific provision of the contract" … .. In addition, CPLR 3016 (b) provides that, "[w]here a cause of action . . . is based upon . . . fraud, the circumstances constituting the wrong shall be stated in detail," and we conclude that the cause of action here failed to satisfy that requirement … . Wilsey v 7203 Rawson Rd., LLC, 2022 NY Slip Op 02905, Fourth Dept 4-29-22

Practice Point: Here not only was the judge wrong to award plaintiffs summary judgment, attorney's fees and costs on the breach of contract and fraudulent misrepresentation causes of act, but the judge made appellate review difficult by issuing orders without a decision explaining the burdens of proof and reasoning, characterized as an "unacceptable practice" by the Fourth Department.

LABOR LAW-CONSTRUCTION LAW, FOLLOWING ORDERS.

PLAINTIFF WAS DIRECTED TO LIFT A HEAVY BOX MANUALLY; THE FACT THAT A FORKLIFT WAS AVAILABLE WAS NOT DETERMINATIVE; A WORKER IS EXPECTED TO FOLLOW ORDERS; PLAINTIFFS' MOTION TO SET ASIDE THE DEFENSE VERDICT IN THIS LABOR LAW 240(1) ACTION SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiffs' motion to set aside the defense verdict in this Labor Law 240(1) action should have been granted. The Labor Law 240(1) claim was reinstated and judgment in favor of plaintiffs was granted. Apparently plaintiff was injured when lifting a heavy box after the stage manager directed him to do so. The fact that a forklift was available would only raise an issue of comparative negligence which will not defeat a Labor Law 240(1) claim:

… [A]lthough defendants established that there was an available safety device, i.e., a forklift, and that plaintiff knew that it was available and that he was expected to use it, plaintiffs established that the stage manager instructed plaintiff and his coworkers to lift the box manually. Regardless of whether that stage manager was plaintiff's actual supervisor, plaintiff was under no obligation to demand safer methods for moving the box … . To expect plaintiff to refuse the stage manager's demands "overlooks the realities of construction work" … .

"When faced with an . . . instruction to use an inadequate device [or no device at all], many workers would be understandably reticent to object for fear of jeopardizing their employment and their livelihoods" … . Finocchi v Live Nation Inc., 2022 NY Slip Op 02680, Fourth Dept 4-22-22

Practice Point: Plaintiff was directed to lift a heavy box manually. A worker is expected to follow directions. The fact that a forklift was available was therefore not determinative. Plaintiffs' motion to set aside the defense verdict in this Labor Law 240(1) action should have been granted.

MUNICIPAL LAW, GENERAL MUNICIPAL LAW 207-A BENEFITS, FIREFIGHTERS.

A FIREFIGHTER INJURED ON THE JOB RETURNED TO THE JOB BUT COULD NOT WORK THE 10 TO 24 HOUR SHIFTS WHICH ARE THE "REGULAR DUTIES" OF A FIREFIGHTER; BECAUSE SHE WAS NOT OFFERED THE FULL-TIME EQUIVALENT OF THE SHORTER SHIFTS OR LIGHT-DUTY WORK, SHE WAS ENITLTED TO GENERAL MUNICIPAL LAW 207-A BENEFITS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined petitioner, a firefighter who had injured her shoulder on the job, was entitled to General Municipal Law 207-a benefits:

A firefighter seeking section 207-a benefits must show "that his or her injury or illness results from the performance of his or her duties and that he or she is physically unable to perform his or her regular duties as a firefighter … . The

regular duties of a firefighter for the City required shifts of between 10-24 hours, and the medical evidence is undisputed that petitioner could work only 8-hour shifts. Inasmuch as the evidence established that petitioner could not work the longer shifts, and she was not offered the full-time equivalent of the shorter shifts or light-duty work, the determination that she is not entitled to General Municipal Law § 207-a benefits is arbitrary and capricious. Matter of Newman v City of Tonawanda, 2022 NY Slip Op 03834, Fourth Dept 6-9-22

Practice Point: Here petitioner-firefighter was injured on the job. When she returned to the job she could not work the 10 to 24 hour shifts which are the "regular duties' of a firefighter. She was assigned shorter shifts which resulted in less pay. She was therefore entitled to General Municipal Law 207-a benefits.

NEGLIGENCE, HUNTING-RELATED SHOOTING, SUMMARY JUDGMENT.

PLAINTIFF AND DEFENDANT WERE HUNTING TURKEY WHEN DEFENDANT SHOT PLAINTIFF; PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY SHOULD HAVE BEEN GRANTED, NOTWITHSTANDING POSSIBLE COMPARATIVE-NEGLIGENCE ISSUES (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiffs' motion for summary judgment in this hunting accident case should have been granted. Defendant, like the plaintiff, was hunting turkey when he shot plaintiff and his friend. Defendant subsequently pled guilty to attempted assault:

We agree with plaintiffs that they established as a matter of law that defendant was negligent by failing to exercise the degree of care that a reasonable person "of ordinary prudence would exercise under the circumstances, commensurate with the known dangers and risks reasonably to be foreseen" … , and that defendant failed to raise an issue of fact in response. We also agree with plaintiffs that triable issues of fact regarding plaintiff's comparative negligence do not preclude an award of summary judgment in plaintiffs' favor on the issue of defendant's negligence … . Pachan v Brown, 2022 NY Slip Op 02684, Fourth Dept 4-22-22

Practice Point: Comparative negligence is no longer a bar to summary judgment on liability. Comparative negligence is relevant only to damages.

TRUSTS AND ESTATES, TRANSFER OF HOME TO DECEDENT'S CAREGIVERS.

THE TRANSFER OF DECEDENT'S HOME TO THE TWO CHILDREN WHO WERE CARING FOR HIM WAS COMPENSATION FOR THE CAREGIVERS PURSUANT TO AN AGREEMENT, NOT A GIFT (WHICH WOULD NOT HAVE BEEN AUTHORIZED BY THE POWER OF ATTORNEY) (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the transfer of decedent's home to the two children who were caring for decedent was demonstrated to be compensation for the caregivers pursuant to an agreement, not a gift (the power of attorney did not authorize agents to make major gifts):

The court concluded that the transfer was an improper gift, relying on the presumption that "where parties are related, . . . services were rendered in consideration of love and affection, without expectation of payment" … . Even assuming, arguendo, that the presumption applies to the inter vivos transfer at issue here … , we conclude that respondents supported their motion with "clear, convincing and satisfactory evidence[] that there was an agreement . . that the services would be compensated" … . Matter of Maik, 2022 NY Slip Op 03589, Fourth Dept 6-3-22

Practice Point: Here there was an agreement that the children who cared for the disabled decedent would be compensated. The transfer of decedent's home to the caregivers was compensation for their services, not a gift (which would not have been authorized by the power of attorney).

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