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An Organized Compilation of Selected Decisions, Mostly Reversals, Released by the Third Department and Posted on the New York Appellate Digest Website October – December 2022. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report.

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CONTRACT LAW, CONSTRUCTION CONTRACTS, WAIVER OF TERMS.

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The Third Department, reversing Supreme Court, determined the failure to follow the construction contract provisions for change orders was not a breach of contract:

… [T]he parties' lack of compliance with the change order procedure contained in the contract did not constitute a breach. … [T]he trial evidence established that the parties used informal text messages and emails in furtherance of project changes rather than following the formal, detailed change order process set forth in the

contract. … [A] written change order requirement included in a construction contract "is not applicable where, as here, the conduct of the parties demonstrates an indisputable mutual departure from the written agreement and the changes were clearly requested by plaintiff and executed by defendant" … Thus, the record amply demonstrates that the parties "waived their contractual right to insist upon strict compliance" with the change order condition … . 107 S. Albany St., LLC v Scott, 2022 NY Slip Op 07276, Third Dept 12-22-22

Practice Point: The parities did not comply with the formal change order requirements in the construction contract. Therefore the formal requirements were waived and failure to comply was not a breach of contract.

DECEMBER 22, 2022

CRIMINAL LAW, INEFFECTIVE ASSISTANCE.

DEFENDANT'S COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A VALID MOTION TO WITHDRAW THE PLEA; THE MOTION WAS MISCHARACTERIZED AS A MOTION TO VACATE THE CONVICTION AND WAS NOT SUPPORTED BY NECESSARY AFFIDAVITS; DEFENDANT'S SENTENCE WAS VACATED (THIRD DEPT).

The Third Department, vacating defendant's sentence, determined defendant's second counsel was ineffective in filing a motion to withdraw the plea:

Instead of filing a motion to withdraw defendant's plea pursuant to CPL 220.60 (3), second counsel moved to vacate the judgment of conviction pursuant to CPL 440.10 (1) (h) based on generalized allegations, supported by his own "information and belief," that first counsel had failed to properly investigate the facts, interview witnesses, assess the strength of the People's case, file any motions or inform defendant of the consequences of pleading guilty. The People opposed the motion, noting that, inasmuch as defendant had yet to be sentenced , a motion pursuant to CPL 440.10 was premature. In reply, second counsel agreed that the motion was premature, presented the same allegations and asked that County Court nonetheless exercise its discretion to permit defendant to withdraw his plea, prompting the

People to oppose the motion on the merits. By order entered September 14, 2017, County Court denied defendant's CPL 440.10 motion to vacate the judgment of conviction as premature; alternatively, the court treated the motion as one to withdraw the plea and denied it, noting, among other things, that the motion was deficient as it was supported only by second counsel's affirmation. * * *

Although second counsel's mischaracterization of the subject motion does not, in and of itself, constitute ineffective assistance of counsel … , the motion was defective in other ways. Specifically, despite County Court granting second counsel two weeks to prepare a motion to withdraw defendant's plea, he filed the motion in one day. In rushing his submission, second counsel failed to support the motion with affidavits from either defendant or first counsel, and he failed to incorporate any of the allegations that defendant made through the PSI; rather, second counsel opted to rely, exclusively, on his own "information and belief" and submitted a general, pro forma motion that was facially deficient. People v Williams, 2022 NY Slip Op 07265, Third Dept 12-22-22

Practice Point: Defense counsel was ineffective for failure to file a proper motion to withdraw the plea. The motion was mischaracterized as a motion to vacate the conviction and was not supported by necessary affidavits based upon first-hand knowledge.

DECEMBER 22, 2022

CRIMINAL LAW, PERSISTENT VIOLENT FELONY PROCEEDING, CONSTITUTIONAL CHALLENGE OF PRIOR CONVICTION.

THE FACT THAT DEFENDANT DID NOT APPEAL HIS 2006 CONVICTION ON THE GROUND HE WAS NOT INFORMED OF THE PERIOD OF POSTRELEASE SUPERVISION DID NOT PREVENT DEFENDANT FROM RAISING THAT ISSUE TO CHALLENGE THE CONSTITUTIONALITY OF THE 2006 CONVICTION IN THE CONTEXT OF A PERSISTENT VIOLENT FELONY OFFENDER PROCEEDING (THIRD DEPT).

The Third Department, vacating defendant's sentence as a persistent violent felony offender, determined the fact that defendant didn't appeal his 2006 conviction on the ground he was not informed of the period of postrelease supervision did not prevent him from raising that issue to challenge use of the 2006 conviction in a persistent-felony-offender proceeding:

Defendant … challenged the constitutionality of the 2006 conviction, alleging that he was not informed during the plea allocution that his sentence would include a period of postrelease supervision … . The record reflects that Supreme Court and the People were under the impression that, because defendant had not raised that objection at his 2006 sentencing and had never appealed the 2006 judgment of conviction, such conviction remained unchallenged as of the hearing date and that, as a consequence, defendant's sole recourse was to bring a motion under CPL article 440 seeking to vacate that conviction. Defendant was advised that, if the CPL article 440 motion was successful, he could then petition Supreme Court regarding his status as a persistent violent felony offender. The court then adjudicated defendant a persistent violent felony offender.

Significantly, "[n]otwithstanding his failure to appeal from the [2006] conviction, defendant had an independent statutory right to challenge its use as a predicate conviction on the ground it was unconstitutionally obtained" … . Under these circumstances, defendant was not afforded a sufficient opportunity to challenge the constitutionality of his 2006 conviction at the hearing. Accordingly, the sentence must be vacated and the matter remitted for a proper persistent felony offender hearing under CPL 400.16 and resentencing. People v Hoyt, 2022 NY Slip Op 05894, Third Dept 10-20-22

Practice Point: The fact that defendant did not appeal his 2006 conviction on the ground he was not informed of the period of postrelease supervision did not prevent defendant from challenging the use of the 2006 conviction in a persistent violent felony offender proceeding on that same ground.

OCTOBER 20, 2022

CRIMINAL LAW, PREDICATE FELONY.

THE FELONY WHICH WAS THE BASIS FOR DEFENDANT'S SECOND FELONY OFFENDER STATUS DID NOT MEET THE CRITERIA FOR A PREDICATE FELONY (THIRD DEPT).

The Third Department, reversing County Court, determined the felony which was the basis of defendant's second felony offender status did not meet the criteria for a predicate felony:

In order for a prior conviction to constitute a predicate felony, the "sequentiality requirement" must be satisfied, which means "that the 'sentence upon such prior conviction must have been imposed before commission of the present felony'" … . Defendant was sentenced on the predicate felony forming the basis for her second felony status on the same day that she was sentenced on the instant offense. As such, that felony offense — referenced in the predicate felony information as an August 27, 2020 conviction for criminal sale of a controlled substance in the fifth degree — could not be used to meet the requirements for sentencing defendant as a second felony offender on the instant offense. People v Hayes, 2022 NY Slip Op 06965, Third Dept 12-8-22

Practice Point: In order to meet the criteria for a predicate felony re: second felony offender status, the sentence for the prior conviction must have been imposed before the instant felony was committed.

DECEMBER 08, 2022

CRIMINAL LAW, SUPERIOR COURT INFORMATION.

THE FELONY COMPLAINT CHARGED DEFENDANT WITH RAPE FIRST (FORCIBLE COMPULSION); THE SUPERIOR COURT INFORMATION (SCI) CHARGED RAPE THIRD (LACK OF CONSENT); BECAUSE RAPE THIRD AS CHARGED IN THE SCI WAS NOT A LESSER INCLUDED OFFENSE OF RAPE FIRST AS CHARGED IN THE FELONY COMPLAINT, THE WAIVER OF INDICTMENT AND SCI WERE JURISDICTIONALLY DEFECTIVE (THIRD DEPT).

The Third Department, reversing defendant's conviction by plea to a superior court information (SCI), determined the SCI did not charge the felony charged in the felony complaint (rape first) or a lesser included offense rendering the waiver of indictment and SCI jurisdictionally defective. The SCI charged rape third based upon lack of consent:

Although we acknowledge that "it is unnecessary to forcibly compel another to engage in sexual acts unless that person is an unwilling participant" … , it is nevertheless theoretically possible for one to use physical force to compel a victim to have sexual intercourse where the victim did not clearly express nonconsent. … [O]ne who commits the greater crime of rape in the first degree by forcible compulsion through physical force does not, by the same conduct, necessarily commit the lesser offense of rape in the third degree in which the victim expressly communicated his or her non-consent … . Consequently, rape in the third degree as charged in the SCI to which defendant pleaded guilty is not a lesser included offense of rape in the first degree as charged in the felony complaint … . People v Odu, 2022 NY Slip Op 07266, Third Dept 12-22-22

Practice Point: Here the felony complaint charged rape first (forcible compulsion) and the superior court information (SCI) charged rape third (lack of consent). Therefore the offense charged in the SCI was not a lesser included offense of the offense charged in the felony complaint, rendering the waiver of indictment and SCI jurisdictionally defective.

DECEMBER 22, 2022

CRIMINAL LAW, TRAFFIC STOPS, RACIAL PROFILING.

DESPITE THE DRIVER'S FAILURE TO USE A TURN SIGNAL AS THE JUSTIFICATION FOR THE TRAFFIC STOP, DEFENDANT WAS ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS CONVICTION ON THE GROUND THE STOP WAS ACTUALLY BASED UPON RACIAL PROFILING; IN THE FIRST DEPARTMENT THE "TURN SIGNAL" GROUND FOR THE STOP WOULD BE ENOUGH, EVEN IF THE STOP WAS ACTUALLY MOTIVATED BY DISCRIMINATION; NOT SO IN THE THIRD DEPARTMENT (THIRD DEPT).

The Third Department, reversing County Court, in a full-fledged opinion by Justice Lynch, disagreeing with the First Department, determined defendant was entitled to a hearing on his motion to vacate his conviction on the ground the traffic stop was motivated by racial profiling. The traffic stop was justified by the driver's failure to use a turn signal. In the First Department, that is good enough, even if racial profiling was the real reason for the stop. Not so in the Third Department:

… [Defendant] asserted a violation of his constitutional rights … based on the allegedly discriminatory police stop. Defendant, who is black, supported this claim with sworn affidavits from himself and the vehicle's driver. The driver — a white woman — averred in her affidavit that, during the police encounter, the investigator who initiated the stop chided her, saying "you stupid little white b****, you think this black guy cares about you, but he's just using you to run drugs." .* * *

… [W]e are mindful that both the majority and dissent in Robinson rejected as unworkable the "primary motivation" subjective test for a traffic stop (see People v Robinson, 97 NY2d at 353; id. at 371 …). We abide by that conclusion. Whether a traffic stop was premised on racial profiling must be assessed objectively with reference to the facts and circumstances of the encounter. Such considerations may include, for example, whether the arresting officers were involved in a plausible investigation prior to executing the vehicle stop. Also important — and certainly most relevant here — is consideration of the officers' actions and comments during the encounter. …

Defendant [submitted] the sworn affidavit of the driver of the vehicle, who … recounted a highly concerning racist statement ostensibly made by the investigator conducting the stop. … [T]he People neither controverted the driver's statement nor included an affidavit from the investigator doing so … . Having demonstrated his right to a hearing (see CPL 440.30 [5]), defendant bears the burden of proving his claims by a preponderance of the evidence … . In resolving the motion, the court should undertake an objective analysis of the facts and circumstances of the entire police encounter. People v Jones, 2022 NY Slip Op 05892, Third Dept 10-20-22

Practice Point: In the Third Department, even if there exists a valid reason for a vehicle stop, here the failure to use a turn signal, the stop may still be deemed invalid if it was motivated by racial profiling. In the First Department, the turn-signal violation would be enough, even if the actual motivation was discriminatory.

OCTOBER 20, 2022

CRIMINAL LAW, ACCOMPLICE LIABILITY.

THERE WAS NO EVIDENCE DEFENDANT WAS AWARE OF THE SPONTANEOUS USE OF A KNIFE BY THE PERPETRATOR IN THIS MURDER CASE; THE EVIDENCE DEFENDANT SHARED THE PERPETRATOR'S INTENT, THEREFORE, WAS INSUFFICIENT (THIRD DEPT).

The Third Department, reversing defendant's conviction for murder under an accomplice theory, determined the evidence defendant shared the intent of Mack, who stabbed the victim, was insufficient:

To hold a person responsible for the criminal conduct of another, the People must demonstrate that "when, acting with the mental culpability required for the commission thereof, he [or she] solicit[ed], request[ed], command[ed], importune[d], or intentionally aid[ed] [the principal] to engage in such conduct" (Penal Law § 20.00 …). In other words, when proceeding "under an acting in concert theory, [the People must prove that] the accomplice and principal [shared] a 'community of purpose'" … . Moreover, in the case of willful homicide, "a

spontaneous and not concerted or planned use of [a] weapon to kill is not, without more, attributable to the companion whose guilt in a joint design to effect death must be established beyond a reasonable doubt" … . In this respect, "[i]t is essential that the intent by [the defendant] to kill be fairly deducible from the proof and that the proof exclude any other purpose" … . …

The sole eyewitness testimony presented by the People established that the altercation between Mack and the victim began as a fist fight until the victim gained the upper hand and knocked Mack to the ground. When Mack got up, he began swinging wildly at the victim, at which point the eyewitness first observed that Mack had a knife in his hand, which had become visible because of the lights from neighboring establishments. The witness testified that he had not seen the knife prior to the victim knocking Mack down and no other evidence presented at trial established that the knife was visible prior to that point. * * *

Even viewing the evidence in the light most favorable to the People … , we find that the jury would have been required to speculate that defendant had become aware of Mack's spontaneous use of a knife during the altercation … . People v Jenkins, 2022 NY Slip Op 06652. Third Dept 11-23-22

Practice Point: Here the perpetrator, Mack, spontaneously pulled out a knife after he was knocked down in a fist fight with the victim. There was no evidence defendant was aware of Mack's spontaneous use of a knife, and, therefore, there was no evidence defendant shared Mack's intent to stab the victim.

NOVEMBER 23, 2022

CRIMINAL LAW, CHILD'S CAPACITY TO TESTIFY, JUDGES.

THE COURT DID NOT CONDUCT ANY INQUIRY TO DETERMINE WHETHER A THREE-YEAR-OLD CHILD HAD THE CAPACITY TO TESTIFY; CONVICTION REVERSED (THIRD DEPT).

The Third Department, reversing defendant's conviction in this sexual abuse case, held the court should have conducted an inquiry of a three-year-old child to

determined the child's capacity to testify. The child was the alleged victim of the sexual abuse:

It is undisputed that, prior to the child giving unsworn testimony, County Court did not conduct any form of inquiry or examination of the child to determine whether the child possessed sufficient intelligence and capacity to give unsworn testimony … . Without such inquiry or examination, the court could not make any determination as to whether the child was competent to give unsworn testimony. Indeed, there is no indication that the court made any findings or specific determination of the child's competency … . In view of the foregoing, the court erred by failing to conduct an inquiry of the child that satisfied the commands of CPL 60.20 (2) … . The People contend that the initial questioning by the prosecutor and the child's responses thereto concerning pedigree information satisfied the strictures of CPL 60.20 (2). Even if we agreed with the People that such questioning was procedurally proper, the colloquy between the prosecutor and the child fails to disclose that the child "understood the difference between a truth and a lie and was competent to testify" … . People v Reed, 2022 NY Slip Op 06657, Third Dept 11-23-22

Practice Point: Here the court did not conduct any inquiry to determine whether a three-year-old child had the capacity to testify. The child was the alleged victim of the charged sexual abuse. The conviction was reversed.

NOVEMBER 23, 2022

CRIMINAL LAW, CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTION.

ALTHOUGH THERE WAS DIRECT EVIDENCE DEFENDANT OWNED THE CAMERA WHICH WAS SET UP TO VIEW THE VICTIM'S BEDROOM, THERE WAS NO DIRECT EVIDENCE IT WAS THE DEFENDANT WHO ACTUALLY PLACED THE CAMERA ON THE NEIGHBOR'S PROPERTY; THERFORE THE CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTION SHOULD HAVE BEEN GIVEN; CONVICTION REVERSED (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined defendant's request for the circumstantial evidence jury instruction should have been granted. Defendant was charged with setting up a camera on a neighbor's property to view the victim's bedroom. There was some direct evidence that the camera belonged to defendant. But the jury would have to rely on circumstantial evidence to find that the defendant had positioned the camera to view the victim:

… [P]roof by direct evidence as to one element of a crime … does not mean that a circumstantial evidence charge should be not given … . …

… [T]he record fails to disclose any eyewitness testimony — or any other proof — identifying defendant as the perpetrator who placed the camera on the neighbor's lawn … . To conclude that defendant was the perpetrator, the jury had to make an inference based upon defendant's ownership of the camera and the pictures of him found therein. Because "the People's proof relative to the identity of the perpetrator . . . was entirely circumstantial" … County Court should have granted defendant's request for a circumstantial evidence charge … . People v Lamb, 2022 NY Slip Op 07267, Third Dept 12-22-22

Practice Point: Even though there was direct evidence of an element of an offense, the circumstantial evidence jury instruction should have been in this case. Defendant was charged with setting up a camera to view the victim in the victim's bedroom. There was direct evidence defendant owned the camera but no direct evidence it was defendant who placed the camera on the neighbor's property.

DECEMBER 22, 2022

CRIMINAL LAW, CONCURRENT INCLUSORY COUNTS, JUDGES.

IN REVIEWING THE GRAND JURY MINUTES, COUNTY COURT SHOULD NOT HAVE DISMISSED THE CONCURRENT INCLUSORY COUNTS; RATHER THOSE COUNTS SHOULD BE SENT TO THE JURY IN THE ALTERNATIVE (THIRD DEPT).

The Third Department, reversing County Court and reinstating three counts of the indictment, determined that inclusory concurrent counts in an indictment should not be dismissed prior to trial:

… [T]he parties entered a stipulation in lieu of motions authorizing County Court to review the grand jury minutes to determine whether there was legally sufficient evidence, adequate instructions or any defects in the proceedings. The court thereafter dismissed those counts charging criminal sexual act in the first degree as inclusory concurrent counts of the predatory sexual assault counts pursuant to CPL 300.30 (4), occasioning this appeal by the People.

"In assessing whether dismissal of an indictment is warranted under CPL 210.20 (1) (b), a reviewing court must assess whether the People presented legally sufficient evidence to establish the offense or offenses charged" … .. Although asked to review the indictment to ensure that the evidence submitted to the grand jury was legally sufficient, the court dismissed the counts at issue as inclusory. Even if certain counts charged in the indictment are inclusory concurrent counts, that does not require dismissal of those counts prior to trial or, upon trial, bar the submission of both the greater and the lesser counts to the jury for consideration. Rather, "[w]hen inclusory counts are submitted for consideration, they must be submitted in the alternative since a conviction on the greater count is deemed a dismissal of every lesser count" … . People v Provost, 2022 NY Slip Op 06966, Third Dept 12-8-22

Practice Point: Conclusory concurrent counts should be allowed to go to the jury in the alternative.

DECEMBER 08, 2022

CRIMINAL LAW, INTOXICATION JURY INSTRUCTION.

THERE WAS SUFFICIENT EVIDENCE, INCLUDING EXPERT EVIDENCE, OF DEFENDANT'S INTOXICATION TO RAISE A DOUBT WHETHER DEFENDANT FORMULATED THE INTENT TO COMMIT ASSAULT SECOND; THE REQUEST FOR THE INTOXICATION JURY CHARGE SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED (THIRD DEPT).

The Third Department, reversing defendant's conviction and ordering a new trial, determined there was sufficient evidence of defendant's intoxication to warrant the jury charge on intoxication. There was enough evidence of intoxication to support a doubt whether defendant was able to formulate the requisite intent to commit assault second:

"To warrant the submission of an intoxication charge to a jury, there must be sufficient evidence of intoxication in the record for a reasonable person to entertain a doubt as to the element of intent on that basis" … . When making the determination as to whether an intoxication charge is warranted, the evidence must be viewed "in the light most favorable to the defendant" … . "[A]lthough a relatively low threshold exists to demonstrate entitlement to an intoxication charge" … , "[e]vidence of intoxication, even under this standard, requires more than a bare assertion by a defendant that he [or she] was intoxicated" … . * * *

Here, in proving assault in the second degree, the People had the burden of establishing that defendant possessed the intent to "cause serious physical injury to another person" … . Although there was testimony that defendant was loud and obnoxious and was arguing with the bartender about the benefit poster just prior to the altercation, there was no testimony regarding interactions between the victim and defendant just prior to the altercation, which could have left a question in the jurors' minds as to defendant's intent and how things escalated as quickly as they did … . The testimony at trial regarding defendant entering the bar with a beer, consuming two more drinks prior to being refused service, coupled with the surveillance footage, established that the suspect consumed multiple alcoholic beverages within a short period of time prior to the assault … . Moreover … the surveillance footage revealed that someone looking strikingly similar to defendant consumed several alcoholic beverages hours before the assault and that, upon returning to the bar, exhibited markedly different behavior from earlier in the

evening. Additionally, … the People's expert witness testified that consumption of alcohol in excess can alter one's personality, which supported his theory of voluntary intoxication. People v Adrian, 2022 NY Slip Op 05896, Third Dept 10-20-22

Practice Point: Here there was sufficient evidence, including expert evidence, of defendant's intoxication to raise a doubt about whether defendant formulated the intent to commit assault second. Defendant's request for the intoxication jury charge should have been granted.

OCTOBER 20, 2022

CRIMINAL LAW, SECOND FELONY OFFENDER, TOLLING OF TEN-YEAR LOOKBACK, JUDGES, APPEALS.

BEFORE SENTENCING DEFENDANT AS A SECOND VIOLENT FELONY OFFENDER, THE COURT DID NOT MAKE A FINDING WHETHER THE TEN-YEAR LOOK-BACK FOR ANY PREDICATE VIOLENT FELONY WAS TOLLED BY A PERIOD OF INCARCERATION; THE ISSUE SURVIVES A WAIVER OF APPEAL AND WAS PROPERLY RAISED FOR THE FIRST TIME ON APPEAL; MATTER REMITTED FOR RESENTENCING (THIRD DEPT).

The Third Department, remitting the matter for resentencing, determined the court did not make a finding about whether the 10-year look-back for a predicate violent felony was tolled by periods of incarceration. The issue survives a waiver of appeal and, because the issue is clear from the record, was properly raised for the first time on appeal:

To qualify as a predicate violent felony, the sentence for the prior violent felony "must have been imposed not more than [10] years before commission of the felony of which the defendant presently stands convicted" (Penal Law § 70.04 [1] [b] [iv]). "In calculating this 10-year look-back period, 'any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be

excluded and such 10-year period shall be extended by a period or periods equal to the time served under such incarceration'" … .

The instant offense occurred on March 3, 2018. Prior to sentencing, the People filed a predicate statement indicating that defendant had previously been convicted of a violent felony in 2004 … . The People also submitted a presentence report which demonstrated that defendant was convicted of additional felonies in 2010 and 2014, but — as the People concede — neither the predicate statement nor the presentence report established the time periods during which defendant was incarcerated during the time between the two violent felonies in order to toll the 10-year look-back period … . People v Faulkner, 2022 NY Slip Op 06957, Third Dept 12-8-22

Practice Point: Before sentencing defendant as a second violent felony offender, the sentencing court did not make a finding whether the ten-year look-back for a predicate violent felony was tolled by a period of incarceration. The issue survives a waiver of appeal and was properly raised for the first time on appeal. The matter was remitted for resentencing.

DECEMBER 08, 2022

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), DOWNWARD DEPARTURE, JUDGES.

DEFENDANT IN THIS SORA RISK-ASSESSMENT PROCEEDING REQUESTED A DOWNWARD DEPARTURE WHICH WAS NOT ADDRESSED BY COUNTY COURT; THE ORDER WAS REVERSED AND THE MATTER SENT BACK FOR THE RELEVANT FINDINGS OF FACT AND CONCLUSIONS OF LAW (THIRD DEPT).

The Third Department, reversing County Court, determined defendant's request for a downward departure in the SORA risk-assessment proceeding was not addressed by the court. The matter was sent back for the relevant findings of fact and conclusions of law:

County Court failed to address his request for a downward departure. We agree and, inasmuch as County Court did not set forth on the record any findings or conclusions on the request, we are unable to assess the court's reasoning for the implicit denial thereof. "Consequently, we reverse and remit so that County Court may determine whether or not to order a departure from the presumptive risk level indicated by the offender's guidelines factor score and to set forth its findings of fact and conclusions of law as required" … . People v Howland, 2022 NY Slip Op 06967, Third Dept 12-8-22

Practice Point: In a SORA risk-assessment proceeding, if the defendant requests a downward departure, the court must address the request and make the relevant findings of fact and conclusions of law.

DECEMBER 08, 2022

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

THE SUPERIOR COURT INFORMATION (SCI) DID NOT CHARGE DEFENDANT WITH CREATING AND FAILING TO REGISTER AN INTERNET IDENTIFIER, WHICH IS A VIOLATION OF THE CORRECTION LAW; INSTEAD, THE SCI CHARGED DEFENDANT WITH FAILURE TO REGISTER A FACEBOOK ACCOUNT, WHICH DOES NOT VIOLATE THE CORRECTION LAW (THIRD DEPT).

The Third Department, reversing defendant's conviction and dismissing the superior court information (SCI) determined that the SCI did not charge defendant with an violation of Correction Law section 168-a (18). The statute requires a sex offender to register the creation of an "Internet identifier." But the SCI charged defendant with creating a Facebook account, which is not prohibited:

… [T]he SCI did not charge defendant with failing to register or report a change in an Internet identifier; instead, defendant was solely charged with failing to report a change in Internet status in violation of Correction Law § 168-f (4). Even assuming, without deciding, that the generalized language employed — failing to report a change in Internet status — coupled with the statutory reference otherwise

would be sufficient to allege the material elements of the crime charged … , such reference was effectively negated "by the inclusion of conduct that [did] not constitute the crime charged" … — namely, "establishing a Facebook account."

The governing statutes were written, and have been interpreted, narrowly. It has been clearly established "that the existence of a Facebook account — as opposed to the Internet identifiers a sex offender may use to access Facebook or interact with other users on Facebook — need not be disclosed to DCJS [Division of Criminal Justice Services] pursuant to Correction Law § 168-f (4)" … . Hence, the mere fact that defendant established a Facebook account was not an occurrence that defendant was required to report to DCJS, and his failure to do so did not constitute a violation of Correction Law § 168-f (4) … . * * *

… [T]he People did not charge defendant with failing to register an Internet identifier; they charged him with failing to report a change in Internet status, i.e., "establishing a Facebook account." Stated differently, instead of "correctly alleg[ing] that the omission constituting the offense was [defendant's] failure to register an Internet identifier used by him to access and identify himself on the Facebook account that he created and maintained, [the SCI] improperly premise[d] the charge on his failure to register the Facebook account itself" … . People v Ferretti, 2022 NY Slip Op 06030, Third Dept 10-27-22

Practice Point: Here the superior court information (SCI) did not charge defendant with an offense. If the SCI had charged defendant with failing to register an Internet identifier, the SCI would have charged an offense. Bu the SCI only charged defendant with failing to register a Facebook account, which is not an offense.

OCTOBER 27, 2022

CRIMINAL LAW, TRAFFIC STOPS.

THE MAJORITY CONCLUDED THE TRAFFIC STOP, THE 40-MINUTE DETENTION, THE CALLING OF DEFENDANT'S PAROLE OFFICER, AND THE SEARCH OF DEFENDANT'S CAR BY THE PAROLE OFFICER, WERE VALID; TWO DISSENTERS ARGUED THE JUSTIFICATION FOR FURTHER DETENTION AROSE ONLY AFTER THE JUSTIFICATION FOR THE LIMITED DETENTION BASED ON THE TRAFFIC STOP HAD DISSIPATED (THIRD DEPT).

The Third Department, over a two-justice dissent, determined the traffic stop for rolling through a stop sign and the extended 40-minute detention and the search of the vehicle were valid. The dissenters argued that rolling through the stop sign justified only a limited detention. The facts described by the majority are too detailed to fairly summarize. When the officers stopped the car, they were aware of defendant's legal history and parole status. The defendant was outside the geographical limit of his parole conditions: The defendant's parole officer was called to the scene and he conducted a search of the car pursuant to parole rules:

Defendant's multiple and inconsistent explanations about his travels, which the police officers knew were false, coupled with his parole situation and his nervous demeanor throughout the encounter, combined to give the officers a founded suspicion of criminality … . As such, the police officers were authorized to extend the scope of the stop beyond its original justification by requesting consent to search defendant's vehicle and, upon denial, detaining defendant to await a canine sniff of the vehicle's exterior … . * * *

Given that defendant was placed on lifetime parole in 1999 due to illegal narcotics activity, we conclude that Pirozzolo's [the parole officer's] decision to search the vehicle was reasonable and substantially related to the performance of his duties … .

From the dissent:

Defendant did give conflicting answers in response to [officer] Linehan's inquiry, and County Court found that such answers, coupled with defendant's nervous

demeanor and parole status, gave Linehan founded suspicion that criminality was afoot. These answers and behavior by defendant, however, came after the initial justification for stopping and detaining defendant had already dissipated … . Indeed, between the time when Linehan effectuated the traffic stop and processed defendant's license and registration, Linehan did not observe anything suspicious by defendant so as to give him founded suspicion that criminality was afoot in order to continue defendant's detention … . People v Thomas, 2022 NY Slip Op 07263, Third Dept 12-22-22

Practice Point: Here the majority concluded the traffic stop, the 40-minute detention, calling the defendant's parole officer, and the search of the car by the parole officer, were valid. Two dissenters argued only the limited initial detention related to the traffic stop for rolling through a stop sign was justified.

DECEMBER 22, 2022

DISCIPLINARY HEARINGS (INMATES), EVIDENCE.

THE RECORD DOES NOT REFLECT THE MEASURES TAKEN BY THE HEARING OFFICER TO DETERMINE THE BODY CAMERA FOOTAGE REQUESTED BY THE PETITIONER DID NOT EXIST; DETERMINATION ANNULLED AND NEW HEARING ORDERED (THIRD DEPT).

The Third Department, annulling the misbehavior determination, held that petitioner-inmate's request for body camera footage was improperly denied:

We … find merit to petitioner's contention that his request for body camera footage was improperly denied. Upon petitioner's request for such footage at the hearing, the Hearing Officer responded that the correction officer's body camera was turned off and, therefore, such footage did not exist. The record does not reflect the measures taken or the basis upon which the Hearing Officer concluded that the footage did not exist … . As such, petitioner's request for the body camera footage was improperly denied and, under these circumstances, the appropriate remedy is remittal for a new hearing … . Matter of Dorcinvil v Miller, 2022 NY Slip Op 06972, Third Dept 12-8-22

Practice Point: Here the petitioner-inmate requested body camera footage. The hearing officer denied the request, saying that the body camera had been turned off. Because the record did not reflect the steps taken by the hearing officer to defermine the footage didn't exist, the determination was annulled and a new hearing was ordered.

DECEMBER 08, 2022

EDUCATION-SCHOOL LAW, EMPLOYMENT LAW, PRIVATE COLLEGE ELIMINATING FACUTLY.

WHETHER A PRIVATE COLLEGE ACTED IRRATIONALLY OR ARBITRARILY AND CAPRICIOUSLY IN ELIMINATING FACULTY POSITIONS IN RESPONSE TO A BUDGET SHORTFALL IS PROPERLY DETERMINED IN AN ARTICLE 78 PROCEEDING; HERE THE COLLEGE FOLLOWED THE RELEVANT RULES IN THE COLLEGE MANUAL; SUPREME COURT SHOULD NOT HAVE RULED THE COLLEGE ACTED ARBITRARILY AND CAPRICIOUSLY (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the respondent private college followed the relevant provisions of the college manual in determining what programs and faculty positions to eliminate in response to a budget shortfall. Petitioners, members of the music department faculty whose positions were eliminated, did not demonstrate the respondents' decisions were irrational or arbitrary and capricious:

A private college, "having accepted a charter and having thus become a quasi-governmental body, can be compelled in a[CPLR] article 78 proceeding to fulfill not only obligations imposed upon them by State or municipal statutes but also those imposed by their internal rules" … Thus, a CPLR article 78 proceeding is the appropriate vehicle for judicial review of matters involving a determination of a professor's benefits and privileges of his or her academic tenure … .

As "the administrative decisions of educational institutions involve the exercise of highly specialized professional judgment and these institutions are, for the most part, better suited to make relatively final decisions concerning wholly internal

matters" … . Deference should be accorded to a college's determination, "and judicial review is circumscribed to whether the [college] failed to substantially comply with its internal rules and whether its decision was arbitrary [and] capricious or made in bad faith … . ….

… [T]he record confirms … there were no procedural rule violations. …

… [T]he record confirms that Supreme Court did not give appropriate deference to respondents' interpretation of the termination preference — as set forth in chapter 2, § E (1) (1.6) of the manual … — and that Supreme Court improperly concluded that respondents' determination was arbitrary and capricious. Matter of Hansbrough v College of St. Rose, 2022 NY Slip Op 05915, Third Dept 10-20-22

Practice Point: A court's Article 78 review of a private college's elimination of faculty positions in response to a budget shortfall is limited to a determination whether the college acted irrationally or arbitrarily and capriciously. Here the record indicated the college followed the relevant rules in the college manual, i.e., the college acted rationally.

OCTOBER 20, 2022

EDUCATION-SCHOOL LAW, ADMISSION TO NYC SPECIAL HIGH SCHOOLS.

NYC DEPARTMENT OF EDUCATION'S (DOE'S) DENIALS OF PETITIONERS' APPLICATIONS FOR ADMISSION TO THE CITY'S SPECIALIZED HIGH SCHOOLS (SHS'S) WERE NOT ARBITRARY AND CAPRICIOUS (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Clark, determined the NYC Department of Education's (DOE's) denials of petitioners' applications for admission to NYC's Specialized High Schools (SHS's) were not arbitrary and capricious. The opinion includes a detailed history of the SHS's and detailed explanations of the criteria for admission of students deemed to be disadvantaged within meaning of the SHS's Discovery program. The petitioners were not disadvantaged students. It is difficult to discern the precise nature of the

petitioners' claims from the opinion, but it appears petitioners were questioning the propriety of the implementation of the Discovery program for disadvantaged students. Matter of C.K. v Tahoe, 2022 NY Slip Op 05899, Third Dept 10-20-22

Practice Point: In this Article 78 proceeding the petitioners were students who were denied admission to NYC's Specialized High Schools (SHS's), The petitioners, who were not disadvantaged within the meaning the SHS's Discovery program, apparently questioned the propriety of the implementation of the Discovery program for disadvantaged students. The Third Department held that the Department of Education's denials of the petitioners' applications for admission were not arbitrary and capricious.

OCTOBER 20, 2022

ELECTION LAW, LACHES.

PETITIONERS' CHALLENGE TO THE NEW PROVISIONS OF THE ELECTION LAW ADDRESSING THE NEW PROCESS OF CANVASSING ABSENTEE BALLOTS WAS PRECLUDED BY THE DOCTRINE OF LACHES (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined the challenge to the new process of canvassing absentee ballots was precluded by the doctrine of laches:

Petitioners commenced this proceeding/action challenging the constitutionality of the new process of canvassing absentee ballots in Election Law § 9-209 nine months after it was enacted, after the process was in effect for two primary elections and several special elections, and at the time that canvassing of absentee ballots using the new process began in the 2022 general election. The amendment to Election Law § 8-400 was enacted in 2020 and has been in effect for multiple general, primary and special elections but petitioners did not challenge the statute until nine months after the sunset clause was extended and after the mailing of absentee ballots had already begun. … In short, petitioners delayed too long in bringing this proceeding/action. To the extent that petitioners contend that they did not bring the challenges until they were ripe, the action constitutes facial

challenges to the statutes, implicating their text, not their applications, and, therefore, the action was ripe at the time of the enactment of the statutes … . Matter of Amedure v State of N.Y., 2022 NY Slip Op 06096, Third Dept 11-1-22

Practice Point: The petitioners didn't bring this challenge to new provisions in the Election Law addressing the canvassing of absentee ballots until nine months after enactment and after the new process had been used several elections. The petition was precluded by the doctrine of laches.

NOVEMBER 01, 2022

EMPLOYMENT LAW, CORRECTION LAW, ADMINISTRATIVE LAW, EVIDENCE.

PETITIONER, A FORMER CORRECTION OFFICER SEEKING REINSTATEMENT, WAS ENTITLED TO THE RECORDS OF THE PSYCHOLOGICAL EXAMINATION WHICH FOUND HIM UNFIT; THE WAIVER OF THE RIGHT TO REVIEW THOSE DOCUMENTS, SIGNED BY PETITIONER, WAS A NULLITY (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Pritzker, reversing Supreme Court, determined petitioner, a former correction officer seeking reinstatement, was entitled to discovery of the records of the psychological examination which found him unfit to serve as a correction officer. The court held that the waiver of the right to review such documents (signed by the petitioner at the outset) was a nullity:

… [W]e do not agree that the limited review procedures established in Correction Law § 8 can lawfully be used to side-step and effectively eviscerate the robust protections set forth in 4 NYCRR 5.9 (e) (3), which directly apply to those seeking reinstatement under Civil Service Law § 71 … . Nevertheless, although both statutes have different purposes — Correction Law § 8 is designed to eliminate applicants "who exhibit psychological disorders that would indicate their unsuitability for the job" … , whereas Civil Service Law § 71 was enacted for the "protection of an employee separated from the service by reason of a disability

resulting from occupational injury or disease" … — both purposes can be achieved, and the statutes harmonized by permitting the use of Correction Law § 8 testing while preserving the review procedure set forth in 4 NYCRR 5.9 relative to employees falling within Civil Service Law § 71 … . Notably, despite the use of Correction Law § 8 testing, this matter remains distinctly a Civil Service Law § 71 reinstatement case.

… [P]etitioner is minimally entitled to receive the clandestine psychological report that formed the very basis for the disqualification for reinstatement, as well as all other rights attendant to a hearing held pursuant to article 3 of the State Administrative Procedure Act. … [T]o the extent that petitioner signed a waiver purporting to extinguish these rights, the waiver is a nullity inasmuch as respondent's policy requiring all applicants to sign the consent and release form is an unpromulgated rule under the definition of "[r]ule" within State Administrative Procedure Act § 102 (2) (a) (i), and therefore is without effect … . Matter of Williams v New York State Dept. of Corr. & Community Supervision, 2022 NY Slip Op 07280, Third Dept 12-22-22

Practice Point: Petitioner, a former correction officer seeking reinstatement, was entitled to the records of the psychological exam which found him unfit. The waiver of the right to review the documents, signed by petitioner at the outset, was based upon an unpromulgated rule and therefore was of no effect.

DECEMBER 22, 2022

EMPLOYMENT LAW, HUMAN RIGHTS LAW, CIVIL RIGHTS LAW, IMMUNITY, MUNICIPAL LAW.

IN THIS HOSTILE-WORK-ENVIRONMENT ACTION UNDER 42 USC 1983 AND THE NYS HUMAN RIGHTS LAW, SOME OF THE DEFENDANTS, ALL CITY EMPLOYEES, WERE DEEMED PROTECTED FROM SUIT BY QUALIFIED IMMUNITY AS A MATTER OF LAW; WITH RESPECT TO THE EMPLOYEE WHO ALLEGEDLY MADE SEXUALLY INAPPROPRIATE COMMENTS TO PLAINTIFF, THERE WERE QUESTIONS OF FACT WHETHER QUALIFIED IMMUNITY WAS APPLICABLE (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined qualified immunity protected plaintiff's supervisors in this hostile-work-environment action under 42 USC 1983 and the NYS Human Rights Law against the City of Albany and individual city employees. Plaintiff alleged a co-worker named Tierney made sexually inappropriate comments to her over a period of two years. The allegations against Tierney properly survived summary judgment, but the allegations against the defendants who played no role in the harassment, alleging supervisory inaction, should have been dismissed. Plaintiff had worked as a civilian dispatcher in the police department:

In the 42 USC § 1983 context, liability of an individual defendant is based on his or her "personal involvement in the alleged constitutional deprivation" … . Individual defendant liability only attaches when his or her own conduct is sufficiently severe and pervasive to create the hostile work environment; otherwise, that defendant is protected by qualified immunity … . * * *

Under state law, public officials are protected by qualified immunity for discretionary acts that are unlawful under the Human Rights Law unless "they are undertaken in bad faith or without reasonable basis" … . Hostile work environment claims under the Human Rights Law are evaluated under the same severe-or-pervasive standard as a claim brought pursuant to 42 USC § 1983 … .* * *

Although individual liability under 42 USC § 1983 may flow from a supervisor's inaction in the face of known harassment … , the alleged individual inaction … did not suffice to create the hostile work environment … .

We reach the same conclusion … under the Human Rights Law, pursuant to which supervisors may be held individually liable to the extent that they aided and abetted conduct creating a hostile work environment (see Executive Law § 296 [6]). … [D]efendants[] … did not actively participate in the conduct creating the hostile work environment as required under the aiding-and-abetting provision … .

Even if plaintiff's Human Rights Law claim against them could proceed under a supervisory inaction theory, we would conclude that they are shielded by qualified immunity. … . Mahoney v City of Albany, 2022 NY Slip Op 07288, Third Dept 12-22-22

Practice Point: Here plaintiff and defendants were city employees. Plaintiff alleged one employee made sexually inappropriate comments to her over a two year period. Supervisory inaction was the basis for the action against other defendants. The Third Department held the "supervisory-inaction" defendants were protected from suit by qualified immunity as a matter of law under both 42 USC 1983 and the NYS Human Rights Law. There were questions of fact about whether the employee who made the comments was protected by qualified immunity.

DECEMBER 22, 2022

EMPLOYMENT LAW, RETIREMENT AND SOCIAL SECURITY LAW, ACCIDENTAL DISABILITY RETIREMENT BENEFITS.

PETITIONER POLICE OFFICER'S SLIP AND FALL WHEN LEAVING A BATHROOM MET THE DEFINITION OF AN "ACCIDENT" IN THE RETIREMENT AND SOCIAL SECURITY LAW; SHE WAS THEREFORE ENTITLED TO ACCIDENTAL DISABILITY RETIREMENT BENEFITS (THIRD DEPT).

The Third Department, annulling the comptroller's ruling, determined the police officer's slip and fall was an accident within the meaning of the Retirement and Social Security Law entitling her to accidental disability retirement benefits:

Petitioner's slip and fall while exiting the bathroom was sudden and unexpected, and the precipitating event was not a risk of the work performed by her, i.e., was not the result of activity undertaken in the performance of her ordinary employment as a police officer … . Petitioner was not required to demonstrate that the slippery substance was not readily observable … . The Retirement System conceded at the hearing that the 2012 accident rendered petitioner permanently incapacitated and on appeal respondent — in conceding that petitioner was entitled to performance of duty disability retirement based upon the 2012 incident — necessarily conceded causation, i.e. that the 2012 fall caused her permanent incapacitation. Matter of Bucci v DiNapoli, 2022 NY Slip Op 06968, Third Dept 12-8-22

Practice Point: Petitioner police officer slipped and fell when leaving a bathroom. That was an "accident" within the meaning of the Retirement and Social Security Law entitling her to accidental disability retirement benefits.

DECEMBER 08, 2022

EMPLOYMENT LAW, RETIREMENT AND SOCIAL SECURITY LAW, ACCIDENTAL DISABILITY BENEFITS.

PETITIONER, AN ADMINISTRATIVE LAW JUDGE, WAS INJURED WHEN A HEAVY SELF-CLOSING DOOR CLOSED ON HER AS SHE LEFT THE HEARING ROOM; THE INCIDENT WAS AN "ACCIDENT" WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW ENTITLING PETITIONER TO DISABILTIY BENEFITS (THIRD DEPT).

The Third Department, reversing the finding that petitioner was not injured in an "accident," determined petitioner was entitled to disability benefits. Petitioner, an administrative law judge, was injured leaving a hearing room when a heavy door closed on her:

… [P]etitioner bears the burden of establishing that the disability was the result of an accident, which is defined as "a sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact" … . "Under this standard, petitioner was

required to demonstrate that [her] injuries were caused by a precipitating event that was sudden, unexpected and not a risk inherent in [her] ordinary job duties" … . …

Although petitioner was aware of the hazard posed by the heavy, self-closing door, she reasonably expected that the supervisor, who was holding the door open, would continue to do so as petitioner walked through. Thus, petitioner demonstrated that her injuries were caused by a "sudden [and] unexpected" precipitating event — the supervisor letting go of the heavy, self-closing door while petitioner walked through it — which was not a risk inherent in her job duties …. Matter of Campbell v DiNapoli, 2022 NY Slip Op 05911, Third Dept 10-20-22

Practice Point: Here a heavy self-closing door closed on the petitioner, an administrative law judge, as she left the hearing room. The incident was "sudden, unexpected and not a risk inherent in her ordinary job duties." Therefore the incident was an "accident" under the Retirement and Social Security Law, entitling petitioner to disability benefits.

OCTOBER 20, 2022

EMPLOYMENT LAW, UNEMPLOYMENT INSURANCE, LABOR LAW, INSURANCE LAW, CONTRACT LAW.

CONTRACT LAW. EVEN IF THE CONTRACT BETWEEN THE INSURER AND CLAIMANT INSURANCE BROKER INCLUDED ALL THE STATUTORY FACTORS IN LABOR LAW 511, THE BROKER WILL BE CONSIDERED AN EMPLOYEE IF THE SERVICES ACTUALLY PROVIDED BY THE BROKER ARE NOT CONSISTENT WITH THE CONTRACT PROVISIONS (THIRD DEPT).

The Third Department determined the insurance company, Paul Revere, did not demonstrate that claimant insurance broker was not an employee. Claimant was entitled to unemployment insurance benefits:

Labor Law § 511 (21) provides that "[t]he term 'employment' shall not include the services of a licensed insurance agent or broker if," among other things, "the

services performed by the agent or broker are performed pursuant to a written contract" … that, in turn, contains seven statutorily enumerated provisions … . Here, the Board concluded that two of the seven statutory requirements were absent from the written agreement entered into between claimant and Paul Revere — specifically, provisions demonstrating that claimant was "permitted to work any hours he . . . chooses" … and was "permitted to work out of his . . . own office or home or the office of the person for whom services are performed" … . Paul Revere disagrees, contending that article XI (A) of the written contract satisfies such requirements by providing that "Paul Revere shall not exercise nor have the right to exercise direction or control over [claimant's] time, when or how [claimant] may work, or over the activities of [claimant]."

… [W]e agree with the Board that the conclusory and sweeping language employed in article XI (A) of the contract does not satisfy the requirements of Labor Law § 511 (21) (d) (iii) and (iv). … [E]ven assuming, without deciding, that the written agreement between Paul Revere and claimant did … fulfill all of the statutory requirements, we agree with the Board's further conclusion that the parties' conduct was inconsistent with the provisions of Labor Law § 511 (21) and, therefore, the services performed by claimant do not fall within the statutory exclusion…. . …

… [T]he statute requires both that the contract at issue contain the seven enumerated provisions and "that the services performed by the insurance agent or broker actually be consistent with those provisions" … . Matter of Hoyt (Paul Revere Life Ins. Co.–Commissioner of Labor), 2022 NY Slip Op 06518, Third Dept 11-17-22

Practice Point: Even if the contract between the insurer and claimant insurance broker includes all the statutory provisions in Labor Law 511 (such that the broker would not be considered an employee for unemployment insurance purposes), if the services actually performed by the broker are not consistent with those contract provisions the broker may be deemed an employee eligible for benefits.

NOVEMBER 17, 2022

EMPLOYMENT LAW, UNEMPLOYMENT INSURANCE, LABOR LAW.

PURSUANT TO LABOR LAW SECTION 511, THE NEW YORK CITY SUPPER CLUB WAS NOT THE EMPLOYER OF THE MUSICIANS, DANCERS AND OTHER PERFORMERS WHO ENTERTAINED AT THE CLUB; THEREFORE THE CLUB WAS NOT OBLIGATED TO MAKE UNEMPLOYMENT INSURANCE CONTRIBUTIONS ON BEHALF OF THE PERFORMERS (THIRD DEPT).

The Third Department, reversing the Unemployment Insurance Appeal Board, determined that the musicians, dancers and other artists who performed at a New York City supper club (Griffs) were not employees of the club under Labor Law 511. Therefore the club was not obligated to make additional unemployment insurance contributions with respect to those performers:

Pursuant to Labor Law § 511 (1) (b) (1-a), the term employment includes "any service by a person for an employer . . . as a professional musician or a person otherwise engaged in the performing arts, and performing services as such for a . . . restaurant, night club or similar establishment unless, by written contract, such musician or person is stipulated to be an employee of another employer covered by [the Labor Law]" … . "The statute, which was designed to extend the availability of unemployment insurance and workers' compensation benefits to those in the performing arts, creates a rebuttal presumption of employment" … — a presumption that may be rebutted by a written contract establishing that the performer in question is the employee of another covered employer … . …

… [T]he sole contested issue is whether a provision contained within the written agreements executed by the performers established that they were "employee[s] of another employer covered by [the Labor Law]" (Labor Law § 511 [1] [b] [1-a]). To that end, paragraph No. 8 of the performers' contracts with Griffs provides, in relevant part, that Griffs "is not nor shall become [the performers'] employer, as other corporations employ them" … . Matter of Griffs Global Corp. (Commissioner of Labor), 2022 NY Slip Op 06670, Third Dept 11-23-22

Practice Point: Under Labor Law 511 the musicians, dancers and other performers who entertained at the New York City supper club were not employees of the club because their contracts stated they were employees of other corporations.

Therefore, the club was not required to make unemployment insurance contributions on behalf of the performers.

NOVEMBER 23, 2022

FAMILY LAW, CUSTODY, NEGLECT, ABUSE, CHILD PROTECTIVE SERVICES RECORDS, EVIDENCE.

EVIDENCE OF ABUSE OR NEGLECT OF ANOTHER CHILD IS ADMISSIBLE IN A MODIFICATION OF CUSTODY PROCEEDING; ALTHOUGH CHILD PROTECTIVE SERVICES RECORDS REGARDING NEGLECT ARE HEARSAY, THE HEARSAY IS ADMSSSIBLE IF CORROBORATED (THIRD DEPT).

The Third Department, reversing Family Court in this modification of custody proceeding, determined it was error to exclude Child Protective Services (CPS) records regarding mother's alleged neglect of another child. Family Court excluded the records because the proceeding was not a neglect proceeding and because the evidence was hearsay. The Third Department noted that evidence of abuse or neglect is admissible in a custody proceeding and hearsay is admissible if corroborated:

The agency records that the father sought to admit are not in the record and, thus, not before this Court. A review of the father's modification petition reveals that he noted CPS's involvement with the mother and cited to such as establishing a change in circumstances. Specifically, he alleged there had been "ongoing child protective involvement in the [mother's] home[,]" that the subject child has indicated there is domestic abuse taking place in the home and that the child has reported that he is being neglected by the mother. The petition states that "it was revealed through the CPS open investigation that the child is reporting that there is no food at the [mother's] home and that he goes without meals." Based on the foregoing, Family Court erred in refusing to allow the CPS records into evidence based upon the rationale that no hearsay exception existed for abuse and neglect allegations in a Family Ct Act article 6 proceeding. In this respect, although this is not a Family Ct Act article 10 proceeding, the law is well established that hearsay evidence as to allegations of abuse or neglect can be admitted into evidence during

a custody proceeding if corroborated by other evidence . As such, this case must be reversed and remitted to Family Court for the admission of such evidence at a new fact-finding hearing on the parties' modification petitions. Matter of Sarah QQ. v Raymond PP., 2022 NY Slip Op 06659, Third Dept 11-23-22

Practice Point: Evidence of abuse or neglect of another child is admissible in a modification of custody proceeding. Although agency records concerning neglect are hearsay, the records would be admissible if the hearsay is corroborated.

NOVEMBER 23, 2022

FAMILY LAW, CUSTODY.

THE EVIDENCE DID NOT DEMONSTRATE A CHANGE IN CIRCUMSTANCES WARRANTING A MODIFICATION OF THE CUSTODY ARRANGEMENT, FAMILY COURT REVERSED (THIRD DEPT).

The Third Department, revering Family Court, determined the evidence did not demonstrate a change in circumstances sufficient to warrant a modification of the custody arrangement:

The father's primary contention was that the change in his work schedule constituted a sufficient change in circumstances. In that regard, at the time that the 2016 order was entered, the father was working weekday night shifts. When the father filed the instant petition, his work schedule was such that he was working a continuous four-day-on, four-day-off schedule. However, in the midst of the hearing, the father revealed that his work schedule had again changed, this time to Monday through Thursday from 4:00 p.m. to 2:00 a.m., which aligned much more closely with his schedule as of the 2016 order. In our view, this does not constitute a sufficient change in circumstances to trigger a best interests analysis. As for the other factors relied upon by Family Court, there was no showing that the mother's new job, the parties' new residences, their new relationships, or the introduction of half-siblings and a stepsibling into the child's life "constitute[d] changed circumstances evidencing any infirmity in the present custody arrangement" … . Accordingly, the father failed to meet his burden of establishing the necessary

change in circumstances, and the petition should have been dismissed. Matter of Kenneth N. v Elizabeth O., 2022 NY Slip Op 05904, Third Dept 10-20-22

Practice Point: Here the evidence relied on by Family Court did not amount to a change in circumstances warranting a modification of custody. The evidence included: mother's new job, the parties' new residences, the parties' new relationships, and more children.

OCTOBER 20, 2022

FAMILY LAW, DIVORCE, PERSONAL INJURY BENEFITS, DEFAULT.

THE HUSBAND DEMONSTRATED HE WAS ILL WHEN THE DIVORCE TRIAL WAS HELD AND THE WIFE MAY NOT BE ENTITLED TO A PORTION OF HIS WORLD TRADE CENTER ACCIDENTAL DISABILITY RETIREMENT BENEFITS BECAUSE PERSONAL-INJURY BENEFITS CONSTITUTE SEPARATE PROPERTY; THE HUSBAND'S MOTION TO VACATE THE DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court in this divorce action, determined the husband's motion to vacate the default judgment should have been granted. The husband demonstrated he missed the trial because of illness and he had a meritorious argument that the World Trade Center accidental disability retirement benefits were personal-injury benefits which constituted his personal property:

Pursuant to CPLR 5015 … a court may vacate an order "upon the ground of excusable default, if such motion is made within one year" after such order … . "[A] party seeking to vacate a default must establish a reasonable excuse for the default and a potentially meritorious . . . defense" to the underlying claim … . Significantly, "in recognition of the important public policy of determining matrimonial actions on the merits, the courts of this State have adopted a liberal policy with respect to vacating defaults in actions for divorce" … . * * *

… [I]n support of his motion to vacate the default, the husband proffered an affidavit wherein he averred that on the day of the hearing he was suffering from

shingles and, as such, he was in extreme pain, sleep deprived, disoriented and unable to leave his bed. The husband also submitted an affidavit from a physician's assistant who diagnosed him with, and treated him for, shingles approximately two weeks prior to the date of the trial. She also averred that she saw the husband again the day following the missed trial and that she "observed a noticeable progression of the shingles rash on [the husband's] body." … . …

… [T]he husband claims that the wife is not entitled to the portion of his pension that is for World Trade Center accidental disability retirement benefits. "While it is true that the portion of a disability pension which represents compensation for personal injuries is separate property, the party so claiming bears the burden of demonstrating what portion of the pension reflects compensation for personal injuries, as opposed to deferred compensation" … . Zeledon v Zeledon, 2022 NY Slip Op 07279, Third Dept 12-22-22

Practice Point: Here the husband's illness at the time of trial was a reasonable excuse for his default and the argument that the wife was not entitled to his World Trade Center accidental disability retirement benefits which constituted his separate property (personal-injury benefits) was meritorious. Therefore the husband's CPLR 5015 motion to vacate the default judgment should have been granted.

DECEMBER 22, 2022

FAMILY LAW, FAMILY OFFENSES, DISORDERLY CONDUCT.

THE THREATS ALLEGEDLY MADE TO PETITIONER WERE NOT MADE IN PUBLIC AND THERE WAS NO EVIDENCE THE THREATS WERE MADE WITH THE INTENTION TO CAUSE A PUBLIC DISTURBANCE; THEREFORE THE FAMILY OFFENSE PETITION ALLEGING DISORDERLY CONDUCT SHOULD HAVE BEEN DISMISSED (THIRD DEPT).

The Third Department, reversing Family Court, determined the alleged threats against petitioner were made privately and did not create a public disturbance. In addition, there was no proof the alleged threats were made with the intent to cause

a public disturbance. Therefore the petition alleging disorderly conduct as a family offense should have been dismissed:

… "[A] person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof[,] . . . [h]e [or she] engages in fighting or in violent, tumultuous or threatening behavior" (Penal Law § 240.20 [1]). Pursuant to both CPL 530.11 (1) and Family Court Act § 812 (1), "'disorderly conduct' includes disorderly conduct not in a public place." Yet, "even where the conduct at issue is alleged to have occurred in a private residence, in order for a petitioner to meet his or her burden of establishing the family offense of disorderly conduct, there must be a prima facie showing that the conduct was either intended to cause, or recklessly created a risk of causing, public inconvenience, annoyance, or alarm. The intent to cause, or recklessness in causing, public harm, is the mens rea of the offense of disorderly conduct" … . * * *

… [P]etitioner failed to meet her burden of making a prima facie showing that respondent had the requisite intent to create public inconvenience, annoyance or alarm, or recklessly causing a risk of the same … . In this respect, petitioner's evidence does not establish that respondent's actions were public in a manner that would support such a finding … . Respondent's threat against petitioner's life would have undoubtedly caused public disorder if others had heard the threat … ; however, the record reveals that respondent appears to have threatened petitioner's life in only their company, and without having drawn the attention of others to the scene … . Further, although the police were called on one instance, without a police report in evidence, it is impossible to determine which one of the parties — or if, in fact, a neighbor — had called the police to therefore permit a finding that respondent's conduct rose to the level of creating a public disturbance. Matter of Kilts v Kilts, 2022 NY Slip Op 06660, Third Dept 11-23-22

Practice Point: To prove the family offense of disorderly conduct, the conduct must occur in public or must have been motivated by the intention to cause a public disturbance. The petitioner did not meet her burden of proof and the family offense petition should have been dismissed.

NOVEMBER 23, 2022

FAMILY LAW, SEPARATE VS MARITAL PROPERTY, PENSION CREDITS.

THE NINE YEARS OF PENSION CREDITS THE HUSBAND EARNED BEFORE THE MARRIAGE ARE HIS SEPARATE PROPERTY; HOWEVER THE MARITAL FUNDS USED TO PURCHASE THOSE CREDITS DURING THE MARRIAGE ARE SUBJECT TO EQUITABLE DISTRIBUTION (THIRD DEPT).

The Third Department, reversing Supreme Court in this divorce proceeding, in a full-fledged opinion by Justice Reynolds Fitzgerald, determined the pension credits earned by the husband during the nine years prior to the marriage were his separate property. But the marital funds used to purchase those credits during the marriage were subject to equitable distribution:

"[A] pension benefit is, in essence, a form of deferred compensation derived from employment and an asset of the marriage that both spouses expect to enjoy at a future date" … . "Even though workers are unable to gain access to the money until retirement, their right to it accrues incrementally during the years of employment. Thus, that portion of a pension based on years of employment during the marriage is marital property" … . In effecting the intent of Domestic Relations Law § 236 (B), the Court of Appeals held that "these post-divorce benefits were marital property to the extent that they were compensation for past services rendered during the marriage" … . Accordingly, "it becomes evident that an employee's interest in such a plan, except to the extent that it is earned before marriage or after commencement of a matrimonial action, is marital property" … .
* * *

… [C]ompensation for past services earned prior to the marriage is separate property. The nine years of premarriage … credits were earned outside the marriage and are based on the fruit of the titled spouse's sole labors. As they are not due in any way to the indirect contributions of the non-titled spouse … , the wife's contention that she is entitled to an equitable share of any "appreciation" in the value of credits that have been classified as the husband's separate property is unpersuasive. The acquisition of the separate pension credits cannot serve to transform such property into a marital asset.

… [A]s marital funds were utilized to purchase the pension credits, said funds are subject to equitable distribution. Szypula v Szypula, 2022 NY Slip Op 06664, Third Dept 11-23-22

Practice Point: The husband earned nine years of pension credits before the marriage. Those pension credits are husband's separate property. During the marriage the pension credits were purchased with marital funds. [T]hose funds are subject to equitable distribution.

NOVEMBER 23, 2022

FAMILY LAW, VISITATION.

THE EVIDENCE INDICATED VISITATION WITH FATHER WOULD NOT BE IN THE BEST INTERESTS OF THE CHILD; FATHER'S PETITION FOR VISITATION SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Family Court, determined the evidence indicated visitation with father would not be in the best interests of the child and his petition for visitation should not have been granted:

… [I]t is undisputed that the father has not lived with the child in over a decade and has only infrequently visited the child due to, among other things, his moving out of the area and frequently relocating around the United States. The father also made no effort to seek a formal award of visitation until 2019, more than seven years after the issuance of the 2012 custody order and over two years after he had last seen the child. This failure by the father to seek a visitation order or otherwise "avail himself . . . of opportunities for visitation over a lengthy period of time is appropriately taken into account in considering whether visitation is appropriate" … .

… [T]he mother testified as to how the father behaved in an irresponsible and harmful manner on the occasions when he did interact with the child and, although the father disputed those claims, we defer to Family Court's assessment that the father's testimony was not credible … . * * * [T]he attorney for the child confirmed to Family Court, and now advises us, that the teenage child is upset by

interactions with the father for a variety of reasons and does not wish to see him. The child's preference to have no in-person contact with the father is not dispositive, but is entitled to "considerable weight" given the child's age … . Matter of Ajmal I. v LaToya J., 2022 NY Slip Op 05912, Third Dept 10-20-22

Practice Point: Although visitation with a parent is generally considered to be in the child's best interests, here father's years-long lack of contact with the child, misbehavior during prior contact, and the child's opposition to visitation, demonstrated visitation with father was not in the child's best interests. The petition for visitation should not have been granted.

OCTOBER 20, 2022

FAMILY LAW, CUSTODY, EVIDENCE, JUDGES.

FAMILY COURT'S BEST INTERESTS RULING IN THIS MODIFICATION OF CUSTODY PROCEEDING DID NOT HAVE A SOUND AND SUBSTANTIAL BASIS IN THE RECORD; THE APPELLATE DIVISION AWARDED PRIMARY PHYSICAL CUSTODY TO MOTHER (THIRD DEPT).

The Third Department, reversing Family Court, determined mother's petition for a modification of custody should have been granted:

Having concluded that Family Court's determination lacks a sound and substantial basis in the record, we are empowered to make our own independent determination of the child's best interests, and our authority in that regard is as broad as that of Family Court … . In reviewing the record, we note that the mother testified without contradiction that she does not abuse alcohol or drugs, and while she previously struggled with her mental health, the hearing evidence showed that she has overcome that challenge and achieved a stable home life. By contrast, we find problematic the evidence of the father's regular drinking in the child's presence and his apparent lack of candor during the DWI assessment, as well as the dirty and unkempt condition of his apartment. We also find significant the strong position of the appellate attorney for the child in support of the mother's petition … . In light of the foregoing, we hold that the child's best interests are served by

having the parents continue to share joint legal custody but awarding primary physical custody to the mother, with parenting time for the father as the parties shall mutually agree … . Matter of Brittni P. v Michael P., 2022 NY Slip Op 06667, Third Dept 11-23-22

Practice Point: The appellate court, reversing Family Court, held the evidence did not support Family Court's best interests ruling continuing primary physical custody with father. The appellate court undertook its own analysis of the record and awarded primary physical custody to mother.

NOVEMBER 23, 2022

FAMILY LAW, CUSTODY, EVIDENCE, JUDGES.

IN THIS MODIFICATION OF CUSTODY PROCEEDING, MOTHER'S PROOF OF THE CHILD'S INJURIES IN FATHER'S CARE AND HER IMPROVED PARENTING SKILLS AND LIVING CONDITIONS WAS SUFFICIENT TO WITHSTAND FATHER'S MOTION TO DISMISS; THE JUDGE APPEARS TO HAVE PREJUDGED THE CASE; MATTER REMITTED TO BE HEARD BY A DIFFERENT JUDGE (THIRD DEPT).

The Third Department, reversing Family Court and remitting the case to a different judge, determined mother's petition for a modification of custody should not have been dismissed:

"A parent seeking to modify an existing custody order must first show that a change in circumstances has occurred since the entry of the existing custody order that then warrants an inquiry into what custodial arrangement is in the best interests of the child" … .. "Only after this threshold hurdle has been met will the court conduct a best interests analysis" … . "When, as here, Family Court is tasked with deciding a motion to dismiss at the close of the petitioner's proof, the court must accept the petitioner's evidence as true and afford the petitioner every favorable inference that could reasonably be drawn from that evidence, including resolving all credibility questions in the petitioner's favor" … . * * *

After reviewing the record, we find that the mother's proof regarding injuries suffered by the child during the father's parenting time, taken together with the mother's improved parenting abilities and living conditions, demonstrated a change in circumstances sufficient to overcome a motion to dismiss … . * * *

Based on Family Court's comments regarding its predispositions and its inappropriate comment regarding the mother's credibility, Family Court appears to have prejudged the case … . Therefore, this matter must be remitted for a new hearing before a different judge. Matter of Nicole B. v Franklin A., 2022 NY Slip Op 06672, Third Dept 11-23-22

Practice Point: Here the evidence of the child's injuries in father's care and mother's improved parenting skills and living conditions was sufficient to support her petition for a modification of custody. Father's motion to dismiss the petition should not have been granted. The judge's remarks about mother's credibility and his encouraging father to make a motion to dismiss indicated the judge had prejudged the case. The matter was sent back to be heard by a different judge.

NOVEMBER 23, 2022

FAMILY LAW, CUSTODY.

THE EVIDENCE DID NOT SUPPORT FAMILY COURT'S SUA SPONTE FINDING THERE HAD BEEN A CHANGE IN CIRCUMSTANCES, I.E., A BREAKDOWN IN COMMUNICATION BETWEEN MOTHER AND FATHER, WARRANTING A MODIFICATION OF THE CUSTODY ARRANGEMENT AND AWARDING SOLE CUSTODY TO MOTHER (THIRD DEPT).

The Third Department, reversing Family Court, determined the judge should not have, sua sponte, found there had been a change in circumstances, i.e., a breakdown in communication between mother and father, justifying awarding sole custody to mother. The evidence did not support the finding that communication had broken down:

… Family Court erred in determining that the parties being unwilling or unable to cooperatively raise the child constituted a change in circumstances and sua sponte modifying the prior order. … Initially, the parties did provide some evidence as to how each has failed to properly communicate with respect to the child, such as the father being unresponsive to the mother's messages regarding child support payments and the mother failing to inform him that she had unenrolled the child from daycare. However, the mother acknowledged that the father has been able to communicate with her via the TalkingParents app to discuss issues regarding the child, such as custodial exchange dates. The father similarly stated that he has been able to communicate with the mother via email. Thus, although their communication is strained at times, partially as a result of these proceedings, the record does not establish that it has completely broken down … . Indeed, "[t]he record establishes that the parties' relationship was no more antagonistic during [the relevant time] period than it was at the time of the entry of the original order" … , which, in this case, was only two months prior to the filing of the father's petition. Accordingly, Family Court should not have proceeded to a best interest analysis and, instead, should have continued the joint legal custody arrangement reflected in the prior order … .Matter of Karl II. v Maurica JJ., 2022 NY Slip Op 05905, Third Dept 10-20-22

Practice Point: Here the evidence did not support the Family Court judge's sua sponte finding that communication between mother and father had broken down warranting a modification of the custody arrangement.

OCTOBER 20, 2022

FAMILY LAW, JUDGES, JUVENILE DELINQUENCY.

THE ADMISSION ALLOCUTION IN THIS JUVENILE DELINQUENCY PROCEEDING, WHICH REQUIRES THAT THE JUDGE QUESTION THE JUVENILE AND A PARENT, FELL SHORT OF THE STATUTORY REQUIREMENTS IN THE FAMILY COURT ACT; PETITION DISMISSED (THIRD DEPT).

The Third Department, reversing respondent's admission to criminal mischief in this juvenile delinquency proceeding, determined: (1) the validity of the admission was not moot despite the completion of the one-year placement, and the issue need to be preserved for review; and (2) the admission allocution was insufficient:

… [R]espondent's argument that the plea allocution did not comply with Family Ct Act § 321.3 is not moot — despite the expiration of respondent's placement — because the delinquency determination challenged herein "implicates possible collateral legal consequences" … .

… Family Court must "ascertain through allocution of the respondent and his [or her] parent or other person legally responsible for his [or her] care, if present, that (a) he [or she] committed the act or acts to which he [or she] is entering an admission, (b) he [or she] is voluntarily waiving his [or her] right to a fact-finding hearing, and (c) he [or she] is aware of the possible specific dispositional orders" (Family Ct Act § 321.3 [1]). Although respondent's mother was present at the April 2021 allocution, Family Court only asked her whether she had sufficient time to speak to respondent about the proceedings…. The record reflects that the court failed to question respondent's mother regarding the acts to which respondent admitted, his waiver of the fact-finding hearing or her awareness of the possible dispositional options. As a result, Family Court's allocution fell short of the statutory mandate … . Matter of Christian VV. (Christian VV.), 2022 NY Slip Op 07275, Third Dept 12-22-22

Practice Point: The Family Court Act requires that the admission allocution in a juvenile delinquency proceeding involve both the juvenile and a parent. Here the allocution of respondent and his mother fell short of the statutory requirements and the juvenile delinquent petition was dismissed. Although the respondent had

already completed his placement, the issue was not moot because of the possible collateral consequences of the delinquency determination.

DECEMBER 22, 2022

FAMILY LAW, JUDGES.

THE JUDGE'S FAILURE TO MAKE FINDINGS OF FACT IN THIS VISITATION PROCEEDING REQUIRED REMITTAL FOR A NEW HEARING (THIRD DEPT).

The Third Department, reversing Family Court, determined the judge's failure to make findings of fact in the visitation proceedings required remittal:

Although the court recited that its determination was based upon the proof adduced at the fact-finding and Lincoln hearings, it did not make factual findings. Furthermore, the record is also not sufficiently developed in order for us to make an independent determination. In this regard, at the fact-finding hearing, the father withdrew his request for in-person visitation with the child and, on appeal, the father requests monthly telephone contact with the child. The mother testified that she opposed additional visitation than what was provided for in the 2013 order because the child showed signs of fear and apprehension, did not have a relationship with the father and was not engaged in writing letters to the father. The mother also testified that the child has a fear associated with prison and violence.

Other than the mother's conclusory testimony, there was scant evidence, if any, demonstrating that the child having telephone contact with the father would be detrimental to the child's welfare … . Moreover, even crediting the mother's testimony about the child's fear, it is unclear whether such fear relates to in-person visitation with the father at a prison or to telephone calls, as the father now requests. Because the record evidence is not sufficiently developed to determine whether the father should be awarded monthly telephone contact with the child, the matter must be remitted for a new hearing … . Matter of Anthony T. v Melissa U., 2022 NY Slip Op 07287, Third Dept 12-22-22

Practice Point: In this "expansion of visitation" proceeding, the judge did not make findings of fact and the record was not sufficient for the appellate court to rule, the case was remitted to Family Court for a new hearing.

DECEMBER 22, 2022

FAMILY LAW, NEGLECT, JUDGES.

ALTHOUGH TWO CHILDREN HAD BEEN REMOVED FROM MOTHER'S CARE AFTER NEGLECT FINDINGS AND MOTHER ALLEGEDLY CONCEALED HER PREGNANCY AND FAILED TO SEEK APPROPRIATE PRENATAL CARE, SUMMARY JUDGMENT FINDING MOTHER HAD NEGLECTED HER NEWBORN WAS NOT APPROPRIATE; MATTER REMITTED TO BE HEARD BY A DIFFERENT JUDGE (THIRD DEPT).

The Third Department, reversing Family Court, determined summary judgment finding respondent mother had neglected and derivatively neglected her newborn baby was not appropriate. Two children had been removed from mother's care based on neglect findings,. Mother allegedly had concealed her pregnancy and allegedly had not sought appropriate prenatal case. But triable issues of fact remained. The matter was sent back to be heard by a different judge:

Upon review of the record and considering the nature of the prior neglect findings, the passage of time, and the questions concerning the degree of progress made by respondent over that time, we find that there are triable issues of fact precluding summary judgment (see CPLR 3212 [b] …). Petitioner's motion was centered upon the two prior findings of neglect and respondent's failure to abide by the corresponding orders of disposition … . However, the petition itself acknowledged that respondent had recently become more compliant with petitioner, resulting in expanded visitation with her children, and had been making improvements in her engagement with services and communication skills. According to the petition, respondent had put together a safety plan for the subject child to live with her, and petitioner saw this as "a strength" and was "hopeful in working with" respondent on this plan. Further, petitioner pointed out in opposition to the motion that she had

improved her housing and employment situation and ended a relationship with an abusive partner…. .

Accordingly, the matter must be remitted for a fact-finding hearing concerning the allegations in the petition … . Under the circumstances, we find it appropriate to remit to a different judge for the purpose of conducting the hearing. Matter of Ja'layna FF. (Jalyssa GG.), 2022 NY Slip Op 07271, Third Dept 12-22-22

Practice Point: Summary judgment is almost never appropriate in a child-neglect matter. Here summary judgment finding mother had neglected her newborn based on neglect findings re: two other children and allegations mother had concealed her pregnancy and failed to seek appropriate prenatal care was reversed. There existed several triable issue of fact, including recent cooperation by mother. The matter was remitted for a hearing in front of a different judge.

DECEMBER 22, 2022

FAMILY LAW, VISITATION BY GRANDPARENTS, JUDGES.

BOTH PARENTS OPPOSED VISITATION WITH THE GRANDPARENTS AND THERE WAS EVIDENCE VISITATION WITH THE GRANDPARENTS HAD NEGATIVE EFFECTS ON ONE OF THE CHILDREN; IT WAS NOT DEMONSTRATED THAT VISITATION WITH THE GRANDPARENTS WAS IN THE CHILDREN'S BEST INTERESTS; MATTER REMITTED FOR A NEW HEARING BEFORE A DIFFERENT JUDGE (THIRD DEPT).

The Third Department, reversing Family Court, determined Family Court's ruling allowing visitation by the grandparents, which was opposed by both parents, was not demonstrated to be in the best interests of the children. The son is autistic and has frequent "meltdowns" which the grandparents allegedly didn't handle appropriately. The matter was sent back for a new hearing in front of a different judge:

In granting visitation to the grandparents, Family Court essentially based its determination on its belief that the son would benefit from frequent contact with

family members who love him, and that "equity demand[ed]" that the daughter have the same level of visitation. While contact with loving family members is certainly a laudable goal for these and any other children, the record does not support the court's finding that the children's best interests would be served by visitation with the grandparents. Indeed, to the contrary, the mother and the father, who were separated as of the time of the hearing but were united in their opposition to the grandparents' visitation petition, offered testimony detailing the negative effects that visitation with the grandparents had on the son. Matter of Virginia HH. v Elijah II., 2022 NY Slip Op 06970, Third Dept 12-8-22

Practice Point: Here both parents opposed visitation with the grandparents and there was evidence such visitation had negative effects on one of the children, who is autistic. It was not demonstrated visitation with the grandparents was in the children's best interests. The case was remitted for a new hearing before a different judge.

DECEMBER 08, 2022

FORECLOSURE, STATUTE OF LIMITATIONS, DE-ACCELERATION LETTER.

PLAINTIFF BANK'S 2017 DE-ACCELERATION LETTER IN THIS FORECLOSURE ACTION WAS NOT AMBIGUOUS AND THEREFORE SERVED TO STOP THE RUNNING OF THE STATUTE OF LIMITATIONS TRIGGERED BY THE INITIAL FORECLOSURE ACTION IN 2012; THEREFORE THE SECOND FORECLOSURE ACTION BROUGHT IN 2018 WAS TIMELY (THIRD DEPT).

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Fisher, determined plaintiff bank's 2017 de-acceleration letter was not ambiguous and served to stop the running of the statute of limitations triggered when the mortgage loan was accelerated by initial the 2012 foreclosure action:

… [P]laintiff submitted … a copy of the September 27, 2018 de-acceleration notice sent by the mortgage servicer, indicating that "we hereby revoke any prior acceleration of the loan, withdrawing any prior demand for immediate payment of

all sums secured by the security instrument and re-institute the loan as an installment loan" … . The notice advised that defendants could resume making monthly payments, which would now be accepted by plaintiff, and further provided that defendants "also have the right to pay the monthly payments that came due prior to and would have come due during the prior acceleration, which has not been revoked." …

Supreme Court found, that this … language — "which has not been revoked" — made the entire notice unclear and ambiguous, we disagree. Such statement was advising defendants of their right to satisfy the arrears and their continuing obligation to make monthly payments; the next sentence in the notice warned that, if defendants failed to "cure the payments in arrears," plaintiff reserved the right "to accelerate the loan anew." To this end, defendants' claim that this language is inconsistent with the monthly statements sent before and after the de-acceleration notice is belied by the record, which confirms that such statements sought payment on the total amount of the arrears plus the monthly mortgage payment, and not the total principal of the mortgage. HSBC Bank, USA, N.A. v Bresler, 2022 NY Slip Op 06671, Third Dept 11-23-22

Practice Point: In a foreclosure action, a de-acceleration letter will stop the running of the statute of limitations as long as the letter is clear and unambiguous. Here Supreme Court found the letter ambiguous and, therefore, ineffective; but the Third Department disagreed.

NOVEMBER 23, 2022

FREEDOM OF INFORMAMTION LAW, DISCIPLINARY HEARINGS (INMATES), ATTORNEY'S FEES.

THE REASONS FOR THE DENIAL OF ATTORNEY'S FEES AFTER PETITIONER'S SUCCESSFUL FOIL REQUEST MERELY PARROTED THE STATUTORY LANGUAGE FOR THE LAW-ENFORCEMENT AND SAFETY EXEMPTIONS WITHOUT ANY SUPPORTING FACTS; THEREFORE ATTORNEY'S FEES SHOULD HAVE BEEN AWARDED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined petitioner was entitled to attorney's fees associated with his ultimately successful FOIL request for the video of the incident which was the basis for the prison disciplinary proceedings. Attorney's fees were denied on the ground that the respondent had a reasonable basis for denying the request for the video. However the respondent's reasons for the denial merely parroted the relevant statutory language for the law-enforcement and safety exemptions, which was deemed insufficient:

In denying petitioner's initial FOIL request and the subsequent administrative appeal, respondent merely quoted the language from the Public Officers Law. It gave no factual explanation or justification for its blanket denial to release the video footage. Although respondent provided an affirmation by its general counsel in this CPLR article 78 proceeding, the affirmation once again merely quoted the statutory language and failed to explain or demonstrate how the footage was compiled for any law enforcement purposes. In a conclusory and speculative fashion, the affirmation referenced some investigations and adjudications, but failed to provide any factual details or explanation of same. Moreover, the affirmation failed to detail how the release of the video footage would affect or interfere with said investigations and adjudications. "[R]espondent[], by merely parroting the statutory language and otherwise failing to provide any adequate sort of harm risked by disclosure, ha[s] failed to meet [its] burden of proving that disclosure of the records would interfere with a pending law enforcement investigation" … .

The affirmation was equally deficient with regard to the safety exemption (see Public Officers Law § 87 [2] [f]), in that it was neither particularized nor specific and failed to articulate an explanation as to how the release of the video footage

could potentially endanger or impair the lives of correction officers or their families. Matter of Prisoners' Legal Servs. of N.Y. v New York State Dept. of Corr. & Community Supervision, 2022 NY Slip Op 07277, Third Dept 12-22-22

Practice Point: In order to deny attorney's fees after a successful FOIL request, the respondent must demonstrate a reasonable basis for the initial denial of the request. Merely parroting the statutory language for the law-enforcement and safety exemptions is not sufficient. The reasons must be fact-based.

DECEMBER 22, 2022

MEDICAL MALPRACTICE, EMPLOYMENT LAW, HOSPITAL'S VICARIOUS LIABILITY.

THE PLEADINGS ALLEGED THE NEGLIGENCE OF THE HOSPITAL'S "AGENTS AND EMPLOYEES" AND PLAINTIFF'S EXPERT POINTED TO THE ALLEGED NEGLIGENCE OF THE EMERGENCY ROOM PHYSICIAN WHO TREATED PLAINTIFF'S DECEDENT; THEREFORE THERE WAS A QUESTION OF FACT WHETHER THE HOSPITAL WOULD BE VICARIOUSLY LIABLE FOR THE EMERGENCY ROOM PHYSICIAN'S ACTS OR OMISSIONS (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined there were questions of fact whether the defendant hospital was vicariously liable for the acts or omissions of the emergency room doctor, Vaugeois, who treated plaintiff's decedent. Although the complaint did not name Vaugeois as a defendant, the pleadings alleged the negligence of defendant's agents and employees:

… [Plaintiff's expert] points to Vaugeois, the hospitalist who admitted and initially rendered care to decedent, as the negligent party. … [P]laintiff's bill of particulars speaks to defendant's "agents and employees, specifically including" Smithem and Dey [who had been dropped from the suit]. The word "including" is not exclusive, leaving open the prospect that vicarious liability was premised on the negligence of other providers. "A hospital is responsible for the malpractice of . . . a professional

whom it holds out as performing the services it offers, even though in fact he or she is an independent contractor" … . At the very least, a question of fact is presented as to whether liability may be imposed against the hospital based on an apparent authority theory … . "Pursuant to that theory, under the emergency room doctrine, 'a hospital may be held vicariously liable for the acts of an independent physician if the patient enters the hospital through the emergency room and seeks treatment from the hospital, not from a particular physician'" … . Fasce v Catskill Regional Med. Ctr., 2022 NY Slip Op 05906, Third Dept 10-20-22

Practice Point: The pleadings alleged negligence on the part of defendant hospital's "agents and employees." Plaintiff's expert alleged the emergency room physician was negligent. Therefore, there was a question of fact whether the hospital would be vicariously liable for the acts or omissions of the emergency room physician.

OCTOBER 20, 2022

NEGLIGENCE, SLIP AND FALL, MUNICIPAL LAW, AMEND COMPLAINT.

THE PLAINTIFF SHOULD HAVE BEEN ALLOWED TO AMEND THE COMPLAINT TO CURE THE OMISSION OF THE "PRIOR WRITTEN NOTICE" REQUIREMENT IN THIS SIDEWALK SLIP AND FALL CASE; THE AMENDMENT WAS NOT PALPABLY DEVOID OF MERIT AND WOULD NOT PREJUDICE THE CITY DEFENDANT; PLAINTIFF DID NOT NEED TO PRESENT ANY PROOF ON THE ISSUE; THEREFORE THE AMENDMENT SHOULD NOT HAVE BEEN DENIED ON THE GROUND THE PROOF SUBMITTED WAS INSUFFICIENT (THIRD DEPT).

The Third Department, reversing Supreme Court, determined plaintiff should have been allowed to amend the complaint to cure a pleading omission in this slip and fall case. The complaint did not allege the defendant city had written notice of the sidewalk condition which allegedly caused plaintiff's fall. The amendment sought to cure the omission. The Third Department explained that plaintiff did not need to present any proof at this pre-discovery stage. As long as the amendment is not palpably devoid of merit and does not prejudice the defendant it should have been

allowed. Therefore Supreme Court should not have considered plaintiff's "written notice" proof and denied the amendment on the ground the proof did not demonstrate the defendant city had written notice of the condition:

As it is undisputed that plaintiff timely filed a notice of claim concerning her fall and the City and plaintiff thereafter participated in a 50-h hearing (see General Municipal Law§ 50-h), the City cannot allege prejudice or surprise. Moreover, as demonstrated by her proposed amended complaint, plaintiff is not changing her theory of causation, but merely curing her pleading omission. Although Supreme Court correctly determined that the proposed amended complaint cured the pleading omission, its attendant conclusion that "[plaintiff's] claim is belied by the documentary evidence" and subsequent dismissal of the action on that basis was error.

At this stage of the litigation, where discovery has not yet even commenced, plaintiff has no burden to submit any proof. As such, the documents that she did submit are of no moment, and do not provide a basis upon which to dismiss her action … .. … [C]ontrary to the City's assertion that the proposed amended complaint contains bare legal conclusions, plaintiff need not establish the merits of the proposed amendments … . Inasmuch as the proposed amendments were not palpably insufficient or patently meritless, and the City cannot allege surprise or prejudice as the proposed amended complaint otherwise contains facts formerly pleaded and previously known to it, leave should have been granted to amend the complaint … . Mohammed v New York State Professional Fire Fighters Assn., Inc., 2022 NY Slip Op 05909, Third Dept 10-20-22

Practice Point: Here plaintiff's motion seeking leave to amend the slip and fall complaint by curing the omission of the "written notice" allegation should have been granted. Plaintiff did not need to present proof that the city actually had written notice. The only issues before the court were whether the amendment was palpably devoid of merit or the amendment would prejudice the city. Therefore Supreme Court erred by considering the "written notice" evidence presented by the plaintiff and denying the amendment because that evidence did not prove the city had written notice of the sidewalk condition.

OCTOBER 20, 2022

NEGLIGENCE, SLIP AND FALL, RECEIVER IS PROPER PARTY.

THE RECEIVER APPOINTED TO CONTROL PROPERTY INVOLVED IN AN OWNERSHIP DISPUTE SHOULD HAVE BEEN SUBSTITUTED AS THE REPRESENTATIVE OWNER IN A SLIP AND FALL CASE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the receiver, appointed to take control of two properties the ownership of which is in dispute, should have been substituted as the representative owner of the property in a slip and fall case:

Generally, a temporary receiver appointed pursuant to CPLR article 64 "is a person appointed by the court to take control of designated property and see to its care and preservation during litigation" … . Pertinent here, the appointment order authorized the receiver "to immediately take charge and enter possession of the properties," and empowered the receiver to "act as manager and landlord of the properties." Correspondingly, the receiver was "authorized and obligated to keep the properties insured against loss by damage of fire . . . and to procure such . . . other insurance as may be reasonably necessary." Given these directives, we cannot agree with Supreme Court's assessment that the receiver was accorded only a limited role that did not include property maintenance. To the contrary, the receiver was charged with both the authority and responsibility to assume control over the properties. Pursuant to CPLR 1017, "[i]f a receiver is appointed for a party . . . the court shall order substitution of the proper parties." That is the situation here. By the court's directive, responsibility over the management of the properties was passed from the disputing owners to the receiver … . As such, the receiver should have been substituted as the representative owner of the … property … . Wen Mei Lu v Wen Ying Gamba, 2022 NY Slip Op 06037, Second Dept 10-27-22

Practice Point: Here a receiver was appointed to control properties involved in an ownership dispute. The receiver should have been substituted as a representative owner in a slip and fall case.

OCTOBER 27, 2022

NEGLIGENCE, TRAFFIC ACCIDENTS, EMERGENCY DOCTRINE.

THERE ARE QUESTIONS OF FACT ABOUT WHETHER THE EMERGENCY DOCTRINE SHOULD HAVE BEEN APPLIED TO DISMISS THE COMPLAINT IN THIS CHAIN-REACTION TRAFFIC ACCIDENT CASE; THE FACT THAT IT WAS SNOWING AND THERE WERE ICY ROAD CONDITIONS DID NOT SUPPORT THE APPLICABILIITY OF THE EMERGENCY DOCTRINE AS A MATTER OF LAW (THIRD DEPT).

The Third Department, reversing Supreme Court in this chain-reaction traffic accident case, determined there were questions of fact about the weather (snow and ice) and traffic conditions at the time of the accident. Plaintiff was a passenger in the middle car: Supreme Court had dismissed the complaint pursuant to the emergency doctrine:

Striking a vehicle in the rear is negligence as a matter of law absent a sufficient excuse" … . The excuse proffered by defendants here, and accepted by Supreme Court, was that they were confronted with an emergency in the form of sudden snowfall and icy road conditions such that they could not avoid the respective collisions. "[I]n order for a driver to be entitled to summary judgment based upon the emergency doctrine, he or she must demonstrate, as a matter of law, that the emergency situation with which he or she was confronted was not of his or her own making and that his or her reaction was reasonable under the circumstances such that he or she could not have done anything to avoid the collision" … . "Whether [a] defendant was presented with an emergency is generally a question of fact" … . In addition, "the emergency doctrine is inapplicable [where a] defendant driver was aware of . . . icy road conditions and should have accounted for them properly" … . "[A] driver is expected to maintain enough distance between himself [or herself] and cars ahead of him [or her] so as to avoid collisions with [slowing or] stopped vehicles, taking into account weather and road conditions" … . Williams v Ithaca Dispatch, Inc., 2022 NY Slip Op 07278, Third Dept 12-22-22

Practice Point: Although it was snowing and there were icy road-conditions at the time of this chain-reaction traffic accident, the emergency doctrine should not have been applied to dismiss the complaint as a matter of law.

DECEMBER 22, 2022

NEGLIGENCE, TRAFFIC ACCIDENTS, EMPLOYMENT LAW, MUNICIPAL LAW, WORKERS' COMPENSATION.

BOTH PLAINTIFF BUS DRIVER AND THE DRIVER OF THE CAR WHICH STRUCK PLAINTIFF'S BUS WERE DEEMED COUNTY EMPLOYEES IN A RELATED PROCEEDING; THEREFORE, PURSUANT TO THE COLLATERAL ESTOPPEL DOCTRINE, WORKERS' COMPENSATION WAS PLAINTIFF'S EXCLUSIVE REMEDY (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Egan, determined the doctrine of collateral estoppel required the dismissal of plaintiff bus-driver's causes of action against the estate of driver of the car which struck plaintiff's county bus, and against Jewish Family Services (JFS) for whom the decedent-driver was volunteering at the time of the accident. JFS and the county collaborated on a program to drive senior citizens to medical appointments. Plaintiff sued JFS under a respondeat superior theory. Pursuant to the Workers' Compensation Law, workers' compensation benefits were plaintiff's exclusive remedy because both she and the driver of the car had been deemed county employees in a related action:

A review of the papers supporting [the county's] cross motion [in the related proceeding] establishes, however, that [the county] focused upon the provisions of Workers' Compensation Law § 29 (6). Plaintiff thereafter had a full and fair opportunity to respond to that issue, which was discussed at length in the 2019 order. Indeed, Supreme Court … expressly held that the provisions of that statute applied because "both [plaintiff] and Hyde were within the same employ and acting within the scope of employment at the time the alleged injuries occurred, therefore rendering them co-employees which results in workers' compensation being the exclusive remedy." Accordingly, under the circumstances of this case, the issue of whether plaintiff and Hyde were coemployees was "actually litigated, squarely addressed and specifically decided" against plaintiff … .

Plaintiff's claim against JFS is premised upon the theory that JFS exercised sufficient control over Hyde to render it vicariously liable for her negligence. The issue of whether plaintiff and Hyde are coemployees has been resolved against plaintiff with preclusive effect, however, and plaintiff's exclusive remedy for the negligence of Hyde is therefore workers' compensation benefits. As noted above, as Workers' Compensation Law § 29 (6) "deprive[s] the injured employee of a right to maintain an action against a negligent coemployee, [it also] bars a derivative action which necessarily is dependent upon the same claim of negligence for which the exclusive remedy has been provided" … . Thus, as "plaintiff[] did not assert any allegation that [JFS] had committed an act constituting affirmative negligence," the cross motion of JFS for summary judgment dismissing the complaint against it should have been granted … . Bryant v Gulnick, 2022 NY Slip Op 07284, Third Dept 12-22-22

Practice Point: In a related proceeding it was determined that both plaintiff bus driver and the driver of the car which struck plaintiff's bus were county employees. Therefore, pursuant to the doctrine of collateral estoppel, Workers' Compensation was plaintiff's exclusive remedy.

DECEMBER 22, 2022

NEGLIGENCE, TRAFFIC ACCIDENTS.

HYDE, THE DRIVER OF THE CAR IN WHICH PLAINTIFF WAS A PASSENGER, LOST CONTROL AND CROSSED INTO THE PATH OF AN ONCOMING COUNTY BUS; HYDE WAS FATALLY INJURED AND PLAINTIFF HAD NO MEMORY OF THE ACCIDENT; THE COUNTY'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE COMPLAINT AGAINST THE BUS DRIVER SHOULD HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Egan, reversing (modifying) Supreme Court in this traffic accident case, determined the complaint against Bryant, the driver of the county bus involved in the accident, should have been dismissed. The driver of the car in which plaintiff was a passenger, Hyde, lost

control of the car and crossed into the path of the oncoming bus. Hyde was fatally injured and plaintiff had no memory of the accident:

Bryant stated in her affidavit and deposition testimony that a mixture of snow and ice was falling in the leadup to the accident and that, although the road was coated in snow, she was still able to see the center line and fog lines. Bryant added that she was travelling two to five miles below the speed limit and was comfortable driving the bus in the weather conditions. As for the accident itself, Bryant stated that Hyde's vehicle entered her lane about 1½ car lengths in front of the bus and that she had a second to react before striking it, as well as that she had "nowhere to go" to evade Hyde's vehicle and that she lightly applied her brakes in an effort to slow down without losing control of the bus. Plaintiff had no recollection of the accident, and nothing else in the record, including the police accident report, contradicted Bryant's version of events. Bryant accordingly established that she reacted reasonably when Hyde's vehicle entered her lane of traffic, and plaintiff's speculation that Bryant might have been able to avoid the collision had she been driving even further below the speed limit or taken other evasive action despite having "at most, a few seconds to react," did not raise a question of fact …
. Northacker v County of Ulster, 2022 NY Slip Op 07285, Third dept 12-22-22

Practice Point: The only evidence of the accident was that the driver of the car in which plaintiff was a passenger crossed into the path of the oncoming county bus and the bus driver had only a second to react. The county's motion for summary judgment dismissing the complaint against the bus driver should have been granted.

DECEMBER 22, 2022

NEGLIGENCE, UNINTENDED INJURY, INSURANCE LAW.

THE INSURANCE POLICY EXCLUDED COVERAGE FOR BODILY INJURY INTENDED OR EXPECTED BY THE INSURED; HERE THE INSURED UNINTENTIONALLY STRUCK COLE, WHO WAS ATTEMPTING TO BREAK UP A FIGHT BETWEEN THE INSURED AND A THIRD PERSON; BECAUSE THE INJURY TO COLE WAS UNINTENDED, THE INSURER WAS REQUIRED TO DEFEND THE INSURED IN COLE'S PERSONAL INJURY ACTION AGAINST THE INSURED (THIRD DEPT).

The Third Department determined plaintiff insurer was required, under the terms of the policy, to defend the insured, LePore, in the personal injury action by Cole against LePore. LePore was fighting with another and Cole was injured attempting to break it up. The policy excluded coverage for bodily injury intended or expected by the insured. The complaint alleged LePore negligently and carelessly struck Cole when LePore was trying to strike another person:

Plaintiff contends that no coverage exists under the insurance policy because LePore intended to cause physical harm to another person. An insured, however, may be indemnified for an intentional act that causes an unintended injury … . To determine whether a result was accidental, "it is customary to look at the causalty from the point of view of the insured, to see whether or not, from [the insured's] point of view, it was unexpected, unusual and unforeseen" … . In describing the incident at issue, LePore stated that she did not intend to hit Cole. The record also contains evidence that Cole was inadvertently hit. In view of this, a sufficient basis exists to conclude that Cole's injuries were not expected or intended within the embrace of the policy exclusion … . To that end, LePore can be indemnified under the policy, not because she acted negligently, but because her intentional act caused unintended harm. …

Plaintiff may be correct that LePore committed an intentional tort based upon [the transferred-intent] doctrine. … Plaintiff, however, erroneously conflates tort principles with contract principles — the latter of which governs the interpretation of insurance policies … . Vermont Mut. Ins. Group v LePore, 2022 NY Slip Op 06978, Third Dept 12-8-22

Practice Point: Here the insurance policy excluded coverage for bodily injury intended or expected by the insured, LePore. Cole was injured when LePore unintentionally struck her as Cole tried to break up a fight between LePore and another. Because LePore injured Cole unintentionally, the insurer was obligated to defend LePore in the personal injury action brought by Cole.

DECEMBER 08, 2022

REAL ESTATE, CONTRACT LAW, PURCHASE AGREEMENT.

CONTRARY TO SUPREME COURT'S RULING, THE REAL ESTATE PURCHASE AGREEMENT, BY ITS TERMS, DECLARED THE CONTRACT CANCELLED IF THE INSPECTION REVEALED PROBLEMS AND THE PARTIES DID NOT AGREE ON HOW TO ADDRESS THOSE PROBLEMS WITHIN TEN DAYS; THE INSPECTION IN FACT REVEALED PROBLEMS AND NO AGREEMENT ON RESOLUTION WAS MADE WITHIN THE ALOTTED TEN DAYS (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that the real estate purchase agreement was canceled in accordance with its own terms:

… [P]laintiff's transmission of the form contract and rider constituted an offer, and the sellers counteroffered by signing and returning to plaintiff only the form contract without the rider. Plaintiff then accepted the counteroffer by proceeding with the inspections, as "a counteroffer may be accepted by conduct" … . We also agree with the court that plaintiff's counsel's May 18, 2020 letter did not constitute attorney disapproval of the contract under the attorney approval contingency. This letter merely acknowledged receipt of the signed contract and inquired as to the rider and other documents; in no way did it signal disapproval.

… Plaintiff's attorney, in his letter of June 17, 2020, notified the sellers' attorney that the property had failed multiple inspections, and provided a copy of the relevant inspection report. This conduct, in accordance with the language set forth in the inspection contingency, rendered the contract "cancelled, null and void" unless plaintiff chose to defer cancellation for 10 days. Given that the letter from

plaintiff's attorney also set forth potential ways in which the inspection issues could be resolved, we are satisfied that the 10-day option was exercised. That said, the parties did not reach a written agreement on these issues within 10 days as was expressly required pursuant to the inspection contingency … . Savignano v Play, 2022 NY Slip Op 06307, Third Dept 11-10-22

Practice Point: In reversing Supreme Court, the Third Department simply read the real estate purchase agreement and enforced the term deeming the contract cancelled if the parties did not agree on the resolution of problems revealed by inspection within ten days. No such agreement was reached.

NOVEMBER 10, 2022

REAL PROPERTY LAW, PURCHASE AND SALE, MUTUAL MISTAKE.

ALTHOUGH PLAINTIFF-SELLER MAY HAVE THOUGHT THE PARCEL OF REAL PROPERTY SHE SOLD WAS SMALLER THAN IT ACTUALLY WAS, DEFENDANT-BUYER WAS NEVER UNDER THAT IMPRESSION; THE COMPLAINT ALLEGING THE DEAL SHOULD BE RESCINDED BASED ON MUTUAL MISTAKE SHOULD HAVE BEEN DISMISSED (THIRD DEPT).

The Third Department, reversing Supreme Court and granting defendant's motion for summary judgment dismissing the complaint, determined the plaintiff-seller of real property did not demonstrate the sale should be rescinded based upon mutual mistake. Plaintiff alleged she intended to transfer 20 acres but the deed described a 39-acre parcel. The parcel, however, was described in feet, not acres, and defendant was never under the impression the parcel was 20 acres in size. There was no "mutual mistake:"

… [E]ven if plaintiff misunderstood the size of the parcel she ultimately conveyed in the corrected deed, she was bound by the contents of a deed she executed absent fraud or other wrongdoing by defendant that she does not suggest occurred, and any unilateral mistake on her part as to the acreage being conveyed by it "resulted from [her] negligence in failing to take the means readily accessible of checking"

its property description … . Williams v Sowle, 2022 NY Slip Op 05914, Third Dept 10-20-22

Practice Point: Here plaintiff-seller may have thought the parcel of land she sold to defendant was smaller than it actually was. But defendant was never under that impression. Therefore the sale could not be rescinded based upon "mutual mistake."

OCTOBER 20, 2022

REAL PROPERTY LAW, TRESPASS, PRESCRIPTIVE EASEMENT.

THERE IS A QUESTION OF FACT WHETHER A PRIOR OWNER OF DEFENDANT'S PROPERTY WAS AWARE OF PLAINTIFF'S INSTALLATION OF A SEPTIC SYSTEM ON DEFENDANT'S PROPERTY GIVING RISE TO A PRESCRIPTIVE EASEMENT (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined there was a question of fact whether plaintiff was entitled to a prescriptive easement with respect to a septic system which encroached on defendant's property:

Plaintiff represents in her complaint that the septic system was installed "[a]t least as early as the 1920s." The septic system was ostensibly concealed until 1997, when plaintiff replaced part of the tank. Moreover, a June 2000 letter from defendants' father, the prior owner of the property, to his attorney indicates that he was aware of a septic tank that had been installed too close to the well on plaintiff's land … . Although the record is sparse on information concerning plaintiff's septic tank, the first indication that defendants sought any information from plaintiff concerning permission for the installation of the septic tank came in September 2018. In this respect, there is evidence suggesting a triable issue of fact as to whether plaintiff can establish that the septic system was installed with defendants' predecessors' knowledge and hostile to their interests. Accordingly, we find that defendants are not entitled to judgment as a matter of law as to whether plaintiff can establish her cause of action for a prescriptive easement in relation to the presence of the septic tank … which will ultimately implicate

whether or not the tank constitutes a trespass … . Sasscer v Vesey, 2022 NY Slip Op 07286, Third Dept 12-22-22

Practice Point: Here there was a question of fact whether the prior owner of defendant's property was aware plaintiff's installation of a septic system encroached on defendant's land, giving rise to a prescriptive easement.

DECEMBER 22, 2022

REAL PROPERTY LAW, VOIDABLE DEEDS, STATUTE OF LIMITATIONS.

IN THIS COMPLEX CASE INVOLVING ALLEGED MISUSE OF LAND GIFTED TO THE AUDUBON SOCIETY AS "FOREVER WILD" AND SUBSEQUENTLY SOLD, THE ATTORNEY GENERAL'S ARGUMENT THE DEED WAS VOID AB INITIO AND THEREFORE NEVER TRIGGERD THE STATUTE OF LIMITATIONS WAS REJECTED; THE DEED WAS DEEMED "VOIDABLE" AND THE STATUTE HAD THEREFORE RUN; THE TWO-JUSTICE DISSENT ARGUED THE MAJORITY SHOULD NOT HAVE SENT THE MATTER BACK TO BE HEARD BY A DIFFERENT JUDGE (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Garry, determined the deed which was the subject of the action was not void ab initio, but rather was voidable, such that the statute of limitations had run on the action. Had the deed been void ab initio, the statute of limitations would not have run. This complex case, which involves alleged misuse of land gifted to the Audubon Society and subsequently sold is fact-specific and cannot be fairly summarized here. There was a two-justice partial dissent which argued the majority should not have ordered the matter be transferred to a different judge:

… [W]e find that the 2013 conveyance of parcel B, held by the Audubon Society in fee simple absolute, was not void but instead merely voidable for any resultant diversion of the subject gift. The Attorney General's recission claim was thus required to be brought within the applicable limitations period. It was not. We

therefore agree with Supreme Court that this challenge to the validity of the 2013 conveyance is time-barred … .

From the dissent:

According to the majority, when deciding the motions at issue, Supreme Court offered its interpretation of the pertinent gift instruments and made certain findings and, therefore, cannot be impartial in resolving the merits … . In our view, it is premature at this stage to conclude that the court has predetermined and/or already addressed central issues in that action such that it cannot be fair. When the time comes, the parties can offer their competing interpretations of the gift instruments. At that time, the parties may rely on the court's rationale and findings made in the April 2021 order. Alternatively, the parties might not do so. Regardless, any remaining issues to be resolved concerning the gift instruments will be better developed and briefed for the court to make an informed decision. Given that "every court retains continuing jurisdiction to reconsider its prior interlocutory orders during the pendency of the action" … , it cannot be presumed how the court will decide any remaining issues.

Moreover, no party has requested that a new judge be assigned. There have been no claims of hostility, bias or lack of impartiality by Supreme Court. Nor does the record bear out any such behavior. Accordingly, the parties seemingly have no qualms with the current judge. In view of the foregoing, we see no basis to assign a new judge for the underlying actions. Rockwell v Despart, 2022 NY Slip Op 06971, Thrid Dept 12-8-22

Practice Point: Here, if the deed which was the subject of the action had been void ab initio, the statute of limitations would never have been triggered. But the deed was deemed "voidable" and the statute had therefore run. The two-justice dissent argued the parties were happy with the judge and there was no reason to assume the judge had permanently predetermined any issues. Therefore the majority should not have ordered the matter transferred to a different judge.

DECEMBER 08, 2022

TAX LAW, ROYALTIES.

DISNEY WAS DEDUCTING ROYALTY PAYMENTS MADE BY AFFILIATES WHICH DID NOT PAY NEW YORK TAXES; THE TAX LAW WAS DESIGNED TO PLUG THAT "LOOPHOLE" AND THE DEDUCTIONS WERE PROPERLY DISALLOWED (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Fisher, determined the Tax Law did not permit petitioner to deduct royalty payments made by affiliates organized under the law of foreign countries pursuant to intellectual-property licensing agreements. The opinion is too detailed and comprehensive to be fairly summarized here: Essentially, the petitioner was deemed to be taking advantage of a "loophole" to avoid paying franchise taxes which had been addressed and closed by the Tax Law:

At the hearing, the Department's employees testified that petitioner was denied the royalty deduction because the foreign affiliates it had received payments from were not New York taxpayers. The ALJ [Administrative Law Judge] found that "[t]he addback and exclusion provisions contained in Tax Law [§ 208 former] (9) (o) work in tandem to ensure that royalty transactions between related members are taxed only once" and do "not escape taxation altogether." In determining that petitioner's interpretation of the statute effectively allowed it to avoid taxation on that income, which went against the Legislature's intent in enacting the statute, the ALJ concluded that the Department's interpretation of the statute was rational and therefore petitioner was not permitted to deduct royalty payments from its income. When the Tribunal affirmed the findings of the ALJ, it added that "the [L]egislature did not intend for a taxpayer to gain the benefit of the income exclusion . . . without the corresponding cost to a related member of the add back." Matter of Walt Disney Co. & Consol. Subsidiaries v Tax Appeals Trib. of the State of N.Y., 2022 NY Slip Op 05898, Third Dept 10-20-22

Practice Point: Disney was deducting royalty payments made by affiliates which did not pay New York taxes. The Third Department determined the Tax Law did not allow the deductions.

OCTOBER 20, 2022

WORKERS' COMPENSATION, REMOVAL FROM LIST OF AUTHORIZED MEDICAL PROVIDERS.

PETITIONER CHIROPRACTOR ACKNOWLEDGED RECEIVING PAYMENTS DIRECTLY FROM A MEDICAL EQUIPMENT PROVIDER IN VIOLATION OF THE WORKERS' COMPENSATION LAW; BECAUSE THERE WERE NO CONTESTED FACTS, THE WORKERS' COMPENSATION BOARD HAD THE POWER TO REMOVE PETITIONER FROM THE LIST OF AUTHORIZED MEDICAL PROVIDERS WITHOUT HOLDING A HEARING (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Lynch (too detailed to fully summarize here), determined petitioner chiropractor was not entitled to a hearing before the Workers' Compensation Board removed petitioner from the list of authorized medical providers. Petitioner acknowledged taking payments directly from a supplier of medical equipment, which is a violation of the Workers' Compensation Law. Petitioner's only argument on appeal was his entitlement to a hearing before removal from the list. After analyzing the applicable statutes, the Third Department determined, absent any contested facts about the statutory violation, petitioner was not entitled to a hearing:

… [W]e agree with respondent that the chair [Workers' Compensation Board] has authority independent of the CPC [chiropractic practice committee] to conduct an investigation, find that the provider is disqualified from rendering care under the Workers' Compensation Law for statutorily specified acts of misconduct and, upon such a finding, remove the provider from the list of authorized chiropractors (see Workers' Compensation Law § 13-l [10], [12]; see also Workers' Compensation Law § 13-l [10] [g]). * * *

In an instance where questions of fact attend the asserted charges of professional misconduct or incompetency, a hearing would be in order. Here, however, petitioner has admitted and documented his receipt of payments from [the medical equipment supplier] for treatment rendered to workers' compensation claimants in direct violation of Workers' Compensation Law § 13-l (10) (g). Under these circumstances, no hearing was warranted and respondent's decision to remove

petitioner from the list of authorized providers was not arbitrary and capricious. Matter of Levi v New York State Workers' Compensation Bd., 2022 NY Slip Op 06850, Third Dept 12-1-22

Practice Point: In the absence of contested facts about whether petitioner-chiropractor violated the Workers' Compensation Law by taking payments directly from a medical equipment provider, the Workers' Compensation Board properly removed petitioner's name from the list of authorized providers without first holding a hearing.

DECEMBER 01, 2022