ROCHESTER LAW DIGEST

Issue 1 — January – February 2013

IN THIS ISSUE

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APPELLATE DIVISION

NEGLIGENCE

FEATURED DECISION

A Shooting Victim's Negligence and Public Nuisance Actions Against the Manufacturer, Distributor and Resellers of Firearms Are Allowed to Go Forward

Back in October, 2012, in a full-fledged opinion by Justice Peradotto, the Fourth Department reversed Supreme Court's dismissal of a complaint brought by a shooting victim which alleged negligence, public nuisance and intentional-violation-of-gun-laws causes of action against the manufacturer, distributor and resellers of firearms. (*Williams v Beemiller, Inc., et al*, 100 AD3d 143).

Reargument was subsequently granted. After reargument, the Fourth Department amended its October opinion by adding a new section. Excerpts from the new section follow:

> With respect to the common-law negligence cause of action, although " ' [a] defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others' " …, "[a] duty may arise … where there is a relationship…between defendant and a third-person's actions " … . In *Hamilton [v Berretta USA Corp.*, 96 NY2d 222], the Court of Appeals determined that no such relationship existed because the plaintiffs were unable to draw any connection between specific gun manufacturers and the criminal wrongdoers … . Here, by contrast, plaintiffs have alleged that defendants sold the specific gun used to shoot plaintiff to an unlawful straw purchaser for trafficking into the criminal market, and that defendants were aware that the straw purchaser was acting as a conduit to the criminal market. Thus, unlike in *Hamilton*, plaintiffs have sufficiently alleged that defendants "were a direct link in the causal chain that resulted in plaintiffs'

FROM THE EDITOR

I am an attorney who has practiced in Rochester for nearly 30 years. Part of my practice is a contract legal research and writing service for other attorneys. To keep current, and to learn about areas of the law in which I haven't practiced, I read through the Appellate Division and Court of Appeals decisions and opinions as they are released and published on the courts' websites. My notes about the cases which either clearly explain what the law on a particular topic is, or clearly demonstrate how the law is being applied, constitute the core of this Digest. It is my hope that these case-summaries will be of some use to you. You can find all of the decisions and opinions referenced here on the courts' websites.

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injuries, and that defendants were realistically in a position to prevent the wrongs" … .

Further [an] intervening criminal act does not necessarily sever the causal connection between the alleged negligence of defendants and plaintiff's injury … . Rather, "liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant[s'] negligence" … . Here, plaintiffs allege that defendants… knowingly participated in the sale of 140 handguns, including 87 handguns in a single transaction, to [a] gun trafficking ring. We conclude that those allegations are sufficient to raise a question of fact whether it was reasonably foreseeable that supplying large quantities of guns for resale to the criminal market would result in the shooting of an innocent victim ….

We likewise conclude that the allegations in the complaint are sufficient to state a cause of action for public nuisance … . [P]laintiffs allege that defendants violated federal and state laws by selling guns to a straw purchaser, who funneled the guns into the criminal gun market, thereby posing danger to the general public, and that plaintiff was injured by one of those guns. Thus, plaintiffs have alleged that defendants engaged in unlawful conduct that endangered the lives of "a considerable number of persons" … and that plaintiff " ' suffered special injury beyond that suffered by the community at large' " … . **Williams v Beemiller, Inc., Motion No. 938/12, CA 11-02092 4th Dept. 2-1-13**

Damages for Worry About Baby's Health Not Recognized in New York

The Second Department held that plaintiff could not recover for purely emotional damages. The complaint alleged plaintiff's doctor knew plaintiff was pregnant, but allowed her to undergo a CT-scan without informing her of the pregnancy. Plaintiff sought damages for "the emotional distress arising from her fear that the CT-scan might have harmed her unborn child." The Second Department determined defendant's motion to dismiss the complaint should have been granted because "[n]o such claim is recognized under New York law…". **Nadal v Jaramillo, 2012-04006, Index No. 30748/08 2nd Dept.1-23-13**

> **"...it was reasonably foreseeable that supplying large quantities of guns for resale to the criminal market would result in the shooting of an innocent victim"**
>
> Williams v Beemiller, Inc.

Primary Assumption of Risk Jury Charge Required Reversal

The Second Department reversed the trial court's dismissal of a personal injury complaint after a "no cause" verdict. The plaintiff's daughter was a 14-year-old pitcher on a school softball team. During practice, she was instructed to pitch from a position closer to the plate than the pitching mound. A so-called "L-screen," a protective pitching screen, was used. But the screen was not properly supported and kept falling down. At some point, the pitcher was instructed by the coach to keep pitching even though the screen was down. The pitcher was then struck and injured by a "line drive" hit by the batter. The trial court submitted the "primary assumption of risk" charge to the jury which states that a participant in a sport consents to the usual risks associated with the sport. The Second Department ruled that whether to apply the primary assumption of risk theory is an issue of law for the court, not the jury, and therefore the jury should not have been instructed on it. There is a substantive discussion of the doctrine of primary assumption of risk and the reasons the doctrine did not apply to the facts of the case. The Second Department went on to say that the evidence raised a question of fact about whether the pitcher impliedly assumed the risk of pitching in the absence of the screen. Therefore, at the new trial, the jury should be instructed on the implied assumption of risk, as well as comparative negligence. **Weinberger v Solomon Schechter School of Westchester, 2010-05992, 2010-10382, Index No. 10087/08 2nd Dept. 1-9-13**

Primary Assumption of Risk Precludes Student's Sports-Related Lawsuit

The "primary assumption of risk" doctrine precluded a student baseball player's lawsuit against his school where the student was struck in the face by a baseball "that had been hit on the ground with a fungo bat." **O'Connor v Hewlett-Woodmere Union Free School District, 2-12-04146, Index No. 021556/09, 2nd Dept. 2-27-13**

Medical Malpractice Against Hospital/No Need to Name Individual Doctors

In a medical malpractice action, where the plaintiff has a respondeat superior claim against a hospital based on the actions of nonparty physicians, the failure to name the individual doctors upon whom the claim is based within the applicable statute of limitations period does not compel dismissal of the vicarious liability claim against the hospital. **Parilla v Buccellato, et al, 2011-09045, Index No. 500001/08 2nd Dept. 1-9-13**

"Liability for selling alcohol triggered only by injury caused by the purchaser"

Gutierrez v Devine

Assault in Medical Facility/Spoliation of Evidence

Plaintiff, a patient at defendant medical center, was assaulted by another patient. Shortly after the incident plaintiff's attorney sent a letter to the medical center asking that it preserve all records of the incident, including videotape. The letter was apparently never forwarded to the defendant's risk management department and any videotape of the incident was overwritten in the ordinary course of business. The trial court, pursuant to CPLR 3126, sanctioned the defendant by striking the defendant's answer "to the extent of precluding the defendant from introducing evidence at trial that the alleged perpetrator was being supervised by its employees at the time of the incident." The Second Department discussed the sanctions available for spoliation of evidence and held that, because the plaintiff was not prevented from establishing her case by the spoliation, the imposed sanction was too harsh. The appropriate sanction was an adverse inference charge to the jury. **Jennings v Orange Regional Medical Center, 2012-00209, Index No. 5601/10 2nd Dept. 1-9-13**

Defendant Did Not Demonstrate Lack of Constructive Notice in Slip and Fall Case---Slip and Fall Cause of Action Should Not Have Been Dismissed

In a slip and fall involving snow and ice, the defendant, in seeking summary judgment, did not demonstrate a lack of constructive notice by offering "some evidence as to when the area in question was last cleaned or inspected relative to the time when plaintiff fell….". Specifically, the defendant "offered no evidence as to what, if any, cleaning procedures or inspection procedures were performed from December 9 … when the parking lots … were plowed, until the time of the injured plaintiff's accident on December 12 …". Without such evidence, the defendant did not meet its prima facie burden and the cause of action should not have been dismissed by the trial court. **Feola v City of New York, et al, 2011-06933, Index No. 101006/07, 2nd Dept. 1-23-13**

Proof of Lack of Constructive Notice Insufficient

"Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice" in opposing a motion for summary judgment in a slip and fall case. **Mahoney v AMC Entertainment, Inc., 2012-00582, Index No. 2258/08, 2nd Dept. 2-27-13**

Liability for Providing Alcohol to Under-Age Purchaser Only Triggered by Injury Caused by the Purchaser

There is no common-law cause of action for the negligent provision of alcohol. Under General Obligations Law section 11-100, liability for furnishing alcohol is triggered only if the person who unlawfully received the alcohol causes injury. In this case, a clerk in a convenience store sold alcohol to a 17-year-old with a fake ID who then shared the

alcohol with friends. One of the friends became intoxicated and had an automobile accident, injuring the plaintiff. Because it was not the purchaser of the alcohol who caused the accident, General Obligations Law section 11-100.did not apply. **Gutierrez v Devine, 1489, CA 12-01209 4th Dept. 2-1-13**

> **"A party may not add a new theory of liability ... in the notice of claim."**
>
> Williams v County of Westchester

Property Owner Responsible for Defect in Sidewalk that Did Not Directly "Abut" Owner's Property (Liability Based On New York City Ordinance)

In a full-fledged opinion by Justice Richter, the First Department determined a property owner was responsible for ensuring the safe condition of a sidewalk that did not directly abut the defendant's property. The sidewalk was separated from the defendant's property by a strip of land owned by the City. The Court determined the terms "abutting" and "adjoining" in the ordinance making a property owner responsible for the condition of a sidewalk should be construed "to include property in close proximity to an improved sidewalk although separated from it by [the strip of land]"… . **James v 1620 Westchester Avenue, LLC, 8710A, 17396/06 1st Dept. 1-7-13**

Intentional Assault Did Not Sever Causal Connection to Serving Alcohol

The First Department determined an intentional assault would not sever the causal connection between injury to the plaintiff and the bar's serving alcohol to a person alleged to have been visibly intoxicated, as well as the bar's alleged failure to provide proper security. **Carver v P.J. Carney's, 9216, 103191/10 1st Dept. 2-7-13**

"Zone of Danger" Theory Applies Only to Immediate Family

The Second Department determined the "zone of danger" theory of recovery for witnessing the death of someone in the plaintiff's "immediate family" did not allow recovery for witnessing the death of a man, not plaintiff's biological father, who was the only person plaintiff had ever known as a father figure. **Thompson v Dhaiti, 2011-11215, Index No. 24951/09 2nd Dept. 2-13-13**

Late Notice of Claim Allowed

The Second Department allowed plaintiff to serve a late notice of claim against the defendant School District because: (1) the School District was made aware of the facts constituting the claim within the 90-day statutory period (shown by a medical claim completed by the school principal); (2) there was a reasonable excuse for the delay (mother was unaware of the severity of the child's injury and had relied on the School District's prior willingness to pay for the child's medical treatment); (3) there was no prejudice to the School District's ability to defend the action. In the Matter of **Funkhouser v Middle Country Central School District, et al, 2011-08142, Index No. 2333/11 2nd Dept. 1-9-13.**

Late Notice of Claim Disallowed

The Second Department reversed the trial court's grant of a petition to file a late notice of claim. "The petitioner did not demonstrate a reasonable excuse… . The petitioners' assertion that they only recently discovered that they had a claim against the City is not an acceptable excuse … . * * * The fact that the … Police Department had knowledge of this accident, without more, cannot be considered actual knowledge of the essential facts underlying the claim against the City …". **Matter of Klass v City of New York, 2012-00913, Index No. 16699/11 2nd Dept. 2-20-13**

Causes of Action Not in Notice of Claim Dismissed

The Second Department affirmed the dismissal of a complaint because the complaint asserted theories not mentioned in the notice of claim. "A party may not add a new theory of liability which was not included in the notice of claim …". **Williams v County of Westchester, 2011-10614, Index No. 15002/08 2nd Dept. 2-20-13**

Failure to Plead Res Ipsa Loquitur Does Not Preclude Application of Theory

"Since the [res ipsa loquitur] doctrine merely permits an inference arising from the evidence in a negligence case, the plaintiff's failure to plead res ipsa loquitur does not foreclose its application on summary judgment or at trial." **Wicks v Leemilt's Petroleum, Inc., 2011-01891, Index No. 1843/08 2nd Dept. 2-20-13**

Expert Opinion Must Be Based On Facts in Record or Personally Known

"A written report prepared by a nontestifying doctor interpreting the results of a medical test is not admissible into evidence. …[O]pinion evidence must be based on facts in the record or personally known to the witness …" **D'Andria v Pesce, 2011-03506, Index No. 16320/02 2nd Dept. 2-20-13**

Criminal Law

FEATURED OPINION

Pat-Down Search Justified by the Objective Existence of Probable Cause to Arrest, Even Though the Officer Did Not Intend to Arrest at the Time of the Search

In a full-fledged opinion by Justice Saxe, the First Department determined that a pat-down search was justified because probable cause for arrest existed (for DWI) even though the officer did not intend to arrest the defendant, whom he had just directed to step out of his car, at the time of the search. The Court wrote:

> This appeal addresses whether suppression should have been granted where the police stopped defendant's car for a traffic infraction, and, based on what the arresting officer heard and observed, defendant was asked to exit the car and patted down; he was placed under arrest only after a knife was found in his pocket. Because the arresting officer candidly admitted that he had not intended to arrest the driver before discovering the knife, defendant contends that the officer lacked the requisite predicate for the search and that therefore we must suppress the knife and other fruits of the search that followed. We disagree.
>
> The arresting officer's factual testimony … established that the necessary predicate existed for each step taken by the officer. Because … we find that at the time of the patdown the officer actually had probable cause to arrest defendant for driving while intoxicated, the search was permissible and the fruits of the search were admissible. While we rely on the factual testimony of the arresting officer, we are not bound by his subjective assessment at the time regarding the nature and extent of his authority to act.
>
> * * *
>
> …[W]e conclude that, even if the police are incorrect in their assessment of the particular crime that gives them grounds to conduct the search, or if they incorrectly assess the level of police activity that is justified by their knowledge, where the facts create probable cause to arrest, a search must be permissible. **People v Reid, 7360 Ind. 717/09 1st Dep. 1-3-13.**

"While we rely on the factual testimony of the arresting officer, we are not bound by his subjective assessment at the time regarding the nature and extent of his authority to act. ... [E]ven if the police are incorrect ..., where the facts create probable cause to arrest, a search must be permissible."

People v Reid

General Question Whether Defendant Was "A Law Abiding Person" Violated Sandoval Ruling and Required Reversal

The prosecutor's violation of the trial court's *Sandoval* ruling required reversal and new trial. Defendant was charged with rape. Prior to trial defendant sought a *Sandoval* ruling that he could not be cross-examined about a nine-year-old

conviction for sexual abuse. The trial court ruled the defendant could not be cross-examined about the sexual abuse conviction because it did "relate to the two charges that are presently before the Court…" [and therefore could unduly prejudice the defendant in the eyes of the jury]. "The prosecutor, despite the court's *Sandoval* ruling, asked a series of general questions regarding prior bad acts by defendant, and then questioned him specifically regarding the precluded prior conviction." The prosecutor started the prohibited line of questioning by asking the defendant whether he was "a law abiding person," to which the defendant replied that he had been "for the last three years." The Fourth Department held that the defendant's answer did not "open the door" to questioning about the sexual abuse conviction, noting that "a defendant opens the door to cross-examination concerning previously-precluded evidence where…'defendant's testimony was meant to elicit an incorrect jury inference'…". The Fourth Department stated unequivocally that the "People may not elicit a general statement by asking questions that violate the *Sandoval* ruling for the sole purpose of circumventing that ruling." **People v Snyder, 1370, KA 11-00316 4th Dept. 2-1-13**

"the People may not elicit a general statement by asking questions that violate the Sandoval ruling for the sole purpose of circumventing that ruling"

People v Snyder

Queens County District Attorney's Standard "Preamble" to the Miranda Warnings Struck Down

In a full-fledged opinion by Justice Skelos, the Second Department struck down a so-called "program" which had been put in place by the Queens County District Attorney's Office. Pursuant to the "program," a "preamble" was read to the defendant just before the *Miranda* warnings were given. The Second Department determined the preamble rendered the *Miranda* warnings ineffective. The Court noted that the defendant was told of his privilege against self-incrimination only after being told (in the preamble) that this was his "only opportunity" to refute what others have said, to correct any misperceptions, and to try to help himself. The preamble suggested that the prosecutor would not investigate his version of events if he declined to speak with the prosecutor at that time. Conversely the preamble suggested that, if the defendant agreed to be interviewed, the prosecutor would assist him with such an investigation. This suggestion, the Second Department held, "is contrary to the very purpose of the warning that anything a suspect says can be used against him … . In essence, the preamble suggests that invoking [the right to remain silent] will bear adverse, and irrevocable, consequences." **People v Dunbar, 2010-04786, Ind. No. 1217/09 2nd Dept. 1-30-13**

Defendant's Flight Did Not Justify Police Pursuit

Flight was not sufficient to justify police pursuit. A police officer had been shot in the afternoon. About eight hours after the shooting, uniformed officers approached the defendant as he was walking within a block or two of where the shooting occurred. The defendant said "What, we can't go to the store?" turned his back, made a gesture toward his waistband, and ran. The police pursued him and saw him discard a handgun from his pocket as he was being tackled by an officer. The defendant subsequently pled guilty to criminal possession of a weapon. The Fourth Department reversed the conviction and vacated the sentence. "Flight alone … is insufficient to justify pursuit because an individual has a right to be let alone and refuse to respond to police inquiry …". Because there were no "specific circumstances indicating that the suspect [was] engaged in criminal activity," there was no "reasonable suspicion" of criminal activity, "the necessary predicate for police pursuit…". **People v Cady, 1427, KA 12-00337 4th Dept. 2-1-13**

Flight Elevated Level of Suspicion and Justified Pursuit

The police received a late-night report that three men had committed a robbery and fled into a park. At the park, the police saw the defendant and two other men. The defendant's flight upon seeing the officers, who were in plainclothes and were getting

out of an unmarked police car, "elevated the level of suspicion to reasonable suspicion of criminality and justified pursuit." **People v Pitman, 9092, Ind. 2908/10 1st Dept. 1-29-13**

Flight Provided Justification for Pursuit

Because the defendant resembled a "mug shot" of a wanted person, the police had the right to approach him to request information. Because the defendant was in an area the wanted person was known to frequent, the police had the common-law right to inquire. The defendant's flight provided reasonable suspicion to pursue and stop him. The defendant's discarding of a gun during the chase, therefore, was not the result of improper police action. **People v Barrow, 2011-030059, Ind. No. 1356/09 2nd Dept. 2-13-13**

No "Reasonable Suspicion"/Defendant Should Not Have Been Stopped and Detained

A new trial was ordered and the defendant's motion to suppress identification evidence was granted by the Second Department. A police radio broadcast described a robbery in progress by two males wearing black jackets, one wearing blue jeans, the other wearing black jeans. The complainant described the robbers only as "wearing dark clothing," one taller than the other, and one with a hood. The Court held that these descriptions were not sufficient to provide reasonable suspicion to stop and detain the defendant, who was dressed in a dark gray and dark green camouflage jacket and was standing alone 20 blocks from the crime scene. **People v Polhill, 2010-01680, Ind. No. 943/09 2nd Dept. 1-30-13**

Evidence Seized in Search Suppressed/Police Officer Did Not Have a Founded Suspicion of Criminal Activity When He Questioned Defendant

A police officer approached the defendant's car which was illegally parked. The officer asked the defendant "What's going on" and the defendant answered that he was seeking a prostitute. The officer asked if there was anything in the car he "should be aware of" and then asked for and received permission to search the car. A gun was found. Defendant eventually pled guilty to attempted criminal possession of a weapon. The Fourth Department determined the search was illegal and suppressed the evidence seized in the search. The Court determined the officer's question whether there was anything in the car he should be aware of, a question that rose to the level of "a common-law inquiry under *De Bour*," was not based on a "founded suspicion that criminal activity is afoot." **People v Carr, 3, KA 08-02222 4th Dept. 2-8-13**

> **"...the search was illegal...the officer's question ... was not based on a founded suspicion that criminal activity is afoot..."**
>
> People v Carr

Suppression Motion Should Not Have Been Granted/Officers Had "Objective Credible Reason" to Approach

In an appeal by the People, the Fourth Department determined the suppression motion should not have been granted for the reasons relied on by the suppression court. The Fourth Department found that the officers who approached two men and asked the non-threatening question "What's up guys" had "an objective credible reason not necessarily indicative of criminality" for doing so. The men were seen walking from a private driveway toward a car in a public parking lot for a recreation area. The men were dressed "pretty heavy" for the mid-70-degree weather, unlike the bikers and hikers who use the park. And there had been a number of daytime burglaries in the area. **People v Johnston, 8, KA 12-01414 4th Dept. 2-8-13**

Frisk of Defendant After a Vehicle Stop Okay/Officer Had Reasonable Suspicion of Criminal Activity and an Articulable Basis to Fear for His Safety

The Fourth Department determined a police officer had the right to frisk the passengers in a lawfully stopped car to the extent necessary to protect his safety because he was acting on reasonable

suspicion that criminal activity was afoot and on an articulable basis to fear for his own safety. Before the defendant got into the car which was stopped for a traffic infraction, the officer had observed the defendant "engage in a number of 'handshakes' "which the officer determined were either hand to hand drug sales or "gang signals." When the car was stopped the officer saw the defendant either take something out of or put something into his pocket. **People v Daniels, 9, KA 09-287 4th Dept. 2-8-13**

> **"Defendant was not prosecuted for the content of any of the emails, but only for giving the false impression that his victims were the ... authors …"**
>
> People v Golb

Throwing Objects Off Balcony Evinces Depraved Indifference

The defendant, who claimed to have been intoxicated at the time, threw bottles and plates off a 26th floor hotel balcony overlooking 7th Avenue during morning rush hour. He was convicted of first degree reckless endangerment, which requires a "depraved indifference to human life." In affirming the conviction, the First Department included a substantive discussion of the relationship among the legal concepts "depraved indifference," " recklessness," and "specific intent to cause harm." In addition, the Court found sufficient "exigent circumstances" to justify the warrantless entry by the police into defendant's hotel room. **People v Green, 7860, Ind. 4295/05 1st Dept. 1-17-13.**

Criminal Impersonation—Falsely Attributed E-Mails

Defendant was convicted of criminal impersonation (and other offenses) because he sent e-mails which he falsely attributed to scholars who disagreed with the defendant's father, an expert on the Dead Sea Scrolls. The First Department explained why the defendant's falsely-attributed e-mails were not protected by the First Amendment: "Defendant was not prosecuted for the content of any of the emails, but only for giving the false impression that his victims were the actual authors of the emails." **People v Golb, 9101, Ind. 2721/09 1st Dept. 1-29-13**

Waiver of Right to Appeal Unenforceable

A waiver of the right to appeal is unenforceable where there is "no promise, plea agreement, reduced charge, or any other bargain or consideration given to the defendant in exchange for [her] plea…". For that reason the Second Department determined defendant's waiver of appeal was invalid and she could appeal her sentence. **People v Brady-Laffer, 2011-11051, Ind. No. 1783-11 2nd Dept. 1-16-13**

Waiver of Appeal Insufficient/Sentence Excessive

Defendant's right to appeal was not knowingly, voluntarily, and intelligently waived—it was not established that defendant was aware the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty. Defendant's sentence was deemed excessive. The sentence was reduced in the interest of justice in light of defendant's age, the mitigating facts of the case and defendant's lack of a juvenile record (youthful offender). **People v Maria M. 8726 Ind. 1563/10 1st Dept. 1-3-13**

Sentence Could Be Challenged In Spite of Waiver of Appeal

A valid waiver of the right to appeal did not preclude defendant from challenging the severity of his sentence where the sentencing court did not inform the defendant of the maximum term of incarceration and there was no specific sentence promise at the time of the waiver. **People v Scott, 107, KA 11-01655 4th Dept. 2-8-13**

Guilty Plea Waives All Nonjurisdictional Pre-Trial and Trial Defects

Defendant went to trial before he pled guilty. On appeal he argued the court erred in admitting recorded conversations. The Fourth Department determined, by pleading guilty, the defendant

forfeited his right to seek review of any nonjurisdictional defects in the proceedings, including issues arising from an audibility hearing and evidentiary rulings during trial. **People v Alvarado, 130, KA 11-02011 4th Dept. 2-1-13**

Victim's Testimony About Her Own Statements Not Hearsay

In affirming a rape conviction, the Fourth Department noted it was not necessary to apply the "prompt outcry" hearsay exception to the victim's testimony about her own out-of-court statements because the statements were not hearsay. **People v Curran, 1323, KA 08-01510 4th Dept. 2-1-13**

19-Year Preindictment Delay Okay/Prior Incidents of Domestic Violence Probative of Motive, Intent and Identity/Admissions Are Direct, Not Circumstantial, Evidence

A 19-year preindictment delay did not violate defendant's speedy trial and due process rights. The charge was murder. The defendant was at liberty until indicted. The People established good cause for the delay in that the case was not ready to bring to a grand jury until the statements of three witnesses and DNA test results were obtained. The Fourth Department held that there was no need for a *Singer* hearing to determine the reason for the delay because there was no issue of fact with respect to the cause of the delay and the record provided County Court with a sufficient basis to determine whether the delay was justified. The admission of prior incidents of domestic violence against the victim (defendant's wife) was proper because the evidence was probative of defendant's motive, intent and identity. The defendant was not entitled to a circumstantial evidence charge because the admissions he made about killing his wife constituted direct evidence. **People v Rogers, 1425, KA 11-00012 4th Dept. 2-1-13**

Because the "Identity" of the Perpetrator Was Not an Issue, Allowing Evidence of Prior Crimes to Prove Identity Was Reversible Error

In a case based upon allegations the defendant assaulted his wife in a jealous rage, the trial judge allowed evidence of a prior crime to prove the "identity" of the perpetrator pursuant to the *Molineux* rule. The Second Department, in a prior decision, reversed the conviction finding that the perpetrator's identity was not an issue in the case. After the initial reversal by the Second Department, the Court of Appeals, in turn, reversed the Second Department finding that the perpetrator's identity had not been "conclusively established," and sent the case back to determine if the identity exception was applicable to the facts. The Second Department stuck to its initial reasoning, finding that allowing the "prior crime" evidence on the issue of the perpetrator's "identity" was an abuse of discretion because the prejudicial effect of the evidence outweighed its probative value. **People v Agina, 2005-11978, Ind. No. 1733/04 2nd Dept. 2-13-13**

> **"...victim's testimony about her own out-of-court statements were not hearsay..."**
>
> People v Curran

Miranda Violations Mandate Suppression

A police officer approached defendant who was in a parked car. The officer smelled a "strong odor of unburnt marijuana coming from the defendant's vehicle's open window." The officer asked if the occupants of the vehicle had "anything illegal." The defendant produced a small bag of marijuana. The officer then told the defendant to get out of the vehicle "as he was now under arrest for unlawful possession of marijuana." The officer searched the vehicle and found two bags of marijuana under the driver's seat. When he asked the defendant if the bags of marijuana were his, he said "yes." A gun was also recovered in the search. The defendant was taken to the police station where he was read his Miranda rights for the first time and he declined to speak with the detective. Two hours later the arresting officer told the defendant that if no one confessed to owning the gun, everyone in the vehicle would be "equally charged." The defendant then asked to speak to the detective. He was read his Miranda rights again and confessed to owning the gun. The Second Department suppressed the marijuana and the gun---the marijuana because the

defendant was in custody and had not been read his rights at the time he was asked about it---and the gun because defendant had initially refused to speak with the police thereby asserting his right to remain silent. Subsequent questioning was not proper. **People v Jackson, 2011-05745, Ind. No. 10-00130 2nd Dept. 2-20-13**

Witness Impeached With Attorney's Statements

"The Supreme Court properly permitted the People to impeach the testimony of a defense witness with a statement made by that witness's former counsel at a plea proceeding… .The statement, which differed from the witness's trial testimony, reasonably appeared to be attributable to the witness … ". **People v Davis, 2010-11219, Ind. No. 921/09 2nd Dept. 2-20-13**

Answering Juror's Question Outside Presence of Defendant, Counsel and Other Jurors Required Reversal

The Second Department determined the trial judge committed reversible error when he answered a juror's questions in the robing room outside the presence of the defendant, the lawyers and the other jurors. The questions included "when the defendant could be deemed to be responsible 'by the law' ….". Because the questions were not "ministerial" and related to "the substantive legal and factual issues of the trial…" the error affected the "organization of the court or the mode of proceedings prescribed by law." Preservation is not required for such a "mode of proceedings" error. **People v Rivera, 2009-11428, Ind. No. 9921/07 2nd Dept. 1-23-13**

"The ... Court properly permitted the People to impeach the testimony of a defense witness with a statement made by that witness' former counsel..."

People v Davis

Judge's Failure to Follow Statutory Requirements for Handling Jury Questions Required Reversal

The jury sent out a note asking "Is intent defined as premeditated desires or actions once engaged?" The trial judge responded to the question by reading an expanded definition of intent and explaining "intent does not require premeditation." Defense counsel did not object to the way the judge handled the jury's question. The First Department explained the statutory procedure for answering jury questions and held that the judge's failure comply with CPL 310.30 by affording "counsel … the opportunity to suggest appropriate responses …," was a reversible "mode of proceedings" error. **People v McGhee, 2010-05026, Ind. No. 2434/08 2nd Dept. 2-6-13**

Syracuse Police Officer Did Not Have Authority to Arrest in Town of DeWitt/Judge Abused Discretion During Jury Selection

A City of Syracuse police detective was assigned to a security detail for a college athletic event. The detective saw codefendant walk toward the gymnasium, turn around and walk back the way he came. The detective followed the codefendant to a car. The detective then approached the codefendant and asked to speak with him. Defendant, who had been in the car, got out of the car. The detective smelled burnt marihuana and both codefendant and defendant admitted they had been smoking marihuana. A consent search of the car turned up a loaded revolver leading to the defendant's and codefendant's arrest. The encounter with the City of Syracuse detective actually took place in the Town of DeWitt, not the City of Syracuse. The Fourth Department held, pursuant to Criminal Procedure Law section 140.50 (1), the City of Syracuse detective did not have statutory authority to stop and question the defendant outside "the geographical area of such officer's employment…". The physical evidence was suppressed and the indictment dismissed on that basis. The Fourth Department went on to hold that there was a valid alternative ground for reversal. The jury selection process went very fast, proceeding group to group. The judge told counsel that once the peremptory challenges for a particular group were finished, there would be no further opportunity to challenge anyone in that group. One of the defense attorneys told the judge that the jury selection process was moving too fast and the defense did not want one of the jurors in the previous group. The judge refused to allow a

challenge of that juror. The Fourth Department held the judge's refusal was an abuse of discretion requiring reversal stating: " 'We can detect no discernable interference or undue delay caused by [the] momentary oversight [of the attorneys for defendant and codefendant] that would justify [the court's] hasty refusal to entertain [their] challenge….' ". **People v McGrew, 1453, KA 09-01308 4th Dept. 2-1-13**

Post-Conviction Review of Redacted Portions of Officer's Notes Ordered

After conviction, the inference that redacted portions of the arresting officer's memo book constituted *Rosario* material warranted an in camera review of the memo book to determine whether the deleted portions constituted *Rosario* material and whether the nondisclosure prejudiced the defendant. **People v Perry 8933 Ind. 1054/09 1st Dept. 1-3-13**

Preservation of Error/DNA Expert/Confrontation Clause

Defendant's claim that a DNA analyst's expert testimony violated the Confrontation Clause because it was based on reports made by non-testifying witnesses was rejected, principally because the claim was deemed unpreserved. There is a substantive discussion of preservation requirements. The Court, however, noted that the Court of Appeals held a similar DNA report was nontestimonial for Confrontation Clause purposes. **People v Rios, 7651, Ind. 1037/08 1st Dept. 1-15-13.**

Insufficient Proof of Value in Grand Larceny Case

In a Grand Larceny 3rd case, based on the theft of cell phones, the value of the stolen phones was proved by the testimony of the store manager who did not provide "a basis of knowledge" for her statement of value. The Second Department noted that " '[c]onclusory statements and rough estimates of value' that are unsupported by a basis of knowledge are insufficient…". The conviction was reduced to petit larceny, which requires no proof of value. **People v Sutherland, 2011-06497, Ind. No. 12436/08 2nd Dept. 1-23-13**

"Weight of the Evidence" Review

The Third Department upheld the defendant's rape conviction in a full-fledged opinion by Justice Spain. The case is interesting because it is a true "weight of the evidence" analysis where the appellate court conducted "a full review of the testimony adduced at trial," acting in the role of a jury. There was a strong dissent which argued the conviction should be reversed because the trial judge did not turn over to the defense certain records concerning the complainant's mental health after an in camera review. **People v McCray, 103682 3rd Dept 1-17-13**

> **"...conclusory statements and rough estimates of value that are not supported by a basis of knowledge are not sufficient to support a Grand Larceny conviction..."**
>
> People v Sutherland

"Searching Inquiry" Required Before Proceeding Without Attorney in SORA Hearing

In reversing a SORA determination, the Fourth Department determined that the SORA court did not make a "searching inquiry" to make sure the defendant's decision to proceed with the SORA hearing without an attorney was knowing, intelligent and voluntary. "The requisite inquiry 'should affirmatively disclose that a trial court has delved into a defendant's age, education, occupation, previous exposure to legal procedures and other relevant factors bearing on a competent, intelligent, voluntary waiver' "… . **People v Wilson, 1475, KA 11-01197 4th Dept. 2-1-13**

SORA Hearing Procedure

In this case, the Second Department clearly laid out the acceptable sources of information, the applicable standards of proof, and the criteria for departure from the presumptive level in a SORA hearing. **People v Lacewell, 2008-07498, 2nd Dept. 2-20-13**

Procedure for Modification of SORA Level

The Third Department described the proper procedure for a petition for the modification of a SORA level pursuant to Correction Law section 168-o. Both an updated recommendation of the Board of Examiners and a hearing are required. **People v Hazen, 514028 3rd Dept. 2-14-13**

> **"Even without a formal grand jury vote, a charge can be deemed dismissed if the prosecutor prematurely takes the charge away from the grand jury..."**
>
> People v Smith

Permission to Re-Submit Charges to a Second Grand Jury Was Required

The prosecutor's failure to get the court's permission to re-submit charges to a second grand jury was a jurisdictional defect requiring dismissal of the indictment after a guilty plea. The first grand jury took "no affirmative action" on drug charges before them. There were not enough votes to indict on or dismiss the charges. The prosecutor then submitted the drug charges to a second grand jury which voted to indict. The First Department noted: "Even without a formal grand jury vote, a charge can be deemed "dismissed" within the meaning of CPL 190.75(3) if the prosecutor "prematurely takes the charge away from the grand jury…". **People v Smith, 7310, 135/10, 801/10 1st Dept. 2-7-13**

Judge's Mistaken Belief Period of Post-Release Supervision Was Mandatory Required Resentencing

Resentencing was required where the sentencing judge indicated the five-year post-release supervision was mandatory. There was, however, an applicable exception to the five-year rule which the judge had the discretion to impose. (Penal Law section 70.45 former [2]). **People v Whitmore, 104652 3rd Dept. 2-14-13**

Multiplicitous Indictment Count Dismissed in the Interest of Justice

The Fourth Department dismissed one count of an indictment finding the indictment "multiplicitous" (charging a single offense in more than one count). The error was not preserved but the Court reviewed the issue "in the interest of justice." **People v Quinn, 1131, KA 11-00278 4th Dept. 2-8-13**

No Right to Counsel in Presentence Interview

There is no right to counsel in a presentence interview with the probation department. **People v McNamara, 1472, KA 12-00204 4th Dept. 2-8-13**

Although Victim Was Shot Injuries Did Not Constitute "Serious Physical Injury" Within Meaning of Assault 1st Statute

Although the victim was shot in the chest and arm, the Fourth Department determined there was insufficient evidence of serious physical injury and reduced the Assault 1st conviction to Attempted Assault 1st. The Court did not reach the issue whether the indictment was supported by legally sufficient evidence because the issue was not raised in the omnibus motion (suggesting that a conviction does not preclude raising insufficient-evidence-to-indict on appeal). **People v Madera, 6, KA 11-00450 4th Dept. 2-8-13**

Attorney Conflict Affected Defense Requiring Reversal

The Fourth Department reversed defendant's conviction because his attorney had a conflict of interest. The attorney had represented someone who was heard on a recording talking to the defendant. The People sought to introduce the recording in evidence to prove defendant's motive and intent for the charged burglary. The Fourth Department explained the procedure and criteria for determining whether such a conflict of interest requires reversal. One of the criteria is that the conflict affect the conduct of the defense, which the Fourth Department found to have occurred in this case. **People v McGillicuddy, 7 12-00530 4th Dept. 2-8-13**

Contract Law

Mutual Mistake

"Mutual mistake may furnish the basis for the reformation of a written agreement where the signed writing does not express the actual agreement of the parties…. Parol evidence is admissible to establish the actual agreement. There is a heavy presumption that the executed agreement reflects the true intention of the parties, and a correspondingly high order of evidence is required to overturn the presumption …" The First Department found that a question of fact had been raised concerning whether the doctrine of mutual mistake should be applied to reform the contract in this case. **West Vernon Petroleum Corp. v Singer Holding Corp., 2010-10522, 2011-00639, Index No. 12514/04 2nd Dept. 2-6-13**

Fee Agreement Unenforceable as Vague

A written agreement concerning a "success fee" and real estate broker's commissions was deemed unenforceable as vague, "since the agreement fails to set the price or compensation to be received…". **Magnum Real Estate Services, Ind. No.133-134-135 Associates, LLC, 8058, 107850/06 1st Dept. 2-14-13**

Spoliation/Discovery Abuse Sanctions/Equitable Estoppel

In a full-fledged opinion by Justice Richter discussing a breach of contract case with a convoluted history, the First Department dealt with the spoliation of evidence and the appropriate sanctions for spoliation under the CPLR. It was alleged that a document was deliberately scorched so its authenticity could not be determined by scientific tests. The Court remanded the case for a hearing on the spoliation issue and determined that, under the facts of the case, if spoliation is demonstrated at the hearing, striking the pleadings would not an appropriate sanction. The Court suggested a monetary sanction. Although most of the decision deals with the factual history of the case, there are substantive discussions of sanctions for discovery abuse under CPLR3126 and the doctrine of equitable estoppel. **Mecher v Appolo Medical Fund Management, LLC, et al, 4759-4764, Index 604047/03 1st Dept. 1-29-13.**

Breach of Contract Not a Defense to Action on Promissory Note

Breach of contract is not a defense to an action for money only on a promissory note. The breach of contract could, however, be the subject of a separate action. **German American Capital Corporation v Oxley Development Company, LLC 8937 Index 651140/10 1st Dept. 1-3-13**

Tortious Interference with Contract

In this case, the Third Department included a clear description of the proof requirements for tortious interference with contract. **Schmidt & Schmidt v. Town of Charlton, 515053 3rd Dept. 2-21-13**

> **"There is a heavy presumption that the executed agreement reflects the true intention of the parties and a correspondingly high order of evidence is required to overturn the presumption..."**
>
> West Vernon Petroleum Corp. v Singer

Attorney's Fees

Acceptance of Settlement Offer Not Communicated to Opposing Party---Attorney Lost Contingency Fee Based on Settlement

The fact that the plaintiff signed a general release and hold-harmless agreement was not enough to settle the case. There was no proof the plaintiff's attorney communicated plaintiff's acceptance of the settlement offer to the defendant or defendant's insurance carrier. Therefore, plaintiff, with a new attorney, was allowed to go forward with the lawsuit and plaintiff's original attorney could not collect his contingency fee, which was based on the settlement-amount. **Gyabaah v Rivlab Transportation Corp., et al, 7654, Index 309081/10 1st Dept. 1-8-13**

Legal Malpractice

Third-Party Claims Against Other Law Firms Which Advised Plaintiff

A law firm sued for malpractice was allowed to assert a third party claims against other law firms which advised the plaintiff on the same matter. There is a substantive discussion of similar third party actions in legal malpractice cases. **Millenium Import, LLC v Reed Smith LLP, et al, Index 603350/07; 591100-07 1st Dept. 1-17-13**

> **"a court has no power to reduce or increase the amount of a judgment when there is no clerical error..."**
>
> Meenan v Meenan

Family Law

Neglect Finding Based On Single Incident Reversed

The First Department reversed a finding of neglect of a child which was based on a single incident. There is a brief but substantive discussion of neglect or abuse findings based upon a single incident. **In re Pria J. L., et al, 88411st Dept. 1-29-13**

Neglect for Allowing Children to Be Driven by Intoxicated Driver

A finding of neglect based upon the respondent's allowing the mother of the children to drive with the children when she was intoxicated (.10%) was affirmed by the Third Department. **Matter of Darcy Y., 514430 3rd Dept. 2-14-13**

Right to Counsel

In a proceeding pursuant to part three, article six of the Family Court Act to allow a mother visitation with her child in her home, the Fourth Department determined the grandmother, who had primary physical custody of the child, should have been advised of her right to assigned counsel (Family Court Act section 262 (a)(iii)). The court's failure to so advise her constituted reversible error. **Matter of Wright v Walker, 11, CA-12-00962 4th Dept. 2-1-13**

Standard for Upward Child Support Modification/Agreement Incorporated But Not Merged

This case, which was not affected by the 2010 amendment to Family Court Act section 451(2)(a), includes a clear discussion of the criteria for an upward modification of a child support obligation where a party is seeking to modify "a child support provision derived from an agreement or stipulation incorporated but not merged into a divorce decree…". The party seeking modification "has the burden of proving that the agreement was unfair or inequitable when entered into or that an unanticipated and unreasonable change of circumstances has occurred resulting in a concomitant increased need or that the needs of the child are not being adequately met…". **Matter of Overbaugh v Schettini, 515079 3rd Dept. 2-14-13**

Court Did Not Have Power to Amend Child Support/Maintenance Judgment

In reversing an "amended judgment" in which the judge purported to correct an error in the calculation of child support and maintenance arrears, the Fourth Department noted: "a court has no power to reduce or increase the amount of a judgment when there is no clerical error…". **Meenan v Meenan, 1493, CA12-01885 4th Dept. 2-8-13**

Condemnation

Damages Related to Improvements Made on Condemned Property Allowed

In a condemnation case where a portion of a sand and gravel quarry was taken, the Second Department affirmed the lower court's valuation of the condemned property. The quarry owner argued that an income-based analysis, rather than a sales-comparison (land-value) approach, should be

employed. The Second Department determined that the income-based analysis (projected profits minus projected expenses) was not appropriate. The Second Department also affirmed the lower court's determination that the quarry should be compensated for damages related to the improvements made on the condemned property, as opposed to damages related to the taking itself. **Matter of Metropolitan Transportation Authority and Washed Aggregate Resources, Inc., 2011-03-14, Index No. 2674/98 2nd Dept. 1-16-13**

Disciplinary Hearings (RE: Inmates)

Right to Call and Question Witnesses

In an inmate's disciplinary hearing, the hearing officer's refusal to allow an inmate to call witnesses, without providing the inmate with a written statement explaining the reasons for the refusal, together with the hearing officer's refusal to allow the inmate to question witnesses, required a new hearing before a new hearing officer. In the Matter of **Benito v Calero, 2011-06219, Index No. 10-00715 2nd Dept. 1-16-13**

> **"When an insured ...fails to preserve the insurer's subrogation rights, ... the insured is prohibited from asserting a claim for underinsured motorist benefits ..."**
>
> Matter of Travelers

Refusing to Provide Relevant Information to an Inmate Required Annulment of the Determination

In a prison disciplinary proceeding, the hearing officer's refusal to provide the inmate with the instructions for the operation of the machine which was used to test his urine for the presence of drugs required annulment of the determination the prisoner had used a controlled substance. **Matter of Marshall v Fischer, 2012-01538, Index No. 6260/11 2nd Dept. 2-13-13**

Insurance Law

Single Policy Limit Held to Apply to Successive Tenants in Lead-Paint-Tainted Apartment

In a full-fledged opinion by Justice Smith, the Fourth Department discussed the liability-limits of an insurance carrier for injuries caused to children by lead paint in the insured apartment. The policy, which had a $500,000 limit, included the following sentence: "All bodily injury and property damage resulting from one accidental loss or from continuous or repeated exposure to the same general conditions is considered the result of one accidental loss." Children in one family who lived in the apartment suffered injury from lead paint and the carrier paid out $350,000. Subsequently children in another family who moved into the same apartment suffered injury from lead paint. The question before the Court was whether the liability to the second family was capped at $150,000 because the total liability of the carrier could not exceed $500,000, or whether the injury to the second family triggered another $500,000 in policy coverage. The Fourth Department determined the carrier was liable for a total of $500,000 for the injuries to both families and the second family could recover no more than $150,000. **Nesmith, et al v Allstate Insurance Company, 1252, CA 12-00182 4th Dept. 2-1-13**

Settlement Without Insurer's Consent

"When an insured settles with a tortfeasor in violation of a condition requiring his or her insurer's written consent to settle, and fails to preserve the insurer's subrogation rights, the insurer is prejudiced, and the insured is prohibited from asserting a claim for underinsured motorist benefits …". **Matter of Travelers Home and Marine Insurance Company v Kanner, 2012-02625, Index No. 16172/11 2nd Dept. 2-13-13**

Duty to Defend Broader than Duty to Indemnify

The Second Department applied the rule that an insurer's duty to defend under a policy is broader than its duty to indemnify. Because the language of the policy was broad enough to cover the cause of action for unfair competition, the insurer was obligated to defend, in spite of the fact that the related breach of contract cause of action was excluded from coverage under the terms of the policy. **Natural Organics, Inc v OneBeacon America Insurance Co., 2011-03268, 2011-05298, Index No. 12763/10 2nd Dept. 1-16-13**

Real Estate

Lawyer's Communication Did Not Make "Time of the Essence"

The Second Department held that the letter from the buyer's attorney to the seller's attorney stating that the buyer was prepared to close "on any date … within the next ten days," and that the buyer would make himself available "at any time and location *so designated by you*," and requested that the seller's attorney "contact me within the next ten days to schedule a closing" did not make "time of the essence" because "it did not clearly and distinctly set a new date and time for closing, and it did not inform the defendant that he would be considered in default if he did not perform by a given date…". **Latora v Ferreira, 2011-09673, Index No. 20462/05 2nd Dept. 1-23-13**

Fee Agreement Unenforceable as Vague

A written agreement concerning a "success fee" and real estate broker's commissions was deemed unenforceable as vague, "since the agreement fails to set the price or compensation to be received…". **Magnum Real Estate Services, Ind. No. 133-134-135 Associates, LLC, 8058, 107850/06 1st Dept. 2-14-13**

Successful Challenge to Property Tax Assessment Affirmed

The board of managers of a condominium complex successfully challenged the town valuation of the property for real estate tax purposes. The town appealed and the Fourth Department affirmed (with two justices dissenting). The lengthy decision includes detailed discussions of the nuts and bolts of commercial property tax assessments, including the determination of the capitalization rate, the necessary documentation for an appraisal, the necessary qualifications for an appraiser, and the use of opinion evidence. In the Matter of **French Oaks Condominium v Town of Amherst, et al, 1040, CA 12-00434 4th Dept. 2-1-13**

> **"stating that buyer was prepared to close 'on any date within the next ten days' ... did not make 'time of the essence'..."**
>
> Latora v Ferreira

Standing to Seek Review of Site Plan Approval Based Upon Interest in Protecting the Ecological Health of a Body of Water Adjacent to Petitioner's Property

Petitioners had standing to seek review of a planning board's site plan approval. Petitioners, who lived one half mile from the site, alleged "direct harm, injury that is in some way different from that of the public at large … . Their allegations that the approved construction project will harm their regular use, enjoyment, and interest in protecting the ecological health of Stony Brook Harbor, which is adjacent to their property, are sufficient to confer standing …". **Matter of Shepherd v Maddaloni, 2011-09750, Index No. 7867/11, 2nd Dept. 2-27-13**

Employment Law

At Will Employee Can Not Use "Fraudulent Inducement" Theory Re: Acceptance-of-Employment Offer

Plaintiff brought a cause of action for "fraudulent inducement" alleging she accepted employment with defendant hospital based on a false claim the hospital had "passed" a survey related to accreditation when, in fact, it had received only a

"conditional accreditation status." The Second Department determined that the fraudulent inducement cause of action must be dismissed because plaintiff was an at-will employee. "The at-will employment doctrine … bars a cause of action sounding in fraudulent inducement, even where the circumstances pertain to a plaintiff's acceptance of an offer of a position rather than his or her termination …". The Second Department agreed with the trial court that the breach of contract cause of action should not be dismissed, but the Court dismissed the punitive damages aspect of the breach of contract cause of action because punitive damages do not attach to purely private wrongs. **Guido v Orange Regional Medical Center, 2011-08527, Index No. 13123/10 2nd Dept. 1-23-13**

"[A]n arbitrator's rulings, unlike a trial court's, are largely unreviewable ..."

Matter of Arbitration

Full-Time Employment, No Matter How It Is Labeled, Counted Toward Teacher Seniority

In a full-fledged opinion by Justice Peradotto, the Fourth Department determined that a teacher, for seniority purposes, deserved credit for the entire period during which she taught full-time, no matter how the type of employment was labeled (per diem, substitute, probationary, etc.). Although the teacher technically was asked to "resign" until she passed a particular exam, the fact that she continued to work full-time under in a different employee-category was determinative. **Matter of Alessi v Board of Education, Wilson School District, et al, 1380, CA 12-0119 4th Dept. 2-8-13**

Arbitration

Arbitrator's Rulings Largely Unreviewable

An arbitrator's interpretation of a collective bargaining agreement was vacated by the trial court. The Fourth Department reversed and confirmed the arbitration award. The decision includes a substantive discussion of the criteria that must be met before an arbitration award can be disturbed by a court. "[A]n arbitrator's rulings, unlike a trial court's, are largely unreviewable…". An arbitrator's interpretation of a contract may be set aside "only if the [arbitrator] gave a completely irrational construction to the provisions in dispute and, in effect, made a new contract for the parties…". **Matter of the Arbitration between Professional, Clerical, Technical, Employees Association and Board of Education for Buffalo City School District, 1317, CA 12-01143 4th Dept. 2-1-13**

Labor Law

"Open and Obvious" Nature of Defect Does Not Negate Duty to Keep Premises Safe

Plaintiff brought a Labor Law and common law negligence action based upon the allegation that a 1 1/2 inch depression in a marble step at the Buffalo City Hall caused him to slip. At the time of the accident, plaintiff was employed by a subcontractor which had been hired by defendant company. The defendant company claimed on appeal that its duty to maintain the premises in a safe condition was obviated by the open and obvious defect in the stair. The Fourth Department noted that the fact that the defect was "open and obvious" speaks only to plaintiff's comparative negligence, and does not negate the defendant's duty to keep the premises reasonably safe. The Fourth Department went on to hold that the defendant company "failed to establish as a matter of law that the hazard posed by the stair was open and obvious and that they had no duty to warn plaintiff of that tripping hazard." **Landahl v City of Buffalo and U & S Services, Inc., 1333, CA 12-01208 4th Dept. 2-1-13**

Knowledge of Dangerous Condition May Make Owner Liable Even Where Owner Exercises No Supervisory Control Over Contractor's Operation

" 'It is settled law that where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attached to the owner under the common law or under section 200

of the Labor Law …'. Defendant, however, may be liable for common-law negligence or the violation of Labor Law [section] 200 if it 'had actual or constructive notice of the allegedly dangerous condition on the premises which caused the … plaintiff's injuries, regardless of whether [it] supervised [plaintiff's] work' …". **Ferguson v Hanson Aggregates New York, Inc. 1460 CA 12-00596 4th Dept. 2-1-13**

> **"Request for a missing witness charge must be made when it is learned the witness will not be called, not after the close of proof."**
>
> Midstate Mutual Insurance Co.

Workers' Compensation

"Alter Ego" of Entity Which Employed Plaintiff Protected by Worker's Compensation Law

"The protection against lawsuits brought by injured workers that is afforded to employers by Workers' Compensation Law [sections] 22 and 29(6) also extends to entities that are alter egos of the entity which employs the plaintiff …". **Quizhpe v Luvin Construction Corp., 2012-01175, Index No. 21761/06 2nd Dept. 2-6-13**

Trial Procedures

Missing Witness Charge Must Be Requested When It Is Known Witness Will Not Testify

Request for a missing witness charge must be made when it is learned the witness will not be called, not after the close of proof. **Midstate Mutual Insurance Co v Camp Road Transmission, Inc., 1462, CA 12-00961 4th Dept. 2-1-13**

Inconsistent Interrogatory Answers Do Not Support A Judgment

No judgment can be entered based upon inconsistent interrogatory answers and general verdict. The only remedy is for the trial judge to instruct the jury to keep deliberating or order a new trial (CPLR 4111 (c)). **Applebee v County of Cayuga, 1388, CA 11-02090 4th Dept. 2-8-13**

Mistrial on Motion by Prosecution Precluded Retrial

The prosecution moved for a mistrial based on defense counsel's improper questioning of a witness in defiance of the court's instructions. The court granted the mistrial. The First Department determined that the defendant could not be retried. "When the court declares a mistrial on the prosecution's motion and over the defendant's objection, a retrial is precluded unless 'there is a manifest necessity for [the mistrial], or the ends of public justice would otherwise be defeated' …" The First Department felt that defense counsel's conduct, while blameworthy, could have been adequately addressed by alternative measures and, therefore, there was not a sufficient basis in the record for a mistrial. **Matter of Morris v Livote, 4334/10, 9012-5107, 1st Dept. 2-21-13**

Freedom of Information Law

Home Addresses of Handgun Licensees and Hate Crime Victims Not Released

In a Freedom of Information Law (FOIL) case brought by the New York Times against the City of New York Police Department, the First Department determined several important procedural aspects of a FOIL request including the proper vehicle to address an untimely response or ruling (Article 78), the proper vehicle for hybrid FOIL and declaratory relief (combined petition and complaint), and the "futility exception" to the exhaustion of administrative remedies applies to FOIL requests. With respect to the substance of the FOIL request, the First Department ruled that the home addresses of handgun licensees and the home addresses of hate crime victims should not be released. **New York Times Company v City of New York Police Department, 7994, 116449/10 1st Dept. 2-5-13**

Defamation

Journalist Deemed "Limited Public Figure"

A defamation complaint was dismissed because the plaintiff, a journalist, was deemed to be a "limited public figure," and there was no showing the challenged statements were made with "actual malice or gross irresponsibility." The First Department noted that the statement which included the word "liar" was likely to be understood as opinion, not fact. **Farber v Jeffreys, 9297, 106399/09 1st Dept. 2-19-13**

Res Judicatta/Collateral Estoppel

Doctrines Do Not Apply to "Nominal Parties" or to Prior Proceedings With Lower Standard of Proof

This decision includes a clear discussion of the doctrines of res judicata and collateral estoppel, the (non)application of those doctrines to a "nominal party," and the (non)application of those doctrines to a prior proceeding with a lower standard of proof. **Matter of Sherwyn Toppin Marketing Consultants, Inc. v New York State Liquor Authority, 2012-01119, Index No. 24980/11 2nd Dept. 2-6-13**

Trusts and Estates

Rights of Adopted Children

In a full-fledged opinion by Justice Austin, the First Department determined, as a case of first impression, an adopted child of the decedent should share in trusts created by the decedent even though the decedent's wife surrendered the child for a second adoption eight years after the adoptive father's death and the admission of his will to probate. The opinion includes a discussion of the rights of adopted children in this context. **Matter of Svenningsen, 2010-11057, 2010-11113, 2010-11114 2nd Dept. 2-6-13**

Question of Fact Existed About Whether Lost or Destroyed Will Had Been Revoked

A question of fact precluded summary judgment denying probate where there was evidence the decedent did not intend to revoke a will that could not be found after her death. There is a presumption that a will that was last in decedent's possession but can not be found after death has been revoked. But in this case there was evidence that the decedent was, close in time to her death, taking steps to dispose of her property in accordance with her will, which expressly disinherited one of her four children. **Matter of DiSiena, et al, 515209, 3rd Dept. 2-28-13**

Civil Procedure

Failure to Serve In Manner Stated in Order to Show Cause Is a Jurisdictional Defect

"The method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with …". **US Bank National Association v Feliciano, 2012-0553, Index No. 3540/09 2nd Dept. 2-20-13**

> **"There is a presumption that a will that was last in decedent's possession but can not be found has been revoked."**
>
> Matter of DiSiena

Relation Back Doctrine Applied to Causes of Action Otherwise Time-Barred

The Third Department applied the "relation back" doctrine (see CPLR 203(f)) to allow the amendment of a complaint to include causes of action that otherwise would have been time-barred. **US Bank National Association v Gestetner, et al, 514808 3rd Dept. 2-14-13**

Order Not Appealable/Did Not Affect Substantial Right

No appeal as of right lies from an order for an in camera inspection of documents (to address a discovery request) where the inspection had not yet been conducted. "Inasmuch as the order does not affect a substantial right of plaintiff, no appeal as of right lies therefrom…". In addition, the Third Department determined that the facts alleged would not support an application for permission to appeal. **Soloman v Meyer. 515208 3rd Dept. 2-21-13**

> **"...records pertaining to the routine inspection, maintenance and calibration of breathalyzer machines ... are nontestimonial ..."**
>
> People v Pealer

Constructive Trust

Proof Requirements for Constructive Trust

In this case the Second Department included a clear discussion of the elements of proof necessary to create a constructive trust: "(1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment…". **Henning v Henning, 2011-09955, Index No. 11901/11 2nd Dept. 2-20-13**

Administrative Law

Right to Cross-Examine Witnesses in Quasi-Judicial Administrative Hearing

The Third Department held that a reversal of the NYS Office of Victim Services determination was required because the respondent Office heard the testimony of two witnesses in the absence of the petitioner, thereby depriving her of her right to cross-examine witnesses, a right which applies to a quasi-judicial administrative hearing. **Matter of Barber v NYS Office of Victim Services, 513256 3rd Dept. 2-14-13**

Environmental Law

Environmental Group Did Not Have Standing to Contest Wal-Mart's Stormwater Pollution Prevention Plan

The Supreme Court affirmed a decision by Judge Teresi, which dismissed a petition commenced by the Clean Water Advocates of New York (petitioner) that challenged the Department of Environmental Conservation's acceptance of a stormwater pollution prevention plan (Plan) submitted by Wal-Mart Real Estate Business Trust and Wal-Mart Stores (Wal-Mart). The plan is part of a proposal to construct a Wal-Mart Supercenter in Lockport, New York. The Court ruled that the petitioner lacked standing to bring a CPLR article 78 proceeding because (1) the petitioner did not demonstrate an "injury-in-fact"; and (2) the petitioner failed to demonstrate that the Plan would cause direct harm to its members in some way different from the public at large. **Clean Water Advocates of New York, Inc. v. New York State Department of Environmental Conservation, 514924 3rd Dept. 2-21-13**

COURT OF APPEALS

Criminal Law

Breathalyzer Maintenance and Calibration Records are Nontestimonial/Vehicle Stop Based on Presence of College Sticker on Back Window Upheld –Judge Pigott , in a Dissent, Would Have Found the Vehicle Stop Unreasonable and Granted Suppression

The Court of Appeals determined the "records pertaining to the routine inspection, maintenance and calibration of breathalyzer machines can be offered as evidence in a criminal trial without producing the persons who created the records. …[S]uch records are nontestimonial…" Judge Pigott agreed with that "Confrontation Clause analysis" but wrote a dissent about the nature of the vehicle stop that led to the DWI arrest. The suppression court had ruled that the stop was not supported by probable cause "but for … a Finger Lakes Community College sticker in the rear window…". Apparently such a sticker violates Vehicle and Traffic Law section 375 (1)(b)(i). Judge Pigott noted that college stickers are common, the statute is rarely if ever enforced, and stopping a car

because of a sticker is "not objectively reasonable." Judge Pigott would have suppressed the evidence which arose from the stop. **People v Pealer, No. 9, Court of Appeals 2-19-13**

Defendant's Behavior Did Not Justify Arrest for Disorderly Conduct

The defendant's arrest for "disorderly conduct" was not supported by probable cause. Specifically, the proof was insufficient to support the "public harm" element of the offense. "During daylight hours on a public street, defendant made two abusive statements claiming harassment to a police officer who was seated in a patrol car. …[T]he public outburst was extremely brief, lasting about 15 seconds. The statements were not accompanied by menacing conduct … . And there is no basis to infer that [the officer] felt threatened by the statements." The "risk to public order" was not sufficient to justify the arrest. **People v Baker, No. 16, Court of Appeals 2-7-13**

"...arrest for disorderly conduct not supported by probable cause...the proof was insufficient to support the 'public harm' element of the offense..."

People v Baker

Consecutive Nature of Sentence is Collateral Consequence of Conviction

…[T]he consecutive nature of defendant's sentence pursuant to Penal Law [section] 70.25 (2-a) is a collateral consequence of his conviction. …[T]he failure of the trial court to address the impact of Penal Law [section] 70.25 (2-a) during the plea colloquy does not require vacatur of the plea." **People v Belliard, No. 5, Court of Appeals 2-5-13**

SORA Hearing---Insufficient Proof of Drug or Alcohol Abuse

Proof was insufficient to demonstrate "drug or alcohol abuse" under the SORA guidelines. The SORA assessment was therefore improper. **People v Palmer, People v Long, Nos. 14 & 15, Court of Appeals, 2-12-13**

Family Law

Father Estopped from Denying Paternity

Before a party can be estopped from denying paternity the court must be convinced applying equitable estoppel is in the best interest of the child. Here the child was eight years old, knew the respondent as her father, with his encouragement, and relied on respondent to be her father. Family Court's finding the respondent was equitably estopped from asserting nonpaternity was correct. **Commissioner of Social Services v Julio, J., No. 57, SSM 44, Court of Appeals, 1-10-13**

Zoning

Check Cashing Business Could Not Be Excluded by Zoning Measure

A zoning measure that prohibited check cashing establishments in a town's business district was invalid. Zoning is concerned with the use of the land, not with the identity of the user. The Town did not try to show and did not argue that check cashing services are in the same category as "adult entertainment" uses which have been found to have "negative secondary effects" on the surrounding community. The zoning measure could not be justified as a "public safety measure." **Sunrise Check Cashing and Payroll Services, Inc. v Town of Hempstead, No. 12, Court of Appeals 2-14-13**

Collateral Estoppel

Workers' Compensation Board's Determination of Duration of Disability Given Preclusive Effect in Related Personal Injury Action

"The doctrine of collateral estoppel is applicable to determinations of quasi-judicial administrative agencies such as the" Workers' Compensation Board with respect to "findings of fact that are necessary for an administrative agency to reach." Here the Workers' Compensation Board's determination of the duration of the work-related injury was given preclusive effect in a related personal injury action. Judge Pigott wrote a strong dissent, arguing in part that the finding was necessarily a mixture of fact and law, not subject to the collateral estoppel principle. **Sunrise Cashing and Payroll Services, Inc. v Town of Hempstead, No. 12, Court of Appeals 2-14-13**

Federal Courts Reject Efforts to Curb Water Pollution

By: Gregg Freeman

Significant Federal District Court and U.S. Supreme Court rulings have been made recently regarding stormwater-runoff-related lawsuits. Stormwater runoff is surface water from rain and melting snow that becomes heavily polluted as it flows through urban areas and construction zones. Thousands of storm drains collect this polluted water, transport it through a series of channels and pipes, and discharge it into nearby waterbodies. This "discharge" of a "pollutant" is the issue at heart in both of the cases discussed below. On January 3, 2013, the U.S. District Court for the Eastern District of Virginia held for the first time that the Environmental Protection Agency cannot regulate stormwater as a "pollutant" under the Clean Water Act (CWA).[1] In addition, on January 8, 2013, the U.S. Supreme Court reversed a decision by the Ninth Circuit Court of Appeals, which last year ruled that Los Angeles County was liable for violating the CWA.[2] These two cases could further jeopardize the health of our nation's waterways.

Stormwater runoff is one of the leading sources of water pollution. As rain and snowmelt flow over impervious surfaces created by buildings and pavement, it collects several different types of pollutants and discharges them into nearby waterways via storm sewer systems. Stormwater often includes lead, zinc, cadmium, chromium, mercury, copper, excessive nutrients, pesticides, bacteria (E. coli and fecal coliform), hydrocarbons, vehicle byproducts, and sediment.[3] These pollutants, as well as the unnaturally large volumes of excess stormwater, increase erosion from the land, and devastate entire fish, insect, and aquatic plant populations. Polluted stormwater runoff has also been linked to chronic and acute illnesses in humans, including: acute gastrointestinal illnesses, ear and eye discharges, skin rashes, diarrhea and paralytic illnesses, and disruption of hormonal systems.[4]

As mentioned above, stormwater runoff is collected by storm drains and is transported through pipes and channels called Municipal Separate Storm Sewer Systems (MS4s). Because of the pollutants that MS4s carry, as well as the fact that MS4s qualify as "point sources," the Clean Water Act (CWA) requires municipalities to obtain National Pollution Discharge Elimination System (NPDES) permits in order to release stormwater into waters of the United States. NPDES permits mainly consist of effluent limits, which control discharges of pollutants, as well as monitoring and reporting requirements that determine compliance with permit conditions. The CWA also requires states to develop lists of impaired waters and to create Total Maximum Daily Load's (TMDLs) in order to calculate the maximum amount of a pollutant that a water body can receive and still meet water quality standards.[5]

The U.S. District Court for the Eastern District of Virginia recently ruled in *Virginia Dep't of Transp. v. U.S. Environmental Protection Agency*, that the EPA cannot regulate stormwater as a "pollutant" under the CWA. The lawsuit began after the EPA established a TMDL which limited the flow rate of stormwater for the Accotink Creek. The TMDL was designed to use stormwater as a "surrogate" in order to limit the amount of sediment (which is classified as a pollutant under the CWA) entering the waterway. After applying the first step of the two-step analysis set forth in *Chevron, U.S.A., Inc. v. NRDC, Inc.,* the Court determined that there is no ambiguity in what Congress identified as a "pollutant" and since stormwater runoff is not defined

as a pollutant, the EPA has no authorization to regulate it via TMDL.[6] The Court cited *Friends of the Earth, Inc. v. Environmental Protection Agency,* where the U.S. Court of Appeals for the District of Columbia Circuit rejected a TMDL issued by the EPA that expressed the maximum load of certain pollutants in terms of annual quantities instead of daily loads. The court noted that just as the EPA exceeded its statutory authority by issuing a seasonal TMDL instead of a daily load, the EPA has no authority to establish a TMDL for stormwater, which is not classified as a pollutant.[7]

Within the same week, the U.S. Supreme Court reversed a decision by the Ninth Circuit Court of Appeals, which last year ruled that Los Angeles County was liable for violating the terms of its NPDES permit. After documenting hundreds of water quality exceedances at mass emissions stations on four different rivers, the Natural Resource Defense Council (NRDC) and Santa Monica Baykeeper filed a citizen suit against the Los Angeles County Flood Control District (District) in 2008. The two environmental organizations argued that the District had violated the terms of its NPDES permit, and therefore the Clean Water Act, by discharging stormwater runoff with exceeding levels of pollutants into navigable waterways from MS4s.

In 2010 the District Court granted summary judgment in favor of the District, holding that they could not be held liable for the exceedances without presenting evidence of who was responsible for the stormwater discharge. NRDC quickly appealed to the Ninth Circuit Court of Appeals, where two issues were addressed: (1) whether exceedances at mass-emission stations constitute permit violations; and (2) whether there was any evidence that showed that the District had discharged stormwater that caused or contributed toward water quality violations.[8] The Court held that monitoring stations within portions of the MS4 owned and operated by the District detected pollutants in excess of the amount outlined in the NPDES permit and that any violation in allowable discharges is a violation of the CWA. The court also held that there was evidence of a discharge because the two rivers are bodies of water that are distinct from the MS4 above these monitoring stations.[9]

The District appealed this ruling and the U.S. Supreme Court granted certiorari based on the single issue whether the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway qualifies as a "discharge of pollutants" under the CWA. The Supreme Court noted that the Ninth Circuit had erroneously come to the conclusion that the MS4s were distinct from the two rivers. Because of this, the Court held that since the water flowed out of a concrete channel *within* a river, there was no "discharge of a pollutant." The Court cited *South Florida Management District v. Miccosukee Tribe,* where the U.S. Supreme Court held that a water transfer of polluted water from a canal, through a pump station, and into a reservoir did not count as a discharge of pollutants under the CWA. The NRDC insisted that "the exceedances detected at the instream monitoring stations are by themselves sufficient to establish the District's liability under the CWA for its upstream discharges." The Court refused to address this issue, reversed the judgment of the Court of Appeals, and remanded the case.[10]

The two lawsuits discussed above could further jeopardize the health of our nation's waterways. Although the ruling in *Virginia Department of Transportation v. Environmental Protection Agency* only applies to the Eastern District of Virginia, the decision could spur a chain of reaction in other jurisdictions where the EPA has required increased TMDL standards. In addition, this case might affect the development of EPA's planned Post-Construction Stormwater Rule, which also uses stormwater as a "surrogate" for various pollutants.[11] The Court in *Los Angeles County Flood Control District v. Natural Resources Defense Council* did not absolve Los Angeles County of liability for pollution exceedances. However, they did fail to

address NRDC's main argument, that proof of exceedances detected is enough evidence to hold the District liable under the CWA. Opponents to stormwater pollution control claim that they are saving taxpayers millions of dollars by preventing improvements in stormwater runoff infrastructures. Although these projects can be quite expensive, inaction will prove to be the much more costly alternative.

[1] No. 1:12-CV-775 (E.D. Va. Jan 3, 2013) (hereinafter, VDOT v. EPA)
[2] 133 S.Ct. 710 (Jan 8, 2013) (hereinafter, LA County v. NRDC)
[3] Oregon Environmental Council. *Chapter 1: Impacts of Urban Stormwater Runoff.* Available at http://www.oeconline.org/our-work/rivers/stormwater/stormwater%20report/impacts
[4] Gaffield et al. 2003. American Journal of Public Health. *Public Health Effects of Inadequately Managed Stormwater Runoff, Vol.93, No.9.*
[5] Environmental Protection Agency. Office of Wastewater Management – Water Permitting. *Water Permitting 101.* Available at http://www.epa.gov/npdes/pubs/101pape.pdf
[6] See *VDOT v. EPA*, at 9.
[7] See id. at 6.
[8] 673 F.3d 880 (July 13, 2011) (Hereinafter NRDC v. LA County).
[9] See id. at 900.
[10] LA County v. NRDC at. 713.
[11] Holland & Knight. 2013. *Court Holds for First Time That EPA Cannot Regulate Stormwater as a Pollutant under the Clean Water Act.* Available at http://www.hklaw.com/publications/court-holds-for-first-time-that-epa-cannot-regulate-stormwater-as-a-pollutant-under-clean-water-act-01-09-2013/

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How Lawyers Representing Guantanamo Detainees Defeated Congress' Repeated Attempts To Eliminate Habeas Corpus

By: Bruce Freeman

[Based on "From Guantanamo to Berlin, Protecting Human Rights after 9/11," by Michael Ratner, in The United States and Torture, Cohen, Marjorie, Ed., NYU Press, 2011. (hereinafter "Ratner")]

In a 2009 article, Michael Ratner, an attorney who was then president of the Center for Constitutional Rights, explained how three United States Supreme Court cases, brought between 2004 and 2008, pushed back on and ultimately defeated Congress' repeated attempts to strip the writ of habeas corpus from the Guantanamo detainees.

"Habeas corpus" means every person who is imprisoned "has the right to go into court and say to the government: 'Tell me why you are detaining me and give me the legal justification.' " (Ratner, p. 207)

"The writ appeared in English law several centuries ago, became 'an integral part of our common-law heritage' by the time the Colonies achieved independence, … and received explicit recognition in the Constitution, which forbids suspension of '[t]he Privilege of the Writ of Habeas Corpus … unless when in Cases of Rebellion or Invasion the public Safety may require it.' ". Rasul v Bush, 542 US 466 (2004) at pp. 473-474.

" 'At its historical core,' " the Supreme Court has explained, " 'the writ of habeas corpus has served as a means of reviewing the legality of Executive detention …' ". (Rasul v Bush, supra, at p. 474).

In the first of the trilogy of "Guantanamo-detainee" cases, the Supreme Court avoided the constitutional question and considered whether the statutory provision which gives federal district courts the authority to hear applications for habeas corpus (28 USC section 2241) could be invoked by foreign nationals held at Guantanamo Bay Naval Base in Cuba.

Ruling in favor of the detainees, Justice Stevens wrote:

> In the end, the answer to the question presented is clear. Petitioners contend they are being held in federal custody in violation of the laws of the United States. No party questions the District Court's jurisdiction over petitioners' custodians. … Section 2241 requires nothing more. We therefore hold that [section] 2241 confers on the District Court jurisdiction to hear petitioner's habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base. Rasul v Bush, supra, at pp. 483-484.

Responding to Rasul, which had been decided solely on statutory grounds, the Bush administration presented, and Congress passed, "The Detainee Treatment Act" of 2005 which "eliminated the [statutory] right of habeas corpus [for the detainees]." (Ratner, p. 208)

Specifically, "The Detainee Treatment Act" amended section 2241 by adding the language: "… no court, justice or judge shall have jurisdiction to hear or consider … an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba …".

In the second of the trilogy, Hamdan v Rumsfeld, 548 US 557 (2006), the Supreme Court was presented with the narrow question whether the amended section 2241 applied retroactively, thereby depriving the Supreme Court of jurisdiction to hear the case.

The Hamdan Court determined the amendment did not apply retroactively. Therefore, the habeas petitions already in the pipeline, including those brought by the petitioners in Hamdan, could once again go forward. (Hamdan v Rumsfeld, supra, at p. 584).

Congress immediately reacted to the Supreme Court's ruling:

> [This time] they stripped habeas corpus retroactively and prospectively from everyone at Guantanamo, eliminating the right to habeas corpus for all detainees. They went even further to say that no non-citizen anywhere in the world who has been classified as an enemy combatant by the president has a right to habeas corpus. This exceeded the bounds of Guantanamo, as the president could now arrest even a permanent resident in the United States … and deny him any right to habeas corpus. (Ratner, p. 208)

Because Congress had now completely blocked habeas relief for the detainees by statute, the purely constitutional question was forced to the surface in the next case to reach the Supreme Court.

In Boumediene v Bush, 553 US 723 (2008), the third in the trilogy of Guantanamo-detainee cases, the Supreme Court was asked to consider whether the requirements of the "Suspension Clause" in the Constitution had been met. In other words, the Supreme Court was asked to determine whether the statute which stripped the right of habeas corpus from the detainees was constitutional.

The Suspension Clause, in full, reads: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it."

As Justice Kennedy described the issue and ruling in Boumediene:

> Petitioners present a question not resolved by our earlier cases relating to the detention of aliens at Guantanamo: whether they have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause … . We hold these petitioners do have the habeas corpus privilege. Congress enacted a statute, the Detainee Treatment Act of 2005 …, that provides certain procedures for review of the detainee's status. We hold that those procedures are not an adequate and effective substitute for habeas corpus. Therefore … 28 USC [section] 2241 (e) operates as an unconstitutional suspension of the writ. Boumediene v Bush, supra, at pp 733-734.

Over the course of four years, then, lawyers for Guantanamo detainees managed to bring three cases to the Supreme Court.

Representing unpopular clients, and in the face of strong opposition by the Bush administration and Congress, these lawyers convinced the Supreme Court that non-citizen detainees allegedly linked to terrorism could not be stripped of the right to have the legality of their detention reviewed.

Michael Ratner was one of the lawyers for the petitioners in Rasul v Bush, the first of the trilogy. He described with great pride how the legal community responded after the initial Supreme Court victory in Rasul:

> Immediately after the Rasul victory began one of the great pages of legal history in the United States. First, we obtained the names of many, many more Guantanamo detainees. Our staff tracked down their families … and identified almost all 400 – 500 detainees at Guantanamo in 2004. Then the law firms started stepping forward to take on cases pro bono. Today, almost every major law firm in the country represents detainees. We now coordinate a group of roughly 600 lawyers from across the country, most of whom have three or four clients each. (Ratner, p. 207)

This is the legal profession at its very best.

The complete story of Salim Hamdan, the detainee who brought the second case in the trilogy, appears in a recent book by Jess Bravin, the Supreme Court correspondent for the *Wall Street Journal* (Terror Courts, Rough Justice at Guantanamo Bay, Yale University Press, 2013).

Mr. Hamdan is a free man today, having been sentenced to only an additional five months after his trial before a military commission. After his release from Guantanamo, his lawyers took the validity of his conviction on appeal to the D.C. Circuit court. The circuit court unanimously reversed, finding that the crime underlying Hamdan's conviction was not a war crime, and, therefore, the military commission did not have the power to adjudicate it.

Thanks to his lawyers, Mr. Hamdan is not only free, he has no criminal record.

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