CasePrepPlus

December 14, 2018

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

Editor: **Bruce Freeman**

NEW YORK STATE BAR ASSOCIATION
Serving the legal profession and the community since 1876

FIRST DEPARTMENT

CRIMINAL LAW.

28 MONTH DELAY DID NOT DEPRIVE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL, DELAY ATTRIBUTED TO PROSECUTION, HOWEVER, WAS CRITICIZED.

The First Department, over a concurring decision, determined that the 28-month delay in prosecution did not rise to the level of a denial of defendant's constitutional right to a speedy trial. The concurrence agreed but took pains to note that much of the delay attributable to the prosecution was inexcusable: "While the 28—month delay was substantial, it was attributable to both the prosecution and the defense. While most adjournments were either on consent or were otherwise satisfactorily explained, the People failed to provide an adequate reason for their delay in responding to defendant's motion to compel production of certain medical records and in producing the records. Nevertheless, the charges were very serious and, although defendant was incarcerated the entire time, he has not demonstrated how his defense was impaired by the delay. This is not a case where the delay, and in particular the portion attributable to the People, was so egregious as to warrant dismissal regardless of prejudice ...". ***People v. Desselle*, 2018 N.Y. Slip Op. 08252, First Dept 12-4-18**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

DEFENSE COUNSEL'S FAILURE TO REQUEST A JURY INSTRUCTION ON THE CORRECT LESSER INCLUDED OFFENSE CONSTITUTED INEFFECTIVE ASSISTANCE, PETIT LARCENY IS A LESSER INCLUDED OFFENSE OF ROBBERY THIRD, NEW TRIAL ORDERED.

The First Department, reversing defendant's conviction, determined that defense counsel was ineffective for failing to request a jury instruction on petit larceny as a lesser included offense of robbery. The defense theory was that defendant did not use violence to take $20.00 from the victim but rather used trickery, claiming the victim had broken defendant's liquor bottle. Defense counsel requested a jury charge on fraudulent accosting, which is not a lesser included offense of robbery: "... [P]etit larceny, which is defined as 'steal[ing] property,' qualifies in the abstract as a lesser included offense of robbery in the third degree, which is defined as 'forcibly steal[ing] property' ... . There is no separate crime of petit larceny 'by false pretenses,' and the fact that a nonforcible taking is committed by fraud does not disqualify it as a lesser included offense of robbery. It is clear that defense counsel's failure to seek a petit larceny charge was not strategic. The defense strategy was to concede that a nonforcible theft occurred and seek a misdemeanor conviction. There is no merit to the People's suggestion that counsel may have had a strategic reason for requesting fraudulent accosting but not petit larceny. We also find that counsel's failure to request a petit larceny charge was prejudicial. There was plainly a reasonable view of the evidence to support petit larceny. Furthermore, the evidence that the theft was forcible rather than a scam was not so overwhelming as to render a request for petit larceny futile. The victims were tourists who returned to their home country and did not testify, and the sole eyewitness's ability to establish the element of force was in question." ***People v. Jones*, 2018 N.Y. Slip Op. 08356, First Dept 12-4-18**

PERSONAL INJURY, EVIDENCE.

ALTHOUGH THE RULES OF THE CITY OF NEW YORK REQUIRED THAT TIME WARNER MAINTAIN ONLY THE AREA 12 INCHES AROUND A METAL BOX COVER IN THE SIDEWALK, THERE WERE QUESTIONS OF FACT WHETHER TIME WARNER OR A PREDECESSOR CREATED THE DEFECT OR HAD CONSTRUCTIVE NOTICE OF THE DEFECT OUTSIDE THE 12 INCH AREA, SUPREME COURT REVERSED IN THIS SLIP AND FALL CASE.

The First Department, reversing Supreme Court, determined that defendant Time Warner's motion for summary judgment in this sidewalk slip and fall case should not have been granted. Although the sidewalk defect was outside 12 inch area around the metal box cover in the sidewalk which the Rules of the City of New York (RCNY) require Time Warner to maintain, there were questions of fact whether Time Warner created the defect or had constructive notice of the defect: "Time Warner ... has a common-law duty not to create a hazardous condition on the sidewalk ... , and, further, as a special user of the public sidewalk, has a 'duty to maintain the area of the special use in a reasonably safe condition'... . Additionally, constructive notice may be imputed where, as here, there is a duty under the administrative code to conduct inspections of the box covers ... . Here, the evidence, including the testimony of Time Warner's construction manager, shows that Time

Warner did not regularly inspect its box covers, as required by the regulation it relied upon ... , and that, if the area had been inspected, Time Warner would have repaired the cracked sidewalk condition around the box cover and replaced the sidewalk flag, which extends to the spot where plaintiff tripped. Time Warner also submitted the affidavit of an engineer who measured the distance between plaintiff's fall and the box cover as more than 12 inches, but did not address whether or not the metal box installed in the sidewalk created the cracked condition around the box cover that extended to the spot where plaintiff fell. Furthermore, the fact that Time Warner did not install the box cover itself has no bearing since the duty to maintain the area of the special use 'runs with the land as long as it is maintained for the benefit of a special user' ...". ***Robles v. Time Warner Cable Inc.*, 2018 N.Y. Slip Op. 08244, First Dept 12-4-18**

PERSONAL INJURY, EVIDENCE.

DOCTRINE OF RES IPSA LOQUITUR MAY APPLY TO WINDOW FALLING ONTO PLAINTIFF, DEFENDANT BUILDING MANAGER'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined there were questions of fact whether defendant building manager was liable for the injuries to plaintiff from a window which fell out and onto his head when he attempted to close it. The doctrine of res ipsa loquitur may apply: "... [P]laintiff used the locker room to change and opened one of the windows half a foot to cool down. When he attempted to close the window, he used a 'little bit more force than [he] did when [he] lifted it.' As the window closed, it reverberated a bit and then the whole window structure came out and crashed over plaintiff's head. ... The defendant met its prima facie burden on lack of constructive notice of a dangerous condition. While it is disputed that defendant never inspected the windows since installation in 2004, it did not have an affirmative duty to conduct reasonable inspections ... . We find that an issue of fact exists as to the applicability of the doctrine of res ipsa loquitur, which allows for an inference of negligence to be drawn on the occurrence of an accident. The doctrine requires that a plaintiff must demonstrate that the 'event is the kind which ordinarily does not occur in the absence of negligence, that it was caused by an agency or instrumentality within the exclusive control of the defendant, and [that] it was not due to any voluntary action or contribution on the part of the plaintiff' ... . Here, 'common experience' dictates that a window being shut does not simply fall out absent negligence. In order to establish exclusive control, plaintiff is not required to show that defendant 'had sole physical access' to the window... . Further, here remains a question of fact whether plaintiff did something to contribute to the window falling on him." ***Wilkins v. West Harlem Group Assistance, Inc.*, 2018 N.Y. Slip Op. 08247, First Dept 12-4-18**

SECOND DEPARTMENT

ARBITRATION, EMPLOYMENT LAW, CONTRACT LAW, MUNICIPAL LAW.

ARBITRATOR, NOT THE COURTS, MUST FIRST DETERMINE WHETHER THE MATTER IS ARBITRABLE, CITY HAD ISSUED NEW PROTOCOLS FOR FIRST RESPONDERS, THE UNION FILED A GRIEVANCE ARGUING THE NEW PROTOCOLS MUST BE THE SUBJECT OF ARBITRATION, AN ARBITRATOR MUST DECIDE WHETHER THE ISSUE IS COVERED BY THE COLLECTIVE BARGAINING AGREEMENT.

The Second Department, reversing Supreme Court, held that whether the public sector employment matter was arbitrable under the terms of the collective bargaining agreement (CBA) must first be determined by the arbitrator, not the courts. The city had issued new protocols for first responders in the EMS program concerning active shooters, animal bites, suspicious packages, medical emergencies associated with criminal activity, etc. The union brought a grievance arguing that their members were not adequately trained for the new protocols and the issues should be the subject of arbitration: " '… [A} dispute between a public sector employer and an employee is only arbitrable if it satisfies a two-prong test' ... . ' Initially, the court must determine whether there is any statutory, constitutional, or public policy prohibition against arbitrating the grievance' ... . ' If there is no prohibition against arbitrating, the court must examine the parties' collective bargaining agreement and determine if they in fact agreed to arbitrate the particular dispute' ... . When deciding whether a dispute is arbitrable, 'the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute' (CPLR 7501). 'Even an apparent weakness of the claimed grievance is not a factor in the court's threshold determination. It is the arbitrator who weighs the merits of the claim' ... . Here, it is undisputed that there is no statutory, constitutional, or public policy prohibition to arbitration of the grievance. Therefore, the only issue is whether the parties in fact agreed to arbitrate the dispute. Where, as here, the relevant arbitration provision of the CBA is broad, if the matter in dispute bears a reasonable relationship to some general subject matter of the CBA, it will be for the arbitrator and not the courts to decide whether the disputed matter falls within the CBA ... . In this case, Local 628's grievance alleged that the City violated Article 33.1 of the CBA, which mandates that the EMS program be kept at the highest level of professional standards based upon the standards in place at the time of the agreement, by issuing General Order 4-15, which increased the call protocols and subjected its members to calls for which they are not trained and lack necessary equipment. Therefore, the grievance is reasonably related to at least one provision in the CBA, and the Supreme Court

should have denied the petition to permanently stay arbitration." ***Matter of City of Yonkers v. Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*, 2018 N.Y. Slip Op. 08294, Second Dept 12-5-18**

CIVIL PROCEDURE, APPEALS.

SUPREME COURT DID NOT ABUSE ITS DISCRETION BY DISMISSING THE COMPLAINT WHEN PLAINTIFF WAS NOT READY FOR TRIAL AND REFUSING TO ALLOW THE TESTIMONY OF A 'SUBSTITUTE EXPERT,' DISMISSAL WAS NOT ON THE MERITS AND THEREFORE THE DISMISSAL SHOULD NOT HAVE BEEN 'WITH PREJUDICE,' ALTHOUGH NO APPEAL LIES FROM A JUDGMENT ENTERED UPON DEFAULT, THE UNDERLYING ISSUES MAY BE REVIEWED.

The Second Department determined; (1) although no appeal lies from a judgment entered by default against the appealing party the contested issues may be reviewed; (2) Supreme Court did not abuse its discretion in dismissing the complaint because plaintiff was not ready to proceed; (3) Supreme Court did not abuse its discretion in refusing to allow plaintiff to present a "substitute expert" when the noticed expert could not appear at trial; (4) Supreme Court should not have dismissed the action with prejudice because the dismissal was not on the merits: "Although no appeal lies from a judgment entered upon the default of the appealing party (see CPLR 5511), an appeal from such a judgment brings up for review' those matters which were the subject of contest before the Supreme Court' ... . 'Pursuant to 22 NYCRR 202.27(b), a court has the discretion to direct dismissal of a complaint where the plaintiff fails to appear or is not ready to proceed' ... . Here, the plaintiff was not ready to proceed to trial due to the unavailability of her expert. ... Pursuant to CPLR 3101(d)(1)(i), 'where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph' … . 'A determination regarding whether to preclude a party from introducing the testimony of an expert witness at trial based on the party's failure to comply with CPLR 3101(d)(1)(i) is left to the sound discretion of the court' ... . Here, since the plaintiff offered only a vague excuse for the unavailability of the intended expert, without offering any details as to when the plaintiff learned of that expert's unavailability, she failed to establish good cause to offer the testimony of the 'substitute expert' ... . Moreover, the plaintiff had previously been unprepared to proceed with trial due to, inter alia, the unavailability of experts ... . '[S]ince dismissal of an action for a default pursuant to 22 NYCRR 202.27 does not constitute a determination on the merits,' the dismissal should have been without prejudice ...". ***Geffner v. Mercy Med. Ctr.*, 2018 N.Y. Slip Op. 08280, Second Dept 12-5-18**

CIVIL PROCEDURE, APPEALS.

PRIOR RULINGS ON APPEAL CONSTITUTE THE LAW OF THE CASE, SUPREME COURT RULING TO THE CONTRARY REVERSED.

The Second Department determined the contested matters had already been ruled upon in a prior appeal and therefore constituted the law of the case which must be followed. The contrary ruling by Supreme Court was reversed: " 'An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court . . . [and] operates to foreclose reexamination of [the] question absent a showing of subsequent evidence or change of law' ... . On the prior appeal, this Court considered, and rejected, the arguments that Pascuitti [a respondent] was no longer a proper party to this proceeding and that the petitioner could not seek relief against the individual movants in the contempt motion ... . The Town and the individuals movants have failed to make a sufficient showing to warrant reexamination of these issues... . Accordingly, based on the law of the case doctrine, we disagree with the Supreme Court's determination granting the motion ...". ***Matter of Norton v. Town of Islip*, 2018 N.Y. Slip Op. 08308, Second Dept 12-5-18**

CIVIL PROCEDURE, CONTEMPT. MUNICIPAL LAW.

TOWN SHOULD HAVE BEEN HELD IN CONTEMPT FOR FAILURE TO BUILD A FENCE IN ACCORDANCE WITH A STIPULATION.

The Second Department, reversing Supreme Court, determined that the town should be held in contempt for failure to erect a fence on town land in accordance with a stipulation. Plaintiff had requested the fence because people were crossing town land to trespass on plaintiff's property: " 'In order to sustain a finding of civil contempt, it is not necessary that the disobedience be deliberate or willful; rather, the mere act of disobedience, regardless of its motive, is sufficient if such disobedience defeats, impairs, impedes or prejudices the rights of a party' ... . In order to adjudicate a party in civil contempt, a court must find: (1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that the party against whom contempt is sought disobeyed the order, (3) that the party who disobeyed the order had knowledge of its terms, and (4) that the movant was prejudiced by the offending conduct... . The party seeking a finding of civil contempt must prove these elements by clear and convincing evidence ... . Here, the plaintiff established by clear and convincing evidence that the so-ordered stipulation clearly expressed an unequivocal mandate to construct a fence... , that the Town had knowledge of the stipulation and nevertheless disobeyed it, and that the plaintiff was prejudiced by the offending conduct. In opposition,

the Town failed to refute the plaintiff's showing or to offer evidence of a defense such as an inability to comply with the order ...". ***Palmieri v. Town of Babylon*, 2018 N.Y. Slip Op. 08317, Second Dept 12-5-18**

CORPORATION LAW, LIMITED LIABILITY COMPANY LAW, CONTRACT LAW, LANDLORD-TENANT.

ALTHOUGH THE PLAINTIFF LIMITED LIABILITY COMPANY DID NOT EXIST AT THE TIME THE LEASE WAS SIGNED, DEFENDANT TOOK POSSESSION OF THE PROPERTY, UNDER THE DOCTRINE OF INCORPORATION BY ESTOPPEL, DEFENDANT CANNOT ESCAPE LIABILITY FOR BREACH OF THE LEASE

The Second Department determined that the doctrine of incorporation by estoppel was properly applied in this breach of contract (lease) case. Although plaintiff limited liability company did not exist at the time the lease was signed, defendant took possession of the property. Defendant was therefore estopped from escaping liability under the lease based on the nonexistence of plaintiff limited liability company: " 'Since a nonexistent entity cannot acquire rights or assume liabilities, a corporation which has not yet been formed normally lacks capacity to enter into a contract'... . However, a corporation may be deemed to exist and possess the capacity to contract pursuant to the doctrine of incorporation by estoppel ... . The doctrine of incorporation by estoppel, or corporation by estoppel, is based on the principle that 'one who has recognized the organization as a corporation in business dealings should not be allowed to quibble or raise immaterial issues on matters which do not concern him [or her] in the slightest degree or affect his [or her] substantial rights' ...". ***TY Bldrs. II, Inc. v. 55 Day Spa, Inc.*, 2018 N.Y. Slip Op. 08345, Second Dept 12-5-18**

CRIMINAL LAW.

THE 2015 COURT OF APPEALS DECISION WHICH PROHIBITED INSTRUCTING A JURY THAT IT COULD FIND A DEFENDANT GUILTY OF BOTH DEPRAVED INDIFFERENCE MURDER AND INTENTIONAL (TRANSFERRED INTENT) MURDER OF A SINGLE VICTIM SHOULD NOT BE APPLIED RETROACTIVELY.

The Second Department determined that a 2015 Court of Appeals decision holding that a jury cannot be instructed that it could find defendant guilty of both depraved indifference murder and intentional murder of a single victim should not be applied retroactively. Defendant was shooting at another when he struck and killed his accomplice: "In People v. Dubarry (25 NY3d at 165), the Court of Appeals addressed 'the novel question' of whether the defendant could be subject to multiple liability for a single homicide based on a theory of transferred intent. 'The transferred intent theory, codified under Penal Law § 125.25(1), provides that where the resulting death is of a third person who was not the defendant's intended victim, the defendant may nonetheless be held to the same level of criminal liability as if the intended victim were killed' ... . The Court in Dubarry concluded that the defendant 'cannot be convicted of depraved indifference murder and intentional murder on a transferred intent theory in a case involving the death of the same person,' and, '[t]herefore, the trial court erroneously submitted to the jury both charges in the conjunctive rather than in the alternative' ... . * * * ... Dubarry established new precedent and constitutes a new rule of law. Consequently, retroactivity analysis is required under this State's rules ... . 'Whether a new rule of New York State law is to be given retroactive effect requires an evaluation of three factors: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect on the administration of justice of retroactive application'... . 'The second and third factors are, however, only given substantial weight when the answer to the retroactivity question is not to be found in the purpose of the new rule itself' ... . As to the first factor, the Court of Appeals in Dubarry clarified the proper application of the transferred intent theory, which should be employed, not to multiply criminal liability, 'but to prevent a defendant who has committed all the elements of a crime (albeit not upon the same victim) from escaping responsibility for that crime' ... . The Court's purpose was to dispel confusion concerning the application of the separate mens rea of intent and depraved indifference to the same outcome ... , and, similar to Policano, to make future homicide prosecutions more sustainable. Furthermore ... , 'nonretroactivity poses no danger of a miscarriage of justice' ... . The other two Pepper factors also weigh in favor of nonretroactivity. ... [T]hree of the departments of the Appellate Division permitted the submission of both intentional (transferred intent) and depraved indifference crimes in the conjunctive. Moreover, '[a]ffording retroactivity to [the] defendant would mean that every defendant to whose case it was relevant, no matter how remote in time and merit, would become [a] beneficiary' ...". ***People v. Drayton*, 2018 N.Y. Slip Op. 08323, Second Dept 12-5-18**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT WAS DEPRIVED OF HIS RIGHT TO COUNSEL WHEN DEFENSE COUNSEL TOLD THE COURT HE DID NOT WANT ANY PART OF DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA.

The Second Department determined defendant was denied his right to counsel when defense counsel told the court he did not want to be a party to defendant's motion to withdraw his guilty plea: "The defendant stated that he wished to withdraw his plea of guilty on the grounds that he was innocent and that he was coerced into pleading guilty. His attorney stated that he did not want to be a party to the motion. His attorney further stated: 'I fought long and hard to get this. I thought we had this.' The court advised the defendant not to say anything further, and noted that the defendant could be charged with perjury. The court denied the defendant's motion, and imposed sentence. The defendant's right to counsel was ad-

versely affected when his attorney took a position adverse to the defendant with respect to his motion to withdraw his plea of guilty... . The Supreme Court should have assigned a different attorney to represent the defendant before it determined the defendant's motion ... . We further note that, in advising the defendant not to say anything further because he could be charged with perjury, the court deprived the defendant of the opportunity to present his contentions ...". ***People v. Sarner*, 2018 N.Y. Slip Op. 08335, Second Dept 12-5-18**

CRIMINAL LAW, EVIDENCE.

ANONYMOUS 911 CALL DID NOT VIOLATE DEFENDANT'S RIGHT OF CONFRONTATION BECAUSE THE INFORMATION WAS NONTESTIMONIAL IN THAT IT DID NOT IDENTIFY THE DEFENDANT BUT MERELY ALERTED THE POLICE TO A BURGLARY IN PROGRESS.

The Second Department noted that the anonymous 911 was properly admitted into evidence, in part, because the call was nontestimonial: "We agree with the Supreme Court's determination to admit into evidence at the trial a recording of a 911 emergency telephone call made by an unidentified caller. The recording was admissible under the present sense impression exception to the hearsay rule ... . Moreover, the admission of the recording did not violate the defendant's right of confrontation. Since the primary purpose of the statements by the unidentified caller was to obtain an emergency response to a burglary in progress, the statements were not testimonial in nature ...". ***People v. Torres*, 2018 N.Y. Slip Op. 08337, Second Dept 12-5-18**

FAMILY LAW, APPEALS.

MOTHER'S PETITION TO HAVE HER CHILD RETURNED AFTER TEMPORARY REMOVAL SHOULD HAVE BEEN GRANTED, EVEN THOUGH THE CHILD HAD BEEN RETURNED AT THE TIME OF THE APPEAL, THE ISSUE IS NOT ACADEMIC BECAUSE OF THE STIGMA ASSOCIATED WITH REMOVAL OF A CHILD.

The Second Department, reversing Family Court, determined mother's petition to have her child returned after removal should have been granted. The child had been removed because of concern the home was not safety-proofed. Mother demonstrated she had taken adequate steps to safety-proof the home. The court noted that, although the child had been returned, the appeal was not academic because of the stigma associated with removing the child: " 'An application pursuant to Family Court Act § 1028(a) for the return of a child who has been temporarily removed shall be granted unless the court finds that the return presents an imminent risk to the child's life or health'... . The court must 'weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal' ... . 'The court must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests'... . Here, the record fails to provide a sound and substantial basis for the Family Court's determination... . Any concerns that the parents' substantial efforts to safety-proof their home were inadequate and subjected the child to possible risk of ingesting harmful substances did not amount to an imminent risk to the child's life or health that could not have been mitigated by reasonable efforts to avoid removal. This is especially so under the circumstances of this case, where the petitioner had been directed to assist the family in safety-proofing the home and failed to do so ... . Additionally, the mother presented evidence at the hearing establishing that she had taken substantial measures to safety-proof the home after the child was removed, and had taken the child to the doctor and dentist. Therefore, the evidence did not establish that the return of the child posed an imminent risk to his life or health, since the offending circumstances had been remedied ...". ***Matter of Saad A. (Umda M.)*, 2018 N.Y. Slip Op. 08292, Second Dept 12-5-18**

FAMILY LAW, CIVIL PROCEDURE.

FAMILY COURT SHOULD NOT HAVE DETERMINED HAWAII WAS THE MORE APPROPRIATE FORUM FOR THIS CUSTODY DISPUTE, HAWAII NEVER HAD SUBJECT MATTER JURISDICTION AND WAS UNAWARE OF THE FATHER'S NEW YORK CUSTODY PROCEEDINGS UNTIL AFTER THE HAWAII PROCEEDINGS WERE COMPLETED, THE HAWAII RULINGS MUST BE VACATED, ONLY THEN CAN FAMILY COURT MAKE A VALID ANALYSIS OF THE APPROPRIATE FORUM.

The Second Department, reversing Family Court, determined that Hawaii should not have been found to be the more appropriate forum for this custody proceeding without first assuring that all the findings made in Hawaii were vacated. Mother had moved to Hawaii and her custody proceedings there were completed before the Hawaii court was alerted by Family Court of father's custody proceedings in New York. Hawaii never had subject matter jurisdiction so the matter was sent back to Family Court for a fresh ruling on whether New York is an inconvenient forum: "... [G]iven the substance of its discussions with the Hawaii Court, the Family Court's determination to engage in an inconvenient forum analysis under Domestic Relations Law § 76-f(1) was an improvident exercise of discretion. Since New York was the child's home state pursuant to the UCCJEA [Uniform Child Custody Jurisdiction and Enforcement Act] , the Hawaii Court lacked subject matter jurisdiction to make determinations on the mother's child custody petition... . When the Family Court conferred with the Hawaii Court, the Hawaii Court informed the Family Court that the father was personally served with the mother's custody petition, which suggested that the Hawaii Court determined that it had personal jurisdiction over the father. But, having

been informed of the facts establishing that New York was the child's home state, the Hawaii Court did not acknowledge its own lack of subject matter jurisdiction to have issued orders regarding child custody ... . 'A judgment or order issued without subject matter jurisdiction is void, and that defect may be raised at any time and may not be waived' ... . In the absence of any indication that the Hawaii Court vacated those orders, the Family Court should not have determined that the Hawaii Court was a more appropriate forum. Indeed, the father did not participate in any of the proceedings in Hawaii and there was no certainty that Hawaii would permit the father to not only reopen the hearings previously held in order to submit his own testimony and evidence, but also, that he would be given an opportunity to challenge the evidence already submitted, including to cross-examine the mother." ***Matter of Montanez v. Tompkinson*, 2018 N.Y. Slip Op. 08305, Second Dept 12-5-18**

MENTAL HYGIENE LAW.

ABSENT A FINDING THE GUARDIAN OF THE PROPERTY OF AN INCAPACITATED PERSON FAILED TO PROPERLY DISCHARGE HER DUTIES, THE COURT SHOULD NOT HAVE ORDERED THE GUARDIAN TO PAY THE ACCOUNTANT WHO ASSISTED IN PREPARING THE FINAL ACCOUNT FROM HER OWN FUNDS.

The Second Department, reversing Supreme Court, determined that, absent a showing of misconduct, the guardian of the property of an incapacitated person should not have been required to pay the accountant used to prepare the final account from her own funds: "A court is authorized to award 'reasonable compensation' to a guardian (Mental Hygiene Law § 81.28[a]). The award of compensation 'must take into account the specific authority of the guardian or guardians to provide for the personal needs and/or property management for the incapacitated person, and the services provided to the incapacitated person by such guardian' (id.). However, '[i]f the court finds that the guardian has failed to discharge his or her duties satisfactorily in any respect, the court may deny or reduce the compensation which would otherwise be allowed' (Mental Hygiene Law § 81.28[b]). Here, since the Supreme Court did not find that the guardian failed to discharge her duties satisfactorily in any respect, the court should not have directed the guardian to pay the accountant's fee from her own funds ...". **Mat*ter of Ruby T. (Carrion)*, 2018 N.Y. Slip Op. 08314, Second Dept 12-5-18**

PERSONAL INJURY, EVIDENCE.

DEFENDANT'S UNSUPPORTED ALLEGATION THAT PLAINTIFF STOPPED SUDDENLY WAS NOT ENOUGH TO DEFEAT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS REAR END COLLISION CASE.

The Second Department noted that defendant driver's allegation that plaintiff driver stopped suddenly in this rear end collision case was not sufficient to create a question of fact: "… [T]he plaintiff demonstrated his prima facie entitlement to judgment as a matter of law on the issue of liability by averring that he was stopped at a red light for 45 seconds before the defendant's vehicle struck the plaintiff's vehicle in the rear... . In opposition, the defendant averred that the accident occurred after the plaintiff made a sudden stop in the middle of the road. However, the defendant did not submit any evidence as to the distance he had maintained from the plaintiff's vehicle, or the speed at which he was traveling, prior to the collision. Without such evidence, the assertion that the plaintiff's vehicle came to a sudden stop was insufficient to rebut the inference that the defendant was negligent ...". ***Auguste v. Jeter*, 2018 N.Y. Slip Op. 08274, Second Dept 12-5-18**

PERSONAL INJURY, EVIDENCE.

QUESTION OF FACT WHETHER SMALL TABLE OVER WHICH PLAINTIFF TRIPPED AND FELL WAS OPEN AND OBVIOUS, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that defendant-store's motion for summary judgment in this slip and fall case should not have been granted. Plaintiff fell over a small table that was behind a taller table thinking that it was possible to walk behind the taller table: " 'Whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the particular facts and circumstances of each case and is generally a question of fact for the jury' ... . Even a condition that is generally apparent 'to a person making reasonable use of their senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted' ... . The determination of '[w]hether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances'... . Here, the defendants failed to establish, prima facie, that the table at issue was open and obvious and not dangerous given the surrounding circumstances at the time of the accident, including the evidence submitted by the defendants on their motion as to the lighting conditions and the presence of other customers in the area ... . Further, the defendants' own evidence, including the deposition testimony of their employees, demonstrated the existence of a triable issue of fact as to whether the space on the side of the table on which the plaintiff was injured could be anticipated as an area of egress by the plaintiff." ***Elfassi v. Hollister Co.*, 2018 N.Y. Slip Op. 08279, Second Dept 12-5-18**

PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

SUPREME COURT PROPERLY RELIED ON THE RESULTS OF A FRYE HEARING IN A PRIOR TRIAL TO ALLOW THE TESTIMONY OF A DEFENSE EXPERT.

The Second Department determined Supreme Court properly relied upon the results of a Frye hearing involving the same expert (and judge) in a prior trial. The expert was allowed to testify plaintiff's injuries could not have been caused by the traffic accident. There was a defense verdict: " 'The long-recognized rule of Frye v. United States . . . is that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has gained general acceptance in its specified field' ... . 'General acceptance can be demonstrated through scientific or legal writings, judicial opinions, or expert opinions other than that of the proffered expert' ... . Further, even if the proffered expert opinion is based upon accepted methods, it must satisfy 'the admissibility question applied to all evidence—whether there is a proper foundation—to determine whether the accepted methods were appropriately employed in a particular case' ... . In this case, we agree with the Supreme Court's determination to permit the expert's testimony without first holding a hearing to determine its admissibility ... . 'A court need not hold a Frye hearing where[, as in the case at bar,] it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony' ... . Moreover, in this particular case, there was a proper foundation for the admission of the expert's opinion." ***Shah v. Rahman*, 2018 N.Y. Slip Op. 08342, Second Dept 12-5-18**

PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

ADVERSE INFERENCE JURY INSTRUCTION IS THE PROPER SANCTION FOR THE NEGLIGENT DESTRUCTION OF AN EMPLOYEE'S RECORDS IN THIS NEGLIGENT SUPERVISION ACTION AGAINST A RESPITE CARE FACILITY.

The Second Department, reversing Supreme Court, determined an adverse inference jury instruction, not striking the answer, was the appropriate sanction in this negligent supervision case. Plaintiffs, coguardians of a blind and disabled adult (Nicholas), alleged negligent supervision and training of an employee (Escajadillo) of the respite care facility where Nicholas fractured his leg. Rosa's employment records had been negligently destroyed by the facility: "Striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct and, in order to impose such a sanction, the court 'will consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness' ... . In contrast, where the moving party has not been deprived of the ability to establish his or her case or defense, a less severe sanction is appropriate ... . Where evidence has been found to have been negligently destroyed, adverse inference charges have been found to be appropriate ... . Here, because the plaintiffs asserted causes of action alleging negligent training and supervision, the defendants' knowledge of any prior wrongdoing by its employees and information concerning their training are issues central to the plaintiffs' causes of action, and the employees' personnel files would be critical in determining those issues ... . In support of their motion, the plaintiffs established that the defendants improperly failed to 'suspend [their] routine document retention/destruction policy and put in place a litigation hold' to ensure the preservation of relevant documents' ... , resulting in the negligent destruction of Escajadillo's personnel file. However, the plaintiffs did not demonstrate that they were deprived of the ability to establish their case. Accordingly, the drastic sanction of striking the defendants' answer is not appropriate ... , but the lesser sanction of directing that an adverse inference charge be given at trial with respect to Escajadillo's personnel file is warranted ...". ***Squillacioti v. Independent Group Home Living Program, Inc.*, 2018 N.Y. Slip Op. 08343, Second Dept 12-5-18**

PERSONAL INJURY, MEDICAL MALPRACTICE, CIVIL PROCEDURE.

A STENT WAS DELIBERATELY INSERTED IN PLAINTIFF DURING SURGERY IN 1993 AND WAS DISCOVERED AND REMOVED IN 2012, ALTHOUGH THE STENT SHOULD HAVE SUBSEQUENTLY BEEN REMOVED, BECAUSE IT WAS INSERTED INTENTIONALLY AND SERVED A SURGICAL PURPOSE IT WAS NOT A 'FOREIGN OBJECT,' THEREFORE THE DISCOVERY OF THE STENT IN 2012 DID NOT START THE STATUTE OF LIMITATIONS, COMPLAINT DISMISSED AS TIME-BARRED.

The Second Department. reversing Supreme Court, determined that the medical malpractice action should have been dismissed as time-barred. Plaintiff alleged a ureteral stent/catheter was inserted during surgery in 1993 and was discovered and removed in 2012. If the stent were a "foreign object," the action would have been timely. But the stent was deliberately inserted for a medical purpose, although it should have been removed after up to six months. Because the stent was purposely inserted, it was not a "foreign object:" "... [T]he plaintiff failed to raise a triable issue of fact as to whether the ureteral stent/catheter allegedly inserted in his body was a 'foreign object' such that the discovery rule should apply. According to the parties' experts, a ureteral stent/catheter is a tube that bridges the kidney to the bladder, and is inserted and intentionally left in a patient for up to six months to assist in the draining of the kidney when the ureter is obstructed or when damage to the ureter was repaired and it is healing. The parties' experts agree that if a ureteral stent/catheter was inserted in the plaintiff's body during the 1993 procedure, then it was intentionally left in his body for the purpose of assisting in the draining of the kidney. Thus, the device was retained in the plaintiff's body (if inserted at all) for 'postsurgery healing purposes' and was not 'analogous to tangible items' or 'surgical paraphernalia,' such as clamps, scalpels, sponges, and drains, 'intro-

duced into a patient's body solely to carry out or facilitate a surgical procedure'... . For these reasons, the ureteral catheter/stent was not a 'foreign object,' and the action should have been dismissed as time-barred ... ". ***Livsey v. Nyack Hosp.*, 2018 N.Y. Slip Op. 08289, Second Dept 12-5-18**

PERSONAL INJURY, MUNICIPAL LAW, EVIDENCE.

POLICE OFFICER SLIPPED AND FELL ON AN OUTSIDE STAIRWAY WHEN PATROLLING DEFENDANTS' PROPERTY, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE NEGLIGENCE AND GENERAL MUNICIPAL LAW § 205-a CAUSES OF ACTION SHOULD NOT HAVE BEEN GRANTED, PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED.

The Second Department, reversing (modifying) Supreme Court, determined that defendants' motion for summary judgment in this slip and fall case should not have been granted. Plaintiff police officer was patrolling defendants' property (at defendants' request) when he slipped and fell an on outside stairway. Both the negligence cause of action and the General Municipal Law § 205-a cause of action presented questions of fact. The section 205-a cause of action was properly based upon an alleged violation of the Property Maintenance Code of New York State: "The injured plaintiff's mere inability to identify the precise nature of the slippery substance upon which he alleges he fell 'cannot be equated with' a failure to identify the cause of his fall ... . The defendants ... failed to establish, prima facie, that they lacked constructive notice of the alleged hazardous substance on the step ... , that the lighting for the area was adequate, and that the lack of a handrail on the steps was not a hazardous condition that may have been a proximate cause of the injuries ... . The defendants ... failed to demonstrate, prima facie, that Property Maintenance Code of New York State (2010) § 306.1, which requires a handrail on '[e]very exterior and interior flight of stairs having more than four risers, 'did not apply to the location where the injured plaintiff's accident occurred. ... [W]e agree with the Supreme Court that the plaintiffs were not entitled to summary judgment on the issue of liability ... . The plaintiffs failed to demonstrate, prima facie, the defendants' 'neglect, omission, willful or culpable negligence' in violating Property Maintenance Code of New York State ... . Moreover, the plaintiffs failed to eliminate all material issues of fact regarding whether the alleged hazardous condition actually existed. Furthermore, to the extent that the cause of action is predicated upon a violation of Property Maintenance Code of New York State... , the plaintiffs' proffered evidence ... failed to establish, prima facie, that the injured plaintiff's accident resulted directly or indirectly from the absence of a handrail ...". ***Stancarone v. Sullivan*, 2018 N.Y. Slip Op. 08344, Second Dept 12-5-18**

THIRD DEPARTMENT

ANIMAL LAW.

THEORY THAT DEFENDANT VETERINARY CLINIC WAS LIABLE IN NEGLIGENCE FOR A DOG BITE WHICH OCCURRED IN THE CLINIC WAITING ROOM REJECTED, ONLY A STRICT LIABILITY THEORY COULD APPLY AND PLAINTIFF CONCEDED RELIEF WAS NOT AVAILABLE PURSUANT TO STRICT LIABILITY.

The Third Department determined defendant veterinary clinic could not be held liable for a dog bite which occurred in the clinic waiting room under a negligence (failure to provide a safe waiting room area) theory. Plaintiff contended the strict liability theory did not apply because defendant clinic did not own the dog: "... [W]e hold that for defendant to be liable for the personal injuries allegedly sustained due to the dog attack that occurred in the waiting room, plaintiff must establish that defendant knew or should have known about the dog's vicious propensities. ... [P]laintiff acknowledges in her appellate brief that she is not asserting a claim for strict liability against defendant and that her claims against it are grounded in negligence and premises liability. In her opposition to defendant's summary judgment motion, plaintiff likewise conceded that she did not have a strict liability claim against defendant. In any event, even if a strict liability claim could be extrapolated from plaintiff's pleadings... . As such, Supreme Court correctly granted defendant's motion for summary judgment and denied plaintiff's cross motion for partial summary judgment ...". ***Hewitt v. Palmer Veterinary Clinic, PC*, 2018 N.Y. Slip Op. 08396, Third Dept 12-6-18**

CONTRACT LAW, CIVIL PROCEDURE.

GENERAL RELEASE WAS NOT LIMITED TO A 2007 ACTION AND THEREFORE PRECLUDED THE 2014 ACTION, A UNILATERAL MISTAKE DOES NOT INVALIDATE A CONTRACT.

The Third Department determined that, although the release signed by plaintiff (Moore) mentioned a 2007 action, the release stated it was not limited to the 2007 action. Therefore it applied to instant action. The fact that plaintiff may not have intended that it apply to the current proceedings, a unilateral mistake does not invalidate a contract: "The general release, executed by Moore after he commenced the present action, released defendant 'from all manner of . . . claims and demands . . . in law or in equity that against [defendant] he ever had, now has or which he . . . shall or may have for any reason from the beginning of the world to the date of this release.' Plaintiffs nonetheless argue that the release is limited by its terms to the 2007 action, noting that 'where a release contains a recital of a particular claim . . . and there is nothing on the face of the instrument other than general words of release to show that anything more than the matters particularly specified was intended to be discharged, the general words of release are deemed to be limited thereby' ... . The release, however, does not

limit or otherwise restrict itself to the 2007 action. Rather, it clearly and unambiguously specifies that it 'includes, but is not limited to,' the incident that led to the 2007 action … . Moore executed the release with full knowledge that this action was pending against defendant, and the 'timing and unequivocal and unconditional language' of the release therefore demonstrates its applicability to the 2014 action at issue here ... . Although plaintiffs claim that Moore did not intend for the release to encompass this action when he executed it, 'the fact that [Moore] may have intended something else is irrelevant[, as] a mere unilateral mistake . . . with respect to the meaning and effect of the release . . . does not constitute an adequate basis for invalidating' it ...". ***Stevens v. Town of Chenango (Forks)*, 2018 N.Y. Slip Op. 08389, Third Dept 12-6-18**

CRIMINAL LAW.

ALTHOUGH THE CRIME WITH WHICH DEFENDANT WAS CHARGED, ATTEMPTED DISSEMINATION OF INDECENT MATERIAL TO A MINOR FIRST DEGREE, CAN BE A FELONY SEX OFFENSE, THE ABSENCE OF STATUTORILY REQUIRED LANGUAGE IN THE ACCUSATORY INSTRUMENT PRECLUDED SENTENCING DEFENDANT AS A FELONY SEX OFFENDER.

The Third Department determined the absence of statutorily-required language in the accusatory instrument precluded sentencing defendant as a felony sex offender: "Although a conviction of attempted dissemination of indecent material to a minor in the first degree (see Penal Law §§ 110.00, 235.22) can be considered a felony sex offense subject to sentencing in accordance with Penal Law § 70.80, the accusatory instrument must specify that the offense is charged 'as a sexually motivated felony' (CPL 200.50 [4]; see Penal Law § 130.91 [2]). Here, the accusatory instrument did not contain the requisite language, nor did it make any reference to Penal Law § 130.91. As such, defendant was not subject to the sentencing provisions of Penal Law § 130.91, rendering the imposed sentence illegal." ***People v. Lavelle*, 2018 N.Y. Slip Op. 08378, Third Dept 12-6-18**

CRIMINAL LAW, APPEALS, EVIDENCE.

ALTHOUGH DEFENDANT THREATENED TO KILL A JUDGE THE EVIDENCE DID NOT SUPPORT THE TERRORISM CONVICTION, THERE WAS NO EVIDENCE THE THREAT WAS MADE TO INFLUENCE OR AFFECT THE POLICY OR CONDUCT OF A GOVERNMENTAL UNIT, CONVICTION REVERSED UNDER A WEIGHT OF THE EVIDENCE REVIEW.

The Third Department, reversing defendant's conviction under New York's terrorism statute, applying a weight of the evidence review, determined that, although the defendant threatened to kill a judge in letters to his wife, there was no proof the threat was made to influence or affect the policy or conduct of a unit of government: "As relevant here, '[a] person is guilty of making a terroristic threat when[,] with intent to . . . influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping, he or she threatens to commit or cause to be committed a specified offense and thereby causes a reasonable expectation or fear of the imminent commission of such offense'... . ... [C]ritically missing is evidence demonstrating that defendant intended to influence a policy of a governmental unit by intimidation or coercion or affect the conduct of a governmental unit — a necessary element of the crime of making a terroristic threat ... . [T]he letters here do not indicate that defendant, by threatening violent acts, intended to influence the judge's policy or conduct. Indeed, the record reflects that, in the time between when the two letters were written, defendant was granted visitation by the subject judge. In our view, they reflect defendant's vented anger towards those individuals involved in his Family Court proceedings ... . [V]iewing the evidence in a neutral light, it cannot be concluded that defendant intended by his actions to influence a governmental policy or affect a governmental unit and, therefore, the verdict finding defendant guilty of making a terroristic threat is against the weight of the evidence ...". ***People v. Richardson*, 2018 N.Y. Slip Op. 08368, Third Dept 12-6-18**

To view archived issues of CasePrepPlus,
visit www.nysba.org/caseprepplus.