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COURT OF APPEALS

CRIMINAL LAW.

DEFENSE COUNSEL'S REMARK ("THAT SHOULD BE FINE") IN RESPONSE TO THE COURT'S INDICATION THAT COURT CONGESTION REQUIRED A LONGER ADJOURNMENT THAN DEFENSE COUNSEL REQUESTED WAS NOT EXPRESS CONSENT TO THE LONGER ADJOURNMENT, INDICTMENT DISMISSED ON SPEEDY TRIAL GROUNDS.

The Court of Appeals, in a full-fledged opinion by Judge Stein, reversing the Appellate Division, determined defense counsel did not expressly consent to an adjournment which the court imposed because of court congestion. When the court stated the adjourned date, defense counsel said "that should be fine:" "[T]he People bear the burden of establishing which time periods should be excluded from the statutory six months, with no burden being placed on the defendant ... . The general rule — that the People should be charged with pre-readiness delays caused by court congestion . . . — is premised on the idea that such delays do not inhibit the People from declaring readiness in writing, through an off-calendar statement ... . That reasoning applies equally well to any portion of a pre-readiness adjournment that is associated with court congestion, regardless of which party is chargeable with the remaining portion or portions of that adjournment. Here, the People could have filed an off-calendar statement of readiness at any time to stop the speedy trial clock, but they never did so. If the People were unsure of whether defense counsel's statement was an indication of consent to the entire period of the adjournment, they could have asked for clarification on the record; again, the People did not do so. Because the People did not meet their burden, Supreme Court erred to the extent it failed to charge the People with the 16 extra days . . . , which the court, itself, requested. Because those 16 days put the People over the statutory limit, defendant's CPL 30.30 motion should have been granted and the indictment should have been dismissed." ***People v. Barden*, 2016 N.Y. Slip Op. 04659, CtApp 6-14-16**

CRIMINAL LAW, APPEALS.

SHACKLES, QUESTIONS ABOUT A PENDING INDICTMENT, AND FAILURE TO INFORM THE GRAND JURY OF A WITNESS REQUESTED BY THE DEFENDANT WERE NOT MODE OF PROCEEDINGS ERRORS AND WERE NOT PRESERVED FOR APPEAL.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined the shackling of defendant during the grand jury proceedings, the prosecutor's questions during the grand jury proceedings about a pending indictment, and the prosecutor's failure to inform the grand jury of a witness requested by the defendant, were not mode of proceedings errors. Therefore, preservation of the errors by objection was required. ***People v. Griggs*, 2016 N.Y. Slip Op. 04655, CtApp 6-14-16**

CRIMINAL LAW, EVIDENCE.

EVIDENCE INSUFFICIENT TO DEMONSTRATE DEFENDANT COULD CONTROL WHETHER CHILDREN ENTERED OR REMAINED IN AN APARTMENT WHERE DRUGS WERE FOUND.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing the Appellate Division, over a three-judge dissenting opinion, determined the evidence was not sufficient to support defendant's conviction for permitting children to enter or remain in a place of drug activity (unlawfully dealing with a child). Defendant was an occasional guest in the apartment where mother and her children resided. The Court of Appeals held that the People did not demonstrate a relationship between defendant and the children or the apartment such that defendant could control whether children were allowed to enter or remain: "[W]e hold that to establish that a defendant permitted a child to enter or remain in a particular place, premises, or establishment, under Penal Law § 260.20 (1), the People must show that defendant's relation to the child or to the place, premises or establishment was of such a kind that defendant had some ability to control the child, so as to permit the child to enter or remain in the place in question. Moreover, a mere ability to notify authorities does not constitute such ability to control, or the statute might apply to anyone who comes into contact with a child entering or remaining in one of the proscribed places." ***People v. Berry*, 2016 N.Y. Slip Op. 04656, CtApp 6-14-16**

INSURANCE LAW.

HEALTH INSURANCE CARRIER WHICH ERRONEOUSLY PAID INJURED PARTY'S NO-FAULT BENEFITS CAN NOT RECOVER FROM THE NO-FAULT CARRIER.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, over a two-judge dissenting opinion, determined Aetna, the health insurance carrier which erroneously paid the injured party's (Herrera's) no-fault benefits, could not recover from Hanover, the no-fault carrier: "The applicable regulation, 11 NYCRR 65.3.11 (a) provides, in relevant part, that 'an insurer shall pay benefits for any loss, other than death benefits, directly to the applicant or, . . . upon assignment by the applicant . . .shall pay benefits directly to providers of health care services. . .' … . Aetna concedes that as a health insurer it is not a 'provider of health care services' as contemplated by the language of this regulation ... . Aetna argues, however, that it stands in Herrera's shoes because Herrera assigned her no-fault rights to it. This argument fails for two reasons. First, since Herrera's health care providers were able to bill and recoup payment from Aetna, an assignment by Herrera of her no-fault rights had already been made, leaving her with no rights to assign to Aetna. Second, by its very language, the no-fault regulation permits only the insured — or providers of health care services by an assignment from the insured — to receive direct no-fault benefits. Because Aetna does not fall under the term 'health care provider,' Herrera could not assign her rights to it." ***Aetna Health Plans v. Hanover Ins. Co.*, 2016 N.Y. Slip Op. 04658, CtApp 6-14-16**

FIRST DEPARTMENT

CRIMINAL LAW, APPEALS.

SEX OFFENDER CERTIFICATION IS PART OF THE JUDGMENT OF CONVICTION AND MUST BE CHALLENGED ON APPEAL FROM THE JUDGMENT, NOT IN A SORA RISK-LEVEL PROCEEDING.

The First Department determined that sex-offender certification is part of the judgment of conviction. Challenge to sex-offender certification, therefore, must be raised on appeal from the judgment and cannot be raised for the first time in a SORA risk-level determination: "Although this appeal from a risk level determination is not subject to dismissal, it does not bring up for review defendant's claim that his underlying New York felony conviction was not for an offense requiring registration as a sex offender. Sex offender certification is part of the judgment of conviction, and the proper occasion for defendant to have challenged that certification was on an appeal from the judgment . . . , but defendant did not appeal." ***People v. Miguel*, 2016 N.Y. Slip Op. 04666, 1st Dept 6-9-16**

REAL PROPERTY LAW, FORECLOSURE.

DEED PROVIDED AS SECURITY FOR A DEBT CONSTITUTES A MORTGAGE TRIGGERING THE NEED FOR FORECLOSURE PROCEEDINGS UPON DEFAULT.

The First Department determined a deed which was security for a debt constituted a mortgage. Therefore, foreclosure proceedings under the Real Property Law were triggered by default on the debt: "Real Property Law § 320 codifies the common-law principle that the giving of a deed to secure a debt, in whatever form and however structured, creates nothing more than a mortgage ... . 'The courts are steadfast in holding that a conveyance, whatever its form, if in fact given to secure a debt, is neither an absolute nor a conditional sale, but a mortgage, and that the grantor and grantee have merely the rights and are subject only to the obligations of mortgagor and mortgagee' ... . 'Significantly, the statute does not require a conclusive showing that the transfer was intended as security; it is sufficient that the conveyance appears to be intended only as a security in the nature of a mortgage' ... . 'In determining whether a deed was intended as security, examination may be made not only of the deed and a written agreement executed at the same time, but also of oral testimony bearing on the intent of the parties and to a consideration of the surrounding circumstances and acts of the parties' ...". ***Patmos Fifth Real Estate Inc. v. Mazl Bldg., LLC*, 2016 N.Y. Slip Op. 04804, 1st Dept 6-16-16**

SECOND DEPARTMENT

ARBITRATION, JUDICIARY LAW.

ARBITRATION HEARING HELD ON A SUNDAY VIOLATED THE JUDICIARY LAW, AWARD VACATED.

The Second Department determined an arbitration award had to be vacated because the proceedings were held on a Sunday in violation of the Judiciary Law: "Since the arbitration hearing was conducted on a Sunday in violation of Judiciary Law § 5, which 'expresses the public policy of the State, and cannot be waived,' the arbitration award is illegal and void ... . Accordingly, the award is vacated and the proceeding is dismissed." ***Matter of Leifer v. Gross*, 2016 N.Y. Slip Op. 04715, 2nd Dept 6-15-16**

CIVIL PROCEDURE, APPEALS.

QUESTION OF FACT WHETHER FIDUCIARY TOLLING RULE EXTENDED STATUTE OF LIMITATIONS; ISSUE CAN BE ADDRESSED ON APPEAL EVEN THOUGH NOT RAISED BELOW.

The Second Department determined plaintiff special guardian had raised a question of fact about whether the fiduciary tolling rule applied to this breach of fiduciary duty action brought on behalf of her mentally ill brother, thereby rendering the action timely. The court explained the rule and why the issue can be raised for the first time on appeal: "[T]he plaintiff raised a question of fact as to whether the statute of limitations was tolled pursuant to the fiduciary tolling rule or the 'repudiation rule,' under which the 'applicable statutory period . . . does not begin to run until the fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated' ... . Although the plaintiff raises the issue for the first time on appeal, the issue of whether the fiduciary tolling rules applies to the facts as alleged may be reached, since it involves a question of law which appears on the face of the record and which could not have been avoided if raised at the proper juncture ...". ***Franklin v. Hafftka*, 2016 N.Y. Slip Op. 04692, 2nd Dept 6-15-16**

CRIMINAL LAW.

UNDULY HARSH AND SEVERE SENTENCE FOR SALE OF A CONTROLLED SUBSTANCE REDUCED.

The Second Department, over a dissent, determined an 8- to 16-year sentence for criminal sale of a controlled substance in the third degree was unduly harsh and reduced the sentence to 5 to 10 years. Defendant had absconded in 1992 and was sentenced in absentia: "Here, taking into account the circumstances of the defendant's nonviolent felony drug conviction, which involved the sale of a relatively small amount of cocaine for the sum of $60, the defendant's prior nonviolent felony drug offense, the probation department's finding that the then 22-year-old defendant had a $100 per day drug addiction at the time, and that the People recommended a lower sentence than what was imposed, we find that, even considering that the defendant absconded, the sentence of 8 to 16 years imprisonment was unduly harsh and severe." ***People v. Kordish*, 2016 N.Y. Slip Op. 04733, 2nd Dept 6-15-16**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT DEPRIVED OF HIS RIGHT TO COUNSEL WHEN DEFENSE ATTORNEY INDICATED THERE WAS NO BASIS FOR DEFENDANT'S REQUEST TO WITHDRAW HIS PLEA.

The Second Department determined defendant's right to counsel was compromised when his attorney took a position adverse to defendant's request to withdraw his plea: "At sentencing, defense counsel informed the Supreme Court that the defendant wanted to withdraw his plea of guilty. Defense counsel stated, among other things, that he did not 'believe there's a basis to withdraw the plea.' As the People correctly concede, the defendant's right to counsel was adversely affected when his attorney took a position adverse to his ... . The Supreme Court should have assigned a different attorney to represent the defendant on the plea withdrawal motion ...". ***People v. Ferguson*, 2016 N.Y. Slip Op. 04728, 2nd Dept 6-15-16**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT'S REQUEST TO REPRESENT HIMSELF SHOULD HAVE BEEN HONORED, CRITERIA EXPLAINED.

The Second Department determined County Court should have honored defendant's request to represent himself. Neither defendant's mental health nor his responses to questions about legal terms was a valid reason for denying the request: " 'A defendant in a criminal case may invoke the right to defend pro se provided: (1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues' ... . * * * To the extent that the County Court based its denial of the defendant's application on the ground that he had a history of mental illness, this was error. * * * To the extent that the County Court based its denial of the defendant's application on his failure to correctly answer the prior Judge's questions about certain legal terms, the Court of Appeals has pointed out that '[t]o accept a defendant's lack of knowledge of legal principles and rules of law or his unfamiliarity with courtroom procedures as the ground for concluding that he is not qualified to represent himself would in effect be to eviscerate the constitutional right of self-representation; such limitations could confidently be said to exist in nearly every criminal case in which the defendant had not received legal training'...". ***People v. Paulin*, 2016 N.Y. Slip Op. 04735, 2nd Dept 6-15-16**

FAMILY LAW.

HUSBAND ENTITLED TO ONLY 5 PERCENT OF WIFE'S ENHANCED EARNING CAPACITY FROM WIFE'S MASTER'S DEGREE OBTAINED DURING MARRIAGE.

The Second Department determined husband's contribution to wife's master's degree was minimal. Therefore, the award to the husband of 5 percent of the wife's increased earning capacity was proper. The court explained the relevant law: "While the enhanced earnings of the defendant resulting from the Master's degree and advanced certification she obtained during the marriage are marital property subject to equitable distribution . . . , 'it is . . . incumbent upon the nontitled party seeking a distributive share of such assets to demonstrate that [he or she] made a substantial contribution to the titled

party's acquisition of that marital asset [and], [w]here only modest contributions are made by the nontitled spouse toward the other spouse's attainment of a degree or professional license, and the attainment is more directly the result of the titled spouse's own ability, tenacity, perseverance and hard work, it is appropriate for courts to limit the distributed amount of that enhanced earning capacity' ... . Here, since the plaintiff's contributions to the defendant's acquisition of her degree and advanced certification were minimal, the Supreme Court providently exercised its discretion in awarding him only five percent of the value of the defendant's enhanced earning capacity ...". ***Taylor v. Taylor*, 2016 N.Y. Slip Op. 04705, 2nd Dept 6-15-16**

FAMILY LAW, ATTORNEYS.

MOTHER'S DUE PROCESS RIGHTS VIOLATED, MOTHER INSTRUCTED NOT TO CONSULT WITH ATTORNEY DURING RECESSES, WHICH WERE EXTENSIVE.

The Second Department, exercising its interest of justice jurisdiction, determined a new custody hearing was necessary because Family Court instructed mother not to speak to her attorney during recesses: "[T]he mother's hearing testimony spanned several court dates and took place over a period of months. At the end of four hearing dates, while the mother's testimony was continuing, the Family Court instructed the mother not to discuss her testimony with her attorney during the recess. One of these recesses was overnight, two recesses were for approximately one week, and one recess was, because of adjournments, for more than three months. ... The Family Court violated the mother's fundamental due process rights when it instructed her not to consult with her attorney during recesses, which resulted in her being unable to speak to her attorney over extended periods of time ...". ***Matter of Turner v. Valdespino*, 2016 N.Y. Slip Op. 04724, 2nd Dept 6-15-16**

INSURANCE LAW.

POLICY EXCLUSION WAS AMBIGUOUS; INSURER HAD A DUTY TO DEFEND.

The Second Department determined the "insured versus insured" policy exclusion was ambiguous and therefore could not be the basis for declaring the insurer, Princeton, did not have a duty to defend in this slip and fall case. Here, an employee of one insured sued the company which owned the land, which was also insured by Princeton. The Second Department held it was not clear whether the plaintiff employee was an "insured" within the meaning of the exclusion: " 'To be relieved of its duty to defend on the basis of a policy exclusion, the insurer bears the heavy burden of demonstrating that the allegations of the complaint [in the underlying action] cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision' ... . '[I]f the language is doubtful or uncertain in its meaning, any ambiguity will be construed in favor of the insured and against the insurer' ... . Here, Princeton disclaimed coverage based upon the 'Insured Versus Insured' exclusion, which excluded '[a]ny claim' made by or for the benefit of, or in the name or right of, one current or former insured against another current or former insured.' As it is not clear from the language of the exclusion at issue whether [plaintiff], as an employee, was an "insured" as that term was defined in the policy . . . , the provisions are ambiguous and subject to more than one interpretation ...". ***Boro Park Land Co., LLC v. Princeton Excess Surplus Lines Ins. Co.*, 2016 N.Y. Slip Op. 04684, 2nd Dept 6-15-16**

PARTNERSHIP LAW.

COMPLAINT STATED A CAUSE OF ACTION FOR AIDING AND ABETTING BREACH OF A FIDUCIARY DUTY.

The Second Department, reversing Supreme Court, determined plaintiff stated a cause of action for aiding and abetting the breach of a fiduciary duty. Plaintiff's former partner left the partnership and joined defendant accounting firm, taking a client with him. Partners owe one another a fiduciary duty. The complaint alleged the defendant firm aided and abetted the former partner in breaching that duty. The court outlined the relevant law: "To recover damages for aiding and abetting a breach of fiduciary duty, a plaintiff must plead and prove that a fiduciary duty owed to the plaintiff was breached, that the defendant knowingly induced or participated in the breach, and that the plaintiff was damaged as a result of the breach ... . Knowing participation in a breach of fiduciary duty occurs when the defendant provides substantial assistance to the primary violator ... . 'Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur . . . . However, the mere inaction of an alleged aider or abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff' ...". ***Smallberg v. Raich Ende Malter & Co., LLP*, 2016 N.Y. Slip Op. 04704, 2nd Dept 6-15-16**

PERSONAL INJURY.

U-HAUL DID NOT DEMONSTRATE IT WAS FREE FROM NEGLIGENCE IN MAINTAINING ITS TRUCK IN THIS VEHICLE-ACCIDENT CASE, MOTION TO DISMISS PROPERLY DENIED.

The Second Department determined, in a vehicle-accident case, defendant U-Haul did not demonstrate it was free from negligence in maintaining its rental truck. Therefore, U-Haul's motion to dismiss was properly denied. The court explained the criteria for liability on the part of companies in the business of renting vehicles: "49 USC § 30106(a), also known as the

Graves Amendment, provides that 'the owner of a leased or rented motor vehicle cannot be held liable for personal injuries resulting from the use of such vehicle if the owner (i) is engaged in the trade or business of renting or leasing motor vehicles, and (ii) engaged in no negligence or criminal wrongdoing' ... . 'The legislative history of the Graves Amendment indicates that it was intended to protect the vehicle rental and leasing industry against claims for vicarious liability where the leasing or rental company's only relation to the claim was that it was the technical owner of the [vehicle]' ... . With respect to that branch of U-Haul's motion which was pursuant to CPLR 3211(a)(1), although U-Haul submitted documentary evidence establishing that it was engaged in the business of renting vehicles and that the subject vehicle had been rented . . . at the time of the accident, U-Haul failed to conclusively establish that it was not negligent in the maintenance of the vehicle, as alleged ...". ***Anglero v. Hanif*, 2016 N.Y. Slip Op. 04682, 2nd Dept 6-15-16**

PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

PLAINTIFF SUBMITTED POLICE REPORT IN SUPPORT OF SUMMARY JUDGMENT MOTION, REPORT CREATED A QUESTION OF FACT, PLAINTIFF WAIVED ANY OBJECTION TO ITS ADMISSIBILITY BY SUBMITTING IT.

The Second Department determined plaintiff created an issue of fact in this rear-end collision case by submitting a police report indicating defendant driver slid on snow and ice. The court noted plaintiff waived any objection to the admissibility of the report by submitting it in support of plaintiff's motion for summary judgment: "In support of the motion, the plaintiff submitted, inter alia, a copy of the police accident report. The police accident report indicated that the defendant driver stated that snow and ice on the road caused him to hit the plaintiff's vehicle, which demonstrated the existence of a triable issue of fact as to whether the defendant driver had a nonnegligent explanation for his actions ... . Since the plaintiff submitted the police report in support of his motion, he waived any objection to its admissibility ...". ***Orcel v. Haber*, 2016 N.Y. Slip Op. 04700, 2nd Dept 6-15-16**

PERSONAL INJURY, LANDLORD-TENANT.

OUT-OF-POSSESSION LANDLORD DID NOT DEMONSTRATE IT DID NOT CREATE THE DANGEROUS CONDITION, SUMMARY JUDGMENT PROPERLY DENIED.

The Second Department determined defendant out-of-possession landlord did not demonstrate it did not cause the alleged radiator defect which injured plaintiff. Therefore, the landlord's motion for summary judgment was properly denied: " '[A]n out-of-possession landowner is generally not responsible for injuries that occur on its premises unless the landowner has retained control over the premises and is contractually or statutorily obligated to repair or maintain the premises or has assumed a duty to repair or maintain the premises by virtue of a course of conduct' ... . However, 'liability may attach to an out-of-possession owner who has affirmatively created a dangerous condition or defect' ... . Here, the defendant failed to establish its prima facie entitlement to judgment as a matter of law. Although the defendant demonstrated that it did not owe a duty to provide the plaintiff with a radiator cover . . . , the defendant failed to establish that it did not cause the radiator to become and remain in a defective, broken, and overheated condition." ***Gowen v. Gabrielle Realty Holdings, LLC*, 2016 N.Y. Slip Op. 04695, 2nd Dept 6-15-16**

PERSONAL INJURY, LANDLORD-TENANT.

OUT-OF-POSSESSION LANDLORD NOT LIABLE FOR FALL ON A WET FLOOR IN THE LEASED PREMISES.

The Second Department determined defendant out-of-possession landlord was entitled to summary judgment in this slip and fall case. Plaintiff, in a bar on leased premises, fell on a bathroom floor alleged to have been wet with cleaning solution and water: " 'An out-of-possession landlord can be held liable for injuries that occur on its premises only if the landlord has retained control over the premises and if the landlord is contractually or statutorily obligated to repair or maintain the premises or has assumed a duty to repair or maintain the premises by virtue of a course of conduct' ... . Here, [the landlord] established, prima facie, that he was an out-of-possession landlord with no contractual obligation to maintain the premises, and that he neither endeavored to perform such maintenance nor owed any duty to the plaintiff by virtue of any statute upon which the plaintiff relies ...". ***Mendoza v. Manila Bar & Rest. Corp.*, 2016 N.Y. Slip Op. 04698, 2nd Dept 6-15-16**

PERSONAL INJURY, MEDICAL MALPRACTICE.

QUESTION OF FACT RAISED UNDER DOCTRINE OF RES IPSA LOQUITUR, PLAINTIFF CONTRACTED HEPATITIS C AFTER COLONOSCOPY.

The Second Department determined plaintiffs raised a question of fact in this medical malpractice action under the doctrine of res ipsa loquitur. Plaintiff contracted hepatitis C after a colonoscopy. There was evidence that the patient defendant performed the procedure on just before plaintiff's procedure had hepatitis C, the disease is only transferred by contact with infected blood, and plaintiff was diagnosed after six weeks, the usual incubation period: "[P]laintiffs relied on the doctrine of res ipsa loquitur, which is available when (1) the event is of a kind that ordinarily does not occur in the absence of someone's negligence; (2) the event is caused by an agent or instrumentality within the exclusive control of the defendant; and (3) the event was not caused by any voluntary action or contribution on the part of the plaintiff ... . 'To rely on res ipsa

loquitur a plaintiff need not conclusively eliminate the possibility of all other causes of the injury. It is enough that the evidence supporting the three conditions afford a rational basis for concluding that it is more likely than not that the injury was caused by defendant's negligence. Stated otherwise, all that is required is that the likelihood of other possible causes of the injury be so reduced that the greater probability lies at defendant's door' ...". ***Gonzalez v. Arya*, 2016 N.Y. Slip Op. 04693, 2nd Dept 6-15-16**

PERSONAL INJURY, MEDICAL MALPRACTICE.

PHYSICIAN'S DUTY EXTENDS ONLY TO THE TASK ASSIGNED, HERE THE INTERPRETATION OF MRI FILM.

The Second Department determined the actions against two physicians tasked with reading plaintiff's spinal MRI should have been dismissed. There was unrefuted evidence the MRIs were read correctly and the doctors' duties did not extend beyond the interpretation of the MRI: " 'Although physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied on by the patient' ... . Here, both West and Davis established, prima facie, that they discharged their respective duties to the injured plaintiff in accordance with accepted practices. West's expert concluded that West's interpretation of the . . . MRI film was correct, and in accordance with accepted practices. The plaintiffs' expert did not dispute this conclusion, but instead opined that West should have ordered a diffusion MRI to look for evidence of the injured plaintiff's condition. However, as West correctly contends, he had no such duty to do so. West's role was to interpret the MRI film and document his findings. He did not assume a general duty of care to independently diagnose the injured plaintiff's medical condition ... . Similarly, the plaintiffs' argument that Davis had a duty to examine the injured plaintiff in person and to ensure that high-dose steroids were properly administered also is without merit. Davis's duty as a neurosurgical consultant was to determine whether neurosurgery was necessary. He determined that it was not. His expert stated that this conclusion was correct, and in accordance with accepted practices. The plaintiffs' expert did not dispute this conclusion, and did not argue that neurosurgery was necessary." ***Meade v. Yland*, 2016 N.Y. Slip Op. 04697, 2nd Dept 6-15-16**

THIRD DEPARTMENT

CRIMINAL LAW, ATTORNEYS.

PERMITTING NONRESPONSIVE ANSWERS FROM WITNESSES AND NOT ADDRESSING THE PEOPLE'S FAILURE TO PRESENT THE CONFIDENTIAL INFORMANT AS A WITNESS CONSTITUTED INEFFECTIVE ASSISTANCE.

The Third Department determined defendant was not provided effective assistance of counsel. Defense counsel permitted lengthy, unresponsive answers from the People's witnesses and failed to address in any way the People's failure to present the confidential informant (CI) as a witness in this "buy and bust" case: "Although defense counsel lodged some successful objections at trial, he largely permitted the People's police witnesses to provide lengthy, nonresponsive answers to questions asked on both direct and cross-examination, even after County Court commented on his failure to object or request that the nonresponsive testimony be stricken from the record. ... Even more perplexing, however, was defense counsel's absolute failure to address the absence of the CI, a pivotal player in the 'buy and bust' operation. Initially, the record is devoid of any indication that defense counsel recognized the possibility of requesting a missing witness charge ... . It is difficult to imagine any legitimate trial tactic for not requesting such a charge under the particular circumstances of this case ...". ***People v. Smith*, 2016 N.Y. Slip Op. 04745, 3rd Dept 6-16-16**

MUNICIPAL LAW, REAL PROPERTY, CONTRACT LAW.

CITY'S ALLEGED VIOLATION OF AN EASEMENT SOUNDS IN CONTRACT, NOT TORT, NOTICE OF CLAIM NOT REQUIRED.

The Third Department, reversing County Court, determined plaintiff was not required to file a notice of claim because the action against the city sounded in contract, not tort. Plaintiff alleged the city violated an easement when work was done on plaintiff's property: "General Municipal Law § 50-e (1) (a) provides that a party seeking to bring a tort action against a municipality must file a notice of claim within 90 days of the date that the claim arises ... . A similar provision is contained in Charter of the City of Glens Falls § 10.14.5. The notice of claim provisions of General Municipal Law § 50-e, however, apply only to actions sounding in tort, not to those premised upon breach of contract ... . The same is true of City of Glens Falls City Charter § 10.14.5, as its terms make clear. Here, plaintiff's small claims action is premised upon defendant's alleged failure to comply with the provisions of the easement agreement resulting in damage to his property in the amount of $5,000. Inasmuch as plaintiff's action sounds in breach of contract, not tort, the notice of claim provisions of General Municipal Law § 50-e and Charter of the City of Glens Falls § 10.14.5 are inapplicable." ***Strauss v. City of Glens Falls*, 2016 N.Y. Slip Op. 04750, 3rd Dept 6-16-16**

PERSONAL INJURY, COURT OF CLAIMS.

IN LIGHT OF DEFENDANT'S INVESTIGATION INTO THE FIRE WHICH CAUSED CLAIMANT'S DECEDENT'S DEATH, THE NOTICE OF CLAIM WAS SUFFICIENT.

The Third Department determined the notice of claim, although "bare bones," was sufficient under the circumstances because defendant Office of Mental Retardation and Developmental Disabilities (OMRDD) had conducted an investigation into the fire at a residential care facility which caused the death of claimant's decedent: "Court of Claims Act § 11 (b) 'places five specific substantive conditions upon [defendant's] waiver of sovereign immunity by requiring the claim to specify (1) the nature of the claim; (2) the time when it arose; (3) the place where it arose; (4) the items of damage or injuries claimed to have been sustained; and (5) the total sum claimed' ... . These statutory requirements are 'strictly construed' ... . The guiding principle and 'purpose of the notice of claim requirement [is] to allow [defendant] to investigate the claim and to estimate its potential liability' ... . 'Absolute exactness' is not required . . . , but the claim must enable prompt investigation and be 'sufficiently specific to enable [a] defendant to reasonably infer the basis for its alleged liability' ... . Moreover, defendant is not required 'to ferret out or assemble information that section 11 (b) obligates the claimant to allege' ... . * * * Where an agency of defendant has performed the internal investigation of an incident and is therefore the primary or, perhaps, even the sole source of information upon which a claim is based, it cannot be readily found that a lack of specificity has interfered with defendant's ability to investigate a claim . . . , nor that defendant has been improperly required to 'assemble' information regarding a claim ...". ***Davila v. State of New York*, 2016 N.Y. Slip Op. 04752, 3rd Dept 6-16-16**

FOURTH DEPARTMENT

CRIMINAL LAW.

ONLY ONE FINE SHOULD HAVE BEEN IMPOSED WHERE TWO CONVICTIONS AROSE FROM THE SAME ACT.

The Fourth Department determined one fine, not two, should have been imposed on two convictions arising from the same act: "We agree with defendant, however, that the fines are illegal to the extent the court imposed a fine on both a conviction for criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree that arose from a single act ...". ***People v. Regatuso*, 2016 N.Y. Slip Op. 04836, 4th Dept 6-17-16**

CRIMINAL LAW, EVIDENCE.

GUNPOINT DETENTION NOT JUSTIFIED, SEIZED EVIDENCE SHOULD HAVE BEEN SUPPRESSED.

The Fourth Department determined the gunpoint detention of defendant was not justified by what the officer knew or observed. The motion to suppress the seized marijuana and handgun should have been granted: "The People concede that the sergeant's encounter with defendant constituted a level three forcible detention under *People v De Bour* . . . , and thus required 'a reasonable suspicion that [defendant] was involved in a felony or misdemeanor' ... . '[A]ctions that are at all times innocuous and readily susceptible of an innocent interpretation . . . may not generate a founded suspicion of criminality' ... . We agree with defendant that the arresting sergeant lacked the requisite reasonable suspicion. There is no evidence in the record that the sergeant was informed of the recovery of marihuana in the area the day before defendant's arrest, and defendant's actions in merely 'grabbing' at his waistline and bending down to the floor of the vehicle, without more, were insufficient to provide the sergeant with the requisite suspicion that defendant committed a crime, and to justify defendant's gunpoint detention ...". ***People v. Elliott*, 2016 N.Y. Slip Op. 04838, 4th Dept 6-17-16**

CRIMINAL LAW, EVIDENCE.

NO JUSTIFICATION FOR A STRIP SEARCH, EVIDENCE SHOULD HAVE BEEN SUPPRESSED.

The Fourth Department determined there were insufficient grounds for a strip search and defendant's motion to suppress the drugs seized from his person should have been granted: "[T]he search performed by the officer constituted a strip search . . . , which must be justified by 'a reasonable suspicion that the arrestee is concealing evidence underneath clothing' ... . We conclude that the officer did not have the requisite reasonable suspicion. Defendant was fully cooperative with the officer, admitting his possession of marihuana and denying possession of any other contraband. There was no indication that defendant might be concealing any contraband under his clothing, and the mere fact that he possessed marihuana does not justify a strip search. Although the People assert that the search was justified because defendant appeared to be nervous about being searched, the record reflects that defendant became nervous only after the officer began to perform the strip search ...". ***People v. Tisdale*, 2016 N.Y. Slip Op. 04842, 4th Dept 6-17-16**

ENVIRONMENTAL LAW.

TOWN DID NOT TAKE THE REQUISITE HARD LOOK AT THE ENVIRONMENTAL IMPACT OF THE CONSTRUCTION OF A WALMART STORE, NEGATIVE DECLARATION ANNULLED.

The Fourth Department determined the town failed to take the requisite hard look at the environmental impact of the construction of a Walmart store and annulled the town's negative (impact) declaration. The court held that the effects of

the construction upon wildlife, community character and surface water were not adequately investigated: "We agree with petitioner . . . that the Town Board failed to take the requisite hard look at the impact of the project on wildlife, the community character of the Village, and surface water, and that the resolution adopting the negative declaration must therefore be annulled. ... Given the information received from the public that state-listed threatened species might be present on the project site and the failure of the Town Board to investigate the veracity of that information, we conclude that the Town Board failed to take a hard look at the impact of the project on wildlife, and the negative declaration with respect thereto was therefore arbitrary and capricious ... . [A] '. . . town . . . board reviewing a big box development should consider the impact of the development on the community character of a neighboring village that might suffer business displacement as a result of the approval of the big box development'... . ... [T]he Town Board erred in failing to consider the surface water impact of the entire project." ***Matter of Wellsville Citizens for Responsible Dev., Inc. v. Wal-Mart Stores, Inc.*, 2016 N.Y. Slip Op. 04847, 4th Dept 6-17-16**

PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE.

STRIKING ANSWER TOO SEVERE A SANCTION FOR FAILING TO PRESERVE SURVEILLANCE TAPES IN THIS SLIP AND FALL CASE.

The Fourth Department, over an extensive dissent, determined striking defendant's answer in this slip and fall case was too severe a sanction for failing to preserve evidence, i.e., surveillance tapes: "[W]e agree with plaintiff that a sanction was warranted inasmuch as defendant 'wilfully fail[ed] to disclose information' that the court had ordered to be preserved (CPLR 3126). Nevertheless, we conclude that the court abused its discretion in striking defendant's answer and affirmative defenses. It is well established that 'a less drastic sanction than dismissal of the responsible party's pleading may be imposed where[, as here,] the loss does not deprive the nonresponsible party of the means of establishing his or her claim or defense' ... . Indeed, we note that the record does not demonstrate that the plaintiff has been "'prejudicially bereft' of the means of prosecuting his action ... . Thus, we conclude that an appropriate sanction is that an adverse inference charge be given at trial with respect to the unavailable surveillance footage ...". ***Sarach v. M&T Bank Corp.*, 2016 N.Y. Slip Op. 04820, 4th Dept 6-17-16**

PERSONAL INJURY, MEDICAL MALPRACTICE.

QUESTION OF FACT WHETHER CONTINUOUS TREATMENT DOCTRINE TOLLED THE STATUTE OF LIMITATIONS, CRITERIA EXPLAINED.

The Fourth Department, over a dissent, determined plaintiff raised a question of fact whether the two-and-a-half-year statute of limitations was tolled by the continuous treatment doctrine, despite gaps in treatment exceeding the statute of limitations: "The determination whether continuous treatment exists 'must focus on the patient' . . . and, 'i]n determining whether plaintiff[] raised an issue of fact concerning the applicability of the continuous treatment doctrine, [her] version of the facts must be accepted as true' ... . Based on plaintiff's version of the facts, there is support in the record for a finding that plaintiff 'intended uninterrupted reliance' upon defendant's observation, directions, concern, and responsibility for overseeing her progress. Notably, during approximately 7 years of treatment with defendant, plaintiff underwent two surgeries, saw no other physician regarding her shoulder, and returned to him for further treatment, i.e., a potential third surgery, but was told that he did not treat or operate on shoulders anymore. Defendant referred plaintiff to another physician in his practice, and plaintiff went to that appointment, but was told that the second physician would not treat her. Furthermore, the fact that plaintiff left the September 5, 2003 appointment with a direction to see defendant 'as needed' is not dispositive inasmuch as defendant conceded that '[o]bviously [plaintiff's] problem is long standing and chronic. She most likely will need further surgery in the future due to her young age and need for revision shoulder replacement vs fusions'." ***Lohnas v. Luzi*, 2016 N.Y. Slip Op. 04819, 4th Dept 6-17-16**

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