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ADMINISTRATIVE LAW, PUBLIC HEALTH LAW, MEDICAL MARIHUANA..

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

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

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

To the extent that DOH failed to undertake the required financial review, its determination regarding the financial standing portion of petitioner's application is

arbitrary and capricious and must be annulled … . Matter of Hudson Health Extracts, LLC v Zucker, 2022 NY Slip Op 04207, Third Dept 6-30-22

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

APPEALS, FAMILY LAW, ELECTRONICALLY RECORDED PROCEEDINGS.

THE ELECTRONICALLY RECORDED HEARING INCLUDED 80 QUESTIONS POSED TO A WITNESS BY COUNSEL BUT ONLY FOUR ANSWERS WERE AUDIBLE; NEW HEARING WITH A STENOGRAPHER ORDERED (THIRD DEPT).

The Third Department determined the record on appeal was insufficient and ordered a new hearing with a stenographer. The hearing was electronically recorded. Counsel ask a witness 80 questions but only four answers were audible. Matter of Jereline Z. v Joseph AA., 2022 NY Slip Op 02848, Third Dept 4-28-22

Practice Point: If a hearing is electronically recorded but most of a significant witness's answers are inaudible, the appeal cannot be considered. Here a new hearing with a stenographer was ordered.

CIVIL PROCEDURE, EXPERT DISCLOSURE, TREATING PHYSICIAN, THIRD DEPARTMENT'S UNIQUE REQUIREMENTS.

CLAIMANT'S ATTORNEY WAS NOT AWARE OF THE THIRD DEPARTMENT'S UNIQUE REQUIREMENT OF FULL EXPERT-WITNESS DISCLOSURE FOR A TREATING PHYSICIAN; THAT WAS AN ADEQUATE EXCUSE FOR AN UNTIMELY DISCLOSURE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined claimant's treating physician (Hopson) in this personal injury case should have been allowed to testify as an expert, despite the failure to comply with full expert disclosure pursuant to CPLR 3101. The Third Department is the only department which requires such full expert disclosure by a treating physician and claimant's attorney had not practiced in the Third Department:

There is no dispute that claimant failed to comply with the expert disclosure requirements of CPLR 3101 (d) (1) (i) in identifying Hopson as a witness. Nevertheless, we disagree with the Court of Claims' finding that claimant's excuse was unreasonable. The situation here mirrors that in Schmitt v Oneonta City Sch. Dist. (151 AD3d 1254), where we accepted the explanation of the plaintiffs' attorney that he was "unaware of this Court's interpretation of CPLR 3101 (d) (1) (i) and the corresponding need to file an expert disclosure for a treating physician, and the record [was] otherwise devoid of any indication that counsel's failure to file such disclosure was willful" … . The same holds true here, as claimant's attorney revealed that she practices law in a different judicial department and candidly conceded that she was unaware of this Court's interpretation that the statute requires expert disclosure for treating physicians. There is nothing in the record calling into question the veracity of counsel's representations and no basis to conclude that the noncompliance with CPLR 3101 (d) (1) (i) was willful. As such, the court erred in precluding Hopson's testimony as an expert witness…. . Freeman v State of New York, 2022 NY Slip Op 03559, Third Dept 6-2-22

Practice Point: Only the Third Department requires full expert-witness disclosure for a treating physician.

CIVIL PROCEDURE, RELATION-BACK DOCTRINE, STATUTE OF LIMITATIONS.

THE RELATION-BACK DOCTRINE DID NOT APPLY TO SAVE THE AMENDED PETITION CHALLENGING A USE VARIANCE; THE INTITIAL PETITION FAILED TO NAME A NECESSARY PARTY WHO WAS KNOWN TO THE PETITIONERS AND WAS DISMISSED ON THAT GROUND; THE AMENDED PEITITION, WHICH NAMED THE NECESSARY PARTY, WAS DISMISSED AS TIME-BARRED; BECAUSE THE PETITIONERS HAD NO DOUBT ABOUT WHO THE NECESSARY PARTY WAS AND HAD NAMED HER IN A PRIOR PETITION, THE RELATION-BACK DOCTRINE COULD NOT BE INVOKED (THIRD DEPT).

The Third Department, over an extensive dissent, determined the relation-back doctrine did not save the petition challenging a use variance. The initial petition was dismissed for failure to name a necessary party, Rosa Kuehn. The subsequent amended petition, which included the necessary party, was dismissed as time-barred:

Supreme Court correctly determined that petitioners are not entitled to the benefit of the relation back doctrine. That doctrine "permits a petitioner to amend a petition to add a respondent even though the statute of limitations has expired at the time of amendment so long as the petitioner can demonstrate three things: (1) that the claims arose out of the same occurrence, (2) that the later-added respondent is united in interest with a previously named respondent, and (3) that the later-added respondent knew or should have known that, but for a mistake by petitioners as to the later-added respondent's identity, the proceeding would have also been brought against him or her" … .

… [P]etitioners simply cannot meet the third and final condition and therefore cannot avail themselves of the doctrine. Indeed, Rosa Kuehn was appropriately named as a respondent and identified as the landowner of the subject property in petitioners' successful challenge to the use variance issued in 2013 … ; "thus, this simply is not an instance where the identity of a respondent . . . was in doubt or there was some question regarding that party's status" … . Matter of Nemeth v K-Tooling, 2022 NY Slip Op 03034, Third Dept 5-4-22

Practice Point: Here a necessary party was not named in the petition and the petition was dismissed for that reason. The amended petition, which named the necessary party, was time-barred. The relation-back doctrine could not be invoked to save the amended petition because the identity of the necessary party was known to the petitioners who had named her in a related petition in 2013.

CONSTITUTIONAL LAW, LOBBYING ACT, GRASSROOTS LOBBYING, CHILD VICTIMS ACT.

PLAINTIFFS' ACTION ALLEGING THE LOBBYING ACT IS UNCONSTITUTIONAL AS APPLIED TO THEM SHOULD HAVE BEEN ALLOWED TO PROCEED; PLAINTIFFS ENGAGED IN "GRASSROOTS LOBBYING" IN SUPPORT OF PASSAGE OF THE CHILD VICTIMS ACT (CVA) (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Pritzker, determined plaintiffs' action alleging the Lobbying Act was unconstitutional as applied to them (First Amendment) should have been allowed to proceed. The opinion is too comprehensive to fairly summarize here. Plaintiffs engaged in publicity aimed at passage of the Child Victims Act (CVA), which extends the statute of limitations for civil and criminal actions stemming from the sexual abuse of children. Although the NYS Joint Commission of Public Ethics (JCOPE) did not end up enforcing the registration and reporting requirements of the Lobbying Act with respect to the plaintiffs' past activities, it indicated future enforcement if plaintiffs continued with their "grassroots lobbying" efforts:

Plaintiff Katherine C. Sullivan, a resident of Florida, supported the CVA and expressed that support, among other ways, through a website that explained that Sullivan was a survivor of child sexual assault that she was subjected to while attending a school in the City of Troy, Rensselaer County, but that she was barred from seeking legal recourse by then-applicable statutes of limitations. A list of state senators who opposed the CVA was provided, along with a script and postcard template for website visitors to contact state senators to voice support for the CVA. Sullivan also rented digital billboard space in this state that displayed a

rotating set of screens, one of which purportedly read, "NY Pass the Child Victims Act," and another that displayed photographs of state senators next to text asking why they did not support the CVA. Some of the screens also purportedly displayed Sullivan's website address; all of the screens indicated that they were paid for by plaintiff Kat Sullivan LLC (hereinafter the LLC). Sullivan later arranged for an airplane to circle the Capitol and the school in Troy towing banners that displayed, among other things, the address of her aforementioned website and the hashtag #NYPASSCVA. Sullivan v New York State Joint Commn. on Pub. Ethics, 2022 NY Slip Op 03553, Third Dept 6-2-22

Practice Point: Here the plaintiffs challenged whether the Lobbying Act, which requires lobbyists to register and report, was constitutional as applied to their "grassroots" efforts to garner support for the passage of the Child Victims Act. Supreme Court had dismissed the action. The Third Department partially reinstated it.

COURT OF CLAIMS, HARNESS RACING ACCIDENT.

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

The Third Department, in a comprehensive decision which should be consulted on the issues of governmental immunity, assumption of the risk and constructive

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

… [T]he duties of [the state's] officials are fundamentally intertwined with the operation of each and every race and, while such tasks may tangentially relate to the overall function of ensuring fair and honest gambling in this state, they are more specifically directed to the goal of ensuring the safety of the participants in those races … . … [I]t is apparent that at least part of the Commission's role in harness racing is to work hand in hand with the private racing industry to further the state's goal of "deriv[ing] a reasonable revenue for the support of government" … . * * *

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

Because [the inspection] duties were imposed upon the Commission officials by regulation, constructive notice of Mister Miami's health and equipment issues that would have been observable during those inspections may be imputed … . Bouchard v State of New York, 2022 NY Slip Op 04202, Third Dept 6-30-22

Practice Point: This opinion has valuable discussions of; (1) how to analyze whether a government is exercising a governmental function (to which the "special relationship" and "governmental immunity" doctrines apply) or a proprietary function (to which ordinary negligence principles apply); (2) the assumption of the risk doctrine; and (3) the imputation of constructive notice when there are regulations mandating inspections which allegedly would have revealed the

dangerous condition. Here claimant was injured during a harness race when his horse collided with a fallen horse. The complaint alleged the NYS Gaming Commission did not inspect the fallen horse and the fallen horse's equipment prior to the race as required by the relevant regulations.

CRIMINAL LAW, ACCOMPLICE LIABILITY.

THERE WAS NO EVIDENCE DEFENDANT SHARED THE ATTACKERS' INTENT TO ROB THE VICTIM; DEFENDANT'S ROBBERY CONVICTIONS UNDER AN ACCOMPLICE-LIABILITY THEORY REVERSED (THIRD DEPT).

The Third Department, reversing defendant's robbery convictions, determined the evidence defendant shared the attackers' intent to rob the victim was legally insufficient. Defendant had set up a drug purchase from the victim. When the victim arrived, he was attacked and robbed by four masked men. Although the victim testified defendant was one of the masked men, there was strong evidence to the contrary:

The People … did not have any direct evidence demonstrating that defendant knew of or shared an intent to forcibly steal property from the victim … . Indeed, there was no evidence that defendant had prior knowledge of a plan to rob the victim … . People v Smith, 2022 NY Slip Op 03547, Third Dept 6-2-22

Practice Point: Although the defendant sent the victim to the address where the victim was to sell marijuana to a buyer, there was no evidence defendant was aware the buyer intended to attack and rob the victim. Therefore, there was no evidence defendant shared the robbers intent and his robbery convictions under an accomplice-liability theory were reversed.

CRIMINAL LAW, APPEALS, DISCHARGE OF JUROR.

THE MAJORITY REFUSED TO CONSIDER WHETHER COUNTY COURT PROPERLY DISCHARGED A JUROR WHO FAILED TO APPEAR BECAUSE THE ISSUE WAS NOT PRESERVED BY OBJECTION; TWO DISSENTERS WOULD HAVE CONSIDERED THE ISSUE IN THE INTEREST OF JUSTICE AND ORDERED A NEW TRIAL (THIRD DEPT).

The Third Department refused to consider whether the court properly discharged a juror because the issue was not preserved by objection. The two dissenting justices would have ordered a new trial in the interest of justice:

From the dissent:

If a juror is unable to continue serving due to an illness, "the court shall make a reasonably thorough inquiry concerning such illness . . . and shall attempt to ascertain when such juror will be appearing in court" (CPL 270.35 [2] [a]). * * *

… [O]n the day at issue and approximately 30 minutes after the scheduled start of the trial, County Court noted that juror No. 1 was not present. The court remarked, "She did leave sick yesterday," and, after such remark, stated that it was necessary to replace juror No. 1 with an alternate juror. …

… [T]here was no reasonably thorough inquiry — let alone, any inquiry — as to juror No. 1's absence. Although juror No. 1 was apparently ill on the day when she was selected for service, the court did not bother to learn if she continued to be ill. It seems that the court merely speculated that, because juror No. 1 was ill the day before, she continued to be ill and that was the reason why she did not show up at the scheduled time for the start of the trial. Such speculation, however, does not meet the standard of conducting a reasonably thorough inquiry. … [E]ven if it could be said that the court did make a reasonably thorough inquiry, the court still failed to ascertain when juror No. 1 would return to court. The record discloses that, prior to discharging juror No. 1, the court neither heard from nor reached out to her to see if she would not be making it for the trial or if she was en route to the courthouse … . People v Colter, 2022 NY Slip Op 04055, Third Dept 6-23-22

Practice Point: Here the issue whether County Court properly discharged a juror was not considered by the majority because the issue was not preserved by objection. The two dissenters argued the court did not conduct a proper inquiry to determine why the juror had not appeared and whether the juror would appear. The dissenters would have considered the issue in the interest of justice and ordered a new trial.

CRIMINAL LAW, APPEALS, JUROR BIAS.

BECAUSE THE ISSUE WAS NOT PRESERVED BY OBJECTION, THE MAJORITY DID NOT CONSIDER WHETHER COUNTY COURT MADE A PROPER INQUIRY OF A JUROR WHO, DURING DELIBERATIONS, FOR THE FIRST TIME, REVEALED SHE WAS A RAPE VICTIM; DEFENDANT WAS CHARGED WITH RAPE; THE DISSENTING JUDGE WOULD HAVE CONSIDERED THE ISSUE IN THE INTEREST OF JUSTICE AND ORDERED A NEW TRIAL (THIRD DEPT).

The Third Department refused to consider whether County Court properly handled an "outburst by a juror during deliberations" because the issue was not preserved by objection. The dissenting justice would have considered the issue in the interest of justice and ordered a new trial:

From the dissent:

The foreperson said it best — "how did you get this far if that's the case? . . . you shouldn't be here." The foreperson said this to one of the jurors, who was in seat No. 6, after this juror revealed during deliberations that she was a victim of rape — one of the crimes for which defendant was being tried. Juror No. 6 had not disclosed this fact during voir dire or on the juror questionnaire. In any event, County Court proceeded to question each juror, including juror No. 6, to determine if any of them was grossly unqualified. Such inquiry, however, was not "probing and tactful" … and, consequently, the court failed to ensure that the finding of guilt was the product of a fair and impartial jury. * * *

In my view, County Court's inquiry did not meet the probing and tactful standard. Based on the allegations of rape made against defendant, juror No. 6's revelation of being a rape victim and the doubt expressed by the foreperson about juror No. 6's impartiality, it was incumbent upon the court, at the very least, to ask juror No. 6 about being a rape victim. Indeed, the court intended on asking juror No. 6 about being a sexual assault victim but, for some reason that is not apparent in the record, it never did. Merely asking whether juror No. 6 was a crime victim did not address the emotionally charged situation that the foreperson brought to the court's attention. The court's inquiry was therefore flawed from the outset. People v Rivera, 2022 NY Slip Op 04050, Third Dept 6-23-22

Practice Point: Because the issue was not preserved for appeal by objection, the majority refused to consider whether Count Court made a proper inquiry when a juror revealed during deliberations, for the first time, she was a rape victim, Defendant was charged with rape. The dissenting justice would have considered the issue in the interest of justice and ordered a new trial.

CRIMINAL LAW, APPEALS, LAW CHANGED WHILE APPEAL PENDING.

ALTHOUGH THE RELEVANT DECISION [PEOPLE VS RUDOLPH] CAME DOWN AFTER DEFENDANT WAS SENTENCED, THE DECISION CAME DOWN BEFORE DEFENDANT'S APPELLATE PROCESS WAS COMPLETE; THEREFORE DEFENDANT WAS ENTITLED TO CONSIDERATION WHETHER HE SHOULD BE AFFORDED YOUTHFUL OFFENDER STATUS; SENTENCE VACATED AND MATTER REMITTED FOR RESENTENCING (SECOND DEPT).

The Third Department, noting that the relevant law was announced after defendant's sentencing but while the appeal was pending, determined County Court's failure to consider whether defendant should be afforded youthful offender status required vacation of the sentence and remittal for resentencing:

There is no dispute that Rudolph [21 NY2d at 499], which was decided after defendant was sentenced but before the appellate process was complete, required County Court to make a determination as to whether defendant, as an eligible youth, should be adjudicated a youthful offender, notwithstanding that no request

was made for such treatment (see CPL 720.20 [1] …). Whether to grant youthful offender status lies within the discretion of the sentencing court and cannot be dispensed with through the plea-bargaining process … . Although this Court is "vested with the broad, plenary power to modify a sentence in the interest of justice, . . . and, if warranted, exercise our power to adjudicate [a] defendant a youthful offender" … , we decline defendant's invitation to do so here, in the complete absence of any consideration by the sentencing court, either summarily or otherwise, as to whether defendant should be adjudicated a youthful offender. As such, we deem it appropriate, under such circumstances, to remit the matter to permit County Court the opportunity to make the initial discretionary determination as to whether youthful offender status for defendant is warranted, after the parties fully set forth their positions for and against such treatment … . Without expressing any opinion as to whether youthful offender adjudication should be afforded defendant, in the event that County Court grants such status upon remittal, which would result in the court imposing a lower sentence than the parties negotiated, the People must be given an opportunity to withdraw consent to the plea bargain … People v Simon, 2022 NY Slip Op 03277, Third Dept 5-19-22

Practice Point: Even if the requirement that youthful offender status be considered for all potentially eligible defendants was not in force when a defendant was sentenced, if the decision imposing the requirement (People vs Rudolph) came down before defendant's appellate process was complete, defendant is entitled to resentencing applying the new law.

CRIMINAL LAW, INVALID WAIVER OF INDICTMENT.

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

The Third Department reversed defendant's judgment by guilty plea and dismissed the superior court information (SCI). A defendant cannot be prosecuted by an SCI after indictment (defendant here had already been indicted. The error is

jurisdictional and need not be preserved by objection. The issue is not forfeited by a guilty plea:

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

Here, at the point in time when defendant agreed to be prosecuted by way of an SCI, defendant already had been indicted and the matter was scheduled for trial. Although the indictment subsequently was dismissed, there is no indication in the record that the dismissal was occasioned by a defect in the indictment itself (see CPL 210.20) or that Supreme Court authorized resubmission of the charge to the grand jury (see CPL 210.45 [9]), and it does not appear that a new felony complaint was filed. "Therefore, defendant was not placed on a formal preindictment procedural track" … . Under these circumstances, the waiver of indictment is invalid and the resulting SCI must be dismissed … . People v Michalski, 2022 NY Slip Op 04190, Third Dept 6-30-22

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

CRIMINAL LAW, PEOPLE'S APPEALS.

THE PEOPLE CAN NOT APPEAL THE GRANT OF DEFENDANT'S MOTION TO WITHDRAW HER PLEA, VACATE HER FELONY CONVICTION AND ALLOW HER TO PLEAD TO A MISDEMEANOR; DEFENDANT MADE THE MOTION AFTER SUCCESSFUL COMPLETION OF A DRUG-COURT TREATMENT PROGRAM (THIRD DEPT).

The Third Department determined the People could not appeal County Court's granting defendant's motion to withdraw her plea, vacate her felony conviction and allow her to plead to a misdemeanor. Defendant made the motion after she completed a drug-court treatment program:

"It is well settled that no appeal lies from a determination made in a criminal proceeding unless specifically provided for by statute" … . "CPL 450.20 delineates the instances in which the People may appeal as of right to an intermediate appellate court" … . Here, judgment has not been entered. We find that County Court's order resolved to be a postsentence, prejudgment motion and no right to appeal lies under CPL 450.20 … . We "may not resort to interpretative contrivances to broaden the scope and application of [this] statute[]" … , as the Legislature's policy is "to limit appellate proliferation in criminal matters" … . "Absent a specific statute granting the People the right to appeal, . . . this Court is without jurisdiction to hear the appeal" … . People v Backus, 2022 NY Slip Op 03949, Third Dept 6-16-22

Practice Point: The People can only appeal on the grounds described in the Criminal Procedure Law (CPL). Here County Court granted defendant's motion to withdraw her plea, vacate her felony conviction and allow her to plead to a misdemeanor, Her motion was made after she completed a drug-court treatment program. The CPL does not give the People the authority to appeal County Court's grant of defendant's motion.

CRIMINAL LAW, APPEALS, JUDGES.

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

The Third Department, vacating defendant's promoting-prison-contraband conviction, determined the trial judge, who had initially dismissed the promoting-prison-contraband count, subsequently stayed the dismissal and promoting-prison-contraband count went to trial with other charges. Apparently the judge stayed the dismissal of the charge because the People had appealed the dismissal. After the

trial, the People's appeal was dismissed as moot. Then the defendant appealed and argued the judge did not have the statutory authority to stay the dismissal and go to trial on the dismissed count:

We agree with defendant that County Court improperly stayed its dismissal order. The People had appealed to this Court pursuant to CPL 450.20 (1). In pertinent part, that provision authorizes the People to appeal, as of right, from an order that dismissed an accusatory instrument or a count thereof pursuant to CPL 210.20. Except as provided for in CPL 460.40, the taking of an appeal from a judgment, sentence or order does not automatically stay the execution thereof. With respect to appeals by the People to an intermediate appellate court, an automatic stay results only in the case of an appeal pursuant to CPL 450.20 (1-a) "from an order reducing a count or counts of an indictment or dismissing an indictment and directing the filing of a prosecutor's information" or an appeal pursuant to CPL 450.20 (1) "from an order dismissing a count or counts of an indictment charging murder in the first degree" (CPL 460.40 [2]). Plainly, none of those circumstances are present. * * *

… [T]here was no statutory authorization for a stay of County Court's dismissal order. Without a stay, the bench trial should not have included the charge of promoting prison contraband in the first degree, and, thus, there should have been no occasion for defendant to be convicted of the lesser included offense of promoting prison contraband in the second degree. Accordingly, we vacate that conviction. People v Felli, 2022 NY Slip Op 04192, Third Dept 6-30-22

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

CRIMINAL LAW, BRADY MATERIAL.

ALTHOUGH INFORMATION PROVIDED FOUR DAYS BEFORE TRIAL PURSUANT TO A DEFENSE SUBPOENA INCLUDED BRADY MATERIAL, THE MAJORITY CONCLUDED THE DEFENSE HAD A MEANINGFUL OPPORTUNITY TO USE THE INFORMATION TO CROSS-EXAMINE THE PEOPLE'S WITNESSES; THE DISSENTER DISAGREED (THIRD DEPT).

The Third Department, over a dissent, determined that the People's failure to turn over Brady material in this sexual-offense prosecution, which the defense received four days before trial pursuant to a subpoena, did not require reversal:

"'[W]hile the People unquestionably have a duty to disclose exculpatory material in their control,' a defendant's constitutional right to a fair trial is not violated when, as here, he [or she] is given a meaningful opportunity to use the allegedly exculpatory material to cross-examine the People's witnesses or as evidence during his [or her] case" … .. Defendant, by way of a subpoena, received the records from the victim's evaluation four days before trial. Defendant asserts that these records contain two pieces of allegedly exculpatory information. The first is that a physical examination of the victim, performed three months after the incident, was "normal" and did not reveal any corporeal injury. The second is that the victim, during an interview related to the physical examination, disclosed allegations of prior sexual abuse by two different individuals, which defendant asserts were fabricated.

From the dissent:

… [I]n my view, the withheld evidence was clearly material and defendant was prejudiced. As a result of the Brady violation, defendant was denied an opportunity to pursue other strategies with defense counsel. He was denied, among other things, the opportunity to investigate and interview other potential defense witnesses well in advance of trial, or to develop a more detailed argument on the issue of whether he could cross-examine the victim and call certain witnesses without running afoul of the Rape Shield Law (see CPL 60.42). With more time, he also could have called the examining physician or retained his own medical expert to review the records. Learning of the existence of potential witnesses such as the victim's brother and the mother's landlord a mere four days before trial

provided defendant no opportunity to locate and interview these witnesses and possibly incorporate their testimony into his defense. Moreover, as County Court noted, defendant, under these circumstances, was under no obligation to seek an adjournment of the trial. People v Sherwood, 2022 NY Slip Op 02455, Third Dept 4-14-22

Practice Point: Although the Brady material was not provided until four days before trial pursuant to a defense subpoena, reversal was not required because the defense had a meaningful opportunity to use the material in the cross-examination of the People's witnesses. The dissenter disagreed.

CRIMINAL LAW, DEPRAVED INDIFFERENCE MURDER, VEHICLE AND TRAFFIC LAW.

THE INTOXICATED DEFENDANT'S DRIVING WHEN HE FLED FROM THE POLICE, WHILE RECKLESS, DID NOT DEMONSTRATE DEPRAVED INDIFFERENCE; DEPRAVED INDIFFERENCE MURDER CONVICTION NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE; CONVICTION REDUCED TO MANSLAUGHTER (THIRD DEPT).

The Third Department, reducing defendant's conviction from depraved indifference murder to manslaughter, over a dissent, determined that the intoxicated defendant's driving when fleeing from the police did not evince a complete disregard for the safety of others. Therefore the depraved indifference murder conviction was against the weight of the evidence:

… [T]he credible evidence at trial made clear that defendant was extremely intoxicated, but his driving prior to police pursuit demonstrated that he was aware of his surroundings, obeyed multiple traffic signals and responded to the alerts of other drivers. Although he was traveling at an exceptionally high rate of speed during the pursuit, he did so "on a roadway designed to accommodate greater rates of speed than residential roads, at an hour when lighter traffic conditions predominated" … , and there is no evidence that he failed to abide by any traffic signals while he fled or that any vehicles were forced to pull over or move out of his way … . According deference to the jury's credibility determinations,

defendant did partially enter the lane of oncoming traffic for brief periods of time, but such "episodic" conduct stands in stark contrast to cases where the defendant traveled in an oncoming lane "as part of a deadly game" … . Defendant in fact largely chose to evade police not by weaving in and out of the oncoming lane but instead by driving on a wide, paved shoulder, and, even if his "attempted escape [was] carried out in a reckless manner," he may "simultaneously intend to flee police and avoid striking other cars" … . "No contact occurred between [defendant's] vehicle and any other vehicle before the accident" … , and the limited evidence of his proximity to other vehicles prior to the collision falls short of establishing the sort of "narrow[] miss[es]" the disregard of which could be some evidence of depraved indifference … . People v Williams, 2022 NY Slip Op 03945, Third Dept 6-16-22

Practice Point: Here the intoxicated defendant acted recklessly in fleeing from the police, but his driving did not evince a depraved indifference to the safety of other drivers. For the most part defendant followed the rules of the road and avoided other vehicles. Therefore the depraved indifference murder conviction was not supported by the weight of the evidence. Conviction reduced to manslaughter.

CRIMINAL LAW, JUDGES, ATTORNEYS, CONFLICT OF INTEREST.

THE JUDGE'S LAW CLERK WAS THE DISTRICT ATTORNEY WHO PROSECUTED DEFENDANT; THE JUDGE SHOULD NOT HAVE DECIDED DEFENDANT'S MOTION TO VACATE HIS CONVICTION (THIRD DEPT).

The Third Department, reversing County Court, determined defendant's motion to vacate his conviction should not have been considered by the judge whose law clerk was the District Attorney at the time of defendant's conviction:

As one of the grounds raised in his CPL article 440 motion, defendant argued that he was deprived of his right to appear before the grand jury due to the actions of the District Attorney. The parties do not dispute that, at the time that defendant's CPL article 440 motion was decided, the judge's law clerk was the former District Attorney who had prosecuted defendant. That said, defendant contends that the judge should have recused himself from deciding defendant's motion. We agree.

"Not only must judges actually be neutral, they must appear so as well" … . In view of the law clerk's direct involvement in defendant's case during her tenure as the District Attorney and the allegations made in the CPL article 440 motion about her conduct while she was prosecuting him, as well as taking into account the need to maintain the appearance of impartiality, it was an improvident exercise of discretion for the judge to decide defendant's motion … . People v Roshia, 2022 NY Slip Op 03546, Third Dept 6-2-22

Practice Point: The judge should not have decided defendant's motion to vacate his conviction because the judge's law clerk was the DA who prosecuted defendant.

CRIMINAL LAW, JUDGES, JURY INSTRUCTIONS, JUSTIFICATION DEFENSE, APPEALS.

THE JURY WAS NOT INSTRUCTED TO STOP DELIBERATIONS IF IT FOUND THE JUSTIFICATION DEFENSE APPLIED TO THE TOP COUNT (MURDER); DEFENDANT'S MANSLAUGHTER CONVICTION REVERSED IN THE INTEREST OF JUSTICE (THE ISSUE WAS NOT PRESERVED) (THIRD DEPT).

The Third Department, reversing defendant's manslaughter conviction in the interest of justice, determined the jury instruction on the justification defense was flawed. The instruction did not explain that if the justification defense was the basis for acquittal on the top count (murder here) the jury must not consider the lesser counts:

… Supreme Court inadequately charged the jury regarding his justification defense. Although this issue is unpreserved inasmuch as defendant failed to raise it during the charge conference and did not object to the final charge … , we nevertheless find it appropriate to exercise our interest of justice jurisdiction to take corrective action and reverse defendant's conviction … .

Where … a defendant raises a claim of self-defense, the trial court commits reversible error if it fails to "instruct the jury that, if it finds the defendant not guilty of a greater charge on the basis of justification, it is not to consider any lesser counts" … . This error was compounded by the verdict sheet, which directed

the jury to consider manslaughter in the first degree if the jury found defendant not guilty of murder in the second degree; the verdict sheet did not contain a qualifier if the acquittal of murder was based on the defense of justification … . Even though … "the jury may have acquitted on the top charge[] without relying on defendant's justification defense, it is nevertheless impossible to discern whether acquittal of the top count[] was based on the jury's finding of justification so as to mandate acquittal on the lesser count[] to which justification also applied" … .People v Harris, 2022 NY Slip Op 03548, Third Dept 6-2-22

Practice Point: If the justification defense is to be considered by the jury, the jury must be instructed to stop any further deliberations (re: the lesser counts) if the justification defense is deemed to apply to to the top count. Here the issue was not preserved by an objection to the jury instruction, but the Third Department reversed in the interest of justice.

CRIMINAL LAW, JUDGES, PLEA COLLOQUY.

DEFENDANT'S PLEA COLLOQUY NEGATED AN ESSENTIAL ELEMENT (JURAT) OF HIS PERJURY CONVICTIONS; PLEA VACATED (THIRD DEPT).

The Third Department, vacating the plea to perjury, determined defendant's plea colloquy negated an essential element of the crime:

… [W]e conclude that defendant is entitled to challenge the plea because he made statements during the colloquy that negated an essential element of the crime … . "A person is guilty of perjury in the third degree when he [or she] swears falsely" … . "A person 'swears falsely' when he [or she] intentionally makes a false statement which he [or she] does not believe to be true . . . under oath in a subscribed written instrument" … . An "'[o]ath' includes an affirmation and every other mode authorized by law of attesting to the truth of that which is stated" … . The document in question was captioned as an "Affidavit of Financial Information." The preamble begins with the representation that defendant, "being duly sworn, deposes and says the following under penalty of perjury." The following statement is included above defendant's signature: "I have carefully read the foregoing statements contained in this Affidavit of Financial Information. They are true and correct." The document includes defendant's signature and a jurat

completed by defendant's attorney in July 2017 … . The same is true for the amended affidavit signed in August 2017.

During the plea allocution, defendant explained that he received the affidavit from his attorney by e-mail "and then [he] filled it out on e-mail as well and sent it right back to him." No statement was made that the attorney actually administered an oath to defendant before he signed the affidavits. Given defendant's limited explanation of the affidavit sequence, County Court was obligated to further inquire as to the oath element before accepting the plea … . People v Marone, 2022 NY Slip Op 03543, Third Dept 6-2-22

Practice Point: Here the defendant's plea colloquy negated an essential element of the crime.. The judge should have inquired further before accepting the plea. Plea vacated.

CRIMINAL LAW, JUDGES, PRONOUNCE SENTENCE.

THE SENTENCING JUDGE DID NOT SEPARATELY PRONOUNCE A SENTENCE FOR EACH CONVICTION; MATTER REMITTED (THIRD DEPT).

The Third Department, remitting the matter for resentencing, noted sentencing judge did not pronounce sentence separately for the two counts:

… [W]e are … obliged to remit for resentencing. The sentencing transcript reflects that County Court imposed a single sentence upon defendant and "failed to pronounce sentence separately on each of the two counts [of] which [she was convicted], as required by CPL 380.20" … . As a result, the matter must be remitted so that County Court can pronounce sentence on each count … . People v Robbins, 2022 NY Slip Op 03549, Third Dept 6-2-22

Practice Point: A sentencing judge must pronounce a sentence separately for each conviction.

CRIMINAL LAW, JUSTIFICATION DEFENSE.

THE EVIDENCE DEMONSTRATED THE DEFENDANT PUNCHED THE POLICE OFFICER AFTER THE DEFENDANT WAS SPRAYED IN THE FACE WITH PEPPER SPRAY; THE JURY SHOULD HAVE BEEN INSTRUCTED ON THE JUSTIFICATION DEFENSE TO THE ASSAULT CHARGE; TWO JUSTICE DISSENT (THIRD DEPT).

The Third Department, reversing defendant's conviction and ordering a new trial, over a two-justice dissent, determined the justification-defense jury instruction should have been given in this assault case. The defendant punched a police officer after the defendant was sprayed in the face with pepper spray:

… [T]he People introduced into evidence a video recording of the assault, in which defendant can clearly be seen punching a police sergeant after defendant is sprayed in the face with pepper spray. Testimony revealed, and the video corroborated, that the pepper spray was deployed because defendant was refusing to take off his shoes and change into footwear provided by the jail so that an officer could finish searching him before bringing him into the jail. However, the video depicts a very brief time period between the initial directive for defendant to remove his footwear and the deployment of the pepper spray. Based on this fact, combined with other circumstances surrounding the incident, we find that there is a reasonable view of the evidence that the use of the pepper spray constituted excessive force in this scenario. People v Heiserman, 2022 NY Slip Op 02588, Third Dept 4-21-22

Practice Point: Here there was evidence that the police officer's spraying defendant in the face with pepper spray constituted the use of excessive force. Defendant punched the police officer after the defendant was sprayed and was charged with assault. The failure to instruct the jury on the justification defense was reversible error. Two dissenters disagreed.

CRIMINAL LAW, JUSTIFICATION DEFENSE.

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CRIMINAL LAW, MIRANDA.

AFTER TRIGGERING A SECURITY ALARM AT A SPORTING GOODS STORE, DEFENDANT WAS DETAINED IN THE STORE FOR HALF AN HOUR IN THE PRESENCE OF POLICE OFFICERS WHOSE QUESTIONS WERE NOT CONFINED TO THE PETIT LARCENY INVESTIGATION RE: AMMUNITION, BUT RATHER RELATED TO DEFENDANT'S POSSESSION OF FIREARMS; DEFENDANT'S UNWARNED STATEMENTS SHOULD HAVE BEEN SUPPRESSED; CONVICTION REVERSED (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined the questioning by the police when defendant was still in a sporting goods store where he allegedly attempted to steal ammunition constituted custodial interrogation in the absence of the Miranda warnings. The statements made by the defendant at the sporting goods store should have been suppressed:

The entire interaction at the sporting goods store was captured by the various body cameras worn by the police involved. Viewing same, it is evident that, throughout most of the interaction, four police officers were present at the sporting goods store, with at least one officer positioned between defendant and the exit. More importantly, shortly after the police arrived, defendant had been told to empty his pockets and place all of his personal property on the counter. Defendant did so. While being detained by the police, defendant asked the police multiple times if he could retrieve his possessions. The police denied each of these requests. … Additionally, the questions posed by the police to defendant exceeded that necessary for investigation. Many of their inquiries were not limited to the petit larceny, the allegation in question, but instead focused on firearms that defendant may have possessed, their location, caliber and defendant's intent as to his usage of same. With the benefit of viewing the interaction between the police and defendant, and considering all the circumstances involved, we cannot say that a reasonable person would have felt free to leave … . People v Abdullah, 2022 NY Slip Op 04045, Third Dept 6-23-22

Practice Point: Defendant triggered a security alarm in a sporting goods store when he attempted to steal ammunition. He was detained by police in the store for half an hour and was asked questions about his possession of firearms. Because the

questions exceeded the scope of the petit larceny investigation and were not preceded by the Miranda warnings, defendant's statements should have been suppressed. His conviction was reversed.

CRIMINAL LAW, MOTION TO VACATE CONVICTION.

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

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

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

demanding a hearing on that issue with defendant … . People v Buckley, 2022 NY Slip Op 04197, Third Dept 6-30-22

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

CRIMINAL LAW, PLEA ALLOCUTION.

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

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

Penal Law § 265.03 (3) requires the possession of a "loaded firearm," meaning "an operable gun with either live ammunition in the gun or held on [the defendant's] person" with the gun … . … [D]efendant negated that element at sentencing when he stated that the handgun in question was in his bedstand drawer, not on his person, and that it "wasn't loaded." At that point, it was incumbent upon County Court to either "conduct a further inquiry or give . . . defendant an opportunity to withdraw the plea" … . People v Reese, 2022 NY Slip Op 04194, Third Dept 6-30-22

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

CRIMINAL LAW, TERRORISTIC THREAT.

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

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

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

… [T]he evidence fails to establish that defendant "cause[d] a reasonable expectation or fear of the imminent commission" of an offense under the factual circumstance presented here (Penal Law § 490.20 [1]). Neither the first investigator nor the supervisor took any actions to warn the correctional facility or any other agency or individuals of the threat. While a notice was eventually issued, this was not done until well after the initial threat was made. None of the witnesses provided any testimony that they or anyone else had a reasonable expectation or fear that the threat would be imminently carried out, nor did their actions indicate any such belief. People v Santiago, 2022 NY Slip Op 04196, Third Dept 6-30-22

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

CRIMINAL LAW, TRAFFIC ACCIDENTS, CRIMINAL NEGLIGENCE.

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

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

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

… [T]he Court of Appeals has held that "[t]he unexplained failure of a driver to see the vehicle with which he [or she] subsequently collided does not, without more, support a conviction for the felony of criminally negligent homicide" … . People v Faucett, 2022 NY Slip Op 04195, Third Dept 6-30-22

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

DISCIPLINARY HEARINGS (INMATES), DUE PROCESS.

PETITIONER-INMATE WAS DENIED DUE PROCEES WHEN HE WAS NOT ALLOWED TO VIEW A VIDEO OF THE INCIDENT WHICH RESULTED IN THE MISBEHAVIOR CHARGE; NEW HEARING ORDERED (THIRD DEPT).

The Third Department, annulling the petitioner-inmate's misbehavior determination, held that the petitioner was denied due process by not being given the opportunity to see the video of the incident:

"[A]n [incarcerated individual] 'should be allowed to call witnesses and present documentary evidence in his [or her] defense when permitting him [or her] to do so will not be unduly hazardous to institutional safety or correctional goals'" … . The videotaped incident occurred while petitioner was incarcerated at a different facility. The Hearing Officer informed petitioner that, due to the format of the video, it could not be played in the hearing room and could only be played on equipment located in a secure area of the facility from which petitioner was barred entry. The Hearing Officer stated that he had viewed the video in the secure area, and he described what he believed the video depicted. Petitioner objected, arguing that he was being prevented from providing exculpatory testimony as to what occurred in the video. The Hearing Officer denied the objection, stating that 'the video speaks for itself,' and the record reflects that he relied, in part, on the video in reaching the determination of guilt. Contrary to respondent's contention, the explanation that the only video equipment capable of playing the video was in a secure area, without any apparent attempt to either move the equipment or find

other equipment capable of playing the video for petitioner, did not articulate institutional safety or correctional goals sufficient to justify denying petitioner's right to reply to evidence against him … .. Similarly, the fact that petitioner may have seen the video at his former facility during a prior hearing on these charges before a different Hearing Officer, a hearing that resulted in a determination that was administratively reversed, does not excuse the denial of petitioner's right to view the video during the new hearing and offer exculpatory testimony as to its contents … .

As to the remedy, we conclude that a new hearing, not expungement, is appropriate. Matter of Proctor v Annucci, 2022 NY Slip Op 03298, Third Dept 5-18-22

Practice Point: Prison inmates charged with misbehavior have due process rights. Here the petitioner-inmate was entitled to see the video which allegedly depicted the charged misbehavior. The determination was annulled and a new hearing ordered.

DISCIPLINARY HEARINGS (INMATES), PRISONERS HAVE DUE PROCESS RIGHTS.

DESPITE THE APPARENT FAILURE TO PRESERVE A VIDEO OF A MEETING DURING WHICH PETITIONER ALLEGEDLY PLANNED A DEMONSTRATION AT THE PRISON, THE DETERMINATION FINDING PETITIONER GUILTY OF PLANNING THE DEMONSTRATION WAS CONFIRMED; THE DISSENT ARGUED PETITIONER WAS DEPRIVED OF DUE PROCESS BY THE FAILURE TO TURN OVER THE VIDEO, WHICH HAD BEEN REVIEWED BY THE OFFICER WHO PREPARED THE MISBEHAVIOR REPORT (THIRD DEPT).

The Third Department confirmed the determination finding petitioner-inmate guilty of urging others to participate in a demonstration at the prison. There was a video of the meeting where the demonstration was allegedly planned. An officer who witnessed the meeting and testified about it apparently viewed the video. Petitioner made timely requests for the video, but it was never provided. The

dissent argued the failure to retain and provide the video of the alleged meeting required that the determination be annulled:

From the dissent:

The sergeant and the correction officer have described two distinctly different meetings, one involving 12 people, the other 30 to 40 … . This discrepancy heightens the relevance of the … video, as does the fact that the sergeant viewed the video and the Hearing Officer was uncertain whether that viewing occurred before or after the undefined retention period expired. Complicating matters, the Hearing Officer noted the three-week delay between the … meeting and issuance and service of the misbehavior report on petitioner.

… In a situation such as this, where there is an extended delay in issuing a misbehavior report and the author of that report has in fact reviewed a video, it is incumbent upon the correctional facility to preserve that evidence … . The failure to do so here compromised petitioner's due process right to a fair evidentiary hearing … . That is particularly so in view of the sergeant's affirmative testimony as to what ostensibly happened in the E-yard on May 29, 2020. It is further evident that the Hearing Officer should have, but failed to, inquire further as to the existence of the video or the circumstances of its deletion … Matter of Headley v Annucci, 2022 NY Slip Op 03166, Third Dept 5-12-22

Practice Point: Inmates subjected to disciplinary actions by prison authorities have due process rights. Here the dissent argued that the failure to preserve and provide a video of the meeting at which petitioner-inmate allegedly planned a prison demonstration deprived him of his due process rights. The dissenter would have annulled the determination on that ground.

EDUCATION-SCHOOL LAW, TRANSPORTATION TO PRIVATE SCHOOLS.

THE EDUCATION LAW PERMITS, BUT DOES NOT REQUIRE, SCHOOL DISTRICTS TO PROVIDE TRANSPORTATION TO STUDENTS ATTENDING NONPUBLIC SCHOOLS WHEN THE PUBLIC SCHOOLS ARE NOT IN SESSION (THIRD DEPT).

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Ceresia, determined that Education Law 3635 should not be interpreted to require school districts to provide transportation to nonpublic schools when public schools are not in session:

As is relevant here, Education Law § 3635 (1) (a) states that "[s]ufficient transportation facilities . . . shall be provided by the school district for all the children residing within the school district to and from the school they legally attend, who are in need of such transportation because of the remoteness of the school to the child or for the promotion of the best interest of such children." * * *

We reject Supreme Court's broad view of the statute not only because it runs afoul of the legislative history, but also because it would lead to unreasonable results … . To be sure, the Legislature could not have intended to require school districts to transport nonpublic school students in the summer, on weekends, on state or federal holidays, or on days when public schools are closed for weather-related or other emergency reasons, none of which would be foreclosed by Supreme Court's interpretation. … [W]e hold that Education Law § 3635 (1) (a) permits, but does not require, school districts outside New York City to transport nonpublic school students to and from school on days when the public schools are closed. Matter of United Jewish Community of Blooming Grove, Inc. v Washingtonville Cent. Sch. Dist., 2022 NY Slip Op 03566, Third Dept 6-2-22

Practice Point: Here the legislative history of Education Law 3635 was consulted to determine that school districts are permitted, but not required, to provide transportation to nonpublic-school students went the public schools are not in session.

EDUCATION-SCHOOL LAW, PHYSICIAN'S-ASSISTANT LICENSES.

A GRADUATE OF AN ANTIGUA MEDICAL SCHOOL WHO HAD PASSED THE US MEDICAL LICENSING EXAMINATION WAS NOT ENTITLED TO LICENSURE AS A PHYSICIAN'S ASSISTANT IN NEW YORK (THIRD DEPT).

The Third Department determined the appellant, who graduated from a medical school in Antigua (AUA) but was not licensed in New York, was not entitled to a license to practice in New York as a Physician's Assistant (PA):

In processing his application, SED [NYS Department of Education] requested documentation from petitioner that he had graduated from a PA education program and passed the Physician Assistant National Certifying Examination (hereinafter PANCE). Petitioner, who had not satisfied either requirement, objected to providing those credentials, asserting that his medical doctorate education and successful completion of all four steps of the United States Medical Licensing Examination (hereinafter USMLE) qualified him for a PA license. * * *

The record supports a finding that, despite significant overlap in basic topics tested in the USMLE and the PANCE, the PANCE specifically tests PA-related practice topics. Noting that professional exam questions "must be closely aligned with the specific knowledge and skills needed in the practice of the profession," SED concluded that, "[w]hile many of the broad medical content categories included on the PANCE can be found on the USMLE, the USMLE does not present them within the context of the PA profession and specific PA job tasks" and, additionally, "a portion of the PANCE covers topics related specifically to PA professional practice, which are not covered at all on the USMLE." Matter of Hammonds v New York State Educ. Dept., 2022 NY Slip Op 03959, Third Dept 6-16-22

Practice Point: The topics tested by the US Medical Licensing Examination (USMLE) are not identical to the topics tested by the Physician Assistant National Certifying Examination (PANCE). Therefore passing the USMLE did not entitle this applicant to licensure as a physician's assistant in New York.

EMPLOYMENT LAW, CIVIL SERVICE LAW, NOTICE OF CHARGES.

PETITIONER WAS CHARGED WITH MAKING A COMMENT TO A FELLOW EMPLOYEE AT A SOCIAL GATHERING, WAS FOUND GUILTY AND WAS TERMINATED; THE EMPLOYEE TESTIFIED THE REMARK WAS MADE AT THE WORKPLACE; THEREFORE PETITIONER WAS FOUND GUILTY OF CONDUCT THAT WAS NEVER CHARGED; DETERMINATION ANNULLED (THIRD DEPT).

The Third Department, annulling the determination terminating petitioner's employment with the state, found that petitioner's due process rights were violated because he was found guilty of conduct that was never charged. Petitioner was charged with making a comment to a fellow employee at a social gathering. But the employee testified the remark was made at the workplace:

Pursuant to Civil Service Law § 75 (1), a civil service employee "shall not be removed or otherwise subjected to any disciplinary penalty . . . except for incompetency or misconduct shown after a hearing upon stated charges." "The standard of review of such a determination made after a disciplinary hearing is whether it is supported by substantial evidence" … . "The first fundamental of due process is notice of the charges made. This principle equally applies to an administrative proceeding for even in that forum no person may lose substantial rights because of wrongdoing shown by the evidence, but not charged" … Fundamentally, the determination made in a disciplinary proceeding "must be based on the charges made" and it is error to find a public employee guilty of uncharged specifications of misconduct and impose a penalty thereon … . Matter of Kiyonaga v New York State Justice Ctr. for the Protection of People with Special Needs, 2022 NY Slip Op 02850, Third Dept 4-28-22

Practice Point: Pursuant to the Civil Service Law, a state employee charged with official misconduct is entitled to due process, including notice of the charges. Here the petitioner was charged with making a comment to a fellow employee at a social gathering. The employee testified the remark was made in the workplace, conduct that was never charged. Petitioner was improperly found guilty of misconduct that was never charged and was terminated. The determination was annulled.

FAMILY LAW, CUSTODY MODIFICATION.

THE PETITIONER SEEKING TO MODIFY A CUSTODY ARRANGEMENT MUST MAKE A THRESHOLD SHOWING THAT THERE HAS BEEN A CHANGE IN CIRCUMSTANCES SINCE THE LAST CUSTODY ORDER WAS ISSUED; HERE, FATHER'S WANTING MORE PARENTING TIME TO DEVELOP A CLOSER RELATIONSHIP WAS NOT A CHANGED CIRCUMSTANCE (THIRD DEPT).

The Third Department, reversing Family Court, determined father did not meet his burden of showing changed circumstances warranting an increase in parenting time. Father's simply wanting more parenting time is not a changed circumstance:

Family Court found that a change in circumstances existed — namely, that the father wanted to have a closer relationship with the child and the amount of parenting time provided in the January 2019 order was insufficient to develop that relationship. Even crediting the father's testimony, the father's mere dissatisfaction with the amount of parenting time provided in the January 2019 order and the desire for more time do not constitute a change in circumstances … .. Furthermore, the record fails to show any "new developments or changes that have occurred since the [January 2019] order was entered" … . Accordingly, because the father did not satisfy his threshold burden of establishing a change in circumstances, the modification petition should have been dismissed … . Matter of Joshua KK. v Jaime LL., 2022 NY Slip Op 02847, Third Dept 4-28-22

Practice Point: A party seeking a modification of a custody order must make a threshold showing of changed circumstances. Here father's wanting more parenting time to develop a closer relationship was not a changed circumstance. Therefore father's petition should have been dismissed.

FAMILY LAW, JUVENILE DELINQUENCY.

THIS JUVENILE DELINQUENCY PROCEEDING STEMMED FROM ALLEGATIONS RESPONDENT COMMITTED VIOLENT ACTS AGAINST THE MOTHER OF HIS CHILD; THE PROCEEDING SHOULD NOT HAVE BEEN DISMISSED "IN FURTHERANCE OF JUSTICE;" CRITERIA EXPLAINED (THIRD DEPT).

The Third Department, reversing Family Court, determined this juvenile delinquency proceeding should not have been dismissed "in furtherance of justice." The respondent was charged with acts of violence against the mother of his child:

Dismissal in the furtherance of justice is an extraordinary remedy that must be employed "sparingly, that is, only in those rare cases where there is a compelling factor which clearly demonstrates that prosecution . . . would be an injustice" … . In determining such a motion, the statutory factors which must be considered, individually and collectively, are as follows: "(a) the seriousness and circumstances of the crime; (b) the extent of harm caused by the crime; (c) any exceptionally serious misconduct of law enforcement personnel in the investigation and arrest of the respondent or in the presentment of the petition; (d) the history, character and condition of the respondent; (e) the needs and best interest of the respondent; (f) the need for protection of the community; and (g) any other relevant fact indicating that a finding would serve no useful purpose" … . "At least one of these factors must be readily identifiable and sufficiently compelling to support the dismissal" …

According to the sworn statement of the victim — the mother of respondent's child — respondent became verbally abusive toward her when she got pregnant, and physically abusive after their child was born, including pinching, punching and slapping her, once when she was holding the child. On the date in question, respondent threw a full, eight-ounce baby bottle at the victim, which hit her in the face, when she asked him to feed the child, who was crying. The victim stated that, although she was bleeding heavily, respondent and his father discouraged her from seeking medical attention. When she eventually did go to the hospital the next day, a cut on her face was glued shut by a doctor and she was told to return for X rays after the swelling had abated. The victim indicated that she felt unsafe living with

the child in the home of respondent and his father. Matter of James JJ., 2022 NY Slip Op 03555, Third Dept 6-2-22

Practice Point: The allegations of violence in this juvenile delinquency proceeding were deemed too serious to warrant dismissal of the juvenile delinquency proceeding "in furtherance of justice." This remedy should be used sparingly and at least one of the statutory factors for dismissal in furtherance of justice must be readily identifiable.

FAMILY LAW, MODIFICATION OF CUSTODY.

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

The Third Department, reversing (modifying) Family Court, determined father had demonstrated a change in circumstances sufficient to support a modification of the custody arrangement. The original custody order provided that the 50/50 custody sharing would change to mother's having primary custody when the child started school. Father explained that mother's primary custody was necessary because his work prevented him from taking the child to and from school. However, father had since changed jobs and moved to the school district where the child attended to school. The Third Department ordered a "best interests of the child" hearing, including a Lincoln hearing, and ordered the appointment of a different attorney for the child because the present attorney had expressed an opinion about the appropriate custody arrangement:

"A party seeking to modify a prior order of custody must show that there has been a change in circumstances since the prior order and, then, if such a change occurred, that the best interests of the child would be served by a modification of

that order" … . According to the father's petition, the sole reason for the parties' initial agreement to decrease the father's parenting time during the school year was because, at the time of the agreement, the father's work schedule prevented him from transporting the child to and from school. According to the father's hearing testimony, that circumstance had since changed. The father testified that, while the 50/50 custody arrangement was still in effect, he obtained a new job with a higher salary and more flexible hours, and bought a house in what was at that time the child's school district, such that the school transportation issue had been alleviated. Matter of Thomas SS. v Alicia TT., 2022 NY Slip Op 04213, Third Dept 6-30-22

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

FAMILY LAW, NEGLECT.

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

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

… [W]e find that petitioner failed to establish that respondent's ill-advised conduct placed the children at risk of anything beyond, "at most, possible harm" … . To this point, respondent testified that her youngest children were in age-appropriate sleeping arrangements that presented no inherent danger resulting from

respondent's inebriated state … . Further, although there was a period when the children were no longer supervised by respondent when she was taken to the hospital, the testimony reveals that shelter staff were watching the children until petitioner's supervisor arrived and took custody of them, and there is no indication that they were in any danger during this period of time … .

… [T]he record is devoid of any proof that the children were upset or suffered any emotional harm at any point during the incident … . Matter of Hakeem S. (Sarah U.), 2022 NY Slip Op 04214, Third Dept 6-30-22

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

FAMILY LAW, VISITATION.

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

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

Although Family Court found that both the mother and the father "testified credi[]bly that relations between the mother and child ha[d] deteriorated" — a determination that was borne out by the testimony — the "denial of visitation to a noncustodial parent is a drastic remedy" … and the record does not contain "substantial proof" that continued supervised visitation "would be harmful to the child" … . We are mindful of the father's testimony that the child had returned home from a visit with bent glasses and marks on his leg. However, Family Court did not make any factual findings regarding these allegations, and the maternal grandfather — who drove the child home from that visit — denied ever observing the child's glasses to be "messed up" or witnessing marks on the child's legs. On this record, there is an insufficient basis to conclude that the bent glasses and

marks observed by the father were caused by the mother's conduct. Moreover, while the mother herself acknowledged that there were issues in the relationship between her and the child, she indicated that this stemmed from the child's difficult behavior and her concern about the child making racist comments in front of his three-year-old half-sibling. There was also testimony regarding the positive aspects of their relationship and the maternal grandfather, who did all the driving, corroborated that the child generally seemed content during visits. Notwithstanding the father's testimony to the contrary, we conclude that the evidence presented was not sufficiently compelling and substantial to justify a wholesale suspension of the mother's supervised visitation … . Matter of William V. v Christine W., 2022 NY Slip Op 04199, Third Dept 6-3022

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

FAMILY LAW, JUDGES, CUSTODY MODIFICATION.

FATHER'S PETITION FOR A MODIFICATION OF CUSTODY SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (THIRD DEPT).

The Third Department, reversing Family Court, determined the court should have held a hearing on father's petition for a modification of custody:

… [T]he father alleged … that, since the prior order, he has relocated to a small, quiet apartment but now has a lengthy commute each way to exercise his parenting time, the child wishes to spend more time with him and the prior order provides him with a limited amount of a parenting time when considering the progress he has made to care for the child. Family Court sua sponte dismissed the father's petition without prejudice, finding that the father failed to allege a sufficient change in circumstances. The father appeals.

Family Court erred in dismissing the petition without holding a hearing. "A parent seeking to modify a prior order of custody and visitation is required to demonstrate that a change in circumstances has occurred since entry thereof that then warrants the court engaging in an analysis as to the best interests of the child" … . "While

not every petition in a Family Ct Act article 6 proceeding is automatically entitled to a hearing" … , "[g]enerally, where a facially sufficient petition has been filed, modification of a Family Ct Act article 6 custody order requires a full and comprehensive hearing at which a parent is to be afforded a full and fair opportunity to be heard" … . Matter of Neil VV. v Joanne WW., 2022 NY Slip Op 03557, Third Dept 6-2-22

Practice Point: Where, as here, a facially sufficient petition for a modification of custody had been filed, petitioner is entitled to a hearing.

FAMILY LAW, SOCIAL SERVICES LAW, PERMANENT NEGLECT, TERMINATION OF PARENTAL RIGHTS.

FOR PURPOSES OF A PERMANENT NEGLECT/TERMINATION-OF-PARENTAL-RIGHTS PROCEEDING, DIRECT PLACEMENT OF THE CHILD WITH A SUITABLE PERSON MEETS THE DEFINITION OF PLACEMENT IN THE "CARE OF AN AUTHORIZED AGENCY" SUCH THAT A PERMANENT NEGLECT PROCEEDING IS AVAILABLE AFTER DIRECT PLACEMENT FOR ONE YEAR; ALTHOUGH RESPONDENT'S PARENTAL RIGHTS HAD BEEN TERMINATED WHEN THIS APPEAL WAS CONSIDERED, THE "EXCEPTION TO THE MOOTNESS DOCTRINE" WAS INVOKED (THIRD DEPT).

The Third Department, considering the appeal as an exception to the mootness doctrine in this neglect/termination-of-parental rights proceeding, determined that direct placement of the child with a suitable person met the definition of placement in the "care of an authorized agency" for purposes of the pre-requisite for a permanent neglect proceeding seeking to terminate parental rights. Family Court had ruled placement with a suitable person was not placement in the "care of an authorized agency" and dismissed the permanent neglect proceeding on that ground. The Third Department, after finding the permanent neglect proceeding should not have been dismissed, went ahead and ruled on the merits, finding that mother had permanently neglected the child:

… [W]e find Family Court's interpretation of Social Services Law § 384-b too narrow and calling for a result that is "unnecessarily circuitous" … and ultimately contrary to the stated legislative intent (see generally Social Services Law § 384-b [1] [a]-[b]). A proceeding for termination of parental rights may be originated by an "authorized agency" such as petitioner … , seeking an order for guardianship and custody when a child is a permanently neglected child … . A "permanently neglected child" is defined as "a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of either at least one year or [15] out of the most recent [22] months . . . substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child" … .

Regarding the phrase "care of an authorized agency," courts have consistently held that a direct placement authorized by Family Court, like the order of fact-finding and disposition issued … pursuant to Family Ct Act § 1055, falls within the purview of Social Services Law § 384-b. Matter of Frank Q. (Laurie R.), 2022 NY Slip Op 02843, Third Dept 4-28-22

Practice Point: For purposes of the prerequisite for a permanent neglect/termination-of-parental rights proceeding, a child's direct placement with a suitable person meets the definition of placement in the "care of an authorized agency" such that the permanent neglect proceeding is available after direct placement for one year. Here, the mother's parental rights had been terminated at the time the appeal was considered, but the "exception to the mootness doctrine" was invoked because the issue was deemed likely to recur.

FAMILY LAW. PRENUPTIAL AGREEMENTS.

THE WIFE RAISED QUESTIONS OF FACT ABOUT (1) THE FAIRNESS OF THE NEGOTIATIONS FOR THE PRENUPTIAL AGREEMENT, (2) WHETHER HER ATTORNEY, CHOSEN FOR HER, ENGAGED IN MEANINGFUL NEGOTIATIONS, (3) WHETHER SHE RATIFIED THE AGREEMENT, AND (4) WHETHER SHE WAS ENTITLED TO TEMPORARY MAINTENANCE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the wife raised questions of fact about the fairness of the prenuptial agreement negotiations and whether she ratified the agreement. The wife alleged her husband chose the attorney who represented her merely to ensure she understood the agreement and not to negotiate its terms. In addition, Supreme Court should not have denied the wife's motion for temporary maintenance:

On the last day of negotiations between counsel, the wife averred that she was preparing to travel to Florida with the parties' children. While the communications submitted by the husband in support of his motion indicate that counsel for the parties continued discussing potential changes to the agreement, there is conflicting evidence establishing the extent that the wife was meaningfully involved in those discussions. The wife further averred that the first opportunity she had to review the agreement was in Florida, at which point it was already in its final form. We find that the foregoing facts, if established, raise issues concerning whether the wife was meaningfully represented during the abbreviated negotiations, and also raise an inference that the husband did not intend on engaging in a good faith negotiation of the agreement from the outset, which, if true, would be sufficient to establish overreaching on his part … . …

We further … the husband's contention that the wife ratified the agreement and is therefore foreclosed from challenging its validity. … [I]t is clear that the wife did not begin receiving benefits under the agreement until the husband commenced this divorce action, and she took sufficiently prompt action to challenge the validity of the agreement in the context of this litigation … . …

… Supreme Court improperly denied the wife's cross motion for temporary maintenance. To this end, the wife argues that the maintenance provision of the

agreement must be invalidated for failing to comply with the requirements of Domestic Relations Law former § 236 (B) (5-a) (f). We agree. Spiegel v Spiegel, 2022 NY Slip Op 03778, Third Dept 6-9-22

Practice Point: Here in this divorce action there were questions of fact whether the wife was meaningfully represented in the prenuptial-agreement negotiations and whether she ratified the agreement. In addition, pursuant to the Domestic Relation Law, Supreme Court should have awarded temporary maintenance.

FORECLOSURE, REFEREE'S FAILURE TO HOLD A HEARING.

IN A FORECLOSURE ACTION, THE REFEREE'S FAILURE TO HOLD A HEARING DOES NOT REQUIRE REVERSAL OF THE JUDGMENT OF FORECLOSURE IF THE DEFENDANT HAD THE OPPORTUNITY TO CHALLENGE THE REFEREE'S REPORT BY SUBMITTING EVIDENCE DIRECTLY TO SUPREME COURT (THIRD DEPT).

The Third Department noted that the referee's failure to hold a hearing in a foreclosure action does not require reversal of a judgment of foreclosure if the defendant had an opportunity the challenge the referee's report by submitting evidence directly to Supreme Court:

"CPLR 4313 requires a referee to notify the parties of the date and place for a hearing. However, hearings may be performed either on paper or by the taking of in-court evidence" … . Generally, "'[a]s long as a defendant is not prejudiced by the inability to submit evidence directly to the referee, a referee's failure to notify a defendant and hold a hearing is not, by itself, a basis to reverse a judgment of foreclosure and sale and remit the matter for a hearing and a new determination of amounts owed'" … . This is because "the referee's findings and recommendations are advisory only; they have no binding effect and the court remains the ultimate arbiter of the dispute [as] CPLR 4403 expressly authorizes a court not only to reject the report but to make its own findings, to take or retake testimony or to order a new trial or hearing" … .

Here, defendants were provided with "an opportunity to challenge the referee's report by submitting evidence directly to Supreme Court" upon plaintiff's motion to confirm the referee's report — an opportunity of which they did not avail themselves … .Carrington Mtge. Servs., LLC v Fiore, 2022 NY Slip Op 03951, Third Dept 6-16-22

Practice Point: Although the CPLR requires the referee in a foreclosure action to hold a hearing, the failure to hold the hearing is not reversible error as long as the defendant had the opportunity to challenge the referee's report by submitting evidence directly to Supreme Court.

FREEDOM OF INFORMATION LAW (FOIL), ATTORNEY'S FEES.

HERE, IN THIS FOIL PROCEEDING, THE REQUESTED DOCUMENTS WERE ULTIMATELY PROVIDED AFTER AN INITIAL REFUSAL RENDERING THE ACTION MOOT; THE PETITIONER'S REQUEST FOR AN AWARD OF ATTORNEY'S FEES, HOWEVER, WAS NOT PRECLUDED (THIRD DEPT).

The Third Department determined the award of attorney's fees for a FOIL request is not precluded when the underlying action is rendered moot because the requested documents were ultimately provided (after an initial refusal):

The fact that the proceeding has been rendered moot by the disclosure of the documents does not … preclude petitioner's request for an award of fees … .The Public Officers Law permits an award of "reasonable [counsel] fees and other litigation costs" where the petitioner "has substantially prevailed" in a FOIL proceeding and "when the agency failed to respond to a request . . . within the statutory time frame" … . Under the circumstances, as petitioner included in his petition a request for fees associated with the FOIL application, the matter must be remitted to Supreme Court for a determination of an award of costs and fees pursuant to Public Officers Law § 89 (4) (c) (i). Matter of Lewis v James, 2022 NY Slip Op 04066, Third Dept 6-23-22

Practice Point: If a FOIL request, after an initial refusal to provide the requested documents, is rendered moot by the respondent's ultimately providing the documents, an award of attorney's fees to the petitioner is not precluded.

GOVERNOR, LIEUTENANT GOVERNOR, SALARY INCREASES.

THE CURRENT GOVERNOR AND LIEUTENANT GOVERNOR, AS WELL AS FORMER GOVERNOR CUOMO, ARE NECESSARY PARTIES IN THIS SUIT PURSUANT TO THE STATE FINANCE LAW CHALLENGING THE CONSTITUTIONALITY OF THE SALARY INCREASES FOR THOSE PARTIES (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the action under the State Finance Law challenging the constitutionality of the salary increases for governor and lieutenant governor should have included the current Governor and Lieutenant Governor, as well as former Governor Cuomo, as necessary parties:

CPLR 1001 (a) provides that "[p]ersons . . . who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." When such a person "has not been made a party and is subject to the jurisdiction of the court, the court shall order him [or her] summoned" … . This requirement protects the right to due process by providing such a person the opportunity to be heard before his or her interests are adversely affected … .

… [T]he interests of the Governor and Lieutenant Governor are not necessarily being represented or protected by defendant and his counsel — the Attorney General, who would also typically represent those other state officials … ;. We cannot determine whether the Governor and Lieutenant Governor will necessarily support and integrate defendant's argument that the resolution is constitutional; indeed, they may argue against its constitutionality, to establish precedent that would prevent a potential future intra-term diminution of their salaries. Accordingly, and as the Governor and Lieutenant Governor are subject to its jurisdiction, Supreme Court should have granted defendant's request that those officers be joined as necessary parties and ordered them summoned (see CPLR 1001 [b] …). Arrigo v DiNapoli, 2022 NY Slip Op 02845, Third Dept 4-28-22

Practice Point: Pursuant to CPLR 1001, parties within the jurisdiction of the court must be added as necessary parties if the ultimate ruling could have an adverse effect on them.

INSURANCE LAW, ABORTION, CONSTITUTIONAL LAW, RELIGION.

A RECENT US SUPREME COURT RULING DOES NOT AFFECT THE NYS COURT OF APPEALS RULING THAT REGULATIONS REQUIRING HEALTH INSURANCE POLICIES TO COVER "MEDICALLY NECESSARY ABORTIONS" BUT WHICH EXEMPT POLICIES PROVIDED BY "RELIGIOUS EMPLOYERS" DO NOT IMPAIR THE FREE EXERCISE OF RELIGION (THIRD DEPT).

The Third Department, on remand from the US Supreme Court, determined the Supreme Court's recent ruling in Fulton v Philadelphia [141 S Ct 1868] did not overturn the NYS Court of Appeals ruling in Catholic Charities of Diocese of Albany [7 NY3d 510]. In Catholic Charities the Court of Appeals held the requirement that health insurance policies cover "medically necessary abortions" but which exempts policies provided by "religious employers" did not impair the free exercise of religion:

… Catholic Charities "is not directly inconsistent with the rationale employed by the United States Supreme Court in any subsequent case, and is thus binding on us as an intermediate appellate court" … .Roman Catholic Diocese of Albany v Vullo, 2022 NY Slip Op 03550, Third Dept 6-2-22

Practice Point: The NYS Court of Appeals ruling In Catholic Charitie [7 NY3d 510] approving the requirement that health insurance policies cover "medically necessary abortions" (with an exemption for "religious employers") was not affected by the recent ruling by the US Supreme Court in Fulton v Philadelphia [141 S Ct 1868].

MEDICAL MALPRACTICE, NEGLIGENCE, LIABILITY OF REHABILITATION SERVICE FOR RAPE AND KIDNAPPING BY CLIENT.

DEFENDANT REHABILITATION AND RECOVERY SERVICES DID NOT DEMONSTRATE IT DID NOT HAVE A DUTY TO PREVENT A PERSON UNDER ITS SUPERVISION AND CARE FROM HARMING MEMBERS OF THE GENERAL PUBLIC; PLAINTIFF WAS KIDNAPPED AND RAPED BY A PERSON WITH A VIOLENT PAST WHO WAS UNDER DEFENDANT'S CARE AND SUPERVISION (THIRD DEPT).

The Third Department determined the defendant Rehabilitation Support Services' (RSS's) motion for summary judgment in this negligence, negligent supervision, medical malpractice, negligent infliction of emotional distress action was properly denied. Plaintiff was kidnapped and raped by Jose Marlett who was under the care and supervision provided by RSS, a rehabilitation and recovery program for persons who have mental illness and substance abuse issues:

Marlett had been an outpatient client at RSS for approximately one year and had been a resident in its apartment program for approximately one to three months prior to his receipt of personal recovery services. Marlett's application for RSS services included his diagnoses of bipolar disorder and schizoaffective disorder, and a history of delusions, hallucinations, paranoia, suicidal and homicidal ideations and incarceration. RSS identified Marlett's risks as suicide and violence, and noted that he had a history of physical altercations, threatening and attempting to harm others and was a danger to himself and others. In order to receive RSS services, Marlett was required to forego other psychiatric and mental health treatment and RSS essentially became the exclusive provider of Marlett's medication management, clinical counseling, therapy and psychiatric assessments. * * *

… [W]e find that defendants failed to prove a lack of duty to take reasonable steps to prevent Marlett from harming members of the general public. * * *

[Re: medical malpractice] Defendants failed to submit a competent expert medical opinion, instead submitting a speculative and conclusory affidavit by its

nonphysician director that failed to provide any factual basis showing that they complied with professional standards … .* * *

"A cause of action for negligent infliction of emotional distress generally requires the plaintiff to show a breach of a duty owed to him or her which unreasonably endangered his or her physical safety, or caused him or her to fear for his or her own safety" … . "Unlike intentional infliction of emotional distress, … the Court of Appeals has not stated that extreme and outrageous conduct is an essential element of a cause of action to recover damages for negligent infliction of emotional distress" … . Doe v Langer, 2022 NY Slip Op 03957, Third Dept 6-15-22

Practice Point: Here defendant provided rehabilitative and recovery services for persons with mental illness and substance abuse problems. A person, with a violent past, was under defendant's care and supervision when he kidnapped and raped plaintiff. Defendant did not demonstrate that it did not have a duty to protect members of the general public from a violent person under its care and supervision.

MENTAL HYGIENE LAW, APPOINTMENT OF GUARDIANS.

THE MODIFICATION OF THE GUARDIANSHIP ORDER MUST BE IN THE BESTS INTEREST OF THE DEVELOPMENTALLY DISABLED PERSON; HERE THE APPOINTMENT OF STEPFATHER AS LIMITED COGUARDIAN CONSTITUTED A CHANGE THAT WAS NOT IN THE DISABLED PERSON'S BEST INTERESTS BECAUSE CONSISTENCY IN ROUTINE AND REGIMEN WAS PARAMOUNT (THIRD DEPT).

The Third Department, modifying Surrogate's Court, determined the appointment of the stepfather as limited cogurdian of Jonathan JJ, a developmentally disable adult, was not in Jonathan's best interests. Jonathan had apparently thrived with his father as guardian and his stepfather had not seen Jonathan since 2009:

… Surrogate's Court granted the father's petition for coguardianship of the person and property of Jonathan JJ. along with the Commissioner. The court also

appointed the stepfather as a limited coguardian with the ability to attend only the medical appointments of Jonathan JJ. The father appeals, arguing that Surrogate's Court erred in appointing the stepfather as a limited coguardian.

In order to modify an existing guardianship order, it must be shown that such change would further the best interests of the person who is intellectually or developmentally disabled … . Such a modification is warranted where it is necessary to protect the "'personal and/or financial interests'" of the person with a disability … , or "as may be deemed necessary or proper for the welfare" of such person … . …

The testimony elicited at the hearing demonstrated that Jonathan JJ. has thrived from consistency in his routine and regimen. In that regard, his outbursts were a primary concern among his treatment providers, and the routine that was put in place, together with management by medical personnel, helped control the outbursts, as well as contributed to other positive physical, medical and cognitive improvements in his life. Matter of Jonathan JJ. (Alan JJ.–Caren KK.), 2022 NY Slip Op 02837, Third Dept 4-28-22

Practice Point: Any modification of an existing guardianship of a developmentally disabled adult must be found to be in the disabled person's best interests. Here consistency in regimen and routine was paramount. The appointment of stepfather, who had not seen the disabled person since 2009, as limited coguardian was deemed a change that would disrupt the successful regimen and routine.

MUNICIPAL LAW, FEES FOR CLOSURE OF STREETS AND SIDEWALKS DURING CONSTRUCTION.

ITHACA'S FEE SCHEDULE FOR PERMITS ALLOWING THE CLOSURE OF STREETS AND SIDEWALKS FOR CONSTRUCTION ON PRIVATE PROPERTY IS VALID, SUPREME COURT REVERSED (THIRD DEPT).

The Third Department, reversing Supreme Court, over a dissent, determined the respondent city demonstrated its fee schedule for permits allowing the closure of streets, sidewalks and parking spaces during construction on private property was

valid. The decision is too detailed and comprehensive to be fairly summarized here:

… City officials had a rational basis for calculating the public costs arising from permitted street and sidewalk closures and … the new street permit fee structure imposed a reasonable approximation of those costs upon permit applicants. …

… [P]etitioner [owner of the property on which the construction was done] failed to raise a question of fact as to the reasonableness of the new street fee structure, respondents were entitled to summary judgment dismissing the challenge to that structure and a declaration that it is valid … .Matter of 201 C-Town LLC v City of Ithaca, N.Y., 2022 NY Slip Op 04069, Third Dept 6-23-22

Practice Point: A city can impose daily fees for permits allowing the closure of streets and sidewalks to allow construction on private property.

NEGLIGENCE, SLIP AND FALL, EMPLOYMENT LAW, INDEMNITY, CONTRIBUTION.

PLAINTIFF'S EMPLOYER'S MOTIONS FOR SUMMARY JUDGMENT ON DEFENDANT'S CONTRACTUAL INDEMNITY, COMMON-LAW INDEMNITY AND CONTRIBUTION CAUSES OF ACTION SHOULD HAVE BEEN GRANTED; CRITERIA EXPLAINED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendant property-owner's indemnity claims against plaintiff's employer (Sodexo) in this slip and fall case should have been dismissed. Defendant, as the property-owner, was responsible for the structural maintenance of the stairwell where plaintiff fell. The fall was not caused by debris on the stairwell, which was Sodexo's only responsibility under its contract with defendant:

While defendant argued … that Sodexo's responsibility to "provide basic housekeeping to all areas of operation during the course of the operating day" included the subject stairs, it is clear from the incident report and post incident/accident root cause analysis form that the staircase was clear of

obstructions, objects, substances and debris of any sort. Accordingly, defendant failed to raise a triable issue of fact regarding whether [the] accident was caused by Sodexo's sole negligence, so Sodexo was entitled to summary judgment dismissing defendant's cause of action for contractual indemnity. * * *

Defendant has not alleged any scenario under which it could be held vicariously or statutorily liable for any negligence of Sodexo. Accordingly, Sodexo was entitled to summary judgment dismissing defendant's cause of action for common-law indemnification … .

… Inasmuch as defendant failed to raise an issue of fact as to Sodexo's negligence, defendant is not entitled to contribution from Sodexo, and Sodexo's motion for summary judgment dismissing defendant's contribution cause of action should have been granted. O'Toole v Marist Coll., 2022 NY Slip Op 03560, Third Dept 6-2-22

Practice Point: Defendant property owner's actions against plaintiff's employer for contractual and common law indemnity and contribution should have been dismissed because plaintiff's slip and fall was not the result of any act or omission on plaintiff's employer's part. The criteria for indemnity and contribution causes of action are explained.

NEGLIGENCE, SLIP AND FALL, PROOF OF CAUSE.

DESPITE THE FACT THAT PLAINTIFF COULD NOT SAY WHICH OF TWO CRACKS IN THE PAVEMENT CAUSED HIS FALL, THE CAUSE OF THE FALL WAS SUFFICIENTLY IDENTIFIED TO WITHSTAND SUMMARY JUDGMENT (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should not have been granted on the ground plaintiff could not identify the cause of his fall. Plaintiff alleged that one of two cracks in the pavement caused the fall:

Plaintiff testified that, on the day of the incident, the weather was clear and there was no snow or debris on the surface of the parking lot. He had parked his car in the parking lot and was approaching the front door of the store when his foot suddenly "hit something along the pavement and . . . stopped," causing him to fall to the ground. An individual who was walking behind plaintiff came to his aid, helping plaintiff up off the ground and assisting him back to his vehicle. At the time of his fall, plaintiff did not look at the ground to determine the cause. However, he recalled that, after being helped back to his vehicle, he looked back and noticed a cracked area of the pavement where he had fallen. Plaintiff was shown photographs of the parking lot and identified the location of his fall by circling in one of the photographs an uneven area of the pavement with two cracks in close proximity to one another. Upon further questioning, plaintiff was unable to identify which of the two cracks caused the fall, but repeatedly testified that he knew it was one of those two cracks based upon where he landed when he fell.

… Although plaintiff's statements were not without some inconsistencies, he was steadfast in his testimony that he tripped on one of the two identified cracks in the pavement of the parking lot. Despite Supreme Court's suggestion to the contrary, plaintiff was not required to state for certain which particular crack caused him to fall in order to withstand summary judgment … . Bovee v Posniewski Enters., Inc., 2022 NY Slip Op 03561, Third Dept 6-2-22

Practice Point: Plaintiff was able to testify that one of two cracks in the pavement was the cause of his fall. The cause was sufficiently identified to withstand summary judgment.

NEGLIGENCE, TRAFFIC ACCIDENTS, MUNICIPAL LAW.

IN THIS Y-INTERSECTION TRAFFIC ACCIDENT CASE, (1) THE TOWN DEMONSTRATED IT DID NOT HAVE THE REQUIRED WRITTEN NOTICE THAT OVERGROWN FOLIAGE BLOCKED LINES OF SIGHT; (2) QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT ON THE CAUSES OF ACTION ALLEGING INADQUATE SIGNAGE AND NEGLIGENT ROADWAY DESIGN (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court Y-intersection traffic accident case, determined:(1) the cause of action against the town alleging overgrown foliage blocked drivers' line of sight should have been dismissed because the town demonstrated it did not have written notice of the condition; (2) the written-notice requirement does not apply to the causes of action alleging inadequate signage and negligent design, which properly survived summary judgment:

By its submission of the affidavits of its Town Clerk and Superintendent of Highways who both averred that, after review of the pertinent records, no written notice was received pertaining to any alleged defective or dangerous condition caused by or from overgrown trees … , the Town successfully shifted the burden to plaintiffs to establish an issue of fact as to prior written notice, which plaintiffs failed to do … .

As to plaintiffs' claims pertaining to inadequate signage and negligent design of the intersection, we agree that prior written notice requirements do not apply to these alleged defects … . * * *

… [T]he record demonstrates that, at the very least, at some point in the modern era the roads were paved and signage was installed. The Town has provided no proof as to when or how often these activities have been undertaken or that they were completed in compliance with the standards in place at the time … .

We further agree that Supreme Court properly rejected the Town's contention that plaintiffs' allegations of negligence by the Town were negated by [the drivers'] familiarity with the intersection. … … [I]t cannot be said that this Y intersection was reasonably safe as a matter of law, nor did the Town conclusively demonstrate

that placing the stop sign in a different location would have resulted in the same conduct by [the drivers]. … [T]riable issues of fact exist as to whether the signage at the intersection was a proximate cause of the accident … . Read v Bell, 2022 NY Slip Op 03563, Third Dept 6-2-22

Practice Point: In a traffic accident case, a municipality will not be liable for overgrown foliage which blocks lines of sight if the town has not been provided with written notice of the condition. The written-notice requirement does not apply to causes of action alleging the accident was caused by inadequate signage or negligent roadway design.

TAX LAW, INCOME TAX, NEW JERSEY RESIDENT.

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

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

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

disputed that, at most, petitioners utilized the Northville home for three weeks during each tax year for either skiing or to visit the racetrack in the City of Saratoga Springs, Saratoga County.,,, The Northville home was not used for access to Obus' job in New York City and was not suitable for such purposes, given that it is over a four-hour drive each way … . In fact, a year-round tenant occupies an attached apartment, who Obus informs of his presence prior to his arrival. Moreover, petitioners do not keep personal effects in the Northville home, instead bringing with them what they will need for their visits. Based on these undisputed facts, petitioners have not utilized the dwelling in a manner which demonstrates that they had a residential interest in the property … . Thus, even though the Northville home could have been used in a manner such that it could constitute a permanent place of abode within the meaning of Tax Law § 605, because petitioners did not use it in this manner, it does not constitute a permanent place of abode … , and a contrary finding by the Tribunal is inconsistent with the legislative intent underlying the statute … . Matter of Obus v New York State Tax Appeals Trib., 2022 NY Slip Op 04206, Third Dept 6-30-22

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

TAX LAW, WITHHOLDING, RESPONSIBLE PERSON.

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

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

Notwithstanding evidence that could support a contrary determination, it is undisputed that petitioner was president, the majority shareholder, had check signing authority, was involved in daily field operations and derived a substantial part of his income from NECC. Additionally, petitioner intentionally held himself out to third parties, as well as to the Division of Taxation itself, as the contact person and responsible person for New York taxes by signing state tax returns and checks accompanying the returns, executing a sales tax certificate of authority listing himself as the corporation's responsible person, filling out the Division's "Responsible Person Questionnaire," and maintaining communication with the Department. Accordingly, respondent's determination that petitioner is a responsible person has a rational basis, is supported by substantial evidence and must be upheld … . Matter of Black v New York State Tax Appeals Trib., 2022 NY Slip Op 04200, Third Dept 6-30-22

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

TRUSTS AND ESTATES, FOREIGN WILLS, DOMICILE.

IF GERMANY WAS DECEDENT'S DOMICILE, NEW YORK MAY RECOGNIZE THE GERMAN HOLOGRAPHIC WILL; MATTER SENT BACK TO SURROGATE'S COURT TO DEVELOP A RECORD ON THE DOMICILE ISSUE (THIRD DEPT).

The Third Department, reversing Surrogate's Court, determined a hearing should be held to determine decedent's domicile. Decedent was a world traveler who owned property in Germany and executed a holographic will in Germany. If Germany was his domicile, New York may recognize the holographic will:

… [D]ecedent was initially domiciled in New Jersey before he left the United States in 2014 … . Since decedent's domicile had been established, "unlike mere physical residency, [domicile] is presumed to continue until a new one is acquired and is controlled by the subjective intent of the party claiming domicile" … . This determination generally involves questions of both fact and law "and is based upon 'conduct manifesting an intent to establish a permanent home with permanent associations in a given location'" … . Where there are particularly unique facts, like here with decedent being a perpetual world traveler, domicile is often "a question of fact rather than law, and it frequently depends upon a variety of circumstances, which differ as widely as the peculiarities of individuals" … .

Domicile is particularly important where, like here, there is a petition to probate a holographic will. Although there are limited circumstances where a holographic

will may be validly executed in New York (see EPTL 3-2.2), New York courts may nevertheless accept holographic wills that are "executed and attested in accordance with the local law of . . . [t]he jurisdiction in which the testator was domiciled, either at the time of execution or of death" (EPTL 3-5.1 [c] [3] …). In doing so, New York courts may take judicial notice of the laws of other countries and, as a matter of comity, may accept the findings of foreign courts (see CPLR 4511 [b] …).

… [T]he record was incomplete and must be further developed as it relates to the proceedings in Germany. Specifically, we are concerned over the omission of the certificate of inheritance — which petitioner argues established decedent's domicile in Germany — as such document may, if afforded comity, be dispositive … . Matter of Noichl, 2022 NY Slip Op 03558, Third Dept 6-2-22

Practice Point: Determination of a person's domicile is a question of law and fact, depending in part on the person's intent. Here, if Germany was decedent's domicile at the time the holographic German will was executed, or at the time of death, New York may recognize the German holographic will. Matter sent back to develop a factual record on the domicile issue.

TRUSTS AND ESTATES, STANDING, UNDUE INFLUENCE.

PLAINTIFFS HAD STANDING TO CHALLENGE THE TRUST SET UP BY DECEDENT; PLAINITIFFS DID NOT STATE A CAUSE OF ACTION FOR FRAUD BECAUSE IT WAS ALLEGED THE DECEDENT (A THIRD PARTY), NOT THE PLAINTIFFS, RELIED ON THE ALLEGEDLY FALSE STATEMENT; THE COMPLAINT STATED A CAUSE OF ACTION ALLEGING DEFENDANTS EXERCISED UNDUE INFLUENCE OVER THE DECEDENT WHICH AFFECTED THE DECEDENT'S ESTATE-RELATED DECISIONS (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined: (1) the complaint did not state a cause of action for fraud because it was alleged a third-party (the decedent), not plaintiffs, relied upon the alleged false statement; (2) the complaint stated a cause of action for "undue influence" on the decedent by the

defendants; and (3), the plaintiffs had standing to challenge the validity of the trust set up by the decedent. It was alleged that the decedent made decisions about the disposition of his assets based upon the false assertion that his daughter-in-law killed his son:

Here, as the grandchildren were given specific bequests in decedent's … last will and testament, and the instrument creating the trust … reserved to decedent a limited power of appointment to name his grandchildren as possible beneficiaries of trust assets upon his death, the grandchildren are interested persons within the meaning of the SCPA, so plaintiffs have capacity to challenge the validity of the trust … . …

… [P]laintiffs cannot state a cause of action for fraud because the Court of Appeals has expressly declined "to extend the reliance element of fraud to include a claim based on the reliance of a third party" … . … As to plaintiffs' cause of action asserting undue influence, plaintiffs' broadly-stated theory is that, upon the death of the deceased son, the previously absent defendants drove a wedge between the daughter-in-law and decedent, took control of decedent's caretaking as he aged and grew infirm and then moved him into defendants' home where decedent created the trust and conveyed into it his assets to benefit defendants and the son upon his death. … [A]ffording the plaintiffs the benefit of every favorable inference … , we find that such allegations are enough to assert a cause of action for undue influence … . Constantine v Lutz, 2022 NY Slip Op 02842, Third Dept 4-28-22

Practice Point: To state a cause of action for fraud, it must be alleged the plaintiff(s), not a third party (the decedent in this case), relied on the alleged false statement. Here plaintiffs alleged the decedent made estate-related decisions based upon the false statement that his daughter-in-law killed his son. Because of the absence of the "reliance" element of fraud, that cause of action was properly dismissed.

UNEMPLOYMENT INSURANCE, DRIVERS FOR UBER-LIKE COMPANIES.

GROUNDANYWHERE DRIVERS, LIKE UBER DRIVERS, ARE EMPLOYEES, NOT INDEPENDENT CONTRACTORS, ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS (THIRD DEPT).

The Third Department determined drivers who work for Groundanywhere, like the drivers who work for Uber, are employees not independent contractors, entitled to unemployment insurance benefits:

Shortly after the [Unemployment Insurance Appeal] Board's decision here, we held that substantial evidence supported the Board's determination that drivers for Uber Technologies, Inc in upstate New York were employees of Uber … . We find that the relationship between Groundanywhere and its drivers is not materially distinguishable from the employment relationship between Uber and its drivers. The record reflects that Groundanywhere uses a smartphone app that is essentially similar to the one used by Uber and exercises a comparable level of control over its drivers, providing substantial evidence to support the Board's finding that claimant and other similarly situated drivers were employees entitled to unemployment insurance benefits and for whom Groundanywhere was liable for additional contributions … . The indicia of control include use of an app owned by Groundanywhere, which reviews and screens drivers' various credentials and inspects their vehicles for compliance with its standards, provides drivers with a GPS navigation system, tests their knowledge of geography and ability to use GPS, and handles both driver and client complaints and problems that arise during the transport. Groundanywhere coordinates and oversees all aspects of the ride through its app, tracking the drivers and the ride on GPS and running a help desk for the drivers and controlling the drivers' access to its clients. Groundanywhere sets and calculates the fares, keeps a set percent as a fee, charges the client a processing fee, adds a gratuity which, if disputed by the client, results in the driver getting a higher percent of the fare in lieu of a gratuity, collects the charges from the client and pays a percent of the base charge to the drivers, who are paid even if the client fails to show up for the trip or disputes the charges. Although drivers use and maintain their own vehicles and pay all vehicle expenses, they display a Groundanywhere logo and are reimbursed for tolls and parking costs. Clients are able to rate drivers, who are selected based upon their location, ratings and history of accepting offered

fares. Matter of Hossain (Groundanywhere LLC–Commissioner of Labor), 2022 NY Slip Op 03424, Third Dept 5-26-22

Practice Point: Uber drivers, and drivers for similar outfits like Groundanywhere, are employees, not independent contractors, entitled to unemployment insurance benefits.

UNEMPLOYMENT INSURANCE, EVIDENCE.

CLAIMANT WAS NOT ALLOWED TO SUBMIT AS EVIDENCE A FLYER FROM THE DEPARTMENT OF LABOR WHICH INDICATED IT WAS NECESSARY TO APPLY FOR STATE UNEMPLOYMENT BENEFITS TO RECEIVE FEDERAL PANDEMIC UNEMPLOYMENT BENEFITS; THE EVIDENCE WAS RELEVANT TO WHETHER CLAIMANT WILLFULLY MISREPRESENTED HER EMPLOYMENT STATUS AND SHOULD HAVE BEEN CONSIDERED; MATTER REMITTED (THIRD DEPT).

The Third Department, reversing the Unemployment Insurance Appeal Board, determined claimant should have been allowed to present evidence that her misrepresentation that she was not employed was not willful. Based on a flyer put out by the Department of Labor, claimant allegedly believed that she needed to apply for state unemployment benefits to be eligible for federal pandemic unemployment insurance:

At the hearing, claimant requested to admit over 50 pages of documentation into the record. Included in these documents is a flyer, which claimant contends was on the Department of Labor's website and led her to believe that, despite not being eligible for state unemployment benefits, she may have been entitled to pandemic unemployment assistance under federal legislation that was put in place due to the coronavirus pandemic. Claimant argues that she understood this flyer to mean that she was required to apply for state unemployment benefits to obtain relief under the federal legislation. A fair interpretation of the flyer supports that contention. Also included in these documents is evidence of claimant's many attempts to contact the Department of Labor to determine whether she was, in fact, entitled to

the benefits that she was receiving. As these documents bear directly on the issue of determining whether claimant's misrepresentation was willful, as well as on claimant's credibility, not allowing them into evidence denied her "a sufficient opportunity to present proof in support of her claim" and did, in fact, deprive her of a fair hearing … . Matter of Nottage (Commissioner of Labor), 2022 NY Slip Op 02476, Third Dept 4-14-22

Practice Point: Here a flyer put out by the Department of Labor indicated it was necessary to apply for state unemployment benefits to be eligible for federal pandemic unemployment benefits. Claimant sought to introduce the flyer in evidence to show her misrepresentation that she was not employed was not "willful." The evidence should have been considered by the Unemployment Insurance Appeal Board.

UNEMPLOYMENT INSURANCE.

CLAIMANT DELIVERY DRIVER WAS NOT AN EMPLOYEE OF NEL, A BUSINESS LOGISTICS COMPANY WHICH ASSIGNED CLAIMANT TO DELIVER AUTO PARTS FOR ITS CLIENT, ANY-PART AUTO STORES (THIRD DEPT).

The Third Department, reversing the Unemployment Insurance Appeal Board, determined claimant was not an employee of NEL, a business logistics company, and NEL was, therefore, not liable for unemployment insurance contributions on remuneration paid to claimant and others similarly situated. Claimant was a delivery driver who was assigned by NEL to deliver auto parts for Any-Part Auto Stores:

The record reflects that, after NEL initially referred claimant to Any-Part, NEL did not retain any supervisory authority over him. NEL did not provide any training, set delivery goals for claimant, conduct performance reviews or evaluations, require any proof of delivery or require any contact from claimant on a day-to-day basis. Any-Part assigned the deliveries to claimant and handled any complaints. Claimant used his own vehicle, NEL did not reimburse him for any expenses and claimant was not restricted from working for others. Under the parties' written

agreement, claimant could refuse an assignment, but, once he accepted an assignment, he was required to complete it. Per the agreement, claimant was permitted to hire other individuals to perform the work if claimant could not, and claimant was responsible for ensuring that those individuals comply with state and federal regulations, including licensing and insurance requirements. … . Matter of Pasini (Northeast Logistics, Inc.–Commissioner of Labor), 2022 NY Slip Op 02464, Third Dept 4-14-22

UNEMPLOYMENT INSURANCE.

STAFFING COMPANY WHICH SCREENED JOB APPLICANTS FOR ITS CLIENTS WAS NOT AN EMPLOYER LIABLE FOR UNEMPLOYMENT INSURANCE CONTRIBUTIONS (THIRD DEPT).

The Third Department, reversing the Unemployment Insurance Appeal Board, determined Strikeforce Staffing was not an employer of the persons for whom it found employment with its clients. Therefore, Strikeforce was not liable for additional unemployment insurance contributions on remuneration paid to the claimant and others similarly situated:

Strikeforce recruited job seekers for its clients, businesses in need of workers, by placing advertisements on various websites. For example, claimant completed an application on Indeed.com for a line production position at a bakery. Strikeforce would first screen a job seeker's application to see if he or she potentially met a client's needs and, if so, send the individual for an interview with the client. The client would make a hiring decision and, according to the testimony of the owner and operator of Strikeforce, Strikeforce clients did not hire about 30% to 40% of the applicants referred to them. If hired, the client, not Strikeforce, would provide the worker with his or her rate of pay, which the worker was free to negotiate with the client, and the worker's schedule. * * *

As Strikeforce does not exercise any control over the manner in which the workers hired by its clients perform their services, the means used to supply those services or the results produced, we cannot find that there is substantial evidence to support the Board's determination that Strikeforce exercised sufficient direction,

supervision and control over claimant, and those similarly situated, to demonstrate an employment relationship … . Matter of Cruz (Strikeforce Staffing LLC–Commissioner of Labor), 2022 NY Slip Op 02849, Third Dept 4-28-22

Practice Point: A staffing company which screens job applicants for its clients but which exercises no supervisory control over the applicants who are hired is not liable for unemployment insurance contributions.

WORKERS' COMPENSATION, INADEQUATE RECORD FOR APPEAL.

THE BOARD FAILED TO ADEQUATELY EXPLAIN ITS DECISION TO DENY COVERAGE OF MEDICAL BILLS ON THE GROUND THEY WERE NOT CAUSALLY RELATED TO CLAIMANT'S MEDICAL CONDITION, MAKING APPELLATE REVIEW IMPOSSIBLE; MATTER REMITTED (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined the Board did not explain its decision to deny coverage of 25 medical bills based on the conclusion the bills did not relate to claimant's medical condition:

Although, "the Board has the exclusive province to resolve conflicting medical opinions" and to evaluate medical evidence before it, and its factual determinations on causal relationship will not be disturbed if supported by substantial evidence in the record, its decision here fails to indicate what medical opinions or reports formed the basis for the conclusions reached regarding causal relationship … . It is further noted that many of the bills or supporting records include multiple diagnoses and charges, with some of the diagnoses appearing to match the established conditions, such as treatment for a urinary tract infection. No basis is provided for denying compensability for portions of the bills related to established conditions, i.e., for denying payment for the entire medical bill based upon the inclusion of non-compensable treatment in the bill or records.

By failing to provide the reasons for its rulings or the basis upon which the determination was made, the WCLJ [Workers' Compensation Law Judge] and the Board "failed to satisfy [their] obligation to provide some basis for appellate

review" … . Matter of Sequino v Sears Holdings, 2022 NY Slip Op 04070, Third Dept 6-23-22

Practice Point: When the Workers' Compensation Board fails to adequately explain its denial of coverage for medical bills it concluded were not related to claimant's medical condition, appellate review by a court is not possible and the matter must be remitted.

WORKERS' COMPENSATION, INJURED ON THE WAY TO WORK.

ALTHOUGH CLAIMANT WAS STRUCK BY A VEHICLE WHILE HE WAS RIDING HIS BICYCLE TO WORK (USUALLY NOT COMPENSABLE), HIS INJURY WAS FOUND COMPENSABLE BY THE WORKERS' COMPENSATION LAW JUDGE (WCLJ) UNDER THE "SPECIAL ERRAND" EXCEPTION; BECAUSE THE WORKERS' COMPENSATION BOARD DID NOT ADDRESS THAT ISSUE, THE MATTER WAS REMITTED (THIRD DEPT).

The Third Department, remitting the matter to the Workers' Compensation Board, determined the Board did not address the basis of the Workers' Compensation Law Judge's (WCLJ's) ruling that claimant was entitled to benefits. Claimant was struck by a vehicle while riding his bicycle to work. Although travel to work is usually not covered by Workers' Compensation, the WCLJ found that "claimant was engaged in a special errand given that he was traveling for the purpose of an overtime assignment and at a location different from his regular work locations." That issue was not addressed by the Board:

In finding that the claim was compensable, the WCLJ found that claimant was engaged in a special errand given that he was traveling for the purpose of an overtime assignment and at a location different from his regular work locations. The Board, however, did not address the exception relied upon by the WCLJ but, instead, found that the outside employee exception did not apply in concluding that the accident did not arise out of or in the course of claimant's employment. Whether an exception to the general rule applies turns on the Board's fact-intensive analysis of the particular circumstances of a given case … , and "[t]he courts are bound by the . . . Board's findings of fact which, including the ultimate

fact of arising out of and in the course [of employment], must stand unless erroneous in law and regardless of whether conflicting evidence is available" … . The fact that claimant was not an outside employee, as found by the Board, is not dispositive as to whether the special errand exception applies, which was the basis of the WCLJ's finding that claimant was entitled to workers' compensation benefits. As the Board has made no findings of fact with regard to whether the special errand exception applies, the matter must be remitted to the Board for further proceedings in regard to this particular issue…. . Matter of Waters v New York City Tr. Auth., 2022 NY Slip Op 02474, Third Dept 4-14-22

Practice Point: Although injury while traveling to work is usually not covered by Workers' Compensation, there are exceptions, including the "special errand" exception which was deemed to apply here by the Workers' Compensation Law Judge.

WORKERS' COMPENSATION, SCHEDULE LOSS OF USE (SLU).

THE BOARD SHOULD HAVE CONSIDERED WHETHER A PRIOR ELBOW INJURY ADDED TO THE SCHEDULE LOSS OF USE (SLU) ASSOCIATED WITH THE SUBSEQUENT SHOULDER INJURY; THE BOARD DEPARTED FROM PRECEDENT WITHOUT EXPLANATION (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined the schedule loss of use (SLU) award for a shoulder injury should not have been offset by a prior award for an elbow injury. Rather, whether the second injury resulted in an increased loss of use should have been considered:

… [T]he Board credited Coniglio's [the employer's expert's] opinion of a 20% SLU as being consistent with the guidelines and expressly declined to add any additional loss of use. …

… [W]e note that the Board has previously determined that adding value for posterior extension to an overall SLU award that also includes a documentation of deficits of flexion or abduction is consistent with the guidelines … . The Board did not address Coniglio's failure to add any value for his finding of a posterior

extension defect to his overall SLU calculation and, as such, has not provided a rational basis for departing from its precedent. Accordingly, its finding of a 20% SLU of the left arm must also be reversed and the matter remitted for further consideration by the Board … . Matter of Kromer v UPS Supply Chain Solutions, 2022 NY Slip Op 04072, Third Dept 6-23-22

Practice Point: Here claimant's prior schedule loss of use (SLU) award for an elbow injury was not considered in connection with the SLU for the subsequent shoulder injury, a departure from precedent. Because the departure from precedent was not explained, the decision was reversed and remitted.

WORKERS' COMPENSATION, SCHEDULE LOSS OF USE (SLU).

THE WORKERS' COMPENSATION BOARD MISINTERPRETED SPECIAL CONSIDERATION 4 TO LIMIT SCHEDULE LOSS OF USE (SLU) OF PLAINTIFF'S LEG TO 10% (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined "special consideration 4" of the Workers' Compensation Guidelines for Determining Impairment was not properly interpreted, resulting in a schedule lose of use (SLU) for claimant's leg that is inappropriately low (10%):

Claimant argues that the Board's interpretation of special consideration 4 and the instructions regarding its application is irrational and runs afoul of the purpose of Workers' Compensation Law § 15 (3). We agree. "SLU awards are not given for particular injuries, but they are made to compensate an injured worker for his or her loss of earning power or capacity that is presumed to result, as a matter of law, from the residual permanent physical and functional impairments to statutorily-enumerated body members" … . * * *

Relying on the plain language of the 2018 guidelines, the Board reads special consideration 4 as making no provision for additional values due to flexion or extension deficits, reasoning that the enumerated SLU range already takes into account range of motion deficits…. . …

Although special consideration 4 may arguably be said to rationally limit an SLU value when it is based upon only a finding of chondromalacia patella, the Board's interpretation of the foregoing instructions results in the obvious inequity identified by claimant and cannot be upheld. To accept the Board's interpretation would be to sanction an application of the 2018 guidelines that results in claimants with only meniscus tears routinely receiving SLU awards far greater than 7½ to 10% based upon their range of motion deficits … . Matter of Blue v New York State Off. Of Children & Family Servs., 2022 NY Slip Op 03565, Third Dept 6-2-22

Practice Point: In determining the schedule loss of use (SLU) for claimant's leg, the Workers' Compensation Board misinterpreted "special consideration 4" resulting in an inappropriately low SLE percentage.

WORKERS' COMPENSATION.

BECAUSE CLAIMANT WAS NOT ENTITLED TO A NONSCHEDULE AWARD DUE TO RETIREMENT, HE WAS ENTITLED TO A SCHEDULE LOSS OF USE (SLU) AWARD (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined claimant was entitled to a schedule loss of use (SLU) award because he was not eligible for a nonschedule award due to retirement:

A nonschedule award "is based [up]on a factual determination of the effect that the [permanent partial] disability has on the claimant's future wage-earning capacity" and is mathematically derived from a claimant's average weekly wages and wage-earning capacity … . On the other hand, an SLU award is designed to compensate for a claimant's "loss of earning power" as a result of anatomical or functional losses or impairments … and, as such, "'is not allocable to any particular period of disability'" … and is "independent of the time an employee actually loses from work" … . That said, "[a] claimant who sustains both schedule and nonschedule injuries in the same accident may receive only one initial award," because SLU and nonschedule awards "are both intended to compensate a claimant for loss of wage-earning capacity sustained in a work-related accident[,] and concurrent payment of an award for a schedule loss and an award for a nonschedule

permanent partial disability for injuries arising out of the same work-related accident would amount to duplicative compensation" … . "However, in the unique circumstance where no initial award is made based on a nonschedule permanent partial disability classification, a claimant is entitled to an SLU award" for the permanent impairments sustained in the same work-related accident … . …

… [T]here is no dispute that claimant is not entitled to a nonschedule award based upon his nonschedule classification because he voluntarily retired in April 2020 and was therefore not attached to the labor market at the time of classification … . Thus, as "no initial award [wa]s made based [up]on [claimant's] nonschedule permanent partial disability classification" … , he "is entitled to an SLU award for the permanent partial impairments to [his] statutorily-enumerated body members" … . Finally, and contrary to the position taken by the Board, the fact that claimant voluntarily retired, and was therefore not attached to the labor market, does not preclude him from receiving an SLU award, because "it is axiomatic that a claimant's lack of attachment to the labor market, voluntary or otherwise, is irrelevant to a determination as to entitlement to an SLU award" … . Matter of Gambardella v New York City Tr. Auth., 2022 NY Slip Op 02475, Third Dept 4-14-22

Practice Point: This Workers' Compensation case includes a clear explanation of a "nonschedule award" versus a "schedule loss of use (SLU)" award.

WORKERS' COMPENSATION.

THERE WAS NO INDICATION ON THE FORM AND NO REGULATION REQUIRING CLAIMANT TO SUBMIT A SEPARATE RB-89 FORM FOR EACH CLAIM; THE BOARD THEREFORE ABUSED ITS DISCRETION WHEN IT REFUSED TO REVIEW THE WORKERS' COMPENSATION LAW JUDGE'S (WCLJ'S) DECISION ON THAT GROUND (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board and remitting the matter, determined it was an abuse of discretion to deny claimant's application on the ground that a separate copy of the RB-89 form was not submitted for each claim:

We note … that the requirement that a party submit a copy of the RB-89 form when referencing multiple claims, or that failing to provide a copy for each claim could result in review being denied on one of the claims, is not included on the form, in the instructions to the form or in the Board's regulations. Although the Board may certainly adopt the formatting requirement that applicants provide a copy of their RB-89 form for each claim referenced therein, we find, under the circumstances presented here, that the Board's denial of claimant's application for review of the WCLJ's decision on the 2017 claim for failing to provide the Board with an additional copy of their RB-89 form was an abuse of the Board's discretion … . Matter of Olszewski v PAL Envtl. Safety Corp., 2022 NY Slip Op 02469, Third Dept 4-14-22

ZONING, SPECIAL USE PERMIT.

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

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

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

The Board's resolutions reflect that it considered the relevant criteria as set forth in Town of Sand Lake Zoning Code § 250-80. The Board noted the various uses permitted as of right by the zoning code and found that these uses "may be more intense and affecting" than Bailey's proposed party venue. The Board relied on the engineering report in concluding that there would be no significant impact to traffic or noise. The record also discloses that the Board entertained comments derived from multiple public hearings. In view of the foregoing, and taking into account that "[a] municipality 'retains some discretion to evaluate each application for a special use permit, to determine whether applicable criteria have been met and to make commonsense judgments in deciding whether a particular application should be granted'" … . Matter of Barnes Rd. Area Neighborhood Assn. v Planning Bd. Of the Town of Sand Lake, 2022 NY Slip Op 04205, Third Dept 6-30-22

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