CasePrepPlus

December 28, 2016

An advance sheet service summarizing recent and significant New York appellate cases

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COURT OF APPEALS

CONTRACT LAW.

FORMULAIC LANGUAGE INDICATING THE ACCEPTANCE OF A BID WAS SUBJECT TO A WRITTEN AGREEMENT AND DEPOSIT DID NOT NEGATE THE FORMATION OF A BINDING CONTRACT UPON ACCEPTANCE.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, reversing the Appellate Division, determined plaintiff (Stonehill) was entitled to summary judgment against defendant Bank of the West (BOTW) in this breach of contract action. BOTW offered for sale a syndicated loan at auction. Plaintiff bid on the loan and BOTW accepted the bid. The acceptance e-mail indicated it was "subject to" an executed agreement and a 10% deposit. BOTW argued that the "subject to" conditions were not met and a contract was never formed. The Court of Appeals disagreed noting a difference between conditions precedent to performance and conditions prefatory to the formation of a binding agreement: "... [The acceptance] email stated that closure of the transaction required execution of a signed document and Stonehill's tender of the 10% deposit. That, however, is not the same as a clear expression that the parties were not bound to consummate the sale and that BOTW could withdraw at any time, for any reason. Nor did BOTW make known its desire for an unrestricted exit from the deal before accepting Stonehill's bid or anytime before it withdrew from the transaction. ... There is a difference between conditions precedent to performance and those prefatory to the formation of a binding agreement." ***Stonehill Capital Mgt., LLC v. Bank of the W.*, 2016 N.Y. Slip Op. 08481, CtApp 12-20-16**

COPYRIGHT.

NO STATE COMMON LAW COPYRIGHT PROTECTION FOR PRE-1972 RECORDINGS PLAYED BY RADIO STATIONS.

In an extensive opinion by Judge Stein, with a concurrence and a two-judge dissent, the Court of Appeals determined the owner of master recordings of songs by the band "The Turtles" did not have a state common-law copyright interest in the public performance of pre-1972 recordings (i.e., recordings broadcast by radio stations). A federal law controls post-1972 recordings: "Simply stated, New York's common-law copyright has never recognized a right of public performance for pre-1972 sound recordings. Because the consequences of doing so could be extensive and far-reaching, and there are many competing interests at stake, which we are not equipped to address, we decline to create such a right for the first time now. … Under these circumstances, the recognition of such a right should be left to the legislature." ***Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 2016 N.Y. Slip Op. 08480, CtApp 12-20-16**

CRIMINAL LAW.

PROCEDURE FOR DETERMINING WHETHER A PROSECUTOR'S INITIAL STATEMENT OF READINESS FOR TRIAL WAS ILLUSORY CLARIFIED.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, over a concurrence in two of the three cases and a dissent in the third, articulated the procedure for determining whether a prosecutor's off-calendar statement of readiness for trial was illusory. An illusory statement of readiness would not stop the speedy trial clock. The issue arises when an initial statement of readiness is followed by an indication the People are not ready for trial: "In each of these appeals, defendants moved to dismiss the accusatory instrument on speedy trial grounds pursuant to CPL 30.30 (1) arguing that the People's off-calendar statements of readiness were illusory because the People were not ready for trial at the next court appearance. The common issue left open in *People v. Sibblies* (22 NY3d 1174 [2014]) — is whether, in the event of a change in the People's readiness status, the People or the defendant have the burden of showing that a previously filed off-calendar statement of readiness is illusory. We hold that such a statement is presumed truthful and accurate; a presumption that can be rebutted by a defendant's demonstration that the People were not, in fact, ready at the time the statement was filed. If the People announce that they are not ready after having filed an off-calendar statement of readiness, and the defendant challenges such statement — at a calendar call, in a CPL 30.30 motion, or both — the People must establish a valid reason for their change in readiness status to ensure that a sufficient record is made for the court to determine whether the delay is excludable. The defendant then bears the ultimate burden of demonstrating, based on the People's proffered reasons and other relevant circumstances, that the prior statement of readiness was illusory." ***People v. Brown*, 2016 N.Y. Slip Op. 08482, CtApp 12-20-16**

CRIMINAL LAW.

JURY INSTRUCTION TO CONTINUE DELIBERATIONS AFTER A NON-UNANIMOUS VERDICT WAS NOT COERCIVE.
The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined a jury instruction given after a jury verdict was found not to be unanimous was not coercive: "The supplemental instruction in this case, taken in context, was not coercive. In response to the jury's representation that it had reached a 'verdict' — when, in fact, the jury was not unanimous — the trial judge provided clarification that, in order to constitute a verdict, all jurors had to agree. Moreover, ... the trial judge here stressed that the jurors should 'attempt' to reach a verdict ... , thereby leaving 'open the possibility that the jurors would have principled disagreements that would prevent them from reaching a unanimous verdict' ... . The court did not 'overemphasize' the need to return a verdict or 'suggest[] that the jurors were failing in their duty' by not doing so ... . Nor did the court indicate that the jurors would be subject to 'prolonged deliberations'... . Contrary to defendant's claim, the absence of 'cautionary language' is not fatal to the supplemental charge. Just two hours before its supplemental instruction, the trial court provided an instruction containing ample cautionary language reminding the jury 'not [to] surrender an honest view of the evidence.' " ***People v. Morgan*, 2016 N.Y. Slip Op. 08484, CtApp 12-20-16**

CRIMINAL LAW.

DENIAL OF DEFENSE COUNSEL'S FOR CAUSE CHALLENGE TO A JUROR WAS NOT AN ABUSE OF DISCRETION, APPELLATE DIVISION REVERSED.
The Court of Appeals, reversing the appellate division, determined the trial court did not abuse its discretion when it denied defense counsel's for cause challenge to a juror. The court's questioning of the juror, which referenced questions just asked of another juror, was sufficient to ensure the juror would render a verdict based on the evidence and the law: "Under the circumstances of this case — including the trial court's direct reference to the questions it had asked of juror No. 123, which called to juror No. 383's attention her previously stated bias — the trial court did not abuse its discretion by denying defendant's for-cause challenge to the prospective juror based on her subsequent unequivocal assurances of impartiality ... . Viewing prospective juror No. 383's statements in totality and in context ... , her assurances to the court adequately expressed her ability and willingness to adhere to her obligation to acquit defendant if the evidence required her to do so and established that she would render an impartial verdict untainted by any aforementioned bias or sympathy. '[T]he CPL . . . does not require any particular expurgatory oath or 'talismanic' words' to resolve doubt about a potential juror's ability to be fair... and, here, the trial court had the discretion to deny defendant's for-cause challenge to the prospective juror ...". ***People v. Warrington*, 2016 N.Y. Slip Op. 08584, CtApp 12-22-16**

CRIMINAL LAW.

UNDER THE FACTS, THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY TO CONSIDER COERCION IN THE SECOND DEGREE AS A LESSER INCLUDED OFFENSE, DESPITE THE FACT THAT COERCION IN THE FIRST DEGREE AND COERCION IN THE SECOND DEGREE HAVE IDENTICAL ELEMENTS.
The Court of Appeals, in a full-fledged opinion by Judge Piggot, over a dissenting opinion, determined the trial judge properly refused to instruct the jury on the lesser included offense of coercion in the second degree. Defendant was charged and convicted of coercion in the first degree. The applicable elements of both the first and second degree offenses were the same in this case. The second degree (misdemeanor) offense is reserved for rare cases where the nature of the coercion does not rise to the level of heinousness warranting a felony conviction (not easily described or discerned): "... [S]econd-degree coercion should be charged as a lesser included offense only in the 'unusual factual situation' in which the coercion by threat of personal or property injury lacks 'the heinousness ordinarily associated with this manner of commission of the crime' ... . We ... left open the possibility that, based on the evidence presented in a given case, a trial court could submit second-degree coercion as a lesser-included offense of coercion in the first degree if the 'threatened physical injury is not truly fearsome' ... . This case does not present one of those 'unusual factual situations' warranting the lesser included charge ... . The People's evidence showed that defendant coerced his former girlfriend by threatening to drive away her clients, make it impossible for her to conduct business, hurt her physically, and even kill her. Such methods of coercion have the heinous quality contemplated by the first-degree statute, and therefore the second-degree charge was not warranted." ***People v. Finkelstein*, 2016 N.Y. Slip Op. 08585, CtApp 12-22-16**

CRIMINAL LAW.

SKIN COLOR RECOGNIZED AS A VALID BASIS FOR A BATSON CHALLENGE TO THE PEREMPTORY STRIKE OF A JUROR.
The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, over a concurring opinion, determined skin color is a valid basis for a *Batson* challenge to a peremptory strike. Here defense counsel challenged the prosecutor's striking of a dark-colored Indian-American woman. The prosecutor did not provide a non-discriminatory reason for striking her: "Our State Constitution and Civil Rights Law plainly acknowledge that color is a 'status that implicates equal protection concerns' ... , and therefore a Batson challenge may be based on color. Discrimination on the basis of one's skin color — or

colorism — has been well researched and analyzed, demonstrating that 'not all colors (or tones) are equal' ... . Persons with similar skin tones are often perceived to be of a certain race and discriminated against as a result, even if they are of a different race or ethnicity. That is why color must be distinguished from race. Today, we acknowledge color as a classification separate from race for Batson purposes, as it has already been acknowledged by our State Constitution and Civil Rights Law. Making this distinction is necessary to serve the purpose of Batson, which recognized that discrimination in the selection of jurors violates 'a defendant's right to equal protection because it denies him [or her] the protection that a trial by jury is intended to secure' ...". ***People v. Bridgeforth*, 2016 N.Y. Slip Op. 08586, CtApp 12-22-16**

CRIMINAL LAW.

QUESTIONS WHETHER PROSPECTIVE JURORS COULD DISREGARD AN INVOLUNTARY CONFESSION SHOULD HAVE BEEN ALLOWED, CONVICTION REVERSED.

The Court of Appeals, reversing the appellate division (and defendant's manslaughter conviction), determined defense counsel should have been allowed to question prospective jurors in voir dire about their ability to disregard an involuntary statement attributed to the defendant. At voir dire, the prosecution indicates it was not sure defendant's statements would be introduced. However, defendant's inculpatory statements were presented in the People's direct case, and those statements tended to corroborate eyewitness testimony: "Under the circumstances of this case, the trial court abused its discretion when it entirely precluded questioning on the issue of involuntary confessions and refused to make its own inquiry of the potential jurors on the issue. Defense counsel's request to question prospective jurors about their ability to follow the law and disregard an involuntary confession went to the heart of determining whether those jurors could be impartial and afford defendant a fair trial. Indeed, defendant, facing the most serious charge of murder, premised his defense at trial on the involuntariness of his inculpatory statements, which effectively corroborated the testimony of the two eyewitnesses whose credibility was strenuously assailed by the defense." ***People v. Miller*, 2016 N.Y. Slip Op. 08587, CtApp 12-22-16**

CRIMINAL LAW, APPEALS.

WAIVER OF APPEAL WAS SUFFICIENT, APPELLATE DIVISION REVERSED.

The Court of Appeals, reversing the appellate division, determined defendant's waiver of appeal was valid. The lower court judge first went through the rights waived by a guilty plea. Only then did the judge turn to the waiver of appeal: "Here, the court separately explained to defendant the panoply of rights normally forfeited upon a guilty plea. After ensuring that defendant understood those rights, the judge next had defendant allocute to the facts of the crimes. Only after the allocution did the court turn to the waiver of appeal. During the oral colloquy defendant stated he understood that he was 'waiving [his] right to appeal' and 'that this conviction, or these convictions will be final, that a court will not review what we have done here.' This verbal waiver was accompanied by a detailed written waiver which stated, among other things, that 'the right to appeal is separate and distinct from the other rights automatically forfeited upon a plea of guilty.' Thus, the record sufficiently demonstrates that defendant knowingly and intelligently waived his right to appeal." ***People v. Bryant*, 2016 N.Y. Slip Op. 08488, CtApp 12-20-16**

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL NOT INEFFECTIVE FOR FAILING TO ASSERT THE JUSTIFICATION DEFENSE, DEFENDANT INSISTED HE WAS NOT THE SHOOTER AND INSTRUCTED COUNSEL NOT TO RAISE JUSTIFICATION AS A DEFENSE.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined defense counsel was not ineffective. Counsel, following defendant's wishes. pursued a misidentification defense and did not pursue a justification defense. A video depicted actions which raised the possibility the shooting was justified as self-defense. However, defendant maintained he was not the shooter depicted in the video: "Here, we cannot say that defendant received less than meaningful representation ... . Defendant concedes that he instructed counsel to pursue a misidentification defense, and he does not claim that counsel's professional efforts in that regard were constitutionally deficient. Rather, defendant claims he was deprived of effective assistance when counsel failed to present a defense of justification. We disagree. Each defense theory available to defendant posed its own challenges, and the choice of one, instead of the other, was not 'determinative of the verdict' ... . We are not presented with a case in which defendant's chosen defense theory was self destructive and ensured conviction. Nor did the path taken by counsel undermine his ability to deploy professional skill and expertise in presenting the chosen defense. For the same reasons, counsel was not ineffective for objecting to any charge that would have presented justification to the jury as a response to the jury's request for further instructions. Thus, we cannot say that counsel's representation was constitutionally deficient at the time because he vigorously pursued the defense defendant approved rather than the one defendant rejected outright." ***People v. Clark*, 2016 N.Y. Slip Op. 08485, CtApp 12-20-16**

CRIMINAL LAW, ATTORNEYS.

AFTER THE SENTENCE WAS OVERTURNED ON APPEAL BECAUSE THE JUDGE CONSIDERED EVIDENCE OF A CHARGE THAT DID NOT GO TO THE JURY, THE JUDGE IMPOSED THE SAME SENTENCE, SECOND SENTENCE WAS NOT VINDICTIVE, FAILURE TO OBJECT NOT INEFFECTIVE ASSISTANCE.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined the resentencing of defendant to the same sentence which was overturned on appeal was not an error and failure to object to the resentence did not constitute ineffective assistance. Defendant was charged with attempted murder, assault and criminal possession of a weapon. Defendant and the victim were wrestling with a gun which discharged and wounded the victim. Defendant was convicted only of criminal possession of a weapon (no evidence of intent). The defendant was sentenced as a persistent violent felony offender to 20 years. During the first sentencing, the judge referred to the impact on the victim. Because defendant had not been convicted of shooting the victim, the appellate division reversed finding the sentence to be based upon evidence improperly considered. The judge imposed the same 20-year sentence upon resentencing. Defense counsel didn't object: "In this case, the resentencing court provided on-the-record, permissible, and wholly nonvindictive reasons substantiating defendant's sentence. Those reasons included defendant's three prior felony convictions, a prior parole violation, and a probation report characterizing defendant as 'a significant risk to the safety of the community.' The record therefore does not evince actual reliance on improper factors, or the type of retaliatory, vindictive conduct that a prophylactic presumption is designed to protect against. Because defendant's resentencing claim fails on its merit, defense counsel cannot be deemed ineffective for declining to assert it." ***People v. Flowers*, 2016 N.Y. Slip Op. 08580, CtApp 12-22-16**

CRIMINAL LAW, EVIDENCE.

NO RECORD SUPPORT FOR LOWER COURT'S DENIAL OF SUPPRESSION OF LINE-UPS WHERE DEFENDANT WAS THE ONLY PERSON WITH DREADLOCKS.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, determined all of the line-up identifications of the defendant should have been suppressed. The suppression court found that defendant's dreadlocks constituted a "distinctive feature." Defendant was the only person in the line-up identifications with dreadlocks. Two of the victims mentioned dreadlocks in their statements to the police, and two did not. The suppression court suppressed only the two line-up identifications made by the victims who mentioned dreadlocks: "We by no means propose that a lineup is unduly suggestive, as a matter of law, merely because a defendant has a different hairstyle than some or all of the fillers. We further decline to categorically state what features may be considered so 'distinct' as to render a lineup unduly suggestive. But here, the courts below concluded that defendant's dreadlocks were distinctive — so much so that they rendered the lineup unduly suggestive as to the two victims ... who had mentioned the perpetrator's hairstyle in their initial description to the police. This conclusion is supported by the lineup photographs introduced into evidence at the hearing, which clearly depict defendant as the only person with long, visible dreadlocks. ... The lower courts' conclusion that this same distinctive feature was not unduly suggestive for [the other two victims] was premised solely on their having not included dreadlocks as part of their descriptions. No other findings of fact were made that would distinguish the outcomes from one another. Since our holding here clarifies that a witness's failure to mention a distinctive feature in his or her initial description is not necessarily the determinative factor in assessing a lineup's suggestivity, here, we must conclude that there was no record support for the lower courts' denial of suppression for [two of the four] lineups ...". ***People v. Perkins*, 2016 N.Y. Slip Op. 08483, CtApp 12-20-16**

CRIMINAL LAW, EVIDENCE.

UNVERIFIED CELL PHONE SUBSCRIBER INFORMATION IN A SPRINT BUSINESS RECORD WAS PROPERLY ADMITTED BECAUSE IT WAS NOT ADMITTED FOR ITS TRUTH, RATHER IT WAS ADMITTED AS A PIECE OF A PUZZLE LINKING THE CELL PHONE TO THE DEFENDANT, WHO WAS OTHERWISE LINKED TO THE ROBBERY.

The Court of Appeals, in a full-fledged opinion by Judge Stein, determined cell phone subscriber information contained within a Sprint business record was properly admitted, even though the subscriber information was not verified by Sprint. The subscriber information was not admitted for its truth, but rather as a piece of a puzzle which connected the cell phone to the defendant, Darnell Patterson. An accomplice in the charged robbery, who had been invited into the apartment which was subsequently robbed, received a call from the subject cell phone shortly before masked robbers arrived at the apartment: "... [T]he purpose of the subscriber information was not to prove that 'Darnell Patterson,' or even defendant, had activated the prepaid Sprint account, but to show that the account had some connection to defendant — regardless of how tenuous — because such a connection would be helpful to the jury in assessing the reliability of the victim's identification of defendant as the perpetrator. The evidence was ultimately relevant to the People's argument to the jury that it was not coincidental that someone — regardless of who — provided pedigree information associated with defendant in activating the cell phone. Under the circumstances of this case, the subscriber information was not admitted for its truth, but for the jury to consider as a piece of the puzzle — along with evidence that the prepaid Sprint account called the same numbers that defendant did in prison, that the date of birth given by defendant when arrested matched that in the subscriber infor-

mation, that the address given in the subscriber information was associated with defendant in police databases, and that defendant had the name Darnell tattooed on his hand — that gave rise to an inference that defendant was the user of the phone, although perhaps not the subscriber, a subtle but critical distinction for purposes of the evidentiary issue before us." ***People v. Patterson*, 2016 N.Y. Slip Op. 08582,, CtApp 12-22-16**

MUNICIPAL LAW, EDUCATION-SCHOOL LAW.

PROCEDURE FOR DETERMINING WHETHER RESPONDENT HAS BEEN PREJUDICED BY PETITIONER'S FAILURE TO TIMELY FILE A NOTICE OF CLAIM CLARIFIED.

The Court of Appeals, in a full-fledged opinion by Judge DeFiore, reversing the appellate division, clarified the procedure for establishing a school district or municipal corporation has been prejudiced by a delay in filing a notice of claim for a tort action. Here a student was injured by a car in the vicinity of the respondent school. The school had been made aware of the location and nature of the accident. After the 90-day notice of claim period had passed, petitioner learned there had been a sign erected by the school that may have had a role in the accident. In denying the motion for leave to file a late notice, Supreme Court placed the burden entirely on the petitioner to demonstrate the school was not prejudiced by the delay. The Court of Appeals clarified the relative burdens of proof on that issue: "We hold that the burden initially rests on the petitioner to show that the late notice will not substantially prejudice the public corporation. Such a showing need not be extensive, but the petitioner must present some evidence or plausible argument that supports a finding of no substantial prejudice. * * * The rule we endorse today — requiring a petitioner to make an initial showing that the public corporation will not be substantially prejudiced and then requiring the public corporation to rebut that showing with particularized evidence — strikes a fair balance. We recognize that a petitioner seeking to excuse the failure to timely comply with the notice requirement should have the initial burden to show that the public corporation will not be substantially prejudiced by the delay. The public corporation, however, is in the best position to know and demonstrate whether it has been substantially prejudiced by the late notice." ***Matter of Newcomb v. Middle Country Cent. Sch. Dist.*, 2016 N.Y. Slip Op. 08581, CtApp 12-22-16**

MUNICIPAL LAW, IMMUNITY.

CITY PROPERLY HELD LIABLE FOR ACCIDENT RELATED TO SPEEDING BECAUSE OF ITS FAILURE TO IMPLEMENT TRAFFIC CALMING MEASURES TO REDUCE DRIVERS' TENDENCY TO SPEED.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a dissenting opinion, determined the city was properly held liable for an accident on a road known for speeding. Plaintiff, a twelve-year-old boy, was struck while trying to cross the road on his bicycle. The driver was going 54 miles per hour in a 30-mile-an-hour zone. The city had received numerous speeding complaints over the years and had undertaken four studies to determine whether traffic control devices should be installed on the road. Plaintiffs presented evidence that traffic control devices would not solve the speeding problem and so-called "traffic calming" measures were needed (speed humps, raised cross-walks, etc.). The Court of Appeals, affirming Supreme Court, found that maintaining safe roadways was a proprietary function, not a governmental function. Therefore there was no need for a special relationship with plaintiff as a prerequisite for liability. The court further found that the city was not entitled to qualified immunity stemming from the traffic studies, because the studies did not address "traffic calming" measures: "We do not suggest that a municipality has a proprietary duty to keep its roadways free from all unlawful or reckless driving behavior. Under the particular circumstances of this case, however, plaintiffs demonstrated that the City was made aware through repeated complaints of ongoing speeding along Gerritsen Avenue, that the City could have implemented roadway design changes in the form of traffic calming measures to deter speeding, and that the City failed to conduct a study of whether traffic calming measures were appropriate and therefore failed to implement any such measures. ... [W]hether the City's negligence was a substantial factor in causing the accident or [the driver's] speeding was the sole proximate cause, and whether the City was entitled to qualified immunity based on its response to those repeated complaints, were both issues to be resolved by the jury." ***Turturro v. City of New York*, 2016 N.Y. Slip Op. 08579, CtApp 12-22-16**

PERSONAL INJJURY, ANIMAL LAW.

QUESTION OF FACT WHETHER ALLOWING A CALF TO ESCAPE FROM A FARM WAS A PROXIMATE CAUSE OF THE DEATH OF A MOTORIST WHO STOPPED TO HELP THE CALF AND WAS STRUCK.

The Court of Appeals, in a full-fledged opinion by Judge Stein, reversing the appellate division, determined the proximate cause of the accident presented a jury question. Defendants own a farm from which a calf, born that day, escaped. Plaintiff's decedent saw the calf in the roadway, stopped her car and got out to help the calf. She was then struck by a vehicle and killed. The appellate division held that the escaped calf created a condition for the accident, but was not a proximate cause of the accident. The Court of Appeals reviewed the case law addressing when an intervening act severs the causal connection and held that, under these facts, proximate cause presented a jury question: "The very same risk that rendered negligent the Farm's alleged failure to restrain or retrieve its farm animal — namely, that the wandering calf would enter a roadway and cause a collision — was, in fact, the risk that came to fruition ... . That the Farm could not predict the exact manner in which the calf would cause injury to a motorist does not preclude liability because the general risk and character

of injuries was foreseeable ... . Thus, we cannot say, as a matter of law, that the Farm's negligence merely furnished the occasion for the collision or that the accident resulting in decedent's death did not flow from the Farm's negligent conduct in permitting its calf to stray. A factfinder could reasonably conclude that decedent's actions in exiting her vehicle and entering the roadway were an entirely "'normal or foreseeable consequence of the situation created by the defendant's negligence' ...". ***Hain v. Jamison*, 2016 N.Y. Slip Op. 08583, CtApp 12-22-16**

FIRST DEPARTMENT

FAMILY LAW.

CEREMONIAL MARRIAGE SUFFICIENTLY PROVEN, CHILD ENTITLED TO SUPPORT.

The First Department, in a full-fledged opinion by Justice Acosta, affirmed the support magistrate's finding that a ceremonial marriage had taken place and, therefore, the child of the marriage was entitled to support from the father. The mother described the Islamic marriage ceremony, and presented some additional proof (photos and a daughter's testimony). Father acknowledged living with mother and relying on her to raise his children, but denied the marriage: "The presumption of legitimacy has since been codified in the Family Court Act, which provides, 'A child born of parents who at any time prior or subsequent to the birth of said child shall have entered into a ceremonial marriage shall be deemed the legitimate child of both parents for all purposes of [support proceedings] regardless of the validity of such marriage' ... . A ceremonial marriage need not take any particular form, provided that the parties solemnly declare in the presence of a clergyman or magistrate, and at least one witness, that they intend to be married ... . New York courts ... treat the presumption as a rebuttable one ... . To rebut the presumption, the challenger must disprove legitimacy by clear and convincing evidence ... . The court's determination after a hearing that respondent and [mother] entered into a ceremonial marriage is supported by the evidence and the court's credibility determinations, which 'are entitled to great weight, since the nisi prius court is in a better position to evaluate the witnesses' ... . Therefore, we affirm the court's factual determination that a ceremonial marriage took place." ***Matter of Commissioner of Social Servs. v. B.C.*, 2016 N.Y. Slip Op. 08613, 1st Dept 12-22-16**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

LOADING LADDERS ONTO A TRUCK DID NOT CREATE AN ELEVATION-RELATED RISK, PLAINTIFF'S NEGLIGENCE WAS THE SOLE PROXIMATE CAUSE OF HIS INJURY.

The First Department determined loading ladders onto a truck did not create an elevation-related risk contemplated by Labor Law 240(1). The ladders slid into plaintiff when plaintiff released a bungee cord. The court further determined plaintiff's negligence (releasing the bungee cord) was the sole proximate cause of his injury: "The work that plaintiff was engaged in when he was injured, i.e., retrieving ladders that his employer had used in its work at the site, was a construction-related activity covered by Labor Law §§ 240(1) and 241(6) ... . However, it did not present an elevation-related risk contemplated by Labor Law § 240(1) ... . Moreover, in view of plaintiff's testimony that he did not notice the tilt of the truck onto which he was loading the ladders, any elevation differential resulting from the tilt was de minimis. Nor is Industrial Code (12 NYCRR) § 23-1.7(e), which requires that passageways and working areas be kept free of accumulations of dirt and debris, a proper predicate for plaintiff's Labor Law § 241(6) claim, since the area outside the gate to the loading dock where plaintiff parked his truck was not a passageway or working area ... . * * * ... [T]he record demonstrates as a matter of law that plaintiff was the sole proximate cause of his accident ... . Although the first ladder that he loaded onto the rack atop the truck slid toward the end of the rack as he loaded it, after plaintiff had secured it with a bungee cord and loaded the second ladder, instead of taking another of the several bungee cords available to him, he unhooked the bungee cord securing the first ladder, intending to wrap it around both ladders, and the ladders slid into him and knocked him off the truck." ***Guido v. Dormitory Auth. of the State of N.Y.*, 2016 N.Y. Slip Op. 08600, 1st Dept 12-22-16**

SECOND DEPARTMENT

CIVIL PROCEDURE, CONSTITUTIONAL LAW.

REQUIRING AN OUT OF STATE RESIDENT TO POST SECURITY FOR COSTS ASSOCIATED WITH BRINGING A LAWSUIT IN NEW YORK DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE US CONSTITUTION.

The Second Department, in a full-fledged opinion by Justice Dickerson, determined requiring an out-of-state resident to post security for costs associated with a lawsuit brought in New York does not violate the Privileges and Immunities Clause of the US Constitution. The plaintiff was injured in an accident in New York (when she was a New York resident) and subsequently moved to Georgia. The defendants moved pursuant to CPLR 8501 and 8503 to direct plaintiff to post security for costs in the amount of $500: "... [T]he U.S. Supreme Court has stated that the Privileges and Immunities Clause is satisfied so long as a nonresident 'is given access to the courts of the State upon terms which in themselves are reasonable and adequate for the enforcing of any rights he [or she] may have' ... . There is a substantial reason for the difference in treatment

between nonresidents and residents, namely, the fact that nonresident plaintiffs are unlikely to have assets in New York that may be used to enforce a costs judgment. And the discrimination practiced against nonresidents—requiring nonresident plaintiffs to post security for costs—bears a substantial relationship to the State's objective of deterring frivolous or harassing lawsuits and preventing a defendant from having to resort to a foreign jurisdiction to enforce a costs judgment ...". ***Clement v. Durban*, 2016 N.Y. Slip Op. 08500, 2nd Dept 12-21-16**

CIVIL PROCEDURE, FORECLOSURE.

COURTS OF EQUITY HAVE BROAD POWERS TO ACT IN THE INTEREST OF JUSTICE, FORECLOSURE IS EQUITABLE IN NATURE, MOTION TO VACATE DEFAULT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that defendant's motion to vacate a default judgment in this foreclosure action should have been granted in the interest of justice. The court explained the "interest of justice" powers in this context: " 'In addition to the grounds set forth in section 5015(a), a court may vacate its own judgment for sufficient reason and in the interests of substantial justice' ... . Moreover, '[a] foreclosure action is equitable in nature and triggers the equitable powers of the court ...'. 'Once equity is invoked, the court's power is as broad as equity and justice require' ... . Thus, a court may rely on 'its inherent authority to vacate [a judgment] in the interest of substantial justice, rather than its statutory authority under CPLR 5015(a),' as the 'statutory grounds are subsumed by the court's broader inherent authority' ...". ***U.S. Bank Natl. Assn. v. Losner*, 2016 N.Y. Slip Op. 08560, 2nd Dept 12-21-16**

ENVIRONMENTAL LAW.

PETITIONERS DID NOT HAVE STANDING TO OBJECT TO CONSTRUCTION ON PARK LAND.

The Second Department determined petitioners did not have standing to object to the construction of a water purification facility, called an "air stripper," on park land. The petitioners alleged they frequented the park and the natural setting would be destroyed by the air stripper. Standing under the State Environmental Quality Review Act (SEQRA) is demonstrated by injury which is different from any injury suffered by the public at large: " 'To establish standing under SEQRA, a petitioner must show (1) an environmental injury that is in some way different from that of the public at large, and (2) that the alleged injury falls within the zone of interests sought to be protected or promoted by SEQRA' ... . '[I]n land-use and environmental cases, a person who can prove that he or she uses and enjoys a natural resource more than most other members of the public has standing . . . to challenge government actions that threaten that resource' ... . Here, the petitioners failed to establish that they use and enjoy the portion of the park in the vicinity of the proposed location for the air stripper more than most other members of the public ...". ***Matter of Brummel v. Town of N. Hempstead Town Bd.*, 2016 N.Y. Slip Op. 08513, 2nd Dept 12-21-16**

FAMILY LAW.

CONSTRUCTIVE TRUST PROPERLY IMPOSED UPON PROPERTY PURCHASED AND IMPROVED WITH MARITAL FUNDS BUT TITLED TO ANOTHER.

The Second Department determined a constructive trust was properly imposed on Florida property in this divorce action. The wife, who sought the constructive trust, alleged that marital funds were used to buy and improve the property and the property was placed in her husband's father's (Boris's) name for tax purposes: "Here, evidence adduced at the hearing showed that the wife was related to the husband and Boris through marriage and that Boris allowed the Florida apartment to be used solely by the husband and wife as their vacation home for many years. Therefore, the first element for the imposition of a constructive trust was satisfied ... . The wife also satisfied the second element by demonstrating the existence of an implied promise that [husband's father] was holding title to the Florida apartment for purposes convenient to the husband and that the apartment belonged to the husband and wife ... . She also demonstrated that, in reliance on that implied promise, marital funds were used to purchase the apartment and to make renovations costing more than $150,000 ... . Furthermore, the wife demonstrated that a constructive trust was necessary 'to satisfy the demands of justice' ...". ***Kaprov v. Stalinsky*, 2016 N.Y. Slip Op. 08509, 2nd Dept 12-21-16**

FAMILY LAW.

SURROGATE'S COURT DOES NOT HAVE THE AUTHORITY TO ABROGATE OR VACATE A FOREIGN ORDER OF ADOPTION.

The Second Department determined Surrogate's Court did not have the authority under the Domestic Relations Law to deny recognition of, or vacate, adoption orders issued to petitioners by a Russian court. After adopting the children, petitioners learned the children had serious mental health problems which required placement in a residential psychiatric treatment facility. Petitioners then sought relief from the Russian adoption orders: "... [T]he Surrogate's Court lacked authority under Domestic Relations Law § 111-c to deny recognition of the adoption order. Although a court may deny a petition for registration of a foreign adoption order on the ground that it does not satisfy the requirements set forth in Domestic Relations Law § 111-c(1) ... , the statute, by its plain language, was not intended to function as a means to abrogate a foreign adoption or deny recognition of a foreign adoption order on the basis of fraud. ... The Surrogate's Court similarly lacked

authority under Domestic Relations Law § 114(3) to vacate the adoption order. That statute provides that, '[i]n like manner as a court of general jurisdiction exercises such powers, a judge or surrogate of a court in which the order of adoption was made may open, vacate or set aside such order of adoption for fraud, newly discovered evidence or other sufficient cause.' ... The plain language of that statute only empowers a New York court to vacate its own adoption orders, and not those issued in a foreign sovereign nation ...". ***Matter of Child A (Parent M.)*, 2016 N.Y. Slip Op. 08510, 2nd Dept 12-21-16**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

RIDING IN A PICKUP TRUCK IS NOT AN ELEVATION-RELATED RISK, FALLING OFF THE TAILGATE OF A MOVING TRUCK NOT COVERED BY LABOR LAW 240(1), RIDING ON THE TAILGATE WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT.

The Second Department, in a full-fledged opinion by Justice Dickerson, reversing Supreme Court, determined defendant general contractor's motions for summary judgment dismissing plaintiff's Labor Law 240(1) and 241(6) causes of action should have been granted. Plaintiff was sitting on an unsecured cast iron gate, which was resting on the tailgate of a pickup truck, when he and the gate fell from the moving truck. The Second Department determined the fall was not the result of a task involving an elevation-related risk, but rather was the result of riding in a pickup truck (not an elevation-related risk). In addition, the court found that plaintiff's negligence (choosing to ride in the truck while sitting on the unsecured gate with his legs hanging off the tailgate) constituted the sole proximate cause of the accident. ***Eddy v. John Hummel Custom Bldrs., Inc.*, 2016 N.Y. Slip Op. 08502, 2nd Dept 12-21-16**

LABOR LAW-CONSTRUCTION LAW.

INJURY NOT GRAVITY-RELATED, LABOR LAW 240(1) CAUSE OF ACTION PROPERLY DISMISSED.

The Second Department determined plaintiff's Labor Law 240(1) cause of action was properly dismissed. Plaintiff was struck by a pipe which was being carried down a ladder by another worker. "According to the deposition testimony of Haylon Dennis ... as Dennis was descending from a ladder, he swung a pipe that he was holding and hit the injured plaintiff, whom Dennis did not realize was standing near him. ... ... [Defendants] established their prima facie entitlement to judgment as a matter of law by demonstrating that the injury was not the direct consequence of the application of the force of gravity to an object or person ... . In opposition, the plaintiffs failed to raise a triable issue of fact ...". ***Palomeque v. Capital Improvement Servs., LLC*, 2016 N.Y. Slip Op. 08538, 2nd Dept 12-21-16**

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF NEED NOT BE ENGAGED IN CONSTRUCTION WORK TO BRING A LABOR LAW 200 CAUSE OF ACTION ALLEGING INJURY CAUSED BY A DANGEROUS CONDTION.

The Second Department determined plaintiff's Labor Law 200 cause of action should not have been dismissed. Plaintiff was working for a mover, moving items out of a basement when he fell into a hole which had been dug for soil samples in anticipation of construction. Labor Law 200 was applicable, even though plaintiff was not engaged in construction work: "Where, as here, 'a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a general contractor may be liable in common-law negligence and under Labor Law § 200 only if it had control over the work site and either created the dangerous condition or had actual or constructive notice of it' ... . [The general contractor] failed to establish, prima facie, that it did not have control over the work site, or that it did not create or have actual or constructive notice of the alleged dangerous condition ...". ***Rocha v. GRT Constr. of N.Y.*, 2016 N.Y. Slip Op. 08555, 2nd Dept 12-21-16**

MUNICIPAL LAW, CIVIL RIGHTS, CIVIL PROCEDURE.

FALSE ARREST AND 42 U.S.C. § 1983 CAUSES OF ACTION SHOULD HAVE BEEN DISMISSED, ARREST STEMMING FROM A WARRANT WAS PRIVILEGED.

The Second Department determined the city's motion to dismiss the complaint as a matter of law, made at the close of plaintiff's proof, should have been granted. Plaintiff was stopped by the police for urinating in public. Based ib an outstanding warrant for plaintiff's arrest, plaintiff was arrested and detained. After dismissal of the charges, plaintiff sued alleging false arrest and civil rights violations (42 U.S.C. § 1983). Because plaintiff's arrest was pursuant to a warrant, the arrest was privileged and could not form the basis of the false arrest and 42 U.S.C. § 1983 causes of action: "To be awarded judgment as a matter of law pursuant to CPLR 4401, a defendant must show that, upon viewing the evidence in the light most favorable to the plaintiff, there is no rational basis by which the jury could find for the plaintiff against the moving defendant ... . The plaintiff's evidence must be accepted as true, and the plaintiff is entitled to every favorable inference that can be reasonably drawn therefrom ... . Where the confinement or detention of an individual against his or her will is privileged, a cause of action alleging false arrest will not lie ... . One instance in which the privilege applies is when the confinement is based on a facially valid arrest warrant, issued by a court having jurisdiction ... . Here, the plaintiff did not contest the fact that the warrant was facially valid, and was issued by a court of competent jurisdiction." ***Ali v. City of New York*, 2016 N.Y. Slip Op. 08490, CtApp 12-22-16**

THIRD DEPARTMENT

PERSONAL INJURY, MEDICAL MALPRACTICE, CIVIL PROCEDURE.

PLAINTIFF NEED NOT ELIMINATE ALL OTHER POSSIBLE CAUSES OF INJURY TO MAKE OUT A PRIMA FACIE CASE OF MEDICAL MALPRACTICE, MOTION FOR A DIRECTED VERDICT SHOULD NOT HAVE BEEN GRANTED.

The Third Department, in a full-fledged opinion by Justice Peters, determined certain causes of action in this medical malpractice suit should have been allowed to go to the jury. Defendant's motion for a directed verdict should not have been granted. Most of the opinion is fact-generated and cannot be summarized here. The law surrounding a directed verdict in this context, including the applicability of the doctrine of res ipsa loquitur, was explained. A plaintiff is not required to eliminate all other possible causes of injury to make out a prima facie case: "A directed verdict is only appropriate 'when, viewing the evidence in a light most favorable to the nonmoving part[y] and affording such part[y] the benefit of every inference, there is no rational process by which a jury could find in favor of the nonmovant[]' ... . '[A] plaintiff asserting a medical malpractice claim must demonstrate that the doctor deviated from acceptable medical practice, and that such deviation was a proximate cause of the plaintiff's injury' ... . '[T]o establish proximate causation, the plaintiff must demonstrate that the defendant's deviation from the standard of care was a substantial factor in bringing about the injury' ... . A plaintiff in a medical malpractice action may also rely on the doctrine of res ipsa loquitur ... , which 'permits the jury to infer negligence and causation sufficient to establish a prima facie case based on circumstantial evidence' ... . 'Notably, a plaintiff is not required to eliminate all other possible causes of the injury in order to establish a prima facie case' of medical malpractice ... . * * * Whether or not res ipsa loquitur was applicable here, plaintiff presented sufficient evidence of negligence to go to the jury' on two of her three theories of liability ... . Upon the evidence submitted, Supreme Court properly rejected plaintiff's first theory of liability as a matter of law at the close of plaintiff's proof, yet provided no explanation for dismissing the entire complaint, and we can perceive none under the circumstances of this case given the existence of two viable and independent theories of liability that were supported by sufficient trial proof ...". ***Majid v. Cheon-Lee*, 2016 N.Y. Slip Op. 08572, 3rd Dept 12-22-16**

WORKERS' COMPENSATION LAW.

PILOTS AND SKYDIVING INSTRUCTORS WERE EMPLOYEES ENTITLED TO WORKERS' COMPENSATION INSURANCE.

The Third Department determined a stop-work order was properly issued against a skydiving company for failure to provide workers' compensation insurance to its pilots and skydiving instructors. The owner of Saratoga Skydiving, Rawlins, argued that the pilots and jump instructors were independent contractors, not employees: "... [W]e find that substantial evidence supports the decision that Saratoga Skydiving, which is controlled, owned and operated by Rawlins, is required to maintain workers' compensation coverage for its pilots and jump instructors because they are employees. Foremost, considering the relative nature of their work, the pilots and jump instructors are indispensable and integral to Saratoga Skydiving's business of offering skydiving experiences to clients ... . Further, Rawlins supplied all of the equipment, including the planes and parachutes through companies solely owned and controlled by him ... . He also exercised sufficient control over the work, scheduling and services provided on behalf of Saratoga Skydiving, selected who to hire for each jump and determined whether they were sufficiently efficient to be paid or should be discharged." ***Matter of Saratoga Skydiving Adventures v. Workers' Compensation Bd.*, 2016 N.Y. Slip Op. 08575, 3rd Dept 12-22-16**

FOURTH DEPARTMENT

CRIMINAL LAW.

PATDOWN SEARCH NOT JUSTIFIED BY A LEGITIMATE CONCERN FOR OFFICER SAFETY, COCAINE SHOULD HAVE BEEN SUPPRESSED.

The Fourth Department determined the street patdown search of defendant was not justified and the cocaine found in the search should have been suppressed. Defendant was a passenger in a car which was legally stopped by the police. Defendant was asked to step out of the car, which was deemed a proper request. Defendant initially refused to get out of the car and demanded an explanation for the request. At that point defendant was seized, pulled from the car, placed face down, hand-cuffed and the patdown search was conducted: "Based upon the evidence at the suppression hearing, we conclude that 'the officers did not have any knowledge of some fact or circumstance that support[ed] a reasonable suspicion that the [defendant was] armed or pose[d] a threat to [their] safety' ... . Defendant's evident nervousness as the officers approached the vehicle was not an indication of criminality or a threat to officer safety ... . Nor was the patdown justified by the fact that the vehicle was in a high crime area ... , particularly when the stop occurred on a busy street during rush hour ... . Moreover, 'there was no suggestion that a weapon was present or that violence was imminent' ... . Finally, neither defendant's initial refusal to exit the vehicle nor his demand for an explanation why he was being asked to exit the vehicle gave rise to a reasonable suspicion that he posed a threat to the officers' safety ...". ***People v. Ford*, 2016 N.Y. Slip Op. 08631, 4th Dept 12-23-16**

CRIMINAL LAW.

DEFENDANT SHOULD HAVE BEEN GRANTED A HEARING ON HIS MOTION TO WITHDRAW HIS GUILTY PLEA.

The Fourth Department determined a hearing on defendant's motion to withdraw his guilty plea should have been held. Defendant was charged with assault. 22 days before the assault defendant had undergone brain surgery. In his motion to withdraw his plea, defendant alleged he was told by his attorney the neurosurgeon had refused to testify if a psychiatric defense was raised. However, the neurosurgeon provided an affidavit stating he never spoke to defendant's attorney and never refused to testify: "It is well settled that the determination whether to grant a motion to withdraw a guilty plea is within the court's discretion and that a defendant is entitled to an evidentiary hearing only in rare instances ... . The denial of such a motion is not an abuse of discretion 'unless there is some evidence of innocence, fraud, or mistake in inducing the plea' ... . Here, if the allegations in defendant's affidavit are true, then defendant's plea was not voluntarily and intelligently entered inasmuch as it was based upon a mistaken belief that a psychiatric defense was unavailable ... . We therefore conclude that defendant's motion was not 'patently insufficient on its face' ... , and that the court abused its discretion in denying the motion without an evidentiary hearing ... . Thus, we hold the case, reserve decision, and remit the matter to County Court for a hearing on defendant's motion." ***People v. Noce*, 2016 N.Y. Slip Op. 08632, 4th Dept 12-23-16**

CRIMINAL LAW.

FAILURE TO COMPLETELY EXPLAIN POTENTIAL SENTENCES AND THE DISCREPANCY BETWEEN THE WRITTEN PLEA AGREEMENT AND THE COURT'S EXPLANATION INVALIDATED THE GUILTY PLEA.

The Fourth Department granted defendant's motion to withdraw his guilty plea based upon the sentencing court's failure to completely explain the possible sentences and the discrepancy between the written plea agreement and the court's oral explanation. The Fourth Department further found that the corrections made to the plea agreement one week after the guilty did not cure the problem. Defendant was not afforded the opportunity to withdraw his plea: "Here, although the court during defendant's arraignment articulated the terms of a plea offer that included the alternative sentences defendant would receive if he was or was not successful in the Judicial Diversion Program, the court did not state those alternative sentences on the record during the plea colloquy. Specifically, although the court stated during the plea colloquy that defendant would receive a 'cap of felony probation if successful[,]' the court did not articulate the sentence that defendant would receive if he was unsuccessful. Furthermore, the Judicial Diversion Program Contract (Contract) signed by defendant on the date he pleaded guilty contradicts the terms of the plea agreement set forth in the transcript of defendant's arraignment. ... The Contract was amended and re-signed by defendant one week after defendant's guilty plea was taken, and the Court of Appeals has made clear that the court must inform the defendant of the direct consequences of a plea '[p]rior to accepting a guilty plea'...". ***People v. Streber*, 2016 N.Y. Slip Op. 08683, 4th Dept 12-23-16**

CRIMINAL LAW.

JUROR NEVER STATED SHE COULD PUT ASIDE HER BIAS IN FAVOR OF POLICE OFFICERS, FOR CAUSE CHALLENGE SHOULD HAVE BEEN GRANTED.

The Fourth Department reversed defendant's conviction because a juror who expressed doubt she could be fair because of her close ties to law enforcement never stated she could put aside her bias toward police officers: "Although the prospective juror responded affirmatively to the court's question whether she could base her decision in the case on what she heard and saw in the courtroom and the general question whether she could be fair and impartial ... , she did not provide an 'unequivocal assurance that . . . [she could] set aside [her] bias' toward police officers who would testify at the trial ...". ***People v. Griffin*, 2016 N.Y. Slip Op. 08701, 4th Dept 12-23-16**

CRIMINAL LAW, ATTORNEYS.

ALTHOUGH THE ERROR WAS DEEMED HARMLESS, TO ALLOW DEFENDANT TO DETERMINE WHETHER TO REQUEST A JURY INSTRUCTION ON A LESSER INCLUDED OFFENSE DEPRIVES DEFENDANT OF HIS RIGHT TO COUNSEL.

Although deemed harmless error, the Fourth Department determined defendant was denied his right to counsel when the court permitted him to decide whether to request a jury charge on a lesser included offense (despite defense counsel advice that he should not): " 'It is well established that a defendant, having accepted the assistance of counsel, retains authority only over certain fundamental decisions regarding the case' such as whether to plead guilty, waive a jury trial, testify in his or her own behalf or take an appeal' ... . On the other hand, defense counsel has ultimate decision making authority over matters of strategy and trial tactics, such as whether to seek a jury charge on a lesser included offense ... . Here, the court 'made plain that [it] would be guided solely by defendant's choice in the matter, despite the defense attorney's clearly stated views and advice to the contrary,' and thus the court 'denied [defendant] the expert judgment of counsel to which the Sixth Amendment entitles him' ...". ***People v. Henley*, 2016 N.Y. Slip Op. 08729, 4th Dept 12-23-16**

CRIMINAL LAW, EVIDENCE.

PROSPECTIVE JUROR WHOSE SON IS MARRIED TO THE DISTRICT ATTORNEY SHOULD HAVE BEEN EXCUSED FOR CAUSE, PRIOR INCONSISTENT STATEMENT BY VICTIM SHOULD HAVE BEEN ADMITTED.

The Fourth Department, reversing defendant's conviction, determined the for cause challenge to a juror whose son is married to the district attorneys daughter should have been granted. The court further determined that a defense witness's testimony that the victim said she didn't "think [defendant] did this" should have been allowed: "... [T]he prospective juror should have been excused from service for cause on the ground that he bears a 'relationship to [the District Attorney] of such nature that it [was] likely to preclude him from rendering an impartial verdict' ... . [T]he court erred in excluding testimony from a defense witness that the victim had said that she did not 'think [defendant] did this,' meaning that defendant did not commit the alleged crime. We conclude that, on cross-examination of the victim, defense counsel had laid an adequate foundation for the admission of that prior inconsistent statement by eliciting testimony that the victim had never discussed the matter with the defense witness and had never told the defense witness that the alleged occurrence 'between [her] and [defendant] might not have happened' ...". ***People v. Collins*, 2016 N.Y. Slip Op. 08645, 4th Dept 12-23-16**

CRIMINAL LAW, EVIDENCE.

FAILURE TO HOLD A SANDOVAL HEARING AND ALLOWING PRIOR CONSISTENT STATEMENTS TO BOLSTER THE COMPLAINING WITNESS'S TESTIMONY REQUIRED REVERSAL

The Fourth Department, reversing defendant's conviction, determined the court's failure to hold a Sandoval hearing concerning the admissibility of prior uncharged crimes or bad acts as impeachment evidence required reversal. Defendant was in fact cross-examined about prior bad acts strikingly similar to the charges against him. In addition, the trial court erred in allowing testimony of prior consistent statements by the complaining witness, i.e., "bolstering:" "The Criminal Procedure Law provides that, '[u]pon a request by a defendant, the prosecutor shall notify the defendant of all specific instances of a defendant's prior uncharged criminal, vicious or immoral conduct of which the prosecutor has knowledge and which the prosecutor intends to use at trial for purposes of impeaching the credibility of the defendant' (CPL 240.43). Here, however, the prosecutor failed 'to advise defendant before trial that he would be questioned on uncharged acts if he testified[,] and no pretrial inquiry or determination was made by the court . . . Because the court's failure to conduct a proper pretrial inquiry may have affected defendant's decision to testify at trial, the error cannot be deemed harmless' ... . 'The term bolstering' is used to describe the presentation in evidence of a prior consistent statement—that is, a statement that a testifying witness has previously made out of court that is in substance the same as his or her in-court testimony' ... . Although '[p]rior consistent statements will often be less prejudicial to the opposing party than other forms of hearsay, since by definition the maker of the statement has said the same thing in court that he said out of it' ... , the Court of Appeals has warned that 'the admission of prior consistent statements may, by simple force of repetition, give to a [factfinder] an exaggerated idea of the probative force of a party's case' ... . Contrary to the People's sole contention, '[i]n light of the importance of the witnesses' credibility in this case . . . , we cannot conclude that the court's error is harmless' ...". ***People v. Memon*, 2016 N.Y. Slip Op. 08653, 4th Dept 12-23-16**

CRIMINAL LAW, EVIDENCE.

INDICTMENT COUNT RENDERED DUPLICITOUS BY TRIAL TESTIMONY.

The Fourth Department determined the trial testimony rendered a count of the indictment duplicitous and dismissed it: "We agree with defendant that the third count of the indictment, charging defendant with engaging in anal sexual contact with the complainant by forcible compulsion, was rendered duplicitous by the complainant's testimony ... . The complainant testified that the acts of anal sexual contact occurred 'more than once' over the course of a two-hour incident, and, contrary to the People's contention, such acts did not constitute a continuous offense ... , but rather were separate and distinct offenses ...". ***People v. Cox*, 2016 N.Y. Slip Op. 08661, 4th Dept 12-23-16**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

DEPRIVING DEFENDANT OF HER RIGHT TO PRESENT A DEFENSE BY DEMONSTRATING THE COMPLAINANT HAD A MOTIVE TO LIE, PROSECUTORIAL MISCONDUCT, CROSS-EXAMINATION ABOUT DEFENDANT'S FAILURE TO TURN HERSELF IN, AND ALLOWING A WITNESS TO TESTIFY DEFENDANT WAS A DRUG DEALER, ALL WARRANTED REVERSAL.

The Fourth Department, reversing defendant's convictions for criminal possession of a weapon, determined: (1) defendant was deprived of her right to present a defense when the court precluded questions that could reveal the complainant's motive to lie; (2) prosecutorial misconduct warranted reversal (considered in the interest of justice; (3) allowing the prosecutor to cross-examine defendant about her failure to turn herself in warranted reversal (considered in the interest of justice); and (4) allowing a witness to refer to defendant as a drug dealer warranted reversal (considered in the interest of justice). With respect to the right to present a defense, the court wrote: "... [W]e conclude that defendant was improperly precluded from establishing that the complainant was engaged in a criminal enterprise and regularly purchased crack cocaine—therefore

having good reason to possess a gun as compared to defendant. More importantly, that evidence, if credited by the jury, would demonstrate that the complainant had every reason to fabricate the story that the gun belonged to defendant and not her ... . In addition, we conclude that the proffered evidence was admissible to complete the narrative of events, i.e., to provide background information as to how and why the complainant allegedly confronted defendant, and to explain the aggressive nature of the confrontation ... . Applying those principles here, we conclude that defendant was denied her constitutional right to present a defense ...". ***People v. Horton*, 2016 N.Y. Slip Op. 08727, 4th Dept 12-23-16**

FAMILY LAW.

COURT ERRED IN CLASSIFYING HOUSE PURCHASED BEFORE MARRIAGE AS MARITAL PROPERTY, HOWEVER THE APPRECIATION IN THE VALUE OF THE HOUSE WAS MARITAL PROPERTY.

The Fourth Department determined a house purchased by the husband prior to marriage was his separate property, despite the fact it was used a the marital residence and proceeds from the sale were used to purchase a marital residence. The appreciation in the value of the house, however, was marital property: "It was undisputed that the Seneca Hill Property was purchased by defendant prior to the marriage, and we conclude that it was not transmuted into marital property when the parties used it as the marital residence for approximately two years, or by virtue of defendant having used some of the sale proceeds therefrom to assist in funding the purchase of a new marital residence ... . Defendant was therefore entitled to a credit for his separate property contributions to the marital estate ... . We further conclude, however, that the appreciated value of the Seneca Hill Property that the court determined to be attributable to the contributions of plaintiff should have been classified as marital property ...". ***Hart v. Hart*, 2016 N.Y. Slip Op. 08692, 4th Dept 12-23-16**

FAMILY LAW.

FAMILY COURT SHOULD HAVE CONSIDERED PATERNITY BY ESTOPPEL BEFORE ORDERING TEST FOR BIOLOGICAL PATERNITY.

The Fourth Department, reversing Family Court and ordering further proceedings before a different judge, reiterated that a court should consider paternity by estoppel before ordering a test for biological paternity. Here, Gerald, the acknowledged father of the child and the custodial parent of the child, was not a named party in the proceedings (a paternity petition brought by the mother naming another party, Shane, as the father). Shane appeared and stated he wanted nothing to do with child. Yet the court ordered a paternity test without making Gerald a party and without notifying him: " 'Family Court should consider paternity by estoppel before it decides whether to test for biological paternity' ... . That did not occur here because Gerald was not a named party in the paternity proceeding and did not otherwise appear when the court ordered Shane to submit to a genetic marker test, so he did not have the opportunity to raise the doctrine of estoppel. The court should have joined Gerald in that proceeding or otherwise notified him before it ordered the test ... . After all, Gerald was not only the acknowledged father of the child, but was the custodial parent of the child, and the court was well aware of those facts inasmuch as it had issued the custody orders. The court made it clear in its decision, however, that even if Gerald had made a timely objection and raised the defense earlier, the court nevertheless would have ordered the test because the child was young and 'the truth is important.' That is contrary to both the plain language of the statute and statements of law by the Court of Appeals." ***Matter of Jennifer L. v. Gerald S.*, 2016 N.Y. Slip Op. 08730, 4th Dept 12-23-16**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

HEIGHT DIFFERENTIAL DEEMED DE MINIMIS AND NOT ACTIONABLE UNDER LABOR LAW 240(1), PIPE WHICH FELL WAS ONE FOOT ABOVE PLAINTIFF'S HEAD AND WITHIN HIS REACH.

The Fourth Department, over a two-justice dissent, determined plaintiff's Labor Law 240(1) cause of action was properly dismissed. Plaintiff was working in the basement when a pipe, which was one foot above him and was within his reach, fell and injured him. The majority found the height differential "de minimis" and therefore not actionable: " 'Liability may . . . be imposed under [Labor Law § 240 (1)] only where the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential' ... . Although there is conflicting deposition testimony concerning the exact elevation of the pipe, it is undisputed that the pipe was, at most, one foot above plaintiff's head, and that the pipe was always within his reach. We therefore conclude that plaintiff's injury did not fall within the scope of section 240 (1) inasmuch as 'any height differential between plaintiff and the [pipe] that fell on him was de minimis' ...". ***Kuhn v. Giovanniello*, 2016 N.Y. Slip Op. 08633, 4th Dept 12-23-16**

PERSONAL INJURY.

INJURY FROM DIVING INTO THE SHALLOW END OF A POOL NOT ACTIONABLE.

The Fourth Department determined plaintiff's injury from diving into the shallow end of a pool was not actionable: "It is well established that '[s]ummary judgment is an appropriate remedy in swimming pool injury cases when from his general knowledge of pools, his observations prior to the accident, and plain common sense' . . . , the plaintiff should have known that, if he dove into the pool, the area into which he dove contained shallow water and, thus, posed a dan-

ger of injury' ... . In light of that standard, we conclude that defendant met her burden on the motion, and that plaintiff failed to raise an issue of fact ... . The record establishes that plaintiff lived on the same street as defendant, swam in the subject pool multiple times prior to the accident, was aware that striking the bottom of a pool was a risk when diving into the shallow end of the pool, and acknowledged that he knew the depth dimensions of defendant's pool, i.e., where the shallow end started and ended. Under those circumstances, we conclude that plaintiff's reckless conduct was the sole proximate cause of his injuries ... . Furthermore, even assuming, arguendo, that defendant was negligent in failing to provide a 'safety float line separating the shallow and deep end of [her] pool, [we conclude that] even the most liberal interpretation of the record eliminates any cause of this accident other than the reckless conduct of plaintiff' ...". ***Brady v. Domino*, 2016 N.Y. Slip Op. 08687, 4th Dept 12-23-16**

PERSONAL INJURY.

GOLFER ASSUMED THE RISK OF LOSING CONTROL OF HER GOLF CART ON A WET SLOPE.

The Fourth Department determined plaintiff had assumed the risk of losing control of her golf cart on a steep slope: "... [D]efendants established on the motion that plaintiff was an experienced golfer who had played that hole and driven that cart path several times previously. Apart from her familiarity with the steep topography of the hole, plaintiff was aware that it had rained the night before and that the course was still wet that morning. She had driven her golf cart on that cart path just moments before her accident, and further had observed the leaves and berries on the cart path as she began down the cart path. It is common knowledge that leaves and other natural litter may be present on a golf course and that such litter may become slick when it is wet ... . For those reasons, we conclude that plaintiff was aware of the risk posed by the cart path and assumed it ...". ***Kirby v. Drumlins, Inc.*, 2016 N.Y. Slip Op. 08709, 4th Dept 12-23-16**

PERSONAL INJURY, MEDICAL MALPRACTICE.

ALTHOUGH THE HOSPITAL WAS NOT LIABLE IN ORDINARY NEGLIGENCE FOR RELEASING PLAINTIFF AND NOT ENSURING A SAFE RETURN HOME, THE COMPLAINT STATED A CAUSE OF ACTION IN MEDICAL MALPRACTICE.

The Fourth Department, over a dissent, determined the motion to dismiss the medical malpractice cause of action was properly denied. The negligence cause of action against the hospital stemming from the same facts had previously been dismissed. Plaintiff was released from the hospital and found two hours later, disoriented and frost-bitten. The hospital, in the negligence cause of action, was found to have no duty to prevent plaintiff from leaving the hospital against medical advice and no duty to ensure plaintiff's safe return home. However, allegations that the assessment plaintiff's medical and mental status and the discharge of plaintiff from the hospital were not in accordance with good and accepted medical practice stated a cause of action in medical malpractice: "Although 'no rigid analytical line separates the two' ... , we have long recognized the distinction between an ordinary negligence cause of action against a hospital and/or a physician ... and a medical malpractice cause of action against a hospital and/or a physician ... . We note that there is no prohibition against simultaneously pleading both an ordinary negligence cause of action and one sounding in medical malpractice ... . It is simply beyond cavil 'that an action for personal injuries may be maintained, in the proper case, on the dual theories of medical malpractice or simple negligence where a person is under the care and control of a medical practitioner or a medical facility' ... . Moreover, in a proper case, both theories may be presented to the jury ... . Here, the medical malpractice cause of action alleges, inter alia, that defendant did not properly assess plaintiff's medical and mental status and rendered medical care that was not in accordance with good and accepted medical practice, and that the discharge of plaintiff was not in accordance with good and accepted medical practices." ***Ingutti v. Rochester Gen. Hosp.*, 2016 N.Y. Slip Op. 08615, 4th Dept 12-23-16**

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