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APPELLATE DIVISION

INTENTIONAL TORTS

FEATURED DECISION

Elements of Malicious Prosecution, False Arrest, False Imprisonment, Libel, Slander and Tortious Interference with a Prospective Business Advantage Succinctly Explained

In affirming Supreme Court, which dismissed some causes of action and allowed others to stand, the Fourth Department succinctly explained the elements of several intentional torts, including malicious prosecution, false arrest, false imprisonment, libel, slander and tortious interference with a prospective business advantage (note that issuance of an appearance ticket does not amount to false arrest or imprisonment):

Malicious prosecution:

"The elements of the tort of malicious prosecution are:(1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice" . ;. . "In the context of a malicious prosecution cause of action, probable cause 'consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty' "…Actual malice "means that the defendant must have commenced the . . . criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served"… . * * *

False arrest, false imprisonment:

It is well settled that a plaintiff's appearance in court as a result of the issuance of a criminal summons or appearance ticket is insufficient to support a claim of false arrest or false imprisonment…, and here "the record establishes that plaintiff was never arrested or held in actual custody by any law enforcement agency as a result of the charge . . . filed against [him]" … .

FROM THE EDITOR

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

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Libel:

…W]e conclude that the court properly denied that part of their motion seeking to dismiss the libel cause of action (eighth cause of action). [Defendant's] statement that plaintiff made "several threats toward[] [defendant] and [her] residence," which was contained in her supporting deposition that she provided to the police, "tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or [to] induce an evil opinion of him in the minds of right-thinking persons" … .Moreover, contrary to the contention of the …defendants, proof of special damages is not required for libel on its face or libel per se…

Slander:

The two allegedly defamatory statements pleaded in the complaint do not constitute slander per se because they do not "charg[e] plaintiff with a serious crime" or "tend to injure [plaintiff] in his . . . trade, business or profession"… .Contrary to the contention of plaintiff, stalking in the fourth degree does not constitute a "serious crime" for purposes of slander per se … . "To be actionable as words that tend to injure another in his or her profession, the challenged statement must be more than a general reflection upon [the plaintiff]'s character or qualities. Rather, the statement must reflect on [the plaintiff's] performance or be incompatible with the proper conduct of [the plaintiff's] business"… .

Tortious Interference with Prospective Business Advantage:

"To establish a claim for tortious interference with prospective business advantage, a plaintiff must demonstrate that (a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship" (…see PJI 3:57). As relevant here, a plaintiff is required to identify a specific customer that the plaintiff would have obtained "but for" the defendant's wrongful conduct … . Although many of plaintiff's assertions of interference are too vague to support a claim of tortious interference with prospective business relations, plaintiff testified at his deposition that a particular couple allegedly changed their minds about purchasing a lot in plaintiff's subdivision because of the conduct of the … defendants. We conclude that such testimony is sufficient to raise a question of fact whether the … defendants tortiously interfered with plaintiff's prospective business relations … . . **Zetes v Stephens, et al, 406, 4th Dept 7-5-13**

Conspiracy to Commit Tort Not Recognized in New York

In reversing Supreme Court's grant of a default judgment, the Fourth Department noted that "New York does not recognize civil conspiracy to commit a tort as an independent cause of action." **Piatt, PA…v Horsley…, 652, 4th Dept 7-19-13**

EVIDENCE/NEGLIGENCE

Erroneous Admission of Hearsay and Expert Testimony Re: ANSI Standards Required Reversal of Million Dollar Verdict in Slip and Fall Case

In reversing a million dollar verdict in a slip and fall case, the Second Department determined that a hearsay statement ("oh my God, someone else fell") and expert testimony about the floor mats not complying with American National Standards Institute [ANSI] standards should not have been admitted:

> …[T]he security guard's statement did not qualify as a present sense impression or an excited utterance. The statement was not admissible as a present sense impression because it is clear that the statement was not made as the security guard perceived the happening of the accident, and there was no evidence that corroborated his statement… . Regarding the excited utterance exception, the plaintiff was required to demonstrate that "at the time of the statement the declarant was under the stress of excitement caused by an external event sufficient to still [his] reflective faculties and had no opportunity for deliberation"… . Here, the plaintiff failed to meet that burden. Therefore, it was error to admit the hearsay testimony concerning the out-of-court statement of the security guard.
>
> The Supreme Court also erred in allowing the plaintiff's expert to testify, in effect, that the defendants' conduct regarding the placement of mats was negligent because it allegedly did not comply with regulations promulgated by the American National Standards Institute (hereinafter ANSI). "[ANSI] standards do not constitute statutes, ordinances, or regulations"… . Although the court did not charge the jury regarding ANSI standards, by permitting such testimony, it allowed the jury to improperly speculate that the defendants' conduct should be measured against a higher standard of care than is required under the common law… . **Gonzalez v City of New York, 2013 NY slip Op 05614, 2nd Dept 8-14-13**

NEGLIGENCE

Res Ipsa Loquitur Applied to Garage Door Suddenly Coming Down

The First Department explained the application of res ipsa loquitur, where it was alleged a garage door suddenly came down on plaintiff's head, as follows:

> The motion court correctly determined that res ipsa loquitur applies in this action involving an accident that occurred, according to plaintiff's testimony, when a garage door suddenly fell and struck him on the head, since this is the type of event that does not normally occur in the absence of negligence … . Notwithstanding defendants' contentions that others could have had access to the garage door, plaintiff demonstrated sufficient exclusivity of control. "[R]es ipsa loquitur does not require sole physical access to the instrumentality causing the injury and can be applied in situations where more than one defendant could have exercised exclusive control" … . **Hutchings v Yuter, 2013 NY Slip Op 04988, 1st Dept 7-2-13**

Testimony that Bus Company Held to Higher Standard Required Reversal

In an action based on the allegation a bus was traveling too close to the curb when it struck plaintiff, the First Department (over a dissent) determined testimony that bus drivers' operating criteria "are much higher than anyone else's, so I would look at the accident by our standards a lot different from anyone else" required a new trial on liability:

> The admission of testimony that holds a defendant to a higher standard of care than required by common law is clearly erroneous…. Moreover, the admitted testimony cannot be considered harmless error because it concerns the ultimate issue to be decided and corroborates unsupported theories of liability proffered by plaintiff's expert, thereby lending them an unwarranted air of authority. It is well settled that "the duty owed by one member of society to another is a legal issue for the courts"…. Only after the extent of a duty has been established as a matter of law may a jury resolve — as a question of fact — whether a particular defendant has breached that duty with respect to a particular plaintiff…. As this Court has noted numerous times, "Where the offered proof intrudes upon the exclusive prerogative of the court to render a ruling on a legal issue, the attempt by a plaintiff to arrogate to himself a judicial function under the guise of expert testimony will be rejected"…. **Williams v NYC Tr Auth, 2013 NY Slip Op 04975, 1st Dept 7-2-13**

Leaky Condominium Roof Supported Negligence and Nuisance

In an action based on a leaky roof in a condominium, the First Department determined plaintiffs were entitled to summary judgment on the negligence cause of action against the sponsor and the cause of action for nuisance, also sounding in negligence, should not be dismissed:

> The sponsor owed a nondelegable duty to plaintiffs to keep the condominium, including its roof, in good repair (see Multiple Dwelling Law § 78[1];…) . The sponsor breached that duty: Its principal… admitted that the original roof that the sponsor had caused to be installed did not render the condominium watertight and that there were instances of water infiltration into plaintiffs' unit that needed to be addressed by the sponsor. * * *
>
> Plaintiffs are correct that nuisance can be negligent; it does not have to be intentional…. In any event, they raised a triable issue of fact whether the sponsor's allowing water to continue infiltrating their unit was intentional…. **Liberman v Cayre Synergy 73rd LLC, 2013 NY Slip Op 04996, 1st Dept 7-2-13**

Garbage on Sidewalk May Create Liability

The Second Department determined that defendant's motion for summary judgment should have been denied. The plaintiff was injured when his bicycle struck garbage and debris on a sidewalk abutting a building owned by defendants.

> New York City Administrative Code § 7-210 imposes a duty upon property owners to maintain the sidewalk adjacent to their property. That duty includes the duty to remove "dirt or other material from the sidewalk," which includes debris on the sidewalk which came from garbage bags placed on the sidewalk by the property owner (New York City Administrative Code § 7-210 [b];…). On their motion for summary judgment, the defendants bore the burden of establishing that they neither created the hazardous condition nor had actual or constructive notice of its existence…. The defendants failed to establish their entitlement to judgment as a matter of law. They failed to demonstrate that they did not create a dangerous condition, nor did they establish that they properly maintained the sidewalk as

> required by Administrative Code of the City of NY § 7-210… . **Weinberg v 2345 Ocean Assoc, LLC, 2013 NY Slip Op 05060, 2nd Dept 7-3-13**

Standard for Liability of Members of Volunteer Fire Company

In affirming the denial of plaintiff's motion for summary judgment, the Second Department explained the standard for finding liability on the part of members of volunteer fire companies:

> Members of volunteer fire companies may not be held liable for acts done in the performance of their duties in the absence of "willful negligence or malfeasance" (General Municipal Law § 205-b;…. Here, the plaintiff failed to establish, prima facie, that the manner in which [defendant]. operated the vehicle at the time of the accident constituted willful negligence or malfeasance…. **Schleger v Jurcsak, 2013 NY Slip Op 05056, 2nd Dept 7-3-13**

"Employer" of Independent Contractor Not Liable for Contractor's Alleged Negligence

The Fourth Department reversed Supreme Court and granted summary judgment dismissing claims which alleged Sirota, who worked as an independent contractor for defendant Ridgeway, was negligent in advising plaintiff to purchase "certain security and investment vehicles." The Fourth Department determined Ridgeway was entitled to summary judgment as Ridgeway had demonstrated it owed no duty of care to plaintiff to supervise Sirota (an independent contractor) because it did not direct or control Sirota's providing investment advice:

> …"[O]rdinarily, a principal is not liable for the acts of independent contractors in that, unlike the master-servant relationship, principals cannot control the manner in which the independent contractors' work is performed"… . Although there are exceptions to that general rule …, we conclude that none apply to the circumstances presented here. Although plaintiff's claim sounds in negligent supervision, one of the recognized exceptions…, it is well settled that "the mere retention of general supervisory powers over an independent contractor cannot form a basis for the imposition of liability against the principal",,, **Wendt v Bent Pyramid Productions, LLC, et al, 448, 4th Dept 7-5-13**

4 ½ Inch Drop Raised Question of Fact About Dangerous Condition and Failure to Warn

The Fourth Department determined a 4 ½ inch drop just inside the entrance to a bowling alley raised a question of fact about whether the drop was a dangerous condition, even though no building codes applied. In addition, there was a question of fact about the failure-to-warn cause of action. **Belsinger v M & M Bowling & Trophy Supplies, Inc, 558, 4th Dept 7-5-13**

Trivial Defect in Sidewalk Not Actionable/First Floor Tenant Abutting Sidewalk Not a Proper Defendant

In a sidewalk slip and fall case, over a substantial dissent, the First Department determined "a three-quarter-inch expansion joint, which was not filled to grade level, coupled with a one-fourth-inch height differential between slabs … was "trivial" and therefore not actionable as a matter of law…". Although there was evidence the width of the expansion joint exceeded the Department of Transportation construction specifications, the First Department noted there was no evidence the sidewalk was constructed with the defect. The First Department also dismissed the action against the first-floor commercial tenant of the abutting building on the ground that the tenant was not an owner within the meaning of section 7-210 of the Administrative Code of the City of New York. **Fayolle v East W Manhattan Portfolio LP, 2013 NY Slip Op 05431, 1st Dept 7-23-13**

Janitorial Schedule Alone Not Enough to Demonstrate Lack of Constructive Notice

In a slip and fall case, over a dissent, the First Department determined the defendant did not demonstrate a lack of constructive notice of a wet substance on the stairway of defendant's apartment building. Although the defendant produced evidence of a janitorial schedule, the defendant did not present any evidence the schedule was followed on the day of the accident:

> …[D]efendant submitted the deposition testimony of its superintendent about the building's regular janitorial schedule. However, it offered no evidence that the schedule was followed on the day of the accident … . Moreover, constructive notice remains an issue in this case because defendant made no showing as to when the stairway was last inspected before plaintiff's accident… .**Gautier v 941 Intervale Realty, LLC, 2013 NY Slip Op 05432, 1st Dept 7-23-13**

Dismissal of Complaint Was Too Severe a Sanction for Spoliation

The New York City Housing Authority (NYCHA) sued a security company and others based upon a fire that apparently was started by a cigarette carelessly thrown into a wastebasket. During discovery defendants requested the surveillance video. Plaintiff had reviewed the video and apparently had deleted portions of it considered unnecessary. Defendants' motion to dismiss pursuant to CPLR 3126 (spoliation of evidence) was granted and the complaint was dismissed. The First Department determined dismissal of the complaint was too severe a penalty and ordered that plaintiff be precluded from using the video as evidence. The court explained:

> As a threshold issue, NYCHA unconvincingly argues that no sanction is appropriate because litigation was not pending when the video was edited. For a spoliation sanction to be applicable, there need only be the "reasonable anticipation of litigation" … . The day after the fire, [NYCHA] was already viewing and editing the video, identifying images he thought would be relevant to determine how the fire started. These actions indicate that NYCHA may have been contemplating litigation, or at least wanted to identify the culpable person, and therefore the records were destroyed with a "culpable state of mind" … . For the purposes of a spoliation sanction, "[a] culpable state of mind . . . includes ordinary negligence"… .
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> Although NYCHA should be sanctioned for the destruction of portions of the surveillance video, the dismissal of the complaint was too harsh a remedy. Dismissing an action is "usually not warranted unless the evidence is crucial and the spoliator's conduct evinces some higher degree of culpability" … . It is a "drastic sanction" and should only be done when a party has destroyed key evidence… .
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> The record does not support defendants' contention that dismissal is required because the unredacted video is key evidence without which they will be "substantially prejudiced"… . **New York City Hous Auth v Pro Quest Sec, Inc, 2013 NY Slip Op 05429, 1st Dept 7-23-13**

Walkway Defect Trivial as a Matter of Law

In finding a one-half inch defect in a walkway was trivial as a matter of law (in a slip and fall case), the Second Department explained the legal principles as follows:

> "[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case' and is generally a question of fact for the jury" … . However, a property owner may not be held liable in damages for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip … . "In determining whether a defect is trivial, the court must examine all of the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance' of the injury'" … . "[T]here is no minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" … . "Photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable" … . **Schiller v St Francis Hosp Roslyn NY, 2013 NY Slip Op 05521, 7-31-13**

Verdict Set Aside as Irreconcilably Inconsistent (Jury Found Defective Sidewalk Was Not Proximate Cause of Plaintiff's Fall)

The Second Department, over a dissent, set aside a verdict in a slip and fall case which found that the defendant's (City of New York's) negligence was not the proximate cause of the fall. Plaintiff fell on a portion of sidewalk which "was all patched" and which had "a hole in it." The court explained:

> A jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence … . Whether a jury verdict should be set aside as contrary to the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors … . Where a jury verdict with respect to negligence and proximate causation is irreconcilably inconsistent, that verdict must be set aside as contrary to the weight of the evidence … .
>
> Contrary to the contention of the defendant City of New York, the plaintiff sufficiently identified the sidewalk defect which allegedly caused her fall … . Under the circumstances of this case, for the jury to find the City negligent for failing to repair a sidewalk defect while on notice of its existence, yet to find that this negligence was not a proximate cause of the plaintiff's injuries, was contrary to the weight of the evidence and irreconcilably inconsistent… . **Wallace v City of New York, 2013 NY Slip Op 05523, 2nd Dept 7-31-13**

No Liability for Third Party Attack Inside Apartment Building/No Evidence Defendant Aware of Alleged Door-Lock Defect

The First Department determined the defendant Housing Authority could not be held liable for a criminal attack inside plaintiff's apartment building absent proof the entry door lock was defective (and defendant had actual or constructive knowledge of the defect) or that defendant knew the door could be opened without a key:

> While an assault on a young victim is most disturbing, a possessor of land is not an insurer of the safety of those who come onto its premises … . It remains that plaintiff's injuries were the immediate and proximate result of a criminal attack committed by third parties, for whose actions the landlord is not responsible absent a failure to provide "even the most rudimentary security" of an entry door lock … . In the absence of proof that the Housing Authority contributed to the injuries sustained by plaintiff, a visitor to its premises, by failing to timely repair a "visible and apparent" defect in its front-door lock, no liability can be imposed … . **Batista v City of New York, 2013 NY Slip Op 05502, 1st Dept 7-30-13**

Proof Requirements for Lack of Constructive Notice of Dangerous Condition Explained

The Second Department reiterated the summary-judgment proof-requirements for a lack of constructive notice of a hazardous condition in a slip and fall case:

> A defendant who moves for summary judgment in a slip-and-fall or trip-and-fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition which allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it … . In order to meet its burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall … . A movant cannot satisfy its initial burden merely by pointing to gaps in the plaintiff's case … . Here, the defendant failed to establish, prima facie, that it lacked constructive notice of the hazardous condition which allegedly caused the plaintiff's fall because it offered no evidence as to when the subject stairway was last cleaned or inspected.. . **Campbell v New York City Tr Auth, 2013 NY Slip Op 05553, 2nd Dept 8-7-13**

Criteria for Accountant's Liability to Third Parties in Absence of Contractual Relationship Explained

In finding that the complaint did not state a cause of action against an accountant for negligent misrepresentations made to third parties with no contractual relationship, the Second Department explained:

> In certain circumstances, accountants may be held liable for negligent misrepresentations made to third parties with whom they have no contractual relationship, but who have relied to their detriment on inaccurate financial statements prepared by the accountant… . In order to establish such liability, the relationship between the accountant and the party must be found to approach privity, through a showing that the following prerequisites are satisfied: "(1) the accountants must have been aware that the financial reports were to be used for a particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely; and (3) there must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance"… . **Signature Bank v Holtz Rubenstein Reminick LLP, 2013 NY Slip Op 05564, 2nd Dept 8-7-13**

Plaintiff Assumed the Risk of Injury in Martial Arts Class

In reversing Supreme Court, the First Department determined the defendant, which conducted a mixed martial arts class, was entitled to summary judgment, based on the assumption-of-risk doctrine, in an action brought by a participant in the class injured when sparring with another "stockier" student. The First Department explained the relevant legal principles:

> It is well established that the doctrine of assumption of risk generally applies where the plaintiff is injured while voluntarily participating in a sport or recreational activity, and the injury-causing event is a "known, apparent or reasonably foreseeable consequence of the participation" … . The participant engaging in a sport or recreational activity "consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" … . Further, the assumption of risk doctrine considers the appreciation of risk measured "against the background of the skill and experience of the particular plaintiff" … . **Tadmor v New York Jiu Jitsu Inc, 2013 NY Slip Op 05721, 1st Dept 8-27-13**

Question of Fact Whether Defect in Basketball Court Was Concealed Precluded Summary Judgment Based upon Doctrine of Assumption of the Risk

In reversing Supreme Court, the Second Department determined there was a triable issue of fact whether plaintiff, who was injured when he tripped on part of a defunct sprinkler system while playing basketball on defendant-town's court, assumed the risks associated with using the court. The Second Department wrote:

> Here, the Town failed to satisfy its prima facie burden of establishing its entitlement to judgment as a matter of law by eliminating all triable issues of fact as to the applicability of the doctrine of primary assumption of the risk … . The evidence submitted in support of its motion, including the plaintiff's deposition testimony and photographs of the basketball court and metal cap, demonstrated that the metal cap was small, was raised only slightly above ground level, was painted the same color as the basketball court, and was difficult to see from more than a few feet away. Under these circumstances, a triable issue of fact exists as to whether the condition was concealed, and it cannot be said as a matter of law that the plaintiff assumed the risks associated with it … . **Bunn v Town of North Hempstead, 2013 NY Slip Op 05727, 2nd Dept 8-28-13**

Questions of Fact Raised Whether Negligent Diversion of Water by Private Property Owner and Negligent Repair by Town Caused Dangerous Icy-Road-Condition; Defendant Driver Lost Control of Her Car on the Ice and Collided with Plaintiffs

The Second Department determined that questions of fact existed about whether defendant abutting property owner (Gromley) and the defendant town created the icy road condition that caused defendant driver to lose control of her car, thereby allegedly injuring the plaintiffs in a collision with the school bus in which plaintiffs were riding:

> A private landowner may be liable for injuries sustained in a car accident that is proximately caused by an ice condition occurring on an abutting public roadway, where that ice condition was caused and created by the artificial diversion of naturally flowing water from the private landowner's property onto the public roadway… . … [T]he plaintiffs raised a triable issue of fact as to whether the artificially diverted water from the Gormley defendants' property contributed to the ice condition on the subject roadway that caused [defendant driver] to lose control of her car and collide with the school bus… . * * *
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> …[T]he plaintiffs raised a triable issue of fact as to whether the Town affirmatively created the condition through an act of its own negligence, and whether the Town's negligence at the time the road was repaired immediately resulted in the existence of the hazardous condition … . **Cebron v Tuncoglu, 2013 NY slip Op 05729, 2nd Dept 8-28-13**

Where Plaintiff's Vehicle Repaired to Pre-Accident Condition, No Additional Recovery for Diminution in Resale Value

Plaintiff's brand new Mercedes was damaged in an accident but was fully repaired, and the repairs were paid for by the defendants' insurance carrier. Plaintiff sought damages based upon the diminution in resale value resulting from the fact that potential buyers would be made aware of the car's involvement in the accident. The Second Department affirmed Supreme Court's dismissal of the complaint explaining that diminution in resale value is not to be taken into account:

> The defendants established that the plaintiff has no cause of action to recover the damages he seeks herein. "The measure of damages for injury to property resulting from negligence is the difference in the market value immediately before and immediately after the accident, or the reasonable cost of repairs necessary to restore it to its former condition, whichever is the lesser" … . "Where the repairs do not restore the property to its condition before the accident, the difference in market value immediately before the accident and after the repairs have been made may be added to the cost of repairs" … . However, where, as here, there is no dispute that the repairs fully restored the vehicle to its condition before the accident, and the only basis of the claim made by the plaintiff for the difference in value immediately before and immediately after the accident is not that his automobile could not be fully repaired, but, rather, that after repair the resale value would be diminished because the car had been in an accident, "the diminution in resale value is not to be taken into account" … . **Parkoff v Stavsky, 2013 NY slip Op 05737, 2nd Dept 8-28-13**

Snow Removal Contractor Owed Duty to Slip and Fall Plaintiff

The Second Department determined plaintiff in a slip and fall case was owed a duty of care by a snow-removal contractor. The Second Department explained the relevant law and its application to the facts of the case as follows:

> "As a general rule, a limited contractual obligation to provide snow removal services does not render the contractor liable in tort for the personal injuries of third parties" .. . "However, in Espinal v Melville Snow Contrs. (98 NY2d 136), the Court of Appeals identified three situations where a party who enters into a contract to render services may be said to have assumed a duty of care and thus be potentially liable in tort to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches an instrument of harm or creates or exacerbates a hazardous condition, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (id. at 140)" … .
>
> Here, the plaintiff demonstrated her prima facie entitlement to judgment as a matter of law on the issue of liability… [----] the defendant's oral agreement with the property owner constituted a comprehensive and exclusive contractual obligation for the defendant to maintain the exterior of the subject premises and to clear the parking lot and walkways of snow and ice. This was sufficient to support a duty of care running from the defendant to the plaintiff based on the defendant's displacement of the property owner's duty to maintain the premises safely… .
> **Sarisohn v Plaza Realty Servs Inc, 2013 NY Slip Op 05741, 2nd Dept 8-28-13**

School District Did Not Owe Special Duty to Plaintiff Injured in Fight After Hours on School Grounds; Failure to Lock Gate Not Proximate Cause of Injury

Plaintiff was assaulted on an athletic filed owned by defendant school district while in a group which was on the field without permission at 9:30 pm. The plaintiff alleged the school district was negligent in not providing security and in not locking the gates to the field. The Second Department determined the school district owed no special duty to the plaintiff and the failure to lock the gates was not the proximate cause of the injury:

> The "provision of security against physical attacks by third parties . . . is a governmental function . . . and . . . no liability arises from the performance of such a function absent a special duty of protection" … . This special duty arises when a municipality assumes an affirmative duty to act on behalf of a specific party, and that party justifiably relies on the direct assurances of the municipality's agents … .
>
> .. The mere provision of security does not give rise to a special duty of protection …. The District established that it did not make direct assurances regarding security to the infant plaintiff and that he did not rely on the provision of security in deciding to congregate with others on the field. * * *
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> A public entity may not escape liability for negligent acts which it performs in a proprietary capacity and which are a proximate cause of an injury which was sustained as the result of a foreseeable act by a third party … . However, the District demonstrated, prima facie, that the failure to lock the gates accessing the field was not a proximate cause of the infant plaintiff's injuries, since the assault here was not a foreseeable act. In opposition, the plaintiffs failed to raise a triable issue of fact. **Weisbecker v West Islip Union Free Sch Dist, 2013 NY slip Op 05743, 2nd Dept 8-28-13**

NEGLIGENCE/MUNICIPAL LAW

Complaint Against Town for Sewage Backup in Home Dismissed

The Fourth Department affirmed the dismissal of a negligence complaint against a town arising from the backup of sewage in plaintiffs' house. The decision includes a concise but complete explanation of the issues relevant to municipal liability for negligence:

> In an action against a municipality such as defendant, it is "the fundamental obligation of a plaintiff pursuing a negligence cause of action to prove that the putative defendant owed a duty of care. Under the public duty rule, although a municipality owes a general duty to the public at large to [perform certain governmental functions], this does not create a duty of care running to a specific individual sufficient to support a negligence claim, unless the facts demonstrate that a special duty was created. This is an offshoot of the general proposition that '[t]o sustain liability against a municipality, the duty breached must be more than that owed the public generally' " … .."The second principle relevant here relates not to an

element of plaintiffs' negligence claim but to a defense that [is] potentially available to [defendant]—the governmental function immunity defense . . . [T]he common-law doctrine of governmental immunity continues to shield public entities from liability for discretionary actions taken during the performance of governmental functions . . . [pursuant to which] '[a] public employee's discretionary acts—meaning conduct involving the exercise of reasoned judgment—may not result in the municipality's liability even when the conduct is negligent' " … .. **Middleton v Town of Salina, 604, 4th Dept 7-5-13**

Exception to Written Notice of Defect Prerequisite Did Not Apply;

Question of Fact Whether Municipality Created Dangerous Condition (Gap in Bridge-Roadway)

The Fourth Department, over a dissent, determined the exception to the written notice requirement (notice to a municipality re: a dangerous condition) did not apply, but there was a question of fact whether the municipality created the dangerous condition, a gap in the roadway on a bridge, which caused the infant plaintiff to fall off his bicycle. The Fourth Department wrote:

> Where the municipality establishes that it lacked prior written notice, the burden shifts to the plaintiff to demonstrate the applicability of an exception to the rule, i.e., that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the municipality …. The affirmative negligence exception is "limited to work by the [municipality] that immediately results in the existence of a dangerous condition" …. An omission on the part of the municipality "does not constitute affirmative negligence excusing noncompliance with the prior written notice requirement"…. We conclude that defendant met its initial burden of establishing as a matter of law that it did not receive prior written notice of any defective or dangerous condition on or near the bridge as required by Local Law No. 1 …. Viewing the evidence in the light most favorable to plaintiff, as we must …, we conclude, however, that plaintiff raised an issue of fact whether defendant created a dangerous condition that caused the accident …. **Hawlwy v Town of Ovid, 450, 4th Dept 7-5-13**

Firefighter Rule Prohibiting Negligence Suit by Injured Police Officer Applied/Action Under Municipal Law 205-e Allowed

In a full-fledged opinion by Justice Leventhal, the Second Department determined a police officer who was injured when she fell off the back of a flat bed truck while loading police barricades could not sue in negligence (based on the firefighter rule) but could sue under General Municipal Law 205-e based on an alleged violation of Labor Law 27-a (which imposes a general duty to provide a safe work environment):

Re: the applicability of the firefighter rule:

> …[T]he firefighter rule provides that "[p]olice and firefighters may not recover in common-law negligence for line-of-duty injuries resulting from risks associated with the particular dangers inherent in that type of employment" …. The rule bars a police officer's or a firefighter's recovery " when the performance of his or her duties increased the risk of the injury happening, and did not merely furnish the occasion for the injury'" … * * *
>
> While loading a flatbed truck may not be a task that is typically associated with police work, the alleged accident occurred while the plaintiff was on a police vehicle, loading police barriers, and while she was assigned to the barrier truck detail, a location and job detail to which she was exposed solely as a result of her duties as a police officer… . * * *

Re: the viability of the General Municipal Law 205-e cause of action:

> As observed by the Court of Appeals, the Legislature has, on several occasions, "sought to ameliorate the harsh effects of the [firefighter] rule" …. To that end, in 1935, the Legislature first enacted General Municipal Law § 205-a, which created a cause of action for firefighters who, while in the line of duty, are injured as a result of violations of statutes or regulations (see General Municipal Law § 205-a; L 1935, ch 800, § 2; L 1936, ch 251, § 1). In 1989, the Legislature enacted General Municipal Law § 205-e in direct response to Santangelo v State of New York (71 NY2d 393), which ,,,had extended the firefighter rule to police officers… . * * *
>
> …[T]he plaintiff has alleged that the defendants' Labor Law § 27-a(3)(a)(1) violation is a predicate for her General Municipal Law § 205-e cause of action. Section 205-e does not stand alone and must be predicated on a violation of a separate legal requirement. …[T]he Court of Appeals, in

addressing the various amendments to General Municipal Law § 205-e, has stated "that we should apply this provision expansively' so as to favor recovery by police officers whenever possible"… .

Since section 27-a provides an objective standard by which the actions or omissions of a public employer, such as the City, can be measured for purposes of liability, Labor Law § 27-a(3)(a)(1) can serve as a predicate for a section 205-e claim… . **Gammons v City of New York, 2013 NY Slip Op 05298, 3rd Dept 7-17-13**

NEGLIGENCE/LEGAL MALPRACTICE

Legal Malpractice Action Accrues When Committed, Not When Client Learns of It

The Fourth Department explained when a legal malpractice action accrues (when it is committed, whether or not the aggrieved party is aware of it):

> " 'A cause of action for legal malpractice accrues when the malpractice is committed' "…. "In most cases, this accrual time is measured from the day an actionable injury occurs, 'even if the aggrieved party is then ignorant of the wrong or injury' "…." 'What is important is when the malpractice was committed, not when the client discovered it' " … . **Elstein v Phillips Lytle, LLP, 631, 4th Dept 7-5-13**

NEGLIGENCE/LEGAL MALPRACTICE/ APPEALS

Failure to Appeal Dismissal of Underlying Medical Malpractice Action Did Not Preclude Related Legal Malpractice Action

The Fourth Department, over a dissent, allowed a legal malpractice action to go forward, finding that the plaintiff's failure to appeal the dismissal of the underlying federal medical malpractice action did not preclude the related legal malpractice action. In the federal action, the court determined a physician was an independent contractor, not a government employee, and therefore had to be named individually as a defendant. The action against the physician was dismissed as time-barred. The dissent argued "if plaintiff had been successful in his appeal of the underlying federal action, we would not have a subsequent legal malpractice case." In holding that the failure to appeal the federal ruling did not preclude the legal malpractice action, the Fourth Department distinguished a prior case, Rupert v Gates and Adams, PC, 83 AD3d 1383, relied upon by the defendants:

> We reject defendants' invitation to extend the ruling in Rupert to a per se rule that a party who voluntarily discontinues an underlying action and forgoes an appeal thereby abandons his or her right to pursue a claim for legal malpractice. …
>
> Although the precise question presented herein appears to be an issue of first impression in New York, we note that several of our sister states have rejected the per se rule advanced by defendants herein… . … [S]uch a rule would force parties to prosecute potentially meritless appeals to their judicial conclusion in order to preserve their right to commence a malpractice action, thereby increasing the costs of litigation and overburdening the court system …. The additional time spent to pursue an unlikely appellate remedy could also result in expiration of the statute of limitations on the legal malpractice claim …. Further, requiring parties to exhaust the appellate process prior to commencing a legal malpractice action would discourage settlements and potentially conflict with an injured party's duty to mitigate damages… . **Grace v Law, et al, 625, 4th Dept 7-19-13**

NEGLIGENCE/MEDICAL MALPRACTICE

Expert's Affidavit Too Speculative to Raise Question of Fact About Proximate Cause

In reversing Supreme Court and dismissing a medical malpractice complaint, the Fourth Department determined plaintiff's expert affidavit was speculative and therefore failed to raise a question of fact about whether the alleged negligence (the failure to order a particular CT scan) was the proximate cause of the injury:

> The expert contends that, if that CT scan had been performed on February 16, 2004, "then diagnosis of [decedent]'s aortic dissection . . . would, more probably than not, have been made." Significantly, however, the medical records indicate that it was a CT scan of decedent's head and chest, not a scan of his pelvis and abdomen, that revealed an aortic dissection on March 1, 2004. Thus, the opinion of plaintiff's expert that an abdominal and pelvic CT scan performed on February 16, 2004 would more likely than not have revealed an aortic dissection is speculative. **Wilk … v James, et al, 401, 4th Dept 7-19-13**

Supreme Court's Setting Aside Jury Verdict Reversed/Use of Juror-Affidavits to Correct Mistake in Verdict Okay

In a medical malpractice case, the Fourth Department reversed Supreme Court's setting aside the jury verdict which found the negligence of one defendant (Caputo) was not a substantial factor in causing plaintiff's injuries. In addition, over a dissent, the Fourth Department found the use of juror affidavits to correct a mistake in the verdict was proper. The Fourth Department wrote:

> "A verdict finding that a defendant was negligent but that such negligence was not a proximate cause of the [plaintiff's injuries] is against the weight of the evidence only when [those] issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause"…. "Where a verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view" … . Here, plaintiffs alleged four different theories of negligence against Dr. Caputo, and we conclude that there is a reasonable view of the evidence to support a finding that Dr. Caputo was negligent in failing to provide [the] resident staff with adequate information concerning the operative procedure and plaintiff's postoperative care, but that such failures were not the proximate cause of plaintiff's injuries… .
>
> …[T]he court properly granted plaintiffs' "supplemental motion" to correct the verdict with respect to the award of damages for plaintiff's future pain and suffering. In support of the "supplemental motion," plaintiffs submitted affidavits from all six jurors, who averred that they understood and agreed that plaintiff would receive $60,000 per year for a period of 30 years, not a total of $60,000 over the course of that period…. We acknowledge that "public policy concerns disfavor the use of juror affidavits for posttrial impeachment of a verdict" … . Here, however, "[t]he information afforded by the affidavits of the jurors is not to impeach, but to support the verdict really given by them"… . **Butterfield v Caputo, et a;l, 602, 4th Dept 7-19-13**

NEGLIGENCE/MEDICAL MALPRACTICE/ CIVIL PROCEDURE

Fact that Medical Guidelines May Be Available to the Public Does Not Warrant Denial of Discovery of Such Documents from the Defendant

The Fourth Department determined Supreme Court had erred in denying certain of plaintiff's discovery demands in a medical malpractice case alleging injuries sustained by infant plaintiff during birth. The materials deemed material and necessary (and not unduly burdensome to produce) included: standards for fetal monitoring and pediatric advancement of life support; a protocol entitled "Circulating Vaginal Delivery;" interpretation and management of fetal heart rate patterns; and specified guidelines and standards published by medical associations. The Fourth Department noted that the fact that standards and guidelines may be available to the public is not a ground for denying discovery. The court explained the discovery criteria generally as follows:

> …[W]e note that CPLR 3101 requires "full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101 [a]). The phrase " 'material and necessary should be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason' "… . "Entitlement to discovery of matter satisfying the threshold requirement is, however, tempered by the trial court's authority to impose, in its discretion, appropriate restrictions on demands which are unduly burdensome . . . and to prevent abuse by issuing a protective order where the discovery request may cause unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (…see CPLR 3103 [a]). In opposing a motion to compel discovery, a party must "establish that the requests for information are unduly burdensome, or that they may cause unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (…see generally CPLR 3103 [a]). **Rawlins…v St Joseph's Hospital Health Center…, 659, 4th Dept 7-19-13**

NEGLIGENCE/WRONGFUL DEATH

Pecuniary Loss Defined

In a wrongful death action, the Fourth Department determined that plaintiff, decedent's brother, was entitled only to pecuniary loss for funeral expenses. In explaining pecuniary loss, the court wrote:

> Damages in a wrongful death action are limited to "fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is

brought" (EPTL 5-4.3 [a]). "Pecuniary loss" is defined as "the economic value of the decedent to each distributee at the time decedent died" and includes loss of income and financial support, loss of household services, loss of parental guidance, as well as funeral expenses and medical expenses incidental to death…. Generally, because it is difficult to provide direct evidence of wrongful death damages, the calculation of pecuniary loss "is a matter resting squarely within the province of the jury"… . On this record, we conclude that there are issues of fact with respect to whether plaintiff, as decedent's brother, suffered pecuniary loss in the form of funeral expenses and whether decedent's brother Matthew suffered pecuniary loss given the evidence of their longstanding close and interdependent relationship. **Milczarski … v Walaszek…, 656, 4th Dept 7-19-13**

NEGLIGENCE/CONTRACT/CIVIL PROCEDURE

E-Mail Met All Criteria for a Stipulation of Settlement Including the "Subscribed Writing" Requirement

In a full-fledged opinion by Justice Sgroi, the Second Department determined an e-mail message satisfied the criteria of CPLR 2104 as a binding and enforceable stipulation of settlement.

The e-mail, written by plaintiff's counsel, read:

> "Per our phone conversation today, May 3, 2011, you accepted my offer of $230,000 to settle this case. Please have your client executed [sic] the attached Medicare form as no settlement check can be issued without this form.
>
> "You also agreed to prepare the release, please included [sic] the following names: Xerox Corporation, Gelco Corporation, Mitchell G. Maller and Sedgwick CMS. Please forward the release and dismissal for my review. Thanks Brenda Greene."

The court determined the phrase "Thanks Brenda Greene" rendered the e-mail a subscribed writing:

> …[W]e hold that where, as here, an email message contains all material terms of a settlement and a manifestation of mutual accord, and the party to be charged, or his or her agent, types his or her name under circumstances manifesting an intent that the name be treated as a signature, such an email message may be deemed a subscribed writing within the meaning of CPLR 2104 so as to constitute an enforceable agreement. **Forcelli v Gelco Corp, 2013 NY Slip Op 05437, 2nd Dept 7-24-13**

CRIMINAL LAW

Detention and Frisk of Juvenile Supported by Reasonable Suspicion

The First Department determined the following scenario provided reasonable suspicion sufficient to justify the detention and frisk of the juvenile:

> A police officer testified that she was investigating an unruly crowd when she observed appellant walking towards her with his arm under his shirt, clutching an object held at his waist. Based on the rigidity of his body and how tightly he held the object, she believed it to be a weapon. As he passed by, she heard him say that he was "going to get him." When she approached with her shield visible around her neck, appellant moved towards her, whereupon she grabbed his hand and felt the handle of a knife. During a brief struggle, the knife fell to the ground. Appellant was placed under arrest and the knife, which had a six-inch blade, was recovered. **Matter of Daquan B, 2013 NY Slip Op 04974m 1st Dept 7-2-13**

Elements of Tampering with Physical Evidence

The First Department explained the elements of the offense of tampering with physical evidence as follows:

> …[A] person is guilty of the completed crime of tampering with physical evidence when, "[b]elieving that certain physical evidence is about to be produced or used in an official proceeding or a prospective official proceeding, and intending to prevent such production or use, he suppresses it by any act of concealment" (Penal Law 215.45[2]).
>
> The offense of tampering does not require the actual suppression of physical evidence, but only that a defendant perform an act of concealment while intending to suppress the evidence…. Regardless of whether the defendant is successful in suppressing the evidence, once an act of concealment is completed with the requisite mens rea, the offense of tampering has been committed. **People v Eaglesgrave, 2013 NY Slip Op 05001, 1st Dept 7-2-13**

Judge's Mistrial Order Precluded Retrial---Double Jeopardy

In precluding a retrial on double jeopardy grounds after the trial judge ordered a mistrial over defendant's objection, the Second Department explained the relevant criteria:

> In a jury trial, once the jury is empaneled and sworn, jeopardy attaches (see CPL 40.30[1][b];..), and the defendant has a "valued right to have his [or her] trial completed by a particular tribunal" …. " [W]hen a mistrial is granted over the defendant's objection or without the defendant's consent, double jeopardy will, as a general rule, bar retrial"…. "However, the right to have one's case decided by the first empaneled jury is not absolute, and a mistrial granted as the product of manifest necessity will not bar a retrial"… ."Manifest necessity" means "a high degree of necessity"; "the reasons underlying the grant of a mistrial must be necessitous, actual and substantial" …. " Even if the reasons for granting a mistrial are deemed actual and substantial, the court must explore all appropriate alternatives prior to granting a mistrial"…. Mistrials premised on the prejudicial effect of improper evidence or argument are entitled to "great deference" …, since "the Trial Judge, better than any other, . . . can detect the ambience of partiality"…. Nonetheless, the trial judge must "temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his [or her] confrontation with society through the verdict of a tribunal he [or she] might believe to be favorably disposed to his [or her] fate" … .**Matter of Taylor v Dowling, 2013 NY Slip Op 05089, 2nd Dept 7-3-13**

Writ of Coram Nobis Granted---Ineffective Assistance of Appellate Counsel

The Second Department granted defendant's writ of coram nobis to vacate (dismissing the indictment), on the ground of ineffective assistance of appellate counsel. Among the grounds for appeal not raised were: repugnant verdicts, erroneous and missing jury charges (including the statutory elements), failure to give a limiting charge with respect to evidence of defendant's prior criminal record, and prosecutorial misconduct. **People v Morales, 2013 NY Slip Op 05094, 2nd Dept 7-3-13**

Jury Was Given Written Copies of Portions of Jury Instructions; Judge's Responses to Subsequent Requests for Jury Instructions and Testimony Read-Back Required Reversal

The Third Department reversed defendant's conviction on two grounds. First, the trial judge's response to the jury's request for jury instructions (written copies of portions of the jury instructions had already been given to the jury) was not "meaningful" and required reversal in the absence of an objection. And second, the read-back

of testimony requested by the jury did not match the request and did not include crucial cross-examination:

> As it was unclear from the jury's note whether the jury simply was seeking the portion of the written charge previously promised by County Court or some other unidentified portion of the charge (or even the charge in its entirety), it was incumbent upon County Court to explore this inquiry with the jury and clarify the nature of the jury's request or, at the very least, ascertain whether its response to the jury's request was satisfactory….Although defense counsel did not object to the manner in which County Court responded to the jury's inquiry, County Court failed "to provide a meaningful response to the jury" and, in so doing, failed to fulfill its "core responsibility" in this regard …. Accordingly, no objection was required to preserve this issue for appellate review… . * * *
>
> Although CPL 310.30 affords a trial court a certain degree of latitude in responding to a jury request for additional information, the court's response must be meaningful … . Additionally, "[a] request for a reading of testimony generally is presumed to include cross-examination which impeaches the testimony to be read back, and any such testimony should be read to the jury unless the jury indicates otherwise"… . **People v Clark, 105237, 3rd Dept 7-3-1**

Evidence of Pornography Allowed as Molineux Evidence to Show Intent

In affirming the defendant's conviction for sexual offenses against a young child, the Third Department determined the trial court properly allowed "Molineux" evidence about pornography found on and/or searched for on defendant's computer. Among the reasons for letting the evidence of pornography in evidence was to demonstrate defendant's intent. The Third Department wrote:

> While intent can often be inferred from the sexual act itself…, here, defendant claimed to the police investigator and the CPS caseworker that much of the sexual contact and the child's knowledge occurred accidentally. The foregoing was, thus, admissible to prove that defendant's charged sexual contact was not accidental or mistaken but, rather, was intentional and sexual … and motivated by his unusual sexual interest in young children. Supreme Court carefully considered the prejudicial effect of the evide nce, limited or excluded much of it, including the actual images and videos, and provided numerous contemporaneous and appropriate limiting instructions. We cannot conclude that the court abused its discretion in finding that the probative value of the admitted evidence outweighed the potential for undue prejudice… **People v Sorrell, 103426, 3rd Dept 7-3-13.**

Evidence Needed to Corroborate Accomplice Testimony and Evidence Admissible at Restitution Hearing Explained

In affirming the conviction, the Fourth Department explained the criteria for corroboration of accomplice testimony, and the admissible evidence in a restitution hearing:

> "New York's accomplice corroboration protection requires only enough nonaccomplice evidence to assure that the accomplices have offered credible probative evidence that connects the accomplice evidence to the defendant"…. Even the most "[s]eemingly insignificant matters may harmonize with the accomplice's narrative so as to provide the necessary corroboration" (id. [internal quotation marks omitted]). Here, defendant's accomplice testified that he assisted defendant in burglarizing the victim's home and stealing the victim's car, and that testimony was corroborated by the testimony of other witnesses that defendant was seen driving the victim's stolen car the day after the burglary.* * *
>
> The victim testified at the restitution hearing and provided a detailed breakdown of the value of the stolen items as well as documents establishing the cost of replacing the ignition and locks on her vehicle, which was returned to her. In addition, the amount of restitution owed to the victim's insurance company, which was financially harmed by reimbursing the victim for a portion of the cost of changing the ignition and locks on her vehicle, was supported by the claim it submitted to the Genesee County Probation Department. It is immaterial that an employee of the insurance company did not testify at the restitution hearing because "[a]ny relevant evidence, not legally privileged, may be received [at a restitution hearing] regardless of its admissibility under the exclusionary rules of evidence" (CPL 400.30 [4] …). **People v Wilson, 275, 4th Dept 7-5-13**

Sentence Deemed Unduly Harsh and Severe

The Fourth Department reduced defendant's sentence for criminal possession of stolen property in the third degree from 2 to 7 years to 7 months. The People conceded the original sentence was unduly harsh and severe. **People v Raszl, 596, 4th Dept 7-5-13**

440 Motion Seeking DNA Testing of Evidence Properly Denied

In affirming the denial of a 440 motion by a defendant convicted of murder seeking DNA testing of blood evidence, the Fourth Department wrote:

> We conclude that the court properly denied that part of the motion seeking testing … "because defendant failed to establish that there was a reasonable probability that, had those items been tested and had the results been admitted at trial, the verdict would have been more favorable to defendant"… . **People v Swift, 617, 4th Dept 7-5-13**

Evidence Insufficient to Support Criminal Contempt in the First Degree---No Evidence of Intent to Harass (Two Dissenting Justices)

The Fourth Department, over a dissent by two justices, determined the evidence was legally insufficient to support criminal contempt in the first degree:

> Even assuming, arguendo, that the evidence is legally sufficient to establish that defendant repeatedly made telephone calls to his ex-girlfriend, we agree with him that the evidence is legally insufficient to establish that he intended by those calls to harass, annoy, threaten or alarm her, with no purpose of legitimate communication (see § 215.51 [b] [iv];…. Rather, the only inference to be drawn from the evidence is that defendant made the calls with the intent to discuss issues of child support and visitation, not to harass, annoy, threaten or alarm his ex-girlfriend. We therefore modify the judgment accordingly. **People v Webb, 619, 4th Dept 7-5-13**

Motion to Vacate Conviction Based upon Co-Defendant's Affidavit Stating Defendant Not Involved Denied

In affirming the denial of a 440 motion to vacate defendant's conviction based upon a co-defendant's affidavit stating the defendant was not involved in the crimes, the Fourth Department wrote:

> It is well settled that on a motion to vacate a judgment of conviction based on newly discovered evidence, the movant must establish, inter alia, that "there is newly discovered evidence: (1) which will probably change the result if a new trial is granted; (2) which was discovered since the trial; (3) which could not have been discovered prior to trial; (4) which is material; (5) which is not cumulative; and[] (6) which does not merely impeach or contradict the record evidence" …. **People v Smith, 642, 4th Dept 7-5-13**

Officer Outside Village Limits Did Not Have Jurisdiction to Arrest for Traffic Offenses but Arrest for DWI Okay

The Fourth Department determined a police officer, who was outside his jurisdiction when he arrested the defendant for DWI and traffic offenses, did not have the authority to arrest for the "petty offenses" but did have the authority to arrest for DWI:

> The authority of a police officer to arrest an individual for a "petty offense" is limited to circumstances in which the officer "has reasonable cause to believe that such person has committed such offense in his or her presence" (CPL 140.10 [1] [a]), and "only when .. . [s]uch offense was committed or believed by him or her to have been committed within the geographical area of such police officer's employment or within one hundred yards of such geographical area" (CPL140.10 [2] [a]). The term "petty offense" is defined as "a violation or a traffic infraction" (CPL 1.20 [39]). Here, the arresting officer is employed by the Village of Gowanda, and it is undisputed that the arrest did not take place within 100 yards of the village limits. Thus, we conclude that the officer exceeded his jurisdictional authority when he arrested defendant for committing the traffic infractions, and the court should have granted defendant's motion insofar as it sought dismissal of those counts.
>
> We further conclude, however, that the court properly refused to dismiss counts one and four of the indictment, charging defendant with felony driving while intoxicated and resisting arrest, respectively. Pursuant to CPL 140.10 (3), a police officer may arrest a person for a crime, as opposed to a petty offense, "whether or not such crime was committed within the geographical area of such police officer's employment, and he or she may make such arrest within the state, regardless of the situs of the commission of the crime." **People v Twoguns, 668, 4th Dept 7-5-13**

Defendant Was Lawfully Seized by Police Under these Facts

The Fourth Department affirmed Supreme Court's denial of defendant's suppression motion, finding that the defendant was not unlawfully seized under the following facts:

> At the suppression hearing, a police officer testified that he stopped defendant because defendant was riding the motorbike in the road without a helmet. When the officer asked defendant whether he had any identification, defendant answered, "no," and took a step back, whereupon the officer reached toward defendant in an attempt to frisk him. Before the officer could detain him, however, defendant ran away and, during his flight, punched another officer who had joined in the pursuit. Defendant was soon apprehended and found to be in possession of a loaded firearm, 20 bags of marihuana, and more than $2,000 in cash. **People v Bradley, 685, 4th Dept 7-5-13**

All But Rape First Charges Were Time-Barred---Different Statute of Limitations for Rape First

The Fourth Department determined all charges but the Rape in the First Degree charge had to be dismissed as time-barred. A change in the statute of limitations for Rape First applied to all such charges not time-barred at the time of the statutory change:

> in 2002, when the crimes were committed, the statute of limitations for the charged offenses was five years (see CPL 30.10 former [2] [b]). Because he was not charged until more than seven years later, defendant raised a facially viable statute of limitations defense, and the burden thus shifted to the People to prove beyond a reasonable doubt that the statute of limitations was tolled or otherwise inapplicable We conclude that the People satisfied their burden with respect to the charge of rape in the first degree. As the People correctly contend, the legislature amended CPL 30.10 in 2006 so as to abolish the statute of limitations for four sex offenses, including rape in the first degree and criminal sexual act in the first degree (see L 2006, ch 3, § 1). The amendment applied not only to crimes committed after its effective date of June 23, 2006, but also to offenses that were not yet time-barred (see L 2006, ch 3, § 5 [a]). **People v Burroughs, 590, 4th Dept 7-5-13**

Suppression of Evidence Reversed---Search of Interconnected Rooms Did Not Violate Terms of Search Warrant

The Fourth Department reversed County Court's suppression ruling. The Fourth Department determined that a search warrant for "a business store front style building…" allowed the officers to search a series of inter-connected rooms behind the storefront area:

> We agree with the People that the warrant sufficiently described the premises to be searched …. Although "a warrant to search a subunit of a multiple occupancy structure is void if it fails to describe the subunit to be searched and . . . describes [only] the larger structure" …, here the series of interconnected rooms were not "subunits," but were instead part of the single rental unit …. **People v Cook, 601 7-5-13**

Valid Waiver of Appeal Did Not Encompass Challenge to Severity of Sentence in this Case

The Fourth Department noted that a valid waiver of the right to appeal does not encompass a challenge to the severity of the sentence when the defendant was not advised of the potential periods of incarceration or the potential maximum term of incarceration. The court, however, concluded the sentence was not unduly harsh or severe. **People v Virgil, 783, 4th Dept 7-5-13**

Statement Correctly Admitted as Dying Declaration

In affirming the conviction, the Fourth Department held that a statement was correctly admitted as a dying declaration:

> {The trial court admitted] as a dying declaration exception to the hearsay rule the testimony of a prosecution witness that, after being shot in the inner thigh, the victim stated, "I got robbed" and "I got shot." The People presented evidence establishing that, when the witness arrived at the scene, the victim was bleeding heavily from a femoral artery wound, his clothes were soaked in blood from the waist down, and he was inhaling and exhaling very hard. The victim stated to the witness, "I'm gonna die, I'm gonna die"; he then became totally unresponsive and, shortly thereafter, he died. Thus, we conclude that the court properly determined that the victim's statements were made with "a sense of impending death, with no hope of recovery" … . **People v Elder, 713, 4th Dept 7-5-13**

Evidence Insufficient to Support Reckless Endangerment in the First Degree—No One In Line of Fire

The Fourth Department reversed defendant's conviction for reckless endangerment in the first degree in a shooting case where there was no evidence anyone was near the line of fire:

> "A person is guilty of reckless endangerment in the first degree when, under circumstances

> evincing a depraved indifference to human life, he recklessly engages in conduct [that] creates a grave risk of death to another person" (Penal Law § 120.25). The evidence at trial established only that defendant stood on a street corner and fired up to five shots from a handgun. The People "presented no evidence that any person . . . 'was in or near the line of fire' " so as to create a grave risk of death to any such person… . **People v Stanley, 757, 4th Dept 7-5-13**

Affidavit Stating that Third Party Confessed to Murder Required a Hearing Pursuant to a Motion to Vacate the Judgment of Conviction Based Upon Newly Discovered Evidence

The Fourth Department reversed Supreme Court finding that a hearing should be held on defendant's motion to vacate his conviction based on newly discovered evidence. The evidence was an affidavit from a person to whom a third person is alleged to have confessed to the murder. The Fourth Department determined the hearsay statement could be considered as a basis for the 440 motion because it met the criteria of a statement against penal interest and, although there was no showing the declarant was unavailable (a criterium for admissibility under this hearsay exception), it was reasonable to assume the declarant would assert his Fifth Amendment privilege against self-incrimination and refuse to testify (thereby becoming unavailable).

> We agree with defendant that where, as here, the declarations exculpate the defendant, they "are subject to a more lenient standard, and will be found 'sufficient if [the supportive evidence] establish[es] a reasonable possibility that the statement might be true' "…. That is because " '[d]epriving a defendant of the opportunity to offer into evidence [at trial] another person's admission to the crime with which he or she has been charged, even though that admission may . . . be offered [only] as a hearsay statement, may deny a defendant his or her fundamental right to present a defense' " …. Although the People contend that there is no evidence that the third party is unavailable, we conclude that, inasmuch as the statements attributed to the third party implicate him in a murder, there is a likelihood that, if called to testify at a trial, he would assert his Fifth Amendment privilege against self-incrimination and thus become unavailable … . **People v McFarland, 729, 4th Dept 7-5-13**

Waiver of Appeal Invalid/Counsel Did Not Take Position Adverse to Client Re: Pro Se Motion

In affirming the conviction, the Third Department determined the waiver of appeal (re; the harshness of the sentence) was not valid and defendant's counsel had not take a position adverse to the defendant with respect to defendant's pro se motion to withdraw his guilty plea. Although defense counsel responded negatively when the court asked if counsel knew of any legal basis for defendant's motion, the Third Department explained that counsel was unaware of the contents of the motion at the time the court asked about it:

> County Court failed to adequately distinguish the right to appeal from those rights that are automatically forfeited upon a guilty plea, thus rendering defendant's appeal waiver invalid…. Moreover, no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal his conviction that he was also waiving his right to appeal the harshness of his sentence …. Nor do we find that the deficiencies in the allocution are cured by defendant's written appeal waiver… * * *
>
> …[D]efense counsel's negative response to County Court's inquiry at the outset of the hearing as to whether "there [was] any legal basis in [counsel's] knowledge to allow [defendant] to withdraw his plea of guilty" was clearly not an opinion on the merits of defendant's pro se motion – which counsel had not yet reviewed – and, thus, counsel did not thereby take a position adverse to that of his client or affirmatively undermine the arguments that defendant sought to present to the court… . **People v Pimentel, 104070, 3rd Dept 7-11-13**

Refusal to Allow Relative's Testimony Did Not Deny Right to Present a Defense

The Second Department determined defendant was not denied his right to present a defense by County Court's refusal to allow defendant's sister-in-law to testify:

> A criminal defendant has a fundamental right to produce witnesses, and "absent a showing of bad faith, an application to produce witnesses whose testimony would be relevant to the defense should not be denied"…. However, a trial court may, in its discretion, exclude evidence that is of slight or remote significance, speculative, lacking a good-faith factual basis, or solely based on hearsay….

> In the instant case, the proposed testimony of the defendant's sister-in-law regarding the relationship between the defendant and his wife consisted largely of hearsay, was cumulative to other evidence, and was only marginally, if at all, relevant. Consequently, the County Court did not improvidently exercise its discretion in precluding that testimony, and that ruling did not deprive the defendant of the right to present a defense… . **People v Strzelecki, 2013 NY Slip Op 05233, 2nd Dept 7-10-13**

Repugnant Verdict Required Reversal

The Fourth Department, over a dissent, reversed defendant's conviction of manslaughter in the first degree as a hate crime as inconsistent with defendant's acquittal of manslaughter in the first degree (without the hate crime element). The Fourth Department wrote:

> "A verdict is inconsistent or repugnant . . . where the defendant is convicted of an offense containing an essential element that the jury has found the defendant did not commit" … . "A verdict shall be set aside as repugnant only when it is inherently inconsistent when viewed in light of the elements of each crime as charged to the jury" …, "without regard to the accuracy of those instructions" … . "The underlying purpose of this rule is to ensure that an individual is not convicted of 'a crime on which the jury has actually found that the defendant did not commit an essential element, whether it be one element or all' " ….
>
> By acquitting defendant of manslaughter in the first degree, the jury necessarily found that the People failed to prove beyond a reasonable doubt at least one element of manslaughter in the first degree. To find defendant guilty of manslaughter in the first degree as a hate crime, however, the jury must have found that the People proved beyond a reasonable doubt all of the elements of manslaughter in the first degree, plus the added element that defendant selected the victim due to his sexual orientation. It therefore follows that the verdict is inconsistent. **People v DeLee, 419, 4th Dept 7-19-13**

Judge's Refusal to Allow Defendant to Call Inmate Witness Required Reversal

The Fourth Department reversed defendant's conviction because the trial court refused defendant's request to present an inmate witness who might have supported defendant's version of events:

> CPL 630.10 provides for the attendance of an inmate witness in a criminal action or proceeding upon a demonstration of "reasonable cause to believe that such person possesses information material" to such proceeding. Here, defendant made the requisite showing under that statute, and the court abused its discretion in refusing to order the production of the subject inmate witness whose testimony defendant sought to present at trial… . There is no dispute that the proposed inmate witness spoke to the driver of the vehicle in which defendant was a passenger just before defendant's arrest. The proposed witness was at a distance of between 20 feet and 20 yards from the vehicle at the time of defendant's arrest. Moreover, we note that there was no fingerprint evidence in this case, which involved a top count of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), and the issue of defendant's guilt turned largely on the testimony of two police detectives. We cannot countenance the court's refusal to allow defendant to present the testimony of a witness who might have supported defendant's version of events. **People v Baxter, 599, 4th Dept 7-19-13**

In SORA Proceeding, Child Pornography Properly Considered Under Factor 7 ("Relationship Between Offender and Victim")

In affirming a SORA determination, the Fourth Department noted that the 20 point assessment under risk factor 7 (entitled "Relationship Between Offender and Victim"), based upon the defendant's pleading guilty to receiving child pornography (a federal statute), was appropriate:

> With respect to …the 20 points assessed under risk factor 7, we note that the underlying conviction was a federal offense to which defendant pleaded guilty to receiving child pornography (18 USC 2252 [a] [2]). Although the Court of Appeals has stated that "[i]t does not seem that factor 7 was written with possessors of child pornography in mind" …, the Court of Appeals determined that points were properly assessed under risk factor 7 in a case where the defendant was convicted of possessing child pornography…. Consequently, we conclude that the court here properly assessed points under risk factor 7. **People v Noyes, 687, 4th Dept 7-19-13**

Improper Admission of Evidence of Similar (Pending) Criminal Charge under Molineux Required Reversal

The Fourth Department determined a new trial was required where the trial court allowed the prosecution to present evidence (in its direct case) of a pending

attempted robbery charge under Molineux to prove identity. The defendant was on trial for allegedly robbing a hotel clerk in Cayuga County and the Molineux evidence involved the attempted robbery of a hotel clerk in Onondaga County. The Molineux evidence included the testimony of five witnesses and a video of the attempted robbery. The Fourth Department wrote:

> "Before admitting evidence of other crimes to establish identity, the Trial Judge must find that both modus operandi and defendant's identity as the perpetrator of the other crimes are established by clear and convincing evidence" (Prince, Richardson on Evidence § 4–514 [Farrell 11th ed]…). Here, the record establishes that the court ruled that the evidence of defendant's identity with respect to the attempted robbery would be admissible as a matter of law, but did not determine the relevancy of the identification evidence of the attempted robbery, nor did it properly balance its prejudicial effect as against its probative value… . Additionally, there is no indication in the record that the court found that the modus operandi and defendant's identity as the perpetrator of the attempted robbery were established by clear and convincing evidence. We thus conclude that the case before the jury became a prohibited "trial within a trial"… . We further conclude that the evidence of the attempted robbery was "sufficiently prejudicial so as to deprive defendant of a fair trial"… . **People v Larkins, 756, 4th Dept 7-19-13**

Defendant's Wearing a Stun Belt During Trial Without Knowledge of Judge Did Not Constitute a "Mode of Proceedings" Error

The Fourth Department determined the defendant's wearing of a "stun belt" during his trial (unbeknownst to the judge and to which no objection was made) did not constitute a mode of proceedings error. The dissent argued to the contrary, characterizing the sheriff's use of the stun belt without the court's involvement as a usurpation of the power of the court:

> County Court could not have granted defendant's motion under CPL 440.10 (1) (f) unless the unauthorized use of the stun belt at trial constitutes a mode of proceedings error, in which case reversal would have been required on direct appeal if the use of the stun belt had been disclosed on the record … .
>
> We respectfully disagree with our dissenting colleague that the improper use of the stun belt, i.e., at the direction of the Sheriff rather than the court, constitutes a mode of proceedings error.
>
> Indeed, we note that a mode of proceedings error occurs "[w]here the procedure adopted by the court . . . is at a basic variance with the mandate of law" …, and that is not the case here. We further note that in Buchanan the court deferred to the Sheriff, indeed delegated to the Sheriff, the determination whether defendant should wear the stun belt after the court acknowledged that defendant had done nothing to merit it (see Buchanan, 13 NY3d at 3), but the Court of Appeals did not find the error to be a mode of proceedings error. Instead, the Court of Appeals simply ruled that the court failed to exercise its discretion… . **People v Schrock, 800, 4th Dept 7-19-13**

Jail Time Does Not Count Toward Subsequent Offense Until Previous Sentence Expired

Defendant was released on parole for a 2001 conviction. While on parole he committed an offense and was jailed. The Fourth Department determined that the time defendant was in jail must first be credited to the 2001 conviction. Only after the 2001 sentence was completely served could any jail time be credited to the subsequent (2009) conviction:

> Here, "[a]ny jail time served prior to the maximum expiration date of the [2001] sentence was properly credited toward that sentence until it expired on its own terms on [July 4, 2009] … . "Thus, the [2009] sentence was properly credited only with jail time served after the expiration of the [2001] sentence" …. In other words, "petitioner is not entitled to jail time credit against the [2009] sentence for the jail time that was credited against the [2001] sentence"… . **Matter of Grahm v Walsh, 811, 4th Dept 7-19-13**

Insufficient Evidence of History of Alcohol and Drug Abuse in SORA Proceeding

The Fourth Department determined there was insufficient evidence in a SORA proceeding to find defendant had a history of alcohol and drug abuse. The case summary stated that "Probation identified [defendant's] continued drug and alcohol abuse as problematic, and he refused to attend treatment for th[at] problem." The Court wrote:

> There is …no evidence that defendant was ever screened for substance abuse issues …, "only very limited information about his alleged prior history of drug and alcohol abuse" …, and no information about what treatment was recommended or why treatment was recommended …. Under these circumstances,

the case summary alone is insufficient "to satisfy the People's burden of establishing that risk factor by clear and convincing evidence" ….

Further, defendant's prior convictions for criminal possession and sale of marihuana and criminal possession of a controlled substance in the seventh degree do not constitute clear and convincing evidence that defendant used drugs, let alone that he had a history of abusing them … . During the presentence investigation, defendant never admitted to using drugs or alcohol, and he denied abusing any substances at the SORA hearing … Defendant's admission that he was intoxicated during a previous incident, which led to a rape charge that was subsequently dismissed, is insufficient to establish that his sexual misconduct can "be characterized by repetitive and compulsive behavior[] associated with drugs or alcohol" (Correction Law § 168-l [5] [a] [ii]), especially because defendant does not have any other history of intoxication with respect to his sexual offenses, including the instant offenses …. Consequently, as noted, the People failed to meet their burden of establishing by clear and convincing evidence that defendant had a history of alcohol or drug abuse… . **People v Coger, 815, 4th Dept 7-19-13**

Padilla v Kentucky, Which Held Attorney's Failure to Inform Client of Immigration Consequences of Plea Was Ineffective Assistance, Not Applied Retroactively Under New York Constitution

The Second Department determined Padilla v Kentucky, 559 US 356, which held an attorney's failure to inform his or her client of the immigration consequences of a plea constituted ineffective assistance of counsel, should not be applied retroactively under the New York Constitution:

> In People v Pepper (53 NY2d 213, cert denied sub nom. New York v Utter, 454 US 1162), the Court of Appeals addressed the issue of whether a new rule should be retroactively applied under the New York Constitution. It recognized three factors a court should weigh to determine whether to retroactively apply a new rule: (1) the purpose to be served by the new standard, (2) the extent to which law enforcement authorities relied upon the old standard, and (3) the effect a retroactive application of the new standard would have on the administration of justice (see id. at 220). The Court of Appeals explained that "the extent of the reliance and the nature of the burden on the administration of justice are of substantial significance only when the answer to the retroactivity question is not to be found in the purpose of the new rule itself" (id.). Thus, a new rule that goes "to the heart of a reliable determination of guilt or innocence" will be retroactively applied "where otherwise there could be a complete miscarriage of justice" (id. at 221). However, a new rule which is "only collateral to or relatively far removed from the fact-finding process at trial" (id.), will have only prospective application. Although the Supreme Court in Padilla held that the Sixth Amendment requires criminal defense counsel to inform their clients whether a guilty plea carries a risk of deportation, this new rule, rather than going to the heart of a reliable determination of guilt or innocence, instead concentrates on the defendant's appreciation of the immigration consequences that may flow from an otherwise proper plea allocution … .
>
> Retroactive application of Padilla is also not warranted under the second and third Pepper factors. With regard to law enforcement reliance, prior to Padilla, a defendant could prevail on an ineffective-assistance-of-counsel claim only if it was established that counsel rendered incorrect advice regarding the immigration consequences of the guilty plea and that the defendant was prejudiced thereby … . The failure to advise a defendant of the possibility of deportation did not constitute ineffective assistance of counsel …, and such failure to advise did not "affect the voluntariness of a plea of guilty or the validity of a conviction" (CPL 220.50[7]). Thus, under the old standard, prosecutors could recommend acceptance of plea allocutions even where the defendant had not been advised of the immigration consequences of entering into the plea …. As to the third factor, retroactive application of the Padilla rule would potentially lead to an influx of CPL 440.10 motions to vacate the convictions of defendants whose guilty pleas were properly entered and accepted by courts under the old standard …, thus adversely affecting the criminal justice system. Accordingly, we further find that under New York law, the Padilla rule should not be retroactively applied to cases like this one where the convictions became final prior to March 31, 2010, the date Padilla was decided. **People v Andrews, 2013 NY Slip Op 05469, 2nd Dept 7-24-13**

Defendant's Statements Made in Pre-Trial Plea Negotiations Should Not Have Been Admitted at Trial

The Second Department determined the prosecutor should not have been allowed to introduce at trial statements made by the defendant in plea negotiations (the error was deemed harmless however):

The defendant and the People executed an agreement, whereby they agreed that the People could introduce those statements against the defendant at a trial, inter alia, "to rebut any evidence" offered by him or on his behalf. At the trial, the Supreme Court found that the defendant had triggered this provision of the agreement and permitted the People to introduce the subject statements.

Statements made during the course of plea negotiations can be used against a defendant only if the People specifically bargained for that…. Under the circumstances of this case, the Supreme Court improperly found that the defendant's trial attorney offered evidence and raised factual issues which triggered the agreement… . **People v Thompson, 2013 NY Slip Op 05473, 2nd Dept 7-24-13**

Depraved Indifference Murder of Child Count Should Not Have Been Dismissed Based On the Grand Jury Evidence In Spite of Difficulty of Proving the Count at Trial

The Third Department determined the trial court should not have dismissed the count of the indictment which charged defendant with depraved indifference murder of a child. While acknowledging the prosecution may have difficulty proving the charge at trial, the court determined that a logical inference from the grand-jury proof was that the injuries defendant inflicted on the child were immediately and obviously very serious and defendant callously delayed getting help while minimizing his conduct and the seriousness of the injuries. In explaining the general criteria for the sufficiency of grand jury evidence, the court wrote:

> In reviewing a motion to dismiss an indictment, courts view the evidence in a light most favorable to the People and determine only whether the evidence presented to the grand jury was legally sufficient … . "In the context of grand jury proceedings, 'legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt'… . "The reviewing court's inquiry is limited to whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes" … . "[I]f the prosecutor has established a prima facie case, the evidence is legally sufficient even though its quality or weight may be so dubious as to preclude indictment or conviction pursuant to other requirements" … . **People v Waite, 105416, 3rd Dept 7-25-13**

Sentence for Which Merit Time Allowance Is Not Available Did Not Preclude Application for Resentencing Under Drug Law Reform Act

The Third Department, over a dissent, declined to follow the Second Department in its application of CPL 440.46 (Drug Law Reform Act). The defendant was eligible to apply for resentencing based upon his offense, but, under the sentence defendant was serving at the time of his application for resentencing, he was not entitled to a merit time allowance pursuant to the Correction Law. The Third Department determined defendant was eligible to apply for resentencing:

> Although defendant, having been sentenced pursuant to his drug offense convictions as a persistent felony offender, is serving a sentence that would preclude him from earning merit time pursuant to Correction Law § 803 (see Correction Law § 803 [1] [d] [ii]; Penal Law § 70.10 [2]), he was not convicted of an "offense for which a merit time allowance is not available" (CPL 440.46 [5] [a] [ii] [emphasis added]; see Penal Law §§ 10.00 [1]; 220.39). This distinction is significant. The Penal Law states:
>
> "'Offense' means conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state, or by any order, rule or regulation of any governmental instrumentality authorized by law to adopt the same" (Penal Law § 10.00 [1]).
>
> Defendant's offense and his sentence are thus two separate components that we decline to conflate for purposes of depriving an otherwise eligible person of the benefits of the remedial legislation that we are tasked with interpreting here. To the extent that the Second Department held to the contrary in People v Gregory (80 AD3d 624 [2011], lv denied 17 NY3d 806 [2011]), we decline to follow that case. Accordingly, we find that defendant is eligible to apply for resentencing pursuant to the Drug Law Reform Act of 2009, and County Court erred in denying defendant's motion. **People v Coleman, 104851, 3rd Dept 8-1-13**

DNA Evidence Which Excluded Defendant Was Not Enough to Warrant Vacation of Conviction, or Even a Hearing on the Motion to Vacate

Defendant was convicted of the rape of one victim and the murder of another during an incident in 1980. Over a substantial dissent, the First Department determined that the recent DNA test results re: hairs found on the perpetrator's hat and DNA found under the fingernails of

the murder victim---results which ruled out the defendant---did not warrant vacation of defendant's conviction pursuant to a CPL 440 motion, and did not warrant a hearing. The First Department noted the strength of the identification evidence provided by the rape victim and the fact that only three of 18 hairs taken from the hat were tested by the defense. The majority of the First Department wrote:

> Defendant has not established that the newly discovered DNA evidence "is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to [him]" … * * *
>
> In deciding a CPL 440.10 motion, a hearing to develop additional facts is not "invariably necessary"; rather, CPL 440.30 contemplates that a court will make an initial determination on the written submissions whether the motion can be decided without a hearing … . Here, we find that even if the reliability of the evidence is assumed, defendant still did not establish a legal basis for ordering a new trial. Accordingly, the factual disputes in this case were not material, and defendant was not prejudiced by the absence of a hearing.

The dissent wrote:

> I respectfully dissent, because I believe the motion court should have granted defendant further DNA testing and held an evidentiary hearing before determining his motion under CPL 440.10. **People v Jones, 2013 NY Slip Op 05547, 1st Dept 8-6-13**

Exclusion of Defense Counsel's Colleague from a Wade Hearing Deprived Defendant of His Right to a Public Trial

The First Department, in a full-fledged opinion by Justice Richter, reversed a conviction finding the defendant was denied his right to a public trial. To protect the undercover officer and others, the defendant was excluded from the Wade hearing concerning the validity of the undercover officer's identification of the defendant. The trial court, in ordering partial closure of the courtroom, had allowed defense counsel, and colleagues of defense counsel, to be present during the hearing. During the hearing, defense counsel's officemate was denied entry to the courtroom by the court officer stationed at the door, who had consulted with the sergeant inside the courtroom. The First Department determined the exclusion of the defendant from the hearing was proper, but the exclusion of the attorney required reversal. The court wrote:

> Here, the undercover was the critical witness, and excluding defense counsel's colleague from the courtroom during this time was not inconsequential. Furthermore, defense counsel explained that the excluded attorney was his officemate, with whom he had consulted about the case. The court also acknowledged that the excluded attorney had substantial experience in criminal defense cases. Although there would have been a problem even if the attorney had no such experience or connection to the case, the exclusion here was particularly troubling because defense counsel alerted the court that his colleagues might be coming, and the excluded attorney could have been of assistance to defense counsel during this critical phase of the trial … . * * *
>
> …[T]he exclusion of defense counsel's colleague interfered with the very purpose of the requirement of a public trial. The requirement that the courtroom be open whenever possible and that closure orders be narrowly tailored "is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions" …. Excluding defense counsel's experienced colleague, who was familiar with the case, deprived defendant of his right to have this person present to assess the undercover's testimony, and enabled the People to present the undercover's testimony without the salutary effects of extra scrutiny. **People v Moise, 2013 NY Slip Op 05550, 1st Dept, 8-6-13**

SORA Court Has Discretion to Deny Downward Departure Even When Mitigating Factor Demonstrated by Preponderance of Evidence

In affirming the SORA court's denial of an application for a downward departure, the Second Department noted that even where the defendant makes a showing by a preponderance of the evidence in support of a mitigating factor, the court need grant the application:

> " A sex offender's successful showing by a preponderance of the evidence of facts in support of an appropriate mitigating factor does not automatically result in the relief requested, but merely opens the door to the SORA court's exercise of its sound discretion upon further examination of all relevant circumstances'" … . **People v Martinez-Guzman, 2013 NY Slip Op 05561, 2nd Dept 8-7-13**

Burden Upon Police to Determine Whether Defendant Represented by Counsel Explained

In affirming the denial of a motion to vacate a conviction after a hearing (over a substantial dissent), the Third Department explained the burden upon the police to determine whether a defendant is represented by counsel before questioning him. In this case the question was whether defendant's attorney, who represented defendant in a robbery case resolved by a cooperation agreement and who initially was involved a homicide case in 2003, was still representing the defendant in the homicide case when the defendant was questioned about it in 2006:

> Although [defendant's attorney] clearly participated in the homicide investigation in 2003 and the police were well aware that he had entered into it as defendant's counsel, the parties agree that there was a genuine lack of clarity …surrounding the question of whether that representation was limited to the cooperation agreement and had terminated once defendant was sentenced in the robbery case.
>
> It is well settled that where, as here, there is any ambiguity as to whether the defendant is represented by counsel, the burden rests squarely on the police to resolve that ambiguity prior to questioning … . Here, before questioning defendant in 2006, [the police] met with [defendant's attorney], who told them unequivocally that he no longer represented defendant. Inasmuch as the police fulfilled their obligation to resolve the ambiguity by determining that [the attorney's] representation of defendant had terminated prior to questioning him, County Court did not err in concluding that defendant's right to counsel had not been violated … . **People v McLean, 104691, 3rd Dept, 8-8-13**

Child Properly Found to Be a Vulnerable Witness and Properly Allowed to Testify Outside the Presence of the Defendant in a Sexual -Offense Trial

In a full-fledged opinion by Justice Hinds-Radix, the Second Department determined the seven-year-old witness (who was the alleged victim of sexual offenses by the defendant) was properly declared a vulnerable witness pursuant to CPL 65.20 and was properly allowed to testify outside the presence of the defendant over closed circuit television.

> …[W]e find that the Supreme Court properly declared the child to be a vulnerable witness. Since the child was seven years old at the time of the trial, she was "particularly young" …. Further, the defendant occupied a position of authority, since he was the child's great uncle by marriage, the child regarded him as a family member …, he was responsible for the care of the child at the time the crime occurred, and he had frequent contact with her …. Thus, two of the factors set forth in CPL 65.20(10) were established by clear and convincing evidence … . It is also clear from the record that the emotional trauma the child experienced when she attempted to testify in open court about the crime substantially impaired her ability to communicate with the jury. Under all of the circumstances, the Supreme Court's determination that the child was a vulnerable witness is supported by clear and convincing evidence in the record … .
>
> Furthermore, the child was properly permitted to testify outside of the physical presence of the defendant. The Supreme Court's observations of the child when she was questioned in the courtroom, and the hearing testimony of the social worker, provided clear and convincing evidence that the cause of the child's severe emotional upset was the defendant's presence in the room …. Accordingly, the record supports the requisite specific finding that placing the defendant and the child in the same room during the testimony of the child would contribute to the likelihood that the child would suffer "severe mental or emotional harm" (CPL 65.20[11]). **People v Beltran, 2013 NY Slip Op 05638, 2nd Dept 8-14-13**

Failure to Include Restitution in Plea Negotiations Precluded Imposing Restitution at Sentencing

The Second Department vacated defendant's sentence because, although restitution was not part of the plea promise, restitution was imposed at sentencing:

> At the sentencing proceeding, the defendant did not have a sufficient opportunity to object to the imposition of restitution. The court made a brief reference to "RJOs," apparently referring to restitution judgment orders. After pronouncing the sentence, the court stated: "With respect to any and all surcharges, given the fact there's significant restitution judgment order obligations here, I'm going to waive the surcharges." Under these circumstances, the defendant's contention will be addressed on the merits … .
>
> Although a court is free to reserve the right to order restitution as part of a plea bargain, the plea minutes in this case do not indicate that the pleas of guilty were negotiated with terms that included restitution … . At sentencing, the

> defendant should have been "given an opportunity either to withdraw his plea[s] or to accept the enhanced sentence[s] that included both restitution and a prison sentence" …, or for the court to impose the sentences agreed upon at the plea proceedings. **People v Pettress, 2013 NY Slip Op 05645, 2nd Dept 8-14-13**

In Sex-Offense Trial, Discovery of the Victim's Psychiatric Records Properly Denied and Cross-Examination About Psychiatric History Properly Prohibited

In a sexual-offense case, the Fourth Department affirmed the trial court's refusal to allow the defense access to the victim's psychiatric records and the court's preculsion of cross-examination of the victim about her psychiatric history:

> Mental health records are discoverable "where a defendant can demonstrate a good faith basis for believing that the records contain 'data relevant and material to the determination of guilt or innocence,' a decision which will rest 'largely on the exercise of a sound discretion by the trial court' "… .. Here, the court reviewed the records in camera before ruling that defendant was not entitled to any portion of that victim's mental health counseling records, and the court did not abuse its discretion in reaching that conclusion.
>
> We reject defendant's further contention that the court abused its discretion by precluding cross-examination of the same victim regarding her psychiatric history. "A defendant has a constitutional right to confront the witnesses against him through cross-examination. With respect to the psychiatric condition of a witness, 'the defense is entitled to show that the witness's capacity to perceive and recall events was impaired by that condition' "… . Here, defendant was permitted to question that victim about any medications that she was presently taking and whether those medications impaired her memory or affected her testimony. However, defendant failed to show that her psychiatric history "would bear upon her credibility or otherwise be relevant" … . **Peopl v Tirado, 486, 4th Dept 8-15-13**

Defendant Denied Constitutional Right to Present a Defense---Evidence Victim Identified Another as the Perpetrator Wrongly Exluded

In a full-fledged opinion by Justice Miller reversing defendant's conviction, the Second Department determined defendant had been deprived of his constitutional right to present a defense. The primary problem identified by the Second Department (among many others not mentioned here but worth reading about) was the preclusion of evidence that the victim had repeatedly identified someone other than the defendant as the perpetrator of the crime. Two crucial pieces of such evidence, an entry in the victim's diary and a statement made to a third party by the victim, were hearsay. The court found that the People's hearsay objection was waived because it wasn't raised before the appeal. Concerning the failure to allow evidence of the victim's identification of another as the perpetrator, the Second Department wrote:

> "Before permitting evidence that another individual committed the crime for which a defendant is on trial, the court is required to determine if the evidence is relevant and probative of a fact at issue in the case, and further that it is not based upon suspicion or surmise" … . "Then, the court must balance the probative value of the evidence against the prejudicial effect to the People and may, in an exercise of its discretion, exclude relevant evidence that will cause undue prejudice, delay the trial, or confuse or mislead the jury" … . Although a trial court has "broad discretion to keep the proceedings within manageable limits and to curtail exploration of collateral matters" …, "the trial court's discretion in this area is circumscribed by the defendant's constitutional rights to present a defense and confront his accusers" … .
>
> Here, the evidence that the victim identified Uppal as the perpetrator was exculpatory evidence that was directly relevant to the fundamental issue in this case---the identity of the attacker. Furthermore, such evidence of third-party culpability, coming from the victim of the crime herself, cannot be properly characterized as "rest[ing] on mere suspicion or surmise"… **People v Thompson, 2013 NY Slip Op 05707, 2nd Dept 8-21-13**

Uniform Act to Secure Attendance of Witnesses from Without the State in Criminal Cases Allowed Colorado Court to Subpoena a Reporter for Purposes of Testifying About Her Confidential Sources in a Matter Related to the Aurora Movie-Theater Shootings

In a full-fledged opinion by Justice Clark, over a two-justice dissent in an opinion by Justice Saxe, the First Department determined a reporter could be compelled to testify, under Criminal Procedure Law section 640.10, in a Colorado proceeding which sought to identify law enforcement personnel who leaked information to the press. The relevant facts are laid out in the dissenting opinion. The petitioner in the case is James Holmes, the

accused shooter in the Aurora, Colorado, movie theater massacre. The respondent is a reporter who interviewed two law-enforcement persons about the contents of a package allegedly sent by James Holmes to his treating psychiatrist. A Colorado court issued a subpoena to the reporter. Supreme Court enforced the subpoena under the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases (CPL 640.10). Because the reporter has already appeared in Colorado, the controversy is moot. But the First Department determined the exception to the mootness doctrine should be applied (important issue likely to recur, etc.). The reporter's testimony about her confidential sources is protected in New York under Civil Rights Law section 79-h (b). But Colorado's privilege statute is much weaker. The majority determined the privilege issue was irrelevant to the enforcement of the subpoena. The dissent argued that the reporter would suffer "undue hardship" within the meaning of the statute if she were forced to reveal her confidential sources (because her livelihood depended on witness-confidentiality). The majority wrote:

> Petitioner furnished the court with a certificate issued, pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases (CPL 640.10), by the Araphoe County District Court Judge, and demonstrated that respondent's testimony was "material and necessary" …, and that she would not suffer undue hardship because petitioner would pay the costs of her travel and accommodations … . …
>
> The narrow issue before the Supreme Court was whether respondent should be compelled to testify, and privilege and admissibility are irrelevant for this determination … . Respondent is entitled to assert whatever privileges she deems appropriate before the Colorado District Court. Compelling respondent to testify is distinguishable from compelling her to divulge the identity of her sources. **Matter of Holmes v Winter, 2013 NY Slip Op 05666, First Dept 8-20-13**

Level One Request for Information Not Justified by "Drug-Prone" Area or Defendant's "Flight"---Seized Handgun Should Have Been Suppressed

Over a dissent, the First Department determined the facts did not justify a level one stop of the defendant by the police inside a New York City Housing Authority building and, therefore, the motion to suppress the handgun found in defendant's pocket should have been granted. The First Department explained that a defendant's presence in a high-crime or drug-prone alone does not justify a police request for information:

> The uniformed police officers entered the building to check on other officers stationed inside. As the officers made their way towards the lobby, they saw defendant descending the stairs. When defendant saw the officers, he froze, jerked back, began to retreat, then stopped and stood on the stairs. Based on defendant's reaction, and given the drug-prone nature of the building, the officers "suspected [defendant of] trespassing," and asked him to come down the stairs to "make sure if he lived in the building."
>
> Defendant initially told the officers that he lived there. However, when asked for identification, he began to stutter, and changed his story to say that he was visiting his girlfriend. Although defendant stated that he had his identification in his pocket, he began moving his hands "all over the place, especially around his chest area," which the officers interpreted to be threatening and indicative of possession of a weapon. To "take control of the situation" before it could "get out of hand," an officer grabbed defendant's left arm and brought it behind defendant's back, which caused defendant's open jacket to open up further and reveal a silver pistol in the netted interior coat pocket. One officer removed the pistol from the pocket, and another handcuffed defendant. * * *
>
> Presence in a high-crime or drug-prone location, without more, does not furnish an objective credible reason for the police to approach an individual and request information … . As we have observed, "[T]he reputation of a location, however notorious, does not provide a predicate for subversion of the Fourth Amendment" … .
>
> Nor does an individual's desire to avoid contact with police---even in a high-crime neighborhood---constitute an objective credible reason for making a level one inquiry… . **People v Johnson, 2013 NY Slip Op 05723, 1st Dept 8-**

CRIMINAL LAW/CONSTITUTIONAL LAW

Right of Confrontation Not Violated by Results of Tests by Persons Who Were Not Called as Witnesses

In determining defendant's right to confrontation was not violated by evidence of DNA testing:

> The court properly admitted files prepared by the New York City Medical Examiner's Office containing DNA profiles derived from the testing of evidence recovered from the crime scenes,

since the documents containing the DNA profiles, which were prepared prior to the defendant's arrest, "did not, standing alone, link [him] to the crime" …. The testimony of the People's expert witness established that she conducted the critical analysis at issue by comparing the DNA profiles derived from the crime scene evidence to the defendant's DNA profile and concluding that all of the profiles matched…. Moreover, the DNA profile generated from the swab of the defendant's cheek, standing alone, shed no light on the issue of the defendant's guilt in the absence of the expert's testimony that it matched the profiles derived from the crime scene evidence…. **People v Washington, 2013 NY Slip Op 05096, 2nd Dept 7-3-13**

References to Fingerprint Evidence Processed by Non-testifying Technician Did Not Violate Right to Confrontation

In determining defendant's right to confrontation was not violated by latent fingerprint evidence processed by a technician who did not testify, the Fourth Department explained:

> The technician who processed and photographed the fingerprint did not compare the latent print to the fingerprints of defendant or any other suspect. Thus, the technician's findings were not testimonial because the latent fingerprint, "standing alone, shed[s] no light on the guilt of the accused in the absence of an expert's opinion that the [latent fingerprint] match[es] a known sample"… .Moreover, the analyst who determined that the latent print matched one of defendant's fingerprints in fact testified at trial and was available for cross-examination. Therefore, defendant's right to confront witnesses against him was not violated… . **People v Jackson, 645, 4th Dept 7-5-13**

DNA Evidence Not Testimonial---No Denial of Right to Confrontation

In affirming defendant's conviction, the Second Department noted that DNA evidence did not violate defendant's right of confrontation because the challenged evidence was not testimonial:

> [Defendant's] right of confrontation (see US Const Sixth Amend) was not violated when an expert testified that a DNA profile produced by the Office of the Chief Medical Examiner (hereinafter OCME) from a sample of the decedent's blood matched a DNA profile produced by the OCME from a sample of a stain on a pair of jeans given to the office by the police department. The DNA profiles were not testimonial …, but rather, were merely raw data that, standing alone, did not link the defendant to the crime… . The connection of the defendant to the crime was made by the testimony of police officers establishing that the defendant was wearing the subject jeans when arrested, and of the DNA expert, who testified that, based on his analysis, the two subject DNA profiles matched…. **People v Pitre, 2013 NY slip Op 05231, 2nd Dept 7-10-13**

40 Month Pre-Trial Delay Did Not Violate Due Process

In determining a 40-month delay did not deprive defendant his right to due process, the Fourth Department wrote:

> In determining whether there has been an undue delay, a court must consider several factors, including " '(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay' " (People v Decker, 13 NY3d 12, 15, quoting People v Taranovich, 37 NY2d 442, 445…).
>
> Upon applying the Taranovich factors to the facts before us, we conclude that the delay did not deprive defendant of his right to due process. We agree with defendant that the rape in the first degree charge "can only be described as serious" … . Conversely, although the 40-month delay in commencing the prosecution was substantial, it was not per se unreasonable …. Furthermore, defendant was not incarcerated for an extended period prior to the trial on these charges, and there is no evidence that defendant was prejudiced by the delay in commencing the prosecution. Finally, the reason for the delay in this case was the police detective's inability to fully identify and locate defendant. That excuse was not unreasonable inasmuch as the victim was unable to identify defendant from mug shots or otherwise ascertain which of the 32 men in the Buffalo Police Department's identification system with defendant's name was the perpetrator. **People v White, 817, 4th Dept 7-19-13**

DNA Reports Did Not Violate Right to Confrontation/Reports Admissible as Business Records

In finding DNA-profile reports generated by the City of New York's Medical Examiner did not violate defendant's right to confrontation, the Second Department wrote:

> The reports contained no conclusions, interpretations, comparisons, or subjective analyses, and "consisted of merely machine-generated graphs" and raw data … . Accordingly, the reports were not "testimonial" in nature … . Further, a foundation for the admission of these reports as business records was established through the testimony of an assistant director employed by the Office of the Chief Medical Examiner of the City of New York (see CPLR 4518[a]…), who also conducted the actual analysis and interpretation of the data contained in the reports at issue. **People v Fucito, 2013 NY Slip Op 05538, 2nd Dept 7-31-13**

CRIMINAL LAW/MENTAL HYGIENE LAW

Reference to Old Offense that Was Dismissed Okay in "Mental Abnormality/Dangerous Sex Offender" Proceeding

The Fourth Department determined that evidence of a 1991 offense that was dismissed with the record sealed was admissible in a Mental Hygiene Law article 10 "dangerous sex offender" proceeding to determined whether defendant had a mental abnormality:

> Evidence of prior crimes is commonly admissible in article 10 proceedings because it is probative of whether a designated felony was sexually motivated and whether a respondent has a mental abnormality…, and evidence of uncharged crimes likewise is admissible in article 10 proceedings because "Mental Hygiene Law article 10 does not limit the proof to acts that resulted in criminal convictions when considering the issue of mental abnormality"… .**Matter of State of New York v Schrainkler,, 657, 4th Dept 7-5-13**

CRIMINAL LAW/EVIDENCE

Therapeutic Dog Allowed In Court to Support Alleged Child Victim of Sexual Offenses During Trial Testimony

The Second Department, in a full-fledged opinion by Justice Sgroi, determined that the "courts of this State should permit the presence of a therapeutic 'comfort dog' in a trial setting when the court determines that the animal may provide emotional support for a testifying crime victim." The defendant was charged with predatory sexual assault against a child. The alleged victim was his daughter who 15 years old at the time of trial. It was alleged that the victim twice became pregnant by the defendant and the defendant arranged for abortions in both instances. The Second Department found support for its determination in Executive Law section 642-a (procedures making the judicial process less threatening to child victims). The Second Department rejected defendant's arguments that the presence of the dog violated his right to due process of law and right of confrontation. **People v Tohom, 2013 NY Slip Op 05234, 2nd Dept 7-10-13**

CRIMINAL LAW/ARTICLE 78/PROHIBITION

Prosecutor Need Not Accept Defendant's Stipulation in Lieu of DNA Test

The Second Department affirmed Supreme Court's denial of an Article 78 petition seeking prohibition with respect to an order that petitioner allow a buccal swab for DNA testing. The petitioner argued that his offer to stipulate his DNA matched the DNA on two firearms should preclude the test. The Second Department held that a prosecutor was under no obligation to accept the offer to stipulate:

> "[A] court order to obtain a [bodily] sample of a suspect may issue provided the People establish (1) probable cause to believe the suspect has committed the crime, (2) a clear indication' that relevant material evidence will be found, and (3) the method used to secure it is safe and reliable"…. "In addition, the issuing court must weigh the seriousness of the crime, the importance of the evidence to the investigation and the unavailability of less intrusive means of obtaining it, on the one hand, against concern for the suspect's constitutional right to be free from bodily intrusion on the other" …. Here, the petitioner … contends that the People's motion should have been denied on the ground that his offer to stipulate that his DNA matched the DNA recovered from the two firearms at issue provided a less intrusive method of obtaining the evidence. However, the law is manifestly clear that the People are under no obligation to accept an offer by a defendant to stipulate to a fact or to an element of a charged crime …, and "the decision as to whether to decline or accept such a stipulation lies wholly within the prosecutor's discretion"…. Accordingly, since the petitioner has failed to demonstrate a clear legal right to the extraordinary remedy of prohibition, his petition is denied … . **Matter of Johnson v Shillingford, 2013 NY slip Op 05212, 2nd Dept 7-10-13**

CIVIL PROCEDURE

Breach of Fiduciary Duty Allegations Not Specific Enough

The First Department determined plaintiff's allegations in support of a breach of fiduciary duty cause of action were not specific enough to survive a motion to dismiss:

> Because the underlying allegations of wrongdoing were inadequately pleaded, the fiduciary breach and injunction causes of action were not sustainable. Although plaintiff alleges, among other things, that defendant tried to prevent her from having any meaningful participation in the companies' operation, her allegations are vague and conclusory, made without any specific instances of the alleged misconduct…. The lack of particularity with respect to plaintiff's allegations of breach of fiduciary duty (CPLR 3016[b]) is not excused by the individual defendant's alleged refusal to provide information or by the lack of discovery, as information regarding the alleged denial of participation in corporate management was not solely in the individual defendant's possession…. Moreover, plaintiff failed to assert specific dates that she had requested information, or to specify the information she had requested…. **Berardi v Beradi, 2013 NY Slip Op 04976, 1st Dept 7-2-13**

Summary Judgment Premature—Disclosure Necessary

In finding Supreme Court should have treated defendant's motion, which was made after issue was joined, as a motion for summary judgment (not a motion to dismiss), the Second Department determined the motion should not have been granted because facts essential to oppose the motion may exist but could not yet be stated:

> An award of summary judgment would be premature at this stage of the case. CPLR 3212(f) permits a court to deny a motion for summary judgment where it appears that the facts essential to oppose the motion "exist but cannot then be stated" (CPLR 3212[f];…). " This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion'"…. Here, the defendant's motion to dismiss the complaint was made prior to the parties conducting depositions. Since the plaintiffs had no personal knowledge of the relevant facts, they should be afforded the opportunity to conduct discovery, including depositions of the defendant's employees and other witnesses that were present during the incident complained of…. **Wesolowski v St Francis Hosp, 2013 NY Slip Op 05061, 2nd Dept 7-3-13**

Attorney's Illness Was Adequate Excuse---Vacation of Preclusion Order Allowed

The Fourth Department affirmed Supreme Court's allowing plaintiff in a medical malpractice action to respond to discovery demands, after the court had precluded plaintiff for not responding. Plaintiff's attorney's illness provided a reasonable excuse, and the expert's affirmation (later converted to an affidavit as directed by the court) demonstrated a meritorious action:

> "It is well established that the illness of an attorney may constitute a reasonable excuse for a default… . In support of the motion, plaintiff's counsel averred that, from early 2010 until shortly before his motion to vacate the default order, he was suffering from recurring health issues stemming from two heart attacks, a serious infection requiring hospitalization, and uncontrolled Type II diabetes. According to counsel, those medical issues "affected [his] health in an ongoing manner and prevented [him] from diligently and timely responding to [defendants'] demands in this case." There is no evidence that counsel's neglect in this case was "willful, contumacious or manifested bad faith" … . Particularly in light of New York's "strong public policy . . . [in favor of] disposing of cases on their merits"…, we conclude that "[w]here, as here, there is no evidence of willfulness, deliberate default, or prejudice to the defendants, the interest of justice is best served by permitting the case to be decided on its merits" …. **Loucks v Klimek, 477, 4th Dept 7-5-13**

Motion to Amend Answer Should Have Been Allowed---Prejudice in this Context Explained

In reversing Supreme Court in a case concerning whether an assault was covered under an insurance policy, the Fourth Department determined the defendant insurance company's motion for leave to amend its answer should have been granted and plaintiffs' motion for summary judgment should have been denied. After finding that the amendment was meritorious, the Fourth Department explained how to analyze whether an amendment would "prejudice" the defendant:

> " 'Prejudice may be found where a party has incurred some change in position or hindrance in the preparation of its case which could have

> been avoided had the original pleading contained the proposed amendment' "… . Here, the alleged prejudice would not have been avoided had the original answer contained the proposed amendment. "[T]he fact that an amended pleading may defeat a party's cause of action is not a sufficient basis for denying [a] motion to amend"…. **Williams… v New York Central Fire Insurance Company, 705, 4th Dept 7-5-13**

Law Office Failure Can Be a Valid Excuse Re: Vacating a Default Judgment

In reversing Supreme Court's denial of a motion to vacate a default judgment, the Fourth Department explained that law office failure can be excused:

> The court erred in rejecting that excuse on the ground that "law office failure is not an excuse that is accepted by the Court of Appeals." It is well established that law office failure may be excused, in the court's discretion, when deciding a motion to vacate a default order (see CPLR 2005;…). With respect to other relevant factors, we note that defendants had contested plaintiff's claims in federal court for more than a year before this action was recommenced in Supreme Court, and their attorneys had filed timely notices of appearances in Supreme Court and had been communicating with plaintiff's attorney before the answer was due. We further note that plaintiff was not prejudiced by defendants' inadvertent default, and that the extent of the delay was minimal.**Calaci v Allied Interstate, Inc…, 750, 4th Dept 7-5-13**

"John Doe" Party Who Was Not Served Waived Objection to Personal Jurisdiction

The First Department determined that an informal appearance by a "John Doe" party who was not served with the complaint waives any objection to personal jurisdiction. The action stemmed from plaintiff's decedent's drowning at Coney Island:

> CPLR 1024 allows for the commencement of an action against an unknown party…. While the use of a John Doe designation does not exempt a plaintiff from the requirement of serving process on the intended defendant by an authorized method under CPLR article 3…, a defendant may appear informally by actively litigating the action before the court…. When a defendant participates in a lawsuit on the merits, he or she indicates an intention to submit to the court's jurisdiction over the action, and by appearing informally in this manner, the defendant confers in personam jurisdiction on the court…. Thus, absent a formal "appearance" by a defendant, a defendant may nevertheless appear in an action where his or her counsel communicates a clear intent to participate… . **Taveras v City of New York, 2013 NY Slip Op 05199, 2nd Dept 7-10-13**

Defendant's Failure to Appear at Pre-Trial Conference Did Not Warrant Striking Answer

The Third Department reversed Supreme Court's striking of defendant's answer as a penalty for defendant's not appearing at a pre-trial conference as ordered:

> Generally speaking, and based upon sound underlying policy, there is a strong judicial preference for determination of issues upon the merits …. Consistent with this policy, defendant's failure to comply with the court's directive for in-person appearance at a pretrial conference is not punishable by an order striking the pleadings. The applicable rule instead specifically authorizes the court only to deem a party's failure to comply "a default under CPLR 3404," which results in removal of the case from the trial calendar (22 NYCRR 202.26 [e]…). **CBA Properties LLC v Global Airlines Services Inc, 515868, 3rd Dept 7-18-13**

Absence of 90-Day Demand to Serve a Note of Issue Precluded Dismissal of Lawsuit Based on Gross Laches (12-Year Delay)

In a full-fledged opinion by Justice Chambers, the Second Department determined that the doctrine of laches was not available to dismiss a pre-note-of-issue case which had been dormant for 12 years. In this slip and fall case, the incident occurred in 1992, issue was joined, plaintiffs served a bill of particulars, but plaintiffs failed to appear at a June 1996 status conference. The action was "marked off" the calendar and later marked "disposed." In October, 2008, the plaintiffs moved restore the action to the active pre-note-of-issue calendar. Supreme Court denied the motion to dismiss based on laches "concluding that it lacked the power to dismiss the … complaint." The Second Department affirmed, explaining:

> At the outset, we note that we summarized the law applicable to the issue in this case in Lopez v Imperial Delivery Serv. (282 AD2d 190), where we explained the interplay among three case management devices: CPLR 3404, 22 NYCRR 202.27, and CPLR 3216. In Lopez, we made clear that none of these devices applies to a pre-note-of-issue case where, as here, there has been no order dismissing the complaint pursuant to 22 NYCRR 202.27, and the

> defendant has never made a 90-day written demand on the plaintiff to serve and file a note of issue pursuant to CPLR 3216… . In this case, the [defendant] attempts to avoid the holding in Lopez by relying on the doctrine of laches as the basis for dismissing the complaint. * * *
>
> …[T]he Court of Appeals concluded in Airmont Homes that dismissal for either gross laches or failure to prosecute was not available in the absence of compliance with CPLR 3216 (see Airmont Homes v Town of Ramapo, 69 NY2d at 902). To allow dismissal under the circumstances of this case based on the doctrine of laches would be tantamount to permitting dismissal for general delay, which the courts lack inherent authority to do, and which is inconsistent with the legislative intent underlying CPLR 3216 [which requires a 90-day demand to serve and file a note of issue]. …
>
> Although an extensive delay in prosecuting an action may, at times, prejudice a defendant's ability to defend against a suit, a defendant has the statutory means of avoiding such prejudicial delay by serving a 90-day demand … . Laches, which is an equitable doctrine, does not provide an alternate route to dismissal where a defendant has not served the 90-day demand statutorily required to prompt resumption of the litigation … . **Arroyo v Board of Educ of City of NY, 2013 NY Slip Op 05507, 2nd Dept 7-31-13**

Absence of Adequate Reason for Errata Sheet (CPLR 3116(a)) Altering Deposition Testimony Precluded Its Acceptance

Plaintiff was injured when he fell while using a ladder at the plumbing business where he worked. The ladder was owned by plaintiff's employer and the property was owned by an out-of-possession landlord. During his deposition, plaintiff said he had no idea why the ladder slid out from under him when he attempted to step on a shelf. In reversing Supreme Court and dismissing the complaint, the Second Department determined plaintiff's post-deposition errata sheet could not be considered in opposition to the defendant's motion for summary judgment because plaintiff did not provide an adequate reason for the alteration of his deposition testimony:

> In his post-deposition errata sheet, the injured plaintiff radically changed much of his earlier testimony, with the vague explanation that he had been "nervous" during his deposition. CPLR 3116(a) provides that a "deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of reasons given by the witness for making them." Since the injured plaintiff failed to offer an adequate reason for materially altering the substance of his deposition testimony, the altered testimony could not properly be considered in determining the existence of a triable issue of fact as to whether a defect in, or the inadequacy of, the ladder caused his fall… . In the absence of the proposed alterations, the injured plaintiff's deposition testimony was insufficient to raise a triable issue of fact with respect to the defectiveness or inadequacy of the ladder so as to warrant the denial of summary judgment. Likewise, in opposition to the defendants' prima facie showing that the trust was an out-of-possession landlord with no duty to repair or maintain the ladder or the floor, the plaintiffs failed to raise a triable issue of fact. **Ashford v Tannenhauser, 2013 NY Slip Op 05508, 2nd Dept 7-31-13**

Supreme Court Does Not Have the Power to Dismiss a Complaint for Delay in Prosecution Absent 90-Notice (CPLR 3216)

The Second Department reversed Supreme Court's dismissal of a complaint based on delay in prosecuting the action because the 90-day demand (CPLR 3216) had not been served on the plaintiff. The First Department wrote:

> CPLR 3216 permits a court to dismiss an action for failure to prosecute only after the court or the defendant has served the plaintiff with a written demand requiring the plaintiff to resume prosecution of the action and to serve and file a note of issue within 90 days after receipt of the demand, and also stating that the failure to comply with the demand will serve as the basis for a motion to dismiss the action. Here, the Supreme Court did not possess the power to dismiss this pre-note of issue action on the ground of a general lack of prosecution since the plaintiff had not received a 90-day demand pursuant to CPLR 3216(b) requiring the plaintiff to serve and file a note of issue … . **Armouth-Levy v New York City, 2013 NY Slip Op 05551, 2nd Dept, 6-7-13**

Complaint Can Not Be Deemed Dismissed in Absence of Final Judgment

In reversing Supreme Court, the Second Department determined a complaint had not been dismissed because no final judgment dismissing the complaint had been entered after an order vacating a default:

> …[T]he Supreme Court issued an order granting

> the defendant's motion to vacate his default in appearing and answering the complaint on the ground of lack of personal jurisdiction. However, no judgment dismissing the complaint on the ground of lack of personal jurisdiction was entered. The plaintiff subsequently moved to extend her time to serve the defendant with process in the action. …[T]he court denied the plaintiff's motion on the ground that its prior order had dismissed the action and, thus, there was no pending action in which to grant an extension of time for service of process … . On her appeal from the August 13, 2012, order, the plaintiff contends that, inasmuch as there was no judgment dismissing the action, the action was pending when she moved to extend the time to serve the defendant with process. We agree. An action is deemed pending until there is a final judgment (see CPLR 5011…)… . **Cooke-Garrett v Hoque, 2013 NY Slip Op 05554, 2nd Dept 8-7-13**

Courts Have Discretion to Grant Affirmative Relief in Absence of a Formal Cross-Motion

In a full-fledged opinion by Justice Balkin, the Second Department determined trial courts have the discretion to determine applications made in the absence of the formal requirements of a cross-motion. In this case the defendant answered a motion for a default judgment demonstrating a reasonable excuse and a meritorious defense. Included in the answering papers was an application for leave to serve a late answer to compel plaintiff to accept the answer. Supreme Court granted all the requested relief. The plaintiff appealed on the ground that the affirmative relief should have been requested through a formal cross-motion. The Second Department wrote:

> Given the language of CPLR 2215, and the contexts in which it is applicable, the most reasonable interpretation of the statute is that a party seeking relief in connection with another party's motion is, as a general rule, required to do so by way of a cross motion, at least to have a right that the request be determined on the merits. Otherwise, a party who seeks relief by way of a notice of cross motion would be in a position less favorable than that of a party who merely makes the request without a notice of cross motion: the party who makes a formal cross motion would be required to comply with the notice and service requirements and deadlines imposed by the statute, but a party seeking relief merely by requesting it would enjoy greater flexibility.
>
> Nonetheless, courts retain discretion to entertain requests for affirmative relief that do not meet the requirements of CPLR 2215. Litigants, however, must be cognizant of an important distinction between the two situations: a party in compliance with CPLR 2215 is entitled to have its cross motion considered; a party not in compliance with the statute must hope that the court opts, in the exercise of its discretion, to entertain the request. Thus, we are in agreement with our colleagues in the Appellate Division, Third Department, who, in Fox Wander W. Neighborhood Assn. v Luther Forest Community Assn. (178 AD2d at 872), held that, even in the absence of an explicit notice of cross motion, the Supreme Court is not "prohibited" from entertaining the nonmoving party's request for relief. **Fried v Jacob Holding Inc, 2013 NY Slip Op 05555, 2nd Dept 8-7-13**

Motion for Summary Judgment in Lieu of Complaint Should Have Been Denied---Question of Fact Re: Whether Spanish Document Was a Judgment

The First Department determined that a motion brought pursuant to CPLR 3213 to enforce a Spanish court's award of damages against the defendant should not have been granted. Experts disagreed about whether the Spanish document was an enforceable judgment. The First Department explained the criteria for recognizing foreign decrees (CPLR 5302) and for determining a motion for summary judgment in lieu of a complaint (CPLR 3213):

> A motion for summary judgment in lieu of a complaint (CPLR 3213) is based on an "instrument for the payment of money only or upon any judgment." The statute allows a plaintiff an expedited procedure for entry of a judgment by filing and service of a summons and a set of motion papers that contain sufficient evidentiary detail for the plaintiff to establish entitlement to summary judgment (see David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3213:8).
>
> CPLR 5302 provides that New York will recognize foreign decrees that are "final, conclusive and enforceable where rendered even though an appeal therefrom is pending." Here, the parties' Spanish law experts disagree as to whether the document here, denominated a "ruling" ("auto" in Spanish), is enforceable as a judgment. * * *
>
> The conflicting evidence as to whether the ruling is final, conclusive and enforceable in Spain precludes plaintiff from obtaining an accelerated judgment pursuant to CPLR 3213. **Sea Trade Mar Corp v Coutsodontis, 2013 NY Slip Op 05599, 1st Dept 8-13-13**

Intervention Not Available to Vacate a Default Judgment—Default Judgment is Not on the Merits and Therefore Has No Res Judicata Effect on Putative Intervenors

The First Department determined a motion to intervene in an action which ended in a default judgment should not have been granted. Plaintiff sued defendant, which defaulted. Defendant had transferred its assets to the parties seeking to intervene to vacate the default. Plaintiff had sued the intervenors alleging the transfer of assets from the defendant to the intervenors was fraudulent (the "supplemental proceeding"). The First Department explained:

> "[T]he potentially binding nature of the judgment on the proposed intervenor is the most heavily weighted factor in determining whether to permit intervention" … .Here, however, intervenors cannot intervene by arguing that the default judgment has a res judicata effect on the supplemental proceeding and adversely affects their rights in that proceeding. The default judgment has no res judicata effect on intervenors because a default is not a determination on the merits as is necessary to invoke that doctrine … . Likewise, intervenors were not parties to the default action … . Further, plaintiffs did not obtain the default judgment through fraud or through any other wrongdoing… . Intervenors' right to act for defendant ended with the 2007 sale---an event that occurred four years before the clerk entered the default judgment against [defendant]. **Amalgamated Bank v Helmsley-Spear, Inc, 2013 NY Slip Op 05600, 1st Dept 8-13-13**

Dismissal of Federal Action Precluded Related Action in State Court---Res Judicata, Privity under Res Judicata Doctrine, Effect of Initial Forum Choice, and "First-in-Time" Rule Discussed

In a full-fledged opinion by Justice Moskowitz, the First Department determined that Supreme Court should have dismissed the state complaint because the dismissal of the related federal complaint controlled under the doctrine of res judicata. The lawsuit was brought by the insurer (Syncora) of mortgage-backed securities issued by the defendant (JP Morgan [formerly known as Bear Stearns]). Syncora first sued in federal court where the action was dismissed based on the findings that the fraud allegations Syncora sought to add to the complaint were untimely and Syncora did not have standing because it was neither a buyer or a seller of the relevant securities. Syncora then filed the state action asserting the same claims rejected as untimely by the federal court. The opinion addresses several distinct issues: (1) the flexibility of the concept of "privity" in applying the doctrine of res judicata to the parties and "those in privity" with the parties; (2) a finding of "privity" can be based upon the plaintiff's allegations about the relationship between a party and another entity; (3) a party which makes a strategic decision to first bring an action in one jurisdiction "is bound by the effects of the path it charted…"; and (4) dismissal of the complaint pursuant to CPLR 3211(a)(4) in favor of the earlier-filed federal action was warranted under New York's "first-in-time" rule. **Syncora Guar Inc v JP Morgan Sec LLC, 2013 NY Slip Op 05602, 1st Dept, 8-13-13**

Court Has No Power to Dismiss for Failure to Prosecute in Absence of 90-Demand to File and Serve Note of Issue

The Second Department noted that a court does not have the power to dismiss a complaint based on the doctrine of laches, or failure to prosecute, where plaintiff has not been served with a 90-day demand to serve and file a note of issue (CPLR 3216). **Baxter v Javier, 2013 NY slip Op 05605, 2nd Dept 8-14-13**

Law Office Failure Was Valid Excuse for Default---Answer Deemed Served in Absence of Cross Motion

The Second Department determined law office failure constituted a valid excuse for a defendant's default and defendant's answer, which was attached to the papers submitted in opposition to plaintiff's motion for a default judgment, would be deemed served in the absence of a cross motion seeking leave to file a late answer:

> In its discretion, the court may accept law office failure as an excuse (see CPLR 2005;… . The claim of law office failure should, however, be supported by a "detailed and credible" explanation of the default or defaults at issue … . Law office failure should not be excused where allegations of law office failure are conclusory and unsubstantiated…. The Supreme Court providently exercised its discretion in accepting the defendant's excuse of law office failure, as the defendant provided detailed affidavits of personnel explaining the delay in timely serving an answer. **Blake v United States of Am, 2013 NY Slip 05609, 2nd Dept 8-14-13**

Criteria for Disclosure from Nonparty Witness

The Second Department explained the criteria for disclosure from a nonparty witness:

> A party seeking disclosure from a nonparty witness must demonstrate that the disclosure sought is material and necessary, and must set forth the "circumstances or reasons" why disclosure is "sought or required" from such

nonparty witness (CPLR 3101[a][4]…). Here, the plaintiff failed to demonstrate that additional testimony from the nonparty witnesses or the information sought would be material and necessary to the prosecution of this case (see CPLR 3101[a]…). **Dicenso v Wallin, 2013 NY Slip Op 05612, 2nd Dept 8-14-13**

Criteria for Avoiding Dismissal After Failure to Comply with 90-Day Notice to Serve and File Note of Issue Explained

The Second Department explained the criteria for avoiding dismissal for failure to comply with a 90-day notice to serve and file a note of issue:

> Here, the defendant … did not serve a 90-day demand, but relied instead on an order dated June 13, 2008, which instructed the plaintiffs that the failure to serve and file a note of issue within 90 days would result in dismissal of the action pursuant to CPLR 3216. This order had the same effect as a valid 90-day notice pursuant to CPLR 3216 … .To avoid the sanction of dismissal, the plaintiffs were initially required to comply with the order dated June 13, 2008, either by serving and filing a timely note of issue or by moving, before the default date, to vacate the order or to extend the 90-day period pursuant to CPLR 2004 … . Having failed to pursue either of the foregoing options, the plaintiffs were obligated to demonstrate a reasonable excuse for the delay and a potentially meritorious cause of action to avoid the sanction of dismissal (see CPLR 3216[e]…). **Griffith v Wray, 2013 NY Slip Op 05615, 2nd Dept 8-14-13**

"Law of the Case" Doctrine Did Not Apply---Dismissal of Affirmative Defense Did Not Constitute Full Litigation of the Issue

In a property-line dispute, the Second Department reversed Supreme Court ruling that the location of the fence on plaintiff's property was the "law of the case." The "law of the case" doctrine was imposed by Supreme Court based on the dismissal of the title insurance company's affirmative defense which claimed the fence was on defendant's land. The Second Department wrote:

> "The doctrine of the law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" … The doctrine "applies only to legal determinations that were necessarily resolved on the merits in [a] prior decision" …, "and to the same questions presented in the same case" … . "Like claim preclusion and issue preclusion, preclusion under the law of the case contemplates that the parties had a full and fair' opportunity to litigate the initial determination" … . Contrary to the determination of the Supreme Court, the prior order …which granted [the] motion pursuant to CPLR 3211 to dismiss …, did not necessarily resolve the issue of whether the fence was located on the plaintiffs' property or the defendants' property, as the parties did not have an opportunity to fully litigate that issue… . **Ramanathan v Aharon, 2013 NY slip Op 05621, 2nd Dept 8-14-13**

Amendment of Bill of Particulars After Four Years of Discovery Should Not Have Been Allowed

The Second Department determined Supreme Court should not have allowed plaintiff to amend his bill of particulars to include aggravation of a preexisting condition because the request came after four years of discovery during which plaintiff had affirmatively stated his injuries did not include aggravation of preexisting condition:

> Generally, in the absence of prejudice or surprise to the opposing party, leave to amend a bill of particulars should be freely granted "unless the proposed amendment is palpably insufficient or patently devoid of merit" (…see CPLR 3025[b]…). "However, where the application for leave to amend is made long after the action has been certified for trial, judicial discretion in allowing such amendments should be discrete, circumspect, prudent, and cautious'" … .Under the circumstances of this case, including the fact that, during four years of discovery, the plaintiff affirmatively maintained that his injuries did not include the aggravation of a pre-existing condition, as well as the lateness of his request for leave to amend, the prejudice to the defendants, and the lack of any reasonable excuse for the delay, the Supreme Court improvidently exercised its discretion in granting the plaintiff's motion for leave to amend his bill of particulars … . **Rodgers v New York City Tr Auth, 2013 NY Slip Op 05623, 2nd Dept 8-14-13**

Defendant in Medical Malpractice Action Should Have Been Allowed to Amend His Answer to Add Statute of Limitations Affirmative Defense

The Second Department reversed Supreme Court's denial of defendant's motion to amend his answer by adding the passing of the statute of limitations as an affirmative defense. The Second Department explained:

Here, it is undisputed that the two-year statute of limitations applicable to a cause of action alleging wrongful death began to run on August 14, 2007, the date of the decedent's death (see EPTL 5-4.1), and that the plaintiff commenced the second action, in which Lehman was a named defendant, more than two years after the decedent's death. Accordingly, Lehman's proposed affirmative defense of the statute of limitations as to so much of the complaint as sought to recover damages for wrongful death was not palpably insufficient nor patently devoid of merit on its face, and the plaintiff's contentions regarding the relation back doctrine (see CPLR 203[b]) did not warrant the denial of Lehman's motion. Consequently, as there was no evidence that the amendment would unfairly prejudice the plaintiff, the Supreme Court should have granted Lehman's motion for leave to amend his answer without conducting a further examination into the ultimate merits of the proposed amendment … . "If [the plaintiff] wishes to test the merits of the proposed added . . . defense, [the plaintiff] may later move for summary judgment upon a proper showing" … . **Carroll v Motola, 2013 NY Slip Op 05728, 2nd Dept 8-28-13**

CIVIL PROCEDURE/INSURANCE LAW

Order to Compel Acceptance of Answer Upheld---Delay Caused by Insurance Carrier is Valid Excuse—Precedent to the Contrary Overruled

In a personal injury action, the Fourth Department affirmed Supreme Court's order compelling plaintiff to accept the answer as timely. In so finding, the Fourth Department noted that a prior decision holding that a delay caused by the defendant's insurance carrier is not a reasonable excuse should no longer be followed:

> It is well settled that " '[p]ublic policy favors the resolution of a case on the merits, and a court has broad discretion to grant relief from a pleading default if there is a showing of merit to the defense, a reasonable excuse for the delay and it appears that the delay did not prejudice the other party' "…. Furthermore, "[t]he determination whether an excuse is reasonable lies within the sound discretion of the motion court"…. Here, defendant met her burden with respect to a meritorious defense by demonstrating that there is factual support for her defenses… . * * * Insofar as we indicated in our decision in Smolinski v Smolinski (13 AD3d 1188, 1189) that " 'an excuse that the delay in appearing or answering was caused by the defendant's insurance carrier is insufficient' " to establish a reasonable excuse for a delay in answering, it is no longer to be followed. Rather, the determination whether delay caused by an insurer constitutes a reasonable excuse for a default in answering lies "in the discretion of the court in the interests of justice" (Castillo v Garzon-Ruiz, 290 AD2d 288, 290; see CPLR 2005). **Accetta v Simmons, 676, 4th Dept 7-5-13**

CIVIL PROCEDURE/APPEALS

Only Attorney Can Represent Voluntary Association---Appeals Dismissed

In dismissing the appeals, the First Department held that only an attorney can represent a voluntary association:

> Petitioner is a voluntary association comprised of rent-regulated tenants in the subject building. Patricia Pillette is a member of the association and appears pro se purportedly on behalf of the association. However, Pillette is not an attorney, and a voluntary association may only be represented by an attorney and not by one of its members who is not an attorney admitted to practice in the state of New York (see CPLR

321[a]). Accordingly, petitioner's failure to appear by attorney requires dismissal of the appeals… . **Matter of Tenants Comm of 36 Gramercy Park v NYS Div of Hous & Community Renewal, 2013 NY Slip Op 04984, 1st Dept 7-2-13**

CIVIL PROCEDURE/NEGLIGENCE

Notice to Admit Improperly Sought Admission at Heart of Case

The Third Department determined Supreme Court abused its discretion when it denied defendant's motion for a protective order pursuant to CPLR 3103(a). The plaintiff had sought a notice to admit that a vehicle owned by the defendant and operated by defendant's employee 'was in contact with the plaintiff." The Second Department wrote:

> "The purpose of a notice to admit is only to eliminate from the issues in litigation matters which will not be in dispute at trial. It is not intended to cover ultimate conclusions, which can only be made after a full and complete trial"…. Here, the plaintiff's notice to admit improperly sought the defendant's admission concerning a matter that went to the heart of the controversy in this case…. Moreover, " the purpose of a notice to admit is not to obtain information in lieu of other disclosure devices, such as the taking of depositions before trial'" …. Accordingly, the Supreme Court should have granted the defendant's motion for a protective order. **Ramcharran v NY Airport Services LLC, 2013 NY Slip Op 05195, 2nd Dept 7-10-13**

CIVIL PROCEDURE/NEGLIGENCE

Work Accident and Auto Accident Cases Should Be Consolidated Because Plaintiff Alleged Auto Accident Injuries Exacerbated by Work-Related-Accident Injuries

The Second Department determined two actions should be consolidated. Plaintiff was injured in an auto accident and alleged that those injuries were exacerbated by a work-related accident:

> Where common questions of law or fact exist, a motion to consolidate or for a joint trial pursuant to CPLR 602(a) should be granted absent a showing of prejudice to a substantial right by the party opposing the … . In view of [plaintiff's] allegations that certain injuries that he sustained in the automobile accident were exacerbated by the work-related accident, in the interest of justice and judicial economy, and to avoid inconsistent verdicts, the two actions should be tried jointly… . **Cieza v 20th Ave Realty Inc, 2013 NY Slip Op 05610, 2nd Dept 8-14-13**

CIVIL PROCEDURE/FRAUD

Fraud Sufficiently Pled/Six-Year Statute of Limitations Applied

In reversing Supreme Court, the Second Department determined plaintiff had adequately pled a cause of action sounding in fraud and that, therefore, the six-year statute of limitations applied to both the fraud and the related breach of fiduciary duty causes of action. In explaining the pleading requirements for fraud, the Second Department wrote:

> To state a cause of action sounding in fraud, a plaintiff must allege that "(1) the defendant made a representation or a material omission of fact which was false and the defendant knew to be false, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) there was justifiable reliance on the misrepresentation or material omission, and (4) injury"… . "A cause of action to recover damages for fraudulent concealment requires, in addition to allegations of scienter, reliance and damages, an allegation that the defendant had a duty to disclose material information and that it failed to do so"… .
>
> In assessing a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint for failure to state a cause of action, the facts pleaded are accepted as true and the plaintiff is accorded every possible favorable inference … . The court is then to "determine only whether the facts as alleged fit within any cognizable legal theory" … . Pursuant to CPLR 3016(b), a cause of action alleging fraud must be pleaded with particularity so as to inform the defendant of the alleged wrongful conduct and give notice of the allegations the plaintiff intends to prove .. . This pleading requirement "should not be confused with unassailable proof of fraud," and "may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct." … . **McDonnell v Bradley, 2013 NY Slip Op 05681, 2nd Dept 8-21-13**

CIVIL PROCEDURE/MARTIN ACT

Causes of Action Based Upon Allegations of Violations of Martin Act Concerning Fraud in the Selling of Securities Allowed to Go Forward--- Supreme Court Should Not Have Evaluated Merits on Motion to Dismiss

The First Department determined Supreme Court should not have dismissed certain Martin Act/Executive Law causes of action alleging fraud in the sale of securities brought by the Attorney General against Charles Schwab. The First Department explained that Supreme Court should not have evaluated the merits of the case in determining the motion to dismiss:

> The Martin Act causes of action are based on General Business Law § 352-c(1)(a), which, where applicable, prohibits fraud, concealment, suppression or false pretense, and General Business Law § 352-c(1)(c), which prohibits false representations or statements to induce or promote the issuance, purchase or sale of securities within or from the State. It is alleged in the complaint that defendant, Charles Schwab & Co., Inc. (Schwab), a registered securities broker-dealer, engaged in fraudulent and deceptive conduct in the sale of auction rate securities (ARS) to the investing public. The Attorney General asserts that Schwab misrepresented ARS to its customers as safe, liquid investments while concealing the fact that they were complex financial instruments with significant, inherent and increasing liquidity risks.
> * * *
>
> In dismissing the Martin Act causes of action, the court concluded that the "misrepresentations alleged were true when made and the complaint contains no allegations that ARS were liquid at a time when they were illiquid." The court based this conclusion on its own finding that there had been no failures in the auctions in the 20 years preceding August 2007. In reaching this conclusion, the court erroneously engaged in an evaluation of the merits of the Martin Act causes of action. On a motion to dismiss for failure to state a cause of action, it is not the function of the court to evaluate the merits of the case… .
> **People v Charles Schwab & Co, Inc, 2013 NY Slip Op 05722, 1st Dept 8-27-13**

FAMILY LAW

Father Estopped from Denying Paternity---Best Interests of Child Prevail

In upholding Family Court's determination the father was estopped from denying paternity, in spite of his executing the acknowledgment based upon a mistake of fact, the Second Department explained the relevant legal principles:

> A party seeking to challenge an acknowledgment of paternity more than 60 days after its execution must prove that it was signed by reason of fraud, duress, or material mistake of fact (see Family Ct Act § 516-a[b][ii]). If the petitioner meets this burden, the court is required to conduct a further inquiry to determine whether the petitioner should be estopped, in accordance with the child's best interests, from challenging paternity…. If the court concludes that estoppel is not warranted, the court is required to order genetic marker tests or DNA tests for the determination of paternity, and to vacate the acknowledgment of paternity in the event that the individual who executed the document is not the child's father (see Family Ct Act § 516-a[b][ii];…). * * *
> The purpose of equitable estoppel "is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position" …. Thus, "a man who has held himself out to be the father of a child, so that a parent-child relationship developed between the two, may be estopped from denying paternity," in light of the child's justifiable reliance upon such representations, and the resulting harm that his denial of paternity would engender…. "The doctrine in this way protects the status interests of a child in an already recognized and operative parent-child relationship" …. In all cases, "the doctrine of equitable estoppel will be applied only where its use furthers the best interests of the child" … . **Matter of Angelo AR v Tenisha NW, 2013 NY Slip Op 05084, 2nd Dept 7-3-13**

Nonparent Must Show Extraordinary Circumstances in Face of Custody Petition Even If Nonparent Has Custody Pursuant to Prior Consent Order

In upholding Family Court's denial of mother's petition for sole custody, the Second Department determined the paternal grandparents, who were sharing custody under a consent order, met their "extraordinary circumstances" burden. The Second Department noted that even where there is a prior order granting custody to a nonparent, the nonparent still has the burden of demonstrating "extraordinary circumstances" to continue the arrangement in the face of a petition for custody:

> In a custody proceeding between a parent and a nonparent, " the parent has the superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right due to surrender, abandonment, persisting neglect, unfitness, or other like extraordinary circumstances'"…. The nonparent has the burden of establishing extraordinary circumstances even where, as here, there is a prior order awarding physical custody of a child to the nonparent that had been issued on the consent of the parties…. Where extraordinary circumstances are present, the court must then consider the best interests of the child in awarding custody…. **Matter of DiBenedetto v DiBenedetto, 2013 NY Slip Op 05064, 2nd Dept 7-3-12**

Criteria for Permanent Neglect Explained

The Second Department determined Family Court properly found father had permanently neglected the child and explained the criteria as follows:

> "To establish permanent neglect, there must be clear and convincing proof that, for a period of one year following the child's placement with an authorized agency, the parent failed to substantially and continuously maintain contact with the child or, alternatively, failed to plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship"….
> According to the statute, planning for the future of the child means taking such steps as may be reasonably necessary to provide an adequate, stable home and parental care for the child within a period of time that is reasonable under the financial circumstances available to the parent (see Social Services Law § 384-b[7][c]). The plan must be realistic and feasible, and good-faith effort shall not, of itself, be determinative …. At a minimum, planning for the future of the child requires the parent to take steps to correct the conditions that led to the child's removal from the home… . **Matter of Egypt AAG, 2013 NY Slip Op 05065, 2nd Dept 7-3-13**

Mother Should Not Have Been Required to Contribute to Children's Educational Expenses

In determining Family Court abused its discretion in ordering mother to contribute to the children's educational expenses (where father affirmatively stated he was not seeking the contribution), the Second Department explained:

> "Unlike the obligation to provide support for a child's basic needs, support for a child's college education is not mandatory'"…. "Pursuant to Domestic Relations Law § 240(11-b)(c)(7), the court may direct a parent to contribute to a child's education, even in the absence of special circumstances or a voluntary agreement of the parties, as long as the court's discretion is not improvidently exercised in that regard"…. Here, however, the Family Court improvidently exercised its discretion in directing the mother to pay 29% of the subject children's educational expenses, since the father affirmatively stated that he was not seeking such contribution from the mother. **Matter of Grubler v Grubler, 2013 NT Slip Op 05068, 2nd Dept 7-3-13**

Criteria for Modification of Existing Visitation Arrangement

The Second Department explained the principles relevant to a modification of an existing visitation arrangement as follows:

> An existing visitation arrangement may be modified "upon [a] showing . . . that there has been a subsequent change of circumstances and modification is required" (Family Ct Act § 652 [a];…). "Extraordinary circumstances are not a prerequisite to obtaining a modification; rather, the standard ultimately to be applied remains the best interests of the child when all of the applicable factors are considered'"… .. "The best interests of the child generally lie in being nurtured and guided by both parents"…. "In order for the noncustodial parent to develop a meaningful, nurturing relationship with her [or his] child, visitation must be frequent and regular. Absent extraordinary circumstances, where visitation would be detrimental to the child's well-being, a noncustodial parent has a right to reasonable visitation privileges"…. **Matter of Grunwald v Grunwald, 2013 NY Slip Op 05068, 2nd Dept 7-3-13**

Prima Facie Case of Family Offenses Not Established (Forcible Touching and Sexual Abuse)

The Second Department found that Family Court properly determined mother failed to establish a prima facie case of the family offense of forcible touching and sexual abuse and properly ruled hearsay inadmissible:

> The mother presented no direct evidence that the father touched the child "for the purpose of degrading or abusing" the child or "gratifying [his] sexual desire" (Penal Law § 130.52; see Penal Law §§ 130.00[3]; 130.55;….
> Furthermore, although, in some instances, the element of intent may be inferred from the nature of the acts committed and the circumstances in which they occurred…, an intent to gratify sexual desire on the part of the father cannot be inferred from the totality of the circumstances here…. * * *
> Contrary to the mother's contention, the Family Court properly refused to permit her to admit hearsay testimony pursuant to Family Court Act § 1046(a)(vi). That section, by its own terms, is limited to a "hearing under . . . article [10] and article ten-A" of the Family Court Act (Family Ct Act § 1046[a]), and although the hearsay exception contained in Family Court Act § 1046(a)(vi) has been applied in the context of custody proceedings commenced pursuant to Family Ct Act article 6 where the basis of the custody proceeding is founded on neglect or abuse such that the issues are "inextricably interwoven"…, the Family Court properly refused to apply Family Court Act § 1046(a)(vi) in this case…. **Matter of Khan-Soleil v Rashad, 2014 NY Slip Op 05074, 2nd Dept 7-3-13**

Revocation of Suspended Judgment Proper

The Second Department determined Family Court had properly revoked father's suspended judgment for failure to comply with its terms and conditions:

> The Family Court may revoke a suspended judgment after a hearing if it finds, by a preponderance of the evidence, that the parent failed to comply with one or more of its conditions…. "When determining compliance with a suspended judgment, it is the parent's obligation to demonstrate that progress has been made to overcome the specific problems which led to the removal of the child[ren] . . . [A] parent's attempt to comply with the literal provisions of the suspended judgment is not enough" … . **Matter of Kimble G II, 2013 NY Slip Op 05066, 2nd Dept 7-3-13**

Permanent Neglect Established—Mental Illness

In affirming Family Court's finding that mother had permanently neglected her child and, because of her mental illness, would not be able to adequately care for the child in the future, the Second Department wrote:

> …[T]he petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parental relationship by, among other things, developing a service plan, facilitating regular visitation with the child, and making referrals for mental health evaluations and counseling …. Additionally, the petitioner established that, despite these efforts, the mother failed to plan for the children's future…. The mother failed to complete a mental health program, and her continued lack of insight into the reasons why the child was removed from her care prevented her from correcting such problems and reflected her failure to plan for the child's future. Accordingly, the Family Court properly determined that the mother permanently neglected the child. Further, the Family Court properly found that there was clear and convincing evidence that the mother is presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the child (see Social Services Law § 384-b[4][c]). **Matter of Kira J, 2013 NY Slip Op 05070, 2nd Dept 7-3-13**

Not Enough Evidence Before Family Court to Make Custody Determination

In remitting the matter to Family Court for a hearing in a custody proceeding with controverted allegations, the Second Department noted that, although a hearing is not always required, there was not enough evidence before the court for an informed determination in this case:

> " [A]s a general rule, it is error as a matter of law to make an order respecting custody based upon controverted allegations without the benefit of a full hearing'"…. " Since the court has an obligation to make an objective and independent evaluation of the circumstances, a custody determination should be made only after a full and fair hearing at which the record is fully developed'"…. However, " it is not necessary to conduct such a hearing where the court already possesses sufficient relevant information to render an informed determination in the child's best interest'" … .Under the circumstances of this case, the Family Court lacked sufficient information to render an informed determination as to the best interests of the subject children … . **Matter of Labella v Murray, 2013 NY Slip Op 05076, 2nd Dept 7-3-13**

Error to Deprive Father of Right to Represent Himself

In determining Family Court committed reversible error by depriving father of his right to self-representation, the Second Department wrote:

> The father, as a respondent in a proceeding pursuant to Family Court Act article 6, had a right to be represented by counsel (see Family Ct Act § 262[a][iii];…). A party, however, may waive the right to counsel and opt for self-representation… .. Before permitting a party to proceed pro se, the court must determine that the party's decision to do so is made knowingly, intelligently, and voluntarily …, by conducting a "searching inquiry" of that party…. Where a respondent has made a knowing, intelligent, and voluntary choice to represent himself or herself, "forcing a lawyer upon [him or her] is contrary to his [or her] basic right to defend himself [or herself]" … . **Matter of Massey v Van Wyen, 2013 NY Slip Op 05078, 2nd Dept 7-3-13**

Criteria for Allowing Parent Relocation

In affirming Family Court's allowing a parent's relocation, the Second Department explained the criteria:

> A parent seeking to relocate bears the burden of establishing by a preponderance of the evidence that the proposed move would be in the child's best interests …. In determining whether relocation is appropriate, the court must consider a number of factors, including the children's relationship with each parent, the effect of the move on contact with the noncustodial parent, the degree to which the lives of the custodial parent and the child may be enhanced economically, emotionally, and educationally by the move, and each parent's motives for seeking or opposing the move …. Inasmuch as "[t]he weighing of these various factors requires an evaluation of the testimony, character and sincerity of all the parties involved" …, the Family Court's credibility determinations are entitled to deference and its decision will be upheld if supported by a sound and substantial basis in the record… . **Matter of Pietrafesa v Pietrafesa, 2013 NY Slip Op 05082, 2nd Dept 7-3-13**

Factual Question About Whether Family Court Had Jurisdiction Over Visitation Modification Where Supreme Court Originally Ordered Visitation

In remitting the matter to Family Court, the Second Department determined Family Court should have examined the evidence to determine whether it had

jurisdiction over a petition to modify visitation where the initial visitation determination was part of a divorce action in Supreme Court:

> The Family Court erred in declining to sign the order to show cause accompanying the father's petition to modify visitation …. Since the initial visitation determination in this matter was made as part of a stipulation of settlement entered into during the parties' divorce proceedings before the Supreme Court, it was error for the Family Court to summarily decline to sign the order to show cause on jurisdictional grounds. Instead, the Family Court should have signed the order to show cause and then directed the parties to submit evidence on the issue of whether the Family Court retained exclusive, continuing jurisdiction over the visitation issues….**Matter of Ramirez v Gunder, 2013 NY Slip Op 05086, 2nd Dept 7-3-13**

Consent Order Not Appealable/Open Court Stipulation Valid

The Second Department noted that an order made on consent is not appealable and affirmed Family Court's determination that a stipulation entered into in open court was valid:

> Stipulations of settlement are favored by the courts and a stipulation made on the record in open court will not be set aside absent a showing that it was the result of fraud, overreaching, mistake, or duress"…. Here, the Family Court conducted a proper allocution of the mother, determining that she understood the terms of the stipulation, that she had sufficient time to consult with her attorney, and that she consented to the terms of the stipulation, and thus properly determined that she voluntarily and knowingly accepted the terms of the stipulation…. The mother's contentions in support of her motion that she felt "forced into settling" and "misle[]d" by her attorney, and that she "did not fully understand what [she] was agreeing to" are insufficient to establish a claim of mistake or duress so as to warrant setting aside the stipulation of settlement… . **Matter of Strang v Rathbone, 2013 NY Slip Op 05088, 2nd Dept 05088**

Court Can Not Order Treatment as Condition of Future Visitation---Okay to Order Treatment as Component of Supervised Visitation

The Second Department noted that Family Court should not have ordered a parent to undergo treatment as a condition of future visitation. Rather treatment should have been ordered as a component of supervised visitation:

> …"[A] court may not order that a parent undergo counseling or treatment as a condition of future visitation or reapplication for visitation rights, but may only direct a party to submit to counseling or treatment as a component of visitation"…. Thus, the Family Court should have directed the mother to enroll in an assisted outpatient treatment program as a component of supervised visitation. **Matter of Torres v Ojeda, 2013 NY Slip Op 05091, 2nd Dept 7-3-13**

Neglect Based on Failure to Provide Child with Cleft Palate Proper Nutrition

The Third Department affirmed Family Court's finding of neglect based upon the father's failure to ensure that the child (born with a cleft palate) was receiving adequate nutrition and medical care.

> Here, the record establishes that the father attended many of the child's pediatric appointments, as well as the evaluation conducted by the feeding and swallowing specialist, during the course of which medical professionals repeatedly explained that the child's cleft palate made it difficult for her to feed, stressed the importance of ensuring that the child was fed consistently and gained weight at a steady rate and offered instruction and specific recommendations for different feeding techniques. **Matter of Mary YY, 514692, 3rd Dept 7-3-13**

Career-Related Relocations Did Not Result in Change of Domicile

In affirming Supreme Court's finding that the plaintiff in a divorce action met the durational residency requirements of Domestic Relations Law section 230, in spite of several career-related relocations, the Third Department wrote:

> Given the absence of any proof that plaintiff intended to abandon her existing New York domicile and adopt any of the temporary locations as her new permanent home, neither the fact that the parties – of necessity or convenience – established homes and all of the accouterments of family and community life in each location where defendant's career took the family nor that they generally paid income taxes as residents of the respective locations demonstrates a change of domicile. **Black v Black, 516094, 3rd Dept 7-3-13**

Grandparents Had Standing to Seek Visitation

The Fourth Department noted that the grandparents had standing to seek visitation with their grandchildren, in addition to mother's and father's visitation:

> …[W]e conclude that the grandparents established "a prima facie case of standing to seek visitation with the subject child[ren]" inasmuch as they demonstrated "the existence of a sufficient relationship with the child[ren] to warrant the intervention of equity"…. The record establishes that the grandparents regularly visited with the children before the mother ceased permitting such visits. In addition, the grandmother provided full-time daycare for the children before they reached school-age, took the children to pre- kindergarten, and engaged in activities with them after school, and the grandfather attended the children's school activities.**Matter of Dubiel v Schaefer, 672, 4th Dept 7-5-13**

Denial of Visitation With Incarcerated Father Upheld

The Fourth Department affirmed Family Court's denial of an incarcerated father's petition for visitation with his children:

> Although we recognize that the rebuttable presumption in favor of visitation applies when the parent seeking visitation is incarcerated…, we conclude that respondents rebutted the presumption by establishing by a preponderance of the evidence that visitation with petitioner would be harmful to the children …. A parent's failure to seek visitation with a child for a prolonged period of time is a relevant factor when determining whether visitation is warranted…, and, here, petitioner has never met the daughter or the son. In fact, before commencing these proceedings, petitioner did not seek visitation with either child. Thus, petitioner is "essentially a stranger to the child[ren]"…. **Matter of Brown v Terwilliger…, 576, 4th Dept 7-5-13**

Respondents in Visitation Proceeding Have Right to Assigned Counsel

The Fourth Department reversed and remitted a visitation proceeding to Family Court because Family Court had relieved assigned counsel, noting that the Fourth Department had recently held respondents in visitation proceedings are entitled to assigned counsel:

> Family Court erred in relieving his assigned counsel after the modification petition, which sought full legal custody of the three children at issue, was amended to seek only a modification of respondent's visitation (amended petition). While this appeal was pending, we held that respondents in visitation proceedings are entitled to assigned counsel… . **Matter of Brown v Patterson, 768, 4th Dept 7-5-13**

Family Court Had Jurisdiction But New York Not a Convenient Forum

The Second Department determined Family Court's finding that it did not have jurisdiction (over a visitation petition) under the Uniform Child Custody Jurisdiction and Enforcement Act was error. But the Second Department went on to determine that New York was an inconvenient forum for the proceeding:

> A New York Family Court has jurisdiction to make an initial custody determination if "(a) this state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent . . . continues to live in this state" (Domestic Relations Law § 76[1][a]). " Home state' means the state in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child custody proceeding" (Domestic Relations Law § 75-a[7]).
>
> …"[T]he inquiry is not completed merely by a determination that a jurisdictional predicate exists in the forum State, for then the court must determine whether to exercise its jurisdiction" … . A court of this state which has jurisdiction under the UCCJEA may decline to exercise it if it finds, upon consideration of certain enumerated factors, that New York is an inconvenient forum and that a court of another state is a more appropriate forum (see Domestic Relations Law § 76-f[1];…). While the Family Court did not consider the enumerated factors, the record is sufficient to permit this Court to consider and evaluate those factors…
>
> …[T]he "evidence regarding [the children's] care, well-being, and personal relationships is more readily available" in Georgia... Under these circumstances, Georgia is the more appropriate and convenient forum … . **Matter of Balde v Balde, 2013 NY slip Op 05204, 2nd Dept 7-10-13**

No Constructive Emancipation or Abandonment

In affirming Family Court's denial of father's petition to modify child support, the Second Department explained

the doctrine of constructive emancipation, noting that a child's reluctance to see a parent is not abandonment:

> The father claimed that he should no longer be required to pay support because the mother had alienated the child from him. Under the doctrine of constructive emancipation, a child of employable age who actively abandons the noncustodial parent by refusing all contact and visitation may forfeit any entitlement to support.… However, a child's reluctance to see a parent is not abandonment.… There is no evidence in the record that the child has refused all contact and visitation with the father. **Matter of Grucci v Villanti, 2013 NY Slip Op 05209, 2nd Dept 7-10-13**

Family Offense Must Be Established by Fair Preponderance

The Second Department determined the family offense of attempted assault in the second degree had not been "established by a fair preponderance of the evidence" in Family Court:

> A family offense must be established by a fair preponderance of the evidence (see Family Court Act § 832;…). "The determination of whether a family offense was committed is a factual issue to be resolved by the Family Court, and the credibility determinations of that court, which has the advantage of seeing and hearing the witnesses, are entitled to considerable deference on appeal" … .Here, a fair preponderance of the credible evidence did not support the Family Court's determination that the appellant committed the family offense of attempted assault in the second degree (see Family Court Act §§ 812[1], 832; Penal Law §§ 110.00, 120.05[1]… . **Matter of Hubbard v Ponce DeLeon, 2013 NY slip Op 05211, 2nd Dept 7-10-13**

Termination of Parental Rights Affirmed Because Diligent Efforts to Reunite Parent and Child Were Made (In Spite of Misdiagnosis of Mother's and Child's Psychological Conditions)

The Fourth Department, over a dissent, affirmed Family Court's termination of mother's parental rights. The dissent argued that the misdiagnosis of both the mother's and child's psychological conditions rendered the efforts to reunite the mother with the child inadequate. The Fourth Department wrote:

> Contrary to the contention of the mother, Family Court properly determined that petitioner made diligent efforts to reunite her with the child (see Social Services Law § 384-b [7] [a], [f]). Among other things, petitioner arranged for a psychological assessment of the mother, arranged for therapy sessions for the mother and various services for the child, and provided the mother with parenting, budgeting, and nutrition education training. Petitioner also provided the mother with supervised and unsupervised visits with the child. Most significantly, petitioner arranged for a child psychologist to meet with the mother on several occasions in her home to provide parenting training, and we agree with the court's assessment that this was "truly a diligent effort" by petitioner to encourage and strengthen the parent-child relationship.
>
> Contrary to the further contention of the mother, the court properly determined that she failed to plan for the future of the child (see Social Services Law § 384-b [7] [a]). " '[T]o plan for the future of the child' shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child" (§ 384-b [7] [c]). "At a minimum, parents must 'take steps to correct the conditions that led to the removal of the child from their home' " (Matter of Nathaniel T., 67 NY2d 838, 840). Here, while the mother participated in the services offered by petitioner and had visitation with the child, the evidence established that she was unable to provide an adequate, stable home for the child and parental care for the child… . **Matter of Cayden LR, 575, 4th Dept 7-1913**

Denial of Father's Petition for Modification of Custody Reversed

In reversing Family Court and granting father's petition for a modification of a prior custody order awarding custody to mother, the Fourth Department wrote:

> "Generally, a court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" … . Here, we conclude that the court's determination that it is in the best interests of the child to remain in the custody of the mother lacks a sound and substantial basis in the record. ,,,
>
> As a preliminary matter, we conclude that the court abused its discretion in failing to "draw the strongest inference that the opposing evidence permits" against the mother based upon her failure to appear for the hearing …, although we

note that the court stated that it was doing so. Although the court properly determined that the father failed to take steps to enforce his right to visit with the child, the court failed to credit the testimony of the mother's family that the mother interfered with the father's ability to visit the child; that the mother disparaged the father in the child's presence; that, despite the court's order granting telephone access to the child, the access lasted only two weeks; that the mother was verbally abusive to the child; that the child was afraid of her mother; and that the mother exhibited behaviors that support a determination that she failed to provide a proper home environment and parental guidance for the child … . Further, the court failed to credit the evidence, including testimony and school records, that the mother failed to provide for the child's emotional development and that the child's intellectual and emotional development was supported by the mother's family members and long-term friend, rather than by the mother …. We note that there is no evidence that the mother has the financial ability to provide for the child and that the evidence establishes that the father has a job, a home, and pays child support … .

Although the court properly determined that the child "barely knows" the father, we conclude that the court erred in failing to give any weight to the 14-year-old child's preference to live with the father rather than the mother, where, as here, the record establishes that her age and maturity would make her input "particularly meaningful"… . **Matter of Juan C… v Sullivan, 818, 4th Dept 7-19-13**

Attorney for Child Could File Abuse Petition After Abuse Petition Withdrawn by Department of Social Services

The Second Department determined that the attorney for the child had the power to file a child abuse petition after the Department of Social Services withdrew its petition:

> Although the primary responsibility for initiating a child neglect or abuse proceeding "has been assigned by the Legislature to child protective agencies" … , Family Court Act § 1032 also permits such a proceeding to be initiated by "a person on the court's direction." "The requirement for court approval or authorization for proceedings prompted by those other than child protective agencies indicates the Legislature's concern that judicial proceedings touching the family relationship should not be casually initiated and imposes upon the courts the obligation to exercise sound discretion before permitting such petitions to be filed" … . Contrary to the appellant's contentions, the record demonstrates that the attorney for the child was in fact authorized by the Family Court to file a new abuse petition on behalf of Amber A., and that the Family Court's decision to authorize him to do so was a provident exercise of its discretion… . **Matter of Amber A, 2013 NY Slip Op 05308. 2nd Dept 7-17-13**

Family Offense of Disorderly Conduct Not Proven---No Proof of Public Inconvenience, Annoyance, or Alarm

In a full-fledged opinion by Justice Skelos, the Second Department determined the wife's allegations against her husband did not demonstrate the family offense of disorderly conduct. The wife alleged the husband tried to push her down stairs, twisted her arm and pushed her against a wall. Under the Penal Law, disorderly conduct requires an intent to cause or the reckless creation of a risk of causing public inconvenience, annoyance or alarm. However, Family Court Act section 812 provides: "For purposes of this article, disorderly conduct included disorderly conduct not in a public place." The Second Department determined that, even in the context of a family offense proceeding, the "public inconvenience, annoyance or alarm" element must be proven:

> We … hold that, even where the conduct at issue is alleged to have occurred in a private residence, in order for a petitioner to meet his or her burden of establishing the family offense of disorderly conduct, there must be a prima facie showing that the conduct was either intended to cause, or recklessly created a risk of causing, public inconvenience, annoyance, or alarm. The intent to cause, or recklessness in causing, public harm, is the mens rea of the offense of disorderly conduct … . The plain language of the subject provision of Family Court Act § 812, in contrast, provides only that the conduct need not occur in a public place (see Family Ct Act § 812). The plain language of Family Court Act § 812 therefore pertains only to the actus reus of the offense—specifically, the place where it is committed—and does not speak to the mens rea of the offense. Indeed, since Family Court Act § 812 does not specify an alternative culpable mental state, if the mens rea provided for in the Penal Law were not applicable in family offense proceedings, it is unclear what the mens rea of this family offense would be. * * *
>
> One can certainly contemplate conduct occurring in a private residence that is intended to cause, or evinces a reckless disregard of causing, public harm. Such conduct might include, for example, a loud fight, or a loud argument with disturbing content, occurring in an apartment building late at night, or under

other circumstances where the public may reasonably be expected to hear or see the altercation. As the Court of Appeals has observed, "the risk of public disorder does not have to be realized," in order to infer that an individual intended to cause, or recklessly disregarded the risk of causing, such a threat… . **Matter of Cassie v Cassie, 2013 NY Slip Op 05446, 2nd Dept 7-24-13**

Out of State Visitation for All School Breaks and Three-Day Weekends (In Addition To Summers) Should Not Have Been Granted

The Second Department determined Family Court correctly awarded visitation with the father in Kentucky for the entire summer, but should not have awarded visitation with the father in Kentucky for school breaks and three-day weekends throughout the year: In remitting the matter for re-working the The visitation, the court wrote:

> The provision of the visitation schedule which, in addition to the summer visitation, awards the father visits in Kentucky during school breaks for "every Thanksgiving, Christmas, winter, mid-winter, spring, and Easter," effectively deprives the mother "of any significant quality time" with the children, and is therefore "excessive… . While that provision takes into account the children's need to spend time with the father and his family, it does not take into account the importance of their relationship with the mother and her extended family, in that it deprives the children of contact "during times usually reserved for family gatherings and recreation" … . We note that the court-appointed forensic evaluator recommended that the parties share parenting time during major holidays such as Thanksgiving, Christmas, and Easter. There was no contrary evidence that awarding all parenting time during these holidays to the father furthers the children's best interests. The opinions of experts "are entitled to some weight" …, and, under the circumstances presented here, the Family Court should have awarded equal parenting time to the parties for these school breaks. Accordingly, we remit the matter to the Family Court to set forth a new visitation schedule regarding "Thanksgiving, Christmas, winter, mid-winter, spring, and Easter" that apportions those school breaks equally between the parties. **Matter of Felty v Felty, 2013 NY Slip Op 05454, 2nd Dept 7-24-13**

Father's Petition to Relocate to North Carolina Properly Denied

The Second Department determined Family Court had properly denied father's petition for permission to relocate to North Carolina. A prior consent order had awarded joint legal custody with primary physical custody to the father. The father, who is in the military, was transferred from West Point to Fort Bragg in North Carolina. The court explained the applicable (relocation) considerations as follows:

> "Relocation may be allowed if the custodial parent demonstrates, by a preponderance of the evidence, that the proposed move is in the child's best interests"…. When evaluating whether a proposed move is in the child's best interest, "the factors to be considered include, but are not limited to, each parent's reasons for seeking or opposing the move, the quality of the relationships between the children and each parent, the impact of the move on the quantity and quality of the children's future contact with the noncustodial parent, the degree to which the lives of the custodial parent and the children may be enhanced economically, emotionally, and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and the children through suitable visitation arrangements" … . Although a multitude of factors may be considered, " the impact of the move on the relationship between the child and the noncustodial parent will remain a central concern'"…. **Matter of Hirtz v Hirtz, 2013 NY Slip Op 05457, 2nd Dept 7-24-13**

Mother Did Not Stipulate to Order of Reference/Therefore Referee Only Had Power to Hear and Report

The Second Department determined mother did not stipulate to the order of reference (referring the custody and visitation proceeding to a referee) in the manner required by CPLR 2104. Therefore, although the order of reference authorized the referee to "hear and determine the parties' rights to custody … and visitation…," absent the parties' consent to the reference, the referee only had the power to hear and report.

> …[T]he mother did not consent to the reference merely by participating in the proceeding without expressing her desire to have the matter tried before a judge… .
>
> Accordingly, the Court Attorney Referee had no jurisdiction to determine, but only to hear and report, with respect to the parties' respective petition and cross petition regarding custody and visitation…. Thus, the Court Attorney Referee's decision … must be deemed a report (see CPLR 4320[b]), and the matter must be remitted for further proceedings pursuant to CPLR 4403 before a judge of the Family Court. **Matter of McClarin v Valera, 2013 NY Slip Op 05461, 2nd Dept 7-24-13**

Where There Are Sharp Factual Disputes, Forensic Evaluations Are Required for a Guardianship Determination

In a case with sharp factual disputes, the Second Department determined Family Court should not have decided the issue of guardianship without the aid of forensic evaluations:

> The Family Court erred in deciding the issue of guardianship without the aid of forensic evaluations of Stephanie, Shanika, and Jada. Although forensic evaluations are not always necessary, such evaluations may be appropriate where there exist sharp factual disputes that affect the final… . Under the circumstances of this case, the record is inadequate to determine the best interests of the child, particularly as there was no expert assessment of the psychological impact of separating Jada from Shanika. In addition, given Stephanie's allegations of alcohol abuse by Shanika, and Shanika's allegations of alienation by Stephanie and Stephanie's current partner, forensic evaluations of Stephanie, Shanika, and Jada are proper to aid in the resolution of these factual issues. **Matter of Shanika M v Stephanie G, 2013 NY Slip Op 05460, 2nd Dept 7-24-13**

Family Court Should Have Granted Change-of-Custody Petition

The Second Department determined Family Court erred in not granting father's petition for a modification of a custody arrangement. Father was awarded temporary custody while the mother dealt with abuse or neglect allegations which were eventually determined to be "unfounded." The father then petitioned for sole residential custody:

> The evidence presented at the hearing on the father's petition established that, while living with the father …, the child, who has special needs, had thrived both at home and in school. It would be disruptive to remove the child from the father's house and his established routine … . Moreover, the father is ensuring that the child maintains a strong and continuing relationship with the mother. The continuation of a liberal visitation schedule will provide the mother with a meaningful opportunity to maintain a close relationship with the child … . We note that the attorney for the child supports the award of sole residential custody of the child to the father… . **Matter of Ellis v Burke, 2013 NY Slip Op 05524, 2nd Dept 7-31-13**

Money Available to Father from Relatives for Children's College Expenses Should Have Been Considered in Allocating those Expenses between Mother and Father

The Second Department determined the Support Magistrate's failure to take into account money received by the father from relatives for the children's college required the case to be remitted to determine father's and mother's shares of the college expenses:

> In determining a parent's child support obligation, a court need not rely upon a party's own account of his or her finances, but may impute income on the basis of the party's past income or earning capacity …, or on the basis of "money, goods, or services provided by relatives and friends" (Family Ct Act § 413[1][b][5][iv][D]…). "A Support Magistrate is afforded considerable discretion in determining whether to impute income to a parent" …, and we accord deference to a support magistrate's credibility determinations … . However, "a determination to impute income will be rejected where the amount imputed was not supported by the record, or the imputation was an improvident exercise of discretion" … .
>
> While the record supports the conclusion that the mother should share in the college expenses of the subject children, the Support Magistrate improvidently exercised her discretion by failing to impute additional income to the father for money he received from his family for the subject children's college expenses. The father's testimony established that the funds he received from his family to pay for the subject children's college expenses were not loans that he was obligated to repay. Thus, the mother's objections to so much of the order … as directed her to pay the father the principal sum of $28,210.02 in arrears for college expenses and to pay for 67% of the subject children's future college expenses should have been granted… . **Matter of Kiernan v Martin, 2013 NY Slip Op 05527, 2nd Dept 7-31-13**

Income of Mother's Cohabiting Fiance Should Not Have Been Considered in Determining Mother's Entitlement to Assigned Counsel

In finding mother was deprived of her right to counsel in a guardianship proceeding, the Second Department determined the income of mother's cohabiting finance should not have been considered:

> …[T]he Family Court erred in considering the income of the mother's cohabiting fiancé in making a determination as to whether she was

needy and, therefore, entitled to appointment of counsel …. Furthermore, nothing in the record supports a finding that the mother waived her right to counsel … . Thus, the mother was deprived of her right to counsel (see Family Ct Act § 262[a][v]…). **Matter of Angel L, 2013 NY Slip Op 05528, 2nd Dept 7-31-13**

Family Offense of Disorderly Conduct Established

The Second Department determined the family offense of disorderly conduct had been established by a fair preponderance of the evidence:

> ...[T]he petitioner established, by a fair preponderance of the evidence …, that the appellant, who …made verbal threats to the petitioner in the hallway of the Family Court building and physically blocked the petitioner's car from exiting the parking lot of the Family Court, engaged in threatening behavior that recklessly created a risk of causing public inconvenience, annoyance, or alarm (see Penal Law § 240.20..... .**Matter of Banks v Opoku, 2013 NY slip Op 05568, 2nd Dept 8-7-13**

Excessive Corporal Punishment Constituted Neglect and Derivative Neglect

In affirming Family Court's determination that excessive corporal punishment constituted neglect and derivative neglect, the Second Department wrote:

> Although parents have a right to use reasonable physical force against a child in order to maintain discipline or to promote the child's welfare, the use of excessive corporal punishment constitutes neglect (…Penal Law § 35.10; Family Ct Act § 1012[f][i][B]). The Family Court's finding of neglect as to the child Briana M., based upon the mother's use of excessive corporal punishment, is supported by a preponderance of the evidence (see Family Ct Act §§ 1012[f][i][B]; 1046[b][i]). The evidence demonstrated that the mother struck then-eight-year-old Briana with a belt numerous times, causing marks on her back and arms … .
>
> The evidence, which established that the mother inflicted excessive corporal punishment on Briana, was sufficient to support the Family Court's determination that the children Matthew M. and Alexis M. were derivatively neglected… . **Matter of Matthew M (Fatima M), 2013 NY slip Op 05573, 2nd Dept 8-7-13**

Criteria for Determining Whether Relocation of Custodial Parent is in Best Interests of the Children Explained

The Second Department explained the criteria for determining whether relocation of the custodial parent would be in the best interests of the children as follows:

> In determining whether relocation is appropriate, the court must consider a number of factors, including the child's relationship with each parent, the effect of the move on contact with the noncustodial parent, and each parent's motives for seeking or opposing the move … . In assessing these factors, "no single factor should be treated as dispositive or given such disproportionate weight as to predetermine the outcome" … . "In the end, it is for the court to determine, based on all of the proof, whether it has been established by a preponderance of the evidence that a proposed relocation would serve the child's best interests" … .
>
> …The Family Court found credible the mother's testimony at trial that, if she were permitted to relocate with the children to Florida, the children's quality of life would be significantly improved on a day-to-day basis because the cost of living would be less than it is in New York, where she was struggling financially, and the mother would have several close family members in the vicinity of her new home to offer her support. Significantly, it was undisputed that the mother was the children's primary caregiver, and that the father was minimally involved in the children's lives. **Matter of Davis v Ogden, 2013 NY Slip Op 05626, 8-14-13**

Three-Step Analysis for Child Support Under Child Support Standards Act

The Second Department explained the three step analysis for the determination of child support obligations pursuant to the Child Support Standards Act (the parents in this case had a combined annual income of more than $700.000.00):

> Under the first step of the analysis, a court must determine the parties' combined parental income … . …Under the second step of the analysis, pursuant to Domestic Relations Law § 240(1-b)(c)(1), we multiply so much of the combined parental income up to $80,000.00---which was the "statutory cap" in effect on the date of the 2008 Judgment …---by the applicable statutory child support percentage, or 29% for the parties' three children (see Domestic Relations Law § 240 [1-b][c][2]…). We then allocate the resulting amount … between the parties according to their

> pro rata share of the combined parental income (see Domestic Relations Law § 240 [1-b][c][2]). The third step in the analysis applies where, as here, the combined parental income exceeds the applicable statutory limit of $80,000.00. In this situation, "courts [have] the discretion to apply the [sub]paragraph (f)' factors, or to apply the statutory percentages, or to apply both in fixing the basic child support obligation on parental income over $80,000" … . As applicable here, the subparagraph (f) factors include a consideration of the financial resources of the custodial and noncustodial parent, and the standard of living the child would have enjoyed had the marriage or household not been dissolved (see Domestic Relations Law § 240[1-b][f][1][3]). These factors further the objectives of the CSSA, which include "the assurance that both parents would contribute to the support of the children" and that the court consider "the total income available to the parents and the standard of living that should be shared with the child" … . **Beroza v Hendler, 2013 NY Slip Op 05607, 2nd Dept 8-14-13**

Wife's Concealment of Terminal Cancer Did Not Warrant Rescission of Divorce Settlement Agreement

The Second Department determined the wife's concealment of the condition of her health (terminal cancer) during the negotiation of a divorce did not constitute actionable fraud. The husband sought to rescind the agreement after learning of his wife's illness (after her death), alleging he would not have entered the agreement had he been aware of it:

> While a party's health is material to the equitable distribution of marital assets (Domestic Relations Law § 236[B][5][d][2]…), the plaintiff does not challenge the manner in which the parties agreed to distribute the marital assets … . Rather, the plaintiff only claims that he would not have agreed to settle with the wife at all had he known of her condition. Contrary to the plaintiff's contention, the wife's alleged misrepresentations or omissions concerning her health were not material to the plaintiff's decision as to whether to enter into any settlement agreement at all with the wife and, thus, would not warrant the equitable remedy of rescission … . To hold otherwise would be to recognize, contrary to public policy favoring settlement and fair dealing …, that the plaintiff was entitled to a "fair" opportunity to stall in settling the action with the goal of retaining all of the marital assets upon the wife's death. Equity is not served by permitting the plaintiff to rescind the separation agreement for lack of this opportunity. **Petrozza v Franzen, 2013 NY Slip Op 05739, 2nd Dept 8-28-13**

Criteria for Imposing Order of Protection for Longer than Two Years Based on Family Offense Involving Aggravating Circumstance (Use of Weapon Here) Explained

The Second Department, in a family offense proceeding involving the use of a weapon, explained the criteria for issuing an order of protection for a period longer than two years:

> To issue an order of protection with a duration exceeding two years on the ground of aggravating circumstances, the Family Court must set forth "on the record and upon the order of protection" a finding of such aggravating circumstances as defined in Family Court Act § 827(a)(vii) (Family Ct Act § 842). The statutory definition of "aggravating circumstances" includes five distinct situations, set forth in the disjunctive: (1) "physical injury or serious physical injury to the petitioner caused by the respondent," (2) "the use of a dangerous instrument against the petitioner by the respondent," (3) "a history of repeated violations of prior orders of protection by the respondent," (4) "prior convictions for crimes against the petitioner by the respondent," "or" (5) "the exposure of any family or household member to physical injury by the respondent and like incidents, behaviors and occurrences which to the court constitute an immediate and ongoing danger to the petitioner, or any member of the petitioner's family or household" (Family Ct Act § 827[a][vii]…),
>
> A finding of aggravating circumstances under the fifth situation set forth in Family Ct Act § 827(a)(vii) must be supported by a finding of "an immediate and ongoing danger to the petitioner, or any member of the petitioner's family or household" (Family Ct Act § 827[a][vii]; …). To the extent that certain language in Matter of Clarke-Golding v Golding (101 AD3d at 1118) might suggest that the "immediate and ongoing danger" requirement pertains to the other four situations enumerated in Family Court Act § 827(a)(vii) as well, it is not to be construed as such. Where the aggravating circumstances involve the use of a dangerous instrument (cf. Penal Law § 10.00[13]…), the "immediate and ongoing danger" requirement does not apply (Family Ct Act § 827[a][vii]… . **Matter of Kondor v Kondor, 2013 NY slip Op 05747, 2nd Dept 8-28-13**

FAMILY LAW/IMMIGRATION LAW

Children Were Not "Dependent on Court"/ They Therefore Did Not Meet Criteria for Statutory Path to Lawful Permanent Residency in US

In a full-fledged opinion by Justice Cohen, the Second Department determined that two children born in Hong Kong, and living with their father in New York, did not meet the "dependency-on-the-family-court" requirement such that they could petition for special immigrant juvenile status (SJIS) pursuant to 8 USC1101 (which provides undocumented children with a gateway to lawful permanent residency in the US). The court explained:

> In New York, a child may request that the Family Court, recognized as a juvenile court (see 8 CFR 204.11[a]), issue an order making special findings and a declaration so that he or she may petition the United States Citizenship and Immigration Services for SIJS … . Specifically, the findings of fact must establish that: (1) the child is under 21 years of age; (2) the child is unmarried; (3) the child is dependent upon a juvenile court or legally committed to an individual appointed by a State or juvenile court; (4) reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis; and (5) it is not in the child's best interests to be returned to his or her home country (see 8 USC § 1101[a][27][J][ii]; 8 CFR 204.11[c]). With the declaration and special findings, the eligible child may then seek the consent of the Department of Homeland Security for SIJS (see 8 USC § 1101[a][27][J][iii]). * * *
>
> The requirement that a child be dependent upon the juvenile court or, alternatively, committed to the custody of an individual appointed by a State or juvenile court, ensures that the process is not employed inappropriately by children who have sufficient family support and stability to pursue permanent residency in the United States through other, albeit more protracted, procedures. In this case, there has been no need for intervention by the Family Court to ensure that the appellants were placed in a safe and appropriate custody, guardianship, or foster care situation, and the appellants have not been committed to the custody of any individual by any court.…
>
> While the appellants met all of the other requirements for SIJS, the Family Court correctly determined that the dependency requirement had not been satisfied. A child becomes dependent upon a juvenile court when the court accepts jurisdiction over the custody of that child, irrespective of whether the child has been placed in foster care or a guardianship situation… . The Family Court has only granted applications for SIJS special findings where dependency upon the court was established by way of guardianship, adoption, or custody. **Matter of Hei Ting C, 2013 NY Slip Op 05310, 2nd Dept 7-17-13**

LABOR LAW

Unsafe Access to Roof Supported Summary Judgment

In affirming the grant of summary judgment to the plaintiff pursuant to Labor Law 240 (1) based on the failure to provide equipment which would allow safe access to the roof where the window-washing equipment in need of repair was located, the First Department explained:

> The record demonstrates that the Met and Lincoln Center failed to provide adequate safety devices to protect plaintiff from the risks associated with gaining access to the Opera House roof and the steel carriage rail, and therefore they are liable for plaintiff's injuries under Labor Law § 240(1).… Not only did plaintiff have to be elevated to the roof of the Opera House from the sixth floor, for which a ladder was provided, but he also had to use both hands to close the hatch door while standing on the ladder. No safety device was provided to protect him against the risk associated with breaking three-point contact with the ladder so as to use both hands to close the hatch door. **Mayo v Metropolitan Opera Assn Inc, 2013 NY Slip Op 04993, 1st Dept 7-2-13**

Labor Law 240(1) Action Not Implicated by Portion of Ceiling Falling

The Second Department determined a Labor Law 240(1) action should have been dismissed. As plaintiff was attempting to paint the ceiling while standing on a ladder, a portion of the ceiling fell, causing injury. In explaining why section 240 does not apply to the facts, the court wrote:

> Labor Law § 240(1) requires property owners and contractors to provide workers with "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection" to the workers (Labor Law § 240[1]). The purpose of the statute is to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured"…. "With respect to falling objects, Labor Law § 240(1) applies where the falling of an object is related to a significant risk inherent in . . . the relative elevation . . . at which materials or loads must be positioned or secured"'… . Thus, to recover damages for violation of the statute, a "plaintiff must show more than simply that an object fell causing injury to a worker" … . The plaintiff must show that, at the time the object fell, it was "being hoisted or secured" (id. at 268) or "required securing for the purposes of the undertaking"… . **Flossos v Waterside Redevelopment Co LP, 2013 NY Slip Op 05297, 2nd Dept 7-17-13**

Losing Balance On Ladder Did Not Support Labor Law 240(1) Cause of Action

Plaintiff was standing on the second highest rung of a ladder when he lost his balance and fell. In reversing Supreme Court's grant of summary judgment to the plaintiff on his Labor Law 240(1) cause of action, the Second Department explained:

> " Labor Law § 240(1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites'" … . " To prevail on a cause of action alleging a violation of Labor Law § 240(1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries'" .. . "The mere fact that a plaintiff fell from a ladder does not, in and of itself, establish that proper protection was not provided" … . There must be evidence that the ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries … . Where a plaintiff falls off the ladder because he or she lost his or her balance, and there is no evidence that the ladder from which the plaintiff fell was defective or inadequate, liability pursuant to Labor Law § 240(1) does not attach … . To impose liability under such circumstances would make a defendant an insurer of the workplace, a result which the Legislature never intended in enacting Labor Law § 240(1) … . **Hugo v Sarantakos, 2013 NY Slip Op 05512, 2nd Dept 7-31-13**

Homeowner's Exception Did Not Apply

Plaintiff lost fingers operating a table saw which was alleged not to have had a blade guard. In determining the homeowner's exception to the Labor Law 241(6) cause of action did not apply, the Second Department wrote:

> With respect to the cause of action pursuant to Labor Law § 241(6), the appellant claimed the homeowners' exemption for owners of one and two-family homes who did not supervise the work. In order to receive the protection of the homeowners' exemption, a defendant must satisfy two prongs: that the work was conducted at a dwelling that is a residence for only one or two families, and the defendant did not direct or control the work … . Summary judgment on this issue was properly denied, as the evidence described above raised a triable issue of fact as to whether the appellant supervised or controlled the work and, further, there was a triable issue of fact as to whether the appellant intended to use the subject house as rental property… . **Murillo v Porteus, 2013 NY slip Op 05517, 2nd Dept 7-31-13**

Sheetrock Resting on Blocks Satisfied Height Differential in Labor Law 240(1) Action

The First Department determined that plaintiff was not entitled to summary judgment on her Labor Law 240(1) claim which was based on injuries from sheetrock boards which slipped from where they were leaning against a wall and resting on blocks of wood two feet high. The two-foot height differential was sufficient to implicate 240(1). However the record was not sufficient to find, upon a summary judgment motion, that the injuries were proximately caused by the absence of a safety device. **Rodriguez v SRLD Dev Corp, 2013 NY Slip Op 05548, 1st Dept 8-6-13.**

Injury from Falling Piece of Concrete-Pour-Form Raised Question of Fact About Liability Under Labor Law 240 (1)

The Second Department affirmed the denial of summary judgment in favor of defendants on plaintiff's Labor Law 240 (1) claim. Plaintiff was removing wooden forms used to pour concrete. After removing one piece of a form, the piece above it fell and struck plaintiff. The Second Department explained:

> Labor Law § 240(1) requires property owners and contractors to provide workers with "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection" to the workers (Labor Law § 240[1]). The purpose of the statute is to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" .. . However, not every object that falls on a worker gives rise to the extraordinary protections of Labor Law § 240(1) …. Thus, in order to recover damages for violation of the statute, the "plaintiff must show more than simply that an object fell causing injury to a worker" .. . A plaintiff must show that, at the time the object fell, it was "being hoisted or secured" … or "required securing for the purposes of the undertaking" … . The plaintiff must also show that the object fell "because of the absence or inadequacy of a safety device of the kind enumerated in the statute"… . . The evidence submitted by the defendants in support of their motion did not establish "the absence of a causal nexus between the worker's injury and a lack or failure of a device prescribed by section 240(1)".. .**Ross v DD 11th Ave LLC, 2013 NY Slip Op 05686, 2nd Dept 8-21-13**

LABOR LAW/CONTRACT LAW

Contract Between Town and Employer of Injured Employee Did Not Allow Indemnification of Town by Employer

In a Labor Law action seeking damages for a fall from the roof of a building under construction, the Fourth Department determined Supreme Court should have dismissed the town's motion for contractual indemnification against plaintiff's employer because the contract was not intended to be retroactive to the day of the injury. The Fourth Department explained the applicable law as follows:

> "Workers' Compensation Law § 11 prohibits a third-party action against an employer unless the plaintiff sustained a grave injury or there is 'a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution or indemnification of the [thirdparty plaintiff]' "… . The Town concedes that plaintiff did not suffer a "grave injury," and that it is entitled to indemnification only if it can demonstrate the existence of a written contract. "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" … . **Meabon v Town of Poland…, 634, 4th Dept 7-19-13**

EMPLOYMENT LAW/CONTRACT LAW

Collective Bargaining Agreement Unambiguous—Lifetime Health Benefits Mandated

In concluding the collective bargaining agreement (CBA) unambiguously provided lifetime health insurance coverage to the petitioners pursuant to the CBA in effect upon their retirement, the Third Department wrote:

> A written agreement that is clear and complete on its face must be enforced according to the plain meaning of its terms …Extrinsic evidence may be considered to discern the parties' intent only if the contract is ambiguous, which is a question of law for the court to resolve….
> In determining whether an ambiguity exists, "'[t]he court should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby'"… . Pursuant to the CBAs in effect at the time each petitioner retired, an employee who had completed 10 years of service was entitled to health insurance coverage "in retirement." In order to receive that coverage at a rate of 100% per individual and 75% per dependent, the only requirement was that the individual "retire during the term of the contract." **Matter of Warner, 516038, 3rd Dept 7-3-13**

Employment Contract Deemed Hiring "At Will"---No Fixed Duration

The Second Department affirmed the dismissal of a breach of contract cause of action which alleged defendant breached an employment contract when the position which was the subject of the contract was withdrawn. In finding the agreement described a hiring "at will," the court described the applicable principles as follows:

> "New York adheres to the traditional common-law rule that absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party" … . In support of their motion to dismiss the complaint, the defendants submitted the … employment contract, setting forth the terms of the employment relationship. The … employment contract contained a merger clause reciting that the writing encompassed the entire agreement between the parties. Contrary to the plaintiffs' contention, the …employment contract did not provide for a fixed or definite term of employment, as it expressly provided that [plaintiff] was to be employed "for an indefinite period of time." Moreover, the …employment contract provided that either party could, without notice, terminate the employment relationship with immediate effect during the first two months after its execution, and thereafter with certain notice. Further, the plaintiffs themselves alleged in the complaint that, pursuant to the … employment contract, [plaintiff's] employment was "to continue without any specific date for termination." Thus, [plaintiff] was presumptively an at-will employee …. The plaintiffs failed to allege facts that would rebut the at-will presumption or limit [defendants'] right to freely terminate [plaintiff's] employment. **Minovici v Belkin BV, 2013 NY Slip Op 05618, 2nd Dept 8-14-13**

Homeowner's Exception Did Not Apply

Plaintiff lost fingers operating a table saw which was alleged not to have had a blade guard. In determining the homeowner's exception to the Labor Law 241(6) cause of action did not apply, the Second Department wrote:

> With respect to the cause of action pursuant to Labor Law § 241(6), the appellant claimed the homeowners' exemption for owners of one and two-family homes who did not supervise the work. In order to receive the protection of the homeowners' exemption, a defendant must satisfy two prongs: that the work was conducted at a dwelling that is a residence for only one or two families, and the defendant did not direct or

CONTRACT

Written Notice of Defect Under Housing Merchant Implied Warranty Waived by Undertaking Repair

The homeowners (defendants) refused to pay the builder (plaintiff) the final payment under a custom home building contract because of alleged defects in the home. The homeowners counterclaimed for breach of the housing merchant implied warranty. The Fourth Department determined the written-notice-of-the-defect warranty-requirement was not an express condition precedent and the builder had waived the requirement by undertaking the repairs in the absence of written notice:

> …[W]e agree with plaintiff that defendants failed to provide written notice of the alleged defects, which is a constructive condition precedent to asserting such a counterclaim (see General Business Law § 777-a [4] [a];…, plaintiff waived the written notice requirement by addressing the defects after receiving defendants' oral notification of those defects… .We reject plaintiff's contention that written notice of the alleged defects was an express condition precedent that was bargained for by the parties and could therefore not be waived. Contrary to plaintiff's contention, the requirements of General Business Law § 777-a, including the written notice req uirement, are implied in every contract for the sale of a new home as a matter of public policy (§ 777-a [5]) and thus may be applied by the courts "to do justice andavoid hardship"…. **Rich v Orlando, 521, 4th Dept 7-5-13**

Action Properly Brought by Third Party Beneficiary of Indemnity Agreement

The Second Department affirmed Supreme Court's denial of a motion to dismiss brought by a defendant who had entered an indemnity agreement with a judgment debtor. The Second Department explained that plaintiff had stated a cause of action based upon plaintiff's being a third-party beneficiary of the indemnity agreement:

> Pursuant to CPLR 5227, a special proceeding may be commenced by a judgment creditor "against any person who it is shown is or will become indebted to the judgment debtor." Such a proceeding is properly asserted against one who agreed to indemnify the judgment debtor in the underlying proceeding. The judgment creditor stands in the judgment debtor's shoes, and may enforce the obligations owed to the judgment debtor by the indemnifying party… * * *.
>
> Here …the judgment debtor … was not a party to the indemnification agreement. However, the

> Supreme Court properly determined that [the judgment debtor] was an intended third-party beneficiary of the indemnification agreement. Parties asserting third-party beneficiary rights under a contract must establish: (1) the existence of a valid and binding contract between other parties; (2) that the contract was intended for their benefit; and (3) that the benefit to them is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate them if the benefit is lost…. Where performance is rendered directly to a third party, it is presumed that the third party is an intended beneficiary of the contract….
>
> Indemnity contracts are to be strictly construed to avoid reading into them duties which the parties did not intend to be assumed…. Here, however, the intent … to benefit [the judgment debtor] is apparent from the face of the indemnification agreement… .**Matter of White Plains Plaza Realty LLC, 2013 NY Slip Op 05220, 2nd Dept 7-10-13**

Release Precluded Civil Rights Action/No Showing Release Signed Under Duress/Releases Signed Under Duress Are Voidable Not Void

The Third Department affirmed the dismissal of plaintiff's civil rights complaint based upon a release signed by the plaintiff. The court determined that plaintiff's allegations did not create a question of fact about whether the release was the product of duress. The relevant legal principles, including the principle that contracts signed under duress are voidable, not void, were explained as follows:

> Under contract law, a signed release that is clear and unambiguous and knowingly and voluntarily entered into is binding on the parties unless cause exists to invalidate it on one of the recognized bases for setting aside written agreements, including illegality, fraud, mutual mistake, duress or coercion… . A party such as plaintiff seeking to void a written contract on the ground of duress must meet her burden of demonstrating "(1) threats of an unlawful act by one party which (2) compel[] performance by the other party of an act which it had a legal right to abstain from performing"… .
>
> Moreover, contracts executed under duress are, at most, voidable and not void and, by accepting and retaining the benefits of the second agreement for almost two years and not timely repudiating it, plaintiff affirmed or ratified that agreement, which is binding and no longer voidable on the grounds of duress, which objections are waived… . **Nelson v Lattner Enterprises of NY…, 515927, 3rd Dept 7-18-13**

Constructive Condition Precedent Properly Fashioned by Court

In a full-fledged opinion by Justice Friedman, the First Department agreed with Supreme Court's fashioning of a constructive condition precedent for the collection of additional rent under a lease. The First Department quoted the controlling law from the Court of Appeals:

> "A condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises' … . Most conditions precedent describe acts or events which must occur before a party is obliged to perform a promise made pursuant to an existing contract, a situation to be distinguished conceptually from a condition precedent to the formation or existence of the contract itself . . . .
>
> "Conditions can be expressed or implied. Express conditions are those agreed to and imposed by the parties themselves. Implied or constructive conditions are those imposed by law to do justice' … . Express conditions must be literally performed, whereas constructive conditions, which ordinarily arise from language of promise, are subject to the precept that substantial compliance is sufficient. The importance of the distinction has been explained by Professor Williston:
>
> Since an express condition . . . depends for its validity on the manifested intention of the parties, it has the same sanctity as the promise itself. Though the court may regret the harshness of such a condition, as it may regret the harshness of a promise, it must, nevertheless, generally enforce the will of the parties unless to do so will violate public policy. Where, however, the law itself has imposed the condition, in absence of or irrespective of the manifested intention of the parties, it can deal with its creation as it pleases, shaping the boundaries of the constructive condition in such a way as to do justice and avoid hardship'. (5 Williston, Contracts § 669, at 154 [3d ed].)" Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co. (86 NY2d 685, 690-691 [1995]). **Mount Sinai Hosp v 1998 Alexander Karten Annuity Trust, 2013 NY Slip Op 05667, 1st Dept 8-20-13**

CONTRACT LAW/CIVIL PROCEDURE

Court in Contract Action Does Not Have Power to Vary 9% Interest Rate

In a case with counterclaims sounding in contract and Labor Law 191-c (1) (re: payment of earned sales commissions after a contract is terminated), the Fourth Department noted that the court does not have discretion to vary the statutory 9% interest rate in a contract action:

> …[W]e conclude that the court lacked discretion to vary the statutorily-prescribed interest rate of 9% per annum (see CPLR 5004). As this Court has previously recognized, interest at the rate of 9% per annum is mandatory for "sum[s] awarded because of a breach of performance of a contract" (CPLR 5001 [a]…). **Polyfusion Electronics, Inc v Promark Eletronics, Inc…, 635.1, 4th Dept 7-19-13**

CIVIL RIGHTS

Damages in Firefighters' Discrimination Suit Modified

The Fourth Department modified the Supreme Court's damages assessment in a case brought by firefighters against the City of Buffalo (and named individuals) "alleging that [the City] discriminated against them by allowing promotional eligibility lists created pursuant to the Civil Service Law to expire solely on the ground that plaintiffs, who were next in line for promotion, were Caucasian." The order finding the City liable was issued based upon the US Supreme Court's ruling in Ricci v DeStefano (557 US 557) which held "before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious discriminatory action"… .In affirming that order (in a prior appeal), the Fourth Department determined the City "did not have a strong basis in evidence to believe that they would be subject to disparate-impact liability if they failed to take the race-conscious action, i.e., allowing the eligibility lists to expire" … . The case came before the Fourth Department this time with respect to damages-issues only. The Fourth Department affirmed the damages for emotional distress, but modified the economic damages finding that Supreme Court had erred in placing the burden of proof on the defendants to establish plaintiffs' economic damages, and noting that damages for loss of future earnings should be based on the difference between what he or she is now able to earn and what he or she could have earned in the absence of discrimination. The Fourth Department determined some of the expert-findings were too speculative. **Margerum, et al v City of Buffalo, et al, 421, 4th Dept 7-5-13**

CONSTITUTIONAL LAW

Wage Parity Law Which Conditions Medicaid Reimbursement Upon Paying Home Health Services Workers a Minimum Wage Is Constitutional

In a full-fledged opinion by Justice McCarthy, the Third Department determined the Wage Parity Law (Public Health Law section 3614-c), which conditions Medicaid reimbursement upon paying home health services providers a minimum wage as set in New York City's Living Wage Law, was constitutional. The court rejected arguments that: (1) the Legislature improperly delegated its authority to New York City; (2) the law improperly incorporated the Living Wage Law by reference; (3) extending the New York City law violated the home rule provision of the NY Constitution; and (5) the statute violated the substantive due process requirements. **Matter of Concerned Home Care Providers, Inc v State of New York, 515737, 3rd Dept 7-3-13**

CONSTITUTIONAL LAW/EDUCATION LAW/ ADMINISTRATIVE LAW

Action Seeking to Enjoin Closure of Charter School Dismissed

Plaintiffs brought an action for injunctive relief against the Board of Regents which had denied the application of plaintiff Pinnacle Charter School to renew its charter. Supreme Court had granted a preliminary injunction and dismissed one cause of action. The Fourth Department reversed the preliminary injunction and dismissed the complaint entirely, including the causes of action alleging a violation of due process and a violation of the Administrative Procedure Act:

> The first and second causes of action allege, respectively, that the determination of the Board of Regents violated Pinnacle's due process rights under the State Constitution (NY Const, art I, § 6) and the Federal Constitution (US Const, 14th Amend, § 1). We agree with defendants that the New York Charter Schools Act (Education Law art 56) creates no constitutionally protected property interest in the renewal of a charter and thus that the first and

second causes of action fail to state a cause of action… * * *

…[W]e agree with defendants that the Board of Regents was acting pursuant to its discretionary authority when it denied Pinnacle's renewal application, and it was not required to promulgate any rules pursuant to article 2 of the State Administrative Procedure Act with respect to its exercise of such authority… . **Pinnacle Charter School, et al v Board of Regents, et al, 432, 4th Dept 7-5-13**

REAL ESTATE

Criteria for Easement Granted in General Terms

In determining Supreme Court should have denied defendant's motion to dismiss, the Second Department explained the criteria for an easement granted in general terms:

> Where, as here, an easement is granted in general terms, "the extent of its use includes any reasonable use necessary and convenient for the purpose for which it is created"…. Further, the holder of an access easement "cannot materially increase the burden of the servient estate or impose new and additional burdens on the servient estate" … . **Shuttle Contr Corp v Peikarian, 2013 NY Slip Op 05057, 2nd Dept 7-3-13**

REAL PROPERTY/CONTRACT LAW

Extrinsic Evidence Properly Considered to Determine Intent of Parties Re: Ambiguous Deed

In an action to quiet title, the Second Department determined a deed was ambiguous on its face and extrinsic evidence was therefore admissible to ascertain the intent of the parties:

> Real Property Law § 240(3) provides that "[e]very instrument creating [or] transferring . . . real property must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law." Where the language used in a deed is ambiguous such that it is susceptible of more than one interpretation, the courts will look beyond the written instrument to the surrounding circumstances … . Moreover, " courts may as a matter of interpretation carry out the intention of a contract by transposing, rejecting, or supplying words to make the meaning of the contract more clear . . . However, such an approach is appropriate only in those limited instances where some absurdity has been identified or the contract would otherwise be unenforceable either in whole or in part'" … . Here, …the 1989 deed purporting to convey the subject property to IDI was ambiguous on its face. Under such circumstances, it was proper for the court to look to extrinsic evidence in order to effectuate the intent of the parties. **Al's Atl Inc v Shatma, LLC, 2013 NY Slip Op 05604, 2nd Dept 8-14-13**

MORTGAGES/CONTRACT LAW

Consolidation and Assignment of Mortgages Does Not Affect Validity of Original Mortgages

The Second Department explained that the consolidation and assignment of mortgages did not affect the validity of the original mortgages:

> In the instant matter, the plaintiff increased the outstanding balance of the first mortgage by borrowing the second mortgage loan and executing the CEMA [Consolidation, Extension and Modification Agreement]. Although the CEMA created a single mortgage lien, "[a] consolidation of outstanding loans is a device intended for the convenience of only the contracting parties" and "cannot impair liens in favor of parties that are not the contracting parties, which retain their independent force and effect" … . Where, as here, balances of first mortgage loans are increased with second mortgage loans and CEMAs are executed to consolidate the mortgages into single liens, the first notes and mortgages still exist and may be assigned to other lenders … . Further, an assignment of a loan obligation means that the obligation has been transferred, not paid in full and, thus, contrary to the plaintiff's allegation, does not render the obligation satisfied and discharged. **Benson v Deutsche Bank Natl Trust Inc, 2013 NY Slip Op 05606, 2nd Dept 8-14-13**

TRUSTS AND ESTATES

Criteria for Domicile Explained

In upholding Surrogate Court's determination decedent's domicile was New York, the First Department explained the relevant criteria as follows:

The Surrogate's Court Procedure Act defines domicile as "[a] fixed, permanent and principal home to which a person wherever temporarily located always intends to return" (SCPA 103[15]). "The determination of an individual's domicile is ordinarily based on conduct manifesting an intent to establish a permanent home with permanent associations in a given location"…. A person's domicile is generally a mixed question of fact and law, which the court must determine after reviewing the pertinent evidence…. No single factor is dispositive…, and the unique facts and circumstances of each case must be considered…. A party alleging a change of domicile has the burden of proving that change by clear and convincing evidence … . **Matter of Ranftle, 2013 NY Slip Op 05006, 1st Dept 7-2-13**

Executor's Motion to Be Substituted for Decedent in Negligence Action Too Late

In affirming the dismissal of an executor's motion to be substituted as a party in a negligence action (on behalf of the decedent), the Second Department explained:

CPLR 1021 provides, in pertinent part, "[i]f the event requiring substitution occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made, however, such dismissal shall not be on the merits unless the court shall so indicate." CPLR 1021 requires a motion for substitution to be made within a reasonable time … . The determination of reasonableness requires consideration of several factors, including the diligence of the party seeking substitution, the prejudice to the other parties, and whether the party to be substituted has shown that the action or the defense has potential merit….

The Supreme Court providently exercised its discretion in denying the appellant's motion pursuant to CPLR 1015 for leave to substitute himself as a party plaintiff and granting the defendant's cross motion pursuant to CPLR 1021 to dismiss the complaint, in light of the 21-month delay in obtaining preliminary letters testamentary, the further one-year delay in seeking substitution, the failure to demonstrate a reasonable excuse for the delays, the absence of any affidavit of merit, and the prejudice to the defendant… . **Terpis v Regal Hgts Rehabilitation & Health Care Ctr Inc, 2013 NY Slip Op 05200, 2nd Dept 7-10-13**

Criteria for Denial of Trustee Commissions Based On Misconduct, Including Post-Commission-Period Misconduct, Explained

The First Department discussed when a trustee can be denied commissions for misconduct, including misconduct after the commission period (a post-commission-period penalty is rare and none was imposed here):

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

Trustees can be denied commission "where their acts involve bad faith, a complete indifference to their fiduciary obligations or some other act that constitutes malfeasance or significant misfeasance" ... The denial of a commission, however, should not be "in the nature of an additional penalty" (Restatement (Second) of Trusts § 243, Comment a). Rather, it should be based on the trustee's failure to properly serve the trust (see id.). **Matter of Gregory Stewart Trust, 2013 NY Slip Op 05290, 1st Dept 7-16-13**

Method of Service of Citation Should Be Calculated toProvide Notice Based Upon Facts Known To Court

The Second Department determined a decree (admitting decedent's will to probate) issued by Surrogate's Court should have been vacated on the ground that decedent's daughter (Ross) was never properly served with the citation and, therefore, the court never obtained personal

jurisdiction over her. The Second Department explained that Surrogate Court should have fashioned a method of service, based upon the unique facts of the case known to the court, that was best calculated to notify Ross:

> An elementary and fundamental requirement of due process in any proceeding which is accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"… . In making a determination as to whether notice is "reasonably calculated," the unique information about an intended recipient must be considered, "regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case" … . Here, given that the Surrogate's Court was aware that Ross and her family would be away from her home in Sloatsburg until sometime in late September 2008, and was vacationing in Long Beach Island during that time, and given that there was no indication that Ross's address in Long Beach Island was unavailable, in order for notice of the probate proceeding to be reasonably calculated to reach Ross, the Surrogate's Court should have at least directed that the supplemental citation be mailed to Ross's address in Long Beach Island, instead of solely directing that the supplemental citation be mailed to Ross's address in Sloatsburg. **Matter of Skolnick, 2013 NY Slip Op 05463, 2nd Dept 7-24-13**

FORECLOSURE

Question of Fact About Whether Plaintiff Had Standing to Bring Foreclosure Proceeding

The Second Department reversed Supreme Court, finding that the plaintiff was not entitled to summary judgment in a mortgage foreclosure proceeding. The defendant alleged plaintiff did not have standing to bring the action. The Second Department determined the plaintiff failed to present sufficient evidence of its standing to support summary judgment in plaintiff's favor. In explaining the underlying legal principles, the Second Department wrote:

> "In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced"…. "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident"…. However, "a transfer or assignment of only the mortgage without the debt is a nullity and no interest is acquired by it," since a mortgage is merely security for a debt and cannot exist independently of it…. "Where, as here, the issue of standing is raised by a defendant, a plaintiff must prove its standing in order to be entitled to relief"….**Homecomings Financial, LLC v Guldi, 2013 NY Slip Op 05048, 2nd Dept 7-3-13**

LANDLORD-TENANT

No Need for Proof of Agent's Authority—Five-Day Notice Demanding Rent Valid

The Second Department determined a five-day notice demanding unpaid rent under a lease was not invalid because it was signed by a purported agent of the landlord without proof of the agent's authority to act for the landlord. In so finding, the Second Department distinguished a case relied upon by the tenant:

> …[T]he Appellate Term properly distinguished this Court's decision in Siegel v Kentucky Fried Chicken of Long Is. (108 AD2d at 221). … Siegel is limited to the "factual peculiarities" of the lease in that case. The lease in Siegel, unlike the lease in the case at bar, designated certain rights that were to be exercised by "the Landlord or Landlord's agent[ ]" and designated the landlord's attorney by name, while the three-day forfeiture notice that was the subject of that dispute was sent by another attorney, who was unknown to the tenant …. The relevant provision of the lease herein (hereinafter the notice provision), provided that the "Landlord shall give Tenant written notice of default stating the type of default," and, unlike the lease in Siegel, did not expressly obligate [landlord] to act only personally or through an identified agent. Consequently, although the notice indicated that it was signed by [landlord's] previously unidentified agent, the failure to include evidence of the agent's authority to bind the landlord, which we found necessary in Siegel, did not render [landlord] noncompliant with the requirements of the notice provision (see RPAPL 711[2]), and did not render the notice invalid. **Matter of QPII-143-45 Sanford Ave, LLC v Spinner, 2013 NY Slip Op 05083, 2nd Dept 7-3-13**

Major Capital Improvement Rent Increase Should Not Have Been Denied in Its Entirety

In a full-fledged opinion by Justice Renwick, the First Department determined the NYS Division of Housing and Community Renewal's (DHCR's) complete denial of a rent increase for a Major Capital Improvement (MCI) to an apartment building was arbitrary and capricious. In the past, DHCR had denied an MCI rent increase only with respect to a small percentage of all the apartments in the improved building which were experiencing problems (like water damage) after the improvement was complete. Here the DHCR had denied the increase in its entirety (for all apartments) based upon problems in a small number of apartments. In noting that the DHCR determination was not supported by any relevant precedent (one aspect of a court's "arbitrary and capricious" review under Article 78), the First Department wrote:

> It is well settled that "[j]udicial review of administrative determinations is limited to whether the determination was affected by an error of law or was arbitrary and capricious or an abuse of discretion… . Further, the Court of Appeals has held that an administrative agency's determination is arbitrary and capricious when it " neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts'"… . "[A]n agency that deviates from its established rule must provide an explanation for the modification so that a reviewing court can determine whether the agency has changed its prior interpretation of the law for valid reasons, or has simply overlooked or ignored its prior decision'" … .
>
> When a party mounts an attack upon a decision by DHCR as inconsistent with prior determinations, our task is to examine DHCR's precedent in similar situations. In those cases where the DHCR has denied an exterior renovation (waterproofing and pointing) MCI rent increase outright in the first instance, this Court has upheld such determinations where the owner failed to prove that the work was necessary and comprehensive… . There is, however, no evidence that the DHCR has ever had a specific policy to deny a rent increase outright in the first instance in the type of situation, as here, where defects (water damage) relating to the improvement are found in a relatively small number of the building's apartments. Nor does DHCR present any evidence of such policy. **Matter of 20 Fifth Ave, LLC, 2013 NY Slip Op 05434, 1st Dept 7-23-13**

INSURANCE LAW

Policy Exclusions Not Affected by Additional Insured Endorsement

The Second Department explained how the exclusion provisions of a policy are affected by the language of an additional insured endorsement:

> Here, the plain meaning of the exclusion … was that the …policy did not provide coverage for damages arising out of bodily injury sustained by an employee of any insured in the course of his or her employment…. Contrary to the plaintiffs' contentions, the fact that the blanket additional insured endorsement contained its own additional exclusions did not eliminate the exclusions contained in the …policy. In construing an endorsement to an insurance policy, the endorsement and the policy must be read together, and the words of the policy remain in full force and effect except as altered by the words of the endorsement…. Accordingly, since the employee exclusion clause in the …policy unambiguously recited that coverage was precluded, the Supreme Court properly granted … a judgment declaring that [the insurer] is not obligated to defend and indemnify the plaintiffs in the underlying action. **Soho Plaza Corp v Birnbaum, 2013 NY Slip Op 05058, 2nd Dept 7-3-13**

Agent Owed No Special Duty to Insured/No Duty to Advise Insured of Unpaid Premiums for Policy Assigned to Insured

The Fourth Department dismissed a negligence cause of action as time-barred and a contract cause of action because the defendant insurance agent owed no special duty to advise the plaintiff. The plaintiff asked for and received an assignment of a workers' compensation policy which had been held by nonparty API. Unbeknownst to the plaintiff at the time of the assignment, API owed unpaid premiums. In reversing Supreme Court's denial of defendant's motion for summary judgment, the Fourth Department determined the statute of limitations for the negligence cause of action started when the assignment of the workers' compensation insurance policy to plaintiff was signed, not when plaintiff learned of the unpaid premiums, and the contract between plaintiff and the defendant insurance agent did not impose a special duty on the agent to advise the plaintiff about the unpaid premiums:

> …[U]pon the execution of the assignment, which shifted liability for arrears in policy premiums from API to plaintiff, plaintiff's damages were "sufficiently calculable to permit plaintiff to obtain prompt judicial redress of that injury" and plaintiff therefore had a "complete cause of action" …. The fact that plaintiff may not have learned of the amount owed … on the date on which NYSIF commenced the action against it [for the unpaid premiums], does not alter the analysis for statute of limitations purposes… . * * *
>
> " '[A]n insurance agent's duty to its customer is generally defined by the nature of the customer's request for coverage' " …. " 'Absent a specific request for coverage not already in a client's policy or the existence of a special relationship with the client, an insurance agent or broker has no continuing duty to advise, guide[ ] or direct a client to obtain additional coverage' " …. "To set forth a case for negligence or breach of contract against an insurance broker, a plaintiff must establish that a specific request was made to the broker for the coverage that was not provided in the policy" …. "A general request for coverage will not satisfy the requirement of a specific request for a certain type of coverage"… .
>
> Here, plaintiff requested only that defendant procure the "best policy value" for plaintiff's workers' compensation coverage. This is "the very kind of request that has been repeatedly held to be insufficient" to trigger a special duty requiring defendant to advise plaintiff concerning its insurance coverage… . Defendant procured workers' compensation coverage for plaintiff through the assignment of API's policy. …[T]he assignment itself indicated that plaintiff would be responsible "for the payment of any premiums or additional premiums . . . which may become due on account of this policy up to the effective date of this assignment of interest agreement." Plaintiff has thus failed to state a breach of contract cause of action because there was no specific request for coverage that defendant failed to meet… . **5 Awnings Plus, Inc v Insurance Group, Inc, 678, 4th Dept 7-19-13**

Automobile Policy Does Not Cover Injury to Passerby Bitten by a Dog Which Was Inside a Vehicle

In finding that the underinsured endorsement for automobile insurance did not cover injuries incurred when plaintiff was bitten by a dog through the window of a car as she walked past, the Second Department explained:

> Use of an automobile encompasses more than simply driving it, and includes all necessary incidental activities such as entering and leaving its confines … . To satisfy the requirement that it arose out of the "ownership, maintenance or use

of" a motor vehicle, the accident must have arisen out of the inherent nature of the automobile and, as such, inter alia, the automobile must not merely contribute to the condition which produces the injury, but must, itself, produce the injury … . "[T]he vehicle itself need not be the proximate cause of the injury," but "negligence in the use of the vehicle must be shown, and that negligence must be a cause of the injury" … . "To be a cause of the injury, the use of the motor vehicle must be closely related to the injury" … .

Here, as a matter of law, Reyes's injuries did not result from the inherent nature of Kazimer's vehicle, nor did the vehicle itself produce the injuries. The injuries were caused by Kazimer's dog, and the vehicle merely contributed to the condition which produced the injury, namely, the location or situs for the injury. Allstate established that a causal relationship between the car and the incident was lacking, and Reyes failed to rebut that showing … . **Matter of Allstate Ins Co v Reyes, 2013 NY Slip Op 05566, 2nd Dept 8-7-13**

Plaintiff Can Not Recover Under Her Own Supplemental Uninsured/Underinsured Motorist Policy When Her Recovery Exceeded the Limit of that Policy

The Second Department explained how plaintiff's supplemental uninsured/underinsured motorist (SUM) policy related to her recovery of damages under the policy when she, as a pedestrian, was struck by a car and recovered damages in excess of the SUM limit:

> When a policyholder purchases supplemental uninsured/underinsured motorist (hereinafter SUM) coverage in New York, he or she is insuring against the risk that a tortfeasor's underinsurance (or complete lack of insurance) will provide less protection for the policyholder than the policyholder provides to others when at fault in causing bodily injury … . SUM coverage is not a "stand-alone policy to fully compensate the insureds for their injuries" … .
>
> Here, the respondent, who was struck by a car while walking in the street, had an automobile policy of her own. In that policy, she chose to provide coverage in the amount of $100,000 per person in the event she was at fault in causing bodily injuries. By paying for SUM coverage in the amount of $100,000 per person, she also ensured that she was protected for that same amount in the event that an uninsured or underinsured motorist caused her to sustain injuries. Although the respondent was injured, she received $400,000 from the tortfeasors, which is $300,000 more than the coverage she provided to others. Consequently, under paragraph 6 of her SUM endorsement, the amount she was entitled to recover under her SUM coverage was reduced to zero. **Matter of Unitrin Auto & Home Ins Co v Gelbstein, 2013 NY Slip Op 05749, 2nd Dept 8-28-13**

INSURANCE LAW/FIDELITY BONDS

"Direct Financial Loss" Caused by Employee Defined

The First Department explained what "direct financial loss" means in the context of bonds issued to indemnify a commodities futures broker [MF Global] for loss caused by a wrongful act by an employee:

> In the bonds, plaintiffs agreed to indemnify MF Global for losses "sustained at any time for . . . any wrongful act committed by any employee . . . which is committed . . . with the intent to obtain financial gain for [the employee]" (emphasis omitted). "Loss" means "the direct financial loss sustained by [MF Global] as a result of any single act, single omission or single event, or a series of related or continuous acts, omissions or events." The bonds exclude coverage for "[i]ndirect or consequential loss." A "[w]rongful act," with respect to trading in commodities and futures, is defined as "any . . . dishonest . . . act committed with the intent to obtain improper financial gain for . . . an employee" … .. * * *
>
> The motion court properly concluded that MF Global's loss constituted a "direct financial loss." Although that term is not defined in the bonds, "[a] direct loss for insurance purposes has been analogized with proximate cause"… ..
>
> Here, [a broker's] conduct in making unauthorized trades beyond his margin was the direct and proximate cause of MF Global's loss… .**New Hampshire Ins Co v MF Global, 2013 NY Slip Op 05291, 1st Dept 7-16-13**

INSURANCE LAW/CIVIL PROCEDURE/ CONTRACT LAW

Choice of Law Criteria Re: Insurance Contracts Explained

The Second Department, in reversing Supreme Court's finding that New York, not New Jersey, law applied to a disclaimer of insurance coverage based on late notice, explained the relevant choice of law principles:

> The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved"…. Here, there is a clear conflict inasmuch as New Jersey law requires insurers asserting a disclaimer based on late notice to show that they were prejudiced by the untimely notice…, while, with respect to an identical disclaimer made under an insurance policy that, like the one in dispute here…, New York law does not ….
>
> In contract cases, the court then applies a "center of gravity" or "grouping of contacts" analysis in order to determine which State has the most significant relationship to the transaction and the parties … . The court considers significant contacts such as the place of contracting, the place of negotiation and performance, the location of the subject matter of the contract, and the domicile or place of business of the contracting parties … ."In the context of liability insurance contracts, the jurisdiction with the most significant relationship to the transaction and the parties' will generally be the jurisdiction which the parties understood was to be the principal location of the insured risk . . . unless with respect to the particular issue, some other [jurisdiction] has a more significant relationship' "…. Where the covered risks are spread over multiple states, "the state of the insured's domicile should be regarded as a proxy for the principal location of the insured risk" … . **Jimenez v Monadnock Constr Inc, 2013 NY Slip Op 05616, 2nd Dept 8-14-13**

TAX LAW/REAL PROPERTY

Violation of Zoning Ordinance Precludes Property Tax Exemption

The Fourth Department affirmed the determination the petitioner (a hospital) was not entitled to a property tax exemption because the use of the property was in violation of a zoning law. After noting that a proceeding pursuant to RPTL article 7, and not an Article 78 proceeding, is the proper vehicle for challenging a tax assessment, the Fourth Department wrote:

> The fact that petitioner used the subject property for "hospital purposes" as that term is used in the RPTL is not contested (RPTL 420-a [5]). Nevertheless, a property owner who uses its property for exempt purposes in violation of an applicable zoning law is prohibited from receiving a tax exemption pursuant to RPTL 420-a… . **Matter of Geneva General Hospital v Assessor of Town of Geneva…,559, 4th Dept 7-5-13**

ANIMAL LAW

Question of Fact Raised About Defendant's Knowledge of Horse's Vicious Propensities

The Third Department affirmed the denial of summary judgment in a case where plaintiff was injured by defendant's horse. Plaintiff was knocked unconscious when defendant's horse "head swatted" him. The Third Department determined the deposition testimony of a neighbor raised a question of fact about whether defendant was aware of the horse's aggressive behavior. The Third Department explained the relevant legal principles as follows:

> As a general rule, an owner of a domestic animal will only be held strictly liable for the harm caused by such animal if he or she "'knows or should have known of that animal's vicious propensities'" Therefore, on his motion for summary judgment, defendant bore the initial burden of establishing that he had no prior knowledge that [his horse] had any vicious propensity …. It is now well established that a vicious propensity is "the propensity to do any act that might endanger the safety of the persons and property of others in a given situation" …, and includes behavior that would not necessarily be considered dangerous or ferocious if those behaviors reflect a "'proclivity to act in a way that puts others at risk of harm'" … However, normal or typical equine behavior is insufficient to establish a vicious propensity … . **Carey… v Schwab, 516021, 3rd Dept 7-18-13**

UNEMPLOYMENT INSURANCE

Employer's Late Request for a Hearing Could Not Be Excused

In affirming the Unemployment Insurance Appeal Board's ruling that an employer's request for a hearing was untimely, the Third Department noted there was no provision allowing an extension of time:

> "Pursuant to Labor Law § 620 (2), an employer has 30 days from the mailing or personal delivery of a contested determination to request a hearing"…. The employer acknowledged receiving the determination, but was unsure of the date of such receipt. Pursuant to the unrebutted presumption found in 12 NYCRR 461.2, the determination was deemed mailed on January 12, 2009 and received by the employer within five days thereafter. Although the employer contends that the admittedly late written request for a hearing was due to law office failure, "the statutory time period in which to request a hearing is to be strictly construed, and the statute contains no provision permitting an extension of time in which an employer can request a hearing"… . **Matter of Agarwal, 515007, 3rd Dept 7-3-13**

Employee's Use of Personal Checking Account Did Not Amount to Misconduct

The Third Department reversed the Unemployment Insurance Appeal Board's denial of benefits finding that, although the practice of depositing money in the employee's bank account for reimbursement to her and others for out of pocket expenses violated company policy, it did not amount to misconduct:

> Even where an employee has been fired for legitimate reasons, the "behavior may fall short of misconduct and, therefore, he or she may still be entitled to receive benefits"…. Although a knowing violation of an employer's established policies that has a detrimental effect on the employer's interests can constitute disqualifying misconduct …, we find that claimant's misconduct in this case did not rise to a disqualifying level. While we do not quarrel with the Board's finding that claimant violated the employer's established policies, which provided a basis for terminating her employment, the hearing testimony reveals that claimant's actions were in keeping with a longstanding practice that was at least partially condoned by her former supervisor and were necessary because claimant did not have check writing authority… . **Matter of Lopresti, 516109, 3rd Dept 7-3-13**

WORKERS' COMPENSATION

Disability Pre-dated Work at World Trade Center--- Worker Entitled to Workers' Compensation

In reversing a decision of the Workers' Compensation Board which ruled the employer was not entitled to reimbursement from the Special Disability Fund on the ground that the employee's lung disease was solely related to work at the World Trade Center, the Third Department wrote:

> [The treating doctor] repeatedly expressed his opinion that claimant's interstitial lung disease was related to both his exposure at the WTC site and certain exposures throughout his career with the employer, which included exposure to asbestos. …Thus, although reimbursement pursuant to Workers' Compensation Law § 15 (8) (d) may be denied when a work-related injury is the sole cause of a permanent disability…, there is no medical evidence present here to support the Board's conclusion that claimant's disability was solely caused by his WTC site exposure and, therefore, the Fund was inappropriately discharged… . **Matter of Surianello, 515055, 3rd Dept 7-3-13**

Employer Policy Re: Firing of Employees Injured in Preventable Accidents Was Discriminatory

The Third Department determined a policy which required probationary employees injured in a preventable accident to be fired, but did not require the firing of uninjured probationary employees who were observed working unsafely, improperly served to dissuade injured employees from seeking Workers' Compensation:

> Workers' Compensation Law § 120 prohibits an employer from discriminating against an employee because that employee either claimed or attempted to claim workers' compensation benefits…. In enacting Workers' Compensation Law § 120, the Legislature intended "to insure that a claimant [could] exercise his [or her] rights under the [Workers'] Compensation Law . . . without fear that doing so [might] endanger the continuity of [his or her] employment… .
>
> …[T]he policy …has a discernible impact upon probationary employees who are injured in work-related accidents, i.e., employees who potentially could seek workers' compensation benefits. The policy effectively categorizes probationary employees into two groups: those who violate safety rules but are not injured, and those who violate safety rules

and are injured – with only the latter group automatically forfeiting their right to work for the employer…. Such a policy dissuades those probationary employees who are injured in the course of their employment and wish to remain employed from reporting their injury and pursuing workers' compensation benefits, which, in turn, runs counter to the Legislature's intended purpose of insuring that employees can exercise their rights under the compensation statutes "without fear that doing so may endanger the continuity of [their] employment"… . **Matter of Rodriguez v C& S Wholesale Grocers, Inc, 516124, 3rd Dept 7-3-13**

Guidelines With Pre-Authorized Specific Procedure List for Medical Tests and Services Held Valid/Variance Procedure for Tests and Services Not on List Held Valid

In a full-fledged opinion by Justice Spain, the Third Department determined the Medical Treatment Guidelines created pursuant to Workers' Compensation Law section 13-a (5) were valid and enforceable. The Guidelines were adopted as the standard of care for all medical treatment for workplace injuries rendered on or after December 1, 2010, relating to injuries to the back, neck, shoulder and knee. The Guidelines include a preauthorized-specific-procedure-list for many common medical tests and services which do not require prior authorization. The regulations set forth a variance procedure in which treatment providers may request approval for medical care or testing that is not preapproved upon a showing that the treatment is appropriate and medically necessary. In the case before the court, the denial of claimant's request for a variance for acupuncture treatment was affirmed. The dissenting justice argued there was "no support for the majority's position that the [Guidelines] were intended to create a preordained and exhaustive list of medically necessary treatments, thereby rendering all non-listed treatments presumptively not medically necessary and creating a presumption that the employers/carriers could 'rely on' in fulfilling their statutory obligation to provide medical care to injured claimants." **Matter of Kigin v State of New York Workers' Compensation Board…, 515721, 3rd Dept 7-18-13**

Applying New Jersey Law—Removal of Safety Guard from Machine Did Not Destroy the Applicability of Workers' Compensation as the Exclusive Remedy

The First Department, over a two-justice dissent, reversed Supreme Court and dismissed a complaint alleging that a work-related injury was the result of an "intentional wrong" by the employer and, therefore, workers' compensation was not the exclusive remedy. The case required the application of New Jersey's Workers' Compensation Act, and the interpretation of the statutory term "intentional wrong" pursuant to New Jersey case law. The injury to plaintiff's fingers occurred on a machine from which a safety guard had been removed. The First Department wrote:

> …[I]n the present case there were no prior incidents or injuries caused by this machine; there is no evidence of deliberate deceit or fraudulent conduct on defendant's part; and there were no OSHA violations issued to defendant prior to this incident. Although plaintiff testified that he requested on a number of occasions that the safety guard be replaced, he and other employees continued to use the machine without incident. Significantly, the accident would not have occurred absent plaintiff's decision to retrieve a piece of stuck leather with his hand, rather than using a long-handled brush or long-handled screwdriver, which was the normal procedure to clear machine jams over the past 13 years that the machine had been in use. In fact, plaintiff testified at his deposition that he used such a long-handled screwdriver over the years to clear jams in the machine. … Thus, there is an insufficient basis for finding that defendant knew that its conduct in not replacing the safety screens was "substantially certain" to result in plaintiff's injury …, or that there was a "virtual certainty" of injury … . The probability or knowledge that such injury "could" result, or even that an employer's action was reckless or grossly negligent, is not enough… . **Lebron v SML Veteran Leather, LLC, 2013 NY Slip Op 05664, 1st Dept 8-20-13**

MEDICARE

Question of Fact About Whether Private Entity Managing Medicare Funds Can Recoup Payments Which Were Above Minimum Fees Required by Medicare

Plaintiffs, emergency and ambulance service-providers, brought an action in response to defendant's reduction in Medicare payments made to recoup alleged overpayments in prior years. In finding plaintiffs had raised a question of fact about whether defendant was entitled to recoup the alleged overpayments, the Fourth Department wrote:

> We agree with plaintiffs that the applicable Medicare fee schedule set a minimum payment, but not a maximum payment, for the services that plaintiffs provided (see 42 USC § 1395w-22 [a] [2] [A]). On the one hand, if defendant had paid plaintiffs the minimum fees required by the applicable Medicare fee schedule, then plaintiffs would not be entitled to object to those payments as being insufficient (see 42 CFR 422.214 [a] [1]). On the other hand, however, while defendant paid plaintiffs more than the minimum amount required by the fee schedule for a period of time, defendants have failed to establish that defendant is entitled as a matter of law to recoup any or all of those funds from plaintiffs. Although the common law right of a governmental agency to recoup erroneously distributed public funds is well established … , that right does not necessarily extend to defendant, a private entity managing public funds… . **Canandaigua Emergency Squad, Inc. … v Rochester Area Health Maintenance Organization, Inc…, 632, 4th Dept 7-19-13**

MEDICAID

Five-Year Look-Back Applied/Pension Properly Included in Determining Applicant's Income In Spite of Unexplained Cessation of Payments

The Fourth Department confirmed the Department of Social Service's determination that transfers of property within the five-year look-back period were properly taken into account in imposing a penalty period before the applicant, who was in a nursing home, was eligible to for Medicaid. The court agreed that a gift made during the look-back period was at least partially motivated by qualifying for Medicaid and the applicant's pension payments, which stopped at some point for unknown reasons, were properly considered in determining the applicant's income (noting that the department was not obligated to determine why the payments, which presumably were for life, stopped). In explaining the relevant law, the court wrote:

> "In determining the medical assistance eligibility of an institutionalized individual, any transfer of an asset by the individual . . . for less than fair market value made within or after the look-back period shall render the individual ineligible for nursing facility services" for a certain penalty period (Social Services Law § 366 [5] [d] [3]). The look-back period is the "sixty month period[] immediately preceding the date that an [applicant] is both institutionalized and has applied for medical assistance" (§ 366 [5] [d] [1] [vi]). Where an applicant has transferred assets for less than fair market value, the burden of proof is on the applicant to "rebut the presumption that the transfer of funds was motivated, in part if not in whole, by . . . anticipation of future need to qualify for medical assistance" (…see generally § 366; 18 NYCRR 360-4.4). **Matter of Donvito… v Shah…, 663, 4th Dept 7-19-13**

FRAUDULENT CONVEYANCE/DEBTOR-CREDITOR/MECHANIC'S LIEN/LIEN LAW

Criteria for Causes of Action Discussed in Extensive Modification of Supreme Court's Orders

In extensively modifying Supreme Court's rulings in an action to foreclose a mechanic's lien, the set aside alleged fraudulent conveyances pursuant to Debtor and Creditor Law section 273, and to recover damages for diversion of trust assets pursuant to article 3-a of the Lien Law, the Second Department explained (1) the effect of obtaining a bond on the Debtor/Creditor and Lien Law causes of action; when the Lien Law cause of action accrues; and (3) the Lien Law has an exception designed to protect purchasers of realty:

> The Supreme Court improperly awarded judgment … to set aside conveyances of the property as fraudulent pursuant to Debtor and Creditor Law § 273. Once [defendant] "obtained a bond to discharge the mechanic's lien, the debt no longer existed for the purposes of Debtor and Creditor Law § 273"… .
>
> However, contrary to the appellants' contention, the discharge of a mechanic's lien by the filing of a bond is not equivalent to payment or discharge of a trust claim pursuant to Lien Law article 3-A … Further, contrary to the appellants' contention, those causes of action were not time-barred by Lien Law § 77(2), which provides that no action to enforce a trust under article 3-A of the Lien Law "shall be maintainable if

commenced more than one year after the completion of such improvement." "The one-year period does not begin to run from the date of substantial completion, but from the date of completion of all work"… .

"While the Lien Law is generally designed to protect contractors, material providers and other classes of workers who supply labor or furnish materials, subdivision (5) of section 13 is an exception which is specifically designed to protect purchasers of realty"… . **Holt Constr Corp v Grand Palais LLC, 2013 NY Slip Op 05189, 2nd Dept 7-10-13**

FRAUDULENT CONVEYANCE

Criteria for Fraudulent Conveyance

In reversing Supreme Court, the Second Department determined the plaintiff was entitled to summary judgment in a fraudulent conveyance action. The court explained the relevant legal principles as follows:

> Pursuant to Debtor and Creditor Law § 276, [e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors'" …. "Direct evidence of fraudulent intent is often elusive. Therefore, courts will consider badges of fraud,' which are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent"…. A plaintiff that successfully establishes actual intent to defraud is entitled to a reasonable attorney's fee under Debtor and Creditor Law § 276-a …. * * *
>
> The plaintiff presented evidence of badges of fraud, including, inter alia, a close relationship between the parties to the transaction, inadequate consideration for the transaction, and the retention of the benefit of the property by Elyahou, who continued to reside in the premises following the transfer… . **5706 Fifth Ave LLC v Louzieh, 2013 NY Slip Op 05187, 2nd Dept, 7-10-13**

HUMAN RIGHTS LAW

Cause of Action Alleging Retaliation for Sexual Harassment Complaint in Violation of New York City Human Rights Law Dismissed

The Second Department affirmed the dismissal of a complaint alleging that defendant Prison Health Service (PHS) retaliated against the plaintiff after she made a sexual harassment complaint. The retaliation was alleged to have violated the New York City Human Rights Law (NYCHRL). Plaintiff claimed she was subjected to excessive demands for her professional credentials and health clearance forms and the denial of overtime work. In explaining the proof requirements, the Second Department wrote:

> …"In assessing retaliation claims that involve neither ultimate actions nor materially adverse changes in terms and conditions of employment, it is important that the assessment be made with a keen sense of workplace realities, of the fact that the chilling effect' of particular conduct is context-dependent, and of the fact that a jury is generally best suited to evaluate the impact of retaliatory conduct in light of those realities" … . … [T]o make out an unlawful retaliation claim under the NYCHRL, a plaintiff must show that (1) he or she engaged in a protected activity as that term is defined under the NYCHRL, (2) his or her employer was aware that he or she participated in such activity, (3) his or her employer engaged in conduct which was reasonably likely to deter a person from engaging in that protected activity, and (4) there is a causal connection between the protected activity and the alleged retaliatory conduct (see Administrative Code of City of NY § 8-107[7]…). Once the plaintiff has met this initial burden, the burden then shifts to the defendant to present legitimate, independent, and nondiscriminatory reasons to support its actions … . Then, if the defendant meets this burden, the plaintiff has the obligation to show that the reasons put forth by the defendant were merely a pretext… . **Brightman v Prison Health Serv Inc, 2013 NY Slip Op 05510, 2nd Dept 7-31-13**

ENVIRONMENTAL LAW/ZONING

Criteria for Review of Planning Board's SEQRA Determination and Zoning Board's Granting a Variance

In upholding the approval of a site plan, the Third Department determined the planning board met the requirements of the State Environmental Quality Review Act (SEQRA) and zoning board properly granted a height variance. In explaining the criteria for both reviews, the Third Department wrote:

> "'Judicial review of an agency determination under SEQRA is limited to whether the [lead] agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination'…. "While judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to 'weigh the desirability of any action or [to] choose among alternatives'"…. The lead agency's determination will only be annulled if it is arbitrary, capricious or unsupported by the evidence (see CPLR 7803 [3];…). * * *
>
> The [zoning board's] determination to grant the variance is also valid. In determining whether to grant a variance, the local zoning board must "'engage in a balancing test, weighing the proposed benefit to [the applicant] against the possible detriment to the health, safety and welfare of the community, as well as consider the five statutory factors enumerated in Town Law § 267-b (3)'"…. "Local zoning boards have broad discretion in considering applications for variances, and judicial review is limited to determinating whether the action taken by the board was illegal, arbitrary or an abuse of discretion"…. **Matter of Schaller, 515824, 3rd Dept 7-3-13**

MUNICIPAL LAW/TOWN LAW

Solid Waste Facility Operating Agreement Not a Lease—No Permissive Referendum Required

The Third Department determined that a Solid Waste Facility Operating Agreement between the Town of Colonie and Capital Region Landfills, Inc (CRL) was not a lease, and therefore a permissive referendum was not a pre-requisite to the agreement. The Third Department wrote:

> Town Law § 64 (2) provides that, upon adopting a resolution, a town board may "convey or lease real property in the name of the town, which resolution shall be subject to a permissive referendum." The petition and amended petition allege that, as the agreement is "the functional equivalent of a lease," the Town violated Town Law § 64 (2) by adopting the resolution and entering into the agreement without first conducting a permissive referendum … . * * *
>
> In view of the significant restrictions on CRL's authority and control of the landfill and the rights and powers retained by the Town, the agreement does not convey "absolute control and possession" to CRL and is not a lease as a matter of law….
>
> Accordingly, petitioners' claim that a permissive referendum was required by Town Law § 64 (2) is without merit. **Matter of Connors v Town of Colonie, 516058, 3rd Dept 7-3-13**

MUNICIPAL LAW/LABOR LAW

Police Officer Not Injured by "Recognized Hazard"---No Recovery Under Municipal Law/Labor Law---Officer Injured by Suspect After Mace Canister Failed

In dismissing a Municipal Law/Labor Law cause of action brought by a police officer against the city after she was injured by a suspect when her mace canister failed, the Second Department explained:

> Although Labor Law § 27-a(3) may serve as a proper predicate for a cause of action alleging a violation of General Municipal Law § 205-e …, the plaintiff failed to allege that her injuries resulted from a "recognized hazard[ ]" within the meaning of the Labor Law (Labor Law § 27-a[3][a][1]…). **Blake v City of New York, 2013 NY Slip Op 05608, 2nd Dept 8-14-13**

ARBITRATION/CONTRACT/ EMPLOYMENT LAW

Arbitrator Exceeded Powers Afforded by Collective Bargaining Agreement Re: Time Limitations for Filing Grievances

In affirming Supreme Court's determination that an arbitrator had exceeded a limitation on his power enumerated in the collective bargaining agreement (CBA), the Third Department explained:

> It is well established that an arbitrator's award is largely unreviewable…. However, such an award may be vacated upon a showing that it "'violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power'" …. Here, Supreme Court properly concluded that the arbitrator exceeded a specifically enumerated limitation on his power by failing to recognize the grievance and arbitration procedures as outlined in the CBA and, more particularly, the time limitation for filing grievances that is contained therein. **Matter of Adirondack Beverages Corporation…, 516022, 3rd Dept 7-3-13**

ARBITRATION/CONSTITUTIONAL LAW/ EDUCATION LAW

Although Arbitrator in Statutorily-Required Arbitration Proceeding Properly Found Teacher Engaged in Misconduct, Teacher's Actions Were Protected by First Amendment

Teachers demonstrated in front of a school while negotiations for a new collective bargaining agreement were on-going. On a rainy day, some teachers parked their cars in front of the school, displaying signs inside the cars. Because the teachers were parked where children are usually dropped off by their parents, children were being dropped off in the street. The board of education brought a disciplinary charge against petitioner pursuant to Education Law 3020-a alleging the creation of a health and safety risk. The matter went to statutorily-required arbitration and the arbitrator found the petitioner had created a health and safety risk. Petitioner challenged the ruling in this Article 78 proceeding. The Second Department explained the court's role in reviewing a statutorily-required arbitration, found that the arbitrator's ruling was supported by the evidence, but determined petitioner's activity was protected by the First Amendment:

> Where, as here, arbitration is statutorily required, "judicial review under CPLR article 75 is broad, requiring that the award be in accord with due process and supported by adequate evidence in the record" … . "The award must also be rational and satisfy the arbitrary and capricious standards of CPLR article 78" … . "Due process of law requires . . . that the [arbitrator's determination] under the power conferred by statute have a basis not only in his good faith, but in law and the record before him [or her]" … . … In this proceeding… the evidence at the hearing provided a rational basis for the arbitrator's decision, and the award was not arbitrary and capricious … .Nonetheless, we hold …that the petition should have been granted. The petitioner's expressive activity regarding collective bargaining issues indisputably addressed matters of public concern …, and the District failed to meet its burden of demonstrating that the petitioner's exercise of her First Amendment rights so threatened the school's effective operation as to justify the imposition of discipline… . **Matter of Lucia v Board of Educ of E Meadow Union Free Sch Dist, 2013 NY Slip Op 05633, 2nd Dept 8-14-13**

EDUCATION LAW

Teacher's Unsatisfactory Performance Evaluation Annulled---No Supporting Documentation

In an Article 78 proceeding, the First Department reversed the Board of Education's denial of a teacher's petition to annul an unsatisfactory performance evaluation because there was no longer any documentation substantiating any instances of corporal punishment in the teacher's file. Disciplinary letters concerning allegations of corporal punishment had previously been removed from the teacher's file by stipulation. The First Department explained the relevant rules as follows:

> It is undisputed that Part 2(I) of DOE's Human Resources Handbook "Rating Pedagogical Staff Members" provides (1) that a teacher's evaluation must be supported by documentation in his/her personnel file; (2) that documentation removed from a file through grievance procedures is inadmissible in performance reviews; and (3) that documentation not addressed directly to a teacher is inadmissible in performance reviews, unless it is attached to and part of another document appropriately placed in the teacher's file. Moreover, materials placed in a teacher's personnel file must include a signature and date line for the teacher, evidencing that she has read the material and understands that it will be placed in the file, as well as a signature and date line for a witness;

unsigned documents are inadmissible in evaluation reviews. **Matter of Friedman v Board of Educ of the City Sch Dist of the City of New York, 2013 NY Slip Op 05598, 1st Dept 8-13-13**

EDUCATION LAW/CORRECTION LAW

Application for Certification as NYC School Bus Driver Should Have Been Denied Because of Past Drug Convictions

The First Department, over a dissent, reversed Supreme Court's order that petitioner, who had been convicted of two drug offenses (felonies) in the past, be certified as a NYC Department of Education school bus driver. The First Department explained the relevant criteria as follows:

> Where the applicant seeks employment with the New York City Department of Education, the School Chancellor's regulations apply and Regulation C-105 establishes procedures to be followed …for background investigations of pedagogical and administrative applicants. Regulation C-105 incorporates by reference article 23-A of the Correction Law. Correction Law § 752 (et seq.) prohibits unfair discrimination against a person previously convicted of a crime "unless: (1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or (2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals." Correction Law § 753(a) - (h), which set forth eight factors a public agency must consider in connection with an application for a license, include the person's duties and responsibilities, the bearing, if any, the criminal offense(s) will have on the person's "fitness or ability" to perform his or her duties, the time that has elapsed since the occurrence of the crime(s), the seriousness of the crime, information about the applicant's reputation, etc., and the legitimate interest of the agency in protecting the safety and welfare of specific individuals or the general public. Regulation C-105 provides further that in reviewing the record of an applicant who has a prior criminal conviction, DOE is particularly concerned with offenses, among others, that involve the possession, distribution or selling of controlled substances.
>
> The Chancellor's Regulation, like the Corrections Law, provides that where the applicant has a certificate of relief from disabilities, that certificate "shall" also be considered (Correction Law § 753[3]). The certificate, however, only creates a "presumption of rehabilitation" with respect to the crime the individual was convicted of, it does not create a prima facie entitlement to the license the person is applying for… . **Matter of Dempsey v NYC Dept of Educ, 2013 NY Slip Op 05289, 1st Dept 7-16-13**

ADMINISTRATIVE LAW

16-Ounce "Portion Cap Rule" for Sugary Drinks Invalid

In a full-fledged opinion by Justice Renwick, the First Department determined the "portion cap rule" (limiting the volume of certain "sugary drink" products to 16 ounces) was invalid because the Board of Health "overstepped the boundaries of its lawfully delegated authority" when it promulgated the rule. In so finding, the First Department applied the analysis used by the Court of Appeals in Boreali v Axelrod, 71 NY2d 1 (1989):

> We must … examine whether the Board of Health exceeded the bounds of its legislative authority as an administrative agency when it promulgated the Sugary Drinks Portion Cap Rule. Boreali illustrates when the "difficult-to-demarcate line" between administrative rulemaking and legislative policymaking has been transgressed. In Boreali, the PHC [Public Health Council] promulgated regulations prohibiting smoking in a wide variety of public facilities following several years of failed attempts by members of the state legislature to further restrict smoking through new legislation. Boreali found the regulations invalid because, although the PHC was authorized by the Public Health Law to regulate matters affecting the public health, "the agency stretched that statute beyond its constitutionally valid reach when it used the statute as a basis for drafting a code embodying its own assessment of what public policy ought to be" (id. at 9). Boreali relied on four factors in finding that the PHC's regulations were an invalid exercise of legislative power. First, Boreali found the PHC had engaged in the balancing of competing concerns of public health and economic costs, "acting solely on [its] own ideas of sound public policy" (id. at 12). Second, the PHC did not engage in the "interstitial" rule making typical of administrative agencies, but had instead written "on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance" (id.). Third, the PHC's

regulations concerned "an area in which the legislature had repeatedly tried — and failed — to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions" (id.). Boreali [*9]found that the separation of powers principles mandate that elected legislators rather than appointed administrators "resolve difficult social problems by making choices among competing ends" (id.). Fourth, Boreali found that the agency had overstepped its bounds because the development of the regulations did not require expertise in the field of health (id. at 14). **Matter of New York Statewide Coalition … v NYC Dept of Health and Mental Hygiene, 2013 NY Slip Op 05505, 1st Dept 7-30-13**

UNFAIR TRADE PRACTICES

Lawsuit Alleging Lehman Brothers' Substitution of Toxic Securities for High Value Securities Can Go Forward

In a full-fledged opinion by Justice Saxe, the First Department determined plaintiff Aetna Life Insurance Company had sufficiently alleged causes of action stemming from Lehman Brothers' alleged removal of high-grade securities from a trust account and replacement of those securities with toxic subprime-mortgage-backed securities. The First Department summarized the facts and its rulings as follows:

> Aetna asserts that defendants [replaced the high value securities with toxic securities] as part of an effort to prop up Lehman Brothers' financial position in the final days prior to its 2008 collapse. The complaint alleges causes of action for breach of the Connecticut Unfair Trade Practices Act (CUTPA) (Conn Gen Stat § 42-110b[a] et seq.); breach of fiduciary duty; negligence; and recklessness. We affirm the determination of the motion court holding that the allegations are sufficient to support each of the causes of action, and modify only to the extent of denying dismissal of the negligence claims against the individual defendants. **Aetna Life Ins Co v Appalachian Asset Mgt Corp, 2013 NY Slip Op 05506, 1st Dept 7-30-13**

CORPORATION LAW

Complaint Sufficiently Alleged Facts to Support Piercing the Corporate Veil

In a full-fledged opinion by Justice Mazzarelli (which dealt with many corporation law issues not mentioned here), the First Department determined the complaint alleged sufficient facts to meet the criteria for piercing the corporate veil:

> To make out a cause of action for liability on the theory of piercing the corporate veil [*5]because the corporation at issue is the defendant's alter ego, the complaining party must, above all, establish that the owners of the entity, through their domination of it, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against the party asserting the claim such that a court in equity will intervene … . Piercing of the corporate veil is not a cause of action independent of that against the corporation; it is established when the facts and circumstances compel a court to impose the corporate obligation on its owners, who are otherwise shielded from liability… . "Because a decision whether to pierce the corporate veil in a given instance will necessarily depend on the attendant facts and equities, the New York cases may not be reduced to definitive rules governing the varying circumstances when the power may be exercised" … . Indeed, this Court has observed:
>
> "In determining the question of control, courts have considered factors such as the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the alleged dominated corporation; whether the corporations are treated as independent profit centers; and the payment or guarantee of the corporation's debts by the dominating entity . . . [n]o one factor is dispositive"… . **Tap Holdings LLC v Orix Fin Corp, 2013 NY Slip Op 05293, 1st Dept 7-16-13**

Criteria for Shareholder's Derivative Action and Shareholder's Action to Inspect Corporate Books Explained

The Second Department explained the pleading criteria for a shareholder's derivative action for inspection of corporation records. Here the court determined the shareholders failed to first demand that the corporation initiate an action before bringing the derivative action, and the shareholders' speculative and conclusory allegations were not sufficient to demonstrate a "proper purpose" for the inspection of corporate records:

> A plaintiff in a shareholders' derivative action must demand that the corporation initiate an action before commencing an action on the corporation's behalf, and the complaint must "set forth with particularity" his or her efforts "to secure the initiation of such action by the board or the reasons for not making such effort" … . Demand may be excused because of futility where the complaint alleges with particularity, inter alia, that a majority of the board of directors is interested in the challenged transaction[s] … . However, "[i]t is not sufficient . . . merely to name a majority of the directors as parties defendant with conclusory allegations of wrongdoing or control by wrongdoers to justify failure to make a demand" … . Here, the plaintiffs' submissions failed to allege specific facts supporting their contention that the defendant directors were interested, such that demand was not required, and the Supreme Court … properly granted that branch of the defendants' motion which was to dismiss [the relevant] causes of action on that ground… . * * *
>
> …"[A] shareholder has both statutory and common-law rights to inspect the books and records of a corporation if inspection is sought in good faith and for a valid purpose" (…Business Corporation Law § 624[f]). However, the plaintiffs failed to allege that their demand for an inspection of [the] books and records met the requirements for such relief under the Business Corporation Law (see Business Corporation Law § 624[b]). The plaintiffs also failed to state a cause of action for an inspection of [the] corporate books and records at common law, since a plaintiff asserting his or her common-law right must plead a "proper purpose" for the inspection …. Apart from the claim concerning the nonpayment of profit distributions …, the plaintiffs' asserted purposes for the inspection were speculative, vague, and conclusory. As such, they were insufficient to establish a proper purpose for the inspection… . **JAS Family Trust v Oceana Holding Corp, 2013 NY Slip Op 05734, 2nd Dept 8-28-13**

CONSTRUCTIVE TRUST

Criteria for Constructive Trust Not Met

In affirming Supreme Court's ruling that plaintiff had failed to establish money given to the defendant (plaintiff's son) by the plaintiff, originally for the purchase of a lake house, was held by the defendant as a constructive trust, the Third Department explained:

> Plaintiff failed to establish the necessary elements of a constructive trust, which include a confidential or fiduciary relationship, a promise, a transfer in reliance thereon and unjust enrichment…. Although plaintiff contends that there was a relationship of trust at the time the money was given to defendant based on the familial relationship and plaintiff's belief that, despite his criminal history, defendant had turned his life around, this argument is contradicted by plaintiff's own testimony that he and defendant were "never too friendly," his relationship with defendant was "at arm's length" and he felt defendant was "always . . . hiding something from me." Furthermore, there was no indication that defendant attempted to take advantage of plaintiff's trust by encouraging the transfer or that plaintiff was under defendant's influence in any way. The record supports Supreme Court's finding that the idea of buying a lake house was eventually abandoned and the money was given to defendant for placement in a mutual fund account in his name alone by plaintiff, who had significantly more education, business and financial experience than defendant. **Garcia v Garcia, 515582, 3rd Dept 7-11-13**

PARTNERSHIP LAW

Proceeds of Sale of Property After Dissolution of Partnership Not "Profits"

The Second Department determined that the appreciation in the value of commercial real estate owned by a partnership after the date of dissolution did not constitute "profits" within the meaning of Partnership Law 73:

> Partnership Law § 73 provides, in relevant part, "[W]hen any partner retires or dies, and the business is continued . . . he or his legal representative . . . shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership." * * * …[T]he Appellate Division, Fourth Department, held that the plaintiff's share of the fair market value of a parcel of real property was fixed as of the date the partnership dissolved, and thus determined that the profits the plaintiff was entitled to in that case did not include increases in the value of real property after the date of dissolution. Here, since the partnership dissolved on April 12, 2000, the plaintiffs were not entitled to a share in the appreciation of partnership assets after that date… . **Breidbart v Wiesenthal, 2013 NY Slip Op 05040, 2nd Dept 7-3-13**

Claim for Undistributed Goodwill Re: Dissolved Partnership Dismissed

The Fourth Department determined that Supreme Court should have granted summary judgment on a counterclaim which sought damages for undistributed goodwill of a partnership. The partnership had been dissolved after the death of one of the partners and did not continue under the same structure. The Fourth Department explained:

> Here, even assuming, arguendo, that the partners' course of dealings or partnership agreement provided that goodwill is a distributable asset of the partnership, we conclude that defendants met their initial burden on that part of the motion for summary judgment dismissing the complaint to the extent it sought damages for undistributed goodwill. Indeed, defendants established that there is no goodwill to distribute because the partnership has been dissolved and no longer exists. In the circumstances presented here, it is incomprehensible that the partnership's goodwill could survive the demise of the partnership, and the Court of Appeals decision in Dawson does not suggest otherwise. In Dawson, although the Court of Appeals indicated that a dissolving partnership may have distributable goodwill, the partnership in that case was dissolved but was immediately reformed with the same partners, minus one, with the same firm name, using the same offices and servicing the same clients. Thus, in essence, the partnership was dissolved in name only. Here, in contrast, the same partnership did not reform after dissolution. Instead, two entirely new partnerships were formed. Thus, plaintiffs failed to raise an issue of fact with respect to the existence of goodwill after the dissolution of the partnership… . **Moore… v Johnson…, 744, 4th Dept 7-5-13**

ATTORNEY-CLIENT

Counsel Should Have Been Disqualified Based On Conflict of Interest---Criteria Explained

In reversing Supreme Court and determining that counsel representing the town must be disqualified for a conflict of interest, the Second Department explained the operative principles:

> "The disqualification of an attorney is a matter that rests within the sound discretion of the court" … . A party seeking disqualification of its adversary's counsel based on counsel's purported prior representation of that party must establish: "(1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse" … . "A party's entitlement to be represented in ongoing litigation by counsel of [its] own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted" … . * * *
>
> There is a rebuttable presumption that "where an attorney working in a law firm is disqualified from undertaking a subsequent representation opposing a former client, all the attorneys in that firm are likewise precluded from such representation" … . That presumption may be rebutted by proof that "any information acquired by the disqualified lawyer is unlikely to be significant or material in the [subject] litigation" … . Proof must also be presented that the law firm properly screened the disqualified lawyer from dissemination and receipt of information subject to the attorney-client privilege … . **Matter of Town of Oyster Bay v 55 Motor Ave Co LLC, 2013 NY Slip Op 05636, 2nd Dept 8-14-13**

DEFAMATION

Plaintiff Unable to Prove Actual Malice—Summary Judgment to Defendant

In determining a libel complaint brought by the Humane Society of the United States (HSUS) against defendants based upon an ad defendants placed in the New York Times which was captioned “Why is [HSUS] Helping a Terrorist Group Raise Money?”, the First Department wrote:

> The court should have dismissed the amended complaint as against all of the defendants. Contrary to plaintiff's contention, it is a public figure…. It thrust itself to the forefront of the public controversy on animal cruelty and sought to influence public action on this issue. Accordingly, as a public figure, plaintiff must show by clear and convincing evidence that defendants published the ad at issue with actual malice in order to prevail on any claim of libel….
>
> "[A] libel defendant's burden in support of summary judgment is not . . . to prove as a matter of law that it did not publish with actual malice, but to point to deficiencies in the record that will prevent plaintiff from proving that fact by clear and convincing evidence" …. Here, defendants were entitled to summary judgment because they cited deficiencies in the record that prevent plaintiff from proving actual malice (i.e., that defendants "entertained serious doubts as to the truth of [its] publication or acted with a high degree of awareness of . . . probable falsity . . . at the time of publication") by clear and convincing evidence…. **Humane League of Phila Inc v Berman & Co, 2013 NY Slip Op 04989, 1st Dept 7-2-13**

Libel Action Against Reporter Dismissed—No Showing of Gross Irresponsibility in Gathering and Verifying Information

In dismissing a libel action against a reporter who erroneously alleged in a newspaper story that plaintiff used money collected from students for workbooks to buy faculty lunches and an air conditioner for the faculty workroom, the Second Department wrote:

> "[W]hen the claimed defamation arguably involves a matter of public concern, a private plaintiff must prove that the media defendant acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties'"…. The "standard of gross irresponsibility' demands no more than that a publisher utilize methods of verification that are reasonably calculated to produce accurate copy" ….
>
> Here, the record reveals that …some of the factual claims in the article and accompanying editorial were true, some of the claims were not, … .However, we nevertheless conclude that the defendants met their prima facie burden of demonstrating their entitlement to judgment as a matter of law by establishing that the article involved matters of public concern …, and that [the reporter] did not act in a grossly irresponsible manner while gathering and verifying information for the article…. **Matovik v Times Beacon Record Newspapers,. 2013 NY Slip Op 05051, 2nd Dept 7-3-13**

Criteria Where Defendant Not Specifically Mentioned in Allegedly Defamatory Statement

In affirming Supreme Court's dismissal of a defamation cause of action, the Second Department explained the plaintiff's burden when the plaintiff is not specifically named in the allegedly defamatory statements:

> While a plaintiff need not be specifically named in a publication to sustain a cause of action sounding in defamation, a plaintiff who is not specifically identified "must sustain the burden of pleading and proving that the defamatory statement referred to him or her" … .. "In determining whether a complaint states a cause of action to recover damages for defamation, the dispositive inquiry is whether a reasonable listener or reader could have concluded that the statements were conveying facts about the plaintiff"…. A court may grant a motion to dismiss a defamation cause of action if the complaint cannot support a finding that the statement refers to the plaintiff …. Indeed, the burden of pleading and proving that statements are " of and concerning'" the plaintiff … is not a " light one'"… . **Dong v Hai, 2013 NY Slip Op 05091, 2nd Dept 7-10-13**

Published Information Gleaned from Court Submission Privileged

The First Department determined that news articles based upon papers filed in court proceedings were privileged pursuant to Civil Rights Law section 74:

> Defendants moved to dismiss the complaint on the ground that all of the published material was absolutely privileged under Civil Rights Law § 74, which protects "the publication of a fair and true report of any judicial proceeding." Supreme Court granted the motion, and we affirm.
>
> It is undisputed that all statements claimed to be libelous are part of a "report of [a] judicial proceeding" (Civil Rights Law § 74) since the article reports on court papers, i.e., the FBI affidavit. **Russian Am Found Inc v Daily News LP, 2013 NY Slip Op 05549, 1st Dept 8-6-13**

DISCIPLINARY HEARINGS (INMATES)

Failure to Transcribe Entire Hearing Required Annulment

In annulling the disciplinary determination, the Third Department explained that the apparent failure to transcribe the entire tape recording of the hearing made it impossible to know whether evidence favorable to the inmate's defense was presented:

> It appears from the transcript that only the first side of the audiotape was transcribed as the stenographer made a notation, "[s]econd side of tape not audible-runs on fast speed only," and then abruptly ended the transcript. We cannot ascertain what was on the second side of the tape or if it would have been beneficial to petitioner's defense… ..Notably, the transcript does not reveal the disposition of petitioner's request to have his wife and family members testify as witnesses at the hearing. In view of this, and given the potentially significant testimony that may be missing, the determination must be annulled… . **Matter of Farrell, 514504, 3rd Dept 7-3-13**

Denial of Inmate's Request for Evidence and Failure to Include Confidential Testimony Required Annulment

In annulling the disciplinary determination, the Third Department noted the Hearing Officer's failure to explain the denial of the inmate's request for evidence and failure to include confidential testimony which was relied upon:

> Inasmuch as the record before us fails to include any explanation for the denial of the requested evidence, which may have prejudiced his defense, and is incomplete in that it does not include the confidential testimony taken and relied upon by the Hearing Officer in reaching the determination, we are unable to undertake meaningful review… . **Matter of Gallagher, 514650, 3rd Dept 7-3-13**

Violation of Inmate's Right to Call a Witness Required Expungement

The Third Department expunged a disciplinary determination because the inmate's right to call a witness was violated and a rehearing was not possible:

> Although [the] witness agreed to testify, the Hearing Officer denied the request for this witness on the basis that the conversation took place after the incident that is the subject of the administrative segregation

recommendation. Under the circumstances presented, we conclude that the testimony of this witness was not irrelevant and thus the request was improperly denied…. As such, the Hearing Officer's ruling constituted a violation of petitioner's conditional, regulatory right to call witnesses …. **Matter of DeBoue, 515486, 3rd Dept, 7-3-13**

Criteria for Expungement Explained

In affirming Supreme Court's annulment of the determination and grant of a new hearing because the recording of the proceeding was incomplete, the Third Department noted that the criteria for expungemet had not been met:

> It is well settled that "[e]xpungement will be ordered only where there has been a showing that '(1) the challenged disciplinary determination is not supported by substantial evidence . . .; (2) there has been a violation of one of the inmate's fundamental due process rights, as enunciated in Wolff v McDonnell (418 US 539 [1974]); or (3) other equitable considerations dictate expungement of the record rather than remittal for a new hearing'"… None of the foregoing situations is implicated here. **Matter of Barnes v Fischer, 515146, 3rd Dept 7-25-13In**

Behavior Did Not Warrant Removal from Hearing

In annulling the determination because the inmate's behavior did not warrant his removal from the hearing, the Third Department wrote:

> It is well settled that "[a]n inmate has a fundamental right to be present during a prison disciplinary hearing unless he or she is excluded for reasons of institutional safety or correctional goals" … . Here, petitioner objected to the continuation of the hearing after the prior Hearing Officer's recusal. It appears that the Hearing Officer became frustrated with petitioner's unwillingness to move forward and warned him that he could be removed. Petitioner then ceased objecting, entered his pleas of not guilty to the charges and stated that he wished to put "a lot" on the record. However, he then twice asked a question that the Hearing Officer apparently deemed irrelevant, and was abruptly removed from the hearing. Under these circumstances, we do not find that petitioner's conduct rose to the level of disruption that warranted excluding him from the remainder of the hearing… . **Matter of German v Fischer, 515746, 3rd Dept 7-25-13**

PAROLE

Parole Board Should Have Used Risk Assessment Instrument

The Third Department determined an inmate was entitled to a new hearing on his request for discretionary parole release because the Board did not use the required written procedure for risk assessment:

> [The inmate argued] the Board improperly failed to utilize a "COMPAS Risk and Needs Assessment" instrument in connection with the relevant amendments to Executive Law § 259-c (4), which became effective October 1, 2011 (see L 2011, ch 62, § 49 [f]). Significantly, Executive Law § 259-c (4) requires that the Board "establish written procedures for its use in making parole decisions as required by law," and the Board acknowledges that the statute requires it to incorporate risk and needs principles into its decision-making process. According to the record, the Board was trained in the use of the COMPAS instrument prior to petitioner's hearing. Moreover, the Board acknowledges that it has used the COMPAS instrument since February 2012 and will use it for petitioner's next appearance. Under these circumstances, we find no justification for the Board's failure to use the COMPAS instrument at petitioner's October 2011 hearing.**Matter of Garfield, 515986, 3rd Dept 7-3-13**

SEX OFFENDER COUNSELING AND TREATMENT PROGRAM (INMATES)

Participation in Program Can Be Delayed Until Close to Release Date

In affirming Supreme Court, in the face to the inmate's request that he be placed in the sex offender counseling and treatment program (SOCTP) in 2015, the Third Department determined the inmate's participation in the program could be delayed until 2023, 36 months before his conditional release date:

> An inmate's evaluation by a case review team under Mental Hygiene Law § 10.05 is triggered by notice to the Office of Mental Health that the inmate is "nearing anticipated release," which is to be provided at least 120 days prior to such "anticipated release" (Mental Hygiene Law § 10.05 [b]). In accordance with the foregoing, DOCCS has developed guidelines for administering sex offender treatment programs throughout the state. The guidelines recognize the need to

allocate limited resources and provide that inmates shall be placed in sex offender treatment programs "as they get closer to their release date." **Matter of Wakefield, 515002, 3rd Dept 7-3-13**

MENTAL HYGIENE LAW/EVIDENCE

"Missing Witness Rule" Properly Applied in Bench-Trial Proceeding to Determine Whether Antipsychotic Medication Should Be Administered to Involuntarily Committed Patient Over Patient's Objection--- Treating Psychiatrist Not Called by Facility

In a full-fledged opinion by Justice Angiolillo, the Second Department determined the "missing witness rule" was properly applied in a civil, bench-trial proceeding for permission to administer antipsychotic medication to an involuntarily committed patient over his objection. The psychiatric center which brought the proceeding did not call the treating psychiatrist as a witness and relied exclusively upon the testimony of a psychiatrist who had reviewed the records. The trial court determined the failure to call the treating psychiatrist gave rise to an inference adverse to the position of the psychiatric center and, under the facts which indicated there may have been disagreement with the reviewing psychiatrist's findings, the dismissal of the psychiatric center's petition was warranted. In explaining the relevant procedures and the applicability of the "missing witness rule," the Second Department wrote:

> The procedures for administering treatment over the objection of an involuntarily committed patient are set forth in detailed regulations promulgated by the Commissioner of the New York State Office of Mental Health, pursuant to Mental Hygiene Law § 7.09(b) (see 14 NYCRR 501.1[a], 501.2[b]). A facility must follow stringent procedures prior to filing a petition seeking court authorization to administer the treatment (see 14 NYCRR 527.8[c][4]). The process requires a series of clinical evaluations of the patient, all of which must be completed within 24 hours (see 14 NYCRR 527.8[c][4][ii]).
>
> First, the patient's treating physician must determine that the treatment is in the patient's best interests in light of all relevant circumstances, including the risks, benefits, and alternatives to treatment, and that the patient lacks the capacity to make a reasoned decision concerning treatment. The treating physician must forward the evaluation and findings to the clinical director with a request for further review, and notify, in writing, the patient, Mental Hygiene Legal Services (hereinafter MHLS), and any other representative of the patient (see 14 NYCRR 527.8[c][4][ii][a]).
>
> Second, the clinical director must appoint a physician to review the patient's record, and personally examine the patient, to evaluate whether the proposed treatment is in the patient's best interests and whether the patient has the capacity to make a reasoned decision concerning treatment. If the reviewing physician determines that treatment over objection is appropriate, the physician must personally inform the patient of that determination (see 14 NYCRR 527.8[c][4][ii][b][1]). Alternatively, if there is a substantial discrepancy between the opinions of the treating physician and the reviewing physician regarding the patient's capacity or best interests, the clinical director may appoint a third physician to conduct an evaluation (see 14 NYCRR 527.8[c][4][ii][b][2]).
>
> Finally, if, after completion of the evaluation by the reviewing physician (or physicians), the patient continues to object to the proposed treatment, the clinical director must make a determination on behalf of the facility. If the director finds that the patient lacks capacity, and that treatment over objection is in the patient's best interests, the director may apply for court authorization to administer the treatment and so notify the patient, MHLS, and any other patient representative. However, if the director makes the opposite determination, the patient's objections must be honored (see 14 NYCRR 527.8[c][4][ii][b][3]). * * *
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> "A party is entitled to a missing witness charge when the party establishes that an uncalled witness possessing information on a material issue would be expected to provide noncumulative testimony in favor of the opposing party and is under the control of and available to that party" … . Where one or more of these elements is absent, the movant is not entitled to the charge … .Moreover, the missing witness rule may be applied in a nonjury civil trial, where the trial court, as finder of fact, is permitted to draw a negative inference against a party failing to call a witness … .The missing witness rule is related to the broader principle that "[a] trier of fact may draw the strongest inference that the opposing evidence permits against a witness who fails to testify in a civil proceeding" … **Matter of Adam K, 2013 NY Slip Op 05631, 2nd Dept 8-14-13**

ELECTION LAW

Failure to Provide Cover Sheet Fatal to Designating Petition

In reversing Supreme Court and granting the petition to invalidate a designating petition and removing the candidate from the ballot, the Second Department determined that the failure provide a cover sheet for the petition in accordance with the Election Law and regulations was fatal to the petition:

> We are mindful that the provisions of Election Law § 6-134 "shall be liberally construed, not inconsistent with substantial compliance thereto and the prevention of fraud" (Election Law § 6-134[10]; see 9 NYCRR 6215.6[a]) in order to avoid the disenfranchisement of voters. However, although certain "[c]over sheet deficiencies may be corrected by the filing of an amended cover sheet" …, a candidate may not "amend" a cover sheet which was never filed in the first place, as was the case here.
>
> "The three-day cure provision for designating petitions (Election Law § 6-134[2]) is available for technical violations of the regulations" …. In the instant case, however, the candidate's initial failure to file a cover sheet was not a mere technical defect subject to cure pursuant to Election Law § 6-134(2) … . To the contrary, the absence of a cover sheet, especially where, as here, the designating petition contained multiple volumes that were unbound, constituted a complete failure to comply with the requirements set forth in 9 NYCRR 6215.1, which may not be cured pursuant to Election Law § 6-134(2) and 9 NYCRR 6215.6 … . Such failure undermines procedural safeguards against both fraud and confusion … . **Matter of Armwood v McCloy, 2013 NY Slip Op 05654, 2nd Dept, 8-15-17**

Filing Petition Four Hours Late Was Fatal Defect

The Second Department determined that the filing of a petition for an opportunity to ballot more than four hours after the deadline was a fatal defect:

> Election Law § 1-106 provides that papers shall be filed with the relevant board of elections between the hours of 9:00 a.m. and 5:00 p.m. Moreover, the "failure to file any petition or certificate relating to the designation or nomination of a candidate for party position or public office . . . within the time prescribed by the provisions of this chapter shall be a fatal defect" (Election Law § 1-106[2]). "[T]he case law interpreting Election Law § 1-106(2) and its predecessor, Election Law former § 143(12) (as amended by L 1969, ch 529, § 1), makes it clear that such time limitations are mandatory in nature, and the judiciary is oreclose[ed] . . . from fashioning exceptions, however reasonable they might be made to appear'"… . **Matter of Rhoades v Westchester County Bd of Elections, 2013 NY Slip Op 05656, 2nd Dept 8-15-13**

Failure to Comply with Service Method in Order to Show Cause Required Dismissal

In a proceeding under the Election Law to invalidate a petition designating a candidate, the Second Department determined dismissal was appropriate based upon the failure to comply the service method prescribed in an order to show cause:

> "The method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with" … . Service within the statutory period by means other than those authorized by the order to show cause does not bring a respondent within the court's jurisdiction … . Here, the subject order to show cause provided that service thereof and of "the papers upon which it [was] granted" upon the candidate Ivy Reeves was to be effectuated by (1) "sending the same by overnight, next-day delivery by UPS, FEDEX or the U.S. Postal Service on or before the 22nd day of July, 2013"; "or" (2) "by personal delivery of the same to [Ivy Reeves] on or before July 23, 2013, no later than 7:00 p.m." It is undisputed that the petitioners did not attempt to personally deliver the papers to Reeves, and that copies of both the order to show cause and petition to invalidate were not delivered to Reeves's address until July 24, 2013. The petitioners submitted evidence that, at 9:30 p.m. on July 22, 2013, they deposited a prepaid United States Postal Service "Priority Mail Express" envelope containing these documents in a mail slot located inside a publicly accessible vestibule of a post office, after the post office itself had closed. The record established that an envelope deposited at that time would not have been collected, scanned, and prepared for delivery by postal employees until 7:00 a.m. on the following day. **Matter of Rotanelli v Board of Elections of Westchester County, 2013 NY Slip Op 05657, 2nd Dept 8-15-13**

Mistake in Name of Party Did Not Warrant Striking Candidate's Name from Ballot

The Second Department reversed Supreme Court's striking of a candidate's name from the ballot. Supreme Court determined the identification of the party as the "Working Family Party" rather than the "Working Families Party" was fatal because the "Working Family Party" is not a registered or recognized political party. The Second Department wrote:

> Although it is undisputed that the designating petition contained an error in the naming of the political party …, a petition should not be invalidated where "there is no proof of any intention on the part of the candidate or of those who have solicited signatures on his [or her] behalf to mislead or confuse, and no evidence that the inaccuracy did or would lead or tend to lead to misidentification or confusion on the part of those invited to sign the petition" … . Here, there has been no showing of any intention to mislead or confuse, and no showing that the inaccuracy in the designating petition did or would lead or tend to lead to misidentification or confusion on the part of those invited to sign the petition. Inasmuch as no such showing was made, the designating petition was improperly invalidated… . **Matter of Cohn v Suffolk County Bd of Elections, 2013 NY Slip Op 05625, 2nd Dept 8-14-13**

Validating Petition Not Sufficiently Particularized

In determining a proceeding to validate a petition designating a candidate for county executive should have been dismissed, the Second Department wrote:

> "A validating petition must specify the individual determinations of a board of elections that the candidate claims were erroneous, including the signatures that the candidate claims were improperly invalidated" … . Here, the validating petition was not sufficiently particularized to give notice of which determinations were claimed to be erroneous or which signatures … were improperly invalidated … .**Matter of Lacorte v Cytryn, 2013 NY slip Op 05623, 2nd Dept 8-14-13**

"Technical Irregularities" Did Not Preclude Allowing Opportunity to Ballot

The Third Department applied the concept of "technical irregularities" to signatures rendered invalid by problems with two subscribing witnesses. In spite of the invalidation of the signatures, because there was no fraud and no indication the voters were not entitled to sign the petition, the opportunity to ballot was properly allowed:

> The record establishes that one of the subscribing witnesses, a commissioner of deeds, failed to inform any of "the signers that, by signing the petition, they affirmed the truth of the matter to which they subscribed" … . While the signatures collected by him were rendered invalid as a result, under the circumstances presented here his failure constituted nothing more than a "technical irregularity"… .The second subscribing witness, Horan, mistakenly executed the statement intended for a notary public or commissioner of deeds rather than that meant for party members. While Horan is in fact a notary public, he did not identify himself as such in the witness statement (see Election Law § 6-132…). The signatures that Horan witnessed were rendered invalid as a result, but his failure to indicate his position was a technical defect that did "not call into serious question the existence of adequate support among eligible voters" … . Absent any indication that fraud was involved or that the voters who signed the invalid pages were not entitled to sign the petition, Supreme Court properly directed an opportunity to ballot for the offices… . **Matter of Hall v Dussault…, 517199, 3rd Dept 8-15-13**

Opportunity to Ballot Should Not Have Been Allowed—Criteria Explained

The Third Department reversed Supreme Court's granting of the opportunity to ballot where the designating petition did not have the required number of valid signatures and there was no evidence of the reason(s) some of the signatures were deemed invalid (no hearing was held). The Third Department explained the procedure for determining whether the opportunity to ballot should be granted:

> "The 'opportunity to ballot' remedy . . . was designed to give effect to the intention manifested by qualified party members to nominate some candidate, where that intention would otherwise be thwarted by the presence of technical, but fatal defects in designating petitions, leaving the political party without a designated candidate for a given office"… . The case law makes clear, however, that this discretionary remedy …"was not intended to be a generally available substitute for the petition process set forth in article 6 of the Election Law" … . Accordingly, a court should grant an opportunity to ballot "only where the defects which require invalidation of a designating petition are technical in nature and do not call into serious question the existence of adequate support among eligible voters" …. Such a

> determination, in turn, typically occurs following a hearing, at which the specific reasons for invalidating the affected signatures may be established … . Notably, a challenge directed to an individual's eligibility to sign a candidate's designating petition in th e first instance implicates a substantive – as opposed to technical – defect … . **Matter of Roberts v Work…, 517208, 3rd Dept 8-15-13**

Misspellings Did Not Render Signatures Invalid

The Third Department affirmed Supreme Court's ruling that misspellings in the petition did not create confusion about the party and person referred to and, therefore, the relevant signatures were valid:

> …[T]he term "Democratic" appears on various sheets of the petition as "Demoratic," "Demotatic" and "Demacatic." These minor misspellings, however, would not tend to confuse the signatories as to the political party involved and nothing in the record indicates an intent to do so … . Similarly, although petitioner's last name is spelled on one sheet of the petition as "Mannaurino" and on another as "Mannano," there has been no showing of any intention to mislead or confuse, nor is there any evidence that the inaccuracy would or did tend to mislead signatories as to the identity of the candidate… . **Matter of Mannarino v Goodbee, 517215, 3rd Dept 8-15-13**

Candidate's Failure to File Certificate of Declination Re: His Accepted Candidacy for Town Councilman Precluded His Running for County Legislator

The Fourth Department, over a substantial dissent, reversed Supreme Court and determined a candidate (Irish) for town council was disqualified from running for county legislator. Irish was first designated a candidate for town council but later was designated a candidate for the county legislature when a vacancy opened up. No certificate of declination of for the town council position was filed by Irish. The Fourth Department explained its role in overseeing election matters and the appropriate review under Article 78. The court wrote:

> It is firmly settled that we "cannot interfere unless there is no rational basis for [respondent's] exercise of discretion or the action complained of is arbitrary and capricious" …and, here, we conclude that respondent had a rational basis for voting to certify a ballot naming Irish as a candidate for Town Councilman. We note, first, that the failure of Irish to file a declination of the designation as a candidate for Town Councilman within the time prescribed by Election Law § 6-158 (2), is a "fatal defect" (Election Law § 1-106 [2]..,.). Thus, his name must remain on the ballot as a candidate for that position … . Second, contrary to petitioner's contention and the view of our dissenting colleague, we conclude that Irish was not disqualified from the designation for Town Councilman by virtue of his subsequent designation for County Legislator. Indeed, "[a] candidate who 'seeks to disqualify himself or herself . . . must present a legal basis for doing so' " … and Irish has presented no such legal basis here. Moreover, petitioner has presented no authority for his position that the subsequent designation of Irish as a candidate for County Legislator disqualified him from being designated as a candidate for Town Councilman. Rather, we conclude that, based on the designation of Irish as a candidate for Town Councilman, he was ineligible to be designated by the Committee as a candidate for County Legislator (see § 6-122; see generally County Law § 411). We agree with the Second Department's conclusion … that, "[d]espite the unique circumstances of this case, 'the judiciary is foreclosed from fashioning any exceptions to th[at] requirement, however reasonable they might appear' " … . We conclude that there was a rational basis for respondent's refusal to certify the ballot naming Irish as a candidate for County Legislator, and that such action was not arbitrary and capricious … . **Matter of Ward v Mohr, 821, 4th Dept 8-16-13**

Conservative Party's Executive Committee Had Authority to Designate Candidates for County Executive and County Clerk in Chautauqua County

The Fourth Department rejected the argument that the Conservative Party's Executive Committee did not have the authority to designate candidates for county executive and county clerk in Chautauqua County:

> It is undisputed that, pursuant to the Election Law, the County Committee is the default "party committee" empowered to issue … certificates for the county offices at issue (Election Law § 6-120 [3]…) . Petitioner, however, contends that the rules and regulations of the County Committee of the Conservative Party (County Committee rules) did not effectively delegate that authority to the Executive Committee and thus that the Executive Committee lacked the power to issue the …certificates. We reject that contention and conclude that, under these circumstances, the County Committee rules delegated to the Executive Committee the

power to authorize the designation of the Unenrolled Candidates as candidates for the relevant county offices in the upcoming Conservative Party primary election… . **Matter of Bankoski v Green, 820, 4th Dept 8-15-13**

Rules Prohibited Interim County Organization of Erie County Independence Party from Authorizing the Designation of Candidates

The Fourth Department determined the applicable rules stripped the power to authorize the designation of candidates from the Interim County Organization (ICO) of the Erie County Independence Party:

> Election Law § 6-120 permits a county committee to exercise the powers of nomination and designation "unless the rules of the party provide for another committee" (§ 6-120 [3]…). Here, inasmuch as the Executive Committee is vested "with the authority to issue authorizations in Erie County," we agree …that the ICO is "thereby stripp[ed] .. . of that authority"… . **Matter of NYS Committee of the Indepence Party v Mohr, 822, 4th Dept 8-15-13**

ELECTION LAW/PREEMPTION

Local Law Purporting to Limit Term of County District Attorney Preempted by New York Constitution and State Law

The Second Department determined that the local law which limited the term of the county district attorney to 12 years was preempted by the New York Constitution and state law, thereby allowing the sitting district attorney (who had served for 12 years) to run for another term. The court reasoned:

> …[T]he County's attempt to place a term limit on the office of District Attorney is impermissible. Since the office of District Attorney is not a local office falling within the ambit of NY Const, article IX, § 2(c)(1) or Municipal Home Rule Law § 10 (1)(ii)(a), the County had no authority to place restrictions on the District Attorney's terms of office. Further, even if the District Attorney is a local office falling within NY Const, article IX, § 2(c)(1) and Municipal Home Rule Law § 10(1)(ii)(a), the New York Constitution and state law, together, so expansively and comprehensively regulate the office, that a county government's ability to place restrictions on a District Attorney's terms of office has been preempted. * * *
>
> Pursuant to the maxim of statutory construction "expressio unius est exclusio alterius," "where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded" (McKinney's Cons Laws of NY, Book 1, Statutes § 240…). Here, in light of the fact that the New York Constitution and state law speak to the duration and term of office of the District Attorney, there is an irrefutable inference that the imposition of any limit on the duration of that office was intended to be omitted or excluded (see McKinney's Cons Laws of NY, Book 1, Statutes § 240…). Indeed, regarding County Court judges, the New York Constitution provides for a 10-year term (see NY Const, art VI, § 10[b]) and a maximum duration to age 70 (see NY Const, art VI, § 25[b]). That the Constitution imposed a durational limit on County Court judges, but not on District Attorneys, who are also "constitutional officers," indicates that the omission was intentional and that it was intended that there be no durational limit on District Attorneys. **Matter of Hoerger v Spota, 2013 NY slip Op 05661, 2nd Dept 8-16-13**

ARTICLE 78

Overriding Village Legislative Cap on Number of Taxicab Licenses Not a Proper Subject of Mandamus Action---Applicability of Mandamus Explained

In reversing Supreme Court, the Second Department determined the Article 78 proceeding which sought to override a legislative cap on the number of taxicab licenses which could be issued by the village was not a proper subject of a mandamus action:

> "The extraordinary remedy of mandamus is available in limited circumstances only to compel the performance of a purely ministerial act which does not involve the exercise of official discretion or judgment, and only when a clear legal right to the relief has been demonstrated" .. . "A discretionary act involves the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" … . Thus, mandamus may be employed "to compel acts that officials are duty-bound to perform" … . However, mandamus will not lie to compel the performance of a purely legislative function … . "[T]he courts must be careful to avoid . . . the

fashioning of orders or judgments that go beyond any mandatory directives of existing statutes and regulations and intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches"… . **Matter of Gonzalez v Village of Port Chester, 2013 NY slip Op 05691, 2nd Dept 8-21-13**

No Article 78 Review Where Petitioner Defaulted

The Second Department noted that there can be no Article 78 review where the petitioner defaulted in the administrative proceeding. Only the denial of the request to vacate the default can be reviewed:

> "[A] petitioner is not aggrieved by an administrative determination made on his [or her] default and may not seek to review such a determination"… . Although the petitioner is not entitled to CPLR article 78 review of the Review Board's determination to sustain the charges and revoke its registration, which was made upon its default, the Review Board's determination to deny its application to vacate the default may be reviewed… . **Matter of Tony's Towing Serv Inc v Swarts, 2013 NY Slip Op 05577, 2nd Dept 8-7-13**

Criteria for Prohibition Explained

In determining that prohibition did not lie to challenge the appointment of a special district attorney to investigate election law issues, the Second Department explained:

> " [A]n article 78 proceeding in the nature of prohibition will not lie to correct procedural or substantive errors of law'" (Matter of Soares v Herrick, 20 NY3d 139, 145, quoting Matter of Schumer v Holtzman, 60 NY2d 46, 51). Rather, "the extraordinary remedy of prohibition may be obtained only when a clear legal right of a petitioner is threatened by a body or officer acting in a judicial or quasi-judicial capacity without jurisdiction in a matter over which it has no power over the subject matter or where it exceeds its authorized powers in a proceeding of which it has jurisdiction" … . Even where prohibition is an available remedy, it " is not mandatory, but may issue in the sound discretion of the court'" … . " In exercising this discretion, various factors are to be considered, such as the gravity of the harm caused by the excess of power, the availability or unavailability of an adequate remedy on appeal or at law or in equity and the remedial effectiveness of prohibition if such an adequate remedy does not exist'" … .
>
> Prohibition is an available remedy to void the improper appointment of a Special District Attorney pursuant to County Law § 701 when the Special District Attorney is performing the quasi-judicial act of representing the State in its efforts to bring individuals accused of crimes to justice … . However, it is not an available remedy when the Special District Attorney is performing the purely investigative function of investigating "suspicious circumstances" with a view toward determining whether a crime has been committed, since, in such circumstances, his or her acts are to be regarded as executive in nature … . Here, the WFP failed to establish that Special District Attorney Adler was performing a quasi-judicial act. Accordingly, prohibition does not lie. **Matter of Working Families Party v Fisher, 2013 NY slip Op 05578, 2nd Dept 8-7-13**

ARTICLE 78/MUNICIPAL LAW

Review Criteria for Municipal Disability Hearing Explained

The Second Department, in an Article 78 proceeding, explained the review criteria where there has been a disability hearing (re: a firefighter) held by a municipality pursuant to General Municipal Law 207-a:

> Judicial review of an administrative determination made after a hearing required by law at which evidence is taken is limited to whether the determination is supported by substantial evidence (see CPLR 7803[4]…). Substantial evidence means more than a "mere scintilla of evidence," and the test of whether substantial evidence exists in a record is one of rationality, taking into account all the evidence on both sides … .
>
> When there is conflicting evidence or different inferences may be drawn, "the duty of weighing the evidence and making the choice rests solely upon the [administrative agency]. The courts may not weigh the evidence or reject the choice made by [such agency] where the evidence is conflicting and room for choice exists"… .. Moreover, where there is conflicting expert testimony, in making a General Municipal Law § 207-a determination, a municipality is "free to credit one physician's testimony over that of another" … . Thus, even if "conflicting medical evidence can be found in the record," the municipality's determination, based on its own expert's conclusions, may still be supported by substantial evidence… . **Matter of Solano v City of Mount Vernon, 2013 NY Slip Op 05322, 2nd Dept 7-17-13**

ARTICLE 78/CRIMINAL LAW

Writ of Prohibition Granted to Prevent Trial Judge from Precluding Testimony of Complainant---Complainant Would Not Release His Psychiatric Records

The First Department granted a writ of prohibition to prevent a trial judge from precluding the testimony of the complainant in a robbery case. The judge had precluded the testimony after the complainant refused to sign a HIPAA form to release his psychiatric records. The complainant had acknowledged that he received psychiatric treatment and that he had auditory and visual hallucinations which were controlled by medication. The First Department wrote:

> An article 78 proceeding seeking relief in the nature of a writ of prohibition is an extraordinary remedy and is available to prevent a court from exceeding its authorized powers in a proceeding over which it has jurisdiction … . "The writ does not lie as a means of seeking a collateral review of an error of law, no matter how egregious that error might be . . . but only where the very jurisdiction and power of the court are in issue" … . Here, the court had no authority to issue this preclusion order since the records were neither discoverable nor Brady material … . It is undisputed that the People did not have the complainant's records and did not know where he had been treated … . The People had no affirmative duty to ascertain the extent of the complainant's psychiatric history or obtain his records … . The People advised the defense of the information they had regarding the complainant's diagnosis and also apprised the defense of the complainant's statements regarding his hallucinations. Therefore, no claim can be made that the People concealed any information from the court or the defense. **Matter of Johnson v Sackett, 2013 NY Slip Op 05663, 1st Dept 8-20-13**

ASSIGNED COUNSEL

Judges Not Obligated to Adhere to Pay-Voucher Recommendations Made by Assigned Counsel Program

The Fourth Department dismissed an Article 78 petition brought by the Onondaga County Bar Association Assigned Counsel Program (ACP) which sought to vacate the respondents-judges' approval of pay vouchers submitted by respondent-attorney. The Fourth Department wrote:

> …[T]his proceeding challenges the authority of respondents to approve vouchers that do not comply with the ACP Plan; it does not challenge the amount of the compensation awarded, a matter reviewable only before an administrative judge …. We reject petitioners' contention that respondents have a mandatory duty to follow the ACP Plan and that their failure to refuse to pay vouchers not in compliance with the Plan is arbitrary and capricious. Although ACP personnel may make recommendations to the trial court with respect to the payment of vouchers, the trial courts are not obligated to adhere to those recommendations. "The ACP Plan does not take away from the courts the ultimate authority to determine assigned counsel's compensation; it merely provides for a preliminary review and recommendation, which individual trial judges are free to accept or reject"… . **Matter of County of Onondaga and Onondaga County Bar Association Assigned Counsel Program, Inc., 57, 4th Dept 7-19-13**

INJUNCTIVE RELIEF

Irreparable Injury to Plaintiffs Not Demonstrated and Balance of Equities Did Not Favor Plaintiffs Who Sought Injunction Prohibiting Landlord from Proceeding with a Water-Damage-Repair Plan Plaintiffs Thought Inadequate

In a full-fledged opinion by Justice Saxe, the First Department affirmed the denial of a preliminary injunction where plaintiffs-tenants sought to prohibit the landlord from going forward with repairs necessitated by water damage. The landlord proposed a repair-plan which involved the installation of insulation in the walls which would reduce the interior space of the 1400 square-foot apartment by about 50 square feet. The plaintiffs wanted the exterior walls completely removed and replaced. The First Department applied the standard criteria for injunctive relief and determined plaintiffs did not show irreparable harm and the balance of equities did not favor plaintiffs:

> …[A]n alteration to residential quarters may be so minor that even though the tenant may be entitled to some form of compensation, a finding of irreparable harm is not warranted. Cases in which interference was sufficient to justify either

injunctive relief or orders preventing the work from proceeding … do not preclude the possibility that interference in other circumstances may be so minimal as to fail to justify injunctive relief. Plaintiff failed to make a clear showing that the possible square footage reduction, a small fraction of the total footprint of the apartment, was more than de minimis. This conclusion, however, does not preclude compensation by other means.

Moreover, the balance of the equities does not weigh in plaintiff's favor. Although plaintiff proposed an alternative method of performing the work on the exterior, she failed to respond to defendant's assertion that this method would entail substantial extra expenses that defendant was under a fiduciary duty to avoid imposing on the other cooperative shareholders … . The claimed impact to plaintiff of the planned modifications to her apartment, most of which will be compensable based on plaintiffs' breach of contract theory, is far outweighed by the expense to the co-op of demolishing and rebuilding exterior walls, especially when those walls have already been repaired and treated for waterproofing. **Goldstone v Gracie Terrace Apt Corp, 2013 NY Slip Op 05725, 1st Dept 8-27-13**

COURT OF APPEALS

ELECTION LAW/PREEMPTION

County Law Setting Term Limits for District Attorney Preempted by State Law

The Court of Appeals affirmed the Appellate Division's ruling that the county law limiting the terms of the district attorney is preempted by state law:

> The office of district attorney is plainly subject to comprehensive regulation by state law, leaving the counties without authority to legislate in that respect. In this light, we view the limitation on the length of time a district attorney can hold office to be an improper imposition of an additional qualification for the position … .
>
> Permitting county legislators to impose term limits on the office of district attorney would have the potential to impair the independence of that office because it would empower a local legislative body to effectively end the tenure of an incumbent district attorney whose investigatory or prosecutorial actions were unpopular or contrary to the interests of county legislators. The state has a fundamental and overriding interest in ensuring the integrity and independence of the office of district attorney. **Matter of Hoerger v Spota, 237, CtApp 8-22-13**

THE HOUSE COMMITTEE'S HEARING ON THE NSA'S COLLECTION OF PHONE-CALL META-DATA

BY: BRUCE FREEMAN

INTRODUCTION

On July 17, 2013, the US House of Representatives' Judiciary Committee, primarily made up of lawyers, held a hearing entitled "NSA Data Collection and Surveillance Oversight." The entire proceeding is available on C-Span's website.

The hearing was called just after Edward Snowden made it known the National Security Agency (NSA) was collecting and storing information about every phone call made in America (so-called "meta-data") and the government was capable of accessing that stored information without judicial oversight.

During the hearing, some of the members of the Judiciary Committee who had participated in drafting the section of the Patriot Act (section 215) relied upon by the government as the authority for the meta-data collection made it clear the statute had been specifically amended to prevent indiscriminate collection of information unrelated to any specific investigation.

Many Committee members expressed outrage that the ("their") statute was being routinely violated by the government.

Many Committee members eloquently raised the constitutional violations implicit in the meta-data collection, most prominently the collection of everyone's meta-data in the absence of probable cause to believe the data associated with any particular person constitutes evidence of a crime. The government's argument that the data is merely collected indiscriminately, not accessed indiscriminately, didn't fly.

The legal arguments made and the questions raised by the Judiciary Committee members on July 17 frame the debate we should be having about the propriety of the NSA surveillance.

I have attempted to transcribe some of what the Committee members argued on July 17 (see below). I am sure the transcription is imperfect. I urge you to watch the video of the hearing if your interest is peaked.

Because section 215 of the Patriot Act is referenced so often in the remarks of the Committee members, having easy access to the most relevant portions of the statute may be helpful (provided immediately below). The parts of the statute in bold-face were most often referenced by the Committee members. The "official" statutory citation to section 215 is "50 USC section 1861:"

THE PATRIOT ACT

Section 215 of the Patriot Act—Portions Relevant to the Hearing

TITLE 50 - WAR AND NATIONAL DEFENSE

CHAPTER 36 - FOREIGN INTELLIGENCE SURVEILLANCE

SUBCHAPTER IV - ACCESS TO CERTAIN BUSINESS RECORDS FOR FOREIGN INTELLIGENCE PURPOSES

§ 1861. Access to certain business records for foreign intelligence and international terrorism investigations

(a) Application for order; conduct of investigation generally

(1) Subject to paragraph (3), the Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.

(2) An investigation conducted under this section shall—

(A) be conducted under guidelines approved by the Attorney General under Executive Order 12333 (or a successor order); and

(B) not be conducted of a United States person solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

(3) In the case of an application for an order requiring the production of library circulation records, library patron lists, book sales records, book customer lists, firearms sales records, tax return records, educational records, or medical records containing information that would identify a person, the Director of the Federal Bureau of Investigation may delegate the authority to make such application to either the Deputy Director of the Federal Bureau of Investigation or the Executive Assistant Director for National Security (or any successor position). The Deputy Director or the Executive Assistant Director may not further delegate such authority.

(b) Recipient and contents of application

Each application under this section—

* * * (2) shall include—

(A) a statement of facts showing that **there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation** (other than a threat

assessment) conducted in accordance with subsection (a)(2) to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, such things being presumptively relevant to an authorized investigation if the applicant shows in the statement of the facts that they pertain to—

(i) a foreign power or an agent of a foreign power;

(ii) the activities of a suspected agent of a foreign power who is the subject of such authorized investigation; or

(iii) an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigation; and

(B) an enumeration of the minimization procedures adopted by the Attorney General under subsection (g) that are applicable to the retention and dissemination by the Federal Bureau of Investigation of any tangible things to be made available to the Federal Bureau of Investigation based on the order requested in such application. (c) Ex parte judicial order of approval

(1) Upon an application made pursuant to this section, if the judge finds that the application meets the requirements of subsections (a) and (b), the judge shall enter an ex parte order as requested, or as modified, approving the release of tangible things. Such order shall direct that minimization procedures adopted pursuant to subsection (g) be followed.

(2) An order under this subsection—

(A) shall describe the tangible things that are ordered to be produced with sufficient particularity to permit them to be fairly identified;

(B) shall include the date on which the tangible things must be provided, which shall allow a reasonable period of time within which the tangible things can be assembled and made available;

(C) shall provide clear and conspicuous notice of the principles and procedures described in subsection (d);

(D) **may only require the production of a tangible thing if such thing can be obtained with a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation or with any other order issued by a court of the United States directing the production of records or tangible things**; * * *

(g) Minimization procedures

(1) In general

Not later than 180 days after March 9, 2006, the Attorney General shall adopt specific minimization procedures governing the retention and dissemination by the Federal Bureau of Investigation of any tangible things, or information therein, received by the Federal Bureau of Investigation in response to an order under this subchapter.

(2) Defined

In this section, the term "minimization procedures" means—

(A) specific procedures that are reasonably designed in light of the purpose and technique of an order for the production of tangible things, to minimize the retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;

(B) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in section 1801 (e)(1) of this title, shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance; and

(C) notwithstanding subparagraphs (A) and (B), **procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes**.

(h) Use of information

Information acquired from tangible things received by the Federal Bureau of Investigation in response to an order under this subchapter concerning any United States person may be used and disclosed by Federal officers and employees without the consent of the United States person only in accordance with the minimization procedures adopted pursuant to subsection (g). No otherwise privileged information acquired from tangible things received by the Federal Bureau of Investigation in accordance with the provisions of this subchapter shall lose its privileged character. No information acquired from tangible things received by the Federal Bureau of Investigation in response to an order under this subchapter may be used or disclosed by Federal officers or employees except for lawful purposes.

TRANSCRIBED COMMENTS MADE BY JUDICIARY COMMITTEE MEMBERS

(Imperfectly Transcribed Excerpts of the Hearing Before the House Judiciary Committee on July 17, 2013)

First Panel (times relate only to first panel)

Rep. John Conyers, Michigan, starts at about 48 minutes into the C-Span video:

"If only relevant conversations can be secured under section 215 of the Patriot Act then why on Earth would we find now that we are collecting the names of everybody in the United States of America who made any calls for the last six years or more?" "Well, how do you consider that to be relevant to anything if there is just collecting only the names [sic]… why on Earth would we be

collecting … just the numbers of everybody in the United States of America for at least six years?" …"We're not talking about access, were talking about the collection in the first instance….When you collect the phone numbers of everybody in the United States for over six years, there wasn't anything relevant in those conversations, now you have them and … this access may become valuable….that's why we do it this way. **But I maintain that the Fourth Amendment right to be free from unreasonable search and seizure means that this meta-data collected in such a super aggregated fashion can amount to a Fourth Amendment violation before you do anything else, you've already violated the law as far as I am concerned and that is … the problem." "…Every phone number that they've ever called is already a matter of record and we skip over whether the collection was a Fourth Amendment violation… You know we changed the Patriot Act to add relevancy as a standard because of this very same problem that has now been revealed to be existing so I feel very uncomfortable about using aggregated meta-data on hundreds of millions of Americans, everybody, including every member of Congress and every citizen who has a phone in the United States of America. This is unsustainable, it's outrageous, and must be stopped immediately."**

Rep. James Sensenbrenner, Wisconsin, starts at about 55 minutes into the C-Span video:

"I want to get at the whole business of who decides what is relevant… . [I]nstead of a court making a determination of relevance, it's the security apparatus that makes a determination of what's relevant… . [The court doesn't] determine which of the phone calls are relevant pursuant to the statute, you do that. [The relevance standard was put in] to limit what the intelligence community could get pursuant to 215… . * * * Section 215 expires at the end of 2015 and unless you realize you've got a problem that is not going to be renewed. … [Y]ou have to change how you operate section 215, otherwise …you're not going to have it anymore.

Rep. Jerrold Nadler, New York, starts at about 1 hour 1 minute into the C-span video:

"…[According to you] everything in the world is relevant and that if we remove that word from the statute you wouldn't consider, or the FISA court wouldn't consider that it would affect your ability to collect meta-data in any way whatsoever. Which is to say you are disregarding the statute entirely. **… "Can you … give me any examples where grand jury subpoenas were used to allow the bulk and on-going collection of telephone meta-data. … …. The type of data is meta-data unlimited to specific individuals… . It's the record of every phone call in the United States**… …. I believe this is totally unprecedented and way beyond the statute…. Can you give us an example of where on-going bulk collection has been allowed by virtue of grand jury subpoena without a showing of a connection between those tangible things and a specific existing investigation?... The statute is talking about collection, you're trying to confuse us by talking about use. … The abuse of the statute, the abuse of civil liberties, the abuse of privacy is not only misuse but miscollection. If you're collecting information about my telephone when you shouldn't be doing that, that is an abuse even if you simply file that and never use it. … The fact that a secret court, unaccountable to the public for what it is doing, for all practical purposes unaccountable to the Supreme Court, may join you in misusing or abusing the statute is of no comfort whatsoever. So to tell me you go to the FISA court is irrelevant if the FISA court is doing the same abuse of the statute."

Rep. Bobby Scott, Virginia, starts at about 1 hour 13 minutes into the C-span video:

…Where is the statutory limitation to what you can get [he previously asked why they can't get the names that go along with the phone numbers]? There is no statutory limitation…You're making it up as you go along. …Once you get this meta-data, where is the limitation on what you can use it for? Where is the statutory limitation? … Once you've got the meta-data can you run a criminal investigation without probable cause? …[Does] the [statutory] minimization exception for criminal investigations … apply? … If you trip over … some crimes does [the exclusionary rule] apply…? …The minimization exception for a criminal investigation … [means] you can run a criminal investigation without [the usual] probable cause… .

Rep. Spencer Bachus, Alabama, starts at about 1 hour 19 minutes into the C-span video:

…My concern is that this could evolve into something that is quite different. …The Star Chamber… evolved … into a powerful weapon for political retribution by the king. My question is…how do we keep this from evolving into… an unchecked weapon by the government to violate the People's constitutional rights?

Rep. Zoe Lofgren, California, starts at about 1 hour 24 minutes into the C-span video:

…[T]hings have gone off in a different direction [from when the Patriot Act was first passed in 2001]. **…[T]he concern is the statute that we crafted so carefully may not be being adhered to as envisioned by us and as reported to us… . I just reviewed the annual report on section 215. … Isn't it true that the annual report to the committee is less than a single page and not more than eight sentences? … Getting all that data is clearly not relevant to any specific investigation …. Is it your position that [Smith vs Maryland, 442 US 735, which held there is no reasonable expectation of privacy in information phone numbers of incoming and outgoing calls] trumps the statute? …[T]his program has gone off the tracks legally and needs to be reined in**.

Rep. Randy Forbes, Virginia, starts at about 1 hour 31 minutes into the C-span video:

…If you collect this amount of data people can get access to it and use it in ways that can harm [the American public].

Rep. Sheila Jackson Lee, Texas, starts at about 1 hour 38 minutes into the C-span video:

[Referring to the 300 "queries" into the collected meta-data done in 2012] **So the query [into the meta-data] is made without a warrant, you go by criteria that has been set and then you make a query [into the database]…?**

Rep. Steve Cohen, Tennessee, starts about 1 hour 50 minutes into the C-span video:

Could [Mr. Snowden] see whatever he wanted to, was he limited in what he had access to? [Summary of answer: Mr. Snowden had a top secret special compartmented intelligence clearance that's standard for someone in the US intelligence community given access to top secret information, he as a systems administrator had additional privileges that he could then set the permissions on various devices within the information systems who could access things and how he could move data around. **Hundreds of people have that same access**.]

Rep. Ted Poe, Texas, starts at about 1hour 57 minutes into the C-span video:

[He read the entire Fourth Amendment.] Do any of you see a national security exception to the Fourth Amendment? We're not talking about foreign intelligence. … **Let's talk about searches and seizures in the United States of American citizens. Is there a national security exception to the Fourth Amendment when it comes to American citizens in the United States…?** … The Fourth Amendment doesn't mention national security exception … . …I think we should remember that the Fourth Amendment was written because of what was going on with King George the third, how he was going into people's homes… and seizing things with his redcoats without a warrant. **… I hope we don't get to the point in this country, in the name of national security, that we infringe and bruise the Fourth Amendment**. … Snowden, you know I don't like him at all but we would never have known what happened if he hadn't told us.

Rep. Hank Johnson, Georgia, starts about 2 hours 2 minutes into the C-span video:

Are you familiar with the case of [Smith] vs Maryland back in 1979…having to do with telephone records? … And the question was whether or not there was a Fourth Amendment privacy interest in telephone records held by the telephone company. … Is that case applicable to the issue of collection of meta-data? [Answer:—Yes, sir, it is.] … Why is it … necessary that the American people not know of that program [the collection of domestic meta-data re: telephone use]? Why is it that that program has to be confidential, classified, secret? … The American people, in my opinion, should know of the activities that affect them, the collection of telephone meta-data is not personal information, however, the government collecting this information and creating a data-base … which it can then use to investigate information acquired from foreign sources related to national security, terrorist act, the American people may conclude that they want their government to collect that data, but if they don't know that the government is collecting the data then they find out after its leaked by someone who thinks that its illegal, they find out in that way and then they start to lose confidence in their government, is that the situation that we find ourselves in today?

Rep. Raul Labrador, Idaho, starts at about 2 hours 9 minutes into the C-span video:

…**You're gathering my information, it's my personal data that right now the United States has, I'm concerned about that, I'm concerned about you having the data, the meta-data, of every single American, and I think there should be some mechanism for us to be able to counter … I am concerned when you don't have somebody on the other side advocating for the rights of citizens of the United States… . … Smith vs Maryland…, it's totally not an analogous case… . What in the FISA statute or in the Patriot Act allows you to collect the**

data of every single American …? Because even if you follow Smith vs Maryland you're talking about one individual who was suspected of committing a crime and now you're telling me and we have just recently learned that we are collecting the meta-data of every single American… . I think that determination [that a phone number is relevant] has to occur before you collect the data, not after you collect the data.

Rep. Judy Chu, California, starts at about 2 hours 15 minutes into the C-span video:

It sounds to me like first you have determined that the phone numbers of all the American people is [sic] relevant, then, in order to actually create a database, you have to establish reasonable articulable suspicion, and, in order to do that, you have said that 22 people at NSA can approve the query… . Why is it that these 22 people have this power? They appear to be acting like court judges and why would they be performing a job that the FISA courts were set up to do? In other words shouldn't the agency go to the FISA court to seek to retrieve data from a third party's database when they actually have need of specified information and who are these 22 people.

Rep. Blake Farenthold, Texas, starts at about 2 hours 22 minutes into the C-span video:

Could you get all google searches and then come back and say were going to search them later when we've got that information [making the search relevant to an investigation]? … **How is having every phone call that I make to my wife, to my daughter, relevant to any terror investigation? …[Y]ou've got them. … Somebody like Mr. Snowden might be able to query them without your knowledge. The Fourth Amendment … was designed to prohibit general warrants, how could collecting every piece of phone data be perceived as anything but a general warrant? … Do I have a reasonable expectation of privacy in any information I share with any company, my google searches, the e-mail I send, do I have a reasonable expectation of privacy in anything but maybe a letter I hand-deliver to my wife?** … The fact that this data exists in the hands of the government, we saw what the IRS has done with tax returns targeting people for political motives… Why do these orders not violate the First Amendment…, my right to freedom of association and my freedom of speech, having the government know who I am talking to and when?

Rep. Ted Deutch, Florida, starts at about 2 hours 27 minutes into the C-span video:

…[S]ection 215 had a standard of relevance. And there had to be concrete information linking a person to a terrorist organization before the NSA could secure that person's information. Instead, what we've learned is that the FISA court has essentially re-written section 215 to say that any and all persons' records may be considered relevant, therefore allowing the NSA to indiscriminately collect sensitive data on all Americans. … It seems that there may be secret laws, laws not passed by Congress, laws not publicly interpreted by the Supreme Court, but rather secret laws borne out of a classified interpretation of the Patriot Act by the FISA court.

Rep. Louie Gohmert, Texas, starts at about 2 hours 43 minutes into the C-span video:

What we've seen and what has been disclosed about the monitoring scares me. …I can't imagine anybody granting the kind of orders we've now seen granted. Just a blanket summary go get all of these phone records… . [I]sn't it true that you can go on public or private data[base] … and secure the names for different numbers… .?

Rep. Hakeem Jeffries, New York, starts at about 2 hours 48 minutes into the C-span video:

[The phone records of all Americans are relevant] because the … FISA court has articulated a set of criteria by which further inquiry can be undertaken… . 22 NSA individuals who are authorized to make the determination of reasonable articulable suspicion … . So these individuals don't have to go back to the court in order to determine whether they can move forward with a more invasive inspection of the phone records of the Americans contained in the database that you have acquired… .

Rep. Trey Gowdy, South Carolina, starts at about 3 hours 1 minute into the C-span video:

The notion that you can't get business records when a third party is involved, we just came up with two where that is not the case [medical records and tax returns]. [The point being that Congress can determine that information can be protected even if the Supreme Court determines people do not have a reasonable expectation of privacy in it.]

Second Panel (times below relate only to the second panel called in the July 17, 2013, hearing)

Rep. John Conyers, Michigan, starts at about 34 minutes into the C-span video:

I am more concerned about the collection legality than I am about the uses to which it is put. More chilling now than anything is the fact that they've got information through phone numbers which can easily be attached to names of everybody in the country for at least six years…

Rep. Louie Gohmert, Texas, starts at about 41 minutes into the C-span video:

…[Y]ou wouldn't have an order from a judge, under our Constitution that requires specificity as to a place and information to be gathered that would say something like this order from this court does "all call detail records between the United States and abroad, or wholly within the United States including local telephone calls," I think that pretty much covers everything. I see no specificity here….I think this justifies major changes.

Rep. Jerrold Nadler, New York, starts at about 47 minutes into the C-span video:

The statute talks about collection, you seem to be talking about queries [re: reasonable suspicion]. There is a difference between collection and query. … Every challenge to the abuse of constitutional rights … has been met in the same way, either the use of the state's secret doctrine to say you can't go to court on that…, or you have no standing because you cannot prove that you personally were harmed by this… . …Mr. Snowden may have done a public service in giving some people standing by proving that they were harmed by this because anyone who is a Verizon subscriber arguably can now go into court and say that.

Rep. Raul Labrador, Idaho, starts at about 55 minutes into the C-span video:

If I passed a law that would allow me to collect the meta-data on every American to stop child pornography, what's the difference between that and what's happening here…? …[T]he authors of the Patriot Act and those who voted for the Patriot Act had no idea the government would go to these lengths to collect data.

Rep. Bobby Scott, Virginia, starts at about 1 hour into the C-span video:

What is the limitation on the data after you have acquired it? They say you have to have articulable suspicion to query the data that you have obtained but the section 215 doesn't require any such limitation, it just tells you to describe what you're getting, this seems to be a little gratuitous policy not a limitation by statute.

CONCLUSION

The outrage expressed by the House Judiciary Committee is justified.

The Committee's constitutional and statutory criticisms are valid.

The propriety of mass surveillance should be debated.

Lawyers, because of our unique training in constitutional law, should be leading the debate.

The House Judiciary Committee got us off to a good start.

A NEW BOOK BY MICHAEL KLARE EXPLAINS ANOTHER CONSEQUENCE OF THE HYDRAULIC FRACTURING OF SHALE DEPOSITS FOR THE PRODUCTION OF NATURAL GAS---THE MASSIVE USE AND CONTAMINATION OF WATER

BY: BRUCE FREEMAN

Michael T. Klare is a scholar who has written several books about how the need to control or have access to diminishing or scarce natural resources drives power struggles among and within nations. He is the director of the Five College Program in Peace and World Security Studies at Hampshire College in Amherst, Massachusetts. In his most recent book, "The Race for What's Left, The Global Scramble for the World's Last Resources," (Metropolitan Books, New York 2012), Mr. Klare explains that the government/industry response to the depletion of the most easily accessible resources, including oil and gas, has been continued extraction using "unconventional" techniques. One such unconventional technique, hydraulic fracturing or "fracking," releases natural gas trapped in shale formations.

New York State has extensive shale formations within its borders. New York's moratorium on fracking just entered its sixth year. Many local communities in New York have enacted legislation to prohibit fracking and/or the treatment and transportation of fracking waste water. The New York State Court of Appeals has just agreed to hear the appeal of the May, 2013, Third Department opinion upholding one such local ordinance. [The case, Norse Energy Corp USA v Town of Dryden, 515227, 3rd Dept 5-2-13 (summarized in Rochester Law Digest, Issue 3, p. 78), was discussed in an article entitled "New York Supreme Court …Upholds Town Ordinance Banning Fracking," by Gregg Freeman (Rochester Law Digest, Issue 3, p. 129)].

Michael Klare's discussion of fracking in his latest book couldn't be more timely for New Yorkers.

Excerpts from the chapter entitled "Tar Sands, Shale Gas, and Other Unconventional

Hydrocarbons," follow:

The most important of the new technologies that have been developed to extract gas from the dense shale formations are horizontal drilling and hydraulic fracturing, or "hydrofracking." In a typical application, energy firms use conventional drills to dig a vertical well down to the level of the shale, usually a mile or so underground; the drills are then steered sideways into the rock, often extending thousands of feet horizontally. Once numerous channels have been drilled and encased in concrete, small explosive charges are set off to puncture the concrete and shatter the rock. Finally, millions of gallons of water laced with sand, lubricants, and other chemical additives are forced into these fissures, widening the openings and allowing the gas to escape toward the central well and then be collected on the surface. [53] * * *

There is no doubt that shale gas has enormous potential as an energy source; indeed many observers are now speaking of a "shale gas revolution." Before that full potential can be realized, however, the industry will have to overcome a number of environmental and regulatory challenges. * * * Many observers worry, for instance, that improper cementing of the wellbore---a key factor in the *Deepwater Horizon* explosion---could result in toxic liquids leaking from a shale gas well and contaminating local acquifers. The danger is all the more significant because some of the most promising shale gas plays are located in the northeastern United States, near the water supplies of major metropolitan areas. [64]

Even if wellbore cementing is performed correctly and no leaks occur, dealing with the wastewater produced by the hydraulic fracturing process is no simple matter. To shatter the shale beds and release the natural gas, hydrofracking uses as much a five million gallons of water per well. This water is mixed with various chemicals, many of them toxic; once fracturing is complete, the remaining water and chemicals must be pumped back out of the well so the gas retrieval process can begin. * * * …[D]rilling companies treat the flowback to remove the toxicants and return it to the environment---which means that any failure in the treatment process can poison rivers that supply drinking water to nearby communities. What's more, before being treated the flowback is usually stored in unlined holding ponds at the drilling site, and so if any liquid escapes from these ponds it, too, can endanger drinking supplies in the area. [65] * * *

In January 2009, gas from an improperly sealed well in Dimock, Pennsylvania, seeped into a surrounding aquifer, contaminating the water supplies of several neighboring households. Cabot Oil & Gas, the company that drilled the well, initially denied responsibility for the contaminants, but later agreed to pay $4.1 million in order to settle claims with nineteen local residents. [68] A year and a half later, in June 2010, a well being drilled by EOG Resources in west-central Pennsylvania suffered a blowout, spewing 35,000 gallons of wastewater, mud, and poisonous chemicals seventy-five feet into the air. The company quickly built a dike around the site to contain the toxic stew, but some of the chemicals are believed to have made their way into underground aquifers. [69] And yet another blowout occurred in April 2011, this time in northeastern Pennsylvania. On this occasion, a well owned by Chesapeake Energy spilled thousands of gallons of chemical-laced

water into nearby fields and streams before company engineers were able to bring it under control. [70]

Beyond such local incidents, a hazard of another order entirely was revealed in early 2011, when the *New York Times* conducted an extensive investigation of water contamination in Pennsylvania, a major site of shale gas production. According to corporate and government data collected by the *Times*, most of the 1.3 billion gallons of wastewater produced by shale gas wells in Pennsylvania between 2008 and 2010 was sent to public treatment plants not equipped to remove many of the toxic materials in the drilling waste. These materials included carcinogenic fracking fluids such as benzene, as well as radioactive particles of radium and uranium from naturally occurring underground deposits that were brought to the surface by the flowback. Some of the wells contributing to the toxic brew were found to be producing wastewater with 100 or even 1,000 times the level of radioactivity considered safe to drink; yet much of this drilling waste eventually found its way into rivers like the Monongahela and the Susquehanna, which provide drinking water for millions of people in Baltimore, Harrisburg, and Pittsburgh. [71] … Many environmentalists and health officials … warn that if the radioactive materials accumulate in drinking water---or enter the food chain through fishing and farming---they are likely to produce an increase in cancer rates. [73] The Race for What's Left, supra, at pp. 118-120.

Mr. Klare's footnotes for the above quotations:

> 53. For background on the hydrofracking technique, se Mooney, "The Truth about Fracking." See also Ben Casselman and Russell Gold, "Drilling Technique Unleashes a Trove of Natural Gas---And a Backlash," *Washington Post*, January 21, 2010.
>
> 64. For background and discussion, see Mark Fischetti, "The Drillers Are Coming," *Scientific American*, July 2010, pp. 82-85; Paul Hagemeier and Jason Jutt, "Hydraulic Facturiong. Water Use Issues Under Congressional, Public Scrutiny," *Oil & Gas Journal*, July 6, 2009, pp. 18-25; Mooney, "The Truth about Fracking"; and Mark Zoback, Saya Kitasei, and Brad Copithorne, *Addressing the Environmental Risks from Shale Gas Development* (Washington, D.C.; Worldwatch Institute, July 2010).
>
> 65. See Zoback, Kitasei, and Copithorne, *Addressing the Environmental Risks from Shale Gas Development*, pp. 7-111. See also Jay Mouawad and Clifford Krauss, "Dark Side of a Natural Gas Boom," *New York Times*, December 8, 2009; Steven Mufson, "Drilling Right into a Heated Environmental Debate" *Washington Post*, December 3, 2009; and Ian Urbina, "Regulation Lax as Gas Well's Tainted Water Hits Rivers," *New York Times*, February 26, 2011.
>
> 68. See Mouawad and Krauss, "Dark Side of a Natural Gas Boom"; and Mufson, "Drilling Right into a Heated Environmental Debate." Se also Nick Snow, "Cabot, Pennsylvania DEP Reach New Accord for 19 Dimock Households," *Oil & Gas Journal Online*, December 21, 2010, retrieved at www.ogj.com on January 3, 2011.
>
> 70. "Gas Well Spews Polluted Water," Associated Press, *New York Times*, April 20, 2011.
>
> 71. Urbina, "Regulation Lax as Gas Wells' Tainted Water Hits Rivers."
>
> 73. Ibid.

Clean water, itself, is a diminishing natural resource.

Five million gallons of water, for each fracking well, is made toxic and radioactive by the fracking process.

To date, in neighboring Pennsylvania, the toxic and radioactive water has been inadequately treated and dumped in rivers, contaminating the sources of drinking water for millions.

Thanks to Michael Klare, and the reporters and writers cited by him, for getting this important information out while New York's debate about fracking is ongoing.

We should not let what happened in Pennsylvania be repeated here.

TO LEARN MORE ABOUT MICHAEL KLARE'S WORK AND BOOKS GO TO

WWW.MICHAELKLARE.COM

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