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APPELLATE DIVISION

NEGLIGENCE

Proximate Cause Can Not Be Based Upon Speculation/Many Possible Causes

In affirming the grant of summary judgment to the defendant, the Second Department explained that, although proximate cause can be established by circumstantial evidence, it cannot be based on speculation:

> "Proximate cause may be established without direct evidence of causation, by inference from the circumstances of the accident; however, mere speculation as to the cause of an accident, when there could have been many possible causes, is fatal to a cause of action".. . **Belousov v Warnock, 2013 NY Slip Op 05787, 2nd Dept 9-11-13**

No Demonstrated Connection Between Stair-Related Code Violations and Injury

In affirming the grant of summary judgment to the defendant in a slip and fall case, the Second Department noted that there was evidence the step risers and tread did not meet code requirements, but there was insufficient evidence connecting the defect with the accident:

> The defendants made a prima facie showing of entitlement to judgment as a matter of law by establishing that the plaintiff was unable to identify the cause of her fall … . In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff submitted expert evidence that the step risers and treads did not comply with various sections of, inter alia, the New York City Building Code. However, the plaintiff's assertion that these alleged stairway defects proximately caused her accident is based on sheer speculation …, and is, in fact, contradicted by the record. **Humphrey v Merivil, 2013 NY Slip Op 05799, 2nd Dept 9-11-13**

FROM THE EDITOR

This is the fifth issue of the Digest---an indexed compilation of the summaries of Appellate Division and Court of Appeals decisions released in September and October and posted weekly on the "Just Released" page of the website rochesterlawdigest.com. If you wish to be notified when the "Just Released" page is updated with summaries of decisions released the week before, please sign up for the mailing list by clicking on the icon at the bottom of the website home page. The four prior issues of the Digest (January-February; March-April; May-June; and July-August) are available online, just click on the "Issue Guide" tab at rochesterlawdigest.com. The full decisions, of course, are posted on the courts' websites. By signing up for the mailing list, you let me know that you find the summaries useful.

- Bruce Freeman

Rochester, New York
Office: 585 645-8902
rochesterlawdigest@gmail.com
www.rochesterlawdigest.com

Question of Fact Raised About Whether Snow-Removal Contractor Created or Exacerbated the Dangerous Condition

The Second Department affirmed the denial of summary judgment to a snow-removal contractor (SCS) in a slip and fall case. The plaintiff fell on a mound of snow between the street and a sidewalk. The court explained:

> A contractor may be held liable for injuries to a third party where, in undertaking to render services, the contractor entirely displaces the duty of the property owner to maintain the premises in a safe condition, the injured party relies on the contractor's continued performance under the agreement, or the contractor negligently creates or exacerbates a dangerous condition … . SCS demonstrated its prima facie entitlement to judgment as a matter of law dismissing the amended complaint insofar as asserted against it … by demonstrating that the injured plaintiff was not a party to the snow and ice removal contract, and that it did not owe a duty to him … . In opposition, however, the plaintiffs raised a triable issue of fact as to whether SCS's alleged negligence created or exacerbated the hazard which was a proximate cause of the accident… . **LaGuarina v Metropolitan Trans Auth, 2013 NY Slip Op 05800, 2nd Dept 9-11-13**

Not Enough Time Passed to Invoke Constructive Notice of Icy Condition Under "Storm Progress Rule"

The Second Department reversed Supreme Court and granted summary judgment to the defendant in a slip and fall case. The court determined not enough time elapsed to invoke constructive notice of the icy condition under the "storm progress rule:"

> "A defendant may be held liable for a dangerous condition on its premises caused by the accumulation of snow or ice upon a showing that it had actual or constructive notice of the condition, and that a reasonably sufficient time had lapsed since the cessation of the storm to take protective measures" … . "Under the storm in progress' rule, a property owner will not be held liable for accidents occurring as a result of the accumulation of snow or ice on its premises until an adequate period of time has passed following the cessation of the storm, within which time the owner has the opportunity to ameliorate the hazards caused by the storm" … .**McCurdy v KYMA Holdings, LLC, 2013 NY Slip Op 05802, 2nd Dept 9-11-13**

More than One Possible Cause of Icy Condition Required Grant of Summary Judgment to Defendant

The Second Department affirmed the grant of summary judgment to the defendant in a slip and fall case. The plaintiff alleged that the black ice which caused the fall was the result of water dripping from a gutter on defendant's property. It had been drizzling for several days prior to the fall and was drizzling on the day of the fall. The court determined the attempt to link the icy condition to the dripping gutter was too speculative to support the action:

> A real property owner or a party in possession or control of real property will be held liable for injuries sustained in a slip-and-fall accident involving snow and ice on its property only if it created the dangerous condition or had actual or constructive notice of the condition … . "Where the facts proven show that there are several possible causes of an injury, for one or more of which the defendant was not responsible, and it is just as reasonable and probable that the injury was the result of one cause as the other, plaintiff cannot have a recovery, since he [or she] has failed to prove that the negligence of the defendant caused the injury" … . **Morreale v Esposito, 2013 NY Slip Op 05803, 2nd Dept 9-11-13**

Gaps in Treatment Precluded "Continuous Treatment Doctrine" in Medical Malpractice Suit---Action Time-Barred

The Second Department reversed Supreme Court and granted summary judgment to the defendant in a medical malpractice action finding the action was time-barred because the continuous treatment doctrine did not apply:

> Although the plaintiffs contend that the statute of limitations was tolled by the continuous treatment doctrine, they failed to raise a triable issue of fact in that regard … . The plaintiffs' decedent received treatment from the defendant over a 17-year period for recurrent bladder tumors. After his initial diagnosis, in 1991, the decedent typically returned for treatment only when he was symptomatic, experiencing hematuria. Thus, between December 1999 and April 2003, and again, from December 2004 until October 2007, the decedent did not visit with the defendant. As a result of these temporal gaps, because the decedent did not continue to seek a course of treatment, any continuity in treatment that had existed was severed … . Accordingly, the Supreme Court should have granted that branch of the defendant's motion

which was to dismiss, as time-barred, so much of the complaint as was based upon alleged acts of medical malpractice and lack of informed consent committed prior to December 22, 2006… . **Peykarian v Yin Chu Chien, 2013 NY Slip Op 05809, 2nd Dept 9-11-13**

Summary Judgment Properly Granted to Snow-RemovalContractor---"Espinal" Exceptions Explained

In affirming the grant of summary judgment to defendant snow-removal contractor (Lemp) in a slip and fall case, the Second Department clearly explained the applicable law, including the "Espinal" exceptions to the rule a contractor is not liable to third parties:

> As a general rule, a limited contractual obligation to provide snow removal services does not render the contractor liable in tort for the personal injuries of third parties … . However, in Espinal v Melville Snow Contrs. (98 NY2d 136, 140), the Court of Appeals recognized that exceptions to this rule apply (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced another party's duty to maintain the premises safely.
>
> Contrary to the plaintiffs' contentions, the defendant Lemp Landscapers, Inc. (hereinafter Lemp), made a prima facie showing of its entitlement to judgment as a matter of law by offering proof that the injured plaintiff was not a party to its snow removal contract with the defendant Woodland Pond Condominium Association (hereinafter Woodland), and that it thus owed no duty of care to the injured plaintiff … . Since the plaintiffs did not allege facts in their complaint or bill of particulars which would establish the possible applicability of any of the Espinal exceptions, Lemp, in establishing its prima facie entitlement to judgment as a matter of law, was not required to affirmatively demonstrate that these exceptions did not apply … .
>
> In opposition to Lemp's prima facie showing, the plaintiffs offered no evidence to support their contentions that Lemp launched a force or instrument of harm by creating or exacerbating the icy condition that allegedly caused the plaintiff Ernest Rudloff's fall … . By merely plowing the snow in accordance with the contract and leaving some residual snow or ice on the plowed area, Lemp cannot be said to have created a dangerous condition and thereby launched a force or instrument of harm. Moreover, a claim that a contractor exacerbated an existing condition requires some showing that the contractor left the premises in a more dangerous condition than he or she found them … . Therefore, even if Lemp failed to sand or salt the roadway on which the injured plaintiff fell, the plaintiffs have offered nothing more than speculation that the failure to perform that duty rendered the property less safe than it was before Lemp started its work … . **Rudloff v Woodland Pond Condominium Assn, 2013 NY Slip Op 05812, 2nd Dept 9-11-13**

Out-Of-Possession Landlord Not Liable for Slip and Fall

In affirming the grant of summary judgment to an out-of-possession landlord in a slip and fall case, the Second Department explained:

> "An out-of-possession landlord's duty to repair a dangerous condition on leased premises is imposed by statute or regulation, by contract, or by a course of conduct" … . Here, the defendant established its prima facie entitlement to judgment as a matter of law by demonstrating that it was an out-of-possession landlord, that it was not contractually obligated to maintain the subject parking lot, that it did not endeavor to maintain the subject parking lot, and that it did not owe the plaintiff a duty by virtue of any applicable statute or regulation … . **Castillo v Wil-Cor Realty Co, Inc, 2013 NY Slip Op 05871, 2nd Dept 9-18-13**

Plaintiff Unable to Identify Cause of Fall

In reversing Supreme Court, the Second Department determined a slip and fall action against defendant (Trump Village) should have been dismissed because the plaintiff could not identify the cause of her fall:

> " [A] plaintiff's inability to identify the cause of the fall is fatal to the cause of action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation'" … . Although "[p]roximate cause may be established without direct evidence of causation, by inference from the circumstances of the accident, . . . mere speculation as to the cause of an accident, when there could have been many possible causes, is fatal to a cause of action" … . Where it is just as

> likely that some other factor, such as a misstep or a loss of balance, could have caused a trip and fall accident, any determination by the trier of fact as to causation would be based upon sheer speculation … . **Ash v city of New York, 2013 NY Slip Op 05864, 9-18-13**

Primary Assumption of Risk Precluded Lawsuit

The Second Department determined Supreme Court should have granted defendant's motion for summary judgment based on the doctrine of primary assumption of risk. Plaintiff was an experienced boxer and was injured when he stepped into a gap (about which he was aware) under the canvas surface of the boxing ring:

> The doctrine of primary assumption of risk provides that "by engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" … . This includes risks associated with any open and obvious conditions of the playing field, including risks arising from "less than optimal conditions" … . Thus, "when an experienced athlete . . . is aware of the existence of a particular condition on the premises where the activity is to be performed, and actually appreciates or should reasonably appreciate the potential danger it poses, yet participates in the activity despite this awareness, he or she must be deemed to have assumed the risk of injury which flows therefrom" … . **Baccari v KCOR, Inc, 2013 NY Slip Op 05865, 2nd Dept 9-18-13**

Question of Fact Whether ¾ Inch Height Differential Was "Trivial"

In a slip and fall case, the Second Department reversed Supreme Court and determined there was a question of fact whether a defect, a ¾" height differential in a walkway, was "trivial:"

> "Generally, whether a dangerous or defective condition exists depends on the particular facts of each case, and is properly a question of fact for the jury unless the defect is trivial as a matter of law" … . "In determining whether a defect is trivial, the court must examine all of the facts presented including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstances of the injury'" … . There is no "minimal dimension test" or per se rule that a defect, in order to be actionable, must be a certain height or depth … .
>
> Here, in support of their motion, the Jamaica Seven defendants submitted evidence, including photographs, which showed that the bricks within the section of the entranceway where the plaintiff tripped were depressed below the adjacent public sidewalk, causing a height differential of at least 3/4 of an inch. This evidence, including the plaintiff's deposition testimony, was insufficient to demonstrate as a matter of law that the alleged defect was trivial and, therefore, not actionable… . **Cardona-Torres v City of New York, 2013 NY Slip Op 05870, 2nd Dept 9-18-13**

Question of Fact Whether City Had Notice of Pothole in Bicycle-Injury Case/Big Apple Pothole Map May Have Provided Notice

The Second Department affirmed the denial of defendant's motion for summary judgment in a pothole bicycle-injury case. The court determined that there was a question of fact about exactly where the pothole was and whether it was indicated on the Department of Transportation's Big Apple Pothole map:

> …"[W]here a municipality has enacted a prior written notice statute such as Administrative Code of the City of New York § 7-201(c)(2), it may not be subjected to liability for injuries arising from a defective roadway unless it has received timely prior written notice of the defective condition" … . A Big Apple map submitted to the Department of Transportation may serve as prior written notice of a defective condition … .
>
> Here, the defendants failed to establish, prima facie, that they did not have prior written notice of the alleged defect. Where, as here, "there are factual disputes regarding the precise location of the defect that allegedly caused a plaintiff's fall, and whether the alleged defect is designated on the map, the question should be resolved by the jury"… **Chia v City of New York, 2013 NY Slip Op -5873, 2nd Dept 9-18-13**

Rear-End Collision Warranted Summary Judgment on Liability

In a rear-end collision case, the Second Department determined plaintiff's motion for summary judgment on liability should have been granted:

> A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle and imposes a duty on that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision … . "A claim that the driver of the lead vehicle made a

sudden stop, standing alone, is insufficient to rebut the presumption of negligence" … .

Here, the plaintiff established his prima facie entitlement to judgment as a matter of law by submitting evidence that the defendant's vehicle struck his vehicle in the rear as the plaintiff's vehicle was slowing down for traffic in front of it … . In opposition, the defendant failed to raise a triable issue of fact. "[V]ehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead" … . **Robayo v Aghaabdul, 2013 NY Slip Op 05889, 2nd Dept 9-18-13**

Defendant Failed to Raise Question of Fact About Lack of Notice of Icy Condition

Over a dissent, the First Department determined the defendant in a slip and fall case failed to raise a question of fact re: its claim it did not have notice of the icy condition on the sidewalk. The court explained that the defendant failed to offer sufficient evidence of the condition of the sidewalk before the fall:

> Plaintiff correctly contends that defendants failed to satisfy their prima facie burden since they did not submit evidence sufficient to establish that they did not have constructive notice of the hazardous icy condition on the sidewalk in front of their franchise restaurant on which plaintiff allegedly slipped …. In cases involving slip and falls on icy sidewalks, a defendant moving for summary judgment must proffer evidence from a person with personal knowledge as to when the sidewalk was last inspected or as to its condition before the accident … . …
>
> Defendants' supervisor, who only visited that franchise twice per week, attested that the employees would typically respond to winter storms by shoveling the sidewalk, and then applying rock salt. However, she had no personal knowledge of whether this procedure was followed in response to this storm, did not aver that she was present on either the day of the storm or the accident, and offered no evidence as to when the sidewalk had last been inspected or cleaned of snow, ice, or other debris. Hence, defendants' evidence was "not probative of lack of actual or constructive notice," and the evidence of their general procedures, standing alone, was insufficient to satisfy their burden on summary judgment …. As defendants failed to meet their initial burden, the motion should have been denied regardless of the sufficiency of plaintiff's opposition papers … . **Rodriguez v Bronx Zoo Rest. Inc, 2013 NY Slip Op 06294, 1st Dept 10-1-13**

Summary Judgment for Out of Possession Landlord in Slip and Fall Case

In a slip and fall case, the Fourth Department determined the defendant out-of-possession landlord (McDonald's) had met its burden demonstrating it was not responsible for snow and ice removal:

> McDonald's met its initial burden of establishing its entitlement to judgment as a matter of law, and plaintiff failed to raise a triable issue of fact … . McDonald's submitted evidence demonstrating that it, as a franchisor, lacked day-to-day control over the franchisee …, and that it was an out-of-possession landlord who did not retain control over the premises and was not contractually obligated to repair or maintain the premises… . **Maisano v McDonald's …, 994, 4th Dept 10-4-13**

Abutting Landowner Not Liable for Sidewalk Slip and Fall

In affirming summary judgment to defendants (abutting landowners) in a sidewalk slip and fall case, the Fourth Department explained:

> "Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions [on a] public sidewalk[] is placed on the municipality and not the abutting landowner" … . That rule does not apply, however, if there is an ordinance or municipal charter that specifically imposes a duty on the abutting landowner to maintain and repair the public sidewalk and provides that a breach of that duty will result in liability for injuries to the users of the sidewalk; the sidewalk was constructed in a special manner for the use of the abutting landowner; the abutting landowner affirmatively created the defect; or the abutting landowner negligently constructed or repaired the sidewalk … .
>
> It is undisputed that the applicable town code does not impose liability on defendants for injuries to users of the public sidewalk abutting their property. Furthermore, the testimony and affidavits submitted by defendants in support of their motion established that the sidewalk was not constructed in a special manner for their benefit, that they did not affirmatively create the

defect, and that they did not negligently construct or repair the sidewalk. Notably, defendants' submissions established that the sidewalk was constructed by the builder of defendants' development, who laid it in continuation of the sidewalk on the properties neighboring defendants' property in both directions, and that defendants did not request that the sidewalk be constructed and had no input into its construction. Contrary to plaintiffs' further contention, defendants established that they did not affirmatively create the defect by any alleged special use of the sidewalk as a driveway… .**Schroeck v Gies…, 1021, 4th Dept 10-4-13**

Primary Assumption of Risk Prohibited Suit by Student Softball Player Injured When Struck by the Ball

The Second Department determined an eighth-grade experienced softball player assumed the risk of being hit by the ball, noting that the supervisor's temporary absence from the field was not the proximate cause of the injury. The court provided a thorough explanation of the primary assumption of risk doctrine:

> Under the doctrine of primary assumption of risk, a person who voluntarily participates in a sporting activity generally consents, by his or her participation, to those injury-causing events, conditions, and risks which are inherent in the activity … . Risks inherent in a sporting activity are those which are known, apparent, natural, or reasonably foreseeable consequences of the participation … . Since the determination of the existence and scope of a duty of care requires "an examination of plaintiff's reasonable expectations of the care owed him [or her] by others" …, the plaintiff's consent does not merely furnish the defendant with a defense, it eliminates the duty of care that would otherwise exist. Accordingly, when a plaintiff assumes the risk of participating in a sporting event, "the defendant is relieved of legal duty to the plaintiff; and being under no duty, he [or she] cannot be charged with negligence" … . It is not necessary to the application of the doctrine that the injured plaintiff should have foreseen the exact manner in which the injury occurred "so long as he or she is aware of the potential for injury of the mechanism from which the injury results"… . **Cruz v Longwood Cent Sch Dist, 2013 NY Slip Op 06541, 2nd Dept 10-9-13**

Triable Issues of Fact in Lawsuit Against Bus Company and Property Owner for Slip and Fall on a Speed Bump

In reversing Supreme Court and reinstating the complaint, the Second Department determined there were triable questions of fact whether plaintiff was negligently allowed to step off a bus onto a speed bump, causing her to fall, and whether the property owner (JQ) allowed a dangerous condition (speed bump) to exist:

> The [bus company] defendants failed to establish, prima facie, that they fulfilled the duty to alighting passengers to stop at a place where they may safely disembark and leave the area … . Triable issues of fact exist as to whether the driver was aware, or reasonably should have been aware, of the presence of a speed bump in the subject location, whether the speed bump constituted a dangerous condition, and whether the driver should have stopped the bus at the designated stop or another location not adjacent to a speed bump … . There is also a triable issue of fact as to whether the driver failed to see that which should have been seen through the reasonable use of one's senses and was, therefore, negligent… . The injured plaintiff's failure to positively state whether sand on the speed bump contributed to her fall was not fatal to her cause of action, because the evidence was sufficient to permit a finding based on logical inferences from the record, and not speculation alone, that the placement of the bus was a proximate cause of the accident, regardless of whether there was sand on the speed bump … .
>
> The JQ defendants, as owners and operators of the office complex, which was open to the public, had a nondelegable duty to provide the public with reasonably safe premises and a safe means of ingress and egress … . This duty may not be delegated by the owner to its agents or employees, or to an independent contractor … . The plaintiffs need not establish that the JQ defendants had notice of the alleged dangerous condition, as it was allegedly created by the JQ defendants or their agent … . The JQ defendants failed to establish, prima facie, that they did not create a dangerous condition on the premises in placing the speed bump, or causing it to be placed, in the subject location. There are triable issues of fact as to whether the speed bump constituted a dangerous condition or was readily visible to a disembarking bus passenger, given its location near the bus stop, and given the conflicting testimony as to whether the speed bump was painted yellow … . Furthermore, triable issues of fact exist as to whether the circumstances were such as to render the subject speed bump a trap for the

unwary … . Some visible hazards, because of their nature or location, are likely to be overlooked. The facts here do not warrant concluding as a matter of law that the speed bump was so obvious that it would necessarily have been noticed by any careful observer, so as to make any warning superfluous… . **Grizzell v JQ Assoc LLC, 2013 NY Slip Op 06544, 2nd Dept 10-9-13**

Valid Cause of Action Stated in Slip and Fall Suit Against Abutting Property Owner for Obstruction in Sidewalk (Gas Cap Cover)

The Second Department reversed Supreme Court and determined the slip and fall complaint stated a cause of action against the owner of property abutting a sidewalk. In the sidewalk was a gas cap cover, owned by a utility, and concrete on top of the gas cap created raised area which was alleged to have caused plaintiff to fall. A Long Beach City Ordinance imposed a duty upon abutting landowners to remove obstructions. The defendant relied heavily on cases construing New York City's sidewalk law, which differed from the more broadly worded Long Beach ordinance:

> The Charter imposes broad obligations on abutting landowners with respect to the condition of sidewalks, and also provides for tort liability on those landowners:
>
> > "The owner . . . of lands fronting or abutting on any street . . . shall make, maintain and repair the sidewalk . . . adjoining his lands and shall keep such sidewalk . . . free and clear of and from snow, ice and all other obstructions. Such owner . . . shall be liable for any injury or damage by reason of omission, failure or negligence to make, maintain or repair such sidewalk . . . or to remove snow, ice or other obstructions therefrom, or for a violation or nonobservance of the ordinances relating to making, maintaining and repairing sidewalks . . . and the removal of snow, ice and other obstructions from sidewalks" (Charter § 256 …).
>
> The Code of Ordinances of the City of Long Beach defines "sidewalk" as "any portion of a street between the curbline and the adjacent property line, intended for the use of pedestrians, excluding parkways" (Code of Ordinances of the City of Long Beach § 1-2). Here, the gas cap was located entirely within a sidewalk flag and was level with the sidewalk, and therefore apparently was intended to be traversed by pedestrians. Thus, the plaintiff contends, the concrete above the gas cap is covered by Long Beach's sidewalk law, at least to the extent that it may have been an "obstruction" on the sidewalk. **Klau v Belair Bldg LLC, 2013 NY Slip Op 06548, 2nd Dept 10-9-13**

Existence of Elevator Maintenance Contract Did Not Rule Out Duty of Care to Elevator User

The Second Department determined plaintiff had stated a cause of action in negligence against a company with a contract to maintain an elevator. The elevator escape door and debris fell on plaintiff. The court explained that the existence of a contract did not rule out that the company owed a duty of care to the plaintiff:

> " Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party'" … . "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" … Exceptions to this general rule exist "(1) where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launch[e]s a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties[;] and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" … .
>
> Here, [defendant] failed to meet its prima facie burden of demonstrating that no questions of fact existed as whether it failed to exercise reasonable care while repairing the subject elevator and whether it thereby launched a force or instrument of harm that caused the accident… . **Dautaj v Alliance El Co, 2013 NY Slip Op 06657, 2nd Dept 10-16-13**

Defendant May Be Liable for Obstruction in Municipal Right of Way

The Second Department determined the defendant's (Argyros's) motion for summary judgment in a slip and fall case should have been denied. Plaintiff tripped on a piece of wood that was anchored into the ground. Argyros owned the land and the piece of wood was in the town's municipal right of way over the land. There was evidence most property owners cared for the areas in the right of way:

> " The law imposes a duty to maintain property free and clear of dangerous or defective conditions only upon those who own, occupy, or control property, or who put the property to a

special use or derive a special benefit from it'" … . Here, while Argyros owned the real property on which the accident occurred and the Town possessed a right of way over the portion of it where the plaintiff fell, title to the land under the right of way is not determinative in assessing the issue of duty, as issues of control and maintenance of the property must also be considered … . * * *

The Supreme Court should have denied Argyros's motion for summary judgment dismissing the complaint insofar as asserted against him, as the evidence submitted in support of the motion failed to eliminate all triable issues of fact as to whether he controlled or maintained the area of the property where the plaintiff fell … . **Riccardi v County of Suffolk, 2013 NY Slip Op 06673, 2nd Dept 10-16-13**

Res Ipsa Loquitur Doctrine Re: Shard of Wood Ingested by Plaintiff Allowed Case to Survive Summary Judgment

In reversing Supreme Court, the Third Department determined the doctrine of res ipsa loquitur sufficiently raised a question of fact about whether a shard of wood, which was swallowed by plaintiff, was negligently present in food prepared by defendant (Cipriani):

> Res ipsa loquitur is neither a theory of liability nor a presumption of liability, but instead is simply a permitted inference – that the trier of fact may accept or reject – reflecting a "common-sense application of the probative value of circumstantial evidence" … . Criteria for res ipsa loquitur to apply are that "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; [and] (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff" … . The parties dispute the exclusive control element and, to establish that element, plaintiffs were "not obligated to eliminate every alternative explanation for the event, but only to demonstrate that the likelihood of causes other than the defendant[s'] negligence is so reduced that the greater probability lies at defendant[s'] door, rendering it more likely than not that the injury was caused by defendant[s'] negligence" … .
>
> Here, the event occurred at a banquet hall operated by Cipriani. Cipriani prepared and provided all of the food. Attendees were not permitted to bring food onto the premises. Individuals undisputedly under Cipriani's control (pursuant to a contractual arrangement) acted as captains, servers and bartenders. Cipriani thus exclusively prepared, provided and served the food. Although the shard possibly could have been present when the ingredients for food were purchased from suppliers, it was not so small as to have been likely concealed and thus not visible upon careful preparation (cf. Restatement [Second] of Torts § 328D, Comment e, Illustration 2). … There is sufficient proof under these circumstances to find ample control by defendants for purposes of res ipsa loquitur. **Brumberg v Cipriani USA Inc, 515666, 3rd Dept 10-17-13**

Late Notice of Claim Denied—Criteria Explained

In affirming the denial a petition for leave to file a late notice of claim, the Second Department explained the relevant criteria:

> Timely service of a notice of claim is a condition precedent to the commencement of an action sounding in tort against the New York City Transit Authority (hereinafter the NYCTA) (see General Municipal Law § 50-e[1][a]…). In determining whether to extend the time to serve a notice of claim, the court will consider whether, in particular, the public corporation received actual notice of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, whether the claimant has a reasonable excuse for the failure to serve a timely notice of claim, and whether the delay would substantially prejudice the public corporation in its defense on the merits (see General Municipal Law § 50-e[5]…). **Matter of Ryan v New York City Tr Auth, 2013 NY Slip Op 06691, 10-16-13**

Late Notice of Claim Denied---Infancy Alone Not Sufficient Reason to Allow Late Notice

In affirming the denial of a petition for leave to file a late notice of claim, the Second Department noted that the infancy of the injured person did not compel the granting of the petition:

> …[T]he factor of infancy alone does not compel the granting of a petition for leave to serve a late notice of claim … . Here, the failure to serve a timely notice of claim and the lengthy delay in seeking leave to serve a late notice of claim were not the product of the injured person's infancy … . Furthermore, the excuse proffered for the delay in commencing this proceeding, that the petitioner, the infant's father, was not aware of the extent of his daughter's injury and disability until 4½ years after the accident, is

unacceptable without supporting medical evidence explaining why the extent of the injury and disability took so long to become apparent… .**Matter of Sparrow v Hewlett-Woodmere Union Free Scjh Dist (#14), 2013 NY Slip Op 06696, 2nd Dept 10-16-13**

Standard of Care Required of Train Operator

In affirming the grant of summary judgment to the defendant, the Second Department explained the standard of care applicable to a train operator. Plaintiff's decedent was struck by the train:

> The complaint in this case alleged that the defendants acted negligently and thereby caused the death of the plaintiff's decedent, who was struck by a train owned and operated by the defendants. "[A] train operator may be found negligent if he or she sees a person on the tracks from such a distance and under such other circumstances as to permit him [or her], in the exercise of reasonable care, to stop before striking the person" … . In support of their motion for summary judgment dismissing the complaint, the defendants submitted evidence, including the deposition testimony of the operator of the train involved in the subject accident, that he was operating the train at a lawful speed and was approximately one car length away when he first observed the decedent, who was intoxicated, trespassing on the tracks. The train operator immediately applied the emergency brakes and sounded the horn, but at that point, it was impossible to avoid the collision. The evidence submitted by the defendants established, prima facie, that they were not negligent in the happening of the accident as a matter of law … . **Neenan v Quinton, 2013 NY Slip Op 06843, 2nd Dept 10-23-13**

Question of Fact about Implied Physician-Patient Relationship In Malpractice Action

In a medical malpractice action, the Second Department determined there was a question of fact about whether an implied physician-patient relationship existed:

> Liability for medical malpractice may not be imposed in the absence of a physician-patient relationship … . A physician-patient relationship is created when professional services are rendered and accepted for purposes of medical or surgical treatment … . An implied physician-patient relationship can arise when a physician gives advice to a patient, even if the advice is communicated through another health care professional … . Whether a physician's proffer of advice furnishes a sufficient basis upon which to conclude that an implied physician-patient relationship has arisen is ordinarily a question of fact for a jury … . **Thomas v Hermoso, 2013 NY Slip Op 06852, 2nd Dept 10-23-13**

Abutting Landowner Not Responsible for Condition of Sidewalk Tree Well/Open and Obvious Condition Relates Only to Comparative Negligence

In affirming the denial of the summary judgment motion brought by the defendant abutting landowner in a sidewalk slip and fall case, the Second Department noted that an abutting landowner is not responsible for defects in a tree well, and the allegation that a condition is open and obvious only raises a question of fact about plaintiff's possible contributory negligence. **Vigil v City of New York, 2013 NY Slip Op 06852, 2nd Dept 10-23-13**

Business Not Liable for Slip and Fall on Abutting Icy Sidewalk/"Special Use" Doctrine Explained

The Fourth Department determined the defendant funeral home could not be held liable for the plaintiff's fall on an icy sidewalk in front of the home. There was no statute or ordinance imposing liability on the abutting landowner (as opposed to the municipality), the funeral home did not derive a special use from the sidewalk, and the funeral home did not create or exacerbate the dangerous condition. In explaining the "special use" doctrine, the court wrote:

> Under the special use doctrine, a landowner whose property abuts a public sidewalk may be liable for injuries that are caused by a defect in the sidewalk when the municipality has given the landowner permission to "interfere with a street solely for private use and convenience in no way connected with the public use" and the landowner fails to maintain the sidewalk in a reasonably safe condition … . "A special use is typically characterized by the installation of some object in the sidewalk or street or some variance in the construction thereof" … . Here, defendants established that the sidewalk was unencumbered by the installation of any objects or by other variances in construction, and plaintiff submitted no evidence that "the sidewalk was constructed in a special manner for the benefit of the abutting owner or occupier"… . **Panzica v Fantauzzi…, 863, 4th Dept 9-27-13**

Storm in Progress Doctrine Warranted Summary Judgment to Defendant in Slip and Fall Case

In reversing Supreme Court, the Fourth Department determined the "storm in progress" doctrine warranted summary judgment to the defendant in a slip and fall case. In addition, the Fourth Department determined the plaintiff failed to raise a question of fact about whether the defendant created the dangerous condition, noting that the failure to remove all the ice and snow and the failure to sand or salt a sidewalk does not constitute exacerbation of a dangerous condition. With respect to the "storm in progress" doctrine, the Court wrote:

> We conclude that the evidence submitted by defendant in support of his motion, including an affidavit from his expert meteorologist and the weather reports upon which that expert relied, established as a matter of law that there was a storm in progress at the time of the accident … and, thus, that defendant had no duty to remove the snow and ice "until a reasonable time ha[d] elapsed after cessation of the storm" …. The accident occurred at approximately 8:45 a.m. on December 31, 2008, when plaintiff exited defendant's store in the City of Rochester. According to defendant's expert meteorologist, a snowstorm began in the Rochester area late in the evening on December 30, 2008, and continued into the next day. At 4:15 a.m. on December 31, the National Weather Service issued a "winter weather advisory" for the Rochester area and, two hours later, the advisory was upgraded to a "winter storm warning." More than 11 inches of snow accumulated in Rochester on December 31, which was a record for that date, and most of that snow fell during the early morning hours. Indeed, plaintiff acknowledged during her deposition that it was snowing on the morning in question as she drove to the store, and that testimony was consistent with the testimony of defendant's wife, among other witnesses. **Glover v Botsford…, 959, 4th Dept 9-27-13**

NEGLIGENCE/BANKRUPTCY LAW

Plaintiff's Chapter 13 Bankruptcy Did Not Preclude Lawsuit—Question of Fact Re: Applicability of Emergency Doctrine

In affirming the denial of summary judgment to the defendant driver who struck plaintiff when the defendant turned toward the shoulder to avoid an on-coming car, the Third Department noted that plaintiff's Chapter 13 bankruptcy did not preclude the suit and there were questions of fact about the applicability of the emergency doctrine:

> Initially, we reject defendants' assertion that plaintiff lacks the capacity to sue by virtue of his failure to disclose his personal injury claim in his chapter 13 bankruptcy schedule of assets. "While [c]hapter 7 and [c]hapter 11 debtors lose standing to maintain civil suits – which must be brought and/or maintained by their bankruptcy trustees – it is clear that [c]hapter 13 debtors like plaintiff are not subject to this restriction" … . Accordingly, Supreme Court properly concluded that plaintiff's omission in this regard was not fatal. …
>
> "Under the emergency doctrine, a driver who confronts a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration may be relieved of liability if the actions taken in response are reasonable and prudent in the emergency context" … . The reasonableness of the driver's conduct, as well as whether he or she could have done something to avoid the accident, typically present questions of fact for a jury to resolve … . Thus, in order to be granted summary judgment in this regard, "a driver must establish as a matter of law that he or she did not contribute to the creation of the emergency situation, and that his or her reaction was reasonable under the circumstances such that he or she could not have done anything to avoid the collision" …Defendants failed to meet that burden here. **Collins v Suraci, 516138, 3rd Dept 10-17-13**

NEGLIGENCE/GENERAL OBLIGATIONS LAW

Fraternity Not Liable for Injuries Caused by Intoxicated Person

The Second Department ruled that summary judgment should have been granted to a fraternity (SPFI) in an action brought pursuant the General Obligations Law 11-100 (creating a cause of action against those who provide alcohol to persons who subsequently cause injury). Plaintiff was injured in a fight that took place outside the fraternity house and there was no evidence the assailant (Poffenbarger) was provided with alcohol while in the fraternity house:

> A defendant may be liable for injuries caused by an intoxicated guest that occurred on the defendant's property, or in an area under the defendant's control, where the defendant had

the opportunity to control the intoxicated guest and was reasonably aware of the need for such control … . Here, the [fraternity] defendants established their prima facie entitlement to judgment as a matter of law dismissing the negligence cause of action insofar as asserted against SPFI by showing that the plaintiff's injuries occurred in an area not under SPFI's control and, thus, that SPFI had no duty to supervise or control Poffenbarger's conduct in that area … .

…Supreme Court erred in denying that branch of the Sigma Pi defendants' motion which was for summary judgment dismissing the cause of action to recover damages pursuant to General Obligations Law § 11-100 insofar as asserted against SPFI.

General Obligations Law § 11-100 provides:

"Any person who shall be injured in person, property, means of support or otherwise, by reason of the intoxication or impairment of ability of any person under the age of twenty-one years, whether resulting in his death or not, shall have a right of action to recover actual damages against any person who knowingly causes such intoxication or impairment of ability by unlawfully furnishing to or unlawfully assisting in procuring alcoholic beverages for such person with knowledge or reasonable cause to believe that such person was under the age of twenty-one years." * * *

Here, the [fraternity] defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action to recover damages pursuant to General Obligations Law § 11-100 … . Specifically, the [fraternity] defendants established… that SPFI did not knowingly cause Poffenbarger's intoxication or impairment of ability … . **Holiday v Poffenbarger, 2013 NY Slip Op 06658, 2nd Dept 10-16-13**

NEGLIGENCE/MUNICIPAL LAW

"Professional Judgment Rule" Did Not Preclude Lawsuit/Plaintiff Bitten by Police Dog While Assisting Police in a Search

The plaintiff was bitten by a police dog while assisting the police in a search. Supreme Court denied defendants' motion for summary judgment and the Second Department affirmed, explaining there was a question of fact about whether the "professional judgment rule" applied:

> "The professional judgment rule insulates a municipality from liability for its employees' performance of their duties where the . . . conduct involves the exercise of professional judgment such as electing one among many acceptable methods of carrying out tasks, or making tactical decisions" … . However, "the immunity afforded a municipality for its employee's discretionary conduct does not extend to situations where the employee, a police officer, violates acceptable police practice" … .
>
> Here, the defendants did not establish their prima facie entitlement to judgment as a matter of law. A question of fact with respect to whether the conduct of the dog's handler was consistent with acceptable police practice was presented by the defendants' evidentiary submissions … . Accordingly, summary judgment was properly denied … . **Newsome v County of Suffolk, 2013 NY Slip Op 05805, 2nd Dept 9-11-13**

Question of Fact About Whether Village Negligent in Maintaining Sewer System

The Fourth Department reversed Supreme Court and determined plaintiffs had raised a question of fact about whether the defendant village was negligent in maintaining the sewer system resulting in sewage leaking into plaintiffs' basement:

> We conclude that issues of fact exist whether defendant "received 'notice of a dangerous condition or ha[d] reason to believe that the [sewer] pipes ha[d] shifted or deteriorated and [were] likely to cause injury' " and whether defendant neglected to " 'make reasonable efforts to inspect and repair the defect' " … . The record establishes that plaintiffs made numerous complaints to defendant for many years prior to the incident at issue and that defendant did not consistently keep written records of the complaints it received with respect to the sewer lines. **Mason v Village of Neward, 856, 4th Dept. 10-4-13**

NEGLIGENCE/GENERAL MUNICIPAL LAW 205-E

Police Officer Injured by Debris in City's Vacant Lot Stated a Cause of Action Under General Municipal Law

In finding a police officer had stated a cause of action against the City pursuant to General Municipal Law 205-e based on an injury caused by debris in an empty lot owned by the City, the Second Department determined that a violation of the NYC Health Code section requiring lots be kept free of debris could be the basis of the action:

> To support a cause of action under General Municipal Law § 205-e, a plaintiff law enforcement officer, inter alia, must identify the statute or ordinance with which the defendant failed to comply … . Liability pursuant General Municipal Law § 205-e will exist where there is negligent noncompliance with "any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of any and all their departments, divisions and bureaus" (General Municipal Law § 205-e), provided that the statute, ordinance, rule, order or requirement cited is found in a "well-developed bod[y] of law and regulation" that "impose[s] clear duties" … . Section 205-e must be applied " expansively' so as to favor recovery by police officers whenever possible" … .
>
> New York City Health Code § 153.19 provides that "[t]he owner, agent, lessee, tenant, occupant or other person who manages or controls a building or lot shall be jointly and severally responsible for keeping . . . the premises free from obstructions and nuisances and for keeping . . . the . . . lot clean and free from garbage, refuse, rubbish, litter, other offensive matter or accumulation of water." Contrary to the Supreme Court's conclusion, this provision constitutes a well-developed body of law… . **Mulham v City of New York, 2013 NY Slip Op 06666, 10-16-13**

NEGLIGENCE/ANIMAL LAW

Question of Fact About Whether Rider Assumed Risk of Being Kicked by Horse—Allegations Defendant Heightened Risk

The Third Department there was a question of fact whether plaintiff assumed the risk of being kicked by defendant's horse. Plaintiff alleged the risk was heightened by defendant's actions:

> While it has been recognized that participants in the sporting activity of horseback riding assume commonly appreciated risks inherent in the activity, such as being kicked …, "[p]articipants will not be deemed to have assumed unreasonably increased risks" … . "'[A]n assessment of whether a participant assumed a risk depends on the openness and obviousness of the risks, the participant's skill and experience, as well as his or her conduct under the circumstances and the nature of the defendant's conduct'" … .
>
> Here, plaintiffs have raised triable issues of fact by offering evidence that defendant's attendant assisted plaintiff in mounting her assigned horse, and the attendant then positioned the head of her horse within six inches of the tail of the horse in the line in front of her. The attendant then was called away and, in leaving, he ducked under the head of plaintiff's horse, causing it to nudge the horse in front of it. The horse in front then kicked back, striking plaintiff in the leg and injuring her. Defendant's co-owner acknowledged that the positioning of horses is an important safety concern and that horses should be spaced approximately one horse length apart. Thus, while being kicked by a horse is an obvious risk of horseback riding, and plaintiff, although an inexperienced rider, was aware of the risk, issues of fact exist as to whether defendant's alleged actions in positioning the horses and then ducking under the head of plaintiff's horse heightened the risk of injury to an inexperienced rider… . **Valencia … v Diamond F Livestock, Inc…, 516434, 3rd Dept 10-24-13**

NEGLIGENCE/TRUSTS AND ESTATES

Malpractice Action for Depression-Treatment Prior to Suicide Is Actionable

The Second Department determined a cause of action for malpractice in treating plaintiff's decedent for depression prior to her committing suicide should not have been dismissed:

> Here, the complaint sought damages for conscious pain and suffering arising from Family Services' alleged negligence in treating the decedent's depression during the period between October 19, 2005, and the time of her death about 10 days later. That cause of action states a cognizable legal theory sounding in professional malpractice … .
>
> Further, EPTL 11-3.2(b), referred to as the "survival statute" …, provides that "[n]o cause of action for injury to person . . . is lost because of the death of the person in whose favor the cause of action existed." A cause of action based on personal injuries which survives the death of the decedent is distinct from a cause of action to recover damages for wrongful death … . Accordingly, the cause of action to recover damages for conscious pain and suffering predicated on alleged acts of professional malpractice committed between October 19, 2005, and October 28, 2005, survived the decedent's death, and damages for such pain and suffering may be recoverable by her estate … . **Stolarski v Family Servs of Westchester Inc, 2013 NY Slip Op 06850, 2nd Dept 10-23-13**

NEGLIGENCE/LANDLORD-TENANT

Summary Judgment Properly Granted to Out-of-Possession Landlord---Injury Caused by Defect in Floor

The Second Department affirmed the grant of summary judgment to an out-of-possession landlord (Hudson). Plaintiff alleged a defect in a concrete floor caused his injury. The Second Department wrote:

> An out-of-possession landlord is not liable for injuries caused by dangerous conditions on leased premises in the absence of a statute imposing liability, a contractual provision placing the duty to repair on the landlord, or a course of conduct by the landlord giving rise to a duty … .
>
> Here, the Hudson defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the code provisions relied upon by the plaintiff do not constitute statutes imposing liability, that the lease placed the responsibility to repair the floor defect on Kawasaki, and that the Hudson defendants did not, through a course of conduct, assume any duty to repair the alleged defect in the floor… . **Volpe v Hudson View Assoc, LLC, 2013 NY Slip Op 05814, 2nd Dept 9-11-13**

NEGLIGENCE/EDUCATION LAW

Request to File Late Notice of Claim Granted in Absence of Good Reason for Delay

Over a dissent, the Second Department determined Supreme Court properly allowed plaintiff to file a late notice of claim, in the absence of a good reason for the delay. The infant plaintiff was a student who injured her finger in a door at school:

> The plaintiffs demonstrated that the defendant acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or within a reasonable time thereafter (see Education Law § 3813[2-a]; General Municipal Law § 50-e[5]…). "In order to have actual knowledge of the essential facts constituting the claim, the public corporation must have knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the notice of claim; the public corporation need not have specific notice of the theory or theories themselves" … .
>
> Before the infant plaintiff was taken to the hospital by ambulance, her teacher told her that he would give her a dollar for every stitch she had, and he later called the infant plaintiff's home to inquire about her. During that telephone call, the teacher and the infant plaintiff's mother allegedly discussed a door at the school… Additionally, the school nurse completed a medical claim form, detailing the accident, the injury, and the treatment provided. Under these circumstances, the defendant acquired actual knowledge of the essential facts constituting the claim … .
>
> Furthermore, the defendant will not be substantially prejudiced in maintaining a defense on the merits as a result of the plaintiffs' delay in

seeking leave to serve a late notice of claim, in light of the teacher's involvement in the incident and the nurse's documentation of the accident and injuries … . "[T]he absence of a reasonable excuse for the delay does not bar the granting of . . . leave to serve a late notice of claim where, as here, there is actual knowledge and an absence of prejudice" … . **Claud v West Babylon Union Free Sch Dist, 2013 NY Slip Op 06339, 2nd Dept 10-2-13**

No Negligence In School District's, School's and Attending Nurse's Care of Child Who Died After Suffering an Allergic Reaction in School

In a full-fledged opinion by Justice Eng, the Second Department determined the action brought on behalf of a child who died in school after suffering an allergic reaction was correctly dismissed with respect to the Department of Education (DOE) and should have been dismissed with respect to the school and the attending nurse who was tasked with monitoring the child at school. The lengthy opinion deals in depth with many topics including: the DOE's duty, the school's duty, the nurse's duty, the finding that the nurse was an independent contractor as opposed to an employee, and the proximate cause issue raised by the inability to determine what caused the allergic reaction. The child was autistic and suffered from asthma and numerous severe allergies. The DOE developed a plan (Individualized Education Program) which involved placement of the child in a private school equipped to care for children with special needs and the provision of a nurse who was with the child continuously during the school day. The Second Department treated all the issues (including the adequacy of the medical care provided by the nurse) exhaustively and determined no questions of fact had been raised about the negligence of any of the defendants. **Begley v City of New York, 2013 NY Slip Op 05867, 2nd Dept 9-18-13**

NEGLIGENCE/CHOICE OF LAW/ FORUM NON CONVENIENS

Action By Israeli Citizens Against Bank Which Allegedly Funded Groups that Committed Bombings and Rocket Attacks Allowed to Go Forward in New York Applying Israeli Negligence Law

In a full-fledged opinion by Justice Feinman, the First Department determined that Israeli law should be applied in a civil action by 50 Israeli citizens who were injured or who represent persons killed in bombings and rocket attacks carried out in Israel by Palestine Islamic Jihad and Hamas. The opinion includes very detailed explanations of American and Israeli tort law (including the different roles of foreseeability in each), the factors that determine choice of law, and forum non conveniens. The action is against the Bank of China (BOC) and alleges the bank was negligent in supplying funds to the groups which carried out the bombings and attacks. BOC argued that no duty ran from the bank directly to those injured by the intentional torts of others. But, under Israeli law, a duty arises when an act is foreseeable and when an act violates a statute. The court explained:

> …[T]he Israeli law of negligence "differs slightly" from New York law in that duty is divided into fact and notional duty and depends on foreseeability …. …[T]he analysis of whether a duty is owed involves an inquiry into whether a reasonable person could have foreseen the occurrence of the damage under the particular circumstances alleged; whether as a matter of policy, a reasonable person ought to have foreseen the occurrence of the particular damage; and whether the occurrence causing the damage was foreseeable … . This differs from New York law, where the foreseeability of harm does not define duty and, absent a duty running directly to the injured person, there is no liability in damages, however careless the conduct or foreseeable the harm … .
>
> In addition, the claim of breach of statutory duty …has no equivalent in New York law. … Israel's tort of breach of a statutory duty "acts as a civil private right of action for the violation of any enactment" issued by the Knesset, the Israeli parliament. The plaintiff must be able to show that the defendant was under a duty imposed by an enactment, the enactment was created for the benefit of the plaintiff, the defendant breached that duty, and the breach caused an injury to the plaintiff of the type that the enactment was intended to prevent …. …[T]he enactments at issue are section 4 of the Prevention of Terrorism Ordinance, sections 145 and 148 of the Penal Law, and section 85 of the Defense Regulations (Emergency Period), all of which prohibit aiding and abetting terrorism, specifically by the giving of money to any terrorist organization, the payment of any contribution to any unlawful association including terrorist groups, and the performance of any service for or holding of funds of any unlawful organization … .**Elmaliach v Bank of China Ltd, 2013 NY Slip Op 05858, 1st Dept 9-17-13.**

NEGLIGENCE/LEGAL MALPRACTICE

In Spite of Settlement of Underlying Action/Legal Malpractice Case Alleging Failure to Adequately Investigate Can Go Forward

Plaintiff was attacked and injured in the lobby of his building. He hired an attorney to bring a premises liability action. The action was ultimately settled, but plaintiff brought a legal malpractice action against the defendant attorney alleging the attorney did not adequately investigate the security of the building. The First Department determined that plaintiff, who was described as unsophisticated in legal matters, had stated a cause of action because the defendant attorney admitted he had relied entirely on a brief conversation with the plaintiff about the security situation at the building before recommending settlement. The First Department explained the relevant principles as follows:

> For a claim for legal malpractice to be successful, "a plaintiff must establish both that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which results in actual damages to a plaintiff and that the plaintiff would have succeeded on the merits of the underlying action but for' the attorney's negligence" … . A client is not barred from a legal malpractice action where there is a signed "settlement of the underlying action, if it is alleged that the settlement of the action was effectively compelled by the mistakes of counsel" … . * * *
>
> In this specific case, given plaintiff's lack of sophistication and his limited education, defendant's statement that he never conducted any investigation, except for speaking to plaintiff for a very limited time, raises a question of fact as to whether defendant adequately informed himself about the facts of the case before he conveyed the settlement offer. Furthermore, defendant says he told plaintiff, when he conveyed the settlement offer, that it was a "difficult liability case." It is difficult to understand, on the record before us, how he made that assessment without going to the building, or speaking to the superintendent. **Angeles v Aronsky, 2013 NY Slip Op 05955, 1st Dept 9-24-13**

NEGLIGENCE/MEDICAL MALPRACTICE

Question of Fact Raised by Competing Expert Affidavits

The Fourth Department determined competing experts raised a question of fact about whether the post-discharge arrangements for psychiatric treatment of plaintiff's decedent were adequate. Plaintiff's decedent committed suicide 16 days after he was released from defendant psychiatrist's in-patient care:

> …[P]laintiff submitted the affidavit of her unidentified expert, wherein the expert stated that the proper standard of care required that decedent, who had been prescribed multiple medications that had significant side effects, such as suicidal ideation, "be monitored closely by a psychiatrist from the point of his discharge." It is undisputed that defendant approved the discharge without ensuring that decedent had a psychiatrist who could treat him. Additionally, defendant acknowledged at her deposition that decedent required psychiatric care upon discharge, but testified that it was not her responsibility to arrange for decedent's post-discharge care and that this responsibility was "customarily [within] the purview of the social worker." Similarly, defendant's expert stated in his affidavit that it was within the standard of care to delegate to a licensed social worker the task of arranging for post-discharge care. Plaintiff's expert, however, disagreed, stating that "delegating the task to a social worker without insuring that the task was completed is a . . . deviation from the standard of care." We conclude that the conflicting opinions of the experts raise an issue of fact for trial… . **Mazella… v Beals…and Mashinik, 931, 4th Dept 9-27-13**

NEGLIGENCE/DENTAL MALPRACTICE

Fraud and Breach of Fiduciary Causes of Action Dismissed as Duplicative

The Fourth Department dismissed as duplicative causes of action sounding in fraud and breach of fiduciary duty in complaints against dentists also alleging malpractice, negligence, breach of General Business Law section 349 and 350, and failure to obtain informed consent, all based on dental treatment provided to children:

> We agree with defendants that the court erred in

denying those parts of their respective motions seeking dismissal of the fraud and breach of fiduciary duty causes of action, and we therefore modify the order by dismissing the first and third causes of action of the amended complaints against defendants. "Dismissal of a fraud cause of action is required '[w]here [it] gives rise to damages which are not separate and distinct from those flowing from an alleged [dental] malpractice cause of action' " … . Inasmuch as the damages sought by plaintiffs, including punitive damages, are the same for the fraud and dental malpractice causes of action, we conclude that the fraud cause of action must be dismissed. We further conclude that the breach of fiduciary duty cause of action must be dismissed because it is duplicative of the malpractice cause of action … . Both the breach of fiduciary duty cause of action and dental malpractice cause of action are based on the same facts and seek identical relief… .
Matter of Small Smiles Litigation … v Forba Holdings LLC…, 996, 4th Dept 9-27-13

NEGLIGENCE/EVIDENCE

Emergency Doctrine Explained/Admissibility of Deposition
Excerpts Re: Summary Judgment Motion Explained/Bicyclist Injured When Path Allegedly Blocked to Protect Child

The Second Department reversed Supreme Court's grant of summary judgment to the defendants. The plaintiff-bicyclist was injured when, it is alleged, one of the defendants stepped into the bicyclist's path to protect children who were crossing the street. The court explained the admissibility requirements for excerpts of deposition testimony and an unsworn police report, as well as the emergency doctrine:

> The unsigned excerpts of …defendants' deposition testimony, which the defendants submitted in support of their motion, were admissible under CPLR 3116(a) since they were submitted by the party deponents themselves and, accordingly, those transcripts were adopted as accurate by those deponents … . Additionally, although the defendants initially failed to submit the certification page of the depositions of nonparties …, as well as those for the depositions of …defendants, they submitted those certifications in reply papers in response to the plaintiffs' arguments in opposition … . Under the circumstances of this case, the late submission did not prejudice the plaintiffs, and the Supreme Court properly considered these certifications …. Furthermore, although unsigned, as noted above, the transcripts … were certified, and the plaintiffs did not raise any challenges to their accuracy. Thus, the transcripts qualified as admissible evidence for purposes of the defendants' motion for summary judgment … . However, the unsigned, uncertified excerpt of the injured plaintiff's deposition was not in admissible form, nor was the uncertified, unsworn police report submitted by the defendants. Accordingly, neither of these items should have been considered in determining whether the defendants satisfied their prima facie burden … . * * *
>
> "Under the emergency doctrine, when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context" … . " This is not to say that an emergency automatically absolves one from liability for his [or her] conduct. The standard then still remains that of a reasonable [person] under the given circumstances, except that the circumstances have changed'" … . " Both the existence of an emergency and the reasonableness of a party's response thereto will ordinarily present questions of fact'" … .
Pavane v Marte, 2013 NY Slip Op 05991, 2nd Dept 9-25-13

NEGLIGENCE/PHYSICIAN-PATIENT PRIVILEGE

Disclosure Appropriate in Lead Paint Case/Physician-Patient Privilege Waived

In a lead-paint-exposure case the Fourth Department reversed Supreme Court's ruling that defendants were not entitled to full disclosure of records based on the physician-patient privilege. The Fourth Department determined the privilege had been waived:

> In view of the injuries alleged by plaintiff, we conclude that she waived her physician-patient privilege and any related privileges with respect to the records sought, and that those records may be material and necessary to the defense of the action … . There may be information in plaintiff's records, however, that is irrelevant to this action, and there are legitimate concerns with respect to "the unfettered disclosure of sensitive and confidential information" contained

in those records … . Thus, here, as in Dominique D. v Koerntgen (107 AD3d 1433, 1434), we modify the order by denying defendants' motion and cross motion to the extent that they seek authorizations for the full disclosure of the records sought and by granting plaintiff's cross motion to the extent that it seeks an in camera review of the records, and we remit the matter to Supreme Court for such in camera review and the redaction of any irrelevant information… . **Adams v Daughtery…, 907, 4th Dept 10-4-13**

NEGLIGENCE/PHARMACY MALPRACTICE

Malpractice Action Against Pharmacy Dismissed/Applicable Standard of Care and Insufficiency of Expert Affidavit Explained

In affirming the dismissal of a malpractice complaint against a pharmacy (Rite Aid) for failure to state a cause of action, the Fourth Department explained the standard of care imposed upon a pharmacy and the necessary contents of an expert affidavit alleging the profession has established a different standard of care:

> With respect to the sufficiency of the complaint before us, we note that in New York " '[t]he standard of care which is imposed on a pharmacist is generally described as ordinary care in the conduct of his [or her] business. The rule of ordinary care as applied to the business of a druggist means the highest practicable degree of prudence, thoughtfulness and vigilance commensurate with the dangers involved and the consequences which may attend inattention' " … . "Generally, a pharmacist cannot be held liable for negligence in the absence of an allegation that he or she failed to fill a prescription precisely as directed by the physician or was aware that the customer had a condition that would render the prescription of the drug at issue contraindicated" … . Here, because plaintiff failed to allege that the dosage "fell below or exceeded the medically acceptable range of dosages that should be provided under any circumstance" …, that Rite Aid did not follow the prescribing physician's directions, or that Rite Aid was aware that the drug was contraindicated for plaintiff, the court properly concluded that the complaint fails to state a cause of action for negligence on the part of Rite Aid … .
>
> Contrary to plaintiff's further contention, she failed to establish through an expert's affidavit that the pharmacy profession itself has created a different standard of care from that set forth herein. In support of that contention, plaintiff submitted the affidavit of a pharmacist who opined that "[t]he dose [of prednisone prescribed for plaintiff] triggers the need to contact the prescribing physician to double check the dosage and to notify the patient of the very high dose and risks associated with that dose." " '[O]rdinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would' [be sufficient to allege a violation of a professional standard of care] .
>
> . . Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to" establish a violation of a standard of care … . Thus, an expert's affidavit is insufficient to establish that a standard of care exists where it is "devoid of any reference to a foundational scientific basis for its conclusions" … . Here, the expert cites no industry standard, treatise or other authority in support of his opinion regarding the standard of care …, and plaintiff therefore failed to establish that the pharmacy profession itself imposes a different standard of care from that set forth in the applicable case law. **Burton v Sciano, et al, 837, 4th Dept 10-4-13**

CRIMINAL LAW

Criteria for Downward Departure in SORA Proceeding Explained

The Second Department explained the criteria for a downward departure in a SORA proceeding:

> A court has the discretion to downwardly depart from the presumptive risk level in a proceeding pursuant to SORA (see Correction Law article 6-C) only when the defendant makes a twofold showing … . The defendant must first identify, as a matter of law, an appropriate mitigating factor, namely, a factor which "tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the [SORA] Guidelines" (…see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006 ed]). Next, the defendant must prove by a preponderance of the evidence the facts necessary to support the applicability of that mitigating factor … . In the absence of this twofold showing, the court lacks discretion to depart from the presumptive risk

level … . Here, the defendant failed to make the requisite showings. Consequently, the Supreme Court did not have the discretion to depart from the presumptive risk level … . **People v Ologbonjaiye, 2013 NY Slip Op 05807, 2nd Dept 9-11-13**

Mitigating Factor (12 Years Since Release) Did Not Warrant Downward Departure in SORA Proceeding

The Second Department affirmed Supreme Court's refusal to depart downward in a SORA proceeding, even though the fact that defendant had not been convicted of any sex offenses in the 12 years following his release from prison was a mitigating factor not taken into account by the risk assessment guidelines:

> … [T]he defendant requested that the Supreme Court downwardly depart from his designation as a presumptive risk level two sex offender. In that respect, the defendant demonstrated, by a preponderance of the evidence, that he had not been convicted of any sex offenses in the 12 years following his release from prison, which is a mitigating factor not adequately taken into account by the SORA Risk Assessment Guidelines … . Nevertheless, in light of the grievous nature of the defendant's offense and, thus, the danger he poses to society should he reoffend, the Supreme Court did not improvidently exercise its discretion in declining to downwardly depart from the presumptive risk level (…Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 2 [2006]).**People v Rivera, 2013 NY Slip Op 05808, 2nd Dept 9-11-13**

Obstructing Governmental Administration Conviction Reversed---Police Not Engaged in "Authorized Conduct"

The Second Department reversed defendant's conviction for obstructing governmental administration as against the weight of the evidence. The court determined there was not sufficient proof the police were engaged in authorized conduct at the time of the contact with the defendant:

> "A person is guilty of obstructing governmental administration when he [or she] intentionally . . . prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference" (Penal Law § 195.05). Thus, a defendant may not be convicted of obstructing governmental administration unless it is established that the police were engaged in authorized conduct … . As determined by the Supreme Court, the initial chase of the defendant by the police was not supported by reasonable suspicion … . Further, in light of the defendant's acquittal by the jury on the charges of criminal possession of a weapon in the second degree and criminal possession of a weapon in the fourth degree, which we may consider in conducting a weight of the evidence review … , the evidence, when properly weighed, did not prove, beyond a reasonable doubt, that the officer was performing an official function authorized by law when he tried to disarm the defendant following the chase … . Thus, the record reflects that, when considering whether the People satisfied the "performing an official function" element of the crime of obstructing governmental administration in the second degree, the jury failed to give the weight properly due to its credibility finding that the defendant was not in possession of a weapon … . **People v Small, 2013 NY slip Op 05842, 2nd Dept 9-11-13**

Defendant Did Not Consent to Entry of Police Into His Home---the Police Accompanied a Parole Officer for the Express Purpose of Investigating a Burglary--- Motion to Suppress Should Have Been Granted

The Second Department determined evidence seized from defendant's home and statements made by the defendant should have been suppressed. Using the authority to visit parolees, the police accompanied the parole officer to defendant's home as part of a burglary investigation. The defendant was arrested after stolen property was noticed by the police in the home. In determining the trial court erred when it found defendant had consented to the entry of the police into his home, the court wrote:

> When the People rely on consent to justify an otherwise unlawful police intrusion, they bear the "heavy burden" of establishing that such consent was freely and voluntarily given … . "Consent to search is voluntary when it is a true act of the will, an unequivocal product of an essentially free and unconstrained choice. Voluntariness is incompatible with official coercion, actual or implicit, overt or subtle" … . The People's burden of proving voluntariness "cannot be discharged by showing no more than acquiescence to a claim of lawful authority" … .
>
> > We agree with the defendant that the People failed to prove that his consent to the entry into his home was voluntary. Consent is not voluntary where an officer falsely represents facts that normally establish the exercise of police authority to which a person would ordinarily yield … . Here, pursuant to the conditions of the

> defendant's release to parole supervision, he was obligated to allow his parole officer to enter his home to conduct a home visit and conduct a related search of his residence. The People showed no more than the defendant's acquiescence to this authority, which does not sustain their burden of proving that he freely and voluntarily consented to the entry by the detectives and the sergeant for the purpose of investigating the subject burglaries. **People v Marcial, 2013 NY Slip Op 05920, 2nd Dept 9-18-13**

Imposition of Fine After Promise No Fine Would Be Imposed Required Vacation of Guilty Plea

The Third Department vacated defendant's sentence because County Court promised the sentence would not include a fine, but County Court imposed a fine because a fine was required by law. The court wrote:

> Defendant pleaded guilty to an indictment charging him with two counts of aggravated unlicensed operation of a motor vehicle in the first degree. County Court agreed, in return, to sentence him to an aggregate jail term of one year with no fines. While County Court sentenced defendant to the contemplated jail term, it further imposed a fine of $1,000 on each count. Defendant now appeals.
>
> County Court promised defendant that his sentence would not include a fine, but such sentence would have been illegal (see Vehicle and Traffic Law § 511 [3] [b]…). The legal sentence that County Court imposed was inconsistent with that promise. Although defendant failed to preserve this issue by moving to withdraw the plea or vacate the judgment of conviction, the sentence must nevertheless "be vacated, and the matter remitted . . . to afford . . . defendant the opportunity to accept the sentence that was actually imposed, or permit him to withdraw his plea of guilty"… . **People v Faulcon, 104625, 3rd Dept 9-19-13**

Statements Made In Plea Allocution Negated Guilt

The Third Department vacated defendant's plea to forgery because, during the plea allocution, the defendant indicated he signed his own name on the credit card receipts. Signing one's own name cannot constitute forgery:

> Although defendant waived his right to appeal and did not preserve his challenge to the voluntariness of his plea by moving to withdraw his plea or vacate the judgment of conviction, the narrow exception to the preservation rule is triggered because he made a statement during the allocution that cast doubt upon his guilt … . During the allocution, defendant admitted to purchasing several items at various stores using a credit card that did not belong to him. When asked whether he had signed the credit card receipts using the name of the person to whom the card had been issued, defendant informed County Court that he did not know whose name was on the card and that he had signed the receipts in his own name. * * *
>
> Here, defendant's signing of his own name to the credit card receipts would render him both the actual and ostensible maker of the instrument, and the making of the instrument would not constitute a forgery … . Accordingly, defendant's statement that he signed his own name to the receipts implicated the voluntariness of his guilty plea to forgery in the second degree, requiring further inquiry from County Court. As the court failed to conduct such an inquiry, defendant's plea must be vacated and the matter remitted to County Court. **People v Morehouse, 104770, 3rd Dept 9-19-13**

"Criminal Enterprise" Does Not Require Continuity of Criminal Participants

In a full-fledged opinion by Justice Tom, the First Department determined that, with respect to "enterprise corruption," the term "criminal enterprise" (Penal Law 460.10[3]) requires "a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents"…, not criminal "participants[.]" The case involved fraudulent billing of insurers by the defendants who were hired to provide medical and chiropractic services by one Vinarsky:

> Both defendants * * * argue that because Vinarsky was essential to the operation of the [clinic], it lacked the structure to maintain the necessary continuity of existence in his absence. Thus, they conclude, the clinic did not meet the statutory requirements of a criminal enterprise essential to sustain conviction for their participation in its operation. * * *
>
> The evidence before the jury amply demonstrates that defendants were engaged in a criminal enterprise overseen by Vinarsky. It embraced more than one clinic, extended over a period of years, and involved a succession of

> patients whose medical history was used to procure income by an organization structured to facilitate the fraudulent billing of insurers, which paid some $6 million for services allegedly provided by the … clinic. Thus, the jury was warranted in concluding that the criminal enterprise had a continuity that extended beyond any individual patient or transaction. **People v Keschner, 2013 NY Slip Op 05975, 1st Dept 9-24-13**

Failure to Inform Defendant of the Specific Period of Postrelease Supervision Applicable to the Offense Defendant Pled To Required Vacation of Sentence

Over a dissent, the Second Department determined the failure to advise the defendant of the specific postrelease-supervision aspect of his sentence at the time of the entry of the plea pursuant to a plea agreement required that the sentence be vacated, even though defendant was informed his maximum sentencing exposure included a period of postrelease supervision:

> …[A]fter informing the defendant that his maximum sentencing exposure included a period of postrelease supervision, the court extended a specific sentence offer, specifying the range of the terms of imprisonment involved …, and this offer omitted any reference to postrelease supervision. The court has a duty to ensure, at the time a plea of guilty is entered, that the defendant is aware of the terms of the plea …. The County Court's failure to inform the defendant, at the time he entered his plea of guilty, that his sentence would, in fact, include a period of postrelease supervision, prevented his plea from being entered knowingly, voluntarily, and intelligently. **People v Divalentino, 2013 NY Slip Op 06013, 9-25-13**

Sentencing Court Can Correct Illegal Sentence If Within Initially-Stated Range

The Second Department explained that the trial court can properly resentence a defendant to correct an illegal sentence as long as the new sentence is within the initially-stated range. Here, after sentencing defendant to an indeterminate term of imprisonment, the court realized it was required to sentence defendant to a determinate term and postrelease supervision:

> Under the circumstances of this case, the County Court properly resentenced the defendant. A trial court has the inherent power to correct an illegal sentence, over a defendant's objection, where the corrected sentence falls within the range initially stated by the court …. Here, after the County Court learned that the indeterminate sentence imposed on the defendant for the conviction of criminal sale of a firearm in the third degree was illegal, it exercised its inherent power to correct the sentence by imposing a determinate term of imprisonment of two years followed by two years of postrelease supervision. This sentence was within the range initially stated by the County Court … . **People v Kaufman, 2013 NY slip Op 06020, 2nd Dept 9-25-13**

Jury Should Have Accepted Extreme Emotional Disturbance Affirmative Defense

In a full-fledged opinion by Justice Cohen, over a dissent, the Second Department determined the jury's failure to reduce the defendant's conviction to manslaughter because he was under the influence of extreme emotional disturbance when he killed his girlfriend was against the weight of the evidence. The opinion describes the nature and causes of the defendant's emotional state in great detail. The court explained the "extreme emotional disturbance" affirmative defense as follows:

> We begin our analysis by examining the nature and scope of the affirmative defense of extreme emotional disturbance. Penal Law §§ 125.25(1)(a) and 125.20(2), "[r]ead in tandem," together "provide that a defendant who proves by a preponderance of the evidence that he or she committed a homicide while under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse' is guilty of manslaughter and not murder" … . The defense of extreme emotional disturbance does not negate intent (see Penal Law § 125.20[2]…). Instead, the "defense allows a defendant charged with the commission of acts which would otherwise constitute murder to demonstrate the existence of mitigating factors which indicate that, although [ ] not free from responsibility for [the] crime, [defendant] ought to be punished less severely" … . Although the defense of extreme emotional disturbance is "an outgrowth of the heat of passion' doctrine which had for some time been recognized by New York as a distinguishing factor between the crimes of manslaughter and murder," the defense is broader than the "heat of passion" doctrine, and was intended to apply to a "wider range of circumstances" … .
>
> The defense of extreme emotional disturbance comprises two elements. The first element is "wholly subjective" and"involves a determination that the particular defendant did in fact act under extreme emotional disturbance, that the claimed explanation as to the cause of his action is not contrived or sham" … . The subjective element "focuses on the defendant's state of mind at the

time of the crime and requires sufficient evidence that the defendant's conduct was actually influenced by an extreme emotional disturbance" … . The subjective element is generally associated with a loss of self-control … . The second element, which the Court of Appeals has acknowledged to be "more difficult to describe," requires that an objective determination be made as to whether there was a reasonable explanation or excuse for the emotional disturbance … . "Whether such a reasonable explanation or excuse exists must be determined by viewing the subjective mental condition of the defendant and the external circumstances as the defendant perceived them to be at the time, however inaccurate that perception may have been'" … . **People v Sepe, 2013 NY Slip Op 06030, 2nd Dept 9-25-13**

Concurrent, Not Consecutive, Sentences Should Have Been Imposed Where "Actus Reus" Was a Single, Inseparable Act

The Second Department corrected a sentence which illegally imposed consecutive, as opposed to concurrent, terms of imprisonment. The defendant lured a 16 year-old girl to his apartment where they had consensual sex. Then defendant then allowed the co-defendants to go into the bedroom where they had sex with her. The court explained:

> The imposition of consecutive sentences on the convictions of rape in the first degree, criminal sexual act in the first degree, and sexual abuse in the first degree, was illegal, except with respect to the sentence imposed on the conviction of criminal sexual act in the first degree under count 11. "Although this issue was not raised before the [sentencing] court or on appeal, we cannot allow an [illegal] sentence to stand" … . Moreover, "a defendant may not waive the right to challenge the legality of a sentence" … .
>
> Section 70.25 of the Penal Law provides that "[w]hen more than one sentence of imprisonment is imposed on a person for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other, the sentences . . . must run concurrently" (Penal Law § 70.25[2]). "Under either of those circumstances, the court has no discretion; concurrent sentences are mandated" … . In determining whether two crimes were separate and distinct for the purposes of imposing consecutive or concurrent sentences, "it is the acts of the defendant that control" … . When the actus reus, or the " wrongful deed that comprises the physical components of a crime'" …, is a "single inseparable act" that violates more than one statute, single punishment must be imposed ….
>
> Here, the actus reus committed by the defendant in concert with each codefendant was "a single, inseparable act" …. With respect to each codefendant, the defendant's actus reus violated more than one statute due solely to the acts committed by the codefendant after the defendant had already completed his role. Each actus reus of the defendant "warrants [only] a single punishment" …. **People v Singh, 2013 NY Slip Op 06033, 2nd Dept 9-25-13**

Sentencing Court Could Amend Restitution Amount But First Must Give Defendant Opportunity to Withdraw Guilty Plea

The Third Department determined County Court had the authority to amend the amount of restitution initially ordered at sentencing. However, the change required giving the defendant the right to withdraw the guilty plea:

> Notably, "in the normal course of events, the People must 'advise the court at or before the time of sentencing that the victim seeks restitution . . . and the amount of restitution . . . sought' (Penal Law § 60.27 [1]), and the trial court must determine the amount of restitution at the time of sentencing" … . Nevertheless, "the court's continuing jurisdiction to impose restitution has been recognized where the claim for restitution is raised at or prior to sentencing and the modification or correction of the sentence occurs within a reasonable time thereafter" … .
>
> Here, we do not find the delay between defendant's September 2009 sentencing and the modification of the restitution order in September 2010 following a hearing unreasonable given the various factors presented by this case … . "Nonetheless, [a] sentencing court may not impose a more severe sentence than one bargained for without providing [the] defendant the opportunity to withdraw his [or her] plea" … . Thus, in light of the fact that the amended restitution amount unquestionably exceeds the total amount to which defendant agreed at the time of her plea and she seeks, among other things, vacatur of that plea herein, we deem it appropriate to remit the matter for the purpose of allowing defendant the opportunity to either accept the enhanced restitution amount or withdraw her plea… . **People v Mahar, 103960, 3rd Dept 9-26-13**

Imposition of Harsher Sentence After Appeal Was Vindictive

The Fourth Department determined the resentencing of defendant after appeal to a more severe sentence than was first imposed was vindictive and imposed the original sentence. The court wrote:

> "In order to ensure that defendants are not being penalized for exercising their right to appeal, 'a presumption of [institutional] vindictiveness generally arises when defendants who have won appellate reversals are given greater sentences . . . than were imposed after their initial convictions' " … . "The threshold issue in evaluating whether a resentence is vindictive is whether the resentence is more severe than that originally imposed" … . In order to justify an increased sentence, a court must set forth its reasons, and " '[t]hose reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding' " … . * * * In our view, "[t]he record is devoid of any objective information sufficient to rebut the presumption of vindictiveness that arose from the court's imposition of a sentence greater than that imposed after the initial conviction"… . **People v Rhodes, 847, 4th Dept 9-27-13**

No Requirement that Defendant Submit Affidavit in Support of Suppression Motion/No Requirement Defendant Deny Commission of Charged Offense to Warrant a Hearing on a Suppression Motion

Although the denial of defendant's suppression motion was affirmed, the Fourth Department noted the trial court erred when it stated the suppression motion must be supported by an affidavit from the defendant and the defendant must deny participation in the alleged crime to warrant a hearing:

> We agree with defendant that the court erred in ruling that defendant, in order to be entitled to a suppression hearing, was required to submit an affidavit in support of her motion. As the Court of Appeals has stated, "suppression motions must be in writing, state the legal ground of the motion and 'contain sworn allegations of fact,' made by defendant or 'another person' " … . . A suppression motion may be based on factual allegations made upon information and belief by defense counsel, provided that, as here, the sources of the attorney's information and the grounds of his or her belief are identified in the motion papers (see CPL 710.60 [1]). The court also erred in suggesting that defendant was required to deny participation in the crime. It is well settled that a defendant must either "deny participating in the transaction or suggest some other grounds for suppression" in order to warrant a suppression hearing… . **People v Battle, 926, 4th Dept 9-27-13**

Okay to Resentence to Determinate Sentence With No Postrelease Supervision Where Initial Sentence Omitted Reference to Postrelease Supervision

The Fourth Department determined defendant was properly resentenced to a determinate sentence without a period of post-release supervision as a remedy for the failure to inform the defendant of the post-release supervision the first time around:

> …[T]he court properly resentenced defendant pursuant to Penal Law § 70.85 to the original sentence without imposing a period of PRS. The statute permits the sentencing judge, with the consent of the People, to "re-impose the originally imposed determinate sentences of imprisonment without any term of post-release supervision." The statute was enacted to "avoid the need to vacate guilty pleas under … when defendants are not properly advised of mandatory terms of postrelease supervision" … . Here, the People requested that the court resentence defendant pursuant to section 70.85, and the court granted that request. The fact that defendant did not ask for resentencing is of no moment … **People v Bennefield, 920, 4th Dept 9-27-13**

Criteria for Allowing Defendant to Proceed Pro Se Explained

In upholding the trial judge's allowing defendant to proceed pro se, the Fourth Department explained the relevant criteria:

> "A defendant in a criminal case may invoke the right to defend [pro se] provided: (1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues" … . "If a timely and unequivocal request has been asserted, then the trial court is obligated to conduct a 'searching inquiry' to ensure that the defendant's waiver is knowing, intelligent, and voluntary"… . * * *
>
> Before granting defendant's request to proceed

pro se, the court conducted the requisite searching inquiry, during which defendant stated, inter alia, that he had successfully represented himself at trial in a prior case. From his initial appearance to his mid-trial request to proceed pro se, defendant expressed dissatisfaction with his assigned attorneys, against whom he had filed multiple complaints with the Attorney Grievance Committee, and he engaged in concerted efforts to assist in his defense. The court "had numerous opportunities to see and hear . . . defendant firsthand, and, thus, had general knowledge of defendant's age, literacy and familiarity with the criminal justice system" … . In addition, the court fulfilled its obligation to ensure that defendant was "aware of the dangers and disadvantages of self-representation" … . **People v Chandler, 985, 4th Dept 9-27-13**

Defendant Should Have Been Allowed to Testify Before the Grand Jury

The Fourth Department reversed the trial court and dismissed the indictment (without prejudice) because the defendant was deprived of his right to testify before the grand jury. The defendant gave notice of his intent to testify and appeared at the right time and place. The defendant signed a waiver of immunity but deleted three paragraphs from the document. The Fourth Department determined the waiver was sufficient even with the deletions:

> CPL 190.50 (5) provides that, if a defendant serves upon the People a notice of his intent to testify before the grand jury, appears at the appropriate time and place, and signs and submits to the grand jury "a waiver of immunity pursuant to [CPL] 190.45," the defendant "must be permitted to testify before the grand jury" (CPL 190.50 [5] [b]; see CPL 190.50 [5] [a]). In the event that the defendant complies with those procedures and is thereafter not permitted to testify, the appropriate remedy is dismissal of the indictment (see CPL 190.50 [5] [c]). The parties do not dispute that defendant complied with the first two requirements of the statute. The only dispute is whether defendant signed "a waiver of immunity pursuant to section 190.45" (CPL 190.50 [5] [b]). CPL 190.45 (1) provides that a waiver of immunity "is a written instrument" in which a person who is to testify before the grand jury stipulates that he or she "waives [the] privilege against self-incrimination and any possible or prospective immunity to which he [or she] would otherwise become entitled, pursuant to [CPL] 190.40, as a result of giving evidence in such proceeding." Here, the paragraphs in the waiver of immunity form that defendant left intact stated that defendant waived his privilege against self-incrimination and any immunity to which he would otherwise be entitled pursuant to CPL 190.40. Thus, defendant signed a waiver of immunity form that complied with the requirements of CPL 190.45 (1) and was therefore required to be permitted to testify before the grand jury (see CPL 190.50 [5] [b]). It is well settled that a defendant's statutory right to testify before the grand jury " 'must be scrupulously protected' " … . **People v Brumfield, 851, 4th Dept 9-27-13**

Furtive Behavior Justified Pat Down Search

The Fourth Department determined the police properly searched (frisked) the defendant after a valid vehicle-stop based on his "furtive" behavior:

> As defendant correctly concedes, the police officer lawfully stopped defendant's vehicle because it had a broken taillight …, and defendant voluntarily exited the vehicle. Given defendant's furtive behavior before and after exiting his vehicle, including being "fidgety" and "evasive" when answering the police officer's questions, turning the right side of his body away from the police officer, and placing his right hand in his jacket pocket, the police officer "reasonably suspected that defendant was armed and posed a threat to [his] safety" … . "Based upon [his] reasonable belief that defendant was armed, the officer[] lawfully conducted [the] pat frisk" that resulted in the seizure of the gun … . **People v Carter, 965, 4th Dept 9-27-13**

Judge Properly Relied on Presentence Report to Refuse to Adjudicate Defendant a Youthful Offender

The Fourth Department determined that the trial judge's refusal to adjudicate defendant a youthful offender, after a promise to do so, based upon information in the presentence report, constituted an adequate reason and explanation for the refusal:

> "As a matter of law and strong public policy, a sentencing promise made in conjunction with a plea is conditioned upon 'its being lawful and appropriate in light of the subsequent presentence report or information obtained from other reliable sources' " … . Contrary to defendant's contention, "the court's reliance on the presentence report for its determination that defendant would not be afforded youthful offender status 'constitutes an adequate explanation for the denial of defendant's request for such status' " … . The presentence report

> "included mitigating and aggravating factors, [and therefore] adequately explained the court's reasons for denying youthful offender status on the instant indictment" … . **People v Jamal H, 831, 4th Dept 9-27-13**

Persistent Felony Offender Statute Does Not Require Prior Felonies to be Equivalent to New York Felonies

The Fourth Department determined that the persistent felony offender statute did not require that the prior felonies taken into consideration for persistent felon status be equivalent to New York felonies:

> The persistent felony offender statute … contains no language requiring that the underlying out-of-state conviction be for a crime that would constitute a felony in New York, i.e., "an offense for which a sentence to a term of imprisonment in excess of one year may be imposed" (Penal Law § 10.00 [5]), or that the elements of the foreign crime be equivalent to the elements of a New York crime (see § 70.10 [1] [b] [i]). Rather, as noted by the Second Circuit in upholding the constitutionality of the persistent felony offender statute, "[s]ection 70.10 (1) (b) does not distinguish among felony convictions that arise under federal, New York State, or out-of-state law. Thus, if the acts constitute a felony under federal or another state's law, they will be deemed a felony for purposes of persistent offender status under [s]ection 70.10 even if there is no counterpart felony in New York law. By contrast, under [s]ection 70.06 [the second felony offender statute], the underlying acts of a federal or out-of-state felony must be recognized as a felony in New York to qualify as a predicate felony" … . **People v Jones, 853, 4th Dept 9-27-13**

Court, Not Prosecutor, Must Determine Whether Defendant Is Eligible for Youthful Offender Adjudication

In remitting the matter to determine whether defendant should be sentenced as a youthful offender, the Fourth Department explained that is was unclear whether the court, as opposed to the prosecutor, made the determination not to afford defendant youthful offender status:

> "After receipt of a written report of the [preplea or presentence] investigation and at the time of pronouncing sentence the court must determine whether or not the eligible youth is a youthful offender" (CPL 720.20 [1]). In People v Rudolph (___ NY3d ___ [June 27, 2013]), the Court of Appeals held that section 720.20 mandates that, when the sentence is imposed, the sentencing court must determine whether to grant youthful offender status to every defendant who is eligible for it. The Court of Appeals stated that "[t]he judgment of a court as to which young people have a real likelihood of turning their lives around is just too valuable, both to the offender and to the community, to be sacrificed in plea bargaining" … . **People v Brownell, 946, 4th Dept 9-27-13**

Police Violated Defendant's Constitutional Rights by Pushing Door Open and Entering Apartment When Defendant Answered the Door---The "Payton" Violation (a Warrantless Arrest Inside Home) Mandated Suppression of Defendant's Statement

Over a two-justice dissent, the Second Department determined defendant was arrested pursuant to a Payton violation (a warrantless arrest inside defendant's home) and his subsequent statement should have been suppressed. The police were at defendant's door with the complainant who told the police defendant had assaulted her. When defendant opened the door, the complainant identified him as the assailant. The defendant tried to shut the door, but the police pushed their way in and arrested him. The trial court felt there was no Payton violation the defendant's attempt to shut the door after the identification was akin to "fleeing" or "exigent circumstances." The Second Department, in a full-fledged opinion by Justice Balkin, disagreed and wrote:

> In Payton v New York (445 US 573), the United States Supreme Court announced a clear and easily applied rule with respect to warrantless arrests in the home: "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant" (Payton v New York, 445 US at 590). The rule under the New York Constitution is the same (see NY Const, art 1, § 12; People v Levan, 62 NY2d 139, 144). Payton and Levan require suppression of the defendant's statement under the clear, undisputed facts of this case.
>
> Certainly, if the defendant's encounter with the police had begun outside his home, or even on the threshold of it, the defendant could not have avoided arrest by fleeing into his home (see United States v Santana, 427 US 38, 43). But, contrary to the hearing court's characterization, the defendant's attempt to close his door was not "akin" to "fleeing"; he had never left the constitutionally protected interior of his home in the first place, even partially, so he did not flee "into" his home … . **People v Gonzales, 2013 NY Slip Op 06381, 2nd Dept 10-2-13**

Papers Sufficient to Require Suppression Hearing---No Need to Allege Expectation of Privacy Where Police Act Illegally

In finding defendant's papers were sufficient to require a suppression hearing (re: the suppression of a gun), the Second Department noted that the defendant was not required to demonstrate he had a legitimate expectation of privacy in the area the gun was found because the motion alleged the gun was seized as a result of illegal police conduct:

> A motion to suppress evidence must state the grounds of the motion and contain sworn allegations of fact supporting such grounds (see CPL 710.60[1]…). "It is fundamental that a motion may be decided without a hearing unless the papers submitted raise a factual dispute on a material point which must be resolved before the court can decide the legal issue" (…see CPL 710.60[3][b],,,). In testing the sufficiency of a defendant's factual allegations, a court should consider "(1) the face of the pleadings, (2) assessed in conjunction with the context of the motion, and (3) defendant's access to information" … .
>
> Here, the allegations in the defendant's papers, when considered in the context of the information provided by the People, raised a factual dispute requiring a hearing … . Contrary to the People's contention, the defendant's motion papers contained the requisite sworn allegations of fact … . Moreover, the defendant was not required to demonstrate that he had a legitimate expectation of privacy in the area where the gun was found …, since, under both the defendant's and the People's versions of events, the dispositive issue was whether the gun was recovered as a direct result of unlawful police action …. In light of the foregoing, the County Court should not have denied suppression without conducting a hearing. Accordingly, we remit the matter to the County Court, Suffolk County, for a hearing and a new determination thereafter of that branch of the defendant's motion which was to suppress physical evidence. **People v Jennings, 2013 NY Slip Op 06384, 2nd Dept 10-2-13**

Failure to Inquire About Defendant's Understanding of Intoxication Defense Required Vacation of Guilty Plea

The Second Department determined defendant's guilty plea should be vacated because the defendant could not recall the events due to his intoxication and the court made no inquiry about whether the defendant was aware of the significance of his intoxication (a possible intoxication defense):

> The defendant pleaded guilty to assault in the second degree (see Penal Law § 120.05). At the plea allocution, the defendant indicated that he had a very limited recollection of the incident, but admitted his guilt based on photographs, police reports, and witness statements. The County Court acknowledged that the defendant could not recollect the incident because he had been drinking alcoholic beverages at the time of the assault, and that the defendant's alleged intoxication at the time of the incident could negate the intent element of the crime of assault in the second degree (see Penal Law §§ 15.25, 120.05). While defense counsel stated that he had discussed "a possible intoxication defense" with the defendant and that the defendant understood it, the court made no inquiry of the defendant to ensure that he was aware of the significance of his claim of intoxication … . The court's failure to conduct any such inquiry of the defendant requires vacatur of the defendant's plea of guilty… . **People v Jiminez, 2013 Slip Op 06386, 2nd Dept 10-2-13**

Checkpoint Vehicle Stop Illegal

The First Department determined a vehicle checkpoint stop to control automobile thefts was unconstitutional:

> The suspicionless vehicle checkpoint stop that led to the recovery of contraband in this case was constitutionally impermissible because the primary purpose of the checkpoint was "essentially to serve the governmental interest in general crime control" … . It is undisputed that the primary purpose of the checkpoint was to deter or control auto theft. Contrary to the People's assertions, the interest in "controlling automobile thefts," as described in this case, "is not distinguishable from the general interest in crime control" … . Under the applicable precedents, a secondary goal of promoting highway safety does not justify a checkpoint stop. **People v Velez. 2013 NY Slip Op 06437, 1st Dept, 10-3-13**

Flawed Jury Instruction Re: Assisted Suicide Affirmative Defense to Murder Required New Trial

In a full-fledged opinion by Justice Richter, the First Department determined the trial court's jury instruction on the assisted-suicide affirmative defense to murder did not accurately instruct the jury on the elements of the defense and a new trial was required. Apparently there was no question that the decedent wanted to die and that the defendant participated in some way in decedent's

death. The central questions were whether defendant held the knife while the decedent leaned into it or whether defendant actively stabbed the decedent. The First Department noted that the prosecutor was not obligated to instruct the grand jury on the assisted-suicide affirmative defense because it is a mitigating defense (reducing the charge from murder) not a complete defense. With respect to the elements of the assisted-suicide affirmative defense, the court wrote:

> If the decedent took no part whatsoever in the ultimate act that led to his death, it cannot be characterized as suicide, even if the record shows the decedent wanted to die. In this regard, we find that the jury's verdict convicting defendant of murder was based on legally sufficient evidence and was not against the weight of the evidence … . The testimony of the People's medical expert provided ample proof that defendant repeatedly stabbed the decedent. Based on this evidence, the jury was entitled to reject defendant's claim that he merely held the knife.
>
> But the jury was also free to accept defendant's account of events. Under that version, a jury could have found that the decedent committed suicide because he committed the final overt act that caused his death, i.e., thrusting himself into the knife. Notably, the People did not argue below that defendant's version, if believed, would not satisfy the affirmative defense to murder. In fact, the record shows that the People acquiesced to the defense being charged, and they do not argue otherwise on appeal. The People made no objection to the charge, and in fact offered their own proposed language to the court. The trial court determined that defendant's version supported the assisted suicide defense because it decided to give the charge … .
>
> Under these circumstances, the portion of the court's instruction that the assisted suicide defense is not made out if defendant "actively" caused the decedent's death, along with the expansive definition of the word "active" given in the supplemental charge, was confusing and conveyed the wrong standard. Neither the word "active," nor its antonym "passive," appears in the statutory language and thus, by giving this charge, the court added an element that is not part of the defense. **People v Minor, 2013 NY Slip Op 06444, 10-3-23**

Mode of Proceedings Error Re: Jury Note Required Reversal/Molineux Rulings Flawed

The Fourth Department reversed defendant's conviction finding the trial court committed a mode of proceedings error in responding to a jury note. The judge instructed the jury in the jury room outside the presence of the defendant. In addition, the Fourth Department found fault with the procedure used by the trial court to address the admission into evidence of defendant's prior bad acts, as well as some of the rulings that such evidence was admissible:

> We agree with defendant that County Court committed a mode of proceedings error when it responded to a jury note off the record, in the jury room, and outside the presence of defendant, with no indication that defendant had waived his right to be present. CPL 310.30 provides that, upon receiving a request for further instruction or information from the jury during deliberations, "the court must direct that the jury be returned to the courtroom and, after notice to both the people and counsel for the defendant, and in the presence of the defendant, must give such requested information or instruction as the court deems proper." It is beyond cavil that "[a] defendant has a fundamental right to be present at all material stages of a trial . . . [and] CPL 310.30 makes a defendant's right to be present during instructions to the jury absolute and unequivocal" … . The court properly read the jury note on the record in the presence of defendant, defense counsel, and the prosecutor, and it then obtained a clear stipulation from both attorneys concerning the accuracy of its intended response to the jury's request for information. We nevertheless conclude that the court committed reversible error by subsequently instructing the jury off the record, in the jury room, and outside the presence of defendant (see CPL 310.30…).
>
> Because there must be a retrial, we deem it appropriate to address defendant's contention that the court abused its discretion by permitting testimony concerning defendant's prior bad acts in the days, months, and years preceding the subject arson. "[A] defendant is not entitled as a matter of law to pretrial notice of the People's intention to offer evidence pursuant to People v Molineux (168 NY 264) or to a pretrial hearing on the admissibility of such evidence" …. Nevertheless, "a prosecutor seeking to introduce Molineux evidence 'should ask for a ruling out of the presence of the jury' . . . and . . . any hearing with respect to the admissibility of such evidence should occur either before trial or, at the latest, 'just before the witness testifies' " … .
>
> Here, that procedure was not followed. Instead, the court improperly afforded defense counsel a standing objection with respect to testimony concerning defendant's prior bad acts while

affording the prosecutor the opportunity to ask one of the victims of the arson, who was defendant's neighbor, about defendant's prior bad acts over a period as long as 10 years before the arson. It was particularly improper to allow that witness to testify that, as a result of defendant's prior bad acts, he had concerns about the safety of his children and pets. "It is fundamental that evidence concerning a defendant's uncharged crimes or prior misconduct is not admissible if it cannot logically be connected to some specific material issue in the case, and tends only to demonstrate that the defendant was predisposed to commit the crime charged" … . Although defendant's bad acts within a few days of the arson could be deemed relevant to such issues as motive and intent, testimony concerning defendant's bad acts in the preceding weeks, months or years was irrelevant to any issue in the case and only could have prejudiced defendant by suggesting to the jury that he was an erratic and potentially dangerous person who had the propensity to commit the crime at issue … . **People v Cornell, 870, 4th Dept 10-4-13**

Erroneous Molineux Rulings Required Reversal

The Fourth Department reversed defendant's conviction, finding error in the trial court's ruling evidence of prior bad acts was admissible:

> Before the trial, the court granted the People's motion to present Molineux evidence for the limited purpose of proving the absence of mistake in defendant's possession of the forged checks (see People v Molineux, 168 NY 264, 293-294). Pursuant to the court's ruling, the People presented evidence on their direct case concerning three of defendant's prior convictions as well as one investigation that did not result in criminal charges, arising from defendant's conduct in writing checks on his accounts with knowledge that those accounts either were closed or had insufficient funds. The court erred in ruling that such evidence was relevant to establish the absence of mistake. The disputed issues at trial were whether defendant knew that the checks were forged and whether defendant was a knowing participant in, or an innocent victim of, a fraudulent check scheme. Defendant's prior bad acts were not "directly relevant" to the absence of mistake in defendant's possession of the forged checks because those prior bad acts are not probative of defendant's ability to recognize that the checks were forgeries or that he had become knowingly involved in a fraudulent check scheme … . Contrary to the People's contention, the Molineux evidence was not admissible to prove defendant's "familiarity with check frauds and his ability to deceive individuals through banking schemes" inasmuch as such evidence "tends only to demonstrate the defendant's propensity to commit the crime charged" .. . Furthermore, the Court of Appeals has expressly declined to create a " 'specialized crime' exception to Molineux" when the charged crime is one "that require[s] unusual skills, knowledge and access to the means of committing it" … . We therefore conclude that evidence of defendant's prior bad acts was inadmissible as a matter of law … .
>
> We further conclude in any event with respect to the court's Molineux ruling that the probative value of the evidence did not outweigh its prejudicial effect … . The evidence was "of slight value when compared to the possible prejudice to [defendant]" and therefore should not have been admitted … . We further conclude that the error in admitting the evidence is not harmless …, even in view of the court's limiting instruction. **People v Mhina, 871, 4th Dept 10-4-13**

Case Sent Back to Suppression Court to DetermineWhether Police Had Sufficient Reason for Asking About Drugs and Weapons After Traffic Stop

The Fourth Department sent the case back for a determination whether the police had a founded suspicion of criminal activity to justify an inquiry about the presence of drugs of weapons after a traffic stop:

> We agree with defendant that Supreme Court erred in refusing to suppress the gun recovered from the vehicle based upon the inevitable discovery doctrine. The testimony at the suppression hearing established that, during a lawful traffic stop, one of the police officers asked defendant whether there were any drugs or weapons in the vehicle before instructing defendant to exit the vehicle. After defendant admitted to having marihuana on his person, the police officer asked defendant to exit the vehicle and, following suspicious behavior by another occupant of the vehicle, searched the vehicle and found a gun in plain view. Notably, the court did not address whether the officer had the requisite founded suspicion of criminal activity to justify an inquiry concerning the presence of drugs or weapons in the vehicle … . Instead, the court refused to suppress the gun on the ground that the police "could" have taken various actions after the traffic stop that would have inevitably led to the discovery of the gun. The People, - however, did not raise the inevitable discovery doctrine as a ground for denying

suppression of the gun, nor did they meet their burden of "demonstrat[ing] a very high degree of probability that normal police procedures would have uncovered the challenged evidence independently of [a] tainted source"… . **People v Sykes, 849, 4th Dept 10-4-13**

Restitution to Police Department Re: Expenses of Drug Bust Proper

The Fourth Department determined defendant was properly ordered to pay restitution to the police department in a drug case, but that payment of a surcharge should not have been ordered:

> … [A] defendant convicted of, inter alia, a class C " 'felony involving the sale of a controlled substance' may be ordered to repay a law enforcement agency 'the amount of funds expended in the actual purchase' of a controlled substance" … . Section 60.27 (9) was amended in 1991 "to authorize restitution to law enforcement agencies for unrecovered funds utilized to purchase narcotics as part of investigations leading to convictions" … . We therefore conclude … that the court properly directed defendant to pay restitution to the City of Oswego Police Department for the funds it expended in buying drugs from him.
>
> The People correctly concede with respect to defendant's further contention … that the court erred in imposing a surcharge on that restitution order. Penal Law § 60.27 (9) further provides that "[a]ny restitution which may be required to be made to a law enforcement agency pursuant to this section . . . shall not include a designated surcharge." **People v Boatman, 940, 4th Dept 10-4-13**

Case Sent Back to Suppression Court for Hearing to Determine Admissibility of Statements

The Fourth Department sent the case back to the suppression court for a hearing to determine the admissibility of statements that had not been included in the initial 710.30 notice provided in connection with a prior indictment that had been dismissed. The statements were included in the 710.30 notice provided in connection with the superseding indictment. The Fourth Department determined the defendant was entitled to a hearing on the admissibility of the statements:

> …[W]e conclude that the court properly refused to preclude the additional statements included in the CPL 710.30 notice served by the People after the superseding indictment was filed … . "Those [statements] were not referenced in the CPL 710.30 notice that was served in connection with the original indictment, but the record establishes that the People filed the superseding indictment out of necessity after the court dismissed . . . the original indictment" … . We agree with defendant, however, that the court erred in determining the admissibility of the additional statements without reopening the Huntley hearing and affording defendant a further opportunity to contest their admissibility. The court concluded that the statements were spontaneously made and therefore not subject to suppression. At the time of the Huntley hearing conducted in conjunction with the initial indictment, however, the only issue before the court with respect to the additional statements was whether they should be precluded on the ground that they had not been included in the first CPL 710.30 notice. Consequently, inasmuch as the voluntariness of the additional statements was not at issue at that time, defendant had no reason or opportunity to explore the issues of spontaneity or the effect of the previously-given Miranda warnings, or to raise any other issues regarding the admissibility of those statements. Thus, "the hearing must be reopened" to afford him that opportunity… .**People v Roberts, 945, 4th Dept 10-4-13**

Suppression Motion Should Have Been Granted--- Defendant Arrested Before Police Had Probable Cause

The Fourth Department reversed the suppression court and granted defendant's motion to suppress and dismissed the indictment. The Fourth Department concluded that the evidence of which the police were aware at the time defendant was handcuffed and placed in the back of a police care did not amount to probable cause. A baggie containing drugs and a dagger were not found until after the illegal arrest:

> …[T]he police were justified in approaching the vehicle outside the bar because they had a "founded suspicion that criminal activity [was] afoot," rendering the police encounter lawful at its inception … . We further conclude that the police were justified in pursuing the vehicle inasmuch as "defendant's flight in response to an approach by the police, combined with other specific circumstances indicating that [he] may be engaged in criminal activity, [gave] rise to reasonable suspicion, the necessary predicate for police pursuit" … . Such reasonable suspicion also gave the police the authority to stop the vehicle … .
>
> …[W]e conclude that an arrest occurred here when defendant was handcuffed and placed in the back of a police car. Under such

circumstances, “a reasonable man innocent of any crime, would have thought” that he was under arrest … . “[V]arious factors, when combined with the street exchange of a ‘telltale sign’ of narcotics, may give rise to probable cause that a narcotics offense has occurred. Those factors relevant to assessing probable cause include the exchange of currency; whether the particular community has a high incidence of drug trafficking; the police officer’s experience and training in drug investigations; and any ‘additional evidence of furtive or evasive behavior on the part of the participants’ ” … . Here, the police observed neither a “ ‘telltale sign’ ” of narcotics, such as a glassine baggie, nor the exchange of currency … . Thus, despite the observations of the police outside the bar, their experience in drug investigations, and defendant’s flight, we conclude that the police did not have probable cause to arrest defendant before the dagger and first baggie were observed. **People v Lee, 1005, 4th Dept 10-4-13**

Indictment Should Not Have Been Dismissed Based on Prosecutorial Misconduct

In determining the trial court erred in dismissing the indictment based upon the prosecutorial misconduct, the Fourth Department explained:

> “ ‘[D]ismissal of an indictment under CPL 210.35 (5) must meet a high test and is limited to instances of prosecutorial misconduct, fraudulent conduct or errors which potentially prejudice the ultimate decision reached by the [g]rand [j]ury’ ” … . As the Court of Appeals has stated, “not every improper comment, elicitation of inadmissible testimony, impermissible question or mere mistake renders an indictment defective. Typically, the submission of some inadmissible evidence will be deemed fatal only when the remaining evidence is insufficient to sustain the indictment” … .
>
> Here, the prosecutor was required to establish that the four-year-old victim could provide unsworn testimony, but failed to do so… . The prosecutor also violated the unsworn witness rule during an attempt to persuade the child to testify about the incident … . Nevertheless, we conclude that the prosecutor did not thereby engage in conduct that was fraudulent in nature, nor was the prosecutor’s conduct so egregious as to impair the integrity of the grand jury proceedings … . We further conclude that the remaining evidence is legally sufficient to sustain the indictment. **People v Elioff, 1002, 4th Dept 10-4-13**

No Element of Intent in Constructive Possession of Contraband

The First Department determined there was no “intent” element to the constructive possession of contraband. The marijuana and stun gun at issue were in an apartment defendant shared with his aunt and nephew. The defendant argued that, even if he was fully aware the items were in the apartment, the People were required to prove that he intended to exercise dominion and control over them. The court wrote:

> In defendant's view, even if he was fully aware that there was contraband in the apartment he shared with his aunt and nephew, and even if he had unfettered control over the areas where the contraband was located, he was not guilty of possessing it since he merely tolerated his drug-dealing nephew's use of the apartment as a repository for the contraband and had nothing else to do with it. We disagree.
>
> There is no element of intent in constructive possession. A long line of authority makes clear that knowing constructive possession of tangible property is established where the People prove knowledge that the property is present and "a sufficient level of control over the area in which the contraband [was] found" … **People v Rodriguez, 2013 NY Slip Op 06495, 1st Dept 10-8-13**

Denial of For Cause Juror Challenge Required Reversal

The First Department reversed defendant’s conviction because the trial court erroneously denied a “for cause” juror challenge:

> The court erred in denying defendant's challenge for cause to a prospective juror who stated his belief and concern that he recognized defendant from his neighborhood, along with his fear that he would "run into" defendant or his friends. After being apprised of defendant's address, the panelist expressed an increased concern, resulting from the fact that he lived near that address. The panelist also expressed a "feeling of defendant's guilt," because he believed the neighborhood was "infected with drugs and drug dealers," After further inquiry regarding whether the panelist could follow the law and remain impartial, he ultimately stated, "I'll try. . . . I can't promise you anything. . . ." Viewing his statements in context and as a whole, they did not amount to an unequivocal assurance of impartiality… . **People v Tavarez, 2013 NY Slip Op 06515, 1st Dept 10-8-13**

Elements of Several Computer Crimes Described

In a full-fledged opinion by Justice Saxe, the First Department affirmed defendant's convictions for computer trespass, computer tampering, unlawful duplication of computer related material, and criminal possession of computer related material. Defendant was on disability leave from his employer Time Warner when he used/installed software to gain access to passwords and log-in information. The First Department took the opportunity to discuss the proof requirements for the elements of these offenses, some of which have little or no appellate authority. With respect to the "without authorization" and "computer material" elements of computer trespass, the court wrote:

> The term "without authorization" is defined as "access of a computer service by a person without permission . . . or after actual notice to such person, that such access was without permission" (Penal Law § 156.00[8]). While there is apparently no appellate authority on this point, the question of how to prove that use of a computer was not authorized was addressed in People v Klapper (28 Misc 3d 225 [Crim Ct, NY County 2010]), which considered a charge of unauthorized use of a computer (Penal Law § 156.05). The Klapper court held that no allegations supported the claim that the defendant's access was unauthorized, because for access to be without authorization, the defendant must have had knowledge or notice that access was prohibited or "circumvented some security device or measure installed by the user" (28 Misc 3d at 230). Of course, here, evidence fully supports the finding that defendant gained access to Time Warner's computers when he was unauthorized to do so. There is proof that Time Warner announced in its employee handbook that employees on disability leave were prohibited from entering the building, and the company deactivated those employees' access cards; this establishes that defendant had actual notice that he lacked authorization to enter the building and to use the company's computers. * * *
>
> As to whether the information defendant gained access to constituted "computer material" for purposes of Penal Law § 156.10, the statutory definition of the term includes "any computer data or computer program" that "is not and is not intended to be available to anyone other than the person . . . rightfully in possession thereof . . . and which accords or may accord such rightful possessors an advantage over competitors or other persons who do not have knowledge or the benefit thereof" (Penal Law § 156.00[5]). With the use of user log-in information and passwords obtained through his installation of the keystroke-logging program Winvestigator, defendant was able to access information not intended to be available to anyone but the rightful user, namely, Time Warner and its authorized employees. Specifically, he gained access to … confidential information about customers' accounts, including address, phone number, subscription, service call records, and billing and payment information, as well as a list of any problems customers reported or services they requested. Customer information … is the sort of information that businesses have an interest in protecting and keeping away from competitors …. Accordingly, it qualifies as computer data that is not intended to be available to anyone other than the rightful possessor and that gives (or may give) the rightful possessor an advantage over competitors. **People v Puesan, 2013 NY Slip Op 06530, 1st Dept 10-8-13**

Imposition of Enhanced Sentence for Defendant's Tardiness Disallowed

The Second Department determined Supreme Court should not have imposed an enhanced sentence on the ground defendant was late appearing for his sentencing:

> The transcript of the plea proceeding does not indicate that the defendant was given any instructions as to what time he was to appear for sentencing; rather, he was told that he must "com[e] to court on the sentence date." Under these circumstances, the imposition of an enhanced sentence, without affording the defendant an opportunity to withdraw his plea of guilty, was error… . **People v Blades, 2013 NY Slip Op 06584, 2nd Dept 10-9-13**

Defendant's 440.46 Motion for Resentencing Should Not Have Been Denied

In finding defendant's motion for resentencing pursuant to CPL 440.46 should have been granted, the Second Department explained the relevant criteria:

> Although resentencing is not mandatory, there is a statutory presumption in favor of resentencing (see L 2004, ch 738, § 23; CPL 440.46[3]…). Under the circumstances of this case, the factors relied upon by the Supreme Court in denying the motion--the defendant's criminal history and parole violations--are insufficient to overcome the statutory presumption. The instant offense and many of the defendant's prior offenses consisted of low-level drug crimes, and none of the defendant's recent convictions involved violence or weapons …. The defendant had no

> disciplinary infractions in prison, and had several positive accomplishments … . While the defendant's parole violations were a relevant consideration …, they were only one factor to consider, and did not mandate denial of the defendant's motion …. Under all of the circumstances presented here, "the presumption that the defendant is entitled to benefit from the reforms enacted by the Legislature based upon its judgment that the prior sentencing scheme for drug offenses like that committed by the defendant was excessively harsh, has not been rebutted" … . **People v Green, 2013 NY Slip Op 06588, 2nd Dept 10-9-13**

(Harmless) Error for Prosecutor to Ask If Other Witnesses' Testimony Was Untrue and to Ask About Defendant's Silence Upon Apprehension

The Second Department noted that it was error for the prosecutor to ask defendant on cross-examination whether testimony which contradicted defendant's was untrue, and to ask about his silence after he was apprehended. The errors were deemed harmless, however:

> The defendant correctly contends that the prosecutor improperly asked him on cross-examination whether a prosecution witness's testimony was "not true" because it contradicted the defendant's recollection of events… . We also agree with the defendant that the prosecutor improperly cross-examined him about his silence when he was apprehended by the police …. However, under the facts of this case, the errors were harmless and did not deprive the defendant of a fair trial … . Indeed, with respect to the questions concerning the defendant's silence after being apprehended, the trial court alleviated any prejudice by sustaining defense counsel's objections to the two offending questions, striking the second question and answer from the record, and directing the jury to disregard the second question and answer. **People v Cosme, 2013 NY Slip Op 07057, 2nd Dept 10-30-13**

Judge's Failure to Comply with CPL Re: Response to Jury Note Required Reversal

The Second Department held that the trial court's failure to comply with Criminal Procedure Law 310.10 with respect to responding to a note from the jury concerning accomplice liability required reversal (despite the absence of an objection):

> A new trial is required due to the trial court's failure to meaningfully comply with CPL 310.10. During deliberations, the jury sent four notes to the trial court. The record reflects that, on the fourth occasion, the court did not disclose the contents of the note to the prosecutor and defense counsel until serially reading, and immediately responding to, the questions contained therein in the presence of the jury. All three of the questions in this note concerned the subject of accomplice liability.
>
> The jury's requests for further explanation of the meaning of accomplice liability within the context of this case required a "substantive response", rather than a merely "ministerial" one … . As such, the trial court's failure to afford defense counsel "the opportunity to provide suggestions" … regarding the court's responses to the jury's questions constituted "a mode of proceedings error . . . requiring reversal" …, despite defense counsel's failure to object to the trial court's handling of the jury's fourth note … . **People v Gadson, 2013 NY Slip Op 07059, 2nd Dept 10-30-13**

Admission of Cell-Phone-Location Data Did Not Require Frye Hearing/Prior Crime Evidence Properly Admitted to Prove Defendant's Identity as Perpetrator of Charged Crime

In a full-fledged opinion by Justice Mastro, the Second Department affirmed the defendant's murder conviction. One piece of evidence against the defendant was location-data based on the use of defendant's cell phone. The Second Department determined there was no need for a Frye hearing before expert testimony about cell-phone location was presented because no novel scientific theory was involved. The Second Department also determined prior crimes demonstrating a similar unique pattern to that of the charged offense were admissible to prove identity. With respect to some of the prior crime evidence, which did not sufficiently match the pattern of the charged crime to be admissible on the issue of identity, the erroneous admission of that evidence was deemed harmless. In discussing the prior-crime evidence, the court wrote:

> In this case, the evidence of other crimes was offered to establish the defendant's identity as [the victim's] killer. Such evidence may be admitted if, as a threshold matter, the defendant's identity is in issue and is not "conclusively established" by other evidence …, and it is demonstrated by clear and convincing evidence that the defendant is the same person who committed the other crimes …. Here, it cannot be said that the defendant's identity as the killer was conclusively established so as to

warrant the preclusion of other crimes evidence to prove identity. Indeed, while the evidence that the defendant was the person who killed [the victim] was compelling, it was also entirely circumstantial. Moreover, the defendant vigorously contested the identification issue and presented as a defense the assertion that his employer… had been the actual killer. Thus, the identity of the murderer was a disputed issue in the case, and any admissible evidence tending to establish identification was relevant… . **People v Littlejohn, 2013 NY Slip Op 07063, 2nd Dept 10-30-13**

Defense Counsel's Statement Defendant "Most Likely" Would Not Be Deported Based on a Guilty Plea Did Not Amount to Ineffective Assistance

The Third Department determined that defense counsel's statement that the defendant "most likely" would not be deported based on his guilty plea to a misdemeanor did not constitute ineffective assistance. Defendant had subsequently been detained by immigration officials for deportation:

> …[D]efendant was required to establish both 'that counsel's performance was deficient' and 'that the deficient performance prejudiced the defense'" … . Here, the record indeed makes clear that defendant was concerned about the possibility of being deported. The record does not, however, establish that defendant was given erroneous advice regarding the potential immigration consequences associated with his guilty plea. **People v Obeya, 105313, 3rd Dept 10-31-13**

Upward Departure in SORA Proceeding Affirmed

The Third Department affirmed County Court's upward adjustment of defendant's sex offender status from a presumptive level I to a level III. Defendant had pled guilty to a course of sexual conduct with a young girl entrusted to his care spanning five years:

> "An upward departure from a presumptive risk classification is justified when an aggravating factor exists that is not otherwise adequately taken into account by the risk assessment guidelines and the court finds that such factor is supported by clear and convincing evidence" … . The circumstances underlying these charges as well as defendant's past misconduct may be considered within the context of this proceeding … . Here, additional factors established by the record, not adequately taken into account by the guidelines, included defendant's disregard and abuse of other children even younger than the victim who were also entrusted to his care, his mental instabilities, and the repeated and lengthy nature of his conduct toward the victim. Accordingly, we find that the record sufficiently supports County Court's upward departure from the presumptive risk level… . **People v Muirhead, 511847, 3rd Dept 10-31-13**

Waiver of Appeal Not Effective

In finding the defendant did not effectively waive his right to appeal, the Second Department explained:

> …[T]he record does not demonstrate that the defendant knowingly, voluntarily, and intelligently waived his right to appeal … . The defendant's purported waiver of the right to appeal is unenforceable, as the record does not indicate that he had " a full appreciation of the consequences'" of such waiver … . While the defendant signed a written waiver, a written waiver "is not a complete substitute for an on-the-record explanation of the nature of the right to appeal, and some acknowledgment that the defendant is voluntarily giving up that right" … . Accordingly, in the absence of a knowing, voluntary, and intelligent waiver of the right to appeal, the defendant retained his right to challenge the denial of that branch of his omnibus motion which was to suppress identification testimony… . **People v Crawford, 2013 NY Slip Op 06705, 2nd Dept 10-16-13**

Effect of Witness' Invocation of Fifth Amendment Privilege on Fairness Explained

The Second Department explained when a witness' asserting the privilege against self-incrimination constitutes reversible error and noted that the introduction of a photograph of the murder victim when he was alive was (harmless) error:

> "[A] witness's invocation of the Fifth Amendment privilege may amount to reversible error in two instances: one, when the prosecution attempts to build its case on inferences drawn from the witness's assertion of the privilege, and two, when the inferences unfairly prejudice defendant by adding critical weight' to the prosecution's case in a form not subject to cross-examination" … . "Absent a conscious and flagrant attempt by the prosecutor to build a case out of the inferences arising from the use of the testimonial privilege or without some indication that the witness's refusal to testify adds critical weight to the People's case in a form not subject to cross-examination, reversal is not warranted" … . Under the circumstances presented here, invocation of the Fifth Amendment privilege

against self-incrimination by a prosecution witness did not add critical weight to the prosecution's case, and the defendant was not deprived of his right to a fair trial by that testimony… . **People v Berry, 2013 NY Slip Op 06872, 2nd Dept 10-23-13**

Partial Closure of Courtroom During Testimony of Undercover Police Okay

The Second Department determined partial closure of the courtroom during the testimony of undercover police detectives was proper:

> …[T]he court providently adopted a reasonable alternative to full closure of the courtroom, excluding the general public and allowing the defendant's sister and the defendant's friend to be present during the testimony of the two undercover detectives, and placing a blackboard in front of the detectives so as to shield their identities from the sister and the friend. The two undercover detectives testified at a Hinton hearing … that they had conducted a long-term undercover operation in the particular housing project where the defendant had been arrested, and that there were unapprehended or "lost" subjects from that investigation. Further, they both testified that they had been threatened by subjects in the past and their safety would be jeopardized if their identities were revealed, that they both planned to conduct future narcotics operations in the area and that one detective planned to return to the particular housing project, that they currently had pending cases in the courthouse in which they were testifying, and that they took special precautions when testifying in court so as to protect their identities. Contrary to the defendant's contention, this testimony exceeded mere "unparticularized impressions of the vicissitudes of undercover narcotics work in general" and included particularized references to their own work which established a specific link between their safety concerns and open-court testimony in this case … . **People v Tate, 2013 NY Slip Op 06882, 2nd Dept 10-23-13**

Loss of Teeth is "Serious Injury" Re: Assault Second

The First Department determined the loss of teeth (in an assault) was a "serious injury" within the meaning of Penal Law 10.00 (10) because the loss of teeth constituted a "serious and protracted disfigurement" notwithstanding replacement by a prostheses:

> The element of serious physical injury (Penal Law § 10.00[10]) was established, because the victim's permanent loss of four front teeth constituted a protracted impairment of her health or protracted loss or impairment of the function of a bodily organ … . Since the teeth are lost, the victim can never eat with them, notwithstanding that she has been fitted with a prosthetic device; accordingly, her loss is not just protracted, but permanent. While the fact that damage to an organ has been successfully repaired may affect whether the injury qualifies as serious …, this does not apply when the organ is permanently lost, irrespective of whether it is replaced by a prosthesis.
>
> Furthermore, the victim's loss of four front teeth also constituted a "serious and protracted disfigurement," since "a reasonable observer would find her altered appearance distressing or objectionable" … . The fact that the victim received a removable prosthetic device did not ameliorate the seriousness of her injuries, since whenever she removes the device, the disfigurement will be readily apparent. **People v Everett, 2013 NY Slip Op 06954, 3rd Dept 10-24-13**

People Could Not Appeal Judge's Vacation of Defendant's Conviction and Sentencing as a Youthful Offender---No Statute Allows Such an Appeal

In dismissing the People's appeal, the Second Department explained that there was no statutory right for an appeal of the judge's vacating defendant's conviction and sentencing defendant as a youthful offender. The only vehicle for the People was an article 78 prohibition proceeding"

> The Criminal Procedure Law expressly enumerates and describes the orders appealable by the People to the Appellate Division in a criminal case (see CPL 450.20…), and "[n]o appeal lies from a determination made in a criminal proceeding unless specifically provided for by statute" … . As no statute

> authorizes an appeal by the People to the Appellate Division from an order, in effect, vacating a conviction and adjudicating a defendant a youthful offender (see CPL 450.20), the People's appeal must be dismissed …. The proper vehicle for challenging the Supreme Court's determination is a CPLR article 78 proceeding in the nature of prohibition… . **People v Tony C, 2013 NY Slip Op 07055, 2nd Dept 10-30-13**

"Anders" Brief Rejected

In rejecting an "Anders" brief, the Second Department noted:

> The brief submitted by the appellant's counsel pursuant to Anders v California (386 US 738) was deficient. The body of the brief---which was only 1½ pages in length---did not contain a statement of facts, and did not contain any case citations. The brief failed to analyze potential appellate issues or highlight facts in the record that might arguably support the appeal … . Since the brief does not demonstrate that assigned counsel acted "as an active advocate on behalf of his . . . client" … or that he diligently examined the record, we must assign new counsel to represent the appellant… . **People v McNair, 2013 NY Slip Op 06389, 2nd Dept 10-2-13**

Canadian Attorney Practicing in New York Properly Convicted of Unlicensed Practice of Law

The First Department affirmed the conviction of a Canadian attorney (not admitted in New York) whose New York law firm, which employed members of the New York bar, represented clients in immigration matters. The complainants were former clients who testified they retained the defendant's law firm based upon their belief defendant was licensed to practice in New York. The complainants testified they did not receive the services they paid for and were not refunded their money. The defendant was charged with grand larceny, scheme to defraud and unlicensed practice of law. The First Department determined there was sufficient evidence to support the convictions even though there was no evidence defendant explicitly represented she was licensed to practice law in New York. Several unique issues were discussed including: the Attorney General's (AG's) loss of documentary evidence (advertisements and retainer agreements) so the appellate court was unable to review them; the Attorney General's jurisdiction over the criminal prosecution under Executive Law 63; the power of the Division of State Police to request that the Attorney General prosecute the case; the law of the case with respect to the First Department's reversal of defendant's conviction after her first trial and its refusal to dismiss the indictment; and the trial court's refusal to substitute counsel for the defendant and giving defendant the choice to proceed pro se (which she did). In discussing the sufficiency of the evidence, the First Department wrote:

> Viewing the evidence in the light most favorable to the AG, as we must …, we find that the evidence was sufficient to convict defendant. It was not unreasonable for the jury to have concluded that by promoting herself in an advertisement as being a lawyer specializing in immigration, and having an office in New York, defendant intended to signal that she was licensed to practice in New York. That some of the lawyers working in the office were admitted in New York is of little moment, since defendant traded almost exclusively on her own reputation and expertise in seeking to attract clientele. Further, the fact that defendant's advertisements made clear that she was admitted to practice in Canada did not preclude the possibility that a client would reasonably believe that she was also admitted in New York, but found it unnecessary to publicize that fact based on her location in Manhattan.
>
> It was also not irrational for the jury to conclude that defendant had an economic motive for concealing her lack of a New York license, despite the fact that such a license was not necessary to process her clients' immigration applications. Aside from the cachet that

prospective clients would have attributed to having a lawyer who was a member of the New York bar, the jury could have concluded that CPI's clients valued the fact that the attorney they retained was subject to the jurisdiction of local disciplinary authorities if they were unsatisfied with defendant's work (as many of them were). Indeed, it is clear that CPI's clients placed a large premium on defendant's bar status, given that each of them testified that they would not have retained the firm had they known that defendant was not admitted to practice in New York. **People v Codina, 2013 NY Slip Op 06291, 1st Dept 10-1-13**

Failure to Move to Dismiss Indictment on Speedy Trial Grounds Constituted Ineffective Assistance of Counsel---Inexcusable Post-Indictment Delay Required Dismissal

The Third Department determined defense counsel's failure to move to dismiss the indictment on speedy trial grounds constituted ineffective assistance of counsel, requiring that defendant's motion to withdraw his guilty plea be granted, and the postindictment delay, for which the People had no adequate excuse, required that the indictment be dismissed:

> A Washington County grand jury handed up a four-count sealed indictment in October 2011 charging defendant with criminal sale and possession of controlled substances occurring in September and November 2010. An arrest warrant was issued and provided to the State Police, who for well over six months were reportedly unable to locate defendant, who had relocated, until he was arrested during a traffic stop in Chautauqua County, where he had been residing. He was arraigned on the indictment on June 14, 2012. * * *
>
> …[D]efendant's ineffectiveness of counsel claim was preserved by his motion to withdraw his plea and adequately alleges that it impacted the voluntariness of his plea and appeal waiver, so as to survive both … . Thus, we address defendant's speedy trial claim in the context of ascertaining whether he was deprived of meaningful representation, mindful that "[a] single error of failing to raise a meritorious speedy trial claim [may be] sufficiently egregious to amount to ineffective assistance of counsel" … . * * *
>
> The People's fleeting description of the efforts made to locate defendant fell far short of "all reasonable efforts to enforce judicially issued warrants" … required to satisfy the "due diligence" standard (CPL 30.30 [4] [c] [i]). As such, the People failed to meet their burden of establishing the statutory exclusion for this postindictment prereadiness delay … . Accordingly, all of this unready time would be chargeable to the People … . **People v Devino, 105441, 3rd Dept 10-17-13**

Resentencing After Original Sentence Expired Violates Double Jeopardy Clause

The Fourth Department explained that a resentencing which takes place after the original sentence has been completed violates the double jeopardy clause. **People v Alvarado, 961, 4th Dept 9-27-13**

Invocation of Right to Counsel When Not in Custody Can Be Withdrawn Without Attorney Present

The Third Department determined defendant's invocation of his right to counsel when he was not in custody (on September 4, 2004) could be withdrawn without an attorney present and did not, therefore, require the suppression of subsequent statements made three weeks later:

> The right to counsel indelibly attaches in two limited situations – where formal judicial proceedings against a defendant have commenced and where an uncharged defendant, who is in custody, has retained or requested an attorney … . However, "[a] suspect who is not in custody when he or she invokes the right to counsel can withdraw the request and be questioned by the police" … . As defendant was not in custody at the time he invoked his right to counsel on September 4, 2009, he was free to withdraw that request or waive such right and speak with the police without having an attorney present – particularly in view of the approximately three weeks that elapsed between his initial request for an attorney and his subsequent statements to law enforcement … . **People v Cade, 103443, 3rd Dept 10-24-13**

Failure to Make Motion for Trial Order of Dismissal Not Ineffective Assistance

In affirming defendant's conviction, the Fourth Department determined defense counsel's failure to make a motion for a trial order of dismissal did not amount to ineffective assistance of counsel:

> …"[D]efense counsel's failure to make a specific motion for a trial order of dismissal at the close of the People's case [does] not constitute ineffective assistance of counsel, inasmuch as any such motion would have had no chance of success" … . Indeed, we note that defendant does not contend on appeal that the evidence at trial is legally insufficient to support the conviction. **People v Hicks, 1008, 4th Dept 10-4-13**

Writ of Prohibition Barring Retrial Granted---Mistrial Granted Without Consent of Defendant Was Not Justified

The First Department granted a writ of prohibition barring a retrial of the defendant because the judge ordered a mistrial without the consent of the defendant based upon a comment made by defense counsel in summation. The First Department determined the comment was not sufficiently prejudicial to justify the mistrial:

> Jeopardy attaches once a jury has been selected and sworn … . When a mistrial is declared without the consent or over the objection of a criminal defendant, the prohibition against double jeopardy contained in the Fifth Amendment of the United States Constitution and in section 6 of article I of the New York State Constitution bars retrial for the same offense or offenses unless there is a manifest necessity for the mistrial or the ends of public justice would otherwise be defeated … . Here, as the People concede, counsel's summation comment was not overly prejudicial and provided no basis for a mistrial on "manifest necessity" or "ends of public justice" grounds.**Matter of Smith v Williams, 2013 NY Slip Op 06329, 1st Dept 10-1-13**

Ineffective Assistance of Counsel Mandated New Trial---Difference Between Federal and State Ineffectiveness Criteria Explained

In determining the defendant was entitled to a new trial because of the ineffectiveness of his trial counsel, the Second Department explained the difference between the federal and state criteria for ineffective assistance. Supreme Court had vacated defendant's murder conviction (ineffective assistance) but allowed the conviction for criminal possession of a weapon to stand. The Second Department explained that, even though there was evidence to support the criminal possession of a weapon charge, the state ineffective assistance criteria required a new trial on all counts:

> A defendant is guaranteed the effective assistance of counsel under both the federal and state constitutions (see US Const, amend VI; NY Const, art I, § 6…). The state standard is considered "somewhat more favorable to defendants," focusing on "the fairness of the process as a whole rather than its particular impact on the outcome of the case" …. "[T]he constitutional requirements [for the effective assistance of counsel] are met when the defense attorney provides meaningful representation" …. While prejudice to the defendant is a necessary factor under the federal standard, embodied in a "but for" test …, under the state standard, "a defendant's showing of prejudice is a significant but not indispensable element in assessing meaningful representation" …. "To meet the New York standard, a defendant need not demonstrate that the outcome of the case would have been different but for counsel's errors" … . Generally, harmless error analysis is inapplicable to an ineffective assistance of counsel claim arising from counsel's performance at trial … .
>
> Here, the litany of failures by defense counsel documented by the Supreme Court established that the defendant was denied "meaningful representation" by his trial attorney. Notwithstanding the fact that there was strong evidence that the defendant possessed a loaded firearm during the incident in question, the New York State constitutional standard for the effective assistance of counsel "is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case" … .**People v Canales, 2013 NY Slip Op 06376, 2nd Dept 10-2-13**

Trial Judge Should Have Allowed Slightly Late Peremptory Challenge---Conviction Reversed

The Fourth Department reversed defendant's conviction based on the trial court's refusal to allow the defense a peremptory challenge. Defense counsel had mistakenly crossed out the juror's name and quickly let the court know about the mistake:

> After several prospective jurors had been excused for cause, the court directed the attorneys to exercise their peremptory challenges to the first group of prospective jurors in the panel. The prosecutor exercised several challenges, followed by defense counsel. As the court began to indicate the number of challenges that remained for each side, defense counsel immediately asked if he could exercise a peremptory challenge to the prospective juror in question on appeal. When the court said no, defense counsel indicated that he had "crossed [the prospective juror's name] out by mistake." The court reiterated that it would not permit the challenge, indicating that it had warned the attorneys about adhering to the court's procedures.
>
> "Under these circumstances, 'we can detect no discernable interference or undue delay caused by [defense counsel's] momentary oversight . . . that would justify [the court's] hasty refusal to entertain [his] challenge,' " and we thus conclude that the court's refusal to permit the challenge was an abuse of discretion … . Inasmuch as "the right to exercise a peremptory challenge against a specific prospective juror is a 'substantial right' . . . , reversal is mandated" … . **People v Rosario-Boria, 1007, 4th Dept 10-4-13**

Curtailing of Defense Counsel's Summation Argument Re: Lack of Motive Was (Harmless) Error

Although the Second Department found the error harmless, the court noted that the trial court improperly curtailed defense counsel's summation argument concerning the lack of a motive. **People v Papas, 2013 NY Slip Op 07065, 2nd Dept 10-30-13**

Cross-Examination About Omission from Witness' Statement to Police Should Have Been Allowed

The Second Department concluded the trial court should have allowed the cross-examination of a witness about a physical characteristic of the defendant the witness had not mentioned to the police:

> "[A] witness may not be impeached simply by showing that he [or she] omitted to state a fact, or to state it more fully at a prior time" … . However, impeachment by omission is permissible when the witness omits a critical fact … . "An omission of fact at a prior time is insufficient for impeachment purposes unless it is shown that at th[at] prior time the witness' attention was called to the matter and that he [or she] was specifically asked about the facts embraced in the question propounded at trial'" … . " [C]urtailment [of cross-examination] will be judged improper when it keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony'" … . Here, given the eyewitness's testimony which demonstrated that the defendant's "squinting," "partly closed" left eye was a significant factor in his identifying the defendant as the assailant, the trial court erred in precluding the defendant from cross-examining the eyewitness about his omission of this observation of the assailant's appearance when he described the assailant to the police… . **People v Greene, 2013 NY Slip Op 06589, 2nd Dept 10-9-13**

SORA Determination Made at Sentencing (Which Included Incarceration) Invalid

The Second Department reversed Supreme Court's SORA determination because the court failed to follow the procedure required for an incarcerated defendant. The SORA determination was made at sentencing:

> In this case, the Supreme Court sentenced the defendant to a nine-month term of incarceration without any probation supervision. The court conducted the risk assessment hearing and made its risk level determination immediately after sentencing, using a risk level assessment instrument prepared by the District Attorney's office. This violated SORA and deprived the defendant of his right to due process … . Pursuant to the SORA statutory scheme, a risk level determination should not have been made until 30 days before his release from custody (see Correction Law § 168-n[2]…). The court's determination should have been preceded by the Board's risk level recommendation, and the

> defendant should have been notified of the opportunity to submit to the Board any information that he believed was relevant for its review (see Correction Law § 168-n[2], [3]). Under the circumstances presented here, the fact that the defendant did not explicitly object to this procedure does not indicate that he knowingly and intelligently waived these statutory and due process rights or failed to preserve the issue for appellate review … . Moreover, while Correction Law § 168-l(8) provides that, notwithstanding the Board's failure to act, a court may still make a determination regarding a sex offender's risk level, "this must be read as applying only where the Board had the opportunity to make a recommendation in the first instance" … . Here, the Board had no such opportunity, since the risk level determination was erroneously made immediately after the defendant was sentenced. As a result, "the Supreme Court was without a statutorily-authorized basis for making a risk level determination"… . **People v Game, 2013 NY Slip Op 06670, 2nd Dept 10-16-13**

In SORA Proceeding, Offender Did Not Provide Sufficient Proof of Exceptional Response to Treatment

The Second Department noted that while an offender's response to treatment can be a mitigating factor supporting a downward departure in a SORA proceeding, there was insufficient evidence of an exceptional response to treatment in this case:

> A downward departure from a sex offender's presumptive risk level generally is only warranted where there exists a mitigating factor of a kind, or to a degree, that is not otherwise adequately taken into account by the Sex Offender Registration Act (hereinafter SORA) Guidelines … . A defendant seeking a downward departure has the initial burden of "(1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the Guidelines; and (2) establishing the facts in support of its existence by a preponderance of the evidence" … .
>
> Here, the defendant identified an appropriate mitigating factor that could provide a basis for a discretionary downward departure (see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 17 [2006]… .). In this regard, the SORA Guidelines recognize that "[a]n offender's response to treatment, if exceptional, can be the basis for a downward departure" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 17 [2006]…). However, the defendant failed to establish, by a preponderance of the evidence, the facts in support of its existence… . **People v Guzman, 2013 NY Slip Op 06671, 2nd Dept 10-16-13**

Robbery Conviction Against Weight of Evidence---Hand In Pocket Not Evidence of Threat to Use Force

In reversing the defendant's robbery conviction as against the weight of the evidence, the Second Department determined the fact that defendant's hand was in his pocket did not support the "threat to use immediate physical force" element of the offense:

> This Court has held that where an unarmed person "positions his hand in his pocket in a manner that is intended to convey to his victim the impression that he is holding a firearm," that qualifies as displaying what appears to be a gun … . Since the defendant here admitted to knowingly entering the warehouse with the intent to commit a crime therein, the acquittal of burglary in the second degree could only be based upon the People's failure to prove that the defendant displayed what appeared to be a firearm, or, in other words, upon the People's failure to prove that the defendant positioned his hand in his pocket in a manner intended to convey to the complainants the impression that he was holding a gun.
>
> The trial court's factual finding that the defendant did not display what appeared to be a firearm is supported by the record. The trial court, however, failed to give that finding the proper weight with respect to the crime of robbery in the third degree … . If the People failed to prove that the defendant displayed what appeared to be a firearm by holding his hand in his pocket, then there was no basis on which the trial court could conclude that the defendant's conduct of holding his hand in his pocket constituted a threat to use immediate physical force upon the complainants in order to overcome their resistance. Accordingly, the verdict of guilt with respect to robbery in the third degree was against the weight of the evidence, and we vacate that conviction and the sentence imposed thereon… . **People v Johnson, 2013 NY Slip Op 06709, 2nd Dept 10-16-13**

Sexual Offense Convictions Reversed as Against the Weight of the Evidence---Too Many Inconsistencies and Contradictions in Proof

The Second Department reversed defendant's convictions on sexual offenses as against the weight of the evidence:

> The testimony of the prosecution's witnesses failed to provide a credible foundation for the defendant's convictions due to numerous inconsistencies and contradictions. * * *
>
> …[T]he prosecution's witnesses testified that the defendant and the mother separated in 2002, and, at the time, the defendant had already moved out of the home where the abuse allegedly took place. Thus, many of the alleged incidents of abuse took place after the defendant had moved out of the home and no longer had a key to it. From 2003 to 2005, a restraining order that the mother obtained against the defendant was in effect, and the mother confirmed that, during one period of time in 2004, the defendant conducted all of his visits with the children outside of the home. The testimony of the prosecution's witnesses was generally inconsistent as to whether, during the other visits, the defendant stayed alone with the children in the mother's home, or whether the grandmother or the mother was always present. In any event, although the younger stepdaughter alleged that the defendant molested her twice per week between 2000 and 2004, the trial testimony clearly established that the defendant's access to the children was often limited after he moved out of the mother's home in 2002. **People v McMitchell, 2013 NY Slip Op 06713, 2nd Dept 10-16-13**

People Failed to Prove Seizure of Cocaine at Police Station Was Not the Fruit of the Illegal Arrest---Attenuation Not Demonstrated

The Third Department determined the People failed to prove that the cocaine seized from the defendant at the police station after his arrest was not the product of the earlier illegal arrest of the defendant (fruit of the poisonous tree). At the Dunaway hearing, the People presented no witnesses concerning the seizure at the police station. County Court's finding that the "attenuation" doctrine supported the legitimacy of the seizure at the station was therefore not supported by the record:

> Under well-established exclusionary rule principles, where police have engaged in unlawful activity – here, by arresting defendant without probable cause – evidence which is a result of the "exploitation of that illegality" is subject to suppression as the "fruit of the poisonous tree" unless one of the recognized exceptions to the exclusionary rule is applicable … . The exception at issue here, as specifically decided by County Court thereby preserving the issue for appeal (see CPL 470.05 [2]…), is attenuation, that is, whether the production of the cocaine evidence during defendant's illegal detention resulted from the exploitation of that illegality, directly or derivatively … . The focus of the attenuation exception is "on the presence or absence of 'free will' or voluntariness regarding a defendant's . . . acts which follow illegal police conduct; thus, the attenuation inquiry resolves whether the causal connection between the police misconduct and the later discovery of the challenged evidence is so far removed as to dissipate the taint" … . "That determination requires consideration of the temporal proximity of the arrest and [acquisition of evidence] . . ., the presence of intervening circumstances and, particularly, the purpose and flagrancy of the official misconduct" … .
>
> Given the complete lack of testimony at the Dunaway hearing regarding the post-illegal-arrest incident at the police station – including any intervening circumstances – in which cocaine evidence was reportedly seized from defendant's person, we find that the People failed to satisfy their burden of proving the applicability of the attenuation exception. That is, the People did not prove that the evidence was not acquired by exploiting the illegal arrest but, rather, came about by means "sufficiently distinguishable from [the illegality] to be purged of illegality" … . Thus, County Court's finding of attenuation is not supported by the hearing record. **People v Small, 103485, 3rd Dept 10-17-13**

No Evidence Defendant Agreed to Adjournment—Indictment Dismissed on Speedy Trial Grounds

In reversing County Court and dismissing the indictment on speedy trial grounds, the Third Department noted there was no evidence the defense agreed to an adjournment during the period another criminal proceeding against the defendant was ongoing:

> There is no support in the record for the People's unsubstantiated claim that "it was agreed and understood" that defendant consented to an adjournment or waiver from March 27, 2009 until July 17, 2009. "Adjournments consented to by the defense must be clearly expressed to relieve the People of the responsibility for that portion of the delay" … . "While a defendant may waive rights under CPL 30.30, the record here contains no

evidence of any waiver, written or oral," and the Court of Appeals has made clear that "prosecutors would be well advised to obtain unambiguous written waivers in situations like these" … . As the People failed to meet their burden of proving that the disputed 112-day period was not chargeable to them …, the People did not establish that they were ready for trial within the statutory six-month period (see CPL 30.30 [1] [a]). Therefore, defendant was entitled to dismissal of the indictment pursuant to CPL 30.30. **People v Smith, 104091, 3rd Dept 10-17-13**

Plea Allocution Insufficient—Plea Vacated in Absence of Motion to Withdraw or Vacate

The Third Department determined defendant's guilty plea was invalid (based on the allocution) and vacated it in the absence of a motion to withdraw the plea or vacate the judgment of conviction:

> As the record before us does not indicate that defendant ever actually entered a guilty plea pursuant to the plea agreement, we reverse. While defense counsel indicated that it was defendant's "intent[]" to do so, after County Court had recited the terms of the plea agreement, which defendant indicated he had "heard," defendant never actually admitted his guilt in any manner and did not enter a valid plea. The plea allocution simply does not reflect that defendant "understood the nature of the charge against him . . . and voluntarily entered into such plea" .. . Further, while defendant "was not required to recite the elements of his crime or engage in a factual exposition," County Court did not pose any questions, read the count of the indictment, or explain the crime (or its elements) to which he was entering a plea, so as to "establish the elements of the crime" … ; nor did defendant provide "unequivocal . . . responses" or "indicate[] that he was entering the plea because he was, in fact, guilty" … .
>
> While defendant did not move to withdraw the plea (and we have no indication on this record that defendant moved to vacate the judgment of conviction) so as to preserve his challenge to the factual sufficiency of the plea allocution … , we find it appropriate to exercise our interest of justice jurisdiction and reverse given, in part, that defense counsel may have been dissuaded from making such a motion by County Court's advisement to defendant during the plea colloquy that if he violated the conditions of his release he "will not be permitted to withdraw [his] plea of guilty." Thus, we find that the plea was invalid. **People v Beniquez, 104692, 3rd Dept 10-17-13**

Failure to Set Forth Manner and Timing of Restitution Required Remittance

The Third Department determined the failure of County Court to set forth the manner and time of the payment of restitution required that the restitution order be vacated and the matter remitted to correct the omissions. **Peoplev Durham, 105027, 3rd Dept 10-17-13**

Leading Questions and Elicitation of Hearing in Grand Jury Proceedings Did Not Constitute Prosecutorial Misconduct

The Third Department reversed County Court and determined leading questions and elicitation of hearsay in the grand jury proceedings did not constitute prosecutorial misconduct:

> "Dismissal of an indictment pursuant to CPL 210.35 (5) is a drastic, exceptional remedy and should thus be limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the [g]rand [j]ury" … . Contrary to County Court's finding, the record as a whole does not reveal a "pervasive mishandling" of the manner in which this case was presented to the grand jury. To the extent that the prosecutor asked leading questions or elicited hearsay testimony from the various witnesses, we note that "not every improper comment, elicitation of inadmissible testimony, impermissible question or mere mistake renders an indictment defective. [Rather], the submission of some inadmissible evidence [typically] will be deemed fatal only when the remaining evidence is insufficient to sustain the indictment" … . Inasmuch as we are satisfied – based upon our review of the grand jury minutes – that there otherwise is legally sufficient (and admissible) evidence to sustain count 1 of the indictment, the isolated instances of hearsay testimony, which were accompanied by appropriate limiting instructions, do not warrant dismissal thereof … . We similarly are persuaded that the prosecutor's limited use of leading questions did not impair the integrity of the grand jury proceeding… . **People v Miller, 105721, 3rd Dept 10-17-13**

PISTOL PERMITS

Revocation of Pistol Permit (After Acquittal) Not Supported by Evidence

The Fourth Department, in an Article 78 proceeding initiated in the appellate court, annulled the revocation of petitioner's pistol permit. The permit was suspended temporarily when petitioner was charged with menacing but was revoked after an acquittal:

> We agree with petitioner that the determination is arbitrary and capricious, and constitutes an abuse of discretion inasmuch as the record from the hearing is devoid of any evidence upon which respondent could have based his determination … . We further agree with petitioner that his due process rights were violated inasmuch as the record from the hearing does not demonstrate that he was afforded the opportunity to review the alleged documentation upon which respondent based his determination … . We therefore annul the determination. We note, however, that our determination does not preclude the commencement of a new revocation proceeding… .**Matter of Curts v Randall, 890, 4th Dept 10-4-13**

FAMILY LAW

Maintenance Should Not Have Been Granted in Absence of Proof of Standard of Living and Need for Maintenance

The Second Department determined Supreme Court abused its discretion by awarding maintenance in the absence of evidence of the parties' standard of living and the plaintiff's need for maintenance:

> …[T]he Supreme Court's award of maintenance to the plaintiff was an improvident exercise of its discretion since the award was made in the absence of any evidence of the parties' standard of living during the marriage, and in the absence of evidence that the plaintiff, who is otherwise self-supporting, needs maintenance to sustain his pre-divorce standard of living. Additionally, the defendant's reasonable needs preclude an award of maintenance to the plaintiff. Under these circumstances, the plaintiff should not have been awarded maintenance… . **Lucere v Lucere, 2013 NY Slip Op 05801, 2nd Dept 9-11-13**

Grant of Custody to Maternal Grandparents Rather than Parent Reversed

In reversing Family Court's grant of custody to maternal grandparents, the Second Department wrote:

> "In a custody proceeding between a parent and a nonparent, the parent has the superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right due to surrender, abandonment, persisting neglect, unfitness, or other like extraordinary circumstances" … . "For a third-party nonparent to gain custody of a child, he or she must first prove that extraordinary circumstances exist such that a parent has relinquished his or her superior right to custody" … . "Where extraordinary circumstances are present, the court must then consider the best interests of the child in awarding custody" … . * * *
>
> We agree with the Family Court that the petitioners, the maternal grandparents of the subject children, satisfied their burden of demonstrating the existence of "extraordinary circumstances," necessitating a determination as to the best interests of the children … . However, considering the totality of the circumstances in this case .., we find that the Family Court's determination awarding … custody … to the maternal grandparents is not supported by a sound and substantial basis in the record. The mother's testimony indicated that, at the time of the hearing, she had abstained from drug use for more than 2½ years. The mother's testimony also indicated that there were no recent incidents of domestic violence between her and Tardo [the father of one of the children]. Indeed, the Family Court noted in its order that the mother and Tardo are now "clean and sober," three years having passed between their last instances of drug use and the date of the order, and that "there have been no reports of aggression." The Family Court placed undue emphasis on the forensic evaluation, which was completed almost two years prior to the court's determination. Additionally, while the Family Court did acknowledge the nature of James's wishes, we conclude that the court failed to adequately consider those preferences … . We further note that the attorney for the children supports the mother's position on appeal, at least insofar as advocating for the mother to have joint custody of both children. **Matter of Noonan v Noonan, 2013 NY slip Op 05824, 2nd Dept 9-11-13**

Child Should Not Have Been Removed from Foster Parents in Favor of Maternal Uncle

In reversing Family Court's determination the child should move to the home of her maternal uncle rather than remain with her foster parents for adoption, the Second Department wrote:

> Once parental rights have been terminated, there is no presumption favoring the child's biological family … . Moreover, while the law expresses a preference for keeping siblings together, the rule is not absolute and may be overcome where the best interests of each child lie in residing apart … . Here, as the children never shared a household, the Family Court erred in concluding that this consideration outweighed the benefit to Orianne of remaining in her foster home, where she has resided since infancy … . The record clearly reflects that Orianne has bonded with her foster family, and is healthy, happy, and well provided for … . Accordingly, the Family Court erred in determining that it was in Oriane's best interests to move to the home of her maternal uncle rather than remain with her foster parents for the purpose of adoption, which, the record indicates, is the foster parents' intent… . **Matter of Ender MZ-P…, 2013 NY slip Op 05829, 2nd Dept 9-11-13**

Disposition of Juvenile Delinquency Proceeding Reversed/Purpose Is Not to Punish

Over a dissent, the First Department reversed Family Court's juvenile delinquency disposition which was based on the findings that, had the juvenile been an adult, he would have been guilty of two counts of sexual abuse 2nd and two counts of forcible touching 3rd. The First Department eliminated the 12-month period of probation and granted an adjournment in contemplation of dismissal. The juvenile was 13 years old at the time of the incident. It was alleged the juvenile grabbed the 12-year-old complainant from behind by pulling on her backpack and, as she tried to get away, touched and squeezed her breasts and the right side of her buttocks. He then tried to kiss her, ignored her when she said she needed to go to class, and demanded a hug in order to let her go. The First Department noted that this was the juvenile's first contact with the justice system, that he and his mother had been cooperative throughout, and that he was a good student (among other factors). The court wrote:

> …[T]the totality of appellant's course of conduct, and his statements to the complaining witness, support the inference that he acted for the purpose of sexual gratification … . The court's findings that appellant committed an act, that, if committed by an adult, would constitute a crime, was, therefore, based on legally sufficient evidence and not against the weight of the evidence … .
>
> A juvenile delinquency adjudication, however, requires both a determination that the juvenile committed an act, that, if committed by an adult, would constitute a crime and a showing, by the preponderance of the evidence, that the juvenile needs supervision, treatment or confinement (Family Ct Act §§ 345.1, 350.3, 352.1). Although the seriousness of the juvenile's acts is an extremely important factor in determining an appropriate disposition …, it is not the only factor. The disposition is not supposed to punish a child as an adult, but provide effective intervention to "positively impact the lives of troubled young people while protecting the public" .. .
>
> While the trial court properly found that appellant committed a delinquent act, there was insufficient support for its decision that appellant needed supervision, treatment or confinement (Family Ct Act §§ 352.1, 350.3). In addition, 12 months probation was not the least restrictive available alternative that would have adequately served the needs of appellant and society (Family Ct Act § 352.2…).**Matter of Narvanda S, 2013 NY Slip Op 05855, 1st Dept 9-17-13**

Relationship of Prenuptial Agreement to Temporary Maintenance and Award of Attorneys Fees

The Second Department determined that temporary maintenance was not properly granted in light of the facts (where the prenuptial agreement did not expressly deal with the topic) and legal fees in excess of the limit in the prenuptial agreement were properly granted. The court explained the relevant analyses as follows:

> "As with all contracts, prenuptial agreements are construed in accord with the parties' intent, which is generally gleaned from what is expressed in their writing" …. "Where a prenuptial agreement is clear and unambiguous on its face, the intent of the parties is gleaned from the four corners of the writing as a whole with a practical interpretation of the language employed so that the parties' reasonable expectations are met" … .
>
> Contrary to the plaintiff's contention, the parties' prenuptial agreement did not expressly preclude an award of temporary maintenance pendente lite, nor did the defendant expressly waive such an award under the terms of the agreement… . On the record presented, including evidence of the defendant's expenses, the defendant's

reasonable needs were more than adequately met. Accordingly, under the circumstances of this case, the Supreme Court improvidently exercised its discretion in directing the plaintiff to pay temporary maintenance in the sum of $1,000 per month… . * * *

Supreme Court properly awarded the defendant interim counsel fees, notwithstanding a provision in the prenuptial agreement limiting, to the sum of $10,000, the plaintiff's obligation to pay such fees incurred by the defendant in any divorce action. Because of a strong public policy favoring the resolution of matrimonial matters on a level playing field …, the determination of whether to enforce an agreement waiving the right of either spouse to seek an award of an attorney's fee is to be made "on a case-by-case basis after weighing the competing public policy interests in light of all relevant facts and circumstances both at the time the agreement was entered and at the time it is to be enforced" … . Here, the parties are involved in extensive litigation concerning child custody, a matter not expressly addressed in their prenuptial agreement. Moreover, the plaintiff's net worth is more than $13 million and his monthly gross income exceeds $45,000, while the defendant has no income other than what she is receiving pursuant to the agreement.**Abramson v Gavares, 2013 NY slip Op 05861, 2nd Dept 9-18-13**

Motion to Suspend Child Support Properly Denied/Criteria Explained

In affirming Supreme Court's denial of plaintiff's motion to suspend child support, the Second Department explained the criteria for early suspension of the child support obligation:

Generally, parents have a statutory duty to continually support their children until they reach 21 years of age (see Family Ct Act § 413[1][a]…). " However, where the noncustodial parent establishes that his or her right of reasonable access to the child has been unjustifiably frustrated by the custodial parent, child support payments may be suspended'" … .

Here, contrary to the plaintiff's contention, the Supreme Court properly denied, without a hearing, that branch of his motion which was to suspend his obligation to pay child support. The plaintiff alleges continuing conduct on the part of the defendant which, if proven, would not "rise to the level of deliberate frustration' or active interference' with the noncustodial parent's visitation rights"… . **Jones v Jones, 2013 NY Slip Op 05879, 2nd Dept 9-18-13**

Determination of Paternity Not in Child's Best Interest/Mother Equitably Estopped from Seeking Paternity Determination

The Second Department determined a genetic marker test to determine appellant's paternity was not in the best interest of the child and the mother was equitably estopped form asserting appellant's paternity. The appellant had not been part of the 16-year-old child's life since the child was 18 months old and the mother had failed to appear in a paternity proceeding instituted when the child was 8 months old:

…[I]in appropriate circumstances, the doctrine of equitable estoppel may be asserted defensively by a purported biological father to prevent a child's mother from asserting biological paternity where a genetic marker test would not be in the best interests of the child … . Here, the Family Court improvidently rejected the appellant's equitable defense. An adverse inference may be taken against the mother for her failure to appear for the court-ordered genetic marker test in 1999, and her failure to pursue that proceeding … . Thereafter, the mother failed to commence a new proceeding for 13 years, during which time the subject child had no relationship with the appellant and lived with the mother, her current husband, and his half-siblings on the mother's side. Accordingly, a genetic marker test is not in the best interests of the subject child, on the ground that the mother is equitably estopped from asserting the appellant's biological paternity (see Family Ct Act § 532[a]…). **Matter of Karen G v Thomas G, 2013 NY slip Op 05901, 2nd Dept 9-18-13**

Criteria for Suspension of Judgment in Neglect Proceeding

In reversing Family Court, the Second Department explained the criteria for a suspension of judgment in a permanent neglect proceeding:

A dispositional order suspending judgment is a dispositional alternative, upon a finding of permanent neglect, that affords "a brief grace period designed to prepare the parent to be reunited with the child" … . In essence, an order suspending judgment provides the parent with a second chance, but it may be utilized only when the court determines that a second chance is in the child's best interests (see Family Ct Act §§ 631, 633…). Moreover, the maximum duration of a suspended judgment is one year, unless the court finds at the conclusion of that period that "exceptional circumstances" require an

extension of that period for one additional period of up to one year (Family Ct Act § 633[b]…). * * *

Family Court Act § 633© provides that an order suspending judgment "must set forth the . . . terms and conditions of the suspended judgment" (see also 22 NYCRR 205.50[b]) so that the Family Court may determine whether the parent has violated it … .**Matter of Jesse D…, 2013 NY slip Op 06001, 2nd Dept 9-25-13**

Neglect Finding Based on Children's Exposure to Bloody Domestic Violence Affirmed/Requirements for Admission of Police Reports Explained

In affirming Family Court's finding of neglect based upon the children's exposure to bloody violence involving the mother and her boyfriend, the Fourth Department noted that police reports should not have been admitted in evidence because they were not properly certified:

The mother correctly contends that Family Court erred in admitting police records in evidence inasmuch as the certification attached to those records failed to comply with Family Court Act § 1046 (a) (iv). That statute provides that where, as here, a certification is completed by a "responsible employee" rather than the head of an agency, the certification "shall be accompanied by a photocopy of a delegation of authority signed by both the head of the . . . agency and by such other employee" (emphasis added). The language of the statute is mandatory, and it is undisputed that "the requisite delegation of authority to [the employee] was lacking" … . We must therefore "find the admission of these records to have been in error if we are to give effect to the clear and unambiguous intention of the [l]egislature"… . **Matter of Kadyn J…, 929, 4th Dept 9-27-13**

Cognizable Counterclaim for Breach of Domestic Partnership Stated

In finding defendant had stated a legally cognizable counterclaim for breach of a domestic partnership agreement, the Fourth Department explained:

With respect to domestic partnership agreements, "New York courts have long accepted the concept that an express agreement between unmarried persons living together is as enforceable as though they were not living together . . . , provided only that illicit sexual relations were not 'part of the consideration of the contract' " … . Additionally, there is no statutory requirement that such a contract be in writing … . We conclude that here defendant sufficiently pleaded counterclaims for breach of a domestic partnership agreement and that the court therefore erred in dismissing the fourth and fifth counterclaims … . **Ramos v Hughes, 866, 4th Dept 9-27-13**

Doctrine of Equitable Estoppel Does Not Apply When Biological Mother Opposes Paternity Petition

In affirming Family Court's dismissal of a paternity petition, the Fourth Department explained that the doctrine of equitable estoppel, urged to bar the mother from denying petitioner is the father of the child, did not apply:

"[T]he Court of Appeals has recently reiterated that a nonbiological, nonadoptive parent does not have standing to seek visitation when a biological parent who is fit opposes it, and that equitable estoppel does not apply in such situations even where the nonparent has enjoyed a close relationship with the child and exercised some control over the child with the parent's consent" … . It is well settled "that parentage under New York law derives from biology or adoption" …, and that "Alison D., in conjunction with second-parent adoption, creates a bright-line rule that promotes certainty in [custody situations] otherwise fraught with the risk of 'disruptive . . . battles' . . . over parentage as a prelude to further potential combat over custody and visitation" … . As the Court of Appeals has stated, "any change in the meaning of 'parent' under our law should come by way of legislative enactment rather than judicial revamping of precedent" … . **Matter of White v Wilcox, 903, 4th Dept 9-27-13**

Proof Requirements Re: Whether An Account Is Entirely Marital Property Explained

The Fourth Department explained the proof requirements where the defendant claimed the entire amount in a deferred compensation account should not have been deemed marital property:

According to defendant, the court improperly presumed that all of the funds in that account accumulated during the marriage, and he therefore contends that we should remit the matter to Supreme Court to determine the "marital share" of that account as distinguished from his "separate property share." There is no merit to that contention. Pursuant to a statutory presumption, "all property, unless clearly separate, is deemed marital property," and the burden rests with the titled spouse to rebut that presumption … . Domestic Relations Law § 236

[B] [1] [c]; [d]). "The party seeking to rebut that presumption must adequately trace the source of the funds" …; otherwise, the court may properly treat the funds as marital property … . Here, it does not appear from the record that defendant offered any evidence establishing the amounts he contributed to his deferred compensation account before or during the marriage. Thus, he failed to meet his burden of establishing that any of the funds in that account are separate property, and we therefore conclude that the court properly presumed that the entire account constitutes marital property subject to equitable distribution. **Zufall v Zufall, 887, 4th Dept 9-27-13**

Mother Demonstrated Relocation to Mississippi Was In Best Interest of Child/Job and Family Support Available

In a full-fledged opinion by Justice Saxe, the First Department reversed Family Court and granted the mother's petition for relocation with the couple's child to Mississippi. The mother's inability to find sufficient work in New York, after several years of effort, coupled with job offers in Mississippi and the support of grandparents in Mississippi, were important factors:

> In this relocation case, where respondent mother, Elizabeth E., seeks permission to move with the parties' child to Oxford, Mississippi, we are once again confronted with the problem of balancing a child's need for the ongoing presence of both parents in his daily life, with the custodial parent's proven inability to support herself and the child beyond the subsistence level here in New York. * * *
>
> Admittedly, the mother here is not (yet) destitute. Her financial situation is certainly not as bleak as that of the mother in Matter of Melissa Marie G. v John Christopher W. (73 AD3d 658, 658 [1st Dept 2010]), where this Court affirmed the grant of the mother's application to relocate with the parties' child to a stable home near the mother's family in Florida, after she and the child had lived in a series of homeless shelters. However, while the need to improve the mother's and child's economic situation was far more extreme in that case, we find that the present relocation application was prompted by a legitimate, pressing need for a secure economic situation. Not only do we reject the unsupported suggestion that the mother actually had other, hidden, means of support, but we observe that proof of economic necessity does not require the parent to wait until she has used up every last dollar of her savings before taking steps to ensure that she will be able to care for the child's future economic needs. **Matter of Kevin McK v Elizabeth AE, 2013 NY Slip Op 06328, 1st Dept 10-1-13**

Wife's Encumbrance of Marital Property in Violation of Court Order and Knowledge of the Court Order by Mortgage-Holder's Agent Precluded Payout to Mortgage-Holder from Surplus Foreclosure Sale Proceeds

The Second Department determined the holder of a mortgage (Marie Holdings), which was undertaken by the wife in violation of the matrimonial court's order not to encumber the marital residence, was not entitled to any of the surplus proceeds after a foreclosure sale of the property. The facts that the wife violated the matrimonial court's order and the attorney who was the agent for the mortgage holder knew of the court-order were determinative:

> "The surplus funds of a foreclosure sale stand in the place of the land for all purposes of distribution among persons having vested interests or liens upon the land" … . Accordingly, "[s]urplus money takes the place of the equity of redemption and only one who had a vested estate or interest in the land sold under foreclosure which was cut off by the foreclosure sale is entitled to share in the surplus money with priority in each creditor determined by the filing date of his lien or judgment" … . * * *
>
> Contrary to Marie Holdings' contention, the matrimonial court had authority to determine that the husband was entitled to the surplus funds as part of the equitable distribution of the marital property … . Thus, notwithstanding the secured interest Marie Holdings acquired in the marital home by virtue of the mortgage the wife gave to it, because the wife undertook the mortgage in violation of the restraining order … , and because Marie Holdings' agent knew or should have known of the restraining order, its interest in the surplus funds was properly limited to the wife's interest therein … . The matrimonial court, in its discretion, divested the wife of that interest based upon her conduct. **Emigrant Mtge Co Inc v Biggio, 2013 NY slip Op 06344, 2nd Dept 10-2-13**

Separation Agreement Found Unconscionable

The Fourth Department affirmed Supreme Court's vacation of a separation agreement finding insufficient evidence the agreement was signed under duress but determining the terms of the agreement were unconscionable:

> " 'Judicial review [of separation agreements] is to be exercised circumspectly, sparingly and with a persisting view to the encouragement of parties settling their own differences in connection with the negotiation of property

settlement provisions' " … . "[S]eparation agreements will be scrutinized 'to see to it that they are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those born of and subsisting in inequity' " … . "A separation agreement 'may be vacated if it is manifestly unfair to one party because of the other's overreaching or where its terms are unconscionable' " … .

We agree with defendant that plaintiff did not sign the agreement under duress. Plaintiff's allegations that defendant threatened to evict her from the marital residence if she did not sign the agreement and that he threw the agreement at her are not substantiated by proof sufficient to justify setting it aside … . Further, even accepting plaintiff's allegation that defendant persistently urged her to sign the agreement, such conduct does not constitute duress, particularly inasmuch as plaintiff signed the agreement after defendant revised it in accordance with her suggested changes.

We conclude, however, that the court properly determined that the agreement was " 'one such as no [person] in his [or her] senses and not under delusion would make on the one hand, and as no honest and fair [person] would accept on the other' " … . As defendant correctly concedes, the agreement gives him almost all of the marital property, including his pension and retirement assets, and we note that the value of the pension and retirement assets is not apparent from the record because defendant failed to include a copy of his net worth statement. The agreement further provides that plaintiff may not seek maintenance and, most troubling under the circumstances of this case, that plaintiff waived her right to seek child support. **Dawes v Dawes, 886, 4th Dept 10-4-13**

Dispositional Hearing Should Have Been Held After Neglect Finding

In a neglect proceeding, the Second Department noted a dispositional hearing was required before entering a dispositional order:

> …Family Court erred in issuing the orders of disposition without first conducting a dispositional hearing (see Family Ct Act §§ 1045, 1047[a], 1052[a]…). "A dispositional hearing must be held as a condition precedent to the entry of a dispositional order" … . "A dispositional hearing is required so as to permit the Family Court to make an informed determination, from amongst the dispositional alternatives, which is consistent with the best interests of the . . . children" … . At a dispositional hearing, "due process requires that the parties be provided an adequate opportunity to offer evidence" (…see Family Ct Act § 1011). Here, the Family Court did not allow the mother to testify, failed to adduce any evidence from the father, to whom it released two of the children, and conducted no inquiry into dispositional alternatives before making its determination. **Matter of Monique M, 2013 NY Slip Op 06577, 2nd Dept 10-9-13**

Parental Rights Termination Based Upon Mental Illness Reversed---Psychologist's Report Included Inadmissible Hearsay

The Third Department reversed Family Court's determination that mother's parental rights should be terminated based upon her mental illness. The psychologist's (Liotta's) report, upon which Family Court based its ruling, should not have been admitted in evidence because it included inadmissible hearsay:

> Pursuant to the professional reliability exception to the hearsay rule, an expert witness may rely on information that would otherwise constitute inadmissible hearsay "if it is of a kind accepted in the profession as reliable in forming a professional opinion or if it comes from a witness subject to full cross-examination on the trial" … . While some of the individuals with whom Liotta spoke testified during the hearing and were thus subject to cross-examination, several others did not. Liotta was not asked and offered no opinion as to whether the information he gleaned from the interviews with individuals who did not testify was professionally accepted as reliable in performing mental health evaluations. Respondent objected on hearsay grounds to Liotta's testimony about these interviews and to the admission of his report – which contained detailed accounts of each interview – but the court overruled these objections. Moreover, when respondent's counsel sought to ask about the effect of the collateral source interviews on his opinions, the court precluded him from doing so. As a result, no proper foundation was laid for the admission of Liotta's testimony or his report… . **Matter of Dakota F …, 513066, 3rd Dept 10-17-13**

Imputed Income, As Opposed to Actual Income, Used to Determine Mother's Contribution to College Costs

The Third Department used imputed income to determine mother's ability to contribute to the children's college education:

In determining child support or related expenses, a court may impute income to a parent based on that party's failure to seek more lucrative employment that is consistent with his or her education, skills and experience … . Imputed income more accurately reflects a party's earning capacity and, presumably, his or her ability to pay … . Thus, imputed income may be attributed to a party as long as the court articulates the basis for imputation and record evidence supports the calculations … .

Here, Family Court accepted the mother's income as $15,000, without imputing any income to her. She testified that she earned approximately that amount at her part-time job as a tax preparer, but acknowledged that she has a Bachelor's degree in accounting and could work full time, yet chooses to work reduced hours out of loyalty to her employer. Because we are basing the college expenses on the parties' ability to pay rather than their actual income, we will impute income to the mother based on her underemployment and ability to earn more ,,, . Using the mother's testimony that she earned approximately $15,000 working full time from January through April and two days per week for the remainder of the year, we can extrapolate a full-time salary for her at the same earning rate, resulting in an imputed income of $25,000. **Matter of Curley…, 514294, 3rd Dept 10-17-13**

Custody Petition by Maternal Grandmother Denied in Favor of Child's Mother

In affirming the denial of custody to petitioner, the maternal grandmother, in favor of the child's mother, the Third Department explained the relevant criteria:

> "'[A] biological parent has a claim of custody of his or her child, superior to that of all others, in the absence of surrender, abandonment, persistent neglect, unfitness, disruption of custody over an extended period of time or other extraordinary circumstances'" … . Significantly, the nonparent seeking custody bears a heavy burden of establishing the existence of extraordinary circumstances … .
>
> Persistent neglect will be found where the parent "has failed either to maintain substantial, repeated and continuous contact with a child or to plan for the child's future" … . While relinquishing care and control of a child for a continuous period of 24 months will be considered an extraordinary circumstance (see Domestic Relations Law § 72 [2]…), petitioner concedes that no such period of separation occurred here … . Although the child had visits with petitioner that lasted multiple weeks and, on at least one occasion, three months, the record does not reflect a prolonged period of separation or "a complete abdication of parental rights and responsibilities"… . **Matter of Mildred PP v Samantha QQ, 514416, 3rd Dept 10-17-13**

No Sound Basis for Family Court's Determination Shared Custody Was Appropriate

The Third Department determined there was not a sound basis for Family Court's determination that shared custody was appropriate:

> …[N]either party appears to have requested such relief, and the parties' testimony at the fact-finding hearing was replete with mutual allegations of domestic violence and poor communication, as well as descriptions of vastly differing parenting styles. Moreover, although not a determinative factor, we note the absence in the court's decision of any discussion concerning the wishes or preferences of the children, both of whom are in their teens, even though this factor should be "entitled to great weight" … . Nor is there any discussion addressing the difficulties in a shared custody arrangement raised by the testimony concerning the son's alleged preference to live in the mother's home. Additionally, while the court specifically found that there was some evidence that the father "does not fully understand or appreciate the daughter's dietary needs and her medical issues," it was not explained how this concern would be met by the alternating physical custody schedule set forth in the decision. Given these and other concerns raised by the parties' testimony, we deem it appropriate to remit the matter to Family Court for a determination of primary physical custody of the children, accompanied by appropriate findings detailing the facts essential to such decision… .**Matter of Glenna Y…, 514558, 3rd Dept 10-17-13**

Resort to Contempt for Failure to Make Payments Appropriate

In finding the resort to contempt for failure to make payments pursuant to a judgment in a matrimonial action was appropriate, the Second Department explained the criteria:

> Pursuant to Domestic Relations Law § 245, where a spouse fails to make payments of money pursuant to an order or judgment entered in a matrimonial action, the aggrieved spouse may apply to the court to punish the defaulting spouse for contempt, but only if "it appears presumptively, to the satisfaction of the court," that payment cannot be enforced by other means such as enforcement of a money judgment or an income execution order (Domestic Relations Law § 245…). In order to punish the defaulting spouse for contempt, the aggrieved spouse is not required to exhaust all alternative remedies; proof that alternative remedies would be ineffectual is sufficient … . Here, the defendant satisfied that burden… . **Longman v Longman, 2013 NY Slip Op 06664, 2nd Dept 10-16-13**

Child Support Standards Act Formula Should Have Been Used

The Third Department determined Family Court erred in determining the parents' respective contributions to child support when it used the catchall factor (factor 10, FamCtAct 413 (1)(f)(10)) to deviate from the Child Support Standards Act (CSSA) formula because the father had custody of the older child all the time and the younger child every other week. The Third Department determined the CSSA formula should have been applied:

> Here, the Support Magistrate stated that he was relying on factor 10, the catch-all provision for "[a]ny other factors the court determines are relevant in each case" (Family Ct Act § 413 [1] [f] [10]). His stated reason for deviating from the presumptive amount was that the father has physical custody of the older child all of the time and of the younger child every other week, so the Support Magistrate adjusted the amount such that the father would not pay support when both children are with him. This was merely another way of applying the proportional offset method, which would reduce a parent's child support obligation based upon the amount of time that he or she actually spends with the child … .
>
> The Court of Appeals has rejected this method as impractical, unworkable and contrary to the statute and legislative history … . … While application of the CSSA formula may seem to produce unfair results where, as here, the parties equally share parenting time with a child, "[t]he difficult policy choices inherent in creating an offset formula for shared custody arrangements are better left to the Legislature" … . The costs of providing suitable housing, clothing and food for the children during custodial periods do not qualify as extraordinary expenses so as to justify a deviation from the presumptive amount (see Family Ct Act § 413 [1] [f] [9]…). While there may be circumstances in which a deviation is warranted in situations involving shared parenting time, the Support Magistrate's articulated reason did not provide an adequate basis for such deviation here… .**Matter of Ryan v Ryan. 514954, 3rd Dept 10-17-13**

Family Court Properly Assumed Jurisdiction Over California Order

In affirming Family Court's dismissal of mother's petition for a modification of custody, the Third Department noted that Family Court properly assumed jurisdiction over a California custody order:

> Family Court properly assumed jurisdiction over this proceeding. As California no longer had exclusive continuing jurisdiction over this matter (see 28 USC § 1738A [d]), New York could assume jurisdiction for the purpose of modifying the California order so long as it "[was] the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent . . . continues to live in this state" (Domestic Relations Law § 76 [1] [a]; see Domestic Relations Law § 76-b). "Home state" is defined as "the state in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child custody proceeding" (Domestic Relations Law § 75-a [7]). **Matter of Clouse v Clouse, 514987, 3rd Dept 10-17-13**

Order Prohibiting Visitation Unless Recommended by Therapist Improper

The Third Department affirmed Family Court's neglect finding but determined the order prohibiting visitation unless recommended by a therapist improperly delegated the court's authority to make determinations in the best interests of the child:

> …[W]e find merit to respondent's argument that Family Court's order prohibiting visitation except "as therapeutically recommended or attendance at therapy with [the child] as recommended by a

therapist after review by . . . Family Court" constitutes an improper delegation of the court's authority to make determinations on the issue of the best interests of the child … . Although the record contains some indication that Family Court recognized and attempted to avoid this delegation, the order failed to require further review unless triggered by the therapist, and did not direct the child to attend therapy with respondent unless recommended by the therapist. As the order thus makes the recommendation of a therapist a prerequisite for any visitation, we find that there was an improper delegation of the court's authority, and the matter is therefore remitted to Family Court for further proceedings regarding the issue of visitation… . **Matters of Alisa M…, 515188, 3rd Dept 10-17-13**

Father Not Denied Due Process by Absence from Portion of Neglect Proceeding

In affirming Family Court's finding that the parents had permanently neglected their daughter, the Third Department noted that father had not been denied due process based on his absence from some of the proceedings:

> We reject the father's assertion that his due process rights were violated when Family Court proceeded with a portion of the fact-finding hearing in his absence. Although a parent in a proceeding seeking to terminate parental rights has a right to be present for all stages of the proceeding, that right is not absolute … . On the second day of the factfinding hearing, the father's counsel appeared and informed the court that his client would not be present due to health reasons. Rather than request an adjournment, counsel affirmed that the father's attendance at the hearing "would not be required today," requested another hearing date – which the court agreed to schedule – so as to allow the father to testify, and thereafter actively participated in the hearing. Under these circumstances, we discern no error in Family Court's decision to proceed with the hearing in the father's absence or any prejudice inuring to the father as a result thereof… . **Matter of Arianna BB…, 515318, 515317, 3rd Dept 10-17-13**

Court Should Have Held Lincoln Hearing to Learn Preferences of 12-Year-Old Child

The Third Department remitted the matter to Family Court for a Lincoln hearing to determine the preferences of the 12-year-old child with respect to custody:

> While the decision whether to conduct such a hearing lies within the court's discretion …, it is often the preferable course … . In this case, the court originally indicated that it intended to speak with the child and later reiterated this position. While we can assume that the court ultimately decided that an interview with the child was not warranted or appropriate, the record is bereft of any articulation or explanation for such decision.
>
> Additionally, we cannot ascertain from the record whether Family Court failed to consider the child's wishes with respect to spending time with her father or whether it considered the child's wishes, but rejected them as a basis for a modification. While Family Court stated in regard to the violation petition that the child's wishes did not excuse the mother from complying with the existing orders, it is not clear to what extent, if any, this conclusion played in the court's determination regarding the modification petition. To be sure, the wishes of this 12-yearold child were "at minimum, entitled to consideration" …, and the record does not reflect whether such consideration was given to the child's wishes. As a result, and because we conclude that a Lincoln hearing is called for under the circumstances here … , we must remit the modification petition to Family Court. **Matter of Yeager v Yeager, 515860, 3rd Dept 10-17-13**

Sex Offender Status Not Enough to Support Neglect Finding

The Third Department reversed Supreme Court's finding of neglect against respondent mother for leaving the children with the father unsupervised. The father was a sex offender who failed to complete sex offender treatment and was previously found to have neglected the children by Supreme Court on that and other grounds. In the prior appeal of the father's neglect finding, the Third Department reversed Supreme Court and determined the father's status as a sex offender was insufficient to support a finding he neglected the children and the other factors relied upon by the court lacked a sound and substantial basis in the record. Because of those prior rulings, a finding of neglect against the mother based on leaving the children unsupervised with the father had to be reversed.

> Inasmuch as the finding of neglect against respondent was premised on her permitting the father to have unsupervised contact with the children, it would be completely illogical to conclude that the subject children's "physical, mental or emotional condition [had] been impaired or [was] in imminent danger of

becoming impaired as a result of the failure of [respondent] . . . to exercise a minimum degree of care . . . in providing the child[ren] with proper supervision or guardianship" (Family Ct Act § 1012 [f] [i] [B]), when we previously determined that petitioner failed to prove that the father posed a risk of imminent danger to them (Matter of Hannah U. [Dennis U.], 97 AD3d at 909). Thus, for the same reasons that led us to reverse the finding of neglect as to the father, we similarly conclude that petitioner failed to prove by a preponderance of the evidence (see Family Ct Act § 1046 [b] [i]) that respondent neglected the subject children as alleged in the petition … . **Matter of Hannah U …, 514024, 3rd Dept 10-14-13**

Relocation Criteria Explained

In affirming the grant of father's petition to relocate with the child, the Third Department explained the criteria:

The party seeking to relocate with a child – here, the father – bears the burden of establishing by a preponderance of the credible evidence that the relocation is in the child's best interests … . Family Court must consider a number of relevant factors in making this determination, including "'each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the child's future contact with the [nonmoving] parent, the degree to which the [moving] parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the [non-moving] parent and child through suitable visitation arrangements'" … . Notably, as "Family Court is in the best position to make factual findings and credibility determinations, its decision will not be disturbed if it is supported by a sound and substantial basis in the record" … . **Matter of Cole v Reynolds, 514712, 3rd Dept 10-24-13**

In Court Stipulation Was Valid Prenuptial Agreement/DRL 236(B)(3) Did Not Apply

In affirming Supreme Court's determination that a stipulation/prenuptial agreement, which was not signed in open court, was not invalidated by Domestic Relations Law 236, the Second Department explained:

…[T]he Supreme Court properly determined that the postnuptial agreement was valid and that Domestic Relations Law § 236(B)(3) does not compel a different result. "An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded" (Domestic Relations Law § 236[B][3]). A written agreement between parties made before or during a marriage which does not meet the formalities of Domestic Relations Law § 236(B)(3) is not enforceable … . However, Domestic Relations Law § 236(B)(3) "applies only to agreements entered into outside the context of a pending judicial proceeding"… . Moreover, "[s]tipulations of settlement are favored by the courts and are not lightly cast aside" … . Thus, "[a]n agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered" (CPLR 2104…).

Here, the record established that the parties relied on the duly executed stipulation of settlement, which was denominated as the postnuptial agreement, as a means of resolving the respondent's prior divorce action. It is undisputed that the postnuptial agreement was executed while the respondent's action was pending before the Supreme Court … . … Accordingly, the postnuptial agreement was valid, as it "was executed in the context of a pending divorce proceeding, and was subject to judicial oversight, even though it was not signed in open court" … . **Rio v Rio, 1013 NY Slip Op 07023, 2nd Dept 10-30-13**

Abuse Not Demonstrated/Conflicting Expert Testimony

In upholding Family Court's determination that petitioner had not demonstrated the child (Sincerity) was abused when the child was in the custody of the mother, in the face of expert testimony the child suffered forceful blunt trauma within 24 hours of death, the Second Department explained:

The Family Court Act defines an "[a]bused child," inter alia, as "a child less than eighteen years of age whose parent or other person legally responsible for his [or her] care (i) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death [or] (ii) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death" (Family Ct Act § 1012[e][i], [ii]). The petitioner may establish a prima facie case of abuse through a method of proof "closely

analogous to the negligence rule of res ipsa loquitur" (…see Family Ct Act § 1046[a][ii]…). If the petitioner establishes a prima facie case of abuse, "the burden of going forward shifts to respondents to rebut the evidence of parental culpability," although the burden of proof always remains with the petitioner … .

The Family Court's assessment of witnesses' credibility is accorded deference and will not be disturbed unless clearly unsupported by the record … . Where there is conflicting testimony and the matter primarily turns on an assessment of witnesses' credibility, we accord great weight to the Family Court's factual findings … . * * *

The mother's expert witness, the forensic pathologist who conducted the autopsy on Sincerity's body, testified that based upon a microscopic examination of the brain injury, Sincerity sustained the brain injury a few days to one week prior to her death. Notably, the petitioner did not present evidence establishing that Sincerity was exclusively in the mother's care for a period of time greater than 24 hours before her death. Moreover, the forensic pathologist testified that she could not determine whether Sincerity died from blunt force trauma to the head or by accidental asphyxiation caused by being placed to sleep on her side and wrapped in a blanket on the mother's futon. **Matter of David T…, 2013 NY Slip Op 07049, 2nd Dept 10-30-13**

FAMILY LAW/EVIDENCE

Abuse Was Not Demonstrated/Non-Testifying Child's Out-Court-Statements Not Corroborated by Witnesses Who Testified About What the Child Told Them

The Third Department affirmed Family Court's determination that the petitioner had not met its burden of proof that respondent had abused a child (Kaelynn). The child did not testify and petitioner relied entirely on the testimony of four people to whom the child had disclosed abuse, and the observations of the child's demeanor during the disclosures. No medical proof was submitted. In finding the out-of-court allegations made by the child had not been corroborated, the court explained:

> …[T]he record contains insufficient evidence to corroborate Kaelynn's allegations. Significantly here, a child's uncorroborated unsworn allegations of abuse alone are insufficient to sustain a finding of abuse (see Family Ct Act § 1046 [a] [vi]) and, although "a child's out-of-court statement 'may be corroborated by any evidence tending to support its reliability, and a relatively low degree of corroborative evidence is sufficient in abuse proceedings'" …, there is "a threshold of reliability that the evidence must meet" … . "Whether this corroboration requirement has been satisfied is a 'fine judgment' entrusted in the first instance to Family Court, which has the advantage of having heard and seen the various witnesses" … .
>
> Under established law, Kaelynn's repetition of the allegations of abuse to the testifying witnesses, however consistent and believable, is not sufficient to corroborate these prior out-of-court statements … . Petitioner presented no expert testimony to "objectively validate [Kaelynn's] account" or to "relate[] any of her past or present conduct or characteristics to the alleged sexual abuse" … . While a police investigator who interviewed Kaelynn testified that he conducted a "truth versus lie" inquiry of her and concluded that she understood the consequences of lying, he did not explain his methodology for reaching this conclusion nor did he relate whether her account fit any profile for truthful testimony from abused children … . Moreover, there was no physical evidence of sexual abuse …, and Kaelynn – in light of her young age — did not give sworn testimony nor was she questioned in camera … .**Matter of Dezarea T …, 514693, 3rd Dept 10-31-13**

Neglect Allegations Not Proven by Hearsay Testimony Based On Statements Made by Mother

The Third Department affirmed the dismissal of a neglect petition after a hearing where the only evidence was the hearsay testimony of the caseworker based on what the caseworker was told by the mother:

> "To establish neglect, [a] petitioner must prove by a preponderance of the evidence that a child's physical, mental or emotional condition was harmed or is in imminent danger of harm as a result of a failure on the part of the parent to exercise a minimum degree of care"… . At a fact-finding hearing, only "competent, material and relevant evidence" may be admitted (Family Ct Act § 1046 [b] [iii]…).Here, the only proof offered by petitioner was the testimony of its caseworker, who had no personal knowledge of the events that led to the filing of the petition. Rather, the caseworker's testimony concerning the alleged acts constituting neglect consisted entirely of what he was purportedly told by the mother. Upon our review of the record and notwithstanding the absence of any contrary testimony, we discern no error in Family Court's determination that the testimony of the

caseworker was insufficient to sustain petitioner's burden of proof… . **Matter of Lydia DD…, 515237, 3rd Dept 10-31-13**

Failure to Call Treating Physician Allowed Negative Inference in Case Alleging Mother Incapable of Caring for Child by Reason of Mental Illness

The First Department determined Family Court properly found mother incapable of caring for her child by reason of mental illness and noted the court properly drew a negative inference from the mother's failure to call her own treating physician to rebut the allegations in the petition and a suspended judgment is not available:

> The evidence, including testimony from a court-appointed psychologist who examined respondent mother, provided clear and convincing evidence that she is presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the child (see Social Services Law § 384-b[4][c], [6][a]…). The psychologist testified that respondent mother suffers from, inter alia, bipolar disorder, which interferes with her ability to care for the child, placing the child at risk of becoming neglected if she is returned to her mother's care. Moreover, respondent mother's testimony confirms that she lacks insight into the nature and extent of her mental illness … .
>
> Contrary to respondent mother's contention, the Family Court properly exercised its discretion by drawing a negative inference against her for failing to call her treating physician or other medical providers to rebut the allegations raised in the petition and by the testimony after she expressed an intention to call her providers … .
>
> The Family Court did not err in denying respondent mother's application for a suspended judgment. This dispositional alternative is not available after a fact-finding determination of mental illness (see SSL § 384-b [3] [g], [4] [c]…). **Matter of Love Joy F, 2013 NY Slip Op 06792, 1st Dept 10-17-13**

FAMILY LAW/EVIDENCE/TRIALS

In a Sexual Abuse Proceeding---Effects of Victim's Exercise of Privilege Against Self-Incrimination and Exclusion of Appellant During Testimony of Victim Explained

In a sexual abuse case, the Second Department affirmed Family Court's finding of abuse and noted the effect of Judith C.Z.'s exercise of her privilege against self-incrimination and the effect of the appellant's exclusion from the courtroom during the testimony Judith C. Z.:

> The failure of [a witness] to testify does not permit the trier of fact to speculate about what his [or her] testimony might have been nor does it require an adverse inference. It does, however, allow the trier of fact to draw the strongest inference against him [or her] that the opposing evidence in the record permits" … . Under the circumstances presented here, we find no basis to disturb the Family Court's refusal to draw the negative inference urged by the appellant … .
>
> The appellant's further contention that the Family Court erred in excluding him from the courtroom during the testimony of Judith C. Z. is without merit. The Family Court reasonably concluded that Judith C. Z. would suffer emotional trauma if compelled to testify in front of the appellant …, and, after properly weighing the respective rights and interests of the parties, thereafter providently exercised its discretion in permitting her to testify via a two-way closed-circuit television set-up. "Because the appellant's attorney was present during the child's testimony and cross-examined her on the appellant's behalf, neither the appellant's due process right nor his Sixth Amendment right of confrontation was violated by his exclusion from the courtroom during the child's testimony" … . **Matter of Michael U…, 2013 NY Slip Op 06583, 2nd Dept 10-9-13**

FAMILY LAW/IMMIGRATION LAW

Special Immigrant Juvenile Law Triggered by Abuse, Neglect or Abandonment by One Parent (Not Both)

In a full-fledged opinion by Justice Roman, the Second Department determined that in order to qualify for the special immigrant juvenile provision of the Immigration and Nationality Act (8 USC 1101), which provides a gateway to permanent residency for undocumented children who have been abused, neglected or abandoned, the juvenile need only demonstrate that reunification with one (not both) of his or her parents "is not viable due to abuse, neglect, abandonment, or a similar basis found under State law…":

> …Susy established that reunification with her father was not viable due to abandonment (see 8 USC § 1101[a][27][J][i]…). The Family Court, as evidenced by its comments at the hearing, denied Susy's application for a special findings order on the ground that the viability of

reunification with Susy's mother rendered Susy ineligible for SIJS. However, we disagree with the Family Court's interpretation of the reunification component of the statute.

"To interpret a statute, we first look to its plain language, as that represents the most compelling evidence of the Legislature's intent" … . Under the plain language of the statute, to be eligible for SIJS, a court must find that "reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law" (8 USC § 1101[a][27][J][i] [emphasis added]). We interpret the "1 or both" language to provide SIJS eligibility where reunification with just one parent is not viable as a result of abuse, neglect, abandonment, or a similar State law basis… . **Matter of Marcelina M-Gv Israel S, 2013 NY Slip Op 06868, 2nd Dept 10-23-13**

FAMILY LAW/CONTRACT

Temporary Maintenance Award Not Waived by Prenuptial Agreement Waiving Only the Final Award of Alimony or Maintenance

CIVIL PROCEDURE

Refusal to Comply with Discovery Demand Supported Sanction of Dismissal of the Complaint

The Second Department determined Supreme Court had properly dismissed the complaint in a medical malpractice action because the plaintiffs refused to identify the mohel who had performed the circumcision of infant plaintiff. In finding dismissal of the entire complaint an appropriate sanction, the court wrote:

"The Supreme Court has broad discretion in making determinations concerning matters of disclosure including the nature and degree of the penalty to be imposed under CPLR 3126" … . "The striking of a pleading may be appropriate where there is a clear showing that the failure to comply with discovery demands is willful or contumacious"… . Further, the court can infer that a party is acting willfully and contumaciously through his or her repeated failure to respond to demands or to comply with discovery orders … . **Silberstein v Maimonides Med Ctr, 2013 NY Slip Op 05813, 2nd Dept 9-11-13**

Summary Judgment Can Not Be Granted Based on Affidavit By Someone with No Personal Knowledge of the Facts, Even If Factual Information Not Disputed

A mortgage foreclosure action was discontinued at the plaintiff's request because the limited signing officer who signed the affidavit in support of plaintiff's motion for summary judgment did not have personal knowledge of the facts. The defendant then cross-moved for summary judgment based on the plaintiff's papers. In explaining that Supreme Court should not have granted summary judgment to the defendant dismissing the action, the Second Department wrote:

…[W]here a motion for summary judgment is based solely upon an affidavit of someone with no personal knowledge of the facts, that circumstance generally presents only a ground for the denial of summary judgment…, not a ground to dismiss the action. [Defendant] failed to establish grounds to dismiss the action against her with prejudice, and there is no basis in this record supporting that request for relief. Accordingly, the Supreme Court improperly granted that branch of [defendant's] cross motion which was, in effect, to dismiss the action against her with prejudice… . **GMAC Mtge LLC v Bisceglie, 2013 NY Slip Op 05878, 2nd Dept 9-18-13**

Opening Statement Provided Grounds for Dismissal of False Arrest/Malicious Prosecution Action

The Second Department affirmed Supreme Court's grant of a judgment as a matter of law to the defendant in a false arrest/malicious prosecution case based upon plaintiff's counsel's opening statement. In the opening, counsel stated the defendant had been arrested after the eyewitness victim made an in-person identification of the plaintiff to a police officer. Because the eyewitness identification provided probable cause for the arrest, the false arrest and malicious prosecution causes of action were not viable:

An application for judgment as a matter of law may be made at the close of an opposing party's case, or at any time on the basis of admissions (see CPLR 4401). The grant of such an application prior to the close of the opposing party's case is generally disfavored … . However, judgment as a matter of law may be warranted prior to the presentation of any evidence if the plaintiff has, "by some admission or statement of fact, so completely compromised his or her case that the court was justified in awarding judgment as a matter of law to one or more defendants"… . * * *

Here, the plaintiff, through his counsel, admitted

that the eyewitness victim of the alleged crimes made an in-person identification of the plaintiff to a police officer, which led to his immediate arrest by that officer. This admission by the plaintiff, through his counsel, "so completely compromised" his position that the police lacked probable cause to arrest him, that the Supreme Court was justified in awarding judgment as a matter of law to the City…. **Okunubi v City of New York, 2013 NY slip Op 05886, 2nd Dept 9-18-13**

Failure to Serve Complaint Upon Demand Required Dismissal of the Action

The Fourth Department determined defendant's motion to dismiss the action based upon plaintiff's failure to serve a complaint after a demand should have been granted:

> "To avoid dismissal for failure to timely serve a complaint after a demand for the complaint has been made pursuant to CPLR 3012 (b), a plaintiff must demonstrate both a reasonable excuse for the delay in serving the complaint and a meritorious cause of action" … . Here, plaintiff failed to meet her burden with respect to either prong of that test. Concerning the first part of the test, plaintiff asserted that she delayed in filing the complaint because she did not receive defendant's demand for the complaint. In our view, that excuse is not reasonable… . Service of the demand for the complaint was complete upon - mailing (see CPLR 2103 [b] [2]), and defendant's submission in support of its motion of a proper affidavit of service of the demand entitled it to the presumption that a proper mailing occurred … . We agree with defendant that plaintiff's mere denial of receipt of the demand was insufficient to rebut that presumption … . Even assuming, arguendo, that nonreceipt of the demand was a reasonable excuse, we conclude that plaintiff failed to establish a meritorious cause of action with a verified complaint or an affidavit of merit, and thus dismissal of the action is required… . **Dunlop v Saint Leo the Great, RC Church, 865, 4th Dept 9-27-13**

Timeliness Requirements for Motion for Summary Judgment Explained

In affirming the trial court's determination defendants' motion for summary judgment was untimely, the Fourth Department explained the applicable law:

> "Where . . . a court does not set a date by which summary judgment motions must be made pursuant to CPLR 3212 (a), such a motion must be made no later than 120 days after the filing of the note of issue 'except with leave of court on good cause shown' " … . Good cause in the context of CPLR 3212 (a) "requires a showing of good cause for the delay in making the motion—a satisfactory explanation for the untimeliness—rather than simply permitting meritorious, nonprejudicial filings, however tardy"… . **O'Brien v Bainbridge…, 990, 4th Dept 9-27-13**

Failure to Serve Claim by Certified Mail Deprived Court of Claims of Subject Matter Jurisdiction

The Fourth Department affirmed the Court of Claims' dismissal of an action for failure to comply with the statutory service-of-claim-by-certified-mail requirement. The court noted that the court never gained subject matter jurisdiction and, therefore, the CPLR 3211 (e) waiver provision, which addressed personal, not subject matter, jurisdiction, did not apply:

> …[C]laimants served their claim on the Attorney General by regular mail instead of by certified mail, return receipt requested, as required by Court of Claims Act § 11. Defendant's answer raised the defense that the court lacked, inter alia, subject matter jurisdiction based on claimants' improper service, and defendant later moved to dismiss the claim on that ground. Claimants opposed the motion and cross-moved for an order deeming the service corrected or disregarded pursuant to CPLR 2001. The court granted defendant's motion and denied claimants' cross motion, and we now affirm.
>
> Court of Claims Act § 11 (a) (i) provides that a party seeking to file a claim against the State of New York must serve a copy of the claim upon the Attorney General by certified mail, return receipt requested. It is well settled that "nothing less than strict compliance with the jurisdictional requirements of the Court of Claims Act is necessary" … . Inasmuch as the claim herein was served by regular mail, the court was deprived of subject matter jurisdiction and thus properly dismissed the claim … . Contrary to claimants' contention, defendant's motion to dismiss on the ground of improper service, made approximately 20 months after service of its answer, was not precluded by the 60-day waiver provision of CPLR 3211 (e). The failure to comply with the service requirements in the Court of Claims Act "result[s] not in a failure of personal jurisdiction, . . . but in a failure of subject matter jurisdiction[,] which may not be waived"… . **Zoeckler…, v State of New York, 883, 4th Dept 9-27-13**

Relief Granted By Court Went Too Far Beyond Relief Requested

In a partition action, the First Department determined Supreme Court ordered relief which went too far beyond the relief requested in the motion papers and explained the relevant principles:

> Pursuant to CPLR 5015(a), a court may relieve a party from an order or judgment, but only "on motion of [an] interested person" and "with such notice as the court may direct" (CPLR 5015[a] [emphasis added]…). " Pursuant to CPLR 5019(a), a trial court has the discretion to correct an order or judgment which contains a mistake, defect, or irregularity not affecting a substantial right of a party, or is inconsistent with the decision upon which it is based. However, a trial court has no revisory or appellate jurisdiction, sua sponte, to vacate its own order or judgment'" … . Likewise, while a court "may grant relief, pursuant to a general prayer contained in the notice of motion or order to show cause, other than that specifically asked for, to such extent as is warranted by the facts plainly appearing [in] the papers on both sides," it may do so only "if the relief granted is not too dramatically unlike the relief sought, and if the proof offered supports it and the court is satisfied that no one has been prejudiced by the formal omission to demand it specifically" … . **Carter v Johnson, 2013 NY Slip Op 06333, 2nd Dept 10-2-13**

Plaintiff Should Have Been Granted Extension to Serve Summons and Complaint Three Days After 120-Day Period Expired

The Second Department determined plaintiff should have been granted an extension of time to serve the summons and complaint where the statute of limitations ran out between the commencement of the action and the service. The Second Department further determined that service of one copy of the summons and complaint upon an officer of defendant corporation (MBRI) was valid for both the corporation and the officer:

> The defendants contend that MBRI was never served with a copy of the summons and complaint. We disagree. Service of one copy of a summons and complaint upon an officer of a corporation constitutes service upon the corporation itself as well as upon the individual officer, where, as here, there was simultaneous compliance with CPLR 311(a)(1) and CPLR 308(1) … .Here, MBRI was served pursuant to CPLR 311(a)(1) when the plaintiff's process server delivered the summons and complaint to the individual defendant, an officer of MBRI. Accordingly, the method employed to serve MBRI was proper and, thus, that branch of the defendants' cross motion which was pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against MBRI for lack of personal jurisdiction should have been denied.
>
> In this case, where the statute of limitations expired between the time that the action was commenced and the time that the copy of the summons and complaint was served, that branch of the plaintiff's motion which was pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon MBRI nunc pro tunc to September 11, 2011, should have been granted in the interest of justice … . The copy of the summons and complaint was served only 3 days after the 120-day time period of CPLR 306-b had expired, the plaintiff promptly sought relief after receiving the answer, and there was no demonstrable prejudice to MBRI attributable to the delay in service … . **Fernandez v Morales Bros Realty Inc, 2013 NY Slip Op 06345, 2nd Dept 10-2-13**

Action Abandoned/Should Not Have Been Restored

In determining an action had been abandoned and should not have been restored, even though there had been a stipulation to restore the action, the Second Department wrote:

> Where, as here, an action has been marked "off" the trial calendar, and more than one year has passed without its restoration to the trial calendar, the action shall be deemed abandoned and shall be dismissed (see CPLR 3404). A plaintiff subsequently seeking to restore an action to the trial calendar must demonstrate the existence of a potentially meritorious cause of action, a reasonable excuse for the delay in prosecuting the action, a lack of intent to abandon the action, and a lack of prejudice to the defendant … .
>
> Although the stipulation to restore this action provides some indication that the plaintiff did not intend to abandon it when it was first marked "off," and there was sporadic activity over the period, in excess of five years, between the automatic dismissal and the motion to restore the action to the trial calendar, the plaintiff failed to rebut the presumption of abandonment that attaches when a matter has been automatically dismissed pursuant to CPLR 3404… .**Saint Mary Byzantine Catholic Church v Kalin, 2013 NY Slip Op 06355, 2nd Dept 10-2-13**

Plaintiff Should Have Been Allowed to Voluntarily Discontinue Lawsuit

The First Department determined Supreme Court should have permitted plaintiff to voluntarily discontinue the lawsuit:

> The court erred in declining to permit plaintiff to voluntarily discontinue the action. CPLR 3217(b) authorizes a court to grant a motion for voluntary discontinuance "upon terms and conditions, as the court deems proper." While the determination upon such an application is generally within the sound discretion of the court …, a party ordinarily cannot be compelled to litigate and, absent special circumstances, such as prejudice to adverse parties, a discontinuance should be granted … . No special circumstances have been shown here, especially since the action is still in the early stages of litigation. Nor was there any showing that plaintiff sought the discontinuance only to avoid an adverse determination in this action ,,, . Since we are granting plaintiff's motion, the cross motion to compel discovery must be denied. **Bank of Am NA v Douglas, 2013 NY Slip 06440, 1st Dept 10-3-13**

Affidavit Supporting Motion to Strike Did Not Demonstrate Good Faith Effort to Resolve Issue with Opposing Counsel

In finding the defendant's cross-claim should not have been struck as a sanction for failure to appear for depositions, the First Department noted that the affidavit in support of the motion to strike did not demonstrate a good faith effort to resolve the matter with opposing counsel:

> A party moving to strike a pleading pursuant to CPLR 3126 is required to submit an affirmation that counsel for the moving party has made "a good faith effort to resolve the issues raised by the motion" with opposing party's counsel (Uniform Rules for Trial Cts [22 NYCRR] 202.7). To be deemed sufficient, the affirmation must state the nature of the efforts made by the moving party to reconcile with opposing counsel (22 NYCRR 202.7[c]…).
>
> Here, [defendant] GSY's affirmation of its good faith effort to resolve the dispute with [cross-claim defendant] Shavolian did not substantively comply with the requirements of 22 NYCRR 202.7 … . In its affirmation in support of the motion to strike, GSY stated that it made "good faith efforts to proceed with disclosure," pointing to a letter it faxed to Shavolian's counsel. There is nothing in the letter, which was written before the continued deposition date, indicating that GSY's counsel actually conferred with Shavolian's lawyer in a good faith attempt to resolve the dispute… . **241 Fifth Ave Hotel LLC v GSY Corp, 2013 NY Slip Op 06514, 1st Dept 10-8-13**

Ineffective Electronic Filing Can Be Corrected Pursuant to CPLR 2001 After Statute of Limitations Expired

In a full-fledged opinion by Justice Dillon, the Second Department reversed Supreme Court's denial of plaintiff's motion, pursuant to CPLR 2001, to allow the filing and serving of a summons and complaint after the statute of limitations had expired. Plaintiff had timely attempted to file the summons and complaint using a new electronic filing system in Westchester County. It turned out that plaintiff's counsel had mistakenly used a "practice" filing system designed to familiarize users with electronic filing and the summons and complaint was never actually filed in time. The Second Department determined plaintiff's motion to be allowed to cure the mistake under CPLR 2001 should have been granted after explaining that, in this case, CPLR 2001 should be to correct an error without concern for whether the defendant would be prejudiced by the correction:

> The defendant argues that the plaintiff's e-filing error cannot be corrected, as doing so would prejudice the defendant by depriving her of a viable statute of limitations defense. However, we conclude that under a proper reading of CPLR 2001, the issue of prejudice to the defendant need not be reached.
>
> More specifically, we believe that many reported cases in New York reflect a misreading of the language of CPLR 2001. Judicial discretion and the absence of prejudice are not requirements that must be applied in a combined fashion. Rather, a close reading of the statute reveals that CPLR 2001 recognizes two separate forms of potential relief to address mistakes, omissions, defects, or irregularities in the filing of papers. The statute distinguishes between the "correction" of mistakes and the "disregarding" of mistakes, and each invokes a different test. Courts may "correct[ ]" mistakes "upon such terms as may be just" (CPLR 2001). The statute then says, set off by an "or," that mistakes may be "disregarded" if a substantial right of a party is not prejudiced … . Thus, a "correction" of a mistake appears to be subject to a broader degree of judicial discretion without necessary regard to prejudice, whereas a complete "disregarding" of a mistake must not prejudice an opposing party. … The distinction between simply correcting a mistake and overlooking a

mistake makes sense, as a party seeking to wholly disregard a filing mistake may understandably be expected to bear a higher burden than a party seeking a mere correction.

A secondary inquiry, therefore, is whether the plaintiff's request for a nunc pro tunc recognition of his filing in the NYSCEF "practice" system amounts to a mere correction that may be permitted upon terms that may be just, or whether it constitutes a full-scale disregard of the filing error that, in order to be permitted, requires a showing that the defendant will not be prejudiced by the disregard.

… [Here] [t]he "filing" was performed in a mistaken manner and method, which courts are permitted to correct on terms that may be just … . Therefore, the plaintiff was under no burden to demonstrate an absence of prejudice to the defendant. In contrast, excusing a clearly untimely filing would constitute the disregarding of an error, which could not be permitted because it would be prejudicial to a defendant to deprive it of a legitimate statute of limitations defense.**Grskovic v Holmes, 2013 NY Slip Op 06545, 2nd Dept 10-9-13**

Ad on Internet, Together With Communications With Florida Medical Group, Did Not Confer Long-Arm Jurisdiction Over the Group in a Malpractice Action Based On Surgery Done in Florida

In a full-fledged opinion by Justice Sgroi, over two dissenters, the Second Department determined that an ad on the Internet by a Florida medical group (LSI) and the group's website, together with communications between the New York plaintiff and the Florida group, were insufficient to provide New York with long-arm jurisdiction over a medical malpractice case brought by the plaintiff who had undergone surgery in Florida:

…[I]t is not the number of contacts which is determinative of whether a defendant purposely availed itself of the benefits and privileges of conducting business in New York. Each jurisdictional inquiry pursuant to CPLR 302(a)(1) will turn upon the examination of the particular facts of the case, "[a]nd although determining what facts constitute purposeful availment' is an objective inquiry, it always requires a court to closely examine the defendant's contacts for their quality" .. . "Purposeful activities are those with which a defendant, through volitional acts avails itself of the privilege of conducting activities with the forum State, thus invoking the benefits and protections of its laws" … . "Whether a non-domiciliary has engaged in sufficient purposeful activity to confer jurisdiction in New York requires an examination of the totality of the circumstances" … .

In the case at bar, the "totality of circumstances" does not provide the plaintiff with a basis for imposing long-arm jurisdiction over the defendants. Initially, we note that personal jurisdiction cannot be based upon LSI's website, since, as far as the record reveals, this website was informational only and, thus, "passive" in nature. There is no indication that the website permitted a user thereof to purchase any goods or services from LSI, that it contained any online form application process, or that it allowed any interaction through the site … . "When a website is passive . . . plaintiffs may have to prove something more' to justify the exercise of personal jurisdiction--that is, plaintiffs must show that defendant purposefully (albeit electronically) directed his activity in an substantial way to the forum state'" … .

This Court has also recently held that such a passive website, without more, cannot be used as the basis for the assertion of long-arm personal jurisdiction. **Paterno v Laser Spine Inst, 2013 NY Slip Op 06669, 2nd Dept 10-16-13**

Second Summary Judgment Motion Properly Denied—Not Based on Newly Discovered Evidence

The Second Department affirmed Supreme Court's denial of a motion for summary judgment because it was the second such motion and, although it included new deposition testimony, it did not include evidence that met the definition of "newly discovered:"

"Generally, successive motions for summary judgment should not be entertained, absent a showing of newly discovered evidence or other sufficient cause" … . Although, in this context, newly discovered evidence may consist of "deposition testimony which was not elicited until after the date of a prior order denying an earlier motion for summary judgment" …, such evidence is not "newly discovered" simply because it was not submitted on the previous motion …. Rather, the evidence that was not submitted in support of the previous summary judgment motion must be used to establish facts that were not available to the party at the time it made its initial motion for summary judgment and which could not have been established through alternative evidentiary means… .**Vinar v Litman, 2013 NY Slip Op 06675, 2nd Dept 10-16-13**

Case Brought by UK Citizen Re: Death in Dubai Dismissed on Forum Non Conveniens Grounds

Over a substantial dissent, the Second Department affirmed Supreme Court's grant of a dismissal motion on forum non conveniens grounds. Plaintiff's decedent died of Legionnaire's disease after staying in defendant's hotel in Dubai. The only connection with New York was defendant's global headquarters in White Plains. The plaintiffs were citizens of the UK.

> The doctrine of forum non conveniens permits a court to stay or dismiss an action when, although it may have jurisdiction over a claim, the court determines that "in the interest of substantial justice the action should be heard in another forum" (CPLR 327[a]…). A defendant bears the burden on a motion to dismiss on the ground of forum non conveniens to "demonstrate relevant private or public interest factors which militate against accepting the litigation" … . "On such a motion, the Supreme Court is to weigh the parties' residencies, the location of the witnesses and any hardship caused by the choice of forum, the availability of an alternative forum, the situs of the action, and the burden on the New York court system" … . "No one factor is dispositive" … . "The Supreme Court's determination should not be disturbed unless the court improvidently exercised its discretion or failed to consider the relevant factors" … . **Boyle v Starwood Hotels & Resorts Worldwide, Inc, 2013 NY Slip Op 06830, 2nd Dept 10-23-13**

Failure to Enter Money Judgment for Ten Years Not Abandonment

The Second Department determined the failure to enter a money judgment for more than ten years did not constitute abandonment under 22 NYCRR 202.48 because the judgment did not require any further action by the court:

> 22 NYCRR 202.48, entitled "[s]ubmission of orders, judgments and decrees for signature," states in pertinent part:
>
> "(a) Proposed orders or judgments, with proof of service on all parties where the order is directed to be settled or submitted on notice, must be submitted for signature, unless otherwise directed by the court, within 60 days after the signing and filing of the decision directing that the order be settled or submitted.
>
> "(b) Failure to submit the order or judgment timely shall be deemed an abandonment of the motion or action, unless for good cause shown" (emphasis added).
>
> However, "the 60-day rule logically applies only where further court involvement in the drafting process is contemplated before entry" … . Here, the order dated September 6, 2000, which awarded judgment to the plaintiff, contained no direction to settle or submit a judgment on notice. Thus,…the 60-day rule of 22 NYCRR 202.48 is inapplicable because no judicial action was necessary before entry of the money judgment … . Consequently, 22 NYCRR 202.48 did not serve as a basis for granting Racer's motion to vacate the judgment. **Shamshovich v Shvartsman, 2013 NY Slip Op 06847, 2nd Dept 10-23-13**

Grant of Writ of Prohibition Reversed---Criteria for Writ Explained

Supreme Court granted a writ of prohibition finding the state police did not have the legal authority to seize cigarettes purchased by a Nebraska Indian tribe from a manufacturer located on the St. Regis Mohawk Indian Reservation in St. Lawrence County. The cigarettes did not have state tax stamps. The Third Department reversed describing the relevant analysis as follows:

> Pursuant to well-established law, a CPLR article 78 proceeding for a writ of prohibition is an extraordinary remedy … that "lies only where there is a clear legal right to such relief, and only when [the body or officer involved] acts or threatens to act without jurisdiction in a matter . . . over which it has no power over the subject matter or where it exceeds its authorized powers in a proceeding over which it has jurisdiction" (…see also CPLR 7803 [2]). Even where such a proceeding is permissible, the court has the discretion to deny the issuance of a writ of prohibition after considering such factors as "'the gravity of the harm caused by the excess of power, the availability or unavailability of an adequate remedy on appeal or at law or in equity and the remedial effectiveness of prohibition if such an adequate remedy does not exist'"… .
>
> …[P]etitioner failed to prove the absence of other avenues of relief that would adequately address the challenged seizure of the cigarettes… . * * *
>
> …[P]etitioner failed to establish a clear entitlement to a writ of prohibition. As relevant here, Tax Law § 471 (1) imposes "a tax on all cigarettes possessed in the state by any person for sale," except under circumstances where "this state is without power to impose such tax" (Tax Law § 471 [1]; see 20 NYCRR 74.1 [a]

[1]).4 All cigarettes within the state are presumed to be subject to tax unless "the contrary is established," with the burden of proof of nontaxibility falling upon the person in possession of the cigarettes (Tax Law § 471 [1]). In claiming that the sale here was not a taxable event, petitioner relies upon regulations which provide that no tax may be imposed on cigarettes sold to an out-of-state purchaser (see 20 NYCRR 74.1 [c] [4]; 76.1 [a] [1]). However, the same regulations that establish such exemption also require that all out-of-state sales be made by a duly licensed cigarette agent and that a certificate be obtained from the out-of-state purchaser showing that the cigarettes "will be immediately removed from the State to an identified location for such purposes and that such cigarettes shall not be returned to the State for sale or use herein" (20 NYCRR 76.3 [b] [emphasis added]).

…[P]etitioner has produced no evidence that the cigarettes would not be reintroduced into the state. In fact, respondents submitted evidence in the form of, among other things, petitioner's corporate shipment records and a statement by the driver of the truck, which suggest that petitioner regularly transports back into the state cigarettes purchased from the same manufacturer involved here. **HCI Distribution, Inc v NYS Police…, 516040, 3rd Dept 10-24-13**

Affirmative Defense Waived by Absence from Initial Complaint May Be Included in Amended Complaint

The Second Department determined a "lack of standing" defense to a mortgage foreclosure action, although initially waived by its absence from the pleadings, could be added in an amended complaint:

> Leave to amend a pleading "shall be freely given" (CPLR 3025[b]), provided that the amendment is not palpably insufficient as a matter of law, does not prejudice or surprise the opposing party, and is not patently devoid of merit … . The decision of whether to allow an amendment is committed "almost entirely to the [motion] court's discretion" … . "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" … .
>
> Although …the homeowner defendants…waived the defense of lack of standing by failing to assert it as an affirmative defense in their initial answer (see CPLR 3211[e]), this defense can nevertheless be interposed by leave of court pursuant to CPLR 3025(b) so long as the amendment does not cause the other party prejudice or surprise resulting directly from the delay… . **HSBC Bank v Picarello, 2013 NY Slip Op 07011, 2nd Dept 10-30-13**

Vacation of a Note of Issue Does Not Constitute Marking Off the Calendar/One Year Automatic Dismissal Did Not Apply

In affirming Supreme Court's granting of plaintiff's motion to restore a Labor Law action, the Second Department explained that vacating a note of issue does not constitute "marking off" or "striking" from the calendar under CPLR 3404:

> CPLR 3404 states, in relevant part:
>
> > "[a] case . . . marked off' or struck from the calendar or unanswered [*2]on a clerk's calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute. The clerk shall make an appropriate entry without the necessity of an order."
>
> The vacatur of a note of issue, as was done in this case on September 11, 2008, returns the case to pre-note of issue status. It does not constitute a marking "off" or striking the case from the court's calendar within the meaning of CPLR 3404 … . Thus, contrary to the defendant's contention, the one-year period under CPLR 3404 for automatic dismissal did not start to run on September 11, 2008, when the note of issue was vacated, and the case was not properly dismissed on that date under CPLR 3404. Accordingly, the plaintiff was not required to establish his entitlement to restoration of the action under that statute… . **Montalvo v Mumpus Restorations, Inc, 2013 NY Slip Op 07017, 2nd Dept 10-3-13**

Affirmative Defense of Arbitration Waived by Participation in Judicial Process

The Third Department determined that defendant waived a contractual provision requiring arbitration by participating in the judicial process:

> …[W]hile defendant asserted the contractual arbitration provision as an affirmative defense in its answer, it did not move to stay the action and compel arbitration (see CPLR 7503 [a]). Instead, it aggressively participated in the discovery process and received the benefit of extensive discovery from plaintiff, which would not otherwise have been available in arbitration

… . In doing so, defendant's acceptance of the judicial forum "manifested a preference 'clearly inconsistent with . . . [a] claim that the parties were obligated to settle their differences by arbitration'" … . Thus, we agree with Supreme Court's determination that defendant's actions resulted in a waiver of its right to compel arbitration … .**Masson v Wiggins & Masson LLP…, 515340, 515427, 3rd Dept 10-31-13**

CIVIL PROCEDURE/ATTORNEY-CLIENT

Failure to File Retainer Agreement In Medical Malpractice Action Remedied Nunc Pro Tunc

The Second Department determined Supreme Court correctly granted leave to file a retainer agreement in a medical malpractice action, nunc pro tunc. The attorney (Siegel) was the second attorney retained in the matter (to handle the trial). After the case settled, the second attorney sued the first (Glassman) over the amount of the fee. The second attorney (Siegel) , however, had not filed a retainer agreement and made a motion to file late:

> Every attorney practicing law in the Second Judicial Department who is retained with respect to, inter alia, a medical malpractice action must file a retainer statement with the OCA within 30 days after being retained … . Additionally, every "attorney retained by another attorney, on a contingent fee basis, as trial or appeal counsel or to assist in the preparation, investigation, adjustment or settlement of any such action, claim or proceeding shall, within 15 days from the date of such retainer, sign personally and file with the [OCA] a written statement of such retainer" (22 NYCRR 691.20[a][3]). Filing a retainer statement with the OCA is a condition precedent to the receipt of a fee for any case to which 22 NYCRR 691.20 applies … . Attorneys failing to correctly file a retainer statement with the OCA pursuant to 22 NYCRR 691.20 are precluded from asserting breach of contract causes of action for outstanding fees, and are limited to suit in quantum meruit … . However, a late filing of a retainer statement is sufficient to preserve an attorney's right to recover fees where that attorney first obtains leave of court to file the statement nunc pro tunc … .
>
> In exercising its discretion to extend the time to file the subject retainer statement pursuant to CPLR 2004, a court may consider such factors as the length of the delay, the reason or excuse for the delay, and any prejudice to the person opposing the motion … . Here, the reason for the delay, in effect, Siegel's law office failure, was an isolated, inadvertent mistake … and there is no prejudice to Glassman… . **Siracusa v Fitterman, 2013 NY slip Op 07025, 2nd Dept 10-3-13**

CIVIL PROCEDURE/TRIALS

In Personal Injury Case, Court Should Not Have Granted Mistrial When Objection Sustained, Lawyer Admonished and Curative Instruction Given

The Second Department reversed Supreme Court's grant of a mistrial in a slip and fall case. Plaintiff was injured playing basketball. Plaintiff objected to remarks made by defense counsel in summation which erroneously implied that the doctrine of primary assumption of risk applied. The trial judge sustained the objection, admonished the lawyer, and gave a curative instruction. After the verdict for the defendant, Supreme Court granted plaintiff's motion for a mistrial:

> The Supreme Court erred in, in effect, granting the plaintiffs' application for a mistrial since the court had previously properly sustained objections to the subject summation comments, openly admonished counsel, and provided curative instructions, thereby correcting any possible prejudice resulting from the subject summation comments … . **Richardson v City of New York, 2013 NY slip Op 05810, 2nd Dept 9-11-13**

CIVIL PROCEDURE/REPLEVIN/SEIZURE

Criteria for Seizure of Equipment Explained

In reversing Supreme Court, the Second Department determined the plaintiff, in a replevin action, was not required to demonstrate irreparable harm in an action for seizure pursuant to CPLR 7102. The defendant had defaulted on an equipment lease. The court wrote:

> Pursuant to CPLR 7102(c) and (d), on a motion for an order of seizure, a plaintiff must demonstrate a likelihood of success on its cause of action for replevin and the absence of a valid defense to its claim … . Here, the plaintiff made such a showing … . Contrary to the court's determination, the plaintiff was not required to demonstrate that it would suffer irreparable injury in order to obtain an order of seizure pursuant to CPLR 7102. **TCF Equip Fin Inc v Interdimensional Interiors, Inc, 2013 NY Slip 05893, 2nd Dept 9-18-13**

CIVIL PROCEDURE/FORECLOSURE

New Affidavits Properly Allowed in Foreclosure Proceedings/Accuracy of the Execution or Notarizations of the Original Affidavits Could Not Be Confirmed

In affirming Supreme Court's granting of plaintiff's motion to substitute new affidavits of merit in a foreclosure proceeding because the accuracy of the execution and/or notarizations of the original affidavits could not be confirmed, the Second Department explained:

> CPLR 2001 permits a court, at any stage of an action, to disregard a party's mistake, omission, defect, or irregularity if a substantial right of a party is not prejudiced … . " Pursuant to CPLR 5019(a), a trial court has the discretion to correct an order or judgment which contains a mistake, defect, or irregularity not affecting a substantial right of a party'" … . The provisions in CPLR 2001 and 5019(a) may only be employed to correct errors where the corrections do not affect a substantial right of the parties … .
>
> Under the facts of this case, the Supreme Court providently exercised its discretion in granting the plaintiff's motion. No substantial right of Eaddy [the defendant] will be affected by the court's substitution of the new affidavits of merit and of the amount due … . The new proposed affidavits of merit and of the amount due list the same amounts due and owing as those stated in the original affidavits submitted with the application for the order of reference and the application for the judgment of foreclosure and sale. Further, Eaddy has remained in possession of the subject property throughout the pendency of the instant action. **US Bank NA v Eaddy, 2013 NY Slip Op 05896, 2nd Dept 9-18-13**

CIVIL PROCEDURE/NEGLIGENCE/ MUNICIPAL LAW

Plaintiff Should Have Been Allowed to Amend Complaint to Allege City Had Notice of Sidewalk Defect

In a slip and fall case, the plaintiff did not allege the city had notice of the defect and sought to amend the complaint to add the allegation. The Second Department determined plaintiff should have been allowed to amend:

> … [T]he Supreme Court erroneously granted that branch of the City's motion which was pursuant to CPLR 3211(a)(7) to dismiss the complaint on the ground that the plaintiff had failed to plead prior written notice of the alleged sidewalk defect. Instead, under the facts of this case, the Supreme Court should have granted the plaintiff's cross motion and permitted him to amend the pleadings and the notice of claim to add an allegation that the City received prior written notice of the alleged sidewalk defect where, as here, the amendment would not prejudice or surprise the City (see CPLR 3025; General Municipal Law § 50-e[6]…). **Perez v City of New York, 2013 NY Slip Op 06553, 2nd Dept 10-9-13**

CIVIL PROCEDURE/NEGLIGENCE/ MEDICAL MALPRACTICE

Hospital Not Necessary Party in Malpractice Action Where Liability Vicarious

The Second Department determined a hospital which may be vicariously liable in a medical malpractice action was not a necessary party to the action:

> The Supreme Court did not err in concluding that the nonparty Victory Memorial Hospital (hereinafter the hospital) was not a necessary party to this action. Contrary to the appellants' contention, even if it were shown that the hospital would be vicariously liable for any negligence of the individual defendants, or that it had a contractual obligation to indemnify those individual defendants for damages recovered from them in this action, those factors would not render the hospital a necessary party to this action (see CPLR 1001[a]…). Complete relief may be accorded to the parties in this action without the presence of the hospital, as a plaintiff may proceed against any or all joint-tortfeasors, and a judgment for or against one tortfeasor does not operate as a merger or bar of a claim against other tortfeasors … . Accordingly, the Supreme Court properly denied those branches of the motion and cross motion which were pursuant to CPLR 3211(a)(10) to dismiss the complaint for failure to join a necessary party. **Smith v Pasqua, 2013 NY slip Op 06356, 2nd Dept 10-2-13**

CIVIL PROCEDURE/ FREEDOM OF INFORMATION LAW (FOIL)

Eliot Spitzer, Former New York Attorney General, Was a Necessary Party in FOIL Proceeding Seeking His Private Emails In Connection With Civil Enforcement Action against AIG Chief Financial Officer

Petitioner, former Chief Financial Officer of AIG, was the subject of a civil enforcement action against him brought in 2005 by then Attorney General Eliot Spitzer. Supreme Court granted petitioner's Freedom of Information Law (FOIL) request for access to private emails of Spitzer. The Third Department determined that, given the nature of the documents requested, and Spitzer's current status as a private person, he was a necessary party to the action:

> Since at this juncture the object of this proceeding is Spitzer's private email account(s), and the outcome of this appeal could be a directive to respondent to gain access to and review those private accounts, Spitzer would certainly be "inequitably affected by a judgment in th[is] [proceeding]" and "ought to be [a] part[y] if complete relief is to be accorded between the persons who are parties to [this proceeding]" (CPLR 1001 [a]). As such, Spitzer is a necessary party herein … . While not raised directly by the parties, "the court may at any stage of a case and on its own motion determine whether there is a nonjoinder of necessary parties" … . "The rule . . . insures fairness to third parties who ought not to be prejudiced or 'embarrassed by judgments purporting to bind their rights or interest where they have had no opportunity to be heard'" … .
>
> In this matter, resolution of the disputed FOIL demand directly impacts the personal property of Spitzer, now a private citizen who is not before this Court and whose significant private rights and property cannot be said to be protected by the current respondent, which admittedly does not represent Spitzer's private interests. However, "[t]his [C]ourt has previously held that a court may not, on its own initiative, add or direct the addition of a party" (…see CPLR 1003). Accordingly, the matter must be remitted to Supreme Court to order Spitzer to be joined if he is subject to the jurisdiction of the court and, if not, to permit Spitzer's joinder by stipulation, motion or otherwise and, "if joinder cannot be effectuated, the court must then determine whether the [proceeding] should be permitted to proceed in the absence of necessary parties"… . **Matter of Smith v NYS Office of the Attorney General, 515758, 3rd Dept 10-17-13**

CIVIL PROCEDURE/ COUNTY LAW

Board of County Legislators is Necessary Party Re: Legality of Local Law

The Second Department determined the Board of County Legislators was a necessary party in an action concerning the legality of a local law enacted by the Board:

> A challenge to the procedures by which local legislation is enacted should be raised in a CPLR article 78 proceeding against the body which enacted it … . In view of the defendants' challenge to the validity of the procedures by which the local law was enacted, the Board, as the body that enacted the local law, was a necessary party (see CPLR 1001[a]…). However, it appears that there are legal impediments to the defendants' commencement of an action or proceeding against the Board without the Board's consent (see Westchester County Charter § 158.11[3]). Under these circumstances, in the interest of fairness and judicial economy, we join the Board as a necessary party …, and direct the plaintiffs to effect service of process upon the Board, and serve the Board with all appropriate papers. **Matter of Jenkins v Astorino, 2013 NY Slip Op 06684, 2nd Dept 10-16-13**

Registered Voter Could Not Intervene In Suit to Determine Constitutionality of Local Term-Limit Law

The Second Department affirmed Supreme Court's denial of a "registered voter's" [Nichol's] motion to intervene in an action to determine the constitutionality of a local law concerning term limits for public offices. The court explained:

> Upon a timely motion, a person is permitted to intervene in an action as of right when, among other things, "the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment" (CPLR 1012[a][2]…). Additionally, the court, in its discretion, may permit a person to intervene, inter alia, "when the person's claim or defense and the main action have a common question of law or fact" (CPLR 1013). " However, it has been held under liberal rules of construction that whether intervention is sought

as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013 is of little practical significance [and that] intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings'" … .

Here, contrary to Nichols's contention, the Supreme Court properly denied his motion for leave to intervene in the action as a defendant. Although Nichols, who describes himself as a "registered voter in the County of Suffolk and an active supporter of [his] constitutional right to pass and enforce term limit legislation," may indeed be interested in defending the local law in question, he failed to demonstrate that he has a "real and substantial interest" in the action … . Moreover, as the Supreme Court appropriately noted, he failed to show that any interest he did have would not be adequately represented by the defendant … . Accordingly, the court properly denied Nichols's motion for leave to intervene. **Spota v County of Suffolk, 2013 NY Slip Op 06558, 2nd Dept 10-9-13**

CIVIL PROCEDURE/ INSURANCE LAW

Similar Pending Lawsuit Properly Dismissed—Two Lawsuits Sought Declaratory Judgment Re: Duty to Defend and Indemnify

The Second Department determined Supreme Court properly dismissed an action for a declaratory judgment re: an insurance company's duty to defend and indemnify because of its similarity to another pending action:

> Where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same, a court has broad discretion in determining whether an action should be dismissed pursuant to CPLR 3211(a)(4) on the ground that there is another action pending … . "The critical element is that both suits arise out of the same subject matter or series of alleged wrongs" … . Under the circumstances of this case, upon the record that existed at the time the Supreme Court issued the order appealed from, the court providently exercised its discretion in granting that branch of the defendants' motion which was to dismiss the complaint pursuant to CPLR 3211(a)(4) … . **Scottsdale Ins Co v Indemnity Ins Corp RRG, 2013 NY Slip Op 06557, 2nd Dept 10-9-13**

ADMINISTRATIVE LAW/ MEDICAID

New Medicaid Reimbursement Procedures Did Not Violate State Administrative Procedure Act

The Third Department affirmed Supreme Court and determined that a modified Medicaid reimbursement procedure for the school supportive health services program (SSHSP) did not violate the State Administrative Procedure Act because the new administrative directives (referred to as Q & A's) were not new rules triggering the requirements of the Act:

> The documentation and reimbursement eligibility requirements reflected in the challenged Q & As were not required to be promulgated as rules under the State Administrative Procedure Act. For purposes of rule-making notice and filing requirements (see State Administrative Procedure Act § 202), a rule is defined as "the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes . . . the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof" (State Administrative Procedure Act § 102 [2] [a]). Expressly excluded from the definition are "rules concerning the internal management of the agency which do not directly and significantly affect the rights of or procedures or practices available to the public" (State Administrative Procedure Act § 102 [2] [b] [i]), and "forms and instructions, interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory" (State Administrative Procedure Act § 102 [2] [b] [iv]). The Court of Appeals has recognized "that there is no clear bright line between a 'rule' or 'regulation' and an interpretative policy" (Cubas v Martinez, 8 NY3d 611, 621 [2007]). Courts have previously found administrative directives to be interpretive statements when they rely on and constitute reasonable interpretations of existing regulations

or statutes, or merely address the type of documentation needed to establish whether a predetermined test of eligibility has been met … . **Board of Education of the Kiryas Joel Village Union Free School District, 516336, 3rd Dept 10-17-13**

ANIMAL LAW

Question of Fact About Whether Horse Owner Liable for Injuries to Novice Rider

The Fourth Department affirmed the denial of summary judgment to the owners of a horse which allegedly brushed up against a tree, injuring the novice rider. The court explained that the "knowledge of vicious propensities" doctrine applied here because there was evidence the defendants knew the horse had a propensity to ride too close to trees, the general release signed by plaintiff was void as against public policy, and the defendants did not establish as a matter of law that plaintiff had assumed the increased risk of horseback riding alleged here:

> It is well settled that "the owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities" … . "[A]n animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities—albeit only when such proclivity results in the injury giving rise to the lawsuit" (id. at 447). In support of their motion, defendants submitted the deposition testimony of plaintiff, wherein she testified that defendant and a guide employed by the Ranch instructed plaintiff to push off of the trees if the horse walked too closely to the trees on the single-file woodland trail. * * *
>
> Even assuming, arguendo, that defendants conclusively demonstrated that plaintiff executed the release, we conclude that, under these circumstances, where the riding lesson was ancillary to the recreational activity of horseback riding, General Obligations Law § 5-326 renders the release void as against public policy… .* * *
>
> Finally, defendants failed to establish as a matter of law that plaintiff assumed the risk of horseback riding. Horseback riding "[p]articipants will not be deemed to have assumed unreasonably increased risks" … . Here, defendants submitted evidence that raised a question of fact whether they unreasonably increased the risks of horseback riding by using a bitless bridle on their horses, which did not provide plaintiff with the ability to control the horse, and by failing to give plaintiff, who was a novice rider, adequate instructions on how to control the horse … . **Vandeerbrook v Emerald Springs Ranch…, 855, 4th Dept 9-27-13**

Negligence of Dog Owners In Calling A Dog Which Ran Into Bicyclist's Path Is Actionable

Over a two-justice dissent, the First Department determined a lawsuit alleging the negligence of dog owners could go forward. Plaintiff, a bicyclist, was injured when plaintiffs caused their dog to run into plaintiff's path. After noting a change in the Court of Appeals' approach to animal-caused injuries that are not the result of vicious propensities, the court wrote:

> Recently, however, the Court of Appeals revisited Bard and Petrone when it decided an appeal of Hastings (94 AD3d 1171). In reversing the grant of summary judgment to the defendants, the Court recognized that an accident caused by an animal's "aggressive or threatening behavior" is "fundamentally distinct" from one caused by an animal owner's negligence in permitting the animal from wandering off the property where it was kept (21 NY3d 122, 125 [2013]). The Court stated that the consequence of a blanket rule against negligence claims in cases where animals displayed no vicious propensities "would be to immunize defendants who take little or no care to keep their livestock out of the roadway or off of other people's property" (id.). * * *
>
> Defendants' actions can be likened to those of two people who decide to toss a ball back and forth over a trafficked road without regard to a bicyclist who is about to ride into the ball's path. If the cyclist collided with the ball and was injured, certainly the people tossing the ball would be liable in negligence. Simply put, this case is different from the cases addressing the issue of injury claims arising out of animal behavior, because it was defendants' actions, and not the dog's own instinctive, volitional behavior, that most proximately caused the accident. **Doerr v Goldsmith, 2013 NY slip Op 06442, 1st Dept 10-3-13**

APPEALS

No Appeal Lies from an Order Entered Upon a Default

The Fourth Department noted that no appeal lies from an order entered upon a default. The only remedy is a motion to vacate the default order:

> Plaintiff appeals from an order granting the respective motion and cross motions of defendants seeking summary judgment dismissing the second amended complaint against them. It is undisputed that plaintiff failed to oppose the motion and cross motions or to appear on the return date thereof, and thus we deem the order to be entered upon plaintiff's default… . We therefore dismiss the appeal from the order inasmuch as no appeal lies from an order entered on default … . The fact that Supreme Court, upon plaintiff's default, granted the motion and cross motions on the merits … is of no moment inasmuch as no appeal lies from an order entered on default. "[I]t is not inconsistent to determine both that plaintiff[is] in default and that defendants are entitled to summary judgment on the merits. Plaintiff['s] remedy is to move to vacate the default [order]"… . **Britt…v Buffalo Municipal Housing Authority…, 977, 4th Dept 9-27-13**

Court Refused to Entertain All Issues Raised on Appeal Because They Were Not Raised Below and Could Not Be Determined as Matters of Law

In a case involving an assessment by defendant against plaintiff under the Federal Power Act for costs associated with a hydropower plant, dams and reservoirs, the Third Department noted that none of defendant's arguments on appeal could be addressed because they were not raised below:

> On appeal, defendant makes none of the arguments raised in connection with the motions before Supreme Court. Instead, defendant now argues that plaintiff failed to state a cause of action for a refund by failing to allege that it paid the unauthorized assessments under protest. However, "[a]n appellate court should not, and will not, consider different theories or new questions, if proof might have been offered to refute or overcome them had they been presented at the trial [level]" … . By raising this issue for the first time on appeal, defendant has deprived plaintiff of the opportunity to provide evidence of any protest. The issue is, therefore, not properly before us, and we decline to consider it (see CPLR 5501 [a] [3]…). Similarly, defendant's contention that equity does not support a finding of unjust enrichment is also fact-intensive and, as such, it too was required to be raised before Supreme Court in order to be preserved for appellate review … .
>
> Also unpreserved is defendant's alternative argument that the action is time-barred … . Although listed as an affirmative defense in the answer, defendant did not pursue dismissal of the action on this ground … . Nor is this an issue of law that may be addressed for the first time on appeal, as plaintiff responds that it would be entitled to a toll of the statute of limitations based on the ongoing administrative proceedings and we must agree that the question of whether a statute of limitations is tolled raises factual issues … . Inasmuch as there are steps that plaintiff might have taken to counter the statute of limitations defense if it had been raised before Supreme Court, the issue is not properly before us and, again, we decline to consider it … . **Albany Engineering Corp v Hudson River/Black River Regulating District, 516220, 3rd Dept 10-17-13**

APPEALS/CIVIL PROCEDURE

"Law of the Case" Doctrine at the Appellate Level Explained

The Second Department explained the "law of the case" doctrine at the appellate level in the context of a Family Court matter:

> As a general rule, the law of the case doctrine precludes this Court from reexamining an issue which has been raised and decided against a party on a prior appeal where that party had a full and fair opportunity to address the issue … . Review of the mother's contention regarding the prohibition against telling the child that any man other than the father is the child's biological father is barred by the doctrine of law of the case, as this Court has already decided this exact issue on a prior appeal …, and there has been no showing of subsequent evidence or change of law … . **Matter of Fulmer v Bisenbaum, 2013 NY slip Op 05819, 2nd Dept 9-11-13**

Stay During Appellate Process Expires Five Days After Court of Appeals Denies Leave to Appeal

A police officer was dismissed from the force just before his retirement pension vested. The dismissal was vacated by Supreme Court because of flaws in serving

the officer with notice of the charges. The First Department affirmed and the Court of Appeals denied leave to appeal. The First Department noted that the stay of the proceedings which was in effect during the appeals process (CPLR 5519(a)) terminated five days after the Court of Appeals denied leave (CPLR 5519(e)(ii)). The commissioner's failure to hold a new hearing and issue a new dismissal order within thirty days of the denial of leave resulted in the automatic vesting of the officer's pension. **Matter of Toolasprashad v Kelly, 2013 NY Slip Op 06772, 1st Dept 10-17-13**

ARBITRATION

Error to Exclude Petitioner from Arbitration Proceeding

Although the First Department determined the error was harmless, the court noted that petitioner should not have been excluded from an arbitration proceedings concerning the termination of her employment:

> The arbitrator exceeded the scope of his authority by excluding petitioner from certain portions of the arbitration proceedings, over her objection, in violation of Rule 23 of the American Arbitration Association's Commercial Arbitration Rules (see CPLR 7511[b][iii]…).
>
> The exclusion of petitioner from approximately 5% of the proceedings was, however, harmless error, since the result would have been the same had she been present. Petitioner's case rested on her argument that respondents' reasons for terminating her were merely a pretext to avoid paying her what she believed would be very high commissions. Since the evidence presented during petitioner's absences from the proceedings had no bearing on that issue, there is no basis for vacating the arbitrator's finding that petitioner was fired for her repeated, and severe, violations of the conflict of interest provisions of her contract, as well as for her threats against her employer… . **Caruso v Viridian Network, LLC, 2013 NY Slip Op 05780, 1st Dept 9-10-13**

No Justification for Vacation of Arbitration Award---Strict Standard Applies

The Second Department determined Supreme Court erred in vacating an arbitration award in a case involving an uninsured motorist endorsement. Petitioner had won a $25,000 (default) civil judgment against the driver, but in the arbitration under the uninsured motorist endorsement, the arbitrator awarded $10,000:

> The Supreme Court erred in vacating the arbitration award. "[J]udicial review of arbitration awards is extremely limited" … . " An arbitration award must be upheld when the arbitrator "offer[s] even a barely colorable justification for the outcome reached"" … . In addition, an "arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice" … . "An arbitrator is not bound by principles of substantive law or rules of evidence, and may do justice and apply his or her own sense of law and equity to the facts as he or she finds them to be" … . Insofar as is relevant to the instant proceeding, pursuant to CPLR 7511(b)(1)(iii), a court may only vacate an arbitration award if the rights of the party moving to vacate the award were prejudiced by the arbitrator "exceed[ing] his [or her] power or so imperfectly execut[ing] it that a final and definite award upon the subject matter submitted was not made." "Such an excess of power occurs only where the arbitrator's award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power" … .
>
> Here, the terms of the SUM endorsement clearly provide that any sum [the insurer] was obligated to pay the petitioner, which the petitioner was legally entitled to recover, was subject to arbitration, and that the parties agreed to be bound by the arbitrator's award. **Matter of Aftor v Geico Ins Co, 2013 NY Slip Op 07032, 2nd Dept 10-30-13**

ARBITRATION/EDUCATION LAW

Reinstatement of Charge Against Teacher After Dismissal of Charge in Arbitration Proper/Interlocutory Ruling by Arbitrator was "Final" in Effect/Courts Can Impose Higher Level of Scrutiny when Arbitration Mandated by Statute

The Second Department affirmed Supreme Court's reinstatement of a charge against a teacher (Hogan) which had been dismissed by the arbitrator. The Second Department explained the criteria for court review of an interlocutory ruling of an arbitrator, noting that more scrutiny is appropriate in an arbitration mandated by statute:

> Initially, we reject Hogan's contention that the petition should have been dismissed because

courts do not have the authority to review an interlocutory award dismissing one of the charges in an arbitration proceeding brought pursuant to Education Law 3020-a. As a general rule, a court lacks authority to entertain a petition to review an interlocutory ruling of an arbitrator on a procedural matter … . Here, however, the award sought to be reviewed is not one which involves "only a very limited procedural question" … . Rather, the award dismissed the most serious disciplinary charge preferred against Hogan, and the only one of the three charges which alleged that he was guilty of misconduct. The award is final as to that charge, and, if allowed to stand, would prevent the District from adducing evidence in support of the alleged misconduct at the hearing. Under these circumstances, the award dismissing Charge No. 1 can be viewed as a final determination subject to review under CPLR 7511 … .

Furthermore, the Supreme Court properly granted the District's petition and reinstated Charge No. 1 against Hogan. Where, as here, the obligation to arbitrate arises through statutory mandate (see Education Law § 3020-a), the arbitrator's determination is subject to closer judicial scrutiny than it would receive had the arbitration been conducted voluntarily … . The award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious … . **Matter of Board of Educ of Hauppauge Union Free Sch Dist v Hogan, 2013 NY Slip Op p05816, 2nd Dept 9-11-13**

ARBITRATION/CONTRACT

Stay of Arbitration Properly Denied/Collective Bargaining Agreement Allowed Issue to Be Determined in Arbitration

In affirming Supreme Court's dismissal of an Article 75 petition seeking a permanent stay of arbitration (with respect to a collective bargaining agreement [CBA]), the Fourth Department explained the operative analysis:

> In determining whether an issue is subject to arbitration under a collective bargaining agreement (CBA), a court must apply the two-step analysis set forth in Matter of Acting Supt. of Schs. of Liverpool Cent. Sch. Dist. (United Liverpool Faculty Assn.) (42 NY2d 509, 513). "First, a court must determine whether there is any statutory, constitutional or public policy prohibition against arbitration of the grievance" … . If the court determines that there is no such prohibition and thus that the parties have the authority to arbitrate the grievance, it proceeds to the second step, in which it must determine whether that authority was in fact exercised, i.e., whether the CBA demonstrates that the parties agreed to refer this type of dispute to arbitration … . With respect to the second step, where there is a broad arbitration clause such as the one in the CBA at issue, "[a] determination of arbitrability is limited to 'whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA' " … . "Succinctly, the test centers on two distinct inquiries as to the public parties' purported entry into the arbitral forum: may they do so and, if yes, did they do so" … . Here, with respect to the issue whether petitioner properly followed the procedures mandated by the CBA in terminating the employee in question, we conclude that the court properly determined that the parties had the authority to agree to arbitrate this grievance, and that they in fact agreed to do so. **Matter of Arbitration…, 1019, 4th Dept 10-4-13**

ARTICLE 78/EDUCATION LAW

Student Who Had Been Expelled Could Bring Plenary Complaint Against School, in Addition to an Article 78 Proceeding

In a full-fledged opinion by Justice Andrias, the First Department determined that a dental student who had been expelled in a disciplinary action could bring both an article 78 proceeding and a plenary action for damages against the school. The court went through each cause of action in the complaint and allowed a few, including sex discrimination claims, to go forward. (In a previous appeal the article 78 petition re: the expulsion had been granted, finding that expulsion was too severe a penalty.):

> "Judicial review of an academic institution's disciplinary determinations is limited to whether it substantially adhered to its own published rules and guidelines and whether the determinations are based on a rational interpretation of the relevant evidence" … . Thus, to the extent plaintiff's causes of action are, in essence, a challenge to the determination to expel her, she was only entitled to article 78 review …, and the filing of the article 78 proceeding mandated the dismissal of the plenary action insofar as it raised such claims … . Conversely, to the extent the gravamen of plaintiff's causes of action is not a challenge to the decision to expel her and is not duplicative of the petition's allegations, she is not limited to article 78 review and may seek damages in a plenary action … . **Kickertz v New York Univ, 2013 NY Slip Op 05781, 1st Dept 9-10-13**

ATTORNEY-CLIENT

Conflicting Evidence About Whether Attorney Discharged for Cause (Thereby Prohibiting Recovery of Attorneys Fees) Required Hearing

The Second Department determined Supreme Court should not have ruled that an attorney was not discharged for cause, thereby entitling the attorney to attorneys fees, without a hearing, because there was conflicting evidence on the issue. The court explained when an attorney who has been discharged is entitled to attorneys fees:

> A client has "an absolute right, at any time, with or without cause, to terminate the attorney-client relationship by discharging the attorney" … . Where the discharge is without cause, the attorney may recover the reasonable value of his or her services in quantum meruit … . In contrast, "[a]n attorney who is discharged for cause . . . is not entitled to compensation or a lien" … . An attorney who violates a disciplinary rule may be discharged for cause and is not entitled to fees for any services rendered … .
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> "Where there are conflicting claims as to . . . whether an outgoing attorney was discharged with or without cause, a hearing is necessary to resolve such dispute"… . **Schultz v Hughes, 2013 NY slip Op 05891, 2nd Dept 9-18-13**

Charging Lien on Settlement Award Allowed---Attorney Withdrew By Mutual Consent

In affirming the validity a charging lien on a settlement award on behalf of an attorney who had withdrawn from the case upon mutual consent the Second Department wrote:

> "Pursuant to Judiciary Law § 475, [w]hen an action is commenced, the attorney appearing for a party obtains a lien upon his or her client's causes of action . . . This lien attaches to any final order or settlement in the client's favor'" … . " Where an attorney's representation terminates upon mutual consent, and there has been no misconduct, no discharge for just cause, and no unjustified abandonment by the attorney, the attorney maintains his or her right to enforce the statutory lien'" … . Here, the plaintiff established, prima facie, that his representation … was terminated upon mutual consent, and that there had been no misconduct, discharge for cause, or unjustified abandonment on his part.**Tangredi v Warsop, 2013 NY Slip Op 06559, 2nd Dept 10-9-13**

FIRST AMENDMENT/ ARBITRATION/EVIDENCE

Death Threats Not Protected Under First Amendment/Hearsay May Be Basis of Administrative Determination

In affirming the arbitrator's recommendation a teacher should be terminated for making death threats against an arbitrator in a prior disciplinary proceeding, the First Department noted that hearsay can be the basis for an administrative determination and explained the threats were not protected by the First Amendment:

> We reject petitioner's allegations that the instant disciplinary proceeding and the ultimate discipline imposed against him violated the right to free speech under the First Amendment to the United States Constitution. Supreme Court properly deferred to the arbitrator's finding that petitioner's statements are exempt from First

Amendment protection because they constitute "true threats." We note that petitioner's former attorney only disclosed the threats because he believed that petitioner's increasingly erratic behavior rendered him genuinely dangerous. Under the circumstances, it cannot be argued that petitioner's speech implicates matters of public concern … . Nor can it be disputed that petitioner's death threats disrupted the initial arbitration proceeding… . **Matter of Smith v New York City Dept. of Educ., 2013 NY Slip Op 05765, 1st Dept 9-3-13**

CONTRACT

No Evidence Release Invalidated by Fraud or Duress

In upholding the validity of a release, the Second Department explained the relevant principles:

> " A release is a contract, and its construction is governed by contract law'" … . "A release may be invalidated . . . for any of the traditional bases for setting aside written agreements'" … . However, "a signed release shifts the burden of going forward . . . to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release'" … .
>
> Here, the plaintiff failed to demonstrate that there was fraud, duress, or some other fact sufficient to void the release. **Davis v Rochdale Vil, Inc, 2013 NY Slip Op 05874, 2nd Dept 9-18-13**

Letters Between Attorney and City Re: Fees Did Not Create Unilateral Contract

The Third Department affirmed the dismissal of a complaint seeking attorneys fees from the City for the defense of a police officer who allegedly pointed a loaded weapon at a coworker. At one point the City and the defense attorney exchanged letters concerning the lawyer's fees and the City offered to pay the defense attorney $150.00 an hour. The breach of contract cause of action was based on those letters. In addition to determining there was no contract, the Third Department explained the flaws in the promissory estoppel, unjust enrichment, quantum meruit and fraud causes of action. In finding that the letters did not constitute a contract, the Third Department wrote:

> "For a contract to be created, regardless of whether it is bilateral or unilateral, 'there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms'" … . Price is a material term of a contract … ..
>
> The complaint here alleges that [the City's] letters constituted a unilateral contract whereby [the City] agreed to pay [defense counsel] at the rate of $150 per hour, and that the contract became binding when [defense counsel] performed under the contract by representing [the officer]. Plaintiffs cannot prevail because their allegations are flatly contradicted by documentary evidence. [Defense counsel's] invoice billed defendant at the rate of $350 per hour for his time and at other rates – all higher than listed in his ….estimate – for his staff. This invoice contradicts plaintiffs' assertion that the parties had agreed on all material terms of a contract, namely a price of $150 per hour … . As documentary evidence refutes the allegations and establishes that no valid contract had been formed, Supreme Court properly dismissed the cause of action for breach of contract… . **DerOhannesian v City of Albany, 515875, 3rd Dept 10-24-13**

Effect of "Notwithstanding" Clause/Criteria for Reformation of Contract

In a full-fledged opinion by Justice Acosta, the First Department affirmed Supreme Court's denial of defendant's motion to dismiss a breach of contract complaint. Plaintiffs contended the floor share price in the "notwithstanding" clause of the contract was an error, and submitted a supporting email referring to a different price in opposition to the motion to dismiss. The court agreed that the email was sufficient to overcome the dismissal motion and explained the powerful legal effect of a "notwithstanding" clause and the criteria for reformation of a contract:

> It is well settled that trumping language such as a "notwithstanding" provision "controls over any contrary language" in a contract … . This Court has likewise noted that "inconsistency provisions" -- i.e. those that dictate which of two contract provisions should prevail in the event of an inconsistency -- "are frequently enforced by courts" … .
>
> In construing statutes and contracts, the U.S. Supreme Court has remarked that "the use of . . . a notwithstanding' clause clearly signals the drafter's intention that the provisions of the notwithstanding' section override conflicting provisions of any other section" … . Thus, the effect of a "notwithstanding" clause will prevail "even if other provisions of the contract[] might seem to require . . . a [conflicting] result" … . * * *
>
> Before a court will grant reformation of a contract, the party demanding this equitable remedy " must establish his right to such relief

by clear, positive and convincing evidence'" … . The purpose of reformation is not to "alleviat[e] a hard or oppressive bargain, but rather to restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties" … . In order to "overcome the heavy presumption" that the contract embodies the parties' true intent, the party seeking reformation must "show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties" … . **Warberg Opportunistic Trading Fund LP v GeoResources, Inc, 2013 NY Slip Op 06826, 1st Dept 10-22-13**

No Ambiguity in Contract/No Resort to Extrinsic Evidence

In affirming the grant of defendant's motion for summary judgment in a contract action, the Second Department explained the analytical criteria concerning whether extrinsic evidence should be considered:

> "[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" … . Thus, "before looking to evidence of what was in the parties' minds, a court must give due weight to what was in their contract" … . "A contract should be read as a whole to ensure that undue emphasis is not placed upon particular words and phrases" … . "Whether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous" … . "Moreover, courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" … .
>
> Here, the plaintiff failed to show any ambiguity in the subject contract that would permit consideration of the proffered extrinsic evidence of an alleged oral agreement to clarify the meaning of [a] term … . **Outstanding Transp Inc v Interagency Council of Mental Retardation & Dev Disabilities, Inc, 2013 NY Slip Op 07020, 10-30-13**

Error to Dismiss Failure-to-Mitigate-Damages Affirmative Defense in Contract Dispute

In a contract dispute, the Second Department determined Supreme Court should not have dismissed the defendant-Everfoam's affirmative defense alleging plaintiffs failed to mitigate damages, noting that the duty to mitigate arises from the common law and need not be expressly bargained for in the contract:

> …[T]he Supreme Court erred in awarding summary judgment dismissing Everfoam's fourth affirmative defense alleging that the plaintiffs failed to mitigate damages, based on its determination that "no such duty exists within the parties' contract." To the contrary, the duty to mitigate damages arising from a breach of contract is a duty that arises from common law and, therefore, need not be expressly bargained for in a contract to be enforceable … . Accordingly, assuming liability, Everfoam should be entitled to limit damages, if any, if the plaintiffs failed to make "reasonable exertions to minimize the injury" … . **Mack-Cali Realty LP v Everfoam Insulation Sys Ind, 2013 NY Slip Op 06348, 2nd Dept 10-2-13**

CONTRACT/ENVIRONMENTAL LAW

Question of Fact Whether General Releases Encompassed Environmental Damage from Leaking Fuel Tank

The Second Department determined that there was a question whether general releases contemplated damages related to environmental contamination and the action should not have been dismissed based on the releases. The action concerned gasoline which had leaked into the ground when defendant had leased the plaintiff's property. The court explained:

> Generally, a valid release completely bars an action on a claim that is the subject of the release … . Principles of contract law govern the interpretation of a release; "a release that is complete, clear, and unambiguous on its face must be enforced according to the plain meaning of its terms'" … . Nonetheless, as the Court of Appeals has recognized with respect to a general release,
>
> "[t]here is little doubt . . . that its interpretation and limitation by the parol evidence rule are subject to special rules. These rules are based on a realistic recognition that releases contain standardized, even ritualistic, language and are given in circumstances where the parties are sometimes looking no further than the precise matter in dispute that is being settled. Thus, while it has been held that an unreformed general release will be given its full literal effect

where it is directly or circumstantially evident that the purpose is to achieve a truly general settlement …, the cases are many in which the release has been avoided with respect to uncontemplated transactions despite the generality of the language in the release form" … .

Further, "[t]he meaning and extent of coverage of a release necessarily depend, as in the case of contracts generally, upon the controversy being settled and upon the purpose for which the release was actually given'" … . A general release may not be construed to cover matters that the parties "did not desire or intend to dispose of" … .

Here, the two releases at issue, whether construed together or separately, are ambiguous regarding whether the parties intended that they cover unknown claims for environmental contamination… . **Burnside 711 LLC v Amerada Hess Corp, 2013 NY Slip Op 05869, 2nd Dept 9-18-13**

CONTRACT/EVIDENCE

Authenticity of Document Not Demonstrated

In finding the existence of a contract had not been demonstrated, the Second Department explained the relevant evidentiary rules concerning the authenticity of a document submitted as proof of a contract:

> The general rule is that "[a] writing is ordinarily not relevant at trial unless evidence had been introduced to show that it was made, signed or adopted by a particular person" (Prince, Richardson on Evidence, § 9-101 [2008]). "A private document offered to prove the existence of a valid contract cannot be admitted into evidence unless its authenticity and genuineness are first properly established" … . The authenticity of a document may be established by submitting the document with a certificate of acknowledgment …, which was not done here. Nor was any other evidence submitted as to the validity of the documents in issue. **Fairlane Fin Corp v Greater Metro Agency, Inc, 2013 NY Slip Op 05875, 9-18-13**

Ambiguity of Contract Is a Question of Fact Where Credibility of Extrinsic Evidence Must Be Assessed

The First Department determined there was question of fact whether defendant signed a note in his personal as well as corporate capacity. The court explained the relevant analysis where a contract is ambiguous:

> A contract is ambiguous if "on its face [it] is reasonably susceptible of more than one interpretation" … . The determination whether a contract is ambiguous is a question of law for the court … . If the court deems a contract ambiguous, it may consult extrinsic evidence to resolve the ambiguity … . However, where "the determination of the parties' intent depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact" … . **Chen v Yan, 2013 NY Slip Op 05957, 1st Dept 9-24-13**

CONTRACT LAW/ FRAUD/DAMAGES INQUEST AFTER DEFAULT

Issues to Be Determined in Inquest After Default in Contract Action Explained/Viability of Fraud Cause of Action in Action Based on Contract Explained

In a contract action, the Third Department noted that: (1) a limitation of liability clause in a contract can be raised by the defaulting party after a default in the inquest on damages; (2) the court can determine whether the defaulting party stated valid causes of action; and (3) allegations of deceptive practices aimed at the general public state a cause of action under General Business Law 349. In explaining why the fraud cause of action was valid in this contract-based case, the Third Department wrote:

> In order to recover on the third cause of action for fraud, the defrauded party must allege a misrepresentation or omission of a material fact known to be false and made with the intent to deceive, as well as justifiable reliance and damages … . While it is the general rule that "[a] separate cause of action seeking damages for fraud cannot stand when the only fraud alleged relates to a breach of contract" …, defendants' allegations of fraud do not concern any express terms of the contract or third-party defendants' failure to perform those term …. Rather, defendants allege that third-party defendants fraudulently induced them into entering the contract by falsely representing that they were skilled, competent and experienced in providing construction management services. Those allegations are not redundant of the breach of contract cause of action, which

claims that third-party defendants failed to perform the terms of the contract …
. Defendants also alleged that they relied on the representations …, and the allegations permit us to infer that the reliance was justified. Nor is there anything in the complaint or contract that would suggest that their reliance was unjustified … . **84 Lumber Co LP v Barringer…, 516235, 3rd Dept 10-17-13**

CONSTRUCTIVE TRUST/FAMILY LAW

Husband's Contribution to Purchase of Home by Wife's Parents Constituted a Constructive Trust

In a divorce action, the Second Department affirmed Supreme Court's determination that the husband's [Henn's] contribution toward the purchase of a house constituted a constructive trust. The parties separated before Henn moved into the home. The wife's [Tyree's] parents [the Raffas] contributed some money and purchased the home for Henn and Tyree, both of whom also contributed funds toward the purchase. In concluding Henn's contribution constituted a constructive trust, the court wrote:

> Here, the Supreme Court correctly found that the first element relevant to imposing a constructive trust was satisfied, as Henn and the Raffas were related through marriage and they pooled their resources to purchase the subject premises … . Henn satisfied the second element by demonstrating that the Raffas implicitly promised to convey the premises to him and Tyree … . He satisfied the third element, which requires a showing that he acted in reliance on the promise, by establishing that he gave $58,500 to Samuel J. Raffa, and that Samuel J. Raffa used that money to purchase the premises … . As for the fourth element, which requires a showing of unjust enrichment flowing from the breach of the promise, the evidence adduced at trial established that Henn never moved into the premises or acquired a legal interest therein. To the contrary, he and Tyree separated the very month that the premises were acquired by the Raffas, and Tyree commenced this divorce action just a few months later. The Raffas remained the sole owners of the premises, and they did not return Henn's $58,500. In view of this evidence, there is no basis upon which to disturb the Supreme Court's determination… . **Tyree v Henn, 2013 NY Slip Op 05895, 2nd Dept 9-18-13**

CORPORATION LAW

Plaintiffs Not Entitled to Attorneys Fees in Shareholder Derivative Action Because They Did Not Go to the Board Before Going to Court

In a full-fledged opinion by Justice Friedman, the First Department determined the plaintiffs in a (putative) shareholder derivative action were not entitled to an award of legal fees pursuant to Business Corporation Law 626 because the plaintiffs went straight to court without first making a pre-suit demand upon the board for the desired action. The plaintiffs sued the Goldman Sachs Group (GPS) to demand a reduction in employee compensation based on the prediction GPS would announce excessive employee compensation. When GPS announced a lower level of compensation, plaintiffs, claiming that the action had attained its objective, moved for a voluntary dismissal and for an award of legal fees. In affirming Supreme Court's denial of legal fees, the court wrote:

> Plaintiffs argue that Business Corporation Law § 626(e) (quoted in pertinent part at footnote 5, supra) does not expressly require a showing that the demand requirement was complied with or excused as a prerequisite to an award of attorneys' fees for bringing an action that brought a substantial benefit to the corporation (as plaintiffs claim---and defendants deny---that this action did). Plaintiffs further argue that there is no reason to construe the statute to imply such a requirement. We disagree. * * *
>
> The demand requirement, far from being a meaningless formality,
> "rests on basic principles of corporate control--that the management of the corporation is entrusted to its board of directors, who have primary responsibility for acting in the name of the corporation and who are often in a position to correct alleged abuses without resort to the courts. The demand requirement thus relieves the courts of unduly intruding into matters of corporate governance by first allowing the directors themselves to address the alleged

abuses. The requirement also provides boards with reasonable protection from harassment on matters clearly within their discretion, and it discourages strike suits commenced by shareholders for personal rather than corporate benefit" … .**Central Laborers' Pension Fund v Blankfein, 2013 NY slip Op 05857, 1st Dept 9-17-13**

No Fiduciary Duty Re: Purchase of One Shareholder's Stock by Another in a Close Corporation

In affirming Supreme Court's dismissal of a cause of action for breach of fiduciary duty based on one shareholder's purchase of another shareholder's stock in a close corporation, the Second Department noted that the status of an officer, director or shareholder of a close corporation does not, without more, create a fiduciary relationship:

> "The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" … . "A fiduciary relationship exists between two persons when one of them is under a duty to act for . . . the benefit of another upon matters within the scope of the relation" …
>
> Contrary to the plaintiff's contention, [the purchaser's] status as an officer, director, or shareholder of a close corporation "does not, by itself, create a fiduciary relationship as to his individual purchase of [another shareholder's] stock" … . **Varveris v Zacharakos, 2013 NY Slip Op 07028, 2nd Dept 10-30-13**

CRIME VICTIMS

Funeral-Expense Award from NYS Crime Victims Board Should Not Have Been Reduced by 50% Based on the Victim's Alleged Involvement in Criminal Activity

The Second Department determined that the reimbursement of funeral expenses from the NYS Crime Victims Board should not have been reduced by 50% on the ground that the victim engaged in conduct contributing to the crime. The court wrote:

> … [G]eneral knowledge that narcotics sellers are subject to a greater risk of being violently murdered is not sufficient to supply a record-based relationship between the subject homicide and the victim's alleged conduct. Under the particular circumstances of this case, the [Office of Victim Services] determination affirming the decision reducing the petitioner's award by 50% based upon a finding that the victim engaged in culpable conduct "logically and rationally related to the crime by which the victim was victimized" (9 NYCRR 525.3[b]) was "taken without sound basis in reason or regard to the facts"… . **Matter of Cox v Office of Victim Servs, 2013 NY Slip Op 06566, 2nd Dept 10-9-13**

DEFAMATION

Statements Constituted Opinion, Not Facts/Defamation Complaint Against Syracuse Basketball Coach Dismissed for Failure to State a Cause of Action

Over a two-justice dissent, the Fourth Department affirmed the dismissal of a defamation action at the pre-answer stage, finding that the statements attributed to the defendant in the complaint constituted opinion, not fact. The defendant (coach of the Syracuse University basketball team) characterized allegations made by plaintiff (accusing defendant's friend and long-time assistant coach, Bernie Fine, of sexual improprieties) as lies. Taking the statements attributed to defendant as a whole, the Fourth Department determined they amounted to opinion and were therefore not actionable:

> "Making a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace constitutes defamation . . . Generally, only statements of fact can be defamatory because statements of pure opinion cannot be proven untrue" … . "The issue at this early, preanswer stage of the litigation is whether plaintiff[s'] [complaint] sufficiently allege[s] false, defamatory statements of fact rather than mere nonactionable statements of opinion" … . "Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation" … . Although the Court of Appeals has acknowledged that "[d]istinguishing between opinion and fact has 'proved a difficult' task" …, it has provided three factors for courts to consider in determining whether the alleged defamatory statements are actionable statements of fact or nonactionable statements of opinion ….
>
> We agree with plaintiffs that defendant's statements that they lied and that they did so out of a financial motivation are statements of fact when viewed in light of the first two factors set forth in Mann, i.e., those statements use specific

language that "has a precise meaning which is readily understood" and are "capable of being proven true or false" …. We note in particular that, when defendant was asked during the syracuse.com interview what plaintiff's "possible motivation would be to tell his disturbing story at this time," he responded that plaintiff was "trying to get money. He's tried before. And now he's trying again." Although that statement may be interpreted as implying that defendant knew facts that were not available to the reader…, we are nevertheless mindful that we "must consider the content of the communication as a whole, as well as its tone and apparent purpose and in particular should look to the over-all context in which the assertions were made and determine on that basis whether the reasonable reader would have believed that the challenged statements were conveying facts about . . . plaintiff" … . Furthermore, we must "avoid[] the 'hypertechnical parsing' of written and spoken words for the purpose of identifying 'possible fact[s]' that might form the basis of a sustainable libel action" … .

Defendant's statements also must be viewed in light of the third factor set forth in Mann, i.e., "whether either the full context of the communication in which the statement[s] appear[] or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact" … . Defendant additionally stated in the interview with syracuse.com: "So, we are supposed to do what? Stop the presses 26 years later? For a false allegation? For what I absolutely believe is a false allegation? I know [plaintiff is] lying about me seeing him in his hotel room. That's a lie. If he's going to tell one lie, I'm sure there's a few more of them . . . I have never been in Bernie Fine's hotel room in my life . . . Now, could I have once . . . one time? I have a pretty good recollection of things, but I don't ever recollect ever walking into Bernie Fine's hotel room. Ever." In his interview with ESPN, defendant stated: "I know this kid, but I never saw him in any rooms or anything . . . It is a bunch of a thousand lies that [plaintiff] has told. You don't think it is a little funny that his cousin . . . is coming forward? . . . He supplied four names to the university that would corroborate his story. None of them did . . . [T]here is only one side to this story. He is lying."

We conclude that defendant's statements demonstrate his support for Fine, his long-time friend and colleague, and also constitute his reaction to plaintiff's implied allegation, made days after Penn State University fired its long-term football coach, that defendant knew or should have known of Fine's alleged improprieties. We therefore conclude that the content of the statements, together with the surrounding circumstances, " 'are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact' "… . **Davis and Lang v Boheim…, 836, 4th Dept 10-4-13**

DEFAMATION/ TORTIOUS INTERFERENCE WITH CONTRACT

Statement Protected by "Common Interest Privilege"/Tortious Interference Action Can Only Be Brought Against a Stranger to the Contract

The First Department affirmed the dismissal of a complaint alleging defamation and tortious interference with contract. The court explained that the statement made by a management employee was protected by the common interest privilege and only a stranger to a contract can bring a tortious interference claim:

> Defendant…'s statement that plaintiff was "deliberately sabotaging" defendant['s] IT redesign project was protected by the common-interest privilege because it constituted a communication "made to persons who have some common interest in the subject matter" …, namely, the people working on the IT system redesign. The statement is also protected as one made by a "management employee[] having responsibility to report on the matter in dispute" … . Plaintiff's allegations of malice, in an effort to overcome the common-interest privilege, amount to little more than "mere surmise and conjecture" … .
>
> Plaintiff's tortious interference claims … were also properly dismissed. "It is well established that only a stranger to a contract, such as a third party, can be liable for tortious interference with a contract" … . **Ashby v ALM Media LLC, 2013 NY Slip Op 06497, 1st Dept 10-8-13**

DISCIPLINARY HEARINGS (INMATES)

Hearing Conducted in Absence of Inmate Okay Due to Inmate's Assaultive and Menacing Conduct

The Third Department affirmed a guilty determination even though the hearing was conducted in the inmate's absence. The inmate had a history of assaults and menacing conduct:

> It is well settled that an inmate has a fundamental right to be present at a disciplinary hearing, unless "he or she refuses to attend, or is excluded for reasons of institutional safety or correctional goals" (7 NYCRR 254.6 [a] [2]…). When an inmate is denied the right to be present at a hearing, there must be a factual basis in the record supporting the Hearing Officer's decision … . Here, the Hearing Officer set forth on the record his reasons for excluding petitioner from the hearing, including petitioner's menacing conduct at a hearing earlier that same day, which he personally witnessed, as well as petitioner's multiple assaults on staff during the past several months. Based upon these incidents, the Hearing Officer could reasonably conclude that petitioner's presence at the hearing would jeopardize institutional safety and correctional goals. **Matter of Barnes v Prack, 514889, 3rd Dept 9-19-13**

Insufficient Justification for Removing Inmate from Hearing

The Third Department reversed a determination of guilt because the petitioner was removed from the hearing without sufficient justification:

> "An inmate has a fundamental right to be present during a prison disciplinary hearing unless he or she is excluded for reasons of institutional safety or correctional goals" … . Petitioner here was first warned that he could be removed from the hearing after he attempted to suggest questions for a witness he had requested who claimed to have been threatened and refused to testify. The Hearing Officer then invited petitioner to explain his defense, namely, that the author of the misbehavior report had set him up after they had sexual contact. Petitioner referred to the officer by her first name, prompting the Hearing Officer to direct him to refrain from doing so. Petitioner then attempted to explain – despite the Hearing Officer's repeated interruptions – that the officer "told me to call her" by her first name and that such was "the only way" he could accurately describe what had occurred. Instead of allowing petitioner to explain further or present his account of events, however, the Hearing Officer abruptly cut petitioner off and removed him from the hearing. Even if petitioner's conduct could legitimately be viewed as indecorous or disrespectful, "our review of the record reveals no evidence that [it] rose to the level of disruption that justified his exclusion from the proceedings"… . **Matter of Watson v Fischer, 515197, 3rd Dept 9-19-13**

Effects of Refusal to Allow Inmate to Call Witness Explained

The Third Department, in determining that a new hearing, not expungement, was the appropriate remedy, explained the ramifications of a hearing officer's refusal of an inmate's request to call witnesses:

> "[W]hile '[a] hearing officer's actual outright denial of a witness without a stated good-faith reason, or lack of any effort to obtain a requested witness's testimony, constitutes a clear constitutional violation [requiring expungement,] [m]ost other situations constitute regulatory violations [requiring a new hearing]'" … . Here, … the denial of the witnesses constituted a regulatory violation, and the proper remedy is to remit the matter for a new hearing… . **Matter of Griffin, 515749, 3rd Dept 10-24-13**

DISCIPLINARY HEARINGS (INMATES)/EVIDENCE

Hearsay Not Assessed for Reliability---Determination Annulled

The Third Department annulled a determination that was based upon hearsay which had not been assessed for reliability:

> While hearsay evidence may constitute substantial evidence to support a determination of guilt, it must be sufficiently detailed to allow the Hearing Officer to independently assess its reliability and credibility … . The basis for the charges here were written and oral statements by inmates implicating petitioner as the thief. There is no indication, however, that those statements were independently reviewed by the Hearing Officer, who based his determination solely upon the misbehavior report and testimony of the correction lieutenant who authored it. **Matter of Carrasquillo…, 515970, 3rd Dept 9-19-13**

DISCIPLINARY HEARINGS (INMATES)/FREEDOM OF INFORMATION LAW (FOIL)

Inmate's FOIL Request for Prison Directive Should Have Been Granted

The Third Department determined the inmate's Freedom of Information Law (FOIL) request for a Department of Corrections directive should have been granted:

> …"[T]here is a presumption that government documents are available for inspection, and the burden rests on the agency resisting disclosure to demonstrate that they are exempt under Public Officers Law § 87 (2) by articulating a specific and particularized justification" … . Although the basis of the denial of petitioner's request was that the disclosure may endanger the life or safety of a person (see Public Officers Law § 87 [2] [f]), we fail to see how the disclosure of DOCCS Directive No. 4004, which pertains to the specifications for creating unusual incident reports, poses a danger to lives or to anyone's safety … . Accordingly, the directive must be disclosed. **Matter of Flores v Fischer, 516131, 3rd Dept 10-24-13**

EDUCATION LAW

Teacher Had Not Acquired "Tenure by Estoppel"

In reversing Supreme Court, the Second Department determined a teacher had not acquired tenure by estoppel:

> "In general, estoppel is a bar which precludes a party from denying [that] a certain fact or state of facts exists to the detriment of another party who was entitled to rely on such facts and had acted accordingly" … . "Tenure may be acquired by estoppel when a school board accepts the continued services of a teacher or administrator, but fails to take the action required by law to either grant or deny tenure prior to the expiration of the teacher's probationary term" … . Although Education Law § 3012(1) provides that certain teachers shall be appointed "for a probationary period of three years," it "does not contain a provision which would prevent a probationary teacher from knowingly and voluntarily waiving the three-year probationary period" … .
>
> Here, as indicated by the petitioner's own letter to the principal, the petitioner agreed to extend his probationary period for an additional year. Consequently, the petitioner's probationary period had not expired when the School District terminated his employment and, thus, he had not acquired a tenured position by estoppel. **Matter of Chishom v Hochman, 2013 NY slip Op 05818, 2nd Dept 9-11-13**

EDUCATION LAW/LAW SCHOOL ADMISSION

Law School Properly Rescinded Student's Application for Admission Based Upon Omissions Concerning Criminal Record

The Second Department affirmed a law school's rescission of admission of a student based upon the student's responses to a question about criminal charges on the school's admission form:

> When the petitioner endeavored to obtain an advance ruling on his eligibility for and the likelihood of his admission to the New York State bar in light of his conviction, the law school first learned of the original charges that had been asserted against the petitioner, including, inter alia, charges for distribution of LSD in the second degree, possession of LSD with the intent to distribute in the second degree, possession of Ecstasy in the third degree, and possession of Ecstasy with the intent to distribute. The law school then advised the petitioner that he must amend his application for admission and include a full accounting of what transpired with respect to his arrest in July 1999 and an explanation with respect to his failure to initially disclose this information. Although the petitioner advised the law school that the statement in his application concerning his criminal record was not factually incorrect and did not need to be amended, he nonetheless supplemented his application and made available all details and documents surrounding his expunged record. In his supplement, the petitioner acknowledged that he had been arrested for distribution and had knowingly distributed illegal substances, and freely admitted his guilt of that crime, although he maintained that he did not engage in distribution of illegal substances on a regular basis.
>
> The law school's determination was made on the grounds of the petitioner's misrepresentations and omissions on his application regarding the extent of his prior criminal background, and was based upon the exercise of discretion after a full review. Despite the petitioner's subsequent disclosure, under the circumstances presented here, and in light of

the true nature of the petitioner's prior criminal activity, the law school's determination to rescind his acceptance was not arbitrary and capricious, and does not warrant judicial intervention… . **Matter of Powers v St John's Univ Sch of Law, 2013 NY Slip Op 06688, 2nd Dept 10-16-13**

EDUCATION LAW/CONSTITUTIONAL LAW

In College Disciplinary Action, Victim Need Not Testify---Failure to Detail Factual Findings in Determination Violates Due Process

The Third Department, in a disciplinary action by SUNY Cortland, determined the alleged victim of harassment was not the complainant in the disciplinary proceeding and therefore the alleged victim need not testify in the proceeding. The court, however, determined the school's failure to set forth detailed factual findings in its disciplinary determination violated the student's due process rights. The matter was sent back for those factual findings, after which the student could pursue administrative remedies:

> We reject petitioner's contention that the Hearing Panel failed to substantially adhere to its rules and regulations published in the Code … . Although petitioner correctly notes that the Code requires the "complainant" to present his or her own case, the "complainant" is defined as "any person or persons who have filed disciplinary charges against a student." Here, the complainant was SUNY Cortland's Director of Judicial Affairs. Thus, petitioner's contention that the Hearing Panel did not comply with the Code because the victim did not present the case is unavailing. Furthermore, as the victim was not called as a witness by either side and nothing in the Code establishes that the victim is a party to a disciplinary proceeding, we find that the Hearing Panel substantially complied with its rule requiring it to afford petitioner the opportunity to question all parties. … We do agree, however, that petitioner was denied due process because the Hearing Panel failed to set forth detailed factual findings in its disciplinary determination. In a disciplinary proceeding at a public institution of higher education, due process entitles a student accused of misconduct to "a statement detailing the factual findings and the evidence relied upon by the decision-maker in reaching the determination of guilt" … . Recognized as one of the "'rudimentary elements of fair play'" in this context …, "[s]uch a statement is necessary to permit the student to effectively challenge the determination in administrative appeals and in the courts and to ensure that the decision was based on evidence in the record"… .**Matter of Boyd v SUNY Cortland, 514925, 3rd Dept 10-17-13**

ELECTION LAW

Failure to Check Box on Cover Sheet Fatal to Designating Petitions

The Second Department affirmed Supreme Court's determination that the designating petitions were properly rejected because the box on the cover sheet indicating that the required number of signatures were included was not checked:

> The Supreme Court properly denied the petition and dismissed the proceeding. Although the provisions of the Election Law "shall be liberally construed, not inconsistent with substantial compliance thereto and the prevention of fraud" (Election Law § 6-134[10]; see 9 NYCRR 6215.6[a]), this matter does not involve a mere technical defect subject to cure pursuant to Election Law § 6-134(2) … . Rather, the express terms of the cover sheet drafted and submitted by the petitioners directed the Board to disregard the designating petitions as void and not accept them for filing. To hold that the designating petitions were nonetheless filed would undermine procedural safeguards against both fraud and confusion, as election officials and interested parties could not have understood the designating petitions actually to have been filed (cf. Election Law § 6-134[10]; 9 NYCRR 6215.1, 6215.6…). **Matter of Balberg v Board of Elections in the City of NY, 2013 NY Slip Op 05897, 2nd Dept, 9-18-13**

14-Day Election Law Statute of Limitations, Not Article 78 Statute of Limitations, Applied

The Second Department determined that a putative Article 78 proceeding seeking to exclude candidates from the ballot based upon alleged violations of the Election Law was governed by the Election Law, not the Article 78, statute of limitations:

> Notwithstanding the characterization of this proceeding as one pursuant to CPLR article 78, the petitioners seek to exclude candidates from the ballot based on their alleged failure to comply with the nomination and designation procedures of Election Law article 6, as supplemented by the general provisions of

> Election Law § 1-106. Accordingly, this proceeding is governed by the statute of limitations set forth in Election Law § 16-102(2) … . Since it is undisputed that this proceeding was not commenced within 14 days after the last day to file the designating and opportunity-to-ballot petitions at issue, as required by Election Law § 16-102(2), the Supreme Court properly dismissed the proceeding as untimely. **Matter of Ciotti v Westchester County Bd of Elections, 2013 NY Slip Op 06000, 2nd Dept 9-25-13**

Provision Requiring Nonincumbents to Reside in District Does Not Violate Equal Protection

The Second Department determined that a charter provision requiring nonincumbents (here, Shapiro) to reside in the legislative district at the time of their nomination for the county legislature does not violate the equal protection clause:

> Shapiro contends that the residency requirement for nominees as set forth in the Charter is unconstitutional and, thus, he should not have been disqualified. In particular, Shapiro challenges § 112(3) of the Charter, which grants incumbents one year to move into a newly drawn district following a "readjustment or alteration of the county legislative district." Shapiro argues that the Charter, in requiring nonincumbents to reside in the legislative district at the time of their nomination, does not afford nonincumbents the same opportunity. "Legislative enactments enjoy a strong presumption of constitutionality . . . [and] parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity beyond a reasonable doubt'"… . Based on the record before us, Shapiro failed to meet his initial burden of demonstrating beyond a reasonable doubt that the Charter's residency provisions violated the Equal Protection Clauses of the United States Constitution (US Const, 14th Amend, § 1) or the New York Constitution (NY Const, art I, § 11). **Matter of Becker v Shapiro, 2013 NY Slip Op 06679, 2nd Dept 10-16-13**

Substitution of Candidate Invalid

The Second Department determined a substitution of a candidate for the county legislature, based on the failure of the initial candidate (Roth) to meet residency requirements, was invalid because the substitution was made by the Committee to Fill Vacancies and not pursuant to Election Law 6-148(3):

> The vacancy at issue here was created at the time of Roth's nomination, when he still did not reside in the district. This constituted a vacancy in nomination rather than in designation. Election Law § 6-148(3) states, in relevant part, as follows: "A vacancy in a nomination made at a primary . . . may be filled by a majority of the members, of the party committee or committees last elected in the political subdivision in which the vacancy occurs."

Here, since Roth's disqualification created a vacancy made in a nomination at a primary, any substitution should have been made pursuant to Election Law § 6-148(3), not by the Committee to Fill Vacancies. "After the primary election has been held the committee named in the designating petition has no function and is without authority" … . The "statute is explicit" that the procedure outlined in Election Law § 6-148(3) governs a vacancy in a nomination that has been made at a fall primary … . Since the purported substitution was not made in accordance with Election Law § 6-148(3), it was invalid. **Matter of Venditto v Roth, 2013 NY Slip Op 06699, 2nd Dept 10-16-13**

EMINENT DOMAIN

Seizure of Property for Construction of Firehouse Okay

The Second Department affirmed the eminent-domain seizure of petitioner's property (under EDPL article 2) for construction of a firehouse:

> "The principal purpose of EDPL article 2 is to insure that an agency does not acquire property without having made a reasoned determination that the condemnation will serve a valid public purpose" … . Judicial review of a condemnation determination is limited to whether the proceeding was constitutional, whether the proposed acquisition is within the condemnor's statutory jurisdiction or authority, whether the determination and findings were made in accordance with the procedures set forth in EDPL article 2 and the State Environmental Quality Review Act, and whether a public use, benefit, or purpose will be served by the proposed acquisition (see EDPL 207[C]…). Here, the petitioner has failed to demonstrate any basis for setting aside the Common Council's determination.
>
> Contrary to the petitioner's contention, the record shows that the determination to condemn a portion of its property is rationally related to the stated public purpose and that such public purpose is dominant … . " [T]he fact that an intended public use confers incidental benefit to

private persons or entities will not invalidate the condemnation'" … . **Matter of Peekskill Hgts Inc v City of Peekskill Common Council, 2013 NY Slip Op 07046, 2nd Dept 10-30-13**

EMPIRE ZONES

Revocation of Empire Zone Program Certifications Cannot Be Applied Retroactively

The Third Department noted that revocation of Empire Zone Program certifications cannot be applied retroactively pursuant to James Sq Assoc LP v Mullen, 21 NY3d 233 [2013]. **Matter of Bond, Schoeneck & King PLLC v NY Dept of Economic Development…, 514812, 3rd Dept 10-17-13**

EVIDENCE

Erasure of Audio Recording Constituted Negligent Spoliation of Evidence Under New York Common Law---No Need to Turn to Federal Law Re: Preservation of Electronically Stored Information

In a full-fledged opinion by Justice Saxe, the First Department determined the City's erasure of an audio recording related to a police chase that resulted in injuries to plaintiffs constituted negligent spoliation under New York common law and there was no need to rely on federal authority re: the spoliation of electronically stored information [ESI]:

> …[P]laintiffs' spoliation claim can be fully addressed under New York's common-law spoliation doctrine. However, because plaintiffs rely exclusively on the [federal] Zubulake IV rule that "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold'" to preserve evidence (220 FRD at 218), we briefly address the question of whether we need to import Zubulake's rules into the established New York common-law rules as to spoliation of non-ESI evidence.
>
> The cases in which this Court has explicitly adopted the Zubulake rulings have involved ESI discovery … . The usefulness of the Zubulake standard in the e-discovery arena, is … that it "provides litigants with sufficient certainty as to the nature of their obligations in the electronic discovery context and when those obligations are triggered" (93 AD3d at 36). At the same time, … Zubulake "is harmonious with New York precedent in the traditional discovery context" … . This is an area that did not need greater certainty or clarification. * * *
>
> We … conclude that reliance on the federal standard is unnecessary in this context. Zubulake interpreted federal rules and earlier federal case law to adapt those rules to the context of ESI discovery. However, the erasure of, and the obligation to preserve, relevant audiotapes and videotapes, can be, and has been, fully addressed without reference to the federal rules and standards. **Strong v City of New York, 2013 NY Slip Op 06655, 1st Dept 10-15-13**

EVIDENCE/FORGERY/NOTARY

Evidence Supported Finding Certificate of Acknowledgment Attached to Deed Was Forged

In affirming the trial court's determination a power of attorney (a certificate of acknowledgment) had been forged, thereby rendering a deed and five mortgages void, the Second Department wrote:

> "A certificate of acknowledgment attached to an instrument such as a deed raises a presumption of due execution" … . "[A] certificate of acknowledgment should not be overthrown upon evidence of a doubtful character, such as the unsupported testimony of interested witnesses, nor upon a bare preponderance of evidence, but only on proof so clear and convincing so as to amount to a moral certainty" … . …
>
> …[W]e find on this record that there nonetheless existed clear and convincing evidence that the power of attorney was in fact forged, particularly in light of the undisputed evidence showing that the plaintiff, as the former owner of the subject property, received no consideration from the sale of the property or from the subject mortgage loans. **Neuman v Neuman, 2013 NY Slip Op 05885, 2nd Dept 9-18-13**

FREEDOM OF INFORMATION LAW/CIVIL RIGHTS LAW

Most of Police Internal Investigation Report Deemed Immune from Disclosure

In determining that most of a police department's internal investigation report need not be disclose pursuant to a Freedom of Information Law (FOIL) request, the Second Department wrote:

> The Freedom of Information Law (Public Officers Law art. 6; hereinafter FOIL) was enacted "to promote open government and public accountability" and "imposes a broad duty on government to make its records available to the public" … . Under FOIL, government records are presumptively open for public inspection unless they fall within one of the exceptions specified by Public Officers Law § 87(2), which permits an agency to deny access, inter alia, to records which "are specifically exempted from disclosure by state or federal statute" (Public Officers Law § 87[2][a]…). One such statute exempting records from disclosure is Civil Rights Law § 50-a(1), which provides, in relevant part, that "[a]ll personnel records used to evaluate performance toward continued employment or promotion" of police officers "shall be considered confidential and not subject to inspection or review." However, "when access to an officer's personnel records relevant to promotion or continued employment is sought under FOIL, nondisclosure will be limited to the extent reasonably necessary to effectuate the purposes of Civil Rights Law § 50-a to prevent the potential use of information in the records in litigation to degrade, embarrass, harass or impeach the integrity of the officer" … . **Matter of Cook v Nassau County Police Dept, 2013 NY Slip Op 06364, 2nd Dept 10-2-13**

INSURANCE/CONTRACT

Certificates of Bond Insurance Are Insurance Policies to Be Interpreted Under Insurance and Contract Law---Restructuring in Bankruptcy and Reduction of Value of the Bonds Did Not Affect the Insurer's Obligation to Cover the Bond Payments

In a full-fledged opinion by Justice Gische, the First Department determined the defendant, which issued certificates of bond insurance (CBI's) insuring bonds against nonpayment, was obligated to cover payment on the bonds even after a bankruptcy restructuring in which the bonds were revalued:

> Defendant acknowledges that it would have been contractually obligated to pay for any loss suffered by plaintiffs under the original bonds when they matured, in the event of the issuer's bankruptcy, but it claims that as a result of the Restructuring Plan that was adopted, the original bonds were cancelled, completely relieving it of any obligation to pay under the CBIs. The court rejects this position because it is inconsistent with the terms of the policies and contrary to law.
>
> The CBIs are financial guaranty insurance policies, which defendant is specially licensed to sell throughout the United States, including New York. …The policies are primarily governed by Article 69 of the Insurance Law. While they have some unique characteristics, they are generally subject to the same laws and principles underlying insurance policies in general (see Insurance Law § 6908). Thus, CBIs are policies of insurance that should be analyzed in accordance with general principles of contract interpretation and insurance law … .
>
> Insurance policies are to be afforded their plain and ordinary meaning and interpreted in accordance with the reasonable expectations of the insured party… . Exclusions from policy obligations must be in clear and unmistakable language …, and if the terms of a policy are ambiguous, any ambiguity must be construed in favor of the insured and against the insurer … . ...
>
> The plain meaning of the contractual language contained in the CBI requires defendant to absolutely and unconditionally guarantee payment on the individual bonds in the event of the issuer's nonpayment. Issuer insolvency is clearly a covered risk, as is bankruptcy, which is a societal hallmark of insolvency. These are the very risks for which defendant received payment of premiums. The CBIs were noncancellable, with a narrow exception not applicable here, and did not provide for any exclusion in the event of bankruptcy. … The restructuring occurred only after the default under the trust agreement had occurred. Confirmation of the restructuring plan made it a certainty that the issuer would not make any future payments to plaintiffs on the original bonds at their respective maturity dates. It is the restructuring of the bonds and their reissuance in a lower principal amount with a longer payment period that concretely represents that plaintiffs have sustained a loss. Neither the restructuring plan, nor the issuer's discharge of debt in the bankruptcy proceeding, changed the obligations under the parties' contracts of insurance. **Oppenheimeer AMT-Free Municipals v ACA Fin. Guar. Corp., 2013 NY Slip Op 05768, 1st Dept 9-3-13**

JUDICIAL ESTOPPEL

Plaintiff Cannot Proceed With Case Taking a Position Different from That Taken in a Prior Action

The First Department determined plaintiff could not proceed with her discrimination action against an organization (ECEC) which had agreed to hire her because there had been a determination in another discrimination action that she was employed by the defendant (East Bronx Day Care) in that action. The court explained the doctrine of judicial estoppel:

> The doctrine of judicial estoppel prevents a party who assumed a certain position in a prior proceeding and secured a ruling in his or her favor from advancing a contrary position in another action, simply because his or her interests have changed … . Also known as the "doctrine of estoppel against inconsistent positions" …, the doctrine "rests upon the principle that a litigant should not be permitted to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise" … . Applying this doctrine, we find that plaintiff has failed to show that she was "qualified" for the ECEC position, as required to make out a prima facie case of discrimination since plaintiff is judicially estopped from denying that, at the time she was allegedly discriminated against by defendants, she was actually employed with East Bronx Day Care, which would make it impossible for her to carry out her duties for defendants. **Becerril v City of New York Dept of Health & Mental Hygiene, 2013 NY Slip Op 06783, 1st Dept 10-17-13**

LABOR LAW

Agents of Property Owner Can Be Liable Under Labor Law 240(1)

In reversing a verdict after trial, the Second Department noted that the Labor Law imposes liability upon the agents of the property owner, as well as the owner and general contractor:

> In addition to owners and general contractors, Labor Law § 240(1) imposes liability upon agents of the property owner who have the ability to control the activity which brought about the injury … . * * * In light of the trial evidence, the jury should have been instructed to determine whether the defendants were acting as the homeowner's agent, with the authority to supervise and control the injured plaintiff's work on the roof … . Accordingly, since the error was not harmless a new trial is required… . **Arto v Cairo Constr Inc, 2013 NY Slip Op 05863, 9-18-13**

Cleaning Gutters Not Covered

The Second Department determined that cleaning out gutters is not work covered under Labor Law 240(1):

> Although Labor Law § 240(1) applies to commercial "cleaning" which is not part of construction, demolition, or repair …, such as commercial window washing and sandblasting …, it does not apply to work that is incidental to regular maintenance, such as clearing gutters of debris … . **Hull v Fieldpoint Community Assn Inc, 2013 NY Slip Op 06837, 2nd Dept 10-23-13**

Homeowner's Exemption Applied/Homeowner Not General Contractor

In dismissing the action against defendant homeowner, the Third Department determined the homeowner's exemption applied, the homeowner did not direct or supervise plaintiff's work, and the homeowner could not be characterized as a general contractor:

> Although Labor Law §§ 240 (1) and 241 each "impose nondelegable duties upon contractors, owners and their agents to comply with certain safety practices for the protection of workers engaged in various construction-related activities . . .[,] the Legislature has carved out an exemption for the owners of one and two-family dwellings who contract for but do not direct or control the work" … . In this context, "the phrase 'direct or control' is to be strictly construed and, in ascertaining whether a particular homeowner's actions amount to direction or control of a project, the relevant inquiry is the degree to which the owner supervised the method and manner of the actual work being performed by the injured [party]" * * *
>
> The case law makes clear …that neither providing site plans …., obtaining a building permit …, hiring contractors, purchasing materials…, offering suggestions/input …, inspecting the site … , retaining general supervisory authority … , performing certain work …nor physical presence at the site operates to deprive a homeowner of the statutory exemption – so long as the homeowner did not exercise direction or control over the injury-producing work… . * * *

We reach a similar conclusion with respect to plaintiff's Labor Law § 200 and common-law negligence claims. In order to prevail on such claims, plaintiff was required to establish that defendant both "exercised supervisory control over plaintiff's work and had actual or constructive knowledge of the unsafe manner in which the work was being performed"… . **Bombard v Pruiksma, 516213, 3rd Dept 10-24-13**

Plaintiff's Failure to Replace Manhole Cover Was Sole Proximate Cause of Injury

Over a dissent, the Second Department determined plaintiff's failure to replace a manhole cover was the sole proximate cause of his injury:

> As to Labor Law § 240(1), which imposes a non-delegable duty upon owners and general contractors to provide safety devices to protect workers from elevation-related risks, liability would attach where a violation of that duty proximately caused injuries … . Conversely, where a plaintiff's own actions are the sole proximate cause of the accident or injury, no liability attaches under the statute … . Where a plaintiff has an adequate safety device readily available that would have prevented the accident, and for no good reason chooses not to use it, Labor Law § 240(1) does not apply … .
>
> Here, plaintiff was provided with the perfect safety device, namely, the manhole cover, which was nearby and readily available. He disregarded his supervisor's explicit instruction given that day to replace the cover before dismantling the enclosure. Plaintiff has not afforded any good reason why he started taking apart the enclosure before ascertaining whether the cover was in place. Having just emerged from it, plaintiff should have known that the manhole was still open, and covering it at that time would have avoided the accident. **Barreto v Metropolitan Transp Auth, 2013 NY Slip Op 07118, 10-30-13**

Evidence of Availability of Ladders Insufficient to Defeat Summary Judgment in Favor of Plaintiff/Plaintiff Fell While Working Standing on Milk Crates

Defendant's claim that ladders were available did defeat summary judgment in favor of plaintiff who fell while standing on milk crates to work:

> Plaintiff alleged that prior to performing his work he unsuccessfully looked for a ladder to use and was directed by the acting foreman to use the milk crates.
>
> Under the circumstances, plaintiff established his entitlement to summary judgment on the issue of liability on his Labor Law § 240(1) claim. The record shows that plaintiff's accident involved an elevation-related risk and his injuries were proximately caused by the failure to provide him with proper protection as required by section 240(1) … . Defendants' claim that ladders were available on the site is conclusory and fails to raise an issue of fact … . The sole evidentiary support for defendants' argument was an affidavit from an individual who claimed …that there more than enough ladders available for plaintiff's work. Even if admissible, the affidavit failed to raise a triable issue as to whether plaintiff was the sole proximate cause of his injuries since it does not indicate that plaintiff knew that there were ladders available at the site and that he was expected to use them… .**Mutadir v 80-90 Maiden Lane Del LLC, 2013 NY Slip Op 07127, 2nd Dept 10-30-13**

LANDLORD/TENANT

Four-Year Statute of Limitations for Rent Overcharge Claim

The Second Department explained the four-year statute of limitations for a rent overcharge claim:

> "A rent overcharge claim, whether made in a judicial or administrative forum, is subject to a four-year statute of limitations" (... see CPLR 213-a; Administrative Code of City of NY § 26-516[a][2]). "[T]he Rent Regulation [*2]Reform Act of 1997 (RRRA) (L 1997, ch 116) clarified and reinforced the four-year statute of limitations applicable to rent overcharge claims (see Rent Stabilization Law of 1969 [Administrative Code of City of NY] § 26-516[a])" …, "preclud[ing] a court from examining the rental history of a housing accommodation prior to the four-year period preceding the filing of the rent overcharge complaint" …, except in situations where there are substantial indicia of fraud.
>
> Here, the DHCR [NYS Division of Housing and Community Renewal] properly determined that July 17, 2005, was the "base date" of this proceeding, that is, the date four years prior to the filing of the relevant rent overcharge complaint. The DHCR properly refused to examine the rental history of the subject apartment prior to the "base date," since there is no merit to the petitioner's contention that there

were substantial indicia of fraud in connection with the landlord's establishment of the amount of the initial legal registered rent… . **Matter of Watson v New York State Div of Hous & Community Renewal…, 2013 NY Slip Op 05828, 2nd Dept 9-11-13**

Four-Year Rent-Overcharge Statute of Limitations Does Not Apply Where There Is Fraud

The First Department noted that the four-year statute of limitations for rent-overcharge actions does not apply where fraud in involved, because the fraud renders the underlying lease void:

> We are not persuaded that plaintiffs' overcharge claim is barred by the four-year statute of limitations. As we noted in Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin. (68 AD3d 29, 32, affd 15 NY3d 358, 366 [2010] [citations ommitted]), "while the applicable four-year statute of limitations reflects a legislative policy to alleviate the burden on honest landlords to retain rent records indefinitely,' and thus precludes us from using any rental history prior to the base date, where there is fraud . . . the lease is rendered void[,]" and the legal rent is to be determined by the default formula … . We went on to note that "[s]anctioning the owner's behavior on a statute of limitations ground can result in a future tenant having to pay more than the legal stabilized rent for a unit, a prospect which militates in favor of voiding agreements such as this in order to prevent abuse and promote enforcement of lawful regulated rents'" … . We thus hold that the four year statute of limitations is not a bar in a rent overcharge claim where there is significant evidence of fraud on the record… . **Conason v Megan Holding LLC, 2013 NY Slip Op 05956, 1st Dept 9-24-13**

Administrative Review of a Rent Overcharge Petition Should Have Been Granted; Allegations of Fraud Overcame Four-Year Statute of Limitations

The First Department, over a dissent, reversed Supreme Court's dismissal of an Article 78 petition for administrative review of the denial of petitioner's rent overcharge complaint by the NYS Division of Housing and Community Renewal (DHCR). Petitioner's rent was increased from $572 to $1750 a month. To justify that adjustment, the landlord was required to have spent $39,000 improving the apartment. Petitioner submitted evidence that supported her position the landlord spent very little on the improvements. The landlord, however, produced no evidence of what was actually spent and, therefore, there was no basis in the record for the DHCR's determination that the $1750 rental amount was justified. The First Department noted that the four-year statute of limitations did not apply because there was substantial evidence of fraud:

> Under the standard set forth in Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin. (15 NY3d 358 [2010]), petitioner made a sufficient showing of fraud to require DHCR to investigate the legality of the base date rent … . Although the "look-back" for an apartment's rental history is ordinarily limited to the four-year period preceding the date that the petitioner files the complaint …, where fraud is alleged and there is "substantial indicia of fraud on the record," DHCR is obliged to investigate whether the base date rate was legal and "act[s] arbitrarily and capriciously in failing to meet that obligation"… .

Thus, we find that DHCR's disparate treatment of the parties' claims was arbitrary. While the agency made no attempt to evaluate the legitimacy of petitioner's claims despite their consistency and degree of detail, DHCR credited the owner's implicit claim that it spent $39,000 to renovate the apartment simply because "it would not be difficult for anyone with any experience in this industry to believe it could have taken $39,000 … to update the appearance and equipment in an apartment which had not changed hands for thirty-two years." This justification for the agency's determination is irrational. Finding that the owner "could have" spent $39,000 …, where the owner never submitted any evidence controverting petitioner's claims is not equivalent to finding that the owner actually made improvements costing that much. Accordingly, this matter should be remanded to DHCR to give the parties the opportunity to present evidence in connection with the legality of the base rate rent. **Matter of Boyd v NYS Division of Housing and Community Renewal…, 2013 NY Slip Op 06966, 1st Dept 10-29-13**

MEDICAID

Statutory Moratorium On Rate Appeals Applied Retroactively to All Appeals Prior to April, 2015

The Fourth Department reversed Supreme Court and determined that a 201/2011statutory moratorium on Medicaid reimbursement rate appeals filed by nursing homes applied retroactively to all appeals filed before April, 2015:

> We agree with respondents that section 2808 (17) (b) and (c) [Public Health Law] apply retroactively to petitioners' rate appeals. The seminal case on whether statutes are to be applied retroactively is Majewski v Broadalbin-Perth Cent. Sch. Dist. (91 NY2d 577, 584),

which provides, in relevant part, that "[i]t is a fundamental canon of statutory construction that retroactive operation is not favored by courts and statutes will not be given such construction unless the language expressly or by necessary implication requires it" (see generally McKinney's Cons Laws of NY, Book 1, Statutes § 51 [b]). We conclude that the language of the statute requires that it be applied retroactively. Public Health Law § 2808 (17) (b) states that, for the period from April 1, 2010 through March 31, 2015, "the [C]ommissioner shall not be required to revise certified rates of payment . . . for rate periods prior to April [1, 2015], based on consideration of rate appeals filed by residential health care facilities" in excess of the monetary cap. While there is no explicit statement that the moratorium and cap shall apply to rate appeals filed before April 1, 2010, the statute specifically states that no revisions are required for any period before April 1, 2015 where the revision would emanate from a rate appeal filed by a residential health care facility. In our view, the necessary implication of that language is that the statute applies to any rate appeal seeking a revision for any period before April 1, 2015, including any revisions resulting from rate appeals filed before the statute took effect. * * *

Inasmuch as the moratorium applies retroactively to petitioners' rate appeals, petitioners do not have a clear legal right to relief, and their [Article 78 mandamus] petition must be denied… . **Matter of Woodside Manor Nursing Home… v Shah…, 862, 4th Dept 10-4-13**

MENTAL HYGIENE LAW

False Imprisonment Claims Against Hospital for Involuntary Confinement Turn on Finding of Medical Malpractice

In affirming the dismissal of a complaint against a hospital for false imprisonment based on involuntary confinement pursuant to the Mental Hygiene Law, the Third Department explained the relevant analysis. Plaintiff had made death threats against family members:

> Pursuant to the Mental Hygiene Law, an individual may be temporarily confined on an involuntary basis where he or she has "a mental illness for which immediate observation, care, and treatment in a hospital is appropriate and which is likely to result in serious harm to himself[, herself] or others" (Mental Hygiene Law § 9.39 [a]). We agree with Supreme Court that all of plaintiff's claims against the hospital are, in effect, claims for false imprisonment, inasmuch as they are all based upon allegations of unlawful seizure and involuntary confinement… . These claims all turn upon a finding of medical malpractice because "[c]ommitment pursuant to Mental Hygiene Law article 9 is deemed privileged in the absence of medical malpractice"… . Accordingly, the hospital was required to make a prima facie showing that its medical treatment did not depart from accepted standards of care… . **Tienken v Benedictine Hospital, 514164, 3rd Dept 10-31-13**

MORTGAGES

Neither Plaintiff Nor Intervenor Bank Had Standing to Determine Validity of Mortgage

The Second Department determined neither the original plaintiff, nor the bank which attempted to intervene in the action, had standing in an action to determine the validity of a mortgage. Plaintiff was not the mortgagee and the bank submitted no proof that the note was physically delivered to it, a necessary element of a valid assignment:

> The plaintiff failed to establish that either it, or the party it wished to substitute as the plaintiff, had standing to maintain the action. Standing requires an inquiry into whether a litigant has "an interest . . . in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request" … . "In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced" … . The instant action, although not an action to foreclose the subject mortgage, was brought on behalf of the purported mortgagee, inter alia, for a judgment declaring the validity of the subject mortgage. The documentary evidence submitted by the appellant in support of her motion to dismiss the complaint established conclusively that the plaintiff was not the mortgagee, a fact which the plaintiff conceded. …
>
> The plaintiff sought to defeat the appellant's motion to dismiss the complaint by cross-moving, in effect, to amend the complaint to substitute U.S. Bank as the plaintiff. "[A]n amendment which would shift a claim from a party without standing to another party who could have asserted that claim in the first instance is proper since such an amendment, by its nature, does not result in surprise or

prejudice to the defendants who had prior knowledge of the claim and an opportunity to prepare a proper defense" (…CPLR 1002[a], 3025[b]). Here, however, the plaintiff failed to show that U.S. Bank had standing and could have asserted the claim in the first instance. The plaintiff submitted only a document executed by MERS, as nominee for the lender Opteum, purporting to assign the mortgage and note to U.S. Bank. To establish the validity of such an assignment, evidence must be submitted establishing that the note was either physically delivered to MERS or assigned to MERS by the lender prior to the commencement of the action … . The plaintiff failed to submit any such evidence. **Midland Mtge Co v Imtiax, 2013 NY Slip Op 06550, 2nd Dept 10-9-13**

Note and Mortgage Void as Usurious

The Second Department determined a loan transaction and the associated note and mortgage were void because the loan was usurious:

> Under the civil usury statute, the maximum interest rate on a loan is 16% per annum (see General Obligations Law § 5-501[1]; Banking Law § 14-a[1]). General Obligations Law § 5-501(6)(a) provides that the 16% maximum interest rate is not applicable "to any loan or forbearance in the amount of [$250,000] or more, other than a loan or a forbearance secured primarily by an interest in real property improved by a one or two family residence." * * *
>
> To determine whether the interest charged exceeded the usury limit, we must apply the traditional method for calculating the effective interest rate as set forth in Band Realty Co. v North Brewster (37 NY2d 460, 462). Viewing the loan as a one-year loan, the total annual interest is $43,175 ($33,000 in annual interest at 12% on $275,000, plus $10,175 in retained interest fees). The net loan funds advanced, i.e., the loan principal ($275,000) minus the retained interest ($10,175), equals $264,825. Expressed as a percentage of the net loan funds advanced, the $43,175 in total annual interest equals 16.3% of $264,825. The effective interest rate of 16.3% exceeds the civil usury limit, and the loan was therefore usurious. **Oliveto Holdings Inc v Rattenni, 2013 NY Slip Op 06844, 2nd Dept 10-23-13**

EQUITABLE MORTGAGE/CIVIL PROCEDURE

Concept of an Equitable Mortgage Explained/Affirmative Defenses Left Out of Original Complaint (Waived) Can Be Included in Amended Complaint

The Second Department explained the concept of an "equitable mortgage" and noted that affirmative defenses waived pursuant to CPLR 3211(e) can be included in a complaint amended by leave of court:

> New York law allows the imposition of an equitable lien if there is an express or implied agreement that there shall be a lien on specific property … . "While [a] court will impose an equitable mortgage where the facts surrounding a transaction evidence that the parties intended that a specific piece of property is to be held or transferred to secure an obligation, it is necessary that an intention to create such a charge clearly appear from the language and the attendant circumstances" … . Here, the defendant initially did not raise in his answer a defense based upon lack of personal jurisdiction, lack of standing or a capacity to sue, or the statute of limitations. Hence, those affirmative defenses were waived at that point (see CPLR 3211[e]). However, defenses waived under CPLR 3211(e) can nevertheless be interposed in an answer amended by leave of court pursuant to CPLR 3025(b) so long as the amendment does not cause the other party prejudice or surprise resulting directly from the delay and is not palpably insufficient or patently devoid of merit (see CPLR 3025[b]…). " Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine'"… . **Deutsche Bank Trust Co Ams v Cox, 2013 NY slip Op 06543, 2nd Dept 10-9-13**

MUNICIPAL LAW

Criteria for County's Immunity from Village Ordinances Explained

In remitting the matter to create a more complete record, the Fourth Department explained the criteria for determining whether the county is immune from the requirements of village ordinances prohibiting the use of the village sanitary system for a county jail within the village limits:

> We agree with the Village that the record is inadequate to make a determination, based upon a "balancing of public interests," whether the County is immune from the requirements of those amendments with respect to its siting of the proposed Facility … . The factors to be weighed in making that determination are "the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests[,] . . . the applicant's legislative grant of authority, alternative locations for the facility in less restrictive zoning areas, . . . alternative methods of providing the needed improvement[,] . . . intergovernmental participation in the project development process and an opportunity to be heard" … . Here, inasmuch as the record is inadequate to permit the appropriate balancing of those factors, we remit the matter to Supreme Court for a determination, based upon a more complete record, whether the County is immune from the requirements of the Village zoning ordinance… .**Matter of County of Herkimer v Village of Herkimer, 937, 4th Dept 9-27-13.**

City Code and Charter Not Unconstitutionally Applied Re: Searches Related to Certificates of Occupancy

The Fourth Department reversed Supreme Court's grant of an Article 78 petition. In granting the petition, Supreme Court found that the relevant provisions of the city code and charter were unconstitutional as applied with respect to searches of petitioner's property in connection with the issuance of certificates of occupancy. In reversing that determination, the Fourth Department wrote:

> We have previously upheld as constitutional the City's CO requirement as well as its procedure for issuing judicial warrants for inspections of premises in cases where the City has failed to obtain the consent of the homeowners or tenants … . Petitioner concedes that the laws at issue are valid on - their face, but contends that the determination that he violated City Code § 90-16 (A) (2) (d) is unconstitutional because, as a result of the determination, he will be required to consent to a warrantless inspection of his property or risk prosecution and fines. That contention, however, was specifically considered and rejected by this Court in Matter of Burns v Carballada (101 AD3d 1610, 1611-1612), which involved facts nearly identical to those herein. The petitioners in Burns commenced a CPLR article 78 proceeding seeking to annul two determinations of the Municipal Code Violations Bureau finding that they violated City Code § 90-16 (A) (2) (d), the same provision at issue here, by owning rental property that was occupied without a valid CO (id. at 1610). In the Burns petition, like the petition in this case, petitioners asserted, inter alia, that the determinations that they failed to comply with the City Code CO provision violated the Fourth Amendment and article I, § 12 of the New York State Constitution (id.). Specifically, petitioners contended that the City's CO inspection and warrant system was unconstitutional as applied to them because it prevented them from obtaining a CO without first consenting to a warrantless search of their properties (id. at 1611-1612). We rejected that contention and stated that, "[u]nder the City's ordinance, . . . an inspection can take place either upon consent or upon the issuance of a warrant (see City Charter § 1-11). On the record before us, petitioners have not shown that they were actually penalized for refusing to allow an inspection inasmuch as there is no evidence that they ever applied for a CO and thereafter refused to consent to the required inspection of their properties" (id. at 1612). **Matter of Capon v Carballada…, 858, 4th Dept 9-27-13**

Town Could Not Be Liable for Discretionary Judgment Made by EMT

The Third Department determined that an EMT employed by the town made a discretionary judgment that plaintiff's decedent did not need life support during transport to the hospital. Plaintiff's decedent's condition worsened during the trip and he died a week later. Because the EMT's judgment was discretionary, the town could not be held liable:

> The Court of Appeals recently held that when a municipality provides emergency first responder services in response to a 911 call for assistance, as the Town did here by dispatching its paramedic, "it performs a governmental function[, rather than a proprietary one,] and cannot be held liable unless it owed a 'special duty' to the injured party" … . A plaintiff

> generally must first establish the existence of a special duty before it becomes necessary for the court to address whether the governmental function immunity defense applies …, but the special relationship issue is irrelevant where the government action in question is discretionary … . "Government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general" … . Discretionary authority involves "the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" … .

Although the record here at least arguably contains factual issues concerning whether the Town voluntarily assumed a duty to decedent or plaintiff, thereby creating a special duty …, we need not address that question because the Town's actions were discretionary. The Town's paramedic exercised his discretion in making medical determinations concerning decedent's condition … . **DiMeo… v Rotterdam Emergency Medical Services, Inc, 516264, 3rd Dept 10-31-13**

PAROLE

Denial of Parole Supported by Evidence

In reversing Supreme Court, the Second Department determined the Parole Board's denial of parole was not arbitrary and capricious. After noting that the 2011 amendments to Executive Law 259-c(4) did not apply retroactively, the court wrote:

…[T]he Supreme Court erred in concluding that the Parole Board's determination was arbitrary and capricious … . Although the Parole Board's primary focus in denying parole was the nature of the crime committed, the Parole Board also looked at the petitioner's institutional record … . The Parole Board "need not expressly discuss each of [the statutory guidelines] in its determination" …, and it was not "required specifically to articulate every factor considered" … . Whether the Parole Board considered the proper factors and followed the proper guidelines are questions that should be assessed based on the "written determination . . . evaluated in the context of the parole hearing transcript" … . Here, the hearing transcript indicates that the Parole Board gave due consideration to a number of factors that reflected well on the petitioner, but that these factors did not outweigh those factors that militated against granting parole.**Matter of Fraser v Evans, 2013 NY slip Op 05900, 2nd Dept 9-18-13**

PUBLIC HEALTH LAW/ IMPAIRMENT OF CONTRACT

Criteria for Unconstitutional Impairment of Contract Rights Explained in Context of Requirement that Health Insurers Reimburse Customers Pursuant to Public Health Law Section 4308

Supreme Court granted summary judgment to plaintiff health insurer on the ground that certain portions of Insurance Law section 4308 constituted an unconstitutional impairment of contract rights. The Third Department determined summary judgment should not have been granted (on grounds unrelated to a determination of constitutionality). In the course of the decision, the court explained the constitutional analytical criteria:

> Plaintiff is a not-for-profit health insurer that offers various types of health insurance to its subscribers, including – insofar as is relevant here – community-rated, large-group insurance and health maintenance organization policies. Historically, insurers such as plaintiff were required to obtain prior approval from the Superintendent of Insurance1 before increasing or decreasing premium rates (see Insurance Law former § 4308 [c] [1]…). In 1995, however, the Legislature replaced this system with a "file and use" methodology, whereby insurers could increase or decrease premiums at their discretion, so long as the "anticipated incurred loss ratio" for the affected insurance pool fell within statutory minimum and maximum percentages… . If the actual loss ratio fell below the statutory minimum, the insurer was required to "issue a refund to its subscribers or credit a dividend against future premiums"; if the actual loss ratio exceeded the statutory maximum, the insurer "increase[d] its premium rates accordingly"… .
>
> In response to growing concerns that steady increases in premium rates were making health insurance less affordable, the Legislature amended Insurance Law § 4308 again in 2010 (see L 2010, ch 107, § 2) – reinstating the prior approval requirement and setting the minimum loss ratio for all coverage pools at 82% loss ratio for its large-group coverage pools fell below the 82% requirement. As a result, defendant Superintendent of Financial Services directed that plaintiff issue refunds or credits totaling $3,349,976 to policyholders enrolled in community-rated large-group contracts. * * *
>
> US Constitution, article I, § 10 provides that "[n]o [s]tate shall . . . pass any . . . [l]aw impairing the [o]bligation of [c]ontracts." The prohibition contained in the Contract Clause,

however, is not absolute, as states "retain the power to safeguard the vital interests of [their] people" … . "Thus, the [s]tate may impair [private] contracts by subsequent legislation or regulation so long as it is reasonably necessary to further an important public purpose and the measures taken that impair the contract are reasonable and appropriate to effectuate that purpose" … . Analysis of a claimed Contract Clause violation "require[s] consideration of three factors: (1) whether the contractual impairment is in fact substantial; if so, (2) whether the law serves a significant public purpose, such as remedying a general social or economic problem; and, if such a public purpose is demonstrated, (3) whether the means chosen to accomplish this purpose are reasonable and appropriate"… .**Healthnow New York Inc … v NYS Insurance Dept, 516179, 3rd Dept 10-17-13**

REAL PROPERTY

Variance Properly Granted/Review Criteria Explained

The Second Department, after noting that an application for a variance can be made by an agent for the property owner, determined the Board of Zoning Appeals had properly granted the lot-width variances. In explaining the court's role in reviewing variances, the court wrote:

> …"[L]ocal zoning boards are vested with broad discretion in considering applications for area variances, and [c]ourts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure'" … . A variance determination of a zoning board should be sustained if it has a rational basis and is not arbitrary and capricious … .
>
> Here, the Board properly balanced the requisite statutory factors, and its determination that the benefit to the applicant of the requested variances outweighed the detriment to the health, safety, and welfare of the neighborhood or community had a rational basis and was not arbitrary and capricious (see Town Law § 267-b[3][b]…). Among other things, the Board found that, despite a few wide lots in the vicinity of the premises, the majority of lots in the uninterrupted two-block segment of Bayview Avenue in which the subject premises were located had a width of 50 feet or less, and, thus, that the variances would not produce an undesirable change in the character of the neighborhood or a detriment to nearby properties. **Matter of Huszar v Bayview Park Props LLC, 2013 NY Slip Op 05906, 2nd Dept 9-18-13**

Planning Board Should Not Have Added Conditions for Approval of Final Plat Plan

The Second Department affirmed Supreme Court's determination that the planning board's denial of approval of a final plat plan was arbitrary and capricious. The Court determined that the planning board was aware of the variance upon which the denial was based (involving the transfer of sanitary flow credits) at the time it approved the preliminary plat plan:

> Although the Planning Board's approval of the preliminary plat in April 2010 did not guarantee approval of the final version (see Town Law § 276[4]), a planning board may not, in the absence of significant new information, deny final approval if a property owner implements the modifications or conditions required by a preliminary approval (…Terry Rice, Practice Commentaries, McKinney's Cons Laws of NY, Book 61, Town Law § 276 Preliminary Review). Here, the Planning Board had long known that the SCDHS's approval of a Suffolk County Sanitary Code variance was based on the transfer of sanitary flow credits and, indeed, the Planning Board specifically referenced that transfer in its April 2010 conditional preliminary approval. Inasmuch as no significant new information came to light after the Planning Board gave its approval to the preliminary plat, its imposition of additional requirements in the conditional final approval was, as the Supreme Court correctly held, arbitrary and capricious… . **Matter of Nickart Realty Corp v Southold Town Planning Bd, 2013 NY Slip Op 05909, 2nd Dept 9-18-13**

Ownership Acquired by Adverse Possession Demonstrated

The Second Department reversed Supreme Court and determined plaintiffs had proved ownership of a strip of land by adverse possession:

> ...[W]e conclude that the plaintiffs demonstrated ownership to the subject strip through adverse possession. " A party seeking to obtain title by adverse possession must prove by clear and convincing evidence . . . that (1) the possession was hostile and under claim of right; (2) it was actual; (3) it was open and notorious; (4) it was exclusive; and (5) it was continuous for the statutory period of 10 years'" … . Additionally,

since the adverse possession claim is not founded upon a written instrument, the plaintiffs must establish, in accordance with the law in effect at the time this action was commenced, that the disputed property was either "usually cultivated or improved" or "protected by a substantial inclosure" (RPAPL former 522…).

Here, the plaintiffs demonstrated that, by building and maintaining a wall along the subject strip, which was styled to match their house and attached to a gate attached to their house, they continually possessed the subject strip, for more than 10 years, in a manner that was open and notorious, exclusive, and inimical to the rights of the [defendants'] predecessor… . **Marone v Kally, 2013 NY Slip Op 05882, 2nd Dept 9-18-13**

Ten Year Adverse Possession Period Began After Ten Year Permissive Use Period Expired

The Second Department determined that plaintiffs acquired property by adverse possession, even though the initial use of the property was by permission. The permission ceased by statute after ten years, and another ten years of hostile use passed:

A party seeking to obtain title by adverse possession must prove, by clear and convincing evidence, the following common-law requirements of adverse possession: that the possession was (1) hostile and under claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the statutory period of 10 years … . Here, only the first element is in dispute. According to the defendants, the plaintiffs' use of the properties was by permission. * * *

…[A] landlord/tenant relationship existed between the parties and their predecessors and, therefore, RPAPL 531 applies. Since no written lease existed and the admissible evidence established that neither the plaintiffs nor their predecessor paid rent for their use of the properties since July 21, 1981, any permission that may have been granted to the plaintiffs or their predecessor to use the properties effectively ceased after 10 years (see RPAPL 531…). Thus, by operation of RPAPL 531, the plaintiffs' adverse possession of the properties commenced on July 21, 1991. Under the circumstances of this case, we agree with the Supreme Court that the plaintiffs established their hostile use of the properties for a period of 10 years after the permissive period expired …, and that the plaintiffs were, therefore, entitled to a judgment declaring them to be the owners in fee simple absolute of the subject properties. **Auto Gobbler Parts, Inc v Serpico, 2013 NY Slip Op 05977, 2nd Dept, 9-25-13**

Question of Fact Whether Initial Broker Entitled to Commission

The Second Department, over a dissent, determined there was a question of fact about whether a real estate broker was entitled to a commission because it generated a chain of circumstances that proximately led to the sale:

To prevail on its cause of action to recover a commission, the plaintiff is required to prove, inter alia, that it was "the procuring cause of the sale" … . "To establish that a broker was the procuring cause of a transaction, the broker must establish that there was a direct and proximate link, as distinguished from one that is indirect and remote, between the bare introduction and the consummation" … . However, "a broker . . . does not automatically and without more make out a case for commissions simply because he [or she] initially called the property to the attention of the ultimate purchaser" … . "Where, as here, the broker is not involved in the negotiations leading up to the completion of the deal, the broker must establish that [it] created an amicable atmosphere in which negotiations proceeded or that it generated a chain of circumstances that proximately led to the sale" … . **Talk of the Town Realty v Geneve, 2013 NY Slip Op 05997, 2nd Dept 9-25-13**

Question of Fact Whether Encroaching Hedge Was De Minimus Encroachment Re: Adverse Possession

The Second Department determined there was a question of fact about whether a hedge which encroached eight feet into plaintiff's right of way was a "de minimus" encroachment within the meaning of the Real Property Actions and Proceedings Law (RPAPL) (re: adverse possession):

RPAPL 543(1), which was enacted in 2008, provides: "Notwithstanding any other provision of this article, the existence of de [minimis] non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls, shall be deemed to be permissive and non-adverse." The plaintiff contends that pursuant to RPAPL 543(1), the existence of all encroaching hedges and shrubbery, no matter how large, shall be deemed permissive and non-adverse. Under the plaintiff's interpretation of the statute, the list of examples contained in RPAPL 543(1) are examples of "de [minimis] non-structural

encroachments." We reject this interpretation. The more reasonable interpretation of RPAPL 543(1) is that the list contains examples of "non-structural encroachments" which could still be adverse if they are not de minimis. This reading gives effect to the words "de [minimis]," while the plaintiff's interpretation would render those words superfluous. "It is a cardinal principle to be observed in construing legislation that . . . whenever practicable, effect must be given to all the language employed. Our duty is to presume that each clause . . . has a purpose" … . **Wright v Sokoloff, 2013 NY Slip Op 06856, 2nd Dept 10-23-13**

Question of Fact Re: Implied Easement for Pipeline to Pond

The Third Department determined there was a question of fact whether an implied easement existed for a pipeline linking defendant's property with a pond. The court agreed with Supreme Court that an express easement had been extinguished when the relevant parcels were owned by the same party and was not subsequently recreated de novo. The court explained the criteria for an implied easement:

> "[A]n easement by implication requires '(1) unity and subsequent separation of title, (2) the claimed easement must have, prior to separation, been so long continued and obvious or manifest as to show that it was meant to be permanent, and (3) the use must be necessary for the beneficial enjoyment of the land'" … . Stated another way, "[a]n implied easement will arise 'upon severance of ownership when, during the unity of title, an apparently permanent and obvious servitude was imposed on one part of an estate in favor of another part, which servitude at the time of severance is in use and is reasonably necessary for the fair enjoyment of the other part of the estate'" … . Here, there is no genuine dispute that there was unity in ownership and a subsequent separation of title of the subject parcels. Similarly, defendants made a prima facie showing that the use of the pipeline across plaintiff's property was continued and obvious for decades. **Freeman v Walther, 516295, 3rd Dept 10-24-13**

Effect of Ambiguity in Easement Explained

In finding there were triable issues of fact, the Second Department explained the effect of ambiguity in the wording of easements:

> The extent of an easement claimed under a grant is generally determined by the language used in the grant … . However, where the language of the grant is ambiguous or unclear, the court will consider surrounding circumstances tending to show the grantor's intent in creating the easement … . Here, the language of the grant creating an easement in favor of the Clemensens' property for "ingress and egress over the continuation of [the] private roadway as now or hereinafter located to the Hudson River" is ambiguous. **Menucha of Nyack, LLC v Fisher, 2013 NY Slip Op 07015, 2nd Dept 10-30-13**

REALPROPERTY/TAX

Termination of Participation in Affordable Housing Program Is Not a Taxable Transfer

In a full-fledged opinion by Justice Cohen, the Second Department determined that when a residential housing cooperative amends its certificate of incorporation as part of a voluntary dissolution, reconstitution, and termination of participation in the Mitchell-Lama housing program (Private Housing Finance Law section 10 et seq, an affordable housing program established in 1955) there is no transfer or conveyance of real property or an interest in real property and, therefore, no taxable event occurs under Tax Law section 1201(b) (i.e., no real property transfer tax [RPTT] is due). This opinion replaced the opinion in Trump Vil. Section 3, Inc v City of New York, 100 AD3d 170, which is recalled and vacated. **Trump Vil Section 3, Inc v City of New York, 2013 NY Slip Op 05894, 2nd Dept 9-18-13**

REAL PROPERTY/ARTICLE 78

Petition Seeking Revocation of Building Permit Should Have Named the Director Who Had the Power to Revoke It

In affirming the grant of a building permit by the village board of appeals (BOA), the Second Department noted that only Director of Building, Code Enforcement and Land Use Administration had the power to revoke a building permit and therefore the Director should have been named in the Article 78 proceeding seeking revocation:

> …[I]n a proceeding pursuant to CPLR article 78 which seeks to compel a body or officer to perform a duty imposed by law, the proceeding must be commenced against the body or officer whose performance is sought (see CPLR 7803). The petitioners sought to compel the BOA to revoke the building permit and any subsequently issued certificate of occupancy.

However, only the Director is empowered to do so (see Village Code §§ 126-7, 126-12, 126-15). Thus, the petitioners should have named and joined the Director as a party to this proceeding … . **Matter of Lucas v Board of Appeals of Vil of Mamaroneck, 2013 NY Slip Op 05908, 2nd Dept 9-18-13**

REAL PROPERTY/ TRUSTS AND ESTATES

Right of First Refusal Not Triggered by Partition Action

In a partition action, the Fourth Department determined the agreement between the parties was a right of first refusal, not an option to purchase, which was not triggered by the partition action. The court explained the operative law:

> Plaintiff and Waite [one of the defendants] are tenants in common and acquired the property at issue by an executor's deed pursuant to the settlement of their mother's estate. In settling that estate, plaintiff, Waite and the other named defendants signed a settlement agreement providing that plaintiff and Waite "agree to grant to [each of the other named defendants] the option to purchase the . . . property, in the event that [plaintiff and Waite], either jointly or severally, determine to sell, assign or transfer the . . . property to someone other than each other. The option price shall be [$120,000] plus the costs of any improvements made by [plaintiff and Waite] to the premises subsequent to [their] purchase of the premises. Said option may be prepared in recordable form by any or all of the [other named defendants] at their own cost and expense, and [plaintiff and Waite] will execute any said recordable option. Upon receipt of an offer to purchase the premises, except from [each other], [plaintiff and Waite] shall notify each of the [other named defendants] then living, in writing of the proposed sale of the premises, and the [other named defendants] shall have sixty (60) days to exercise their option as granted herein." * * *
>
> We conclude that the right bestowed by the settlement agreement … is a right of first refusal, not an option to purchase, despite the use of the term "option" therein …, and thus that Supreme Court mistakenly treated the contractual right as an option to purchase. "A right of first refusal is a dormant right that is triggered when an owner decides to sell the property to a third party at an agreed-upon price" …, and those are the applicable facts set forth in the settlement agreement.
>
> We agree with Waite on her appeal that the court erred in determining that the contractual right was triggered upon plaintiff's commencement of the instant action, for partition and sale. It must first be determined in a partition action whether the property may be partitioned, i.e., divided among the owners in some fashion, without great prejudice to them, and "partition sale" is a secondary consideration only in the event that partition greatly prejudices the owners (see RPAPL 901 [1]…). Thus, commencement of the partition action did not trigger the right of first refusal inasmuch as a partition, as opposed to a partition sale, would not result in a transfer of the property to a third party. Furthermore, no offer of purchase from a third party triggered either the right of first refusal or the contractual obligation of plaintiff or Waite pursuant to the settlement agreement or recorded document. **Tuminno v Waite…, 915, 4th Dept 10-4-13**

RECOUPMENT

Affirmative Defense of Recoupment Not Extinguished by Bankruptcy Sale

In affirming Supreme Court's denial of a motion to dismiss a recoupment affirmative defense, the First Department noted the defense is not extinguished by a bankruptcy sale:

> The affirmative defense of recoupment is not an "interest" that is extinguishable by a "free and clear" sale under the Bankruptcy Code … . Further * * * [d]efendant's recoupment defense arises out of the same transaction (i.e., the same contract) that forms the basis for plaintiff's action against defendant… . **Hispanic Ind Tel Sales LLC v Unaa Vez Mas LP, 2013 NY Slip Op 06518, 1st Dept 10-8-13**

TAX LAW

Equipment Leases Are Not "Securities" for Purposes of Tax Law

In a detailed decision going into depth on many of the related issues, the Third Department determined that (1) leases of equipment which the customer has the option to buy at the end of the term and (2) installment sales of equipment in which title is conferred to the customer at the outset, both referred to as "financial agreements," were not "securities" and therefore the related interest

was not “investment income” within the meaning of Tax Law 208:

> Business income is defined as "entire net income minus investment income" (Tax Law § 208 [8]); investment income, as relevant here, is defined as "income . . . [derived] from investment capital" less allowable deductions (Tax Law § 208 [6]), which is "investments in stocks, bonds and other securities, corporate and governmental, not held for sale to customers in the regular course of business" (see Tax Law § 208 [5] [emphasis added]). The corporate franchise tax statutes do not offer a definition of the term security or the phrase "other securities." The [Tax] Department's regulations provide that the phrase "stocks, bonds and other securities," among other things, means "debt instruments issued by . . . government[s]" (20 NYCRR 3-3.2 [c] [2]). Petitioner's main argument is that the finance agreements in issue constitute such debt instruments and, thus, the income derived therefrom is investment income under Tax Law § 208 (5) and (6). The [Tax Appeals] Tribunal rejected this interpretation, and we confirm. **Xerox Corp v NYS Tax Appeals Tribunal, 514464, 3rd Dept 10-24-13**

Failure to Serve Superintendent of Schools in Accordance with RPTL Required Dismissal of Property Tax Certiorari Proceeding

The Second Department determined Supreme Court properly vacated an order which directed the school district to repay back taxes for 2006 through 2010 on the ground that the superintendent of schools was not properly served in the tax certiorari proceeding:

> It is undisputed that the petitioner failed to comply with the requirements of RPTL 708(3) which provide, in pertinent part, that in a tax certiorari proceeding, within 10 days after service upon the Assessor, "one copy of the petition and notice shall be mailed . . . to the superintendent of schools of any school district within which any of part of the real property on which the assessment to be reviewed is located." RPTL 708(3) further provides that "[f]ailure to comply with the provisions of this section shall result in the dismissal of the petition, unless excused for good cause shown." RPTL 708(3) requires a petitioner to show good cause to excuse its failure to notify the appropriate school district, and not merely to demonstrate the absence of prejudice to that school district … . Contrary to the petitioner's contention, it failed to establish good cause for its failure to serve the petitions on the School District … . Accordingly, the Supreme Court providently exercised its discretion in denying the petitioner's cross motion [for leave to make late service] (see CPLR 2004, 2005; RPTL 708[3]…).

Petitioner Was Domiciled in New York at Time of Stock Sale/Taxes Owed to New York

In affirming the Tax Appeals Tribunal’s determination that petitioner was domiciled in New York when she sold shares of stock resulting in $2 million in capital gains, the Third Department explained the relevant principles:

> …[A]n individual is a resident of this state for income tax purposes when that individual is domiciled in New York (see Tax Law § 605 [b] [1] [A]). A domicile "is the place which an individual intends to be such individual's permanent home" (20 NYCRR 105.20 [d] [1]) and, "once established[, a domicile] continues until the individual in question moves to a new location with the bona fide intention of making such individual's fixed and permanent home there" (20 NYCRR 105.20 [d] [2]; see Matter of Newcomb, 192 NY 238, 250 [1980]). "Domicile is established by physical presence and intent"… . "No single factor is controlling and the unique facts and circumstances of each case must be closely considered" … . "The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that such individual did this merely to escape taxation" (20 NYCRR 105.20 [d] [2]). The party seeking to establish a change in domicile must carry the burden of doing so by clear and convincing evidence … . Upon review, this Court will defer to the Tribunal's determinations regarding witness credibility and the weight to be accorded the evidence …, and the Tribunal's determination will be confirmed if it is "rationally based upon and supported by substantial evidence" … . **Matter of Ingle v Tax Tribunal of the Department of Taxation…, 514245 3rd Dept 10-31-13**

TRIALS

Excessive Intervention by Trial Judge Required New Trial

Over a partial dissent, the Second Department granted defendant a new trial before a different justice in a medical malpractice case based upon the trial judge’s erroneous exclusion of evidence, excessive intervention in the trial, and an erroneous (“Noseworthy”) jury

instruction. With respect to the judicial intervention, the Second Department wrote:

> The defendant was … deprived of a fair trial by the court's excessive intrusion into the examination of witnesses, and by the nature and extent of its questioning and comments … . It is axiomatic that the trial court "has broad authority to control the courtroom, rule on the admission of evidence, elicit and clarify testimony, expedite the proceedings and to admonish counsel and witnesses when necessary" … . Nonetheless, a trial court must be "mindful that its participation in the questioning of witnesses has the potential to influence the jury and, thus, when it intervenes to clarify testimony or elicit a responsive answer, it must be careful to do so in an evenhanded and temperate manner" … . Here, while the trial court had the authority to elicit and clarify the defense witnesses' testimony, the record shows that on repeated occasions, including those specifically discussed by our dissenting colleague, it did not do so in an evenhanded and temperate manner. The court conveyed an impression of incredulity with respect to the defense witnesses' opinions, as reflected by the record … . Moreover, the court's incredulity had an improper cumulative effect … . **Nunez v New York City Health & Hosps Corp…, 2013 NY Slip Op 06350, 2nd Dept 10-2-13.**

Excessive Intervention and Improper Conduct by Trial Judge Required New Trial

In a medical malpractice case, the Second Department determined plaintiff was deprived of a fair trial by the trial judge's excessive intervention and improper conduct:

> "[A]ll litigants, regardless of the merits of their case, are entitled to a fair trial" . A trial justice plays a "vital role in clarifying confusing testimony and facilitating the orderly and expeditious progress of the trial," but that "power is one that should be exercised sparingly" … . Accordingly, a trial justice may not " so far inject himself [or herself] into the proceedings that the jury could not review the case in the calm and untrammelled spirit necessary to effect justice'" … .
>
> A trial justice must maintain an atmosphere of impartiality. Here, while the plaintiff's counsel may have been overly aggressive, and at times even antagonized the trial justice, nonetheless, a trial justice should " at all times maintain an impartial attitude and exercise a high degree of patience and forebearance'" … . Indeed, our review of the record convinces us that the repeated conflict between the court and the plaintiff's counsel, at all phases of the trial===and often times in the presence of the jury---unnecessarily injected personality issues into the case, which militated against a fair trial. The trial justice demonstrated a propensity to interrupt, patronize, and admonish the plaintiff's counsel, and gave the plaintiff's counsel significantly less leeway with regard to examination and cross-examination of witnesses than that which was afforded the defendants' counsel.**Porcelli v Northern Westchester Hosp Ctr, 2013 NY Slip Op 06354, 2nd Dept 10-2-13.**

TRUSTS AND ESTATES

Criteria for Denial of Trustee Commission for Misconduct Explained (Commission Was Not Denied Here)

The First Department explained the criteria for determining whether a trustee can be denied an annual commission for misconduct. The court ultimately concluded the commission should not be denied in this case:

> We conclude that courts have the discretion to take into consideration all of a trustee's misconduct in determining the grant of annual commission, even conduct that occurred after the period applicable to the commission. Although there are no appellate cases on point, no New York case holds otherwise. As a basic principle, the Surrogate has broad discretion to deny commission to a trustee if the trustee has engaged in misconduct … . In determining if a commission should be denied, misconduct that is not directly related to the commission being sought may be taken into consideration … . The Restatement (Second) of Trusts § 243 supports this conclusion with a multi-factor analysis (Comment c). Among the factors to be considered under the Restatement in determining if a commission should be denied are whether the trustee acted in good faith, if the misconduct related to management of the whole trust and if the trustee completed services of value to the trust (id.). We conclude, therefore, it is within the court's discretion to determine whether the trustee's later misconduct bars her from receiving commission.
>
> Trustees can be denied commission "where their acts involve bad faith, a complete indifference to their fiduciary obligations or some other act that constitutes malfeasance or significant misfeasance" …. The denial of a commission, however, should not be "in the

nature of an additional penalty" (Restatement 243, Comment a). Rather, it should be based on the trustee's failure to properly serve the trust, not designed as an additional punishment … . Indeed, even the beneficiaries in this case state that it will be rare that a trustee's later misconduct will serve as the basis for a denial of commission. **Matter of Gregory Stewart Trust, 2013 NY Slip Op 06079, 1st Dept 9-26-13**

Conveyance Was For Convenience (Getting a Loan) and Was Not a Gift---Property Therefore Remained in Decedent's Estate

The Second Department determined Surrogate's Court correctly found that the conveyance of a one-third interest in property was for the decedent's convenience and was not a gift. Therefore, the one-third interest was in the decedent's estate:

> The petitioner presented evidence establishing that the decedent's conveyance was for his convenience, and was designed to obtain a refinance mortgage loan on the property at a more favorable interest rate than would have been offered had decedent's name remained on the title. The petitioner also presented evidence that, after the refinancing was completed, the decedent's one-third interest in the subject real property was to be reconveyed to him. …
>
> "In a turnover proceeding, the burden of establishing that the property was that of the decedent rests with the petitioner, and once that burden is met, it shifts to the respondent to establish that it was a gift" … . Here, the petitioner met her initial burden of establishing that the one-third interest in the subject real property belonged to the decedent. The petitioner's proof included, inter alia, deposition testimony given by [decedent's brother] George in a related proceeding, wherein he acknowledged that the decedent's one-third interest was to be reconveyed to the decedent after the refinancing. [Decedent's sister] Elaine failed to come forward with clear and convincing proof that the decedent intended to make a gift of his interest in the subject real property… . **Matter of Voyiatgis, 2013 NY Slip Op 06700, 2nd Dept 10-16-13**

Decedent's Acknowledgment of Paternity of Nonmarital Child Precluded Objections to Distribution by Sibling

In finding that the decedent's brother did not have standing to raise objections to the distribution of an estate because the decedent had sufficiently acknowledged paternity of at least one nonmarital child, the Second Department wrote:

> …[T]he appellant, in his capacity as a sibling of the decedent, had no standing to raise objections unless he could be considered a istribute of the decedent's estate. Siblings, who are defined as issue of the decedent's parents, are only istributes if the decedent dies without issue (see EPTL 4-1.1[a][3]). If the decedent here was survived by any issue, the appellant, in his capacity as a sibling of the decedent, does not have standing as a person interested in the estate (see SCPA 103[39]).
>
> Since the decedent died after April 28, 2010, EPTL 4-1.2, as amended in 2010, is applicable (see L 2010, ch 64). That provision states, among other things, that a nonmarital child may inherit from his or her father and paternal kindred, if paternity was established during the decedent's lifetime or "paternity has been established by clear and convincing evidence, which may include, but is not limited to: (i) evidence derived from a genetic marker test, or (ii) evidence that the father openly and notoriously acknowledged the child as his own" (emphasis added). The affidavits in this case demonstrated that the decedent had at least one nonmarital child whom he openly and notoriously acknowledged as his own. As this Court noted …, "[t]o establish an open and notorious acknowledgment of paternity, there is no requirement that the putative father disclose paternity to all his friends and relatives. An acknowledgment of paternity in the community in which the child lives is sufficient." **Matter of Reape, 2013 NY Slip Op 07048, 2nd Dept 10-30-13**

UNEMPLOYMENT INSURANCE

Tour Musicians Were Employees of Columbia Artists Management/Workers Who Loaded and Unloaded Equipment Were Not Employees

The Third Department determined that, for purposes of assessing unemployment insurance contributions, musicians on tour were employees of, not independent contractors for, Columbia Artists Management, but the workers who loaded and unloaded the equipment used by the musicians were independent contractors, not employees:

> … [T]here are a number of factors that establish that Columbia retained control over important aspects of the musicians' work. Specifically, Columbia paid the musicians a flat fee per week for the duration of the tour as well as the costs of transportation, lodging and miscellaneous expenses, supplied them with sheet music on occasion and prohibited them from taking on engagements that conflicted with the tour. Most significantly, under the written contracts, Columbia retained the right to ensure the artistic quality of the show by insisting that a performance be changed if it found it to be inappropriate. In addition to retaining broad overall control over the musicians' performances, Columbia retained the right to dismiss any musician for drug or alcohol abuse. In view of this, we conclude that substantial evidence supports the Board's finding of an employer-employee relationship between Columbia and the musicians … .
>
> We reach a different conclusion, however, with respect to the loaders. There is nothing in the record to indicate that Columbia exerted any type of control over either the means or the results of the work of these individuals. All communications involved in retaining the loaders occurred through the union representative at the venue, who dictated the terms of payment as well as the number of loaders needed. The Columbia representative present at the time the trucks were unloaded was there solely for the purpose of paying the loaders and provided no equipment or instruction to assist them in performing their work. **Matter of Columbia Artists Management LLC…, 515768, 3rd Dept 9-26-13**

Claimant Who Sold Educational Materials Was an Employee

The College Network (TCN) sells educational materials for personal study from home to obtain college credits through testing. Claimant was retained by TCN to promote and selling the materials. After claimant stopped working for TCN he filed a claim for unemployment insurance. The Unemployment Insurance Appeal Board upheld the decision that claimant was an employee entitled to unemployment insurance. The Third Department affirmed:

> It is well settled that "the existence of an employment relationship is a factual issue for the Board to decide and its determination will be upheld if supported by substantial evidence" … . "The predominant consideration in making this inquiry is evidence of the alleged employer's control over the results produced or the means used to achieve those results, with the latter being more important" … . Here, there is ample evidence that TCN exercised control over many aspects of the program advisors' work.
>
> Notably, TCN established the program advisors' sales territory and provided them with sales leads as well as product knowledge training. Although the program advisors could pursue these leads or develop their own, they were paid commissions based upon percentages set by TCN depending on the manner in which the sale was generated. The program advisors were required to report to TCN the results of company-generated leads and were only allowed to use advertisements and promotional materials approved by TCN. TCN provided program advisors with company email addresses and business cards, and reimbursed them for the expenses of attending some training. Notably, at times, regional sales managers accompanied the program advisors on sales calls to ensure they were providing customers with accurate information. In addition, TCN maintained a corporate calendar by which it would schedule appointments for the program advisors depending upon their availability. Significantly, the program advisors were expected to contact nine customers within a 90-day period, and TCN retained the right to terminate them if they were underperforming. TCN also prohibited the program advisors from working for competitors for a two-year period. **Matter of Smith…, 515773, 3rd Dept 9-26-13**

Math Tutor Was an Independent Contractor, Not an Employee

The Third Department affirmed the decision of the Unemployment Insurance Appeal Board finding that claimant, a math tutor, was an independent contractor, not an employee:

> Although claimant maintains that he was erroneously considered an independent

> contractor in connection with earnings received from tutoring services through TestQuest, Inc. and that such funds should be utilized as covered employment to establish his claim, we cannot agree. As noted earlier, TestQuest, Inc. tutors such as claimant were deemed by this Court to be independent contractors (Matter of Leazard [TestQuest, Inc.–Commissioner of Labor], 74 AD3d at 1415-1416), which decision is conclusive and binding upon all such persons employed by TestQuest, Inc. (see Labor Law § 620 [1] [b]). As such, those earnings cannot qualify for inclusion as remuneration in the base periods… . **Matter of Tkachyshyn…, 516210. 3rd Dept 9-26-13**

Hearing Officer's Factual Misconduct Findings Cannot Be Ignored

In reversing the Unemployment Insurance Appeal Board's grant of unemployment benefits to the claimant, the Third Department explained that the hearing officer's factual findings of disqualifying misconduct cannot be ignored:

> While the Board was free to make "independent additional factual findings" and draw its own independent conclusion as to whether claimant's behavior rose to the level of disqualifying misconduct for purposes of entitlement to unemployment insurance benefits, it was also bound by the Hearing Officer's "factual findings regarding claimant's conduct and his conclusion" that claimant had been insubordinate … . Despite the fact that "the question of claimant's conduct leading to his termination necessarily had to be considered" in making that assessment, the Board here inexplicably failed to consider whether claimant's actions … constituted disqualifying misconduct… . **Matter of Winters…, 515809, 3rd Dept 9-19-13**

Claimant Properly Found to Be an Employee

In affirming the Unemployment Insurance Appeal Board's conclusion that claimant was an employee of Village Wine, the Third Department wrote:

> Claimant was a salesperson for Village Wine Imports Ltd., a wine importer and distributor. Substantial evidence supports the Unemployment Insurance Appeal Board's conclusion that claimant and those similarly situated were Village Wine's employees and not independent contractors. Village Wine set claimant's commission rate, paid him a draw on his commission for a period of time, and reimbursed his travel and telephone expenses. Claimant was also trained by Village Wine, which assisted his sales efforts by providing product samples and business cards bearing the company name. Village Wine also set the price, terms and conditions for all sales, gave claimant sales leads, required him to obtain approval for sales, and handled all shipping and invoicing matters. While evidence in the record could support a contrary result, the Board was free to determine from the above that Village Wine exercised sufficient control over claimant to establish an employer-employee relationship… . **Matter of Miciletto…, 515852, 3rd Dept 9-19-13**

Claimant Who Provided Computer-Training for Company's Clients Properly Found to Be Employee of Company

In affirming the Unemployment Insurance Appeal Board's determination claimant was an employee of a company (Eden Technologies) which provides computer-training personnel to clients, the Third Department wrote:

> The existence of an employer-employee relationship is a factual determination for the Board to resolve and its determination will not be disturbed if supported by substantial evidence … . This Court has held that "'an organization which screens the services of professionals, pays them at a set rate and then offers their services to clients exercises sufficient control to create an employment relationship'" … . In this case, there is proof that Eden sought, interviewed and selected claimant to perform services at the request of a client. On a weekly basis, claimant was required to submit time sheets provided by Eden, including information about what services were provided. Eden then paid claimant directly on a biweekly basis at a set hourly rate and billed the client separately. Additionally, certain restrictions were placed upon claimant's provision of services to Eden's clients and other entities during her employment and for one year following separation. Thus, although there is evidence that could support a different result, we find substantial evidence to support the Board's decision… . **Matter of Lamar…, 516039, 3rd Dept 9-19-13**

Inability to Find Sufficient Childcare Was "Good Cause"for Leaving Employment

In affirming the Unemployment Insurance Appeal Board's determination claimant had good cause for leaving her employment, the Third Department wrote:

> "Whether a claimant has good cause to leave his or her employment is a factual determination

to be made by the Board, and its decision will not be disturbed when supported by substantial evidence" … . Claimant offered multiple reasons that she was dissatisfied with her employment, but the record supports the Board's conclusion that the impetus for her resignation was an inability to arrange appropriate childcare despite having made sufficient efforts in that regard. We find that substantial evidence supports the Board's determination that, under all of the circumstances presented here, claimant had good cause to leave her employment… . **Matter of Cottone…, 516338, 3rd Dept 9-19-13**

WATER LAW/PREEMPTION

Construction of Dock Could Not Be Regulated by Town---Land Under Navigable Waters Owned by State

The Third Department determined that the Lake George Town Planning Board did not have jurisdiction to grant or deny petitioner's application to build a dock in Lake George because the state, not the town, owned the land under navigable waters:

> When the state owns land under navigable waters in its sovereign capacity, its exclusive authority preempts local land use laws and extends beyond the regulation of navigation "to every form of regulation in the public interest."… . The state holds title to the lands under Lake George in its sovereign capacity and, thus, has sole jurisdiction over construction in the lake's navigable waters provided it has not delegated this authority to a local government … .
>
> "[A]bsent the delegations in Navigation Law § 46-a allowing local municipalities to regulate the manner of construction and location of structures in waters owned by the [s]tate in its sovereign capacity, municipalities bordering or encompassing such waters . . . have no authority to issue such regulations"… . **The Hart Family v Town of Lake George, 515142, 3rd Dept 10-24-13**

WORKERS' COMPENSATION

Criteria for Payment from Special Fund Explained

In finding there was insufficient evidence to determine if claimant was entitled to be paid workers' compensation benefits from the Special Fund (for previously closed cases), the Third Department wrote:

> "Worker's Compensation Law § 25-a provides for the transfer of liability to the Special Fund 'when an application to reopen a closed case is made more than seven years from the date of injury and more than three years after the last payment of compensation'" … . "Advance payments that are made voluntarily, in recognition of an employer's liability, are payments of compensation" for purposes of Workers' Compensation Law § 25-a … . Thus, even where the requisite time periods have elapsed, if a claimant has – during the relevant time period – received advance payment of benefits in the form of full wages for the performance of light or limited duty work, liability is not appropriately shifted due to those advance payments … . Here, the record contains numerous progress reports from claimant's chiropractor indicating that she has been working for the employer since November 2004 with restrictions. Inasmuch as the record does not contain an affidavit or testimony of claimant or any other evidence regarding whether claimant was performing light or limited duties and, if so, whether she received full wages, we find that the Board's decision is not supported by substantial evidence and the matter must be remitted for further development of the record… . **Matter of Capodagli…, 516177, 3rd Dept 9-19-13**

Retroactive Transfer of Liability to Special Fund Proper

The Third Department affirmed the board's determination that retroactive transfer of liability to the Special Fund to a time within seven years of the underlying injury was proper:

> Pursuant to Workers' Compensation Law § 25-a, liability is transferred to the Special Fund "when an application to reopen a closed case is made more than seven years from the date of injury and more than three years after the last payment of compensation" (…see Workers' Compensation Law § 25-a [1]). Here, there is no dispute that these conditions have been met and the only issue before us is whether the Board properly transferred liability to the Special Fund retroactively to a period of time prior to the lapse of seven years following claimant's injury.
>
> While the retroactive transfer of liability to the Special Fund is limited to no longer than two years prior to the date of the application to reopen (see Workers' Compensation Law § 25-a [1-a]…), there is no statutory requirement that there be a seven year lapse from the date of a claimant's injury prior to the date of a retroactive transfer of liability (see Workers' Compensation Law § 25-a [1-a]). Accordingly, we conclude that the Board's determination, that Workers' Compensation Law § 25-a does not preclude a retroactive transfer of liability to the Special

> Fund to a time period within seven years of the underlying injury, is not unreasonable, irrational or inconsistent with the purpose of the statute …, and the Board has set forth sufficient reasons for no longer following any prior decisions to the contrary. **Canfora v Goldman Sachs…, 515529, 3rd Dept 10-3-13**

Music Teachers Are Employees Not Independent Contractors

In finding that music teachers were employees [of Musika, LLC], not independent contractors, the Third Department wrote:

> Claimant offered guitar lessons for Musika LLC, a business that matches music teachers it deems qualified with students. Musika required its teachers to execute a contract that set the fee for lessons, prohibited them from competing with Musika or soliciting its students, and obliged teachers to perform any services "reasonably requested" by it. The teachers were required to report their work activities to Musika which, in turn, billed the students and paid the teachers by check. Moreover, teachers were expected to notify Musika if they were unavailable to work and could not use a substitute teacher without prior approval. Notwithstanding the proof in the record that could support a contrary result, the above constitutes substantial evidence for the determination of the Unemployment Insurance Appeal Board that claimant and those similarly situated were Musika's employees and not independent contractors… . **Matter of Tekmitchov…, 516112, 3rd Dept 10-24-13**

ACCIDENTAL DISABILITY RETIREMENT BENEFITS (POLICE OFFICERS)

Injuries In Line of Duty Not Due to "Accidents"

The Third Department confirmed the comptroller's determination that the injuries suffered by a police officer were not the result of "accidents" and therefore did not justify the award of accidental disability retirement benefits. The officer slipped on a wet metal-encased curb while directing traffic and was subsequently injured again when a suspect he was chasing resisted arrest. The Third Department wrote:

> Initially, we note that petitioner has the burden of demonstrating that he is entitled to receive accidental disability retirement benefits, and the Comptroller's determination will be upheld if supported by substantial evidence … . In order to qualify as an accident, the precipitating event must be "a sudden, fortuitous mischance that is unexpected, out of the ordinary and injurious in impact" … . Notably, an injury will not be considered accidental if it "'results from an expected or foreseeable event arising during the performance of routine employment duties'" … . **Matter of Rodriques v DiNapoli, 515935, 3rd Dept 10-3-13**

ZONING

Variance Should Not Have Been Granted to Homeowner Who Built Swimming Pool In Violation of Set-Back Requirements

The Second Department reversed Supreme Court's annulment of a Zoning Board of Appeals (ZBA) determination that a variance should not be granted to a homeowner who, without a permit, constructed a swimming pool in violation of a rear-yard setback.

> In deciding whether to grant an application for an area variance, the Board "is required to engage in a balancing test that weighs the benefit to the applicant if the variance is granted against the detriment to the health, safety, and welfare of the neighborhood or community" … . The Board must consider whether (1) an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will result by the granting of the area variance, (2) the benefit sought by the applicant can be achieved by some feasible method other than an area variance, (3) the requested area variance is substantial, (4) the proposed variance will adversely impact the physical or environmental conditions in the neighborhood if it is granted, and (5) the alleged difficulty was self-created (see Town Law § 267-b[3][b]). * * *
>
> Contrary to the conclusion reached by the Supreme Court, the ZBA's determination had a rational basis and was not arbitrary and capricious. The evidence before the ZBA supported its conclusions that granting the requested variance would produce an undesirable change in the character of the neighborhood, the variance was substantial, and any hardship was self-created (see Town Law § 267-b[3][b]). Contrary to the petitioner's contention, the ZBA's granting of two prior applications seeking, inter alia, area variances for rear-yard setbacks of in-ground swimming pools, did not constitute a precedent from which the ZBA was required to explain a departure, because the two prior applications, inter alia, involved lots that were not near the subject property and were located in different zoning districts. Thus, the petitioners failed to establish that either of the two cases in which a variance was granted bore sufficient factual similarity to the subject application so as to require an explanation from the ZBA… . **Matter of Blandeburgo v Zoning Bd of Appeals Town of Islip, 2013 NY Slip Op 06680, 2nd Dept 10-16-13**

COURT OF APPEALS

APPEALS

Assignment of Counsel Required Before Determining Whether Appeal Should Be Dismissed as Untimely

The Court of Appeals determined the appellate division was required to assign counsel upon a showing of indigency before ruling on whether defendant's first-tier appeal as of right should be dismissed for failure to meet the timeliness requirement in the Second Department's rules:

> In this case, the Appellate Division erroneously failed to assign counsel to represent defendant before dismissing his first-tier appeal as of right based on his failure to timely perfect it. Notwithstanding the Appellate Division's rule mandating automatic dismissal of an untimely perfected appeal (see 22 NYCRR 670.8 [f]), its decision to dismiss the appeal here remained a discretionary determination on the merits of a threshold issue on defendant's first-tier And an appellate court had not yet passed on, nor had counsel presented, defendant's appellate claims with respect to dismissal or any other matter, thus leaving defendant ill equipped to represent himself. Because the factors cited in Douglas [372 US 387], Halbert [545 US 605] and Taveras [463 F3d 141], are present in the instant case, the Appellate Division was required to assign defendant an attorney upon a showing of indigence in order to enable him to oppose the court's motion to dismiss his first-tier appeal as of right, and the court's failure to appoint counsel to represent defendant without considering his indigency or the merits of dismissal warrants reversal and reinstatement of defendant's appeal. Upon remittal to the Appellate Division, that court should decide whether defendant is indigent pursuant to CPLR 1101. If defendant establishes his indigence, the court must assign counsel to litigate the dismissal motion, and the court should determine, in its discretion, whether dismissal is appropriate. appeal, rather than an automatic bar to appeal … . **People v Kordish, 252, Ct App 10-17-2013**

Appellate Division, Acting as Second Appellate Court, Used Wrong Standard of Review

The Court of Appeals reversed the appellate division in a holdover tenant proceeding because the appellate division, acting as the second appellate court, use the wrong standard of review:

> We agree with the dissenting opinion that the Appellate Division applied the incorrect standard of review to the Appellate Term order. In primary residence cases, where the Appellate Division acts as the second appellate court, "the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses" … .The Appellate Division did not apply this standard of review to this case, instead substituting its own view of the trial evidence. Accordingly, the case needs to be remitted to that court to apply the appropriate standard of review… . **409-411 Sixth Street, LLC v Mogi, 250, Ct App 10-10-13**

APPEALS/EVIDENCE/CRIMINAL LAW

Evidentiary Issues Not Preserved for Review

In a full-fledged opinion by Judge Rivera, the Court of Appeals affirmed the conviction of a psychiatric patient based on his assault of another patient. The court determined the doctor, who was cross-examined about defendant's capacity by defense counsel, could have been questioned by defense counsel about the hearsay basis for her opinion. The failure to do so could not be complained about on appeal. The court also determined an objection to a line of questioning did not preserve the issue of witness-bias for review because defense counsel's proffer did not specifically mention the exploration of witness-bias as the purpose of the questioning. **People v Daryl H, 154, Ct App 10-10-13**

CRIMINAL LAW

Insufficient Evidence to Warrant Jury Charge on Intoxication Defense

The Court of Appeals affirmed defendant's rape conviction finding that defendant presented insufficient evidence to warrant a jury charge on the intoxication defense:

> Although intoxication is not a defense to a criminal offense, a defendant may offer

> evidence of intoxication whenever relevant to negate an element of the charged crime (see Penal Law § 15.25). An intoxication charge should be issued when, viewing the evidence in a light most favorable to defendant …, "there is sufficient evidence of intoxication in the record for a reasonable person to entertain a doubt as to [an] element . . . on that basis" … . In order to meet this "relatively low threshold," defendant must present evidence "tending to corroborate his claim of intoxication, such as the number of drinks, the period of time between consumption and the event at issue, whether he consumed alcohol on an empty stomach, whether his drinks were high in alcoholic content, and the specific impact of the alcohol upon his behavior or mental state" … .
>
> Here, the evidence was insufficient to allow a reasonable juror to harbor a doubt concerning the element of intent on the basis of intoxication. Defendant's bare assertions concerning his intoxication were, by themselves, insufficient … . Nor did his statement to police and the victim's testimony that she smelled alcohol on his breath corroborate defendant's claim. While he may, indeed, have consumed alcohol prior to the events leading up to the crimes alleged, the evidence established that defendant's conduct was purposeful. He cut a hole in a screen to gain entry, instructed the victim to be quiet, threw a blanket over her head, and stole her cell phone so she could not call the police. Given this evidence, the court correctly ruled an intoxication charge was not warranted. **People v Beaty, 148, Ct App 10-17-13**

Emergency Doctrine Applied—Statements Made to Police and Overheard by Police Not Suppressible

In a full-fledged opinion by Judge Graffeo, the Court of Appeals affirmed the denial of motions to suppress certain statements made by the defendant to the police and to a friend in the presence of the police under the emergency doctrine. [The concurring judge felt the emergency was over when defendant spoke to his friend and his prior request for counsel rendered those statements suppressible. The majority held that the conversation with the friend was not police interrogation because there was no police involvement and the conversation was not a ploy by the police to elicit information from the defendant.] When the police encountered the defendant his clothes had wet blood on them and blood was found in defendant's vehicle. The emergency doctrine applied because the police were justified in questioning the defendant to determine if someone was injured and needed help:

> As a general rule, a person who is in custody cannot be questioned without first receiving Miranda warnings or after the right to counsel attaches … . There are exceptions to these principles, one of which is referred to as the "emergency doctrine" … . It recognizes that the Constitution "is not a barrier to a police officer seeking to help someone in immediate danger" …, thereby excusing or justifying otherwise impermissible police conduct that is an objectively reasonable response to an apparently exigent situation … . We have explained that the exception is comprised of three elements: (1) the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property and this belief must be grounded in empirical facts; (2) the search must not be primarily motivated by an intent to arrest and seize evidence; and (3) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched … . **People v Doll, 141, Ct App 10-17-13**

Out of State Conviction of then 15-Year-Old Could Not Serve as Basis for Second Felony Offender Sentence

The Court of Appeals determined that the defendant's Pennsylvania conviction for third degree murder (when the defendant was 15) could not serve as the basis for a second felony offender sentence. In so finding, the court noted that the error did not need to be preserved for the Court of Appeals to reach it:

> As an initial matter, we conclude that this case falls within the narrow exception to our preservation rule permitting appellate review when a sentence's illegality is readily discernible from the trial record … . * * *
>
> Penal Law § 30.00 (1) specifies that a person must be at least 16 years old to be criminally responsible for his conduct. Penal Law § 30.00 (2) lists crimes that are exceptions to this age requirement, but second-degree manslaughter is not among them. So assuming as we must for purposes of this appeal that third-degree murder in Pennsylvania is equivalent to second degree manslaughter in New York, defendant's Pennsylvania conviction was not a predicate felony conviction within the meaning of Penal Law § 70.06 (b) (i) because he could not even have been prosecuted for second-degree manslaughter in New York at the age of 15. **People v Santiago, 159, Ct App 10-15-13**

Failure to Allow Hearsay Admissible as Statement Against Penal Interest Required Reversal

In a weapon-possession case, the Court of Appeals, over a dissent, reversed the appellate division and held the defendant should have been allowed to call an attorney to testify that a (separately tried and acquitted) co-defendant told the attorney the weapon at issue was hers. The court found the attorney's testimony was admissible under the statement-against-penal-interest exception to the hearsay rule:

> The declaration against penal interest exception to the hearsay rule "recognizes the general reliability of such statements . . . because normally people do not make statements damaging to themselves unless they are true" … . The exception has four components: (1) the declarant must be unavailable to testify by reason of death, absence from the jurisdiction or refusal to testify on constitutional grounds; (2) the declarant must be aware at the time the statement is made that it is contrary to penal interest; (3) the declarant must have competent knowledge of the underlying facts; and (4) there must be sufficient proof independent of the utterance to assure its reliability … . The fourth factor is the "most important" aspect of the exception … . Assuming that the other elements are satisfied, such statements can be admissible if there is "a reasonable possibility that the statement might be true" … .
>
> We conclude that the courts below erred by focusing on the inconsistency between the … codefendant's trial testimony and her pretrial statement to [the] lawyer. Knowledge that a declaration is against penal interests must be assessed "at the time" it was made …, and later recantations generally affect the weight and credibility that a fact-finder should ascribe to the statement. Applying this legal standard, there was adequate evidence to establish admissibility under the particular facts of this case: the handgun was found in a handbag located in the rear of the automobile directly adjacent to the … codefendant; she was the only woman in the vehicle; and the circumstances under which the utterance was declared make it clear that the statement was against her interests. Contrary to the dissent's contention, there was also sufficient proof that the woman was not available to testify. Finally, the exclusion of the statement cannot be deemed harmless because the People's case was not overwhelming. Defendants are therefore entitled to a new trial. **People v Shabazz, 150, Ct App 10-15-13**

Ineffective Assistance On Suppression Issues---Case Sent Back

The Court of Appeals, over two dissenters, determined defendant had not been provided with effective assistance counsel with respect to the motion to suppress and suppression hearing. The court sent the matter back to properly consider the suppression issues, stating that if defendant prevailed on suppression the conviction should be vacated and the indictment dismissed:

> In his written motion requesting a hearing, counsel misstated the facts relating to the arrest, indicating that defendant had been involved in a motor vehicle stop rather than a street encounter with police. At the suppression hearing, the attorney did not marshal the facts for the court and made no legal argument. This, coupled with his failure to make appropriate argument in his motion papers or to submit a posthearing memorandum, meant that the defense never supplied the hearing court with any legal rationale for granting suppression. Moreover, after the court issued a decision describing the sequence of events in a manner that differed significantly from the testimony of the police officer (the only witness at the hearing) and was adverse to the defense, defendant's attorney made no motion to reargue or otherwise correct the court's apparent factual error. Counsel never ascertained whether the court decided the motion based on the hearing proof or a misunderstanding of the officer's uncontradicted testimony.
>
> And this is not a case where any of these errors can be explained as part of a strategic design (assuming one could be imagined), given that defense counsel asked to be relieved, informing the court that he was unable to provide competent representation to defendant. Thus, although the attorney secured a hearing, his representation in relation to the application as a whole was deficient in so many respects -- both before, during and after the proceeding -- that defendant was not afforded meaningful representation at a critical stage of this prosecution. **People v Clermont, 166, Ct App 10-22-13**

Recklessness Demonstrated In Operation of Vehicle

In a full-fledged opinion by Judge Graffeo, the Court of Appeals affirmed defendant's convictions for reckless manslaughter and reckless assault after defendant's car struck another car head on. There was evidence defendant was deliberately speeding (134 mph) in an area he knew to include a sharp turn. The court

explained the difference between recklessness and criminal negligence in this context:

> The mental states of recklessness and criminal negligence share many similarities. Both require that there be a "substantial and unjustifiable risk" that death or injury will occur; that the defendant engage in some blameworthy conduct contributing to that risk; and that the defendant's conduct amount to a "gross deviation" from how a reasonable person would act (compare Penal Law § 15.05 [3] [Recklessly] with Penal Law § 15.05 [4] [Criminal Negligence]). The only distinction between the two mental states is that recklessness requires that the defendant be "aware of" and "consciously disregard" the risk while criminal negligence is met when the defendant negligently fails to perceive the risk … .
>
> In the context of automobile accidents involving speeding, we have held that the culpable risk-creating conduct necessary to support a finding of recklessness or criminal negligence generally requires "some additional affirmative act" aside from "driving faster than the posted speed limit" … . Here, there was ample proof that defendant did more than merely drive faster than the legal limit -- indeed, there was eyewitness testimony that he was traveling at more than double the posted speed limit of 55 miles per hour. Moreover, before the collision, defendant stopped his vehicle in the middle of the unlit road and revved the engine. He then hit the gas pedal and accelerated to an extremely high rate of speed before crossing the double line into oncoming traffic. Viewed in the light most favorable to the People, the evidence showed that defendant used a public road as his personal drag strip to showcase the capabilities of his modified sports car. Although the jury acquitted defendant of driving while ability impaired (by alcohol), there was evidence that he had been drinking and smoking marijuana that evening … . The evidence therefore demonstrated that defendant engaged in conduct exhibiting "the kind of seriously blameworthy carelessness whose seriousness would be apparent to anyone who shares the community's general sense of right and wrong" … .
>
> Furthermore, the proof was sufficient to support the jury's conclusion that defendant acted recklessly -- by consciously disregarding the risk he created -- as opposed to negligently failing to perceive that risk. Defendant was familiar with the curve in the road …, having driven by there on a number of prior occasions, and he had been warned twice about speeding into that very section of the road. **People v Asaro, 158, Ct App 10-22-13**

CRIMINAL LAW/EVIDENCE

Uncharged Crime Evidence (911 Call) Admissible to Explain Aggressive Actions of Police

In a full-fledged opinion by Judge Abdus-Salaam, over a dissent, the Court of Appeals determined it was not an abuse of discretion to allow in evidence a 911 call, which could have been interpreted to have implicated defendant in an uncharged robbery, to explain the aggressive actions of the police when they stopped and seized the defendant, who was convicted of a weapon-possession charge:

> Determining whether the probity of such evidence exceeds the prejudice to the defendant "is a delicate business," and as in almost every case involving Molineux or Molineux-type evidence, there is the risk "that uncharged crime testimony may improperly divert the jury from the case at hand or introduce more prejudice than evidentiary value" … . Yet this case-specific, discretionary exercise remains within the sound province of the trial court …, which is in the best position to evaluate the evidence … . Thus, the trial court's decision to admit the evidence may not be disturbed simply because a contrary determination could have been made or would have been reasonable. Rather, it must constitute an abuse of discretion as a matter of law … .
>
> On this record, we cannot say that the admission of the 911 evidence was an abuse of discretion. The trial court reasonably determined that, given the aggressive nature of the police confrontation with defendant and the attendant risk of improper speculation by the jury, the 911 evidence was necessary to provide background information explaining the police actions, and that its probative value outweighed the potential prejudice to defendant … . Defendant claims that the 911 evidence had no probative value because he admitted to possessing the gun and agreed not to challenge the propriety of the police stop. But the 911 evidence was probative of all of the police conduct in this case, not just the stop itself. The police behaved aggressively after the stop and before they discovered the gun by singling out defendant, grabbing him, and forcing him up against their patrol car. By specifying why the officers stopped defendant in the first instance, the 911 evidence allowed the jury to put this conduct in the proper context.
>
> The evidence was also probative of the officers' credibility, which was a central issue for the jury

to resolve on the resisting arrest charge …. The People had the burden of proving every element of the resisting arrest charge …, and meeting that burden depended largely on the jury's evaluation of the officers' testimony and, particularly, the weight the jury accorded it in relation to contrary testimony proffered by defendant … . Although the officers admitted to grabbing defendant, pushing him against the car, and tackling him when he tried to escape, defendant testified that the officers hit him several times in the head and face, that he never tried to escape, and that the officers' violent acts were essentially unprovoked. There was also contrary testimony about how the officers recovered the gun, which direction defendant was walking when he was stopped, and whether he was alone or with two black men as described in the radio run. The 911 evidence better enabled the jury to resolve these discrepancies and assess the credibility of the officers' testimony. Without a complete picture of the events preceding the encounter, the jury would have had little reason not to fault the officers for being overly aggressive and to discredit their testimony as untruthful.

Any potential for prejudice here was offset by the trial court's four strong limiting instructions, which emphasized that the 911 evidence "was not to be considered proof of the uncharged crime" … . **People v Morris, 147, Ct App 10-15-13**

CRIMINAL LAW/TRIALS

Failure to Exercise Peremptory Challenge Not Ineffective Assistance

In a full-fledged opinion by Judge Smith, the Court of Appeals determined the failure to exercise a peremptory challenge against a juror (Peters) who was a long-time friend of the prosecuting attorney did not amount to ineffective assistance of counsel:

> …[D]efendant can prevail on his ineffective assistance claim only by showing that this is one of those very rare cases in which a single error by otherwise competent counsel was so serious that it deprived defendant of his constitutional right (see People v Turner, 5 NY3d 476, 478 [2005]). We held in Turner that this had occurred where a lawyer overlooked "a defense as clear-cut and completely dispositive as a statute of limitations" (id. at 481). The mistake that defendant accuses defense counsel of making here was not of that magnitude.
>
> It could be argued that counsel's decision not to use a peremptory challenge on Peters was a mistake for two reasons: because Peters, as a juror, would be biased in the prosecution's favor; and because, by not using a peremptory challenge to excuse him, counsel failed to preserve for appeal any claim that the court erred in rejecting the for-cause challenge. We consider those arguments separately.
>
> The first argument is a weak one, because defense counsel may reasonably have thought Peters an acceptable juror from the defense point of view. * * *
>
> The second argument -- that counsel erred by failing to preserve the issue of the for-cause challenge for appeal -- gives us somewhat more pause. The trial court's decision to deny the challenge for cause may have been error … . Counsel's choice not to exercise a peremptory challenge deprived defendant of the opportunity to make that argument on appeal; under CPL 270.20 (2), where a defendant has not exhausted his peremptory challenges, a denial of a challenge for cause "does not constitute reversible error unless the defendant . . . peremptorily challenges such prospective juror." Considering the poor odds of acquittal that defendant was facing, it is hard to see how keeping a particular juror -- no matter how strong defense counsel's hunch that he would be favorable -could justify the loss of a significant appellate argument.
>
> We conclude, however, that counsel's mistake, if it was one, was not the sort of "egregious and prejudicial" error that amounts to a deprivation of the constitutional right to counsel… . **People v Thompson, 144, Ct App 10-10-13**

Trial Judge's Participation in Readbacks Not Mode of Proceedings Error

In a full-fledged opinion by Judge Read, the Court of Appeals determined the trial judge's participation in the readbacks of testimony requested by the jury did not amount to a mode of proceedings error.

> …[T]he two jury notes -- requests for readbacks of two witnesses' testimony -- were disclosed in their entirety in open court before the trial judge responded to them. And the judge explained exactly how he was going to conduct the readbacks. If defense counsel considered the judge's intended approach prejudicial, he certainly had an opportunity to ask him to alter course, and it behooved him to do so… . * * *
>
> …[W]e agree with the Second Department that, as a general matter, a trial judge should shun

engaging in readbacks of testimony. In the usual case, it is easy enough for a judge to assign this task to non-judicial court personnel and thereby avoid any risk of creating a misperception in the minds of the jurors.

In a case where a trial judge nonetheless elects to participate in a readback (certainly, nothing in CPL 310.30 prohibits it), any error is not of the mode of proceedings variety. "Not every procedural misstep in a criminal case is a mode of proceedings error"; rather, this narrow exception to the preservation rule is "reserved for the most fundamental flaws," such as shifting the burden of proof from prosecution to the defense, or delegating a trial judge's function to a law secretary… . **People v Alcide, 143, Ct App 10-10-13**

Accomplice Testimony Corroboration Insufficient Under Law Read to Jury

Even though the evidence of corroboration of accomplice testimony was sufficient under People v Reome, 15 NY3d 188 [2010], it was not sufficient under the stricter criteria of People v Hudson, 51 NY2d 233 [1980] which Reome overruled. Because the jury was read the Hudson criteria, that criteria applied and the evidence of corroboration was not sufficient to support conviction:

Under the Hudson standard, the corroborating evidence was insufficient. The evidence that was "independent" of the accomplice testimony in the Hudson sense proved, at most, that defendant had driven a minivan that was the same color as a car that was used to commit some of the crimes charged. This by itself did not tend "to connect the defendant with the commission" of the crimes **(CPL 60.22 [1]). People v Rodriguez, 169, Ct App 10-17-13**

CRIMINAL LAW/MENTAL HYGIENE LAW

Error to Preclude Witness for Sexual Offender in Article 10 Proceeding

In a Mental Hygiene Law article 10 proceeding to determine whether Enrique D, a sexual offender, suffered from a mental abnormality justifying civil confinement, the Court of Appeals determined the judge erred in refusing to allow a former girlfriend, Naomi N, to testify about whether Enrique ever tried to offend against her and whether Enrique respected her "boundaries:"

In the circumstances of this case, Supreme Court abused its discretion by precluding Naomi N. from testifying. Mental Hygiene Law § 10.08 (g) provides that a respondent in an article 10 proceeding "may, as a matter of right, testify in his or her own behalf, call and examine other witnesses, and produce other evidence in his or her behalf." This provision manifestly does not limit a respondent to expert witnesses. The pertinent question is whether a witness -- expert or lay -- has material and relevant evidence to offer on the issues to be resolved.

Here, Naomi N.'s rejected testimony was relevant to the State expert's diagnosis of paraphilia NOS -- non-consent. The jury was asked to decide whether Enrique D. suffered a condition, disease, or defect that predisposed him to commit sex offenses, and whether that condition caused him serious difficulty in controlling his sex offending conduct. With respect to the first prong, Naomi N.'s testimony would have called into question whether Enrique D. exhibited a longstanding fixation on nonconsenting women; as to the second, her testimony was relevant to show whether he experienced difficulty controlling his sexual behavior. **Matter of State of New York v Enrique D, 168, Ct App 10-22-13**

EMPLOYMENT DISCRIMINATION/HUMAN RIGHTS LAW

Employment Discrimination Claim Stated Under the NYC Human Rights Law But Not Under the State Human Rights Law

Over a partial dissent, the Court of Appeals determined that plaintiff's employment discrimination claim under the state Human Rights Law (HRL) was properly dismissed but that the claim under the city HRL should not have been dismissed. The city, unlike the state, places the burden on the employer to show that it could not provide reasonable accommodations to allow a disabled employee to work. The employee essentially asked for an indefinite leave from work based upon severe depression:

In the context of employment discrimination, the term "disability" as defined in the State HRL is "limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held" (Executive Law § 292 [21]). A "reasonable accommodation" means actions taken which permit an employee with a disability to perform in a reasonable manner activities involved in the job, and "do not

impose an undue hardship on the business" (Executive Law § 292 [21-e]). To state a claim under the State HRL, the complaint and supporting documentation must set forth factual allegations sufficient to show that, "upon the provision of reasonable accommodations, [the employee] could perform the essential functions of [his or] her job" … . Indefinite leave is not considered a reasonable accommodation under the State HRL … .

Here, neither plaintiff's communications with his employer just prior to his termination nor the complaint filed one year later offer any indication as to when plaintiff planned to return to work. Instead, plaintiff informed his employer that he had not expressed any intention to "abandon" his job and that his return to work date was "indeterminate"; the complaint merely alleges that plaintiff sought "a continued leave of absence to allow him to recover and return to work." "Indeterminate" means "not definitely or precisely determined or fixed" … . * * *

The City HRL, on the other hand, affords protections broader than the State HRL * * *.

Unlike the State HRL, the City HRL's definition of "disability" does not include "reasonable accommodation" or the ability to perform a job in a reasonable manner. Rather, the City HRL defines "disability" solely in terms of impairments (Administrative Code of City of NY § 8–102 [16]). The City HRL requires that an employer "make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job . . . provided that the disability is known or should have been known by the [employer]" (id. at § 8–107 [15] [a]). Contrary to the State HRL, it is the employer's burden to prove undue hardship … . And, the City HRL provides employers an affirmative defense if the employee cannot, with reasonable accommodation, "satisfy the essential requisites of the job" (Administrative Code 8-107 [15] [b]). Thus, the employer, not the employee, has the "pleading obligation" to prove that the employee "could not, with reasonable accommodation, satisfy the essential requisites of the job" … . **Romanello v Intesa Sanpaolo …, 152, Ct App 10-10-13**

EMPLOYMENT DISCRIMINATION/ EDUCATION LAW

School Employee Stated Discrimination Cause of Action City Department of Education

The Court of Appeals affirmed the appellate division and found plaintiff had presented sufficient evidence of employment discrimination to survive a motion to dismiss:

> Defendants are of course correct that evidence only that the principal made stray discriminatory comments without any basis for inferring a connection to the termination would be insufficient to defeat defendants' motion (see Forrest, 3 NY3d at 308 [comments made years before the plaintiff's termination failed to raise a triable issue of fact in light of the clear evidence of plaintiff's misconduct]). But that is not the case here. Plaintiff has offered evidence of, among other things: defendant principal's repeated homophobic remarks directed at plaintiff; his decision to report to the Department of Education (DOE) allegations that plaintiff had engaged in misconduct while working at an after-school program that he did not supervise; his close relationship with the alleged victims of the misconduct; his independent decision to terminate plaintiff's employment; and the after-school program supervisor's opinion that plaintiff had not engaged in any misconduct worthy of reporting to the DOE. This is sufficient to deny defendants' motion for summary dismissal. **Sandiford v City of New York Dept of Education, 157, Ct App 10-17-15**

INSURANCE LAW/NO-FAULT (SERIOUS INQUIRY)

Plaintiff's Proof of Reason for Termination of Treatment Was Sufficient to Get By Defendant's Summary Judgment Motion

Over two dissenters, the Court of Appeals reversed the grant of summary judgment to the defendant with respect to plaintiff's proof of "serious injury" under the No-Fault Law. Plaintiff testified that he stopped physical therapy because "they cut [him] off like five months." The appellate division held that bare assertion was insufficient to justify the termination of treatment and documentary evidence of the exhaustion of insurance benefits or at least an indication the claimant could not pay for the treatment was required. In reversing, the Court of Appeals wrote:

> We stated in Pommells [4 NY3d 566] that a plaintiff claiming "serious injury" within the meaning of the No-Fault Law "must offer some reasonable explanation" for terminating treatment (4 NY3d at 574). We did not require any particular proof regarding that explanation, although we recognized that there is "abuse of the No-Fault Law in failing to separate 'serious injury' cases, which may proceed to court, from the mountains of other auto accident claims,

which may not"… .

The Appellate Division's requirement that plaintiff either offer documentary evidence to support his sworn statement that his no-fault benefits were cut off, or indicate that he could not afford to pay for his own treatment, is an unwarranted expansion of Pommells. Plaintiff testified at his deposition that "they" (which a reasonable juror could take to mean his no-fault insurer) cut him off, and that he did not have medical insurance at the time of the accident. While it would have been preferable for plaintiff to submit an affidavit in opposition to summary judgment explaining why the no-fault insurer terminated his benefits and that he did not have medical insurance to pay for further treatment, plaintiff has come forward with the bare minimum required to raise an issue regarding "some reasonable explanation" for the cessation of physical therapy. **Ramkumar v Grand Style Transportation Enterprises Inc…, 170, Ct App 10-15-13**

INSURANCE LAW

Damage to Building Caused By Excavation Next Door Constituted "Vandalism"

In a full-fledged opinion by Judge Smith, over a partial dissent, the Court of Appeals answered two certified questions from the Second Circuit. The case involved damage to a building caused by the excavation of a parking garage next door. The question was whether the damage could fall within the meaning of "vandalism" in the building owner's insurance policy, even though the alleged acts were not directed at the damaged building. The Court of Appeals answered in the affirmative:

> It is true that, in some cases of alleged vandalism not directed at particular property, the term does not intuitively seem to fit. … The word vandalism, which derives from the sack of Rome by the original Vandals in 455 AD (see IV, Gibbon, The History of the Decline and Fall of the Roman Empire at 246-248 [Folio Society 1986]), more readily brings to mind people who smash and loot than business owners who seek their own profit in disregard of the injury they do to the property of others. We conclude, however, that there is no principled distinction between the two. An excavator who is paid to dig a hole, and does so in conscious disregard of likely damage to the building next door, is, for these purposes, not essentially different from an irresponsible youth who might dig a hole on the same property, with the same effect, whether in search of buried treasure or just for fun. …
>
> In common speech, and by the express terms of the policy in suit, vandalism is "malicious" damage to property. The Second Circuit's second question asks, in essence, what state of mind amounts to "malice" for these purposes. We answer by adopting, insofar as it relates to property damage, the formulation we have used in reviewing awards of punitive damages. Conduct is "malicious" for these purposes when it reflects "such a conscious and deliberate disregard of the interests of others that [it] may be called willful or wanton"… . **Georgitsi Realty LLC v Penn-Starr Insurance Co, 156, Ct App 10-17-13**

JUDICIARY LAW/CRIMINAL LAW/TRIALS

Judge Who Had Represented Defendant Not Required to Recuse Himself

In a full-fledged opinion by Judge Pigott (over a substantial partial dissent which dealt with defense counsel's antagonistic behavior toward the judge and degrading comments about the defendant), the Court of Appeals determined the trial judge, who had represented the defendant in the past on an unrelated matter (about which the judge had no specific memory), properly denied defendant's recusal request which alleged bias on the judge's part:

> Unless disqualification is required under Judiciary Law § 14, a judge's decision on a recusal motion is one of discretion … . "This discretionary decision is within the personal conscience of the court when the alleged appearance of impropriety arises from inappropriate awareness of nonjuridical data" … . We have held that for any alleged bias and prejudice to be disqualifying it "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case" … . **People v Glynn, 155, Ct App 10-17-13**

LANDLORD/TENANT

Son's Application for Succession to Mitchell-Lama Apartment Should Not Have Been Denied Because of Mother's Failure to File Income Affidavit

In a full-fledged opinion by Judge Lippman, with three dissenters, the Court of Appeals determined that his mother's failure to file an income affidavit did not warrant the denial of her son's [Murphy's] application for succession to the Mitchell-Lama apartment vacated by his parents.

> In this case, DHCR [Division of Housing and

Community Renewal] contests neither Murphy's status as a family member, nor that he lived in the apartment during the relevant two-year period of 1998-1999. The sole basis for DHCR's denial of Murphy's application was that his mother did not file the requisite income affidavit for 1998, the year prior to Murphy's high school graduation. Given the overwhelming evidence of primary residence, and the absence of any indication that the failure to file was related to Murphy's status as a co-occupant or an income-earner, we hold that it was arbitrary and capricious for DHCR to deny succession on the basis of the failure to file a single income affidavit.

There is no doubt that DHCR has a compelling interest in encouraging the timely filing of income affidavits in order to fairly and efficiently administer the Mitchell-Lama program. Housing companies and supervising agencies like DHCR rely on these affidavits to monitor both the number and aggregate income of occupants, information that is crucial to determining the appropriate amount of rent and to ensuring that tenants remain eligible for the rental subsidy. Accordingly, failure to file income affidavits can result in harsh penalties: the tenant can be charged a surcharge on rent for the applicable year (as occurred here), or can be evicted (see 9 NYCRR §§ 1727-2.6 [a] and 1727-5.3 [a] [7]).

In the succession context, however, the principal purpose of the income affidavit is to provide proof of the applicant's primary residence… . As both Supreme Court and the Appellate Division noted, Murphy provided ample evidence in support of his succession application evincing that he resided in the apartment during 1998 and 1999. Indeed, DHCR does not dispute Murphy's residency for the past 32 years. DHCR instead cites only his mother's technical non-compliance for a single year to justify evicting him from the only home he has ever known.

Notwithstanding the importance of the income affidavit requirement, given the overwhelming evidence of residency provided in this case, and the lack of relationship between the tenant-of-record's failure to file and Murphy's income or cooccupancy, DHCR's decision to deny Murphy succession rights was arbitrary and capricious. **Matter of Murphy v NYS Division of Housing and Community Renewal, 146, Ct App 10-17-13**

MEDICAID

Physician Can Be Removed from Medicaid Program Irrespective of Action Taken by Bureau of Professional Medical Conduct

In a full-fledged opinion by Judge Read, with two concurring judges, the Court of Appeals determined that the Office of Medicaid Inspector General (OMIG) is authorized to remove a physician from New York's Medicaid program based on a consent order between the physician and the Bureau of Professional Medical Conduct (BPMC) regardless of whether BPMC chooses to suspend the physician:

> In this litigation, Supreme Court annulled OMIG's determination to terminate petitioner-physician's participation in the Medicaid program on the basis of a BPMC consent order, and directed his reinstatement. In the consent order, petitionerphysician pleaded no contest to charges of professional misconduct and agreed to 36 months' probation. Upon OMIG's appeal, the Appellate Division affirmed, holding that it was arbitrary and capricious for the agency to bar petitionerphysician from treating Medicaid patients when BPMC permitted him to continue to practice; and that OMIG was required to conduct an independent investigation before excluding a physician from Medicaid on the basis of a BPMC consent order … . We subsequently granted OMIG permission to appeal (19 NY3d 813 [2012]).
>
> We disagree with the Appellate Division's rationale, but affirm because OMIG's determination was arbitrary and capricious for another reason. Specifically, OMIG did not explain why the BPMC consent order in this case caused it to exercise its discretion pursuant to 18 NYCRR 515.7 (e) to exclude petitioner-physician from the Medicaid program.
> * * *
>
> When resolving charges of professional misconduct with BPMC, physicians and their attorneys should be mindful that a settlement with BPMC does not bind OMIG, as petitioner-physician discovered in this case. **Matter of Koch, DO v Sheehan…, 153, Ct App 10-22-13**

NEGLIGENCE

Lab Conducting Blood Tests for Drugs Owed Duty of Care to Plaintiff Whose Blood Was Tested

In a full-fledged opinion by Judge Lippman, over two

dissenting opinions, the Court of Appeals held that plaintiff had stated a negligence cause of action against a laboratory (Kroll) which issued a test-result positive for the presence of drugs and initiated a violation of probation proceeding against the plaintiff. In concluding the laboratory owed a duty of care to the plaintiff, Judge Lippman wrote:

> Although the existence of a contractual relationship by itself generally is not a source of tort liability to third parties, we have recognized that there are certain circumstances where a duty of care is assumed to certain individuals outside the contract … . As relevant here, such a duty may arise "where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launche[s] a force or instrument of harm" … . This principle recognizes that the duty to avoid harm to others is distinct from the contractual duty of performance. Accepting the allegations of the complaint as true, Kroll did not exercise reasonable care in the testing of plaintiff's biological sample when it failed to adhere to professionally accepted testing standards and, consequently, released a report finding that plaintiff had tested positive for THC. The alleged harm to plaintiff was not remote or attenuated. Indeed, it was his own biological specimen that was the sole subject of this testing and he was directly harmed by the positive test result causing the extension of his probation and the necessity of having to defend himself in the attendant court proceedings.
>
> Additionally, there are strong policy-based considerations that counsel in favor of finding that Kroll owed a duty to plaintiff under these circumstances. Without question, the release of a false positive report will have profound, potentially life-altering, consequences for a test subject. In particular, here, plaintiff faced the loss of freedom associated with serving an extended period of probation. The laboratory is also in the best position to prevent false positive results. Under the circumstances, we find that Kroll had a duty to the test subject to perform his drug test in keeping with relevant professional standards and that the existence of its contract with the County does not immunize defendant laboratory. **Landon v Kroll Laboratory Specialists Inc, 142, Ct App 10-10-13**

PISTOL PERMITS

Part-time Resident of New York Can Apply for Pistol Permit

In a full-fledged opinion by Judge Pigott, the Court of Appeals answered a certified question from the Second Circuit and determined a person who has a part-time residence in New York State, but who is not domiciled in New York, can apply for a pistol permit in New York (based upon the language of the controlling statute):

> Penal Law § 400 (3) (a) states that applications for a license to carry a pistol or revolver "shall be made and renewed . . . to the licensing officer in the city or county, as the case may be, where the applicant resides, is principally employed or has his principal place of business as merchant or storekeeper." The applicant's residence is referred to in the context of delineating the procedure whereby an individual files an application for a license. The applicant is instructed to apply to the licensing officer in the city or county where he resides (or is principally employed, etc.). The plain language of the statute is not consistent with the theory that the law requires an applicant to establish domicile as an eligibility requirement. Were it so, we would expect to see the manner of proof of domicile set out in the statute.**Osterweil v Bartlett, 167, Ct App 10-15-13**

PUBLIC HEALTH LAW/CONSTITUTIONAL LAW

Law Requiring Approval Before Health Care Facility Withdraws or Transfers Assets Held Valid

In a full-fledged opinion by Judge Lippman, the Court of Appeals reversed the lower courts and found that Public Health Law 2808(5)(c), which requires the Commissioner of Health's approval before a residential health care facility withdraws or transfers more than three percent of its assets, did not violate substantive due process and did not delegate legislative authority to the Commissioner.

> The lower courts, we believe, erred in concluding that the subject statute was offensive to substantive due process. Economic regulation will violate an individual's substantive due process property interest only in those situations, vanishingly rare in modern jurisprudence, where there is absolutely no reasonable relationship to be perceived between the regulation and the achievement of a legitimate governmental purpose …; the regulation, to be actionable, must be arbitrary in the constitutional sense -- which is to say "so outrageously arbitrary as to constitute a gross abuse of governmental authority" … . * * *
>
> Plaintiffs' alternative theory for deeming § 2808 (5) (c) unconstitutional -- that the provision's catch-all phrase effects an improper delegation

> of legislative policy-making power -- is not, in our view, more viable than their substantive due process claim. * * * The enumerated criteria clearly tie the Commissioner's disposition of an equity withdrawal application to the financial condition of the facility and its quality of care record. These are highly pertinent and not excessively general criteria and it is reasonably clear, and in any case conceded by defendants, that the catch-all's immediately subsequent reference to "such other factors" does not authorize application dispositions based on criteria that are generically different. **Brightonian Nursing Home… v Daines…, 161, Ct App 10-15-13**

WORKERS' COMPENSATION

As Long As Work-Related Injury Was A Cause of Death, Death Benefit Must Be Paid---No Apportionment Between Non-Work-Related and Work-Related Causes of Death

In a full-fledged opinion by Judge Read, the Court of Appeals determined death benefits under the Workers' Compensation Law (section 16) could not be apportioned between work-related and non-work-related causes of death. As long as the work-related injury or illness is a cause of death, the benefit must be paid. In a concurring opinion, Judge Pigott agreed that the benefit cannot be apportioned, but concluded the result in this case, where the claimant's (Hroncich's) death was primarily related to non-work-related thyroid cancer, should be that no death benefit was available.

Importantly, there is no language in section 16 to suggest that the Board should apportion death benefits to workrelated and non-work-related causes when fashioning an award. Presumably, if the legislature had wanted this to be the case, it would have said so. Instead, however, the legislature made employers joint-and-several insurers of their injured employees' lives, subject to a prescribed schedule of payments. The death benefit is not about replacing lost wages, but rather compensates for a life lost at least partly because of work-related injury or disease (see e.g. Bill Jacket, L 1990, ch 296 [authorizing $50,000 in death benefits to non-dependent survivors]). **Matter of Hroncich v Con Edison…, 145, Ct App 10-15-13**

ARBITRATION

Nonsignatory Could Not Be Compelled to Arbitrate Under Direct Benefit Estoppel Doctrine

The Court of Appeals, in a full-fledged opinion by Judge Rivera, reversed the appellate division and determined a party who was not a signatory to an agreement which included an arbitration clause could not be compelled to arbitrate under the direct benefit estoppel doctrine. In explaining the doctrine, the court wrote:

> Under the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory "knowingly exploits" the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement … .
>
> Where the benefits are merely "indirect," a nonsignatory cannot be compelled to arbitrate a claim. A benefit is indirect where the nonsignatory exploits the contractual relation of the parties, but not the agreement itself … . **Matter of Belzberg v Verus Investments Holdings Inc, 149, Ct App 10-17-13**

WOULD THE PROPOSED "SENSENBRENNER/LEAHY" AMENDMENTS TO SECTION 215 OF THE PATRIOT ACT (50 USC 1861) STOP THE ON-GOING BLANKET COLLECTION OF ALL AMERICANS' PHONE RECORDS?

BY: BRUCE FREEMAN

In July, the Judiciary Committee in the House of Representatives, made up mostly of lawyers, expressed outrage about how section 215 of the Patriot Act (codified as 50 USC 1861) had been (mis)interpreted by the Justice Department and the secret Foreign Intelligence Surveillance Court to allow the routine collection and storing of the phone records (meta-data) of all Americans. In an article entitled "The House Committee's Hearing on the NSA's Collection of Phone-Call Meta-Data" (Issue 4, Rochester Law Digest, p. 82), excerpts of the statements made by the representatives during the hearing were collected. Many argued the statute simply did not authorize the blanket seizure of the phone records of all citizens and, therefore, the government and the court had acted illegally.

Bills are now being drafted and introduced in response to the "bulk meta-data collection" revelations.

One of those bills, the "USA Freedom Act" introduced by Representative Jim Sensenbrenner of Wisconsin and Senator Patrick Leahy of Vermont, purports to prohibit the bulk collection of Americans' phone records. The press release on Rep. Sensenbrenner's website states:

> The USA FREEDOM Act would end the dragnet collection of Americans' phone records under Section 215 of the USA PATRIOT Act and ensure that other authorities cannot be used to justify similar dragnet collection. The bill also provides more safeguards for warrantless surveillance under the FISA Amendments Act.

[The other major bill, the "FISA Improvements Act of 2013," introduced by Senator Dianne Feinstein of California, seeks to explicitly codify (i.e., legalize) the bulk collection of American's phone records by adding a new section to 50 USC 1861 entitled: "(j) AUTHORIZATION FOR BULK COLLECTION OF NON-CONTENT METADATA."]

In an attempt to make sense of the "Sensenbrenner/Leahy" amendments ("The USA Freedom Act"), and to determine how the amendments would prohibit the bulk collection of phone records, the relevant text of 50 USC 1861 and the proposed amendments is provided below. The portions in bold face have been removed by the amendments. And the portions underlined have been added by the amendments.

What emerges from a careful reading is that even the statute as it now stands (without considering the amendments) did not authorize the blanket collection of everyone's phone records. It doesn't appear that bulk collection was ever authorized under the explicit terms of 50 USC 1861 (b) (2). What the amendments appear to do is add stricter criteria for the secret court's issuance of an order which includes a "nondisclosure requirement." As explained below, if the government wishes

an order authorizing the seizure of records to remain secret (from the targets), the proposed amendments ostensibly demand a more rigorous showing of the relevance of the sought records to an "international terrorism" investigation.

The Initial Portion of the Statute Is Not Changed by the Proposed Sensenbrenner/Leahy Amendments

The initial portion of the statute, with the exception of one "and," remains unchanged:

> 50 USC § 1861 – Access to certain business records for foreign intelligence and international terrorism investigations
>
> (a) Application for order; conduct of investigation generally
>
> (1) Subject to paragraph (3), the Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.
>
> (2) An investigation conducted under this section shall—
>
> (A) be conducted under guidelines approved by the Attorney General under Executive Order 12333 (or a successor order); and
>
> (B) not be conducted of a United States person solely upon the basis of activities protected by the first amendment to the Constitution of the United States.
>
> (3) In the case of an application for an order requiring the production of library circulation records, library patron lists, book sales records, book customer lists, firearms sales records, tax return records, educational records, or medical records containing information that would identify a person, the Director of the Federal Bureau of Investigation may delegate the authority to make such application to either the Deputy Director of the Federal Bureau of Investigation or the Executive Assistant Director for National Security (or any successor position). The Deputy Director or the Executive Assistant Director may not further delegate such authority.
>
> (b) Recipient and contents of application
>
> Each application under this section—
>
> (1) shall be made to—
>
> (A) a judge of the court established by section 1803 (a) of this title; or

(B) a United States Magistrate Judge under chapter 43 of title 28, who is publicly designated by the Chief Justice of the United States to have the power to hear applications and grant orders for the production of tangible things under this section on behalf of a judge of that court; **and**

The Next Portion of the Statute, Paragraphs (b) (2) (A) and (B), Is Replaced in the Proposed Amendments, But Remains Essentially Unchanged

The next portion of the statute, sections (b) (2) (A) and (B), are replaced in the amendment. The portion below in bold is the original statute. You will see that the bold (original) portion is repeated nearly, but not exactly, verbatim in the amended version (underlined). The phrase which begins "such things being presumptively relevant to an authorized investigation…" in the original section (b) (2) (A) has been removed in the amendment. That is the only substantive change.

It is hard to see how the following language, as it appears in both the original statute (bold) and the amendments (underlined), could have been fairly interpreted to allow the government to apply for the blanket seizure of all Americans' phone records.

[EXISTING STATUTE]

[(b) Recipient and contents of application]

[Each application under this section—]

(2) shall include—

(A) a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation (other than a threat assessment) conducted in accordance with subsection (a)(2) to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, such things being presumptively relevant to an authorized investigation if the applicant shows in the statement of the facts that they pertain to—

(i) a foreign power or an agent of a foreign power;

(ii) the activities of a suspected agent of a foreign power who is the subject of such authorized investigation; or

(iii) an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigation; and

(B) a statement of proposed minimization procedures; and an enumeration of the minimization procedures adopted by the Attorney General under subsection (g) that are applicable to the retention and dissemination by the Federal Bureau of Investigation of any tangible things to be made available to the Federal Bureau of Investigation based on the order requested in such application.

[PROPOSED SENSENBRENNER/LEAHY AMENDMENTS]

[(b) Recipient and contents of application]

[Each application under this section—]

(2) shall include—

‘‘(A) a statement of facts showing that there are reasonable grounds to believe that the records or other things sought—

‘‘(i) are relevant and material to an authorized investigation (other than a threat assessment) conducted in accordance with subsection (a)(2)

“(I) to obtain foreign intelligence information not concerning a United States person; or

“(II) to protect against international terrorism or clandestine intelligence activities; and

‘‘(ii) pertain to—

‘‘(I) a foreign power or an agent of a foreign power;

‘‘(II) the activities of a suspected agent of a foreign power who is the subject of such authorized investigation;

‘‘(III) an individual in contact with, or known to, a suspected agent of a foreign power; and

‘‘(B) a statement of proposed minimization procedures; and’’

At this Point in the Statute, the Proposed Sensenbrenner/Leahy Amendments Add a New Section, Paragraph (b) (3); Because the New Paragraph [(b) (3)] Is the Only Relevant New Material Included in the Proposed Amendments to 50 USC 1861, Paragraph (b) (3) Necessarily Is Where the Bulk Collection of Phone Records Is Addressed in Some Way

Section (b) (3), below, is a new addition to the statute in the proposed amended version. Because this section contains significant, new language, it is necessarily here that the amendments attempt to prohibit the government from applying for an order authorizing the blanket, bulk seizure of everyone’s phone records.

The new section outlines the showing the government must make if it wishes to keep the seizure order secret (by requesting a nondisclosure requirement in the court order). Obviously, the government will always wish to keep such orders secret from the targets, so these requirements will presumably have to be met in every application for the seizure of phone records.

[AMENDMENT—NEW LANGUAGE]

[(b) Recipient and contents of application]

[Each application under this section—]

(3) if the applicant is seeking a nondisclosure requirement described in subsection (d), shall include—

"(A) the time period during which the Government believes the nondisclosure requirement should apply;

''(B) a statement of facts showing that there are reasonable grounds to believe that disclosure of particular information about the existence or contents of the order requiring the production of tangible things under this section during such time period will result in—

''(i) endangering the life or physical safety of any person;

''(ii) flight from investigation or prosecution;

''(iii) destruction of or tampering with evidence;

''(iv) intimidation of potential witnesses;

''(v) interference with diplomatic relations;

"(vi) alerting a target, an associate of a target, or the foreign power of which the target is an agent, of the interest of the Government in the target; or

''(vii) otherwise seriously endangering the national security of the United States; and

''(C) an explanation of how the nondisclosure requirement is narrowly tailored to address the specific harm identified under subparagraph (B)."

It appears that the key new phrase in the added section is that which requires "an explanation of how the nondisclosure requirement is narrowly tailored to address the specific harm identified…".

In other words, the secret orders issued for the seizure of Americans' phone records must now include a demonstration that secrecy is necessary to prevent "seriously endangering the national security of the United States…".

Presumably such a showing would not be possible for the phone records of "law-abiding Americans with no connection to terrorism or espionage." (A quote from the fact sheet issued by Senator Wyden of Oregon in connection with his bill, which is very similar to the Sensenbrenner/Leahy bill.)

The problem, however, is that the statute as it is now written requires the same connection to an "authorized investigation" into international terrorism. Yet the bulk seizure of everyone's phone records was apparently justified by the government to the court's satisfaction under that (existing) criteria.

If the Statute As It Now Stands Did Not Authorize "the Bulk Collection of Records of Law-Abiding Americans with No Connection to Terrorism or Espionage," How Effective Will the Proposed New Language in the Sensenbrenner/Leahy Bill Be?

The new section, section (b) (3) (the underlined portion quoted above), appears to be the technique decided upon to render "the bulk collection of records of law-abiding Americans with no connection to terrorism or espionage" illegal.

But the bulk collection of everyone's phone records under the purported authority of section (b) (2) of the existing statute (quoted in bold above) was never "legal" because a connection between the records and an "authorized investigation" into international terrorism was always ostensibly necessary.

Yet the bulk collection of all Americans' phone records was (and still is) routinely applied for by the government, and routinely ordered by the secret court.

And, as noted above, Senator Feinstein's bill, for the first time, explicitly codifies the bulk collection of all Americans' phone records by adding a completely new section to the end of 50 USC 1861.

Isn't that new provision in the Feinstein bill a tacit acknowledgment the bulk collection was never authorized under the current version of the statute?

If the seizure of all Americans' phone records was somehow justified by the government and the secret court under the language requiring a connection to international terrorism in section (b) (2) of the existing statute, the proposed new section [(b) (3)], it seems, could easily be interpreted just as loosely.

TO PREVENT CLIMATE-CHANGE CATASTROPHE, 80% OFTHE KNOWN RESERVES OF FOSSIL FUELS MUST STAY IN THE GROUND---THE DEBATE OVER FRACKING IN NEW YORK SHOULD BE OVER

BY: BRUCE FREEMAN

(Based on a Now Famous Article by Bill McKibben and a Recent Blog Post by RL Miller Discussing the September, 2013, Assessment by the Intergovernmental Panel on Climate Change)

In the August 2, 2012, issue of *Rolling Stone*, Bill McKibben, a long-time leader in educating the public about the causes and dangers of climate change, published an article entitled “Global Warming’s Terrifying New Math.”

Based on uncontroversial, widely-accepted, hard science, Mr. McKibben demonstrated that that catastrophic climate change can be avoided only by leaving most of the known reserves of fossil fuels in the ground.

In other words, to prevent disaster, not only must we stop looking for more fossil fuels, we can’t burn 80% of what has already been found.

The following excerpts from the *Rolling Stone* article will give you the gist of his argument.

Point I: Even a 2 degree (Celsius) rise in temperature will be devastating in effect:

> So far, we've raised the average temperature of the planet just under 0.8 degrees Celsius, and that has caused far more damage than most scientists expected. (A third of summer sea ice in the Arctic is gone, the oceans are 30 percent more acidic, and since warm air holds more water vapor than cold, the atmosphere over the oceans is a shocking five percent wetter, loading the dice for devastating floods.) Given those impacts, in fact, many scientists have come to think that two degrees is far too lenient a target. "Any number much above one degree involves a gamble," writes Kerry Emanuel of MIT, a leading authority on hurricanes, "and the odds become less and less favorable as the temperature goes up." Thomas Lovejoy, once the World Bank's chief biodiversity adviser, puts it like this: "If we're seeing what we're seeing today at 0.8 degrees Celsius, two degrees is simply too much." NASA scientist James Hansen, the planet's most prominent climatologist, is even blunter: "The target that has been talked about in international negotiations for two degrees of warming is actually a prescription for long-term disaster."
> All told, 167 countries responsible for more than 87 percent of the world's carbon emissions have signed on to the Copenhagen Accord, endorsing the two-degree target. … The official position of planet Earth at the moment is that we can't raise the temperature more than two degrees Celsius – it's become the bottomest of bottom lines. Two degrees.

Point II: Because carbon dioxide stays around in the atmosphere long after it is emitted, it has a cumulative effect. There is a point at which the amount of carbon dioxide added to the atmosphere will force the warming over the 2 degree threshold. That amount is a known number---565 gigatons. Therefore we know how much more carbon dioxide can be emitted before we reach the point of certain, catastrophic global warming:

> Scientists estimate that humans can pour roughly 565 more gigatons of carbon dioxide into the atmosphere by midcentury and still have some reasonable hope of staying below two degrees. …
>
> This idea of a global "carbon budget" emerged about a decade ago, as scientists began to calculate how much oil, coal and gas could still safely be burned. Since we've increased the Earth's temperature by 0.8 degrees so far, we're currently less than halfway to the target. But, in fact, computer models calculate that even if we stopped increasing CO2 now, the temperature would likely still rise another 0.8 degrees, as previously released carbon continues to overheat the atmosphere. That means we're already three-quarters of the way to the two-degree target.

Point III: The proven coal, oil and gas reserves available for burning right now would produce 2795 gigatons of carbon, five times the amount that will trigger climate-change catastrophe:

> Think of two degrees Celsius as the legal drinking limit – equivalent to the 0.08 blood-alcohol level below which you might get away with driving home. The 565 gigatons is how many drinks you could have and still stay below that limit – the six beers, say, you might consume in an evening. And the 2,795 gigatons? That's the three 12-packs the fossil-fuel industry has on the table, already opened and ready to pour.
> We have five times as much oil and coal and gas on the books as climate scientists think is safe to burn. We'd have to keep 80 percent of those reserves locked away underground to avoid that fate. Before we knew those numbers, our fate had been likely. Now, barring some massive intervention, it seems certain.

McKibben's thesis has recently been confirmed by the fifth assessment of the Intergovernmental Panel on Climate Change (IPCC), a comprehensive, rigorous, scientific report released in September (2013).

As RL Miller, chair of the California Democratic Party's Enviromental Caucus, explained in a September, 2013, blog post on the website TakePart.com:

> …[T]he IPCC's new calculations essentially support the conclusions drawn in Bill McKibben's now-famous Rolling Stone article from 2012, "Global Warming's Terrifying New Math."
>
> In that story, the climate hawk and founder of 350.org, posited that there were three key numbers that global policymakers needed to focus on to prevent calamitous climate change. 1) The First Number: 2° Celsius [3.6° Fahrenheit]: This is the temperature rise we need to target if we want to have our best chance of averting multiple catastrophes and amplifying carbon cycle feedbacks.

The IPCC agrees with McKibben, and McKibben got his number from prior IPCC reports: Two degrees is still considered "safe."

2) The Second Number: 565 Gigatons: Scientists estimate that humans can pour roughly 565 more gigatons of carbon…into the atmosphere by midcentury and still have some reasonable hope of staying below two degrees. (‘Reasonable,’ in this case, means four chances in five, or somewhat worse odds than playing Russian roulette with a six-shooter.)”

Here's where the IPCC starts to make the math a little harder. As of 2011, we had emitted roughly 531 billion tons of carbon since the Industrial Revolution, meaning we have already burned through about 53 percent of a targeted one-trillion-ton carbon budget. So we only have 469 billion tons—not 565 billion tons, as McKibben wrote—left to spend in our carbon budget.

The trouble is that we've greatly increased population and industrialization since the start of the Industrial Revolution—it took us 250 years to burn the first half, but at our current rate we'll burn through the second half in the next 30 years.

3) The Third Number: 2,795 Gigatons: “This number is the scariest of all—one that, for the first time, meshes the political and scientific dimensions of our dilemma….The number describes the amount of carbon already contained in the proven coal and oil and gas reserves of the fossil-fuel companies, and the countries (think Venezuela or Kuwait) that act like fossil-fuel companies. In short, it’s the fossil fuel we’re currently planning to burn.

The new consensus from the IPCC puts this number closer to 3,000 gigatons, or 205 more than McKibben projected. Though, to be sure, it's hard to pin down, as new discoveries are made and new technologies are invented.

But what's critical for humanity is the gigatons that we can afford to burn, not what we keep on finding but can't burn. Indeed, every proposed coal mine needs to be evaluated in the same way a lobster dinner does for a person on a budget: 'Can we afford this or will it blow a hole in our budget?'

McKibben had estimated leaving 79.8 percent of the fossil fuels in the ground (565 gigatons divided by 2,795 gigatons)—a daunting challenge of math, policy and politics. The IPCC's new math is even more terrifying: 469 gigatons divided by 3,000 gigatons, or 84.3 percent of the world's fossil fuels need to remain forever untouched.

"In a way, the biggest development since the last IPCC report is the now obvious idea that we have to leave most of the carbon we've found underground," McKibben told TakePart on Friday. "Global warming is a big math problem, and the bottom line is now clearly in focus." http://www.takepart.com/article/2013/09/27/ipcc-report-climate-change-bill-mckibben-new-math

The debate about whether fracking should be allowed in New York to extract natural gas should be over. We have to stop emitting carbon or we will destroy the planet. Given what scientists now know, extracting fossil fuels is suicidal.

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BRUCE FREEMAN – EDITOR/WRITER
GREGG FREEMAN – WRITER RE: ENVIRONMENTAL LAW
ANDREW MARKS – PRODUCTION AND DESIGN

ROCHESTER, NEW YORK
OFFICE: 585 645-8902 - HOME: 585 381-9954
ROCHESTERLAWDIGEST@GMAIL.COM
WWW.ROCHESTERLAWDIGEST.COM

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APPELLATE DIVISION

COURT OF APPEALS