ROCHESTER LAW DIGEST

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APPELLATE DIVISION

FROM THE EDITOR

This is the tenth issue of the Digest---an indexed compilation of the summaries of Appellate Division and Court of Appeals decisions released in July and August (2014) and posted weekly on the "Just Released" page of the website rochesterlawdigest.com.

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APPELLATE DIVISION (Cont'd)

COURT OF APPEALS

APPELLATE DIVISION

ADMINISTRATIVE LAW/CIVIL PROCEDURE/ARTICLE 78/STATUTE OF LIMITATIONS

Ambiguity About the Timing of a Final Decision from an Administrative Agency Precluded Dismissal Based Upon the Statute of Limitations Defense

In the course of a decision finding the Commissioner of Health had properly determined Medicaid reimbursement rates for residential health care facilities, the Third Department determined ambiguity about when a final decision had been made precluded dismissal based on the statute of limitations defense:

> "[W]hen an administrative body itself creates ambiguity and uncertainty" concerning the finality of a determination, however, "affected [parties] should not have to risk dismissal for prematurity or untimeliness by necessarily guessing when a final and binding determination has or has not been made. Under these circumstances, 'the courts should resolve any ambiguity created by the public body against it in order to reach a determination on the merits and not deny a party his [or her] day in court'"... . **Matter of Adirondack Med Center-Uihlein v Daines, 2014 NY Slip Op 05386, 2nd Dept 7-16-14**

ADMINISTRATIVE LAW/EDUCATION LAW

Termination of Teacher for Failure to Control Special-Education Class to Which He Was Assigned After an Unblemished 18-Year Career Shocked the Court's Sense of Fairness

The First Department, over a two-justice dissent, determined that the termination of a teacher shocked the court's sense of fairness. The teacher had an unblemished 18-year record before being assigned to a special-education class. Although the court agreed that the teacher's inability to control the class had been demonstrated, the punishment was deemed too severe:

> While we do not dispute the specific findings of the Hearing Officer concerning petitioner's deficiencies in the management of this one special education class, we find that under the circumstances presented here the penalty of termination shocks our sense of fairness ... . **Matter of Russo v New York City Department of Educ, 2014 NY Slip Op 05032, 1st Dept 7-3-14**

ADMINISTRATIVE LAW/ENVIRONMENTAL LAW

Adirondack Park Agency Properly Approved the Construction of a Resort Within the Confines of the Park

In a full-fledged opinion by Justice Rose, the Third Department determined the Adirondack Park Agency (APA) properly approved the construction of a club and resort project which will include a ski area, an inn, single family residences, camps and a marina. The court went through each of the required findings and found them supported by substantial evidence. The court explained its review role as follows:

> Judicial review of the APA's determination, made after a hearing at which evidence was taken pursuant to law, is limited to whether the decision is supported by substantial evidence (see CPLR 7803 [4]...). Substantial evidence does not require overwhelming evidence or even a preponderance of the evidence ... . Rather, all that is required is "'relevant proof [that] a reasonable mind may accept as adequate to support a conclusion or ultimate fact'" ... . Additionally, "[t]he fact that a different conclusion could have been reasonably reached is not sufficient ground to set aside the determination" ... .
>
> To the extent that petitioners argue that the APA's determination was affected by errors of law (see CPLR 7803 [3]), this Court's "review of these arguments, made in a CPLR article 78 proceeding following a hearing, is limited to whether the [APA] exceeded its authority, violated a controlling law or otherwise acted in an arbitrary and capricious manner" ... . **Matter of Protect the Adirondacks! Inc v Adirondack Park Agency, 2014 NY Slip Op 04992, 3rd Dept 7-3-14**

ADMINISTRATIVE LAW/VECHICLE AND TRAFFIC LAW/PARKING TICKETS

Failure to Strictly Comply with the Statutory Requirements for the Contents of a Parking Ticket Invalidates the Ticket

The First Department, in a full-fledged opinion by Justice Renwick, determined that the failure to strictly comply with the statutory requirements for a parking ticket rendered the tickets invalid and unenforceable. Specifically, the type of license plate on the trucks in question was described on the ticket as "IRP" when the plates should have been described as

"Apportioned" or "APP" ("IRP" and "APP" are related terms used interchangeably by the NYC Parking Violations Board). The decision is noteworthy because of the strictness with which the statutory requirements for the contents of a parking ticket are applied:

> ...[T]his Court is bound by the plain language of VTL 238(2). We must conclude that the New York City Parking Violations Bureau's policy of deeming "IRP" an accurate description of out-of-state "APPORTIONED" license plates for purposes of adjudicating parking violations violates the statute. As indicated, VTL § 238(2) requires that a notice of parking violation shall include the "plate type as shown by the registration plates of said "vehicle" (emphasis added). It is undisputed that each ticket here described the "vehicle type" as "IRP," while the corresponding license plate described the vehicle type as "APPORTIONED." The choice of the words in the statute "as shown" by the vehicle plate is evidence that the legislature intended strict compliance with the statute, and "new language cannot be imported into a statute to give it a meaning not otherwise found therein" ... . **Matter of Nestle Waters N Am Inc v City of New York, 2014 NY Slip Op 05609, 1st Dept 7-31-14**

AGRICULTURAL AND MARKETS LAW/ADULTERATED FOOD/CIVIL PROCEDURE

No Standing to Bring an Action Contending Foie Gras Produced by Forced Feeding Is an Adulterated Food

The Third Department determined petitioner [Stahlie] did not have standing to bring an action contending that foie gras produced by force feeding ducks or geese was an adulterated food which causes secondary amyloidosis:

> Standing "requir[es] that the litigant have something truly at stake in a genuine controversy" ... . Petitioners have "the burden of establishing both an injury in fact and that the asserted injury is within the zone of interests sought to be protected by the statute alleged to have been violated" ... . The injury in fact element must be based on more than conjecture or speculation ... . * * *
>
> Here, the risk of exposure is minimal and the indication of harm uncertain. Although petitioners included expert opinion indicating a possible risk of secondary amyloidosis from foie gras for some individuals with certain medical conditions, they cite no situation of any person ever suffering secondary amyloidosis that was linked to foie gras. Stahlie does not contend that he has any of the underlying medical conditions that may be related to an increased risk of secondary amyloidosis. His exposure to foie gras is infrequent. There are no studies, statements or warnings by the regulating agency or other pertinent governmental entity regarding a relevant risk related to the occasional consumption of foie gras. Stahlie has, at best, occasional exposure to a product that has not yet been connected by any actual case to the purported risk of harm alleged by petitioners. We agree with Supreme Court that, even affording petitioners the benefit of every favorable inference, their allegations regarding an injury in fact to Stahlie are speculative and rest upon conjecture. **Matter of Animal Defense Fund Inc v Aubertine, 2014 NY Slip Op 05395, 3rd Dept 7-17-14**

ANIMAL LAW/STRICT LIABILITY IN TORT/NEGLIGENCE

Defendant Demonstrated He Did Not Have Knowledge of Dog's Vicious Propensities

The Second Department determined plaintiff was unable to raise a question of fact about whether the dog owner had knowledge of his dog's vicious propensities. The presence of a "Beware of Dog" sign on defendant's property was not enough to raise a question of fact. The court noted that there is no common law negligence cause of action in this context:

> To recover in strict liability in tort for damages caused by a dog, the plaintiff must establish that the dog had vicious propensities and that the owner knew or should have known of the dog's vicious propensities ... . Evidence tending to demonstrate a dog's vicious propensities includes evidence of a prior attack, the dog's tendency to growl, snap, or bare its teeth, the manner in which the dog was restrained, the fact that the dog was kept as a guard dog, and a proclivity to act in a way that puts others at risk of harm ... .
>
> Here, the defendant established her prima facie entitlement to judgment as a matter of law ... . Evidence submitted in support of the motion, including a transcript of the deposition testimony of the defendant, showed that the dog had been living with the defendant's family, which included a small child, without incident, for approximately four or five years before it bit the plaintiff. Prior to the incident, the defendant had not seen the dog exhibit aggressive behavior. In opposition, the plaintiff failed to raise a triable issue of fact as to whether the defendant was aware, or should have been aware, that her dog had vicious propensities ... . The mere presence of a "Beware of Dog" sign

on the defendant's property, and the fact that the dog might have been confined when there was a celebration at the premises, were insufficient to raise a triable issue of fact ... . **Vallejo v Ebert, 2014 NY Slip Op 05976, 2nd Dept 8-27-14**

APPEALS

Even Though the Appeal Had Been Rendered Moot, It Was Appropriate for the Appellate Court to Vacate the Underlying Order

The Second Department explained that, although the appeal had been rendered academic, it was appropriate for the appellate court to vacate the underlying order in order to prevent the order from spawning any further legal proceedings:

> While it is the general policy of New York courts to simply dismiss an appeal which has been rendered academic, vacatur of an order or judgment on appeal may be an appropriate exercise of discretion where necessary "in order to prevent a judgment which is unreviewable for mootness from spawning any legal consequences or precedent" ... . Here, the plaintiffs sold the premises and satisfied the subject mortgage under threat of foreclosure. They " ought not in fairness be forced to acquiesce in'" the unreviewable order, which could spawn adverse legal consequences due to its res judicata effect ... . Accordingly, we vacate so much of the order ... as awarded the defendants summary judgment dismissing the complaint. **Mannino v Wells Fargo Home Mtge Inc, 2014 NY Slip Op 05846, 2nd Dept 8-20-14**

ARBITRATION

"Transactions Involving Commerce" and "Waiver of Arbitration by Participating in Litigation" (Re: the Federal Arbitration Act) Defined

The First Department, in a full-fledged opinion by Justice Richter, determined that the Federal Arbitration Act applied because the underlying transactions "involv[ed] commerce" within the meaning of the federal statute. The court further determined that the plaintiffs did not pursue litigation to the extent necessary to constitute a waiver of arbitration. The court explained the criteria for "transactions involving commerce" and waiver of arbitration by participating in litigation:

> [The Supreme Court] found the phrase "involving commerce" to be the equivalent of "affecting commerce," a term associated with the broad application of Congress's power under the Commerce Clause ... .
>
> The Supreme Court reaffirmed this interpretation of "involving commerce" ... , stating that "it is perfectly clear that the FAA encompasses a wider range of transactions than those actually in commerce, that is, within the flow of interstate commerce" ... . Further, the Court held that individual transactions do not need to have a substantial effect on interstate commerce in order for the FAA to apply ... . Rather, as long as there is economic activity that constitutes a general practice "bear[ing] on interstate commerce in a substantial way" ... . * * *
>
> Although a party may have a right to arbitrate, the court may determine that a party has waived this right by having participated in litigation ... . There is a "strong federal policy [*6]favoring arbitration," and waiver should not be "lightly inferred" under the FAA ... . A party does not waive the right to arbitrate simply by pursuing litigation, but by "engag[ing] in protracted litigation that results in prejudice to the opposing party" ... . **Cusimano v Schnurr, 2014 NY Slip Op 05702, 1st Dept 8-7-14**

ARBITRATION/CHOICE OF LAW/CIVIL PROCEDURE

Arbitrator Not Precluded from Considering Punitive Damages by Provision that the Agreement Is To Be "Construed and Enforced" in Accordance with New York Law

In a full-fledged opinion by Justice Manzanet-Daniels, over an extensive dissent, the First Department determined that the provision in an agreement covering arbitration of disputes stating that the agreement is to be "construed and enforced" in accordance with New York law did not necessarily preclude the arbitrator from considering punitive damages. The court found the language in the agreement insufficiently specific to invoke the "Garrity rule. " Under "Garrity," arbitrators in New York are prohibited from considering punitive damages. But the Federal Arbitration Act, which may apply here because of the involvement of interstate commerce, does not. The court also noted that participation in arbitration precludes a party from seeking a stay of arbitration pursuant to CPLR 7503. The choice of law issue is framed by the following passages:

> Merely stating, without further elaboration, that an agreement is to be construed and enforced in accordance with the law of New York does not suffice to invoke the Garrity rule. The Supreme Court has made clear that in order to remove the issue of punitive damages from the arbitrators, the agreement must "unequivocal[ly] exclu[de]" the claim ... . The agreement in this case, which provided only that it was to be "construed and

enforced" in accordance with the law of New York, did not unequivocally exclude claims for punitive damages from the consideration of the arbitrators

From the dissent:

The core issue in this case - an appeal from an order denying petitioners' motion to stay arbitration of claims for punitive damages - relates to the tension between New York State policy against the privatization of punitive damages and the federal policy that there is no such prohibition. Specifically, under New York State law, as expressed by Garrity v Lyle Stuart, Inc. (40 NY2d 354 [1976]), the power to award punitive damages is limited to judicial tribunals, and is not within an arbitrator's authority... . Conversely, the federal view, as reflected in the Federal Arbitration Act (FAA),... which applies to arbitration disputes concerning interstate commerce, generally empowers arbitrators to award punitive damages, absent a contractual intent to the contrary. Unlike the majority, I find that, while the agreement here evidences a transaction involving interstate commerce, the provision stating that the agreement is to be "construed and enforced" in accordance with the laws of New York suffices to invoke the Garrity rule. Therefore, I dissent and would grant petitioners' motion to stay arbitration of the claims for punitive damages. **Matter of Flintlock Constr Servs LLC v Weiss, 2014 NY Slip Op 05818, 8-14-14**

ARBITRATION/COLLATERAL ESTOPPEL/EMPLOYMENT LAW

Arbitration Award Based Upon Collective Bargaining Agreement Does Not Have a Preclusive Effect Upon a Subsequent Employment Discrimination Action Based on the Same Facts

The Second Department noted that an arbitration award based upon the terms of a collective bargaining agreement does not bar a subsequent employment discrimination action under the doctrine of collateral estoppel. Here the employee was terminated based upon excessive absences. He subsequently brought a discrimination action alleging the employee failed to accommodate his disability. (The Second Department determined the "disability" alleged by the employee did not require accommodation):

> An arbitrator's award may be given preclusive effect in a subsequent judicial proceeding ... . However, arbitration is an inappropriate forum for the disposition of an employment discrimination claim where "the arbitrator's sole task is to effectuate the intent of the parties in connection with the collective-bargaining agreement, and not to consider a statutory claim of discrimination . . . The violation of these contractual and statutory rights by the same factual occurrence does not vitiate their separate nature" ... . Thus, the arbitrator's decision did not have preclusive effect on the plaintiff's separate action based on unlawful discrimination in employment ..., and the complaint is not barred by the doctrine of collateral estoppel. **Caban v New York Methodist Hosp, 2014 NY Slip Op 05292, 2nd Dept 7-16-14**

ARBITRATION/UNIONS/COLLECTIVE BARGAINING AGREEMENT

Grievance Did Not Relate to Provisions of Collective Bargaining Agreement

In finding that one of two grievances was not arbitrable because the grievance (overtime pay for police officers privately employed as security officers at the airport) did not relate to the provisions of the collective bargaining agreement (CBA), the Fourth Department explained the operative criteria:

> It is well settled that, in deciding an application to stay or compel arbitration under CPLR 7503, we do not determine the merits of the grievance and instead determine only whether the subject matter of the grievance is arbitrable (see CPLR 7501...). "Proceeding with a two-part test, we first ask whether the parties may arbitrate the dispute by inquiring if there is any statutory, constitutional or public policy prohibition against arbitration of the grievance' . . . If no prohibition exists, we then ask whether the parties in fact agreed to arbitrate the particular dispute by examining their collective bargaining agreement. If there is a prohibition, our inquiry ends and an arbitrator cannot act" ... .
>
> "Where, as here, the [CBA] contains a broad arbitration clause, our determination of arbitrability is limited to whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA' " ... . If such a "reasonable relationship" exists, it is the role of the arbitrator, and not the court, to "make a more exacting interpretation of the precise scope of the substantive provisions of the CBA, and whether the subject matter of the dispute fits within them" ... .
> **Matter of City of Syracuse v Syracuse Police Benevolent Assn Inc, 2014 NY Slip Op 05251, 4th Dept 7-11-14**

ASBESTOS LITIGATION/CIVIL PROCEDURE

Two Asbestos Cases Properly Consolidated

The First Department, in a full-fledged opinion by Justice Mazzarelli, over a two-justice dissent, determined Supreme Court properly consolidated two cases alleging injury related to asbestos exposure. One case involved a worker injured by asbestos dust from drywall sanding at a construction site. The other involved a navy boiler technician who maintained steam valves containing asbestos. The court determined that the cases had more commonality than differences:

> Consolidation of cases is authorized by CPLR 602(a), which provides:
>
> "When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."
>
> As the statutory language suggests, joining cases together is designed to "reduce the cost of litigation, make more economical use of the trial court's time, and speed the disposition of cases" ... . Further, "[g]reat deference is to be accorded to the motion court's discretion" in joining cases together ... .
>
> Malcolm v National Gypsum Co. (995 F2d 346 [2d Cir 1993]) is the seminal case concerning consolidation in asbestos cases. There, the Second Circuit endorsed "[a standard set of] criteria . . . as a guideline in determining whether to consolidate asbestos exposure cases[, including]: (1) common worksite; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether plaintiffs were living or deceased; (6) status of discovery in each case; (7) whether all plaintiffs were represented by the same counsel; and (8) type of cancer alleged" ... .
>
> The court entertaining a consolidation motion is further required to take into consideration the number of separate cases (id. at 352). This Court has applied the Malcolm factors to asbestos cases ... . Not all of the factors need be present; consolidation is appropriate so long as "individual issues do not predominate over the common questions of law and fact" (id.). However, in asbestos cases, it has been "routine" to join cases together for a single trial ... . **Matter of New York City Asbestos Litig, 2014 NY Slip Op 05054, 1st Dept 7-3-14**

ATTORNEY'S CHARGING LIEN/FAMILY LAW

Law Firm Representing Wife in a Divorce Proceeding Entitled to Charging Lien Pursuant to Judiciary Law 475 But Not Entitled to Money Judgment with Interest

In reversing Supreme Court, the Second Department determined the law firm which represented the wife in a divorce was entitled to a charging lien for outstanding legal fees (to be paid from the proceeds of the upcoming sale of the marital residence). However, in the absence of a plenary action, the law firm was not entitled to enter a money judgment with interest (Judiciary Law 475):

> Judiciary Law § 475 provides that, from the commencement of an action in any court, the attorney who appears for a party has a lien upon his client's cause of action, claim, or counterclaim, which attaches to a verdict, report, determination, decision, judgment, or final order in his client's favor, and the proceeds thereof. "A charging lien is a security interest in the favorable result of litigation, giving the attorney equitable ownership interest in the client's cause of action and ensuring that the attorney can collect his fee from the fund he has created for that purpose on behalf of the client" ... . " Where an attorney's representation terminates upon mutual consent, and there has been no misconduct, no discharge for just cause, and no unjustified abandonment by the attorney, the attorney maintains his or her right to enforce the statutory lien'" ... . In a matrimonial action, a charging lien will be available " to the extent that an equitable distribution award reflects the creation of a new fund by an attorney greater than the value of the interest already held by the client'" ... . **Wasserman v Wasserman, 2014 NY Slip Op 05535, 2nd Dept 7-30-14**

ATTORNEY DISQUALIFICATION

No Showing Attorney Had Acquired Any Client Confidences Before Changing Firms

The Second Department determined there was no basis for disqualifying a law firm which represented the plaintiffs in a personal injury case based upon the firm's hiring of an attorney who had represented the defendant in the same case. It was sufficiently demonstrated that the attorney had not acquired any client confidences during his representation of the defendant:

> While generally, a party seeking to disqualify an opponent's attorney "must prove: (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" ..., "no presumption of disqualification will arise if either the moving party fails to make any showing of a risk that the attorney changing firms acquired any client confidences in [his or her] prior employment ... or the nonmoving party disproves that the attorney had any opportunity to acquire confidential information in the former employment" ... . **Sharifi-Nistanak v Coccia, 2014 NY Slip Op 05318, 2nd Dept 7-16-14**

Written Waiver of Conflict by Defendants Precluded Disqualification of Plaintiff's Counsel

The Second Department reversed Supreme Court, finding that the motion by the defendants to disqualify plaintiff's attorney (Brooks) based upon a conflict of interest should have been denied. The defendants had signed a waiver after full disclosure of the conflict:

" [T]he disqualification of an attorney is a matter which rests within the sound discretion of the court. A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted, and the movant bears the burden on the motion'" ... . Here, the Supreme Court improvidently exercised its discretion in granting the motion to disqualify Brooks ..., as counsel for the plaintiff. Pursuant to the written waiver, the ...defendants specifically waived any conflict of interest that might arise from Brooks's representation of the plaintiff. The waiver fully informed the ...defendants of the potential conflict of interest and, by executing the waiver, the ... defendants consented to have Brooks represent them notwithstanding that conflict ... . **Grovick Props LLC v 83-10 Astoria Blvd LLC, 2014 NY Slip Op 05627, 2nd Dept 8-6-14**

ATTORNEY MALPRACTICE

Plaintiffs Could Not Demonstrate the Alleged Malpractice Was Proximate Cause of Damages---Summary Judgment Properly Granted to Defendants---Elements of Attorney Malpractice Action Explained

The Second Department determined that any deficiencies in the attorney's motion papers, seeking to vacate a default, were not the proximate cause of the plaintiffs' damages, therefore the malpractice action was properly dismissed. The court explained the elements of an attorney malpractice action:

To sustain a cause of action alleging legal malpractice, a plaintiff must establish that the attorney "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession," and that the attorney's breach of this duty proximately caused the plaintiff actual and ascertainable damages ... .

Even if a plaintiff establishes the first prong of a legal malpractice cause of action, the plaintiff must still demonstrate that he or she would have succeeded on the merits of the action but for the attorney's negligence ... . "[A]s to [this] second prong, the plaintiff must plead and prove actual, ascertainable damages as a result of an attorney's negligence" ... .

"To obtain summary judgment dismissing a complaint in an action to recover damages for legal malpractice, a defendant must demonstrate that the plaintiff is unable to prove at least one of the essential elements of [his or her] legal malpractice cause of action"... . **Di Giacomo v Langella, 2014 NY Slip Op 05150, 2nd Dept 7-9-14**

Complaint Stated Cause of Action for Legal Malpractice/Court Rejected Argument that Defect in Service Could Have Been Cured by Successor Counsel as Speculative

The Second Department determined the complaint sufficiently stated a cause of action for legal malpractice. The court rejected the defendants' argument that successor attorneys could have remedied the defect in service as speculative because, in order to remedy the defect, Supreme Court would have had to exercise discretion:

To establish a cause of action to recover damages for legal malpractice, a plaintiff must prove (1) that the defendant attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community, (2) proximate cause, (3) damages, and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care ... . To establish proximate cause, it must be demonstrated that a plaintiff would have prevailed in the underlying action but for the attorney's negligence ... .

On a motion to dismiss pursuant to CPLR 3211(a)(7), the facts alleged in the complaint are accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court's function is to determine only whether the facts as alleged fit within any cognizable legal

theory ... . **Grant v La Trace, 2014 NY Slip Op 05155, 2nd Dept 7-9-14**

BANKRUPTCY

Case Against Non-Debtor Not Entitled to Automatic Stay

The Second Department, in reversing Supreme Court's granting of a stay, explained the circumstances when cases by and against non-debtors can be stayed under the bankruptcy law (11 USC 362(a)):

> "[T]he bankruptcy court can stay actions against any party, even a non-debtor, whenever the objective of the action is to obtain possession or exercise control over the debtor's property. Unless a case involves unusual circumstances, however, the bankruptcy court cannot halt litigation by non-debtors, even if they are in a similar legal or factual nexus with the debtor.
>
> "The unusual circumstances in which the bankruptcy court can stay cases against non-debtors are rare. They typically arise where there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor. In other words, the automatic stay will apply to non-debtors only when a claim against the non-debtor will have an immediate adverse economic consequence for the debtor's estate" ... . **Bankdirect Captial Fin v Insurance Co of State of PA, 2014 NY Slip Op 05824, 2nd Dept 8-20-14**

CIVIL PROCEDURE

Cause of Action Accruing Outside New York Brought by a Nonresident Deemed Untimely---Relevant Law Explained

In finding an action brought by a nonresident based upon a cause of action which accrued outside New York untimely, the Second Department explained the applicable law:

> " [W]hen a nonresident sues on a cause of action accruing outside New York, CPLR 202 requires the cause of action to be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued'" ... . When borrowing the foreign jurisdiction's statute of limitations, its tolling provisions are also borrowed ... .
>
> Here, it is undisputed that the applicable limitations period is three years under either New York law or Kazakh law (see CPLR 214[2]; Kazakh Civil Code Article 178). In general, "the applicable Statute of Limitations is triggered once a cause of action accrues" ... . "A cause of action accrues, for the purpose of measuring the period of limitations, when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court'" .... An action to recover for a liability created or imposed by statute must be instituted "according to the language of the statute generating the liability" ... . **Grynberg v Giffen, 2014 NY Slip Op 04901, 2nd Dept 7-2-14**

Capacity to Sue Does Not Go to the Jurisdiction of the Court---Court Can Not Dismiss a Complaint Sua Sponte On that Ground---Capacity to Sue Must Be Raised as a Defense in the Answer or in a Pre-Answer Motion

The Third Department determined Supreme Court did not have the authority to dismiss a complaint sua sponte based upon the plaintiff's capacity to sue. The capacity to sue is not jurisdictional and must be raised as a defense:

> "The issue of lack of capacity to sue does not go to the jurisdiction of the court . . . . Rather, lack of capacity to sue is a ground for dismissal which must be raised by [pre-answer] motion [or in the answer] and is otherwise waived" ... . Here, plaintiff's capacity to sue was not raised by pre-answer motion or in defendant's answer. Consequently, Supreme Court erred in raising the issue sua sponte and dismissing the complaint on that basis (see CPLR 3211 [e]). As such, the order must be reversed and the complaint reinstated. **Town of Delhi v Telian, 2014 NY Slip Op 05008, 3rd Dept 7-3-14**

Plaintiff Sufficiently Demonstrated the Possibility of Long-Arm Jurisdiction to Warrant Discovery

The Third Department determined Supreme Court should not have dismissed an attorney's suit for fees on lack-of-personal-jurisdiction grounds. The underlying action was brought by a New York resident (Swanson) injured in Massachusetts. In explaining the general principles of long-arm jurisdiction, the court noted that some discovery may be necessary to determine the jurisdiction issue:

> New York courts "may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state or contracts anywhere to

supply goods or services in the state" (CPLR 302 [a] [1]). Inasmuch as CPLR 302 (a) (1) is a "single act statute . . . proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" ... . With respect to the requirement of a substantial relationship, "the existence of some articulable nexus between the business transacted and the cause of action sued upon" is "[e]ssential to the maintenance of a suit against a non-domiciliary under CPLR 302 [(a) (1)]" ... . Although plaintiff bears the burden of proof as the party seeking to assert jurisdiction, that burden "does not entail making a prima facie showing of personal jurisdiction; rather, plaintiff need only demonstrate that it made a 'sufficient start' to warrant further discovery" ... . In that regard, we note that the issue of whether long-arm jurisdiction exists often presents complex questions; "[d]iscovery is, therefore, desirable, [*3]indeed may be essential, and should quite probably lead to a more accurate judgment than one made solely on the basis of inconclusive preliminary affidavits" ... .

In our view, plaintiff has made a "sufficient start" and demonstrated that additional facts establishing personal jurisdiction "may exist" but are within defendants' exclusive control ... . Specifically, plaintiff raised questions of fact regarding whether defendants interjected themselves into Swanson's New York workers' compensation proceeding, ultimately negotiating the workers' compensation lien on the settlement proceeds from Swanson's personal injury action. **Gottlieb v Merrigan, 2014 NY Slip Op 05011, 3rd Dept 7-3-14**

Motion to Quash Subpoena for Billing Records Re: the Insurance Company's Examining Physician Properly Denied

The Fourth Department determined a motion to quash a subpoena duces tecum was properly denied, even though the billing documents for the insurance company's (State Farm's) examining physician were sought for cross-examination and impeachment purposes:

State Farm moved to quash the subpoena pursuant to CPLR 2304 on the ground that it was plaintiff's intent to use the subpoenaed materials to impeach the examining physician's general credibility. Plaintiff opposed the motion on the ground that she intended to use the subpoenaed documents to cross-examine the examining physician at trial with respect to his bias or interest. Supreme Court denied the motion, and we affirm.

"It is . . . well settled that a motion to quash a subpoena duces tecum should be granted only where the materials sought are utterly irrelevant to any proper inquiry" ... . "Moreover, the burden of establishing that the requested documents and records are utterly irrelevant is on the person being subpoenaed" ... . It is "proper to allow cross-examination of a physician regarding the fact that the defendant's insurance company retained him to examine the plaintiff in order to show bias or interest on the part of the witness" ... . Questions concerning the bias, motive or interest of a witness are relevant and should be "freely permitted and answered" ... and, thus, plaintiff is entitled to discovery materials that will assist her in preparing such questions. In light of the foregoing, we conclude that the court did not abuse its discretion in denying the motion. **Dominici v Ford, 2014 NY Slip Op 05081, 4th Dept 7-3-14**

Default for Failure to File Note of Issue Within 90 Days of Demand Properly Excused

In affirming Supreme Court's denial of defendants' motion to dismiss for failure to file and note of issue after a 90-day demand, the Second Department noted the court's discretion in this area:

Where, as here, a plaintiff has been served with a 90-day demand pursuant to CPLR 3216(b)(3), that plaintiff must comply with the demand by filing a note of issue or by moving, before the default date, either to vacate the demand or to extend the 90-day period ... . Here, the plaintiff failed to do either within the 90-day period. Therefore, in order to excuse his default, the plaintiff was required to demonstrate a justifiable excuse for his failure to timely file the note of issue or move to either vacate the demand or extend the 90-day period, as well as a potentially meritorious cause of action ... . The determination of what constitutes a reasonable excuse lies within the discretion of the motion court ... .

Nevertheless, CPLR 3216 is "extremely forgiving" ..., in that it "never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed" ... . Thus, "the statute prohibits the Supreme Court from dismissing a complaint based on failure to prosecute whenever the plaintiff has shown a justifiable excuse for the delay, and potentially a meritorious cause of action" ..., but depending on

the circumstances, a plaintiff is not always required to establish both a justifiable excuse and a potentially meritorious cause of action to avoid such a dismissal ... .

In this case, the plaintiff demonstrated that he did not intend to abandon the action and that there were ongoing discovery proceedings conducted during the time period involved. **Belson v Dix Hills AC Inc, 2014 NY Slip Op 05144, 2nd Dept 7-9-14**

Defense of Lack of Personal Jurisdiction Is Not Waived by Making a Motion to Dismiss on that Ground/Process Server's Testimony About Attempts to Locate Defendant Lacked Credibility

The Second Department determined the defendant did not waive the defense of lack of personal jurisdiction by submitting a motion to dismiss on that ground. The court further determined that Supreme Court properly dismissed the complaint based upon the process server's lack of credibility about his attempts to locate the defendant:

A defendant may waive the issue of lack of personal jurisdiction by appearing in an action, either formally or informally, without raising the defense of lack of personal jurisdiction in an answer or pre-answer motion to dismiss ... . A defendant may also waive lack of personal jurisdiction by entering into a stipulation of settlement of the action ... . Additionally, a defendant may waive lack of personal jurisdiction by making payments pursuant to a judgment or wage garnishment for a substantial period of time ... However, where the defendant's only participation in the action is the submission of a motion to vacate a default judgment for lack of personal jurisdiction, the defense of lack of personal jurisdiction is not waived ... . * * *

Service of process pursuant to the affix-and-mail provisions of CPLR 308(4) is only permitted where service by personal delivery under CPLR 308(1) or by delivery to a person of suitable age and discretion and a subsequent mailing pursuant to CPLR 308(2) "cannot be made with due diligence" (CPLR 308[4]). " For the purpose of satisfying the due diligence requirement of CPLR 308(4), it must be shown that the process server made genuine inquiries about the defendant's whereabouts and place of employment'" ... . The process server's testimony that he inquired as to the defendant's whereabouts from a neighbor was not credible, since he was unable to provide any description of the neighbor—even a description of the neighbor's sex. The affidavit of service referred to the "person spoken to," but provided no further description, although spaces were provided to insert the person's sex, skin color, hair color, approximate age, height, and weight.

The determination of the hearing court as to the credibility of the process server should not be disturbed since the hearing court had the advantage of seeing and listening to that witness. **Cadlerock Joint Venture LP v Kierstedt, 2014 NY Slip Op 05147, 2nd Dept 7-9-14**

Criteria for Discovery from Non-Party Explained/Criteria for Discovery of Trade Secrets Explained

The Second Department explained the criteria for discovery demanded of a non-party [Morgan Stanley] and described the relevant considerations when discovery is opposed on the ground that the material requested constitutes trade secrets. The court concluded Morgan Stanley had demonstrated certain of the discovery requests related to protected trade secrets:

Pursuant to CPLR 3101(a)(4), a party may obtain discovery from a nonparty in possession of material and necessary evidence, so long as the nonparty is apprised of the "circumstances or reasons" requiring disclosure. Pursuant to the Court of Appeals' recent decision in Matter of Kapon v Koch (____ NY3d ____, 2014 NY Slip Op 02327 [2014]), disclosure from a nonparty requires no more than a showing that the requested information is "material and necessary," i.e. relevant to the prosecution or defense of an action (id., *1). However, "the subpoenaing party must first sufficiently state the circumstances or reasons' underlying the subpoena (either on the face of the subpoena itself or in a notice accompanying it), and the witness, in moving to quash, must establish either that the discovery sought is utterly irrelevant' to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious'" (id.). Should the nonparty witness meet this burden, "the subpoenaing party must then establish that the discovery sought is material and necessary' to the prosecution or defense of an action, i.e., that it is relevant" (id.). * * *

Notwithstanding New York's policy of liberal discovery (see id., * 4-5), a party seeking disclosure of trade secrets must show that such information is "indispensable to the ascertainment of truth and cannot be acquired in any other way" ... . A witness who objects to disclosure on the ground that the requested information constitutes a trade secret bears only a minimal initial burden

> of demonstrating the existence of a trade secret ... . Contrary to [plaintiff's] contention, Morgan Stanley met its minimal initial burden of showing that the documents requested in paragraphs 11 through 19 in the section of the subpoena duces tecum entitled "Requests for Production" contained trade secrets ... . Thus, the burden shifted to [plaintiff] to demonstrate that the information contained in those documents was indispensable to the ascertainment of truth, and could not be acquired in any other way ... . **Ferolito v Arizona Beverages USA LLC, 2014 NY Slip Op 05153, 2nd Dept 7-9-14**

Affidavits, Deposition Testimony, and Letters Are Not Considered "Documentary Evidence" Within the Meaning of CPLR 3211(a)(1)

The Second Department described the types of documents which will not support a motion to dismiss pursuant to CPLR 3211(a)(1):

> "A motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim'" ... . "Neither affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)(1)"... . Contrary to the defendant's contention, an affidavit by a ... project manager did not constitute documentary evidence with the intendment of CPLR 3211(a)(1) ... . **JA Lee Elec Inc v City of New York, 2014 NY Slip Op 05159, 2nd Dept 7-9-14**

Rationale for Allowing a Late Motion for Summary Judgment When It Is Identical in Substance to a Timely Motion for Summary Judgment Made by Another Party Explained

The Second Department determined an untimely motion for summary judgment should not have been granted. The court explained that an untimely motion may be entertained when it is identical in substance to a timely summary judgment motion made by another party in the action. But that was not the case here. The timely motion made by the MTA defendants, who were deemed not liable, did not determine the liability of the LIPA defendants. Therefore, plaintiff's untimely motion for summary judgment against the LIPA defendants could not "rely" on the motion made by the MTA defendants:

> The plaintiff's motion for summary judgment on the issue of liability was made more than 90 days after the filing of the note of issue, in violation of the terms of a certification order requiring motions for summary judgment to be filed within 90 days of the filing of a note of issue (see CPLR 3212[a]...). Although an untimely motion or cross motion for summary judgment may be considered by the court, in the exercise of its discretion, where a timely motion for summary judgment was made on nearly identical grounds ..., that rule did not apply here. The reason why an untimely motion for summary judgment may be considered if another party made a motion on nearly identical grounds is that, pursuant to CPLR 3212(b), the court has the authority, on a motion for summary judgment, to search the record and award relief to a nonmoving party ... . In the instant case, the MTA defendants, the original movants, established as a matter of law that they were not at fault in the happening of the accident. However, the fact that the MTA defendants were not at fault in the happening of the accident did not mean that the LIPA defendants were at fault and, therefore, that the plaintiff was entitled to summary judgment against the LIPA defendants. Accordingly, the plaintiff's motion for summary judgment on the issue of liability against the LIPA defendants should have been denied as untimely. **Williams v Wright, 2014 NY Slip Op 05172, 2nd Dept 7-9-14**

Subsequent Action Which Included Claims Which Could Have Been Raised in the First Action Precluded by Doctrine of Res Judicata

The Third Department determined that a prior ruling had res judicata effect even though the subsequent action sought damages for a different period of time:

> Under the doctrine of res judicata, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" ... , so long as "the party to be barred had a full and fair opportunity to litigate any cause of action arising out of the same transaction and the prior disposition was a final judgment on the merits" ... . Thus, where those requirements have been met, if "a plaintiff in a later action brings a claim for damages that could have been presented in a prior [action] against the same party, based upon the same harm and arising out of the same or related facts, the claim is barred by res judicata" ... . Stated another way, "when a plaintiff brings an action for only part of his [or her] cause of action, the judgment obtained in that action precludes him [or her] from bringing a second action for the residue of the claim" ... .
>
> Here, the record reflects that plaintiff had a full opportunity to litigate the issues relating to his small claim for unpaid wages in City Court and

such court's disposition was a final decision on the merits. It is also evident that the claim brought by plaintiff in City Court and the instant action arise out of the same series of transactions in connection with his work for defendants. Although the present action concerns wages allegedly owed for a different time period than the City Court claim, inasmuch as it had matured at the time that plaintiff commenced the prior action ..., plaintiff could have also raised the current claim at that time ... . **Tovar v Tesoros Prop Mgt LLC, 2014 NY Slip Op 05233, 3rd Dept 7-10-14**

Statutory and Due-Process Criteria for Long-Arm Jurisdiction Over a Nondomiciliary Defendant Described

The Third Department determined Supreme Court properly exercised jurisdiction over defendant under the long-arm statute and under federal due process principles:

> In deciding whether an action may be maintained in New York against a nondomiciliary defendant, the court must first determine whether jurisdiction exists under New York's long-arm statute (see CPLR 302) based upon the defendant's contacts with this state; and, if it does, the court then determines "whether the exercise of such jurisdiction comports with due process" ... . The ultimate burden is on the plaintiff to demonstrate that such requirements have been met ... .
>
> Here, plaintiffs assert that defendant's conduct falls within the provisions of CPLR 302 (a) (3) (ii), which confers jurisdiction when a defendant commits a tortious act outside New York that causes injury to a person or property within the state and the defendant "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce" ... . * * *
>
> Based on the record before us, we likewise find that the exercise of jurisdiction over defendant is compatible with federal due process standards. Generally, "a State may constitutionally exercise jurisdiction over non-domiciliary defendants, provided they had certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice" ... . The relevant inquiry is whether a defendant "purposefully avai[led] itself of the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws" ... . Under the circumstances here, inasmuch as defendant targeted New York consumers through a network of distributors that rendered it likely that its products would be sold in New York, "it is not unreasonable to subject it to suit in [this state] if its allegedly defective merchandise has . . . been the source of injury to [a New York resident]" ... . **Darrow v Hectronic Deutschland, 2014 NY Slip Op 05239, 3rd Dept 7-10-14**

Untimely Summary Judgment Motion Which Is Nearly Identical to a Summary Judgment Motion Already Before the Court Should Be Considered

The Second Department explained when an untimely summary judgment motion, which is nearly identical to a timely summary judgment motion already before the court, should be considered:

> While the cross motion was made more than 120 days after the note of issue was filed and, therefore, was facially untimely ..., an untimely cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds ... . "In such circumstances, the issues raised by the untimely cross motion are already properly before the motion court and, thus, the nearly identical nature of the grounds may provide the requisite good cause (see CPLR 3212 [a]) to review the merits of the untimely cross motion. Notably, a court, in deciding the timely motion, may search the record and award summary judgment to a nonmoving party" (...see CPLR 3212 [b]). Therefore, the Supreme Court should have entertained the plaintiff's cross motion for summary judgment. **Wernicki v Knipper, 2014 NY Slip Op 05324, 2nd Dept 7-16-14**

Extremely Forgiving Nature of CPLR 3216 (Dismissal for Neglect to Prosecute) Explained

The Second Department noted the "extremely forgiving" nature of CPLR 3216 in affirming Supreme Court's denial of a motion to dismiss for neglect to prosecute:

> CPLR 3216 is "extremely forgiving" ... in that it "never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed" ... . While the statute prohibits the Supreme Court from dismissing an action based on neglect to proceed whenever the plaintiff has shown a justifiable excuse for the delay in the prosecution of the action and a meritorious cause of action (see CPLR 3216[e]...), such a dual showing is not strictly necessary to avoid dismissal of the action ... . **Altman v Donnenfeld, 2014 NY Slip Op 05402, 2nd Dept 7-23-14**

Criteria for Determining a Motion to Amend the Pleadings Explained

In reversing Supreme Court's denial of a motion for leave to serve a second amended complaint, the Second Department explained the criteria for determining the motion:

> "Applications for leave to amend pleadings under CPLR 3025(b) should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit" ... .
>
> "No evidentiary showing of merit is required under CPLR 3025(b)" ... . "The court need only determine whether the proposed amendment is palpably insufficient' to state a cause of action or defense, or is patently devoid of merit" (id.). "[A] court shall not examine the legal sufficiency or merits of a pleading unless such insufficiency or lack of merit is clear and free from doubt" ... . **Favia v Harley-Davidson Motor Co Inc, 2014 NY Slip Op 05408, 2nd Dept 7=23=14**

Defendant's Failure to Comply with Discovery Orders Warranted Striking the Answer

The Second Department determined defendant's answer was properly struck due to defendant's failure to comply with the court's orders concerning discovery:

> "[A] trial court is given broad discretion to oversee the discovery process" ... . When a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is within the court's discretion to strike the "pleadings or parts thereof" (CPLR 3126[3]) as a sanction against such party ... . However, public policy favors the resolution of cases on the merits ... . Accordingly, "the drastic remedy' of striking a pleading pursuant to CPLR 3126 should not be imposed unless the failure to comply with discovery demands or orders is clearly willful and contumacious" ... . "Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply or a failure to comply . . . with court-ordered discovery over an extended period of time" ... .
>
> Here, the plaintiff moved to strike the answer insofar as asserted by the defendant Roger Powell (hereinafter the defendant) almost three years after commencing this action. At that time, the defendant still had not appeared for a deposition, despite numerous "so-ordered" extensions entered into between counsel for the parties, and in violation of a court order directing him to appear for such deposition. In opposition to the motion, defense counsel's investigator stated that he had been unable to locate the defendant. Under these circumstances, the Supreme Court providently exercised its discretion in granting that branch of the plaintiff's motion which was to strike the answer insofar as asserted by the defendant and to direct an inquest against him ... . **Stone v Zinoukhova, 2014 NY Slip Op 05532, 2nd Dept 7-30-14**

Sua Sponte Dismissal of Complaint Not Justified and Improperly Imposed

In reversing Supreme Court, the Second Department noted the "sua sponte" dismissal of a foreclosure-complaint with prejudice was not justified and was improperly imposed without affording the plaintiff an opportunity to be heard:

> The Supreme Court ... erred in, sua sponte, directing dismissal of the action in its entirety with prejudice ... . "A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal" ... . Furthermore, when a court exercises its power to impose a sanction sua sponte, it must afford the party to be sanctioned a reasonable opportunity to be heard ... . **Bank of NY v Castillo, 2014 NY Slip Op 05823, 2nd Dept 8-20-14**

Supreme Court Erred by Making Dispositive Rulings on Grounds Not Raised in the Motion Papers

The Second Department determined Supreme Court should not have made dispositive rulings on grounds not raised in the motion papers. The court had granted plaintiff's (Evans') motion to discharge Citifinancial's mortgage and cancel the notice of pendency:

> Civil Practice Law and Rules § 2214(a) provides that "[a] notice of motion shall specify . . . the relief demanded and the grounds therefor." However, the court "may grant relief that is warranted by the facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party" ... . * * *
>
> On grounds not raised or argued by the parties nor contained in the pleadings, the Supreme Court granted Evans's motion, determining that Citifinancial never actually owned the mortgage. The Supreme Court determined that a prior

assignment of the mortgage to Citifinancial's predecessor had been defective on the grounds that the power of attorney needed to execute such assignment was not recorded and, as a result, the mortgage could not thereafter properly be assigned to Citifinancial. The Supreme Court erred in discharging the mortgage and cancelling the notice of pendency on such grounds since Evans failed to dispute or contest the validity of Citifinancial's mortgage and actually affirmatively acknowledged the validity of the mortgage in his complaint and motion to the court ... . **Evans v Argent Mtge Co LLC, 2014 NY Slip Op 05835, 2nd Dept 8-20-14**

Email and Affidavit Not Sufficient "Documentary Evidence" to Require Dismissal of Complaint

The First Department, over a dissent, determined that the documentary evidence (an email and an affidavit) submitted by the defendant in support of a motion to dismiss the complaint was not sufficient to warrant dismissal of the fraudulent and negligent misrepresentation causes of action. The complaint alleged defendant misrepresented that a non-party new hire, David Bowd, was not subject to a non-solicitation agreement, when, in fact, he was. The defendant submitted an email together with an affidavit in support of its motion to dismiss purporting to demonstrate plaintiff was informed of the non-solicitation agreement prior to hiring Bowd:

> The courts of this State have grappled with the issue of what writings do and do not constitute documentary evidence, since the term is not defined by statute. "Judicial records, such as judgments and orders, would qualify as documentary,' as should the entire range of documents reflecting out-of-court transactions, such as contracts, deeds, wills, mortgages, and even correspondence" (David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10 at 22). To qualify as "documentary," the paper's content must be "essentially undeniable and . . ., assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based. (Neither the affidavit nor the deposition can ordinarily qualify under such a test)" (id.).
>
> We have held that affidavits that "do no more than assert the inaccuracy of plaintiffs' allegations--may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint . . . and do not otherwise conclusively establish a defense to the asserted claims as a matter of law" ... . * * *
>
> The emails in this particular case, aside from being not otherwise admissible, are not able to support the motion to dismiss. The "documentary evidence" here ... do not, standing on their own, conclusively establish a defense to the claims set forth in the complaint. While they may indicate that Bowd put defendants on notice of potential employment restrictions, other letters indicate that Bowd had, in fact, accepted the offer of employment days before he sent the emails in question. Because defendant has not "negated beyond substantial question" the allegation of reasonable reliance, and the submissions raise factual issues concerning the circumstances and communications underlying plaintiff's hiring of Bowd, it cannot be concluded that plaintiff has no causes of action for fraudulent and negligent misrepresentation ... . **Amsterdam Hospitality Group LLC v Marshall-Anan Assoc Inc, 2014 NY Slip Op 06007, 1st Dept 8-28-14**

Criteria for Motion to Change Venue Explained---Plaintiff's Out-of-State Address in Police Report Not Enough to Support Defendant's Motion

The Second Department determined that the fact that a police accident report indicated the plaintiff resided in Texas was not sufficient to demonstrate that plaintiff was not a resident of Kings County (New York) where the action was brought. Defendant's motion to change the venue to Queens County, where defendant resided, was properly denied:

> CPLR 503(a) provides, in relevant part, that "the place of trial shall be in the county in which one of the parties resided when it was commenced." "For venue purposes, a residence is where a party stays for some time with a bona fide intent to retain the place as a residence for some length of time and with some degree of permanency" ... . "Residence means living in a particular place; domicile means living in that locality with intent to make it a fixed and permanent home'" ... . In the context of determining the proper venue of an action, a party can have more than one residence ... .
>
> "To effect a change of venue pursuant to CPLR 510(1), a defendant must show that the plaintiff's choice of venue is improper and that [his or her] choice of venue is proper" ... . To succeed on his motion here, the defendant was obligated to demonstrate that, on the date that this action was commenced, neither of the parties resided in the county that was designated by the plaintiff .. . Only if the defendant made such a showing was the plaintiff required to establish, in opposition, via documentary evidence, that the venue he selected was proper ... .

> Here, the sole piece of evidence that the defendant submitted with respect to the issue of the plaintiff's residence was the police accident report referable to the subject accident. This evidence merely showed that, at the time the accident occurred, the plaintiff had a residence in Texas. This evidence did not demonstrate that the plaintiff did not maintain a residence in Kings County at the time when the action was commenced, two months after the accident ... . Consequently, the defendant failed to meet his initial burden.
>
> Although a plaintiff may choose venue based solely on a defendant's address, as set forth in a police accident report ..., a police accident report, standing alone, is not sufficient evidence to demonstrate that, on the date that an action is commenced, a plaintiff does not reside in the county where he or she elects to place the venue of trial. To the extent that this Court's decisions in Samuel v Green (276 AD2d 687) and Senzon v Uveges (265 AD2d 476) may be read to indicate to the contrary, they should not be followed. **Chehab v Roitman, 2014 NY Slip Op 05939, 2nd Dept 8-27-14**

Class Certification Properly Denied---Disputes Among Plaintiffs Made It Impossible for Them to Fairly and Adequately Represent Members of the Class

The Second Department determined that disputes among plaintiffs seeking class certification made it impossible for the plaintiffs to fairly and adequately represent each member of the class:

> The plaintiffs commenced this action, inter alia, to recover money which, they alleged, had been unlawfully deducted from commissions they earned while working as commissioned sales staff for the defendant. The plaintiffs then sought certification of the matter as a class action on behalf of all nonexempt persons employed by the defendant in New York State as salespersons during the six years prior to the filing of the complaint in this action. * * *
>
> A class action may be maintained in New York only after the five prerequisites of CPLR 901(a) have been satisfied (see CPLR 902...). Once those prerequisites are satisfied, the court "shall consider" the factors set forth in CPLR 902 (CPLR 902...). The class representative "bears the burden of establishing compliance with the requirements of both CPLR 901 and 902, and the determination is ultimately vested in the sound discretion of the trial court" ... .
>
> One of the prerequisites to class certification requires the class representative to demonstrate that "the representative . . . will fairly and adequately protect the interests of the class" (CPLR 901[4]). "A class representative acts as principal to the other class members and owes them a fiduciary duty to vigorously protect their interests" ... . "That responsibility clearly encompasses the duty to act affirmatively to secure the class members' rights as well as to oppose the adverse interests asserted by others" (id. at 100). "The three essential factors to consider in determining adequacy of representation are potential conflicts of interest between the representative and the class members, personal characteristics of the proposed class representative (e.g. familiarity with the lawsuit and his or her financial resources), and the quality of the class counsel" ... .
>
> Here, the plaintiffs failed to sustain their burden of demonstrating that they would fairly and adequately protect the interests of the class (see CPLR 901[4]...). To the contrary, the record discloses that one of the proposed representatives maintains that he was entitled to a certain commission that was wrongfully paid by the defendant to a different member of the proposed class. Given the evidence in the record indicating that such disputes between and among salespersons were not unusual, we conclude that there exist potential conflicts of interest between the representatives and the class members such that the plaintiffs cannot fairly and adequately represent the interest of each member of the class ... . **Cooper v Sleepy's LLC, 2014 NY Slip Op 05942, 2nd Dept 8-27-14**

Must Commence New Action to Renew a Judgment Lien After Passage of Ten Years

The Second Department determined the failure to commence a new action to renew a judgment lien after the passage of ten years required the denial of a motion to renew the judgment lien:

> "Since a money judgment is viable for 20 years, but a lien on real property is only effective for 10 years (see CPLR 211[b]; 5203[a]), the Legislature enacted CPLR 5014 to allow a judgment creditor to apply for a renewal of the lien by commencing an action for a renewal judgment" ... . "Pursuant to CPLR 5014(1), an action upon a money judgment may be maintained between the original parties where ten years have elapsed since the judgment was originally docketed" ... . Thus, an action for a renewal judgment is not time-barred

even when it is commenced more than 10 years after the original judgment was docketed ... .

Here, instead of commencing a new action, as required by CPLR 5014, the plaintiff moved in the instant, original action to renew the judgment lien. In view of the plaintiff's failure to commence a new action and thereby satisfy the procedural requirement of CPLR 5014, the Supreme Court properly denied that branch of her motion which was to renew the judgment lien on the subject property. **Guerra v Crescent St Corp, 2014 NY Slip Op 05948, 2nd Dept 8-27-14**

Failure to Comply with Conditional Preclusion Order (Re: Discovery) Led to Dismissal of the Complaint

The Second Department determined the complaint was properly dismissed because the plaintiffs failed to comply with a conditional preclusion order requiring the provision of discovery within 30 days and did not provide sufficient reason to vacate the preclusion order after it went into effect. The court explained the relevant procedure:

A conditional order of preclusion requires a party to provide certain discovery by a date certain, or face the sanctions specified in the order ... . As a result of the plaintiffs' failure to timely comply with the conditional order of preclusion, that conditional order became absolute ... . To be relieved of the adverse impact of the conditional order of preclusion, the plaintiffs were required to demonstrate a reasonable excuse for their failure to comply with the order and the existence of a potentially meritorious cause of action ... . The plaintiffs failed to demonstrate either ... . Accordingly, the Supreme Court properly denied that branch of the plaintiffs' motion which was to vacate the conditional preclusion order and properly granted the respondents' cross motion to dismiss the complaint on the ground that the plaintiffs failed to comply with the conditional order of preclusion. **Hughes v Brooklyn Skating LLC, 2014 NY Slip Op 05951 8-27-14**

Premature Return Date and Wrong Courthouse Address in Notice of Motion Constituted Jurisdictional Defects

The Second Department determined that setting a premature return date and using the wrong address for the courthouse in a notice of motion were jurisdictional defects that could not be cured pursuant to CPLR 2001:

These defects in the notice of motion, under the particular circumstances of this case and in the context of an action commenced pursuant to CPLR 3213, created a greater possibility of frustrating the core principles of notice to the defendants ... . Accordingly, these defects constitute "jurisdictional defect[s] that courts may not overlook" pursuant to CPLR 2001 ... . Since the Supreme Court failed to acquire personal jurisdiction, "all subsequent proceedings are thereby rendered null and void" ..., and the default judgment entered against the defendants is "a nullity"... . **Segway of NY Inc v Udit Group Inc, 2014 NY Slip Op 05971, 2nd Dept 8-27-14**

CIVIL PROCEDURE/CONFLICT OF LAWS/NEGLIGENCE

New York's Seatbelt Defense Applies to Action Stemming from Pennsylvania Accident (Where There Is No Seatbelt Defense)---Defense Is Not a Conduct-Regulating Law (Which Would Trigger the Application of Pennsylvania Law)---Rather the Defense Relates to the Allocation of Damages (Which Supports the Application of New York Law)

The Fourth Department determined New York's "failure to wear a seatbelt" defense applied in an action stemming from an accident in Pennsylvania involving New York residents. The court explained the operative criteria:

Plaintiff contends that the court erred in denying her motion because New York's seat belt affirmative defense regulates conduct, and thus does not apply in a tort dispute arising from an accident that occurred in Pennsylvania. We reject that contention. "Conduct-regulating rules have the prophylactic effect of governing conduct to prevent injuries from occurring" ... . " If conflicting conduct-regulating laws are at issue, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders' " ... . Conversely, where the conflicting laws serve only to allocate losses between the parties, such as vicarious liability or comparative negligence rules, the jurisdiction where the tort occurred has only a minimal interest in applying its own law ... .

Here, the conflicting laws relate to whether there is a valid affirmative defense of seat belt nonuse. Pennsylvania law prohibits the presentation of evidence of seat belt nonuse ... , while New York law allows the trier of fact to consider a plaintiff's failure to wear an available seat belt only in assessing damages and the plaintiff's mitigation thereof ... . We therefore conclude that the court properly determined that the seat belt defense "allocate[s] losses after the tort occurs" ... . **Lankenau v Patrick K Boles, M & S Leasing**

Co LLC, 2014 NY Slip Op 05255, 4th Dept 7-11-14

CIVIL PROCEDURE/CORPORATION LAW

Service Requirements of Business Corporation Law Trumped CPLR

The Third Department determined the service requirements of the Business Corporation Law trumped the CPLR:

> It is well settled that the CPLR "govern[s] the procedure in civil judicial proceedings . . . except where the procedure is regulated by inconsistent statute" (CPLR 101...). As is relevant here, the procedure for the judicial dissolution of corporations is governed by Business Corporation Law article 11. Business Corporation Law § 1106 in particular provides that an order to show cause is to be served upon, among others, "the corporation[s] and upon each person named in the petition" (Business Corporation Law § 1106 [c]), while the petition need only be filed with the county clerk (see Business Corporation Law § 1106 [d]). As this is inconsistent with the requirements of CPLR 406 (b), the specific requirements of Business Corporation Law § 1106 control in this circumstance ... . **Matter of Gould Erectors & Rigging Inc, 2014 NY Slip Op 05004, 3rd Dept 7-3-14**

CIVIL PROCEDURE/EQUITABLE ESTOPPEL/GOVERNMENTAL IMMUNITY/ENVIRONMENTAL LAW

Equitable Estoppel Against NYS Department of Environmental Conservation (DEC) Not Available Under the Facts

The Third Department determined the doctrine of equitable estoppel could not be applied to a statute of limitations defense raised by the Department of Environmental Conservation (DEC). The petitioner's president [Sage] alleged he was told by an employee of the DEC [Lynch] that he need not comply with the 30 day time limit for challenging the DEC's approval of a Freshwater Wetlands permit:

> It is axiomatic that the doctrine of equitable estoppel cannot generally be invoked against governmental agencies in the exercise of their governmental function ... . However, estoppel may apply in certain "exceptional cases in which there has been a showing of fraud, misrepresentation, deception, or similar affirmative misconduct, along with reasonable reliance thereon" ... .
>
> Here, less than 30 days after the permit was issued, Sage spoke with Lynch regarding petitioner's plans to challenge the permit. According to Sage, Lynch explained that he was not adequately familiar with the permit and needed to review the matter. Sage "believe[d]" that it was during this conversation that Lynch told him that petitioner did not need to commence a CPLR article 78 proceeding within 30 days of the issuance of the permit because petitioner had four months to bring a challenge, which would give Lynch time to review it. Although Lynch acknowledged having spoken to Sage about the permit, he denied telling Sage that the applicable statute of limitations was four months or that the limitations period would be extended. Indeed, Lynch averred that he had no authority to waive or extend the applicable statute of limitations on behalf of DEC, and the statement that petitioner attributes to Lynch was, at best, akin to erroneous advice that does not rise to the level necessary to implicate the exception where estoppel may be invoked against a governmental agency...
> . **Matter of Atlantic States Legal Found Inc v NYS Dept of Envtl Conservation, 2014 NY Slip Op 05384, 3rd Dept 7-17-14**

CIVIL PROCEDURE/JUDGMENTS/ EQUAL PROTECTION CLAUSE

Distinction Between New York College Funds, Which Are Protected Against Creditors, and College Funds Established in Other States, Which Are Not Protected, Does Not Violate the Equal Protection Clause

The Second Department determined that a college fund established under the laws of New Hampshire, unlike a college fund established under the laws of New York, was not entitled to the protection from creditors afforded by CPLR 5205. The distinction between New York funds and funds established in other states was deemed to be constitutional:

> The parties do not dispute that the protection from creditors afforded by CPLR 5205(j)(2) to college tuition savings program accounts defined in 26 USC § 529 (hereinafter 529 savings plans) does not apply where, as here, the accounts are not qualified college savings program accounts established pursuant to the New York State College Choice Tuition Saving Program, as set forth in Education Law article 14-A. The Supreme Court correctly concluded that the distinction made in CPLR 5205(j) between 529 savings plans established under the laws of New York, and those established in other states, or under the laws of other states, does not violate the equal protection clause of the United States

Constitution. Since the classification "is not based on an inherently suspect characteristic and does not impermissibly interfere with the exercise of a fundamental right, it need only rationally further a legitimate state interest to be upheld as constitutional" ... . Applying this standard of rational basis review, the court properly determined that CPLR 5205(j) was not unconstitutional, as the disparate treatment is not " so unrelated to the achievement of any combination of legitimate purposes"' as to be irrational ... . **County Bank v Broderick, 2014 NY Slip Op 05621, 2nd Dept 8-6-14**

CIVIL PROCEDURE/ MORTGAGE FORECLOSURE

"Sua Sponte" Dismissal of Complaint Based on Lack of Standing Reversed

The Second Department, in a foreclosure action, determined Supreme Court abused its discretion in dismissing, sua sponte, the complaint on the ground the plaintiff lacked standing. The court explained that sua sponte dismissal is warranted only in extraordinary circumstances, the defendants had not raised the "lack of standing" defense, and lack of standing is not a jurisdictional defect:

> A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal ... . Here, the Supreme Court was not presented with extraordinary circumstances warranting sua sponte dismissal of the complaint and cancellation of the notice of pendency. Since the defendants did not answer the complaint and did not make pre-answer motions to dismiss the complaint, they waived the defense of lack of standing ... . Furthermore, a party's lack of standing does not constitute a jurisdictional defect and does not warrant a sua sponte dismissal of the complaint by the court ... . **Bank of NY v Cepeda, 2014 NY Slip Op 05614, 2nd Dept 8-6-14**

CIVIL PROCEDURE/MORTGAGE FORECLOSURE/HOME AFFORDABLE MORTGAGE PROGRAM (HAMP)

Bank Did Not Negotiate a Mortgage Modification in Good Faith as Required by CPLR 3408---Applicable "Good Faith" Standard Determined and Explained

The Second Department, in a full-fledged opinion by Justice Leventhal, determined that Supreme Court had properly found that plaintiff bank did not negotiate in good faith a mortgage modification pursuant to the Home Affordable Mortgage Program (HAMP) (CPLR 3408). In the course of the opinion, the court described the applicable "good faith" standard:

> ...[W]e hold that the issue of whether a party failed to negotiate in "good faith" within the meaning of CPLR 3408(f) should be determined by considering whether the totality of the circumstances demonstrates that the party's conduct did not constitute a meaningful effort at reaching a resolution. We reject the plaintiff's contention that, in order to establish a party's lack of good faith pursuant to CPLR 3408(f), there must be a showing of gross disregard of, or conscious or knowing indifference to, another's rights. Such a determination would permit a party to obfuscate, delay, and prevent CPLR 3408 settlement negotiations by acting negligently, but just short of deliberately, e.g., by carelessly providing misinformation and contradictory responses to inquiries, and by losing documentation. Our determination is consistent with the purpose of the statute, which provides that parties must negotiate in "good faith" in an effort to resolve the action, and that such resolution could include, "if possible," a loan modification (CPLR 3408[f]...).
>
> Where a plaintiff fails to expeditiously review submitted financial information, sends inconsistent and contradictory communications, and denies requests for a loan modification without adequate grounds, or, conversely, where a defendant fails to provide requested financial information or provides incomplete or misleading financial information, such conduct could constitute the failure to negotiate in good faith to reach a mutually agreeable resolution.
>
> In this case, the totality of the circumstances supports the Supreme Court's determination that the plaintiff failed to act in good faith, as the plaintiff thwarted any reasonable opportunities to settle the action, thus contravening the purpose and intent of CPLR 3408. **US Bank NA v Sarmiento, 2014 NY Slip Op 05533, 2nd Dept 7-30-14**

CIVIL PROCEDURE/NEGLIGENCE

Successive Summary Judgment Motions OK Based On Evidence Learned in Discovery

The Third Department noted that successive summary judgment motions are allowed where discovery turns up new evidence. In this case summary judgment was granted to the defendants who were struck by plaintiff's decedent's vehicle which had crossed over into on-coming traffic:

> Although successive summary judgment motions are generally discouraged absent "'a showing of newly discovered evidence or other sufficient cause'" ..., where, as here, evidence produced from additional discovery places the motion court "in a far better position to determine" a legally dispositive issue, the court should not be precluded from exercising its discretion to consider the merits of a subsequent motion ... . **Foster v Kelly, 2014 NY Slip Op 05472, 3rd Dept 7-24-14**

Advertising in New York and an Interactive Website Not Enough to Exercise Long-Arm Jurisdiction

The Second Department determined Supreme Court properly dismissed an action against a Vermont ski business (Killington) because plaintiffs failed demonstrate a basis for New York's long-arm jurisdiction. The court noted that advertising in New York and the existence of an interactive website through which out-of-state residents make reservations for participation in the defendant's ski camp was not sufficient to bring the defendant within the jurisdiction of New York courts:

> Even assuming that Killington engaged in substantial advertising in New York, as the plaintiffs claim, the plaintiffs have not demonstrated that Killington also engaged in substantial activity within this State sufficient to satisfy the solicitation-plus standard. Contrary to the plaintiffs' contention, this Court's decision in Grimaldi v Guinn (72 AD3d 37, 49-50) does not stand for the principle that a business's interactive website, accessible in New York, subjects it to suit in this State for all purposes. Instead, the Grimaldi decision stands only for the more limited principle that a website may support specific jurisdiction in New York where the claim asserted has some relationship to the business transacted via the website ... . Here, even Killington's alleged substantial solicitation in New York constitutes no more than solicitation ... .
>
> CPLR 302(a)(1), the section of New York's long-arm statute at issue in this case, grants New York courts jurisdiction over nondomiciliaries when the action arises out of the nondomiciliaries' "transact[ion of] any business within the state or contract [] . . . to supply goods or services in the state" (CPLR 302[a][1]). Pursuant to CPLR 302(a)(1), jurisdiction is proper "even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" ... . "Purposeful activities are those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws'" ... . **Mejia-Haffner v Killington, Ltd, 2014 NY Slip OP 05522, 2nd Dept 7-30-14**

CIVIL PROCEDURE/RES JUDICATA

Transactional Res Judicata Analysis Explained

In determining a motion to amend the answer was precluded by the doctrine of res judicata, the Second Department wrote:

> "[U]nder New York's transactional analysis approach to res judicata, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy'" ... . "In determining whether a factual grouping constitutes a transaction for res judicata purposes, a court must apply a pragmatic test and analyze how the facts are related as to time, space, origin or motivation, whether they form a convenient trial unit, and whether treating them as a unit conforms to the parties' expectations or business understanding" ... . **Matter of Haberman v Zoning Bd of Appeals of the City of Long Beach, 2014 NY Slip Op 05335, 2nd Dept 7-16-14**

CONTRACT LAW

Partial Performance of an Oral Modification Will Allow Enforcement of the Oral Modification Even Where the Written Agreement Prohibits Oral Modification

The Second Department explained that an oral modification of a written agreement which prohibits oral modification can be enforced if there is partial performance of the oral modification:

> "Generally, a written agreement which prohibits oral modification can only be changed by an executory agreement . . . in writing'" (...General Obligations Law § 15-301 [1]). "However, an oral modification is enforceable if the party seeking enforcement can demonstrate partial performance of the oral modification, which performance must be unequivocally referable to the modification" ... . **Matter of Latin Events LLC v Doley, 2014 NY Slip Op 05644, 2nd Dept 8-6-14**

On a Motion for Summary Judgment, to Successfully Contest a Party's Construction of an Ambiguous Contract, the Opposing Party Must Present Evidence Supporting a Competing Construction

In reversing Supreme Court, the Second Department explained the burdens of proof on a summary judgment motion where a contract is ambiguous:

> Whether or not a contract is ambiguous is a question of law to be resolved by the court ... . Where a court determines that the terms of the agreement are ambiguous and the intent of the parties becomes a matter of inquiry, parol evidence is permitted to determine that intent ... . Where the movant submits evidence to support its construction, the opposing party may not defeat the motion merely by alleging that the term is ambiguous; it "must also set forth the extrinsic evidence, in evidentiary form, upon which it relies to support the construction it urges" ... . **1375 Equities Corp v Buildgreen Solutions LLC, 2014 NY Slip Op 05966, 2nd Dept 8-27-14**

CONTRACT LAW/AGENCY/LIMITED LIABILITY CORPORATION LAW

Criteria for "Apparent Authority" to Enter a Binding Contract, Including the "Apparent Authority" of a Member of a Limited Liability Corporation, Explained

In determining the criteria for apparent authority, including apparent authority under the Limited Liability Corporation Law, had been met, the Fourth Department held that member of the defendant limited liability corporation (Sultan) entered into a binding contract on behalf of the defendant corporation:

> "Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by his own acts imbue himself with apparent authority. Rather, the existence of apparent authority depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal — not the agent" ... . Here, we conclude that plaintiffs reasonably relied on, inter alia, their prior course of dealing with Sultan in his capacity as president, principal and manager of defendant ... . * * *
>
> ...[W]e note that Limited Liability Company Law § 412 (a) provides that, "[u]nless the articles of organization of a limited liability company provide that management shall be vested in a manager or managers, every member is an agent of the limited liability company for the purpose of its business, and the act of every member, including the execution in the name of the limited liability company of any instrument, for apparently carrying on in the usual way the business of the limited liability company, binds the limited liability company, unless (i) the member so acting has in fact no authority to act for the limited liability company in the particular matter and (ii) the person with whom he or she is dealing has knowledge of the fact that the member has no such authority." A nearly identical subsection provides that, where management of an LLC is vested in a manager, the acts of the manager are binding upon the LLC unless the manager at issue has in fact no authority to act for the LLC, and the person with whom he or she is dealing knows that the manager lacks such authority (§ 412 [b] [2] [A], [B]). Thus, regardless whether Sultan was acting as a manager of defendant, as reflected by his signature on the contract, or as a member of defendant, as he and defendant's attorney previously had indicated to plaintiffs, he had apparent authority to act and his acts were binding upon defendant unless, inter alia, plaintiffs had "knowledge of the fact that [Sultan] ha[d] no such authority" ... . **Pasquarella v 1525 William St LLC, 2014 NY Slip Op 05745, 4th Dept 8-8-14**

CONTRACT LAW/MORTGAGES/STATUTE OF FRAUDS

Insufficient Proof of an Agreement to Assume a Mortgage at the Time Deed Transferred

The Second Department determined that the writings were insufficient to demonstrate the grantee agreed to assume a mortgage at the time the deed was transferred:

> General Obligations Law § 5-705 provides, in relevant part, that "[n]o grantee of real property shall be liable upon any indebtedness secured by a mortgage" unless, "simultaneously with the conveyance," the grantee executes a writing before a notary agreeing to assume and pay the mortgage debt. Here, it is clear from the allegations in the complaint and attached exhibits that the defendants did not execute a notarized written agreement to assume the mortgage allegedly held by the plaintiff at the time the properties were conveyed ... . Thus, General Obligations Law § 5-705 bars the plaintiff from recovering on the theory that the defendants agreed to assume his existing mortgage on the properties as alleged in the complaint. Furthermore, [recovery] is also barred by the

statute of frauds because an agreement to answer for the debt of another must be in writing (see General Obligations Law § 5-701[a][2]). Contrary to the plaintiff's contention, the various writings attached to the complaint, taken together, were insufficient to memorialize the existence of an agreement ... . **Dahan v Weiss, 2014 NY Slip Op 05767, 2nd Dept 8-13-14**

CORPORATION LAW

Corporation Dissolved for Failure to Pay Franchise Taxes Can Be Sued On Its Pre-Dissolution Obligations

The Second Department explained that a corporation that has been dissolved by the Secretary of State for failure to pay franchise taxes continues to exist for winding up its affairs and may be sued on its pre-dissolution obligations:

> Pursuant to Tax Law § 203-a, a corporation can be dissolved by proclamation of the Secretary of State for failure to pay its franchise taxes. A dissolved corporation may not carry on new business (see Business Corporation Law § 1005[a][1]) and no longer has the right to commence an action in the courts of this State, except in specific circumstances permitted by statute ... . Business Corporation Law § 1006 provides, in relevant part, that a dissolved corporation "may continue to function for the purpose of winding up the affairs of the corporation . . . The dissolution of a corporation shall not affect any remedy available to or against such corporation, its directors, officers or shareholders for any right or claim existing or any liability incurred before such dissolution, except as provided in sections 1007 . . . or 1008."
>
> A corporation therefore "continues to exist after dissolution for the winding up of its affairs, and a dissolved corporation may sue or be sued on its obligations, including contractual obligations and contingent claims, until its affairs are fully adjusted" ... . The Business Corporation Law requires that the claim was to have existed before dissolution ... . **MMI Trading Inc v Nathan H Kelman Inc, 2014 NY Slip Op 05632, 2nd Dept 8-6-14**

Allegation Corporation Was Deliberately Rendered Judgment Proof by Parent Corporation Is Sufficient to Support Action in Equity to Pierce the Corporate Veil

The First Department explained the nature of "wrongdoing" which will support a complaint in equity seeking to pierce the corporate veil:

> ....[T]he allegations that defendant [parent corporation], through its domination of [its subsidiary] PFLLC, misrepresented the value of the assets sold and then caused PFLLC to become judgment proof, are ... sufficient to support claims that defendant perpetrated a wrong or injustice against plaintiff, thus warranting intervention by a court of equity ... . Wrongdoing in this context does not necessarily require allegations of actual fraud. While fraud certainly satisfies the wrongdoing requirement, other claims of inequity or malfeasance will also suffice ... . Allegations that corporate funds were purposefully diverted to make it judgment proof or that a corporation was dissolved without making appropriate reserves for contingent liabilities are sufficient to satisfy the pleading requirement of wrongdoing which is necessary to pierce the corporate veil on an alter-ego theory ... . **Baby Phat Holding Co LLC v Kellwood Co., 2014 NY Slip Op 05925, 1st Dept 8-21-14**

CORPORATION LAW/CONTRACT LAW

Failure to Comply with a Time-Limit for a Buy-Out in a Shareholders' Agreement Was Trumped by the Overall Purpose of the Agreement---Shareholder Properly Compelled to Sell His Shares

The Third Department determined a shareholders' agreement. although it did not address the particular problem at issue, must be read to avoid a result which would be at odds with the clear purposes of the agreement. One of the three shareholders of the closely held corporation (the defendant) was convicted of a felony and the other shareholders terminated his employment and sought to buy his shares. The defendant sought to prohibit the buy-out by arguing it was untimely under the terms of the shareholders' agreement. Because the corporation distributed alcoholic beverages, if the defendant remained a shareholder the corporation would lose its distributor's license:

> A shareholders' agreement — like any other contract — should be enforced according to its terms ... . In so doing, "[t]he contract must be read as a whole to determine its purpose and intent, and it should be interpreted in a way [that] reconciles all its provisions, if possible" ... . To

that end, "the goal should be a practical construction of the language used so that the reasonable expectations of the parties are realized" ..., and "the contract must be interpreted so as to give effect to, not nullify, its general or primary purpose" ... .

Here, the shareholders' agreement reflects "[t]he shareholders['] desire to establish a market value for their shares, to effectively control the management of the company, for their mutual best interests, and to protect against divisive relationships which would arise if outsiders with incompatible management philosophies gained interests in the company." Consistent with that stated objective, the agreement further recognizes that "[t]he company is dependent upon and derives substantial benefit from the continued active interest and participation of those shareholders who participate in the management of the company." In an attempt to preserve the closely-held nature of the corporation, the agreement provides that when a shareholder's employment with the corporation ceases, "he or she shall be treated as though he or she were selling all of his or her shares under paragraph A of . . . [s]ection [t]wo [of the agreement]," which outlines the procedures to be followed when a shareholder, during the course of his or her lifetime, "transfer[s] any of his or her shares to anyone other than a family member." In such case, the shareholder is to give notice of his or her intention to sell and, "[f]or a period of thirty [30] days after the notice is delivered, the [corporation] shall have an option to purchase all or any part of the offered shares on the payment terms specified in [s]ection [f]our [of the agreement]." If the corporation does not exercise such option, then the remaining shareholders are granted an additional 30-day option to purchase any or all of the available shares. * * *

...[R]eading the agreement as a whole and affording it a practical construction that is consistent with and gives proper effect to the parties' stated intentions ..., we are satisfied that Supreme Court properly granted plaintiffs' motion to compel [defendant] to sell his shares to the corporation — even if that option to purchase was not timely exercised. To hold otherwise and permit [defendant] to retain his shares due to the asserted noncompliance with the time period set forth in the shareholders' agreement not only would effectively rewrite the parties' agreement and undermine its stated purpose, i.e., to retain managerial control within the closely-held family corporation, but would place the corporation at risk of losing its distributor's license, thereby rendering its stock worthless... . **A Cappione Inc v Cappione, 2014 NY Slip Op 05230, 3rd Dept 7-10-14**

CRIMINAL LAW

Defendant Not Afforded Right to Testify Before Grand Jury---Indictment Dismissed

The Second Department determined the indictment must be dismissed (without prejudice) because the defendant was not afforded his right to testify before the grand jury:

> CPL 190.50(5) provides that a defendant has a right to appear and testify before a grand jury if he or she serves written notice of his or her intent to do so upon the District Attorney before an indictment is filed. "[T]he opportunity to testify prior to any Grand Jury vote is qualitatively different from and more advantageous than the opportunity to testify . . . after the Grand Jury ha[s] committed itself to a vote based on the prosecution's ex parte presentment of evidence" ... . Thus, a defendant who provides timely notice "prior to the prosecution's presentment of evidence and prior to the Grand Jury vote on an indictment [is] entitled to testify before the vote" ... .
>
> Where, as here, the defendant has been arraigned upon an undisposed felony complaint, the People must notify the defendant of the grand jury proceeding and accord him or her a reasonable time to appear (see CPL 190.50[5][a]...). Here, the People's notice pursuant to CPL 190.50 indicated that the defendant was "scheduled to testify" before the grand jury on June 8, 2010, and that his testimony was required to have been given before 5:00 p.m. on that date. The record reveals that the defendant provided the People with written notice of his intent to testify before the grand jury pursuant to CPL 190.50, at the latest, by 3:37 p.m. on June 7, 2010. Thus, the defendant provided the People with the requisite notice more than 24 hours in advance of his proposed appearance. Under these circumstances, the defendant was entitled to testify prior to the grand jury's vote. **People v Ellison, 2014 NY Slip Op 04957, 2nd Dept 7-2-14**

County Court Should Have Afforded Defendant Opportunity to Withdraw His Plea Before Imposing an Enhanced Sentence Based Upon Post-Plea Events

The Third Department determined County Court should not have imposed an enhanced sentenced based upon

post-plea events without affording the defendant the opportunity to withdraw his plea:

> A sentencing court may not impose an enhanced sentence unless it has informed the defendant of specific conditions that the defendant must abide by or risk such enhancement, or give the defendant an opportunity to withdraw his or her plea before the enhanced sentence is imposed ... . Here, County Court enhanced defendant's sentence due to defendant's arrest while on release pending sentencing. However, the record reflects that defendant was never warned that County Court would not be bound by its sentencing commitment if he were arrested while out on release ... . Consequently, County Court erred in imposing an enhanced sentence without first providing defendant an opportunity to withdraw his plea... . **People v Tole, 2014 NY Slip Op 04980, 3rd Dept 7-3-14**

Court's Failure to Conduct an Inquiry After Learning of a Juror's Comments During Trial Indicating Her Lack of Impartiality Required Reversal

The Second Department determined that the trial judge had been made aware of information raising the possibility that a juror would not be impartial and erred in not conducting an inquiry:

> The Court of Appeals, in People v Buford (69 NY2d 290, 299), set forth the basic framework to be followed when conduct occurs during a trial that may be the basis for disqualifying a juror. The court should conduct an in camera inquiry of the juror, in which counsel should be permitted to participate if they desire, and evaluate the nature and importance of the information and its impact on the case ... . In addition, the "trial court's reasons for its ruling should be placed on the record . . . [and] the court may not speculate as to possible partiality of the juror" ... . Although the Court of Appeals acknowledged that an "in camera inquiry may not be necessary in the unusual case . . . where the court, the attorneys, and defendant all agree that there is no possibility that the juror's impartiality could be affected and that there is no reason to question the juror" (People v Buford, 69 NY2d 299 n 4), here, defense counsel wanted the juror to be questioned.
>
> The Supreme Court erred in failing to conduct an in camera "probing and tactful inquiry" (id. at 299) of juror number seven, during the trial, when it was alleged that he had stated "the evidence speaks for itself or they got themsel[ves] into this situation" ..., and subsequently, after deliberations had commenced, when it was alleged that juror number seven had engaged in flirtatious conduct with someone connected to the defendant as well as someone connected to the codefendant ... . Since the court's general inquiry of the jurors with respect to the first incident failed to meet the requirements of Buford ..., and no inquiry at all was made with respect to the later incidents ..., it is unknown whether the juror held an opinion that affected his ability to be impartial ... . Such an error is not subject to harmless error analysis and, thus, the conviction must be reversed ... . **People v Henry, 2014 NY Slip Op 04962, 2nd Dept 7-2-14**

Court's Refusal to Allow Defendant to Inspect His Laptop Computer, Evidence from Which Was Central to the People's Case, Was Reversible Error

The Second Department determined that denial of defendant's request to inspect his laptop computer, from which evidence was extracted to prosecute him, was reversible error:

> The trial court erred in denying the defendant's motion to compel the People to provide the defendant with the opportunity to inspect the laptop computer that was seized from his home and for an adjournment of the trial, in order to permit the defense to examine that computer (see CPL 240.20[1][f]...). The defendant was entitled to inspect the laptop computer, pursuant to CPL 240.20(1)(f), and the defendant made a timely demand to inspect the laptop computer (see CPL 240.20[1][f]...).
>
> Further, the laptop computer was central to the People's case against the defendant; the People's expert witness testified, at length, as to his examination of the laptop computer, the evidence that was extracted from that computer, and the basis for his conclusion that such evidence was accessed from or uploaded to the internet by the defendant. Additionally, the prosecution provided no reason for its failure to provide the computer to the defense. Under these circumstances, this error warrants reversal ... . **People v Naran, 2014 NY Slip Op 04969, 2nd Dept 7-2-14**

Court Erred In Failing to Hold a Restitution Hearing---No Support In Record for Amount Imposed

The Third Department determined County Court erred by imposing $100,000 restitution without a hearing. The People had determined the $100,000 figure was excessive and had requested restitution in the approximate amount of $32,000:

....[W]e agree with defendant that County Court erred in ordering restitution in the amount of $100,000 without a hearing. By statute, when a court requires restitution, it must make a finding as to the actual amount of loss and, "[i]f the record does not contain sufficient evidence to support such finding or upon request by the defendant, the court must conduct a hearing" (Penal Law § 60.27 [2]...). Defendant sufficiently preserved this challenge to the increased amount of restitution, in that defense counsel and the People questioned it at sentencing ... . Upon review, we find that there is no evidence in the record to support the court's imposition of $100,000 in restitution. To the contrary, at sentencing the People characterized such figure as "excessive," stated that they "lacked sufficient documentation and proof" to support that amount, and proffered evidence supporting restitution in the amount of $32,240, a figure to which the victim, the court and defendant had all agreed. Further, there are statutory limits on the amount of restitution, which may be exceeded, as relevant here, provided '"the amount in excess [is] limited to the return of the victim's property, including money, or the equivalent value thereof"' ... . Accordingly, the matter must be remitted for a restitution hearing or a redetermination of restitution consistent with the plea agreement. Given that "[a] sentencing court may not impose a more severe sentence than one bargained for without providing [the] defendant the opportunity to withdraw his [or her] plea" ..., under the circumstances here, upon remittal, defendant must be afforded an opportunity to withdraw his guilty plea if a hearing is held and the amount of restitution imposed exceeds the originally agreed upon amount, i.e., $32,240. **People v Pleasant, 2014 NY Slip Op 04981, 3rd Dept 7-3-14**

Denial of For Cause Challenge to Juror Required Reversal

The Third Department determined the trial court erred in denying defendant's "for cause" challenge to a juror:

> "Prospective jurors who make statements that cast serious doubt on their ability to render an impartial verdict, and who have given less-than-unequivocal assurances of impartiality, must be excused" ... . Here, during jury selection, juror No. 153 stated that he was "very uncomfortable" about the alleged use of a firearm during the commission of the charged crimes. When asked by defense counsel if his stated discomfort was something that would affect his ability to keep an open mind, juror No. 153 responded, "It might. I can't say for sure what it is, but it's a concern to me."
>
> After questioning of this panel had concluded, and out of the presence of the prospective jurors, defense counsel challenged juror No. 153 for cause. County Court, stating that defense counsel failed to ask any follow-up questions of juror No. 153 at the time the juror made the subject statements in order to make out an appropriate foundation for cause, denied the challenge. Having heard the statements by juror No. 153, County Court should have either granted the challenge for cause or conducted a further inquiry of that juror and obtained express, unequivocal assurances on the record of his impartiality ... . **People v Young, 2014 NY Slip Op 04975, 3rd Dept 7-3-14**

Conditioning Plea Offer Upon Withdrawal of a Constitutional Speedy Trial Motion Is an Inherently Coercive Mode of Proceedings Error

The Third Department determined that the People's conditioning of a plea bargain on the defendant's withdrawal of his constitutional speedy trial motion was a mode of proceedings error requiring reversal:

> ...[T]he Court of Appeals has recently cited to People v Blakley (34 NY2d at 315) as an example of the "mode of proceedings" exception to the preservation rule (People v Hanley, 20 NY3d 601, 604, 605 n 2 [2013]). In that case, the Court held that conditioning a plea on a waiver of a constitutional speedy trial claim is "inherently coercive" (People v Blakley, 34 NY2d at 313). The narrow mode of proceedings exception speaks to fundamental flaws that implicate "rights of a constitutional dimension that go to the very heart of the process" ... . Where, as in Blakley, the People condition a plea offer on the defendant's waiver of his or her constitutional speedy trial claim, the integrity of the judicial process has been undermined ... .
>
> Here, the People expressly conditioned the plea offer on defendant's withdrawal of his constitutional speedy trial motion, while the hearing on this issue was still pending. To make matters worse, the offer was set to expire as soon as the hearing resumed ... . This is the type of prosecutorial bartering expressly prohibited as "inherently coercive" in People v Blakley (34 NY2d at 313). A trial court has a core obligation to recognize and prevent such an unfair tactic, but here the court simply reiterated the impermissible condition of the plea and waiver ... . **People v Wright, 2014 NY Slip Op 04976, 3rd Dept 7-3-14**

People v Rudolph (Requiring Sentencing Court to Consider Youthful Offender Status for All Eligible Defendants) Applied Retroactively to 2008 Conviction (on Direct Appeal)

The Third Department determined the ruling in People v Rudolph (21 NY3d 497 [2013]), requiring that courts always consider youthful offender status for eligible defendants, applied retroactively to a 2008 conviction by guilty plea in which the defendant agreed he would not receive youthful offender status:

> In People v Rudolph (supra), the Court of Appeals, overruling precedent, held that the statutory command in CPL 720.20 (1) that the sentencing court address youthful offender status when a defendant is eligible for such status "cannot be dispensed with, even where defendant has failed to ask to be treated as a youthful offender, or has purported to waive his or her right to make such a request" (id. at 499). When addressing such status, the sentencing court should set forth factors considered in its determination ..., particularly when denying youthful offender status ... .
>
> The People * * * assert that, since the sentence was consistent with prevailing precedent when imposed ...., the holding in Rudolph should not be applied retroactively. However, notwithstanding the lengthy delay in perfecting this appeal, this case is before us on direct appeal — not a collateral attack — and the law as it now exists controls... . **People v Calkins, 2014 NY Slip Op 04977, 3rd Dept 7-3-14**

Prosecutor's Remarks In Summation Required Reversal

The Third Department determined the prosecutor's remarks in summation required reversal:

> Counsel is afforded wide latitude in advocating for his or her case during summation, but "[t]here are certain well-defined limits" that may not be exceeded ... . Here, the prosecutor strayed beyond those parameters by, among other things, repeatedly making remarks that impermissibly shifted the burden of proof from the People to defendant ... . He described defense counsel's summation as "throwing mud," which he characterized as something done by people who "don't have a reasonable excuse as to crimes that they've committed" — thus not only denigrating the theory of defense, but suggesting that it was defendant's affirmative burden to present such an excuse. He then averred that nothing in the trial record established that defendant had not committed the alleged acts. * * * He stated that, in order to find defendant not guilty, jurors would have to believe that police officers were engaged in a scheme whereby they staged audio recordings of the controlled buys and planted evidence on defendant to frame him, referencing a comedy skit in which police purportedly got away with mistreating people "by sprinkling drugs on them." * * *
>
> The prosecutor also repeatedly and improperly expressed his personal opinion in an effort to vouch for the credibility of witnesses .... . When discussing a forensic chemist's testimony that the substances allegedly sold and possessed by defendant were heroin, the prosecutor stated that the issue was "done" and that it was "a closed case." He repeatedly described his witnesses as honest or declared that they had told the truth. He told the jury to take the male CI's word for what had happened during one of the controlled buys, adding that he "believe[d] that [the male CI] was more than credible."* * * **People v Casanova, 2014 NY Slip Op 04978, 3rd Dept 7-3-14**

Assault Counts Should Have Been Dismissed As Inclusory Concurrent Counts of the Counts Charging Assault in the First Degree as a Sexually Motivated Felony

The Fourth Department determined that counts of an indictment should have been dismissed as inclusory concurrent counts:

> We agree with defendant ... that the fourth and sixth counts of the indictment, each charging him with assault in the first degree, must be reversed and dismissed pursuant to CPL 300.30 (4) as inclusory concurrent counts of counts five and seven, each charging him with assault in the first degree as a sexually motivated felony. We therefore modify the judgment accordingly. CPL 300.30 (4) provides in pertinent part that "[c]oncurrent counts are inclusory' when the offense charged in one is greater than any of those charged in the others and when the latter are all lesser offenses included within the greater." A crime is a lesser included offense of another where "it is theoretically impossible to commit the greater crime without at the same time committing the lesser . . . [, as] determined by a comparative examination of the statutes defining the two crimes, in the abstract" ... . Here, "defendant could only commit the sexually motivated felon[ies] if it was proven that he had committed the underlying [assaults] and that the [assaults were] committed for his own sexual gratification" ... . Thus, the underlying assault counts charging assault in the first degree should have been dismissed as inclusory concurrent

counts of the counts charging assault in the first degree as a sexually motivated felony upon defendant's conviction of the latter crime... . **People v Dallas, 2014 NY Slip Op 05083, 4th Dept 7-3-14**

Court Should Not Have Imposed a Greater Sentence Based Solely on Bare Fact Defendant Had Been Arrested Since His Guilty Plea

The Fourth Department determined County Court erred when it enhanced defendant's sentence based solely on the indication in the presentence report that he had been arrested after his guilty plea:

> On the day of sentencing, the court noted that, two weeks after defendant's plea of guilty, defendant was arrested in the Town of Allegany and charged with a violation and a class A misdemeanor. The court thereafter imposed on defendant a term of imprisonment, rather than one of the lesser alternatives it had previously mentioned, based upon defendant's postplea arrest. The record is clear that the court based its determination to impose a term of imprisonment solely on the information contained in the presentence report that defendant had been arrested and charged with the violation and misdemeanor. Notably, in response to the court's inquiry concerning "what was happening" with that matter, defense counsel responded that he did not represent defendant on the matter and that it was still pending in local court. Thus, we conclude that, in imposing a term of imprisonment, the court erred in relying on the " mere fact' " that defendant had been arrested ..., and that it failed to "carry out an inquiry of sufficient depth to satisfy itself that there was a legitimate basis" for defendant's arrest ... . **People v Kolata, 2014 NY Slip Op 05101, 4th Dept 7-3-14**

Court Has Discretion to Order an Informal Psychological Assessment in Response to Defense Counsel's Request for an Article 730 Assessment to Determine Whether Defendant Is Competent to Stand Trial

The Fourth Department noted that Supreme Court had the discretion to order an informal psychological assessment in response to defense counsel's request for an examination pursuant to Criminal Procedure Law Article 730 to determine whether defendant was competent to stand trial:

> ...[D]efendant contends that Supreme Court erred in failing to follow the requirements of CPL article 730 to determine whether he was competent to stand trial at the time his case was presented to the grand jury (see CPL 730.30 [1]). We reject that contention. The record establishes that the court granted defense counsel's request for a "forensic examination" of defendant by ordering only an informal psychological examination and not by issuing an order of examination pursuant to CPL article 730. We conclude that "[t]he decision of the court to order an informal psychological examination was within its discretion . . . and did not automatically require the court to issue an order of examination or otherwise comply with CPL article 730' "... . **People v Castro, 2014 NY Slip Op 05102, 4th Dept 7-3-14**

Proof of "Physical Injury" Was Legally Insufficient

The Second Department determined the "physical injury" element of robbery in the second degree had not been proven:

> "Physical injury" is defined as "impairment of physical condition or substantial pain" (Penal Law § 10.00[9]). The subject complainant testified that he sustained an injury to his left ring finger after he was attacked from behind and fell to the ground. The complainant went to the hospital after the incident, where his bruised finger was bandaged and placed in a splint, but X rays revealed no broken bones and there was no evidence presented that he was prescribed pain medication. A "bruise" was still present four years after the incident, but the complainant only testified generally that he felt pain on his hand and arms immediately after the incident, and he did not testify that the injury limited or diminished his ability to use his finger for any length of time. Under these circumstances, there was insufficient evidence from which a jury could infer that the complainant suffered substantial pain or impairment of physical condition ... . **People v Boney, 2014 NY Slip Op 05197, 2nd Dept 7-9-14**

Even In a Nonjury Trial, a Defendant Should Not Be In Shackles Unless Reasons Are Placed on the Record

The Third Department found the error harmless, but it noted that, even in a nonjury trial, the defendant should not be in shackles in the courtroom unless reasons for the restraint are put on the record:

> Even in a nonjury trial, a defendant should not remain restrained in the courtroom unless the trial court sets forth particularized reasons for such restraint on the record ... . **People v Whitehead, 2014 NY Slip Op 05213, 3rd Dept 7-10-14**

Alleged Error Did Not Raise a Question of Jurisdiction or Constitute a Constitutional Defect---Therefore the Alleged Error Did Not Survive the Guilty Plea

The Third Department described the types of fundamental errors which survive a guilty plea. The prosecutor's alleged failure to inform the grand jury of defendant's request to call witnesses in not one of them:

> By his plea of guilty, defendant forfeited this argument. "As a rule, a defendant who in open court admits guilt of an offense charged may not later seek review of claims relating to the deprivation of rights that took place before the plea was entered" ... . As relevant here, a claim "that the District Attorney did not inform the grand jury of defendant's request to call witnesses to testify on his behalf as required by CPL 190.50 (6) . . . does not activate a question of jurisdiction or constitute a constitutional defect and, thus, does not survive a guilty plea" ... . **People v McCommons, 2014 NY Slip Op 05215, 3rd Dept 7-10-14**

Insufficient Proof of Value of Stolen Property, Evidence of Prior Crimes Improperly Admitted, Identification Testimony Improperly Admitted, Prosecutor Improperly Vouched for Witnesses---New Trial Ordered

In reversing the defendant's grand larceny conviction, the Fourth Department determined the evidence of the value of the property was "conclusory" consisting only of "rough estimates" and was therefore legally insufficient. The court also determined evidence of uncharged crimes and identification testimony should not have been admitted, and noted the prosecutor improperly vouched for the credibility of prosecution witnesses. With respect to the uncharged crimes and identification evidence, the court wrote:

> ...[W]e agree with defendant that County Court erred in allowing the People to introduce evidence concerning an uncharged burglary to prove his identity as the perpetrator of the burglary and petit larceny charged in the indictment. The instant crime is "not so unique as to allow admission of evidence of the [uncharged burglary] on the theory of the similarity of the modus operandi" ... . The court further erred in admitting the testimony of a witness who identified defendant in an out-of-court photo array procedure and thereafter identified him in court. The People failed to satisfy their obligation pursuant to CPL 710.30 inasmuch as no statutory notice was given by the People with respect to their intent to offer "testimony regarding an observation of the defendant at the time or place of the commission of the offense or upon some other occasion relevant to the case, to be given by a witness who has previously identified him as such" (CPL 710.30 [1]...). The errors in admitting evidence of the uncharged burglary and the identification of defendant are not harmless, considered singularly or in combination, inasmuch as the proof of defendant's guilt is not overwhelming, and there is a significant probability that the jury would have acquitted defendant had it not been for either of the errors... . **People v Walker, 2014 NY Slip Op 05254, 4th Dept 7-11-14**

Dissenters Would Have Reduced the Defendant's Sentence---Defendant Was 16 Years Old at the Time of the Offenses and Was Offered a Lower Sentence as Part of a Plea Bargain

Although the Fourth Department affirmed defendant's conviction and sentence, two dissenting justices would have reduced the defendant's sentence. The dissenters noted that the defendant was 16 years old at the time of the offenses and there was a great disparity between the sentence after trial and the sentence offered as part of a plea bargain. **People v Angona, 2014 NY Slip Op 05257, 4th Dept 7-11-14**

Dissenter Would Have Reduced Defendant's Sentence Because of His Age (15), the Factual Background of the Offense and Defendant's "Sad Life"

The First Department affirmed the conviction and sentence of a defendant who was 15 years old at the time he pled guilty. The court determined the sentencing court properly refused to grant the defendant youthful offender status. The decision is notable for the extensive dissent of Justice Freedman who would have reduced the defendant's sentence because of his age, the facts of the offense and the defendant's background. **From the dissent:**

> I write separately because I believe the current law that allows 15 year olds to be tried as adult criminals, even though they are sentenced as juvenile offenders, belies everything science has taught us about the functioning of the juvenile brain (People v Rudolph, 21 NY3d 497 [Graffeo, J., concurring at 506] [2013]). For that reason, I would reduce the sentence to 2 to 6 years to be served concurrently with the five-year term of defendant's Kings County sentence, but would not accord defendant the youthful offender treatment that he seeks. * * *

> In the 2010 presentence report in the instant matter, the probation department stated that defendant "would benefit from a mental health evaluation and a residential mental health treatment program." However, the court sentenced him to three to nine and denied youthful offender treatment. In pronouncing sentence here, the court noted that defendant had "a very sad life," but since he "violated every condition" a sentence near the maximum without youthful offender treatment was warranted. The differences between juvenile and adult criminals were highlighted by the United State Supreme Court in Graham v Florida (560 US 48, 68 [2010] ["(a)s petitioner(s) point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence" and "(a)s compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility. . . . Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of irretrievably depraved character' than are the actions of adults," quoting Roper v Simmons, 543 US 551, 569, 570 (2005); see also People v Rudolph, 21 NY3d 506]). **People v Crawford, 2014 NY Slip Op 05364, 1st Dept 7-17-14**

Defendant's Actions In Driving Under the Influence and Causing a Collision Did Not Support Convictions for Offenses Requiring Proof of a Depraved Indifference to Human Life

The Second Department determined that there was insufficient proof of "depraved indifference" to support defendant's convictions for first degree assault and reckless endangerment stemming from a collision with a vehicle driven by Petrone:

> Depraved indifference is " best understood as an utter disregard for the value of human life—a willingness to act not because one intends harm, but because one simply doesn't care whether grievous harm results or not'" ... . It is embodied in conduct that is " so wanton, so deficient in a moral sense of concern, so devoid of regard of the life or lives of others, and so blameworthy as to warrant the same criminal liability as that which the law imposes upon a person who intentionally causes [serious physical injury to] another'" ... .
>
> The issue of whether a defendant possessed a state of mind evincing depraved indifference to human life is highly fact-sensitive, requiring a case-by-case analysis ... . Here, the prosecution's witnesses established that the defendant's vehicle, without braking, collided into the back of Petrone's vehicle while both were traveling eastbound in the left lane on Northern Boulevard. The collision was of such force that both vehicles left the roadway and flipped over. Moreover, the testimony of the forensic toxicologist demonstrated that, at the time of the accident, the defendant was significantly impaired due to his ingestion of six different drugs, including methadone. Nevertheless, the evidence of the defendant's conduct did not support a finding of depraved indifference. The defendant was not driving well in excess of the speed limit, he was not driving the wrong way into oncoming traffic, he had not failed to obey traffic signals, and there was no evidence that he was driving erratically prior to the collision ... . Under these factual circumstances, the prosecution failed to establish that the defendant possessed an "utter disregard for the value of human life" or that he "simply [did not] care whether grievous harm result[ed] or not" from his actions ... . Consequently, there is simply no "valid line of reasoning and permissible inferences [that] could lead a rational person to the conclusion" ... that the defendant acted with depraved indifference to human life when he caused the injuries to Petrone... . **People v Jakobson, 2014 NY Slip Op 05354. 2nd Dept 7-16-14**

Confusing Jury Instruction Re: the Justification Defense Required Reversal of Murder Conviction in the Interest of Justice/Defendant's Attorney Should Have Been Allowed to Testify at the Suppression Hearing---There Was a Question of Fact Whether the Attorney Called and Told the Police He Represented the Defendant and Defendant Should Not Be Questioned

The First Department reversed defendant's murder conviction in the interests of justice because of a confusing jury instruction. The trial court did not make it clear to the jurors that the use of deadly force can be justified in defense of a robbery. The First Department also noted that defendant's lawyer should have been allowed to testify at the suppression hearing because it was alleged the lawyer called the police station, informed officer Risorto he was representing defendant, and told officer Risorto the defendant should not be questioned:

> In its main charge, the court instructed the jury that "[t]he only difference between the law of self-defense to repel a robbery as opposed to assault [is that] in repelling the robbery, the person has no duty to retreat." This is an incorrect statement of the law because it ignores an additional critical difference between the two grounds for justification, namely, that deadly physical force may be permissible to defend against a robbery

even if the alleged robber is using only physical force, and not deadly physical force (see People v Fuller, 74 AD2d at 879 ["a person is justified in using deadly physical force if he reasonably believed it necessary to use such force in order to resist his victim's imminent use of [mere] physical force against himself, in the course of a robbery attempt"]; People v Davis, 74 AD2d 607, 609 [2d Dept 1980] [jury should have been told that the defendant was justified in using deadly physical force if he reasonably believed it necessary to do so to resist the imminent use of physical force against him in the course of a robbery attempt]). The court's error was exacerbated when it repeated this erroneous statement in response to a jury note requesting further instructions on the defense of justification. * * *

The Court of Appeals has held that "an attorney enters a criminal matter and triggers the indelible right to counsel when the attorney . . . notifies the police that the suspect is represented by counsel" ... . Once the police have reason to know that the suspect is represented by counsel in the case under investigation, the right to counsel cannot be waived unless the suspect does so in the presence of counsel ... . An attorney does not need to enter the case in person, but can communicate his representation to the police by phone, "at which point the police are required to cease all questioning" ... .

Here, the court erred in precluding defense counsel from testifying about the critical conversation with Risorto. The police testimony, along with defense counsel's affirmation, raised questions as to what defense counsel actually said to Risorto and, in particular, whether defense counsel told Risorto that he "represented" defendant in the case for which defendant was to be questioned. The court should not have made a factual finding that implicitly accepted Risorto's account, without giving defendant the opportunity to challenge that account. **People v McTiernan, 2014 NY Slip Op 05363, 1st Dept 7-17-14**

People Failed to Demonstrate Seizure of Heroin from Defendant's Impounded Vehicle Was Pursuant to a Standard Inventory Search---Heroin Should Have Been Suppressed

The Third Department, over a dissent, determined that heroin seized from inside defendant's vehicle after a stop for speeding should have been suppressed. The defendant was arrested at the scene of the stop based upon an outstanding warrant. The People failed to demonstrate the heroin was found pursuant to a standard inventory search of the impounded vehicle:

Following a lawful arrest of the driver of a vehicle, "the police may impound the car, and conduct an inventory search, where they act pursuant to 'reasonable police regulations relating to inventory procedures administered in good faith'" ... . To this end, "courts have insisted that an inventory search be conducted according to a familiar routine procedure and that the procedure meet two standards of reasonableness" ... . Specifically, the procedures must be "designed to meet the legitimate objectives of the search while limiting the discretion of the officer in the field" ... .

Here, the transcript of the ... suppression hearing fails to support a determination that the conduct of the police was reasonable. Although not fatal to their argument against suppression ..., the People failed to offer a copy of the State Police procedure manual into evidence. Additionally, the People also failed to ask any substantive questions of their witnesses so as to otherwise establish (1) that the State Police had a standardized procedure, (2) that such procedure was reasonable, and (3) that it was followed here. **People v Leonard, 2014 NY Slip Op 05468, 3rd Dept 7-24-14**

Defense Counsel's Failure to Request that the Jury Be Charged with an Affirmative Defense to Robbery First (Weapon Was Not Capable of Being Discharged) Constituted Ineffective Assistance

The Second Department determined defense counsel's failure to request that the jury be charged with an affirmative defense constituted ineffective assistance:

...[T]he defendant was deprived of the effective assistance of counsel, under both the federal and state constitutions, as a result of his trial counsel's failure to request that the trial court submit to the jury the affirmative defense to robbery in the first degree that the object that appeared to be a firearm was not a loaded weapon from which a shot, capable of producing death or other serious physical injury, could be discharged (see Penal Law § 160.15[4]...). "[T]he New York State constitutional standard for the effective assistance of counsel is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case'" ... . Thus, denial of a defendant's fundamental right to counsel generally requires reversal of the conviction and a new trial... . **People v Collins, 2014 NY Slip Op 05555, 2nd Dept 7-30-14**

Sentence for Weapons Charge Should Have Been Imposed Concurrently with the Sentence for Manslaughter---No Evidence the Possession of the Weapon Was Unrelated to the Manslaughter

The Second Department determined the sentence for the weapons charge should not run consecutively with the sentence for the manslaughter charge because there was no evidence the weapon was possessed for reasons unrelated to the manslaughter:

> The Supreme Court erred in directing that the term of imprisonment imposed on the conviction of criminal possession of a weapon in the second degree with the intent to use it unlawfully against another, pursuant to Penal Law § 265.03(1)(b), was to run consecutively to the term of imprisonment imposed on the conviction of manslaughter in the first degree. The evidence adduced at trial did not demonstrate that the defendant possessed the gun with a purpose unrelated to his intent to use it against the victim (see Penal Law § 70.25[2]...). Therefore, the sentence imposed on the conviction of criminal possession of a weapon in the second degree with the intent to use it unlawfully against another, pursuant to Penal Law § 265.03(1)(b), must run concurrently with the sentence imposed on the conviction of manslaughter in the first degree. **People v Fitzgerald, 2014 NY Slip Op 05649, 2nd Dept 8-6-14**

Closed Box Properly Seized and Searched Under the Plain View Doctrine

The Second Department determined a police officer properly seized evidence under the plain view doctrine. The box that was seized and opened had the words "Smith & Wesson" on it:

> Here, the evidence at the suppression hearing established that a police officer was lawfully present in the apartment building where the defendant resided ... . The officer discovered the challenged physical evidence, a handgun and ammunition, in a gun box located in a common storage area accessible to anyone in the building. The box was not locked, and there was no indication that the defendant's name or other personal identification, such as his apartment number, was on the box which would lead one who observed it to understand that it belonged to the defendant or a person living in his apartment ... . The box was clearly marked "Smith and Wesson." Under these circumstances, the distinctive label on the outside of the box "proclaimed [its] contents" and, as such, made it immediately apparent to the officer that the box contained a firearm ..., thus authorizing the officer to seize the box without a warrant ... . Furthermore, since the gun box, "by its very nature, could not support any reasonable expectation of privacy because its content could be inferred from its outward appearance" ... , the officer lawfully opened the box, and discovered the handgun and ammunition inside. **People v John, 2014 NY Slip Op 05653, 2nd Dept 8-6-14**

Speedy Trial Clock Starts Running Only On the Charges Included in the Original Felony Complaint, Not On Separate and Distinct Charges Ultimately Included in the Indictment

The Second Department determined defendant's "speedy trial" motion to dismiss certain counts of the indictment should not have been granted. Although the speedy trial clock started to run when the felony complaint was filed for the charges in the felony complaint, it did not start to run on the new charges appearing for the first time in the indictment:

> Where a defendant is charged with a felony, CPL 30.30 requires the People to be ready for trial within six months of the commencement of the criminal action (see CPL 30.30[1][a]...). A criminal action is commenced when the first accusatory instrument is filed, and "includes the filing of all further accusatory instruments directly derived from the initial one" (CPL 1.20[16][b]...). Therefore, subsequent accusatory instruments that are "directly derived" from the first instrument will relate back to the first instrument for purposes of assessing the People's compliance with their speedy trial obligations ... . The filing of a felony complaint signals the commencement of a criminal action (see CPL 1.20[1], [17]). Where, however, "the felony complaint and subsequently filed indictment allege separate and distinct criminal transactions, the speedy trial time clock commences to run upon the filing of the indictment with respect to the new charges" ... . **People v Sant, 2014 NY Slip Op 05658, 2nd Dept 8-6-14**

SORA Point Assessments Affirmed Over Two-Justice Dissent Arguing the Proof of Online Sexual Conduct Was Insufficient, the Evidence of "Grooming" the Victims Was Insufficient, and the Social Immaturity of the Defendant Should Have Been Considered as a Mitigating Factor

The Third Department, over a two-justice dissent, determined that the points assessed by County Court in a SORA proceeding were appropriate. The charges were based entirely upon online communication between the defendant and three underage girls. The decision is notable for the extensive dissent which found the

evidence defendant had masturbated during online communication through a webcam, and the evidence that the defendant engaged in "grooming" the victims was insufficient, and further found that certain mitigating factors, including that defendant functioned socially at the level of a young teenager, should have been considered:

> **FROM THE DISSENT:**
> Here, the record lacks clear and convincing proof of prohibited sexual conduct with the third victim referenced in the indictment — as to whom defendant pleaded guilty to endangering the welfare of a child and aggravated harassment in the second degree. During the plea allocution, defendant admitted that he had engaged in conversations of a sexual nature with this victim, and the victim testified before the grand jury that defendant had contacted her by webcam video, during which time he touched himself in the area of his genitals, over his clothing. There was no physical sexual contact between the two at any time. As defendant argues, the grand jury testimony included too little factual detail to constitute clear and convincing evidence that he was masturbating. Although this might be inferred, it was not clearly revealed; viewed objectively, the testimony demonstrates nothing more than a brief swipe of defendant's hand in his genital region, accompanied by innuendo. Our precedent establishes a significantly higher standard of misconduct ... .
>
> We further find that the record supports defendant's contention that he was improperly assessed 20 points under risk factor 7 because his conduct was not "directed at a stranger or a person with whom a relationship had been established or promoted for the primary purpose of victimization" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 12 [2006]). The majority accepts County Court's finding that defendant and the victims were not "strangers," but that defendant had engaged in "grooming" behavior; we disagree. An example of grooming behavior provided in the guidelines is that of a scout leader who chose the position in order to gain access to his victims (see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 12 [2006]). As defendant argues, the record does not establish this type of calculated behavior on his part, nor was there a showing of emotional manipulation, undue influence or other customary indicia of grooming conduct. **People v Izzo, 2014 NY 05679, 3rd Dept 8-7-14**

Decision Offers a Rare, Detailed Discussion of the Probable-Cause Analysis of a Search Warrant Application Which Included Hearsay from Confidential Informants (Analyzed Under the Aguilar-Spinelli Reliability Tests), Controlled Buys and Surveillance

In a rare, detailed analysis of the sufficiency of a search warrant application which relied on confidential informants, surveillance, controlled buys, and hearsay found sufficient under the Aguilar-Spinelli tests, the Fourth Department determined the motion to suppress was properly denied. The decision is notable for the depth of discussion and the full range of issues involved in the analysis of a search warrant application. **People v Myhand, 2014 NY Slip Op 05742, 4th Dept 8-8-14**

In a Matter of First Impression, the Fourth Department Determined that Criminal Records Are Eligible for Sealing Pursuant to CPL 160.58 Even If They Relate to Convictions that Predate the Statute

The Fourth Department, in a full-fledged opinion by Justice Whalen, determined that criminal records eligible for sealing pursuant to Criminal Procedure Law 160.58 even if they related to convictions that predate the statute. **People v M.E., 2014 NY Slip Op 05748, 4th Dept 8-8-14**

Pointing Finger and Saying "I'm Going to Shoot You" Did Not Support Harassment and Menacing Charges

The First Department determined that the allegations supporting harassment and menacing charges were insufficient:

> ...[T]he accusatory instrument was insufficient as a matter of law with regard to the harassment and menacing charges. The allegation that defendant pointed his finger in a shooting motion and stated, "I'm going to shoot you," without any indication that defendant was armed at the time, did not set forth an imminent threat of harm to the complainant. Nor were any facts alleged showing the statement should have been taken seriously ... . **People v Harris, 2014 NY Slip Op 05814, 1st Dept 8-14-14**

Failure to Move to Sever Unrelated Counts of Indictment Constituted Ineffective Assistance of Counsel

The Second Department determined defense counsel's failure to move to sever unrelated counts of the indictment constituted ineffective assistance of counsel:

> In this case, based solely on the complainant's identification, the defendant and his codefendant were charged with robbery in the first degree and robbery in the second degree in connection with a robbery that occurred on November 6, 2005. The same indictment also separately charged the defendant with four drug offenses and resisting arrest, stemming from his arrest at his mother's home on January 16, 2006, despite the fact that the drug and resisting arrest charges had no connection to the November 6, 2005, robbery. Defense counsel failed to make an on-the-record pretrial motion to sever the robbery charges from the other charges and did not raise the issue at trial, and the defendant was tried on all counts in the indictment. * * *
>
> As a result of defense counsel's error, the same jury that heard evidence regarding the robbery also heard voluminous evidence concerning the defendant's arrest and the large quantity of drugs found in his mother's home. Consequently, the jury could have inferred that the robbery at issue was committed for a drug-related purpose, and it is probable that the improper joinder tainted the jury's evaluation of the separate, unrelated incidents ... . Under the circumstances presented here, the defendant was deprived of the effective assistance of counsel, based on defense counsel's failure to make a proper pretrial motion to sever the charges of robbery from the drug charges. **People v Hall, 2014 NY Slip Op 05802, 2nd Dept 8-13-14**

Court Should Have Held a Hearing to Determine Whether Exigent Circumstances Justified Warrantless Forced Entry to an Apartment

The First Department determined that the motion court should have held a hearing to determine whether the forced entry of an apartment was justified by exigent circumstances. At the time of defendant's motion for a hearing, the facts surrounding the incident were not available to the defendant and the People's response to the motion was "conclusory:"

> In denying defendant's application for a hearing, the Court summarily found that exigent circumstances justified the pursuit and warrantless entry, based upon the individuals in the hallway reportedly having smoked marijuana, then racing into the apartment and locking the door, and the need to prevent destruction of evidence. Defendant argues in his brief that at most some individuals were seen smoking marijuana, a class B misdemeanor that would not present exigent circumstances sufficient for a forced entry.
>
> Under the circumstances presented here, where the information proffered by the People to support the forcible entry was conclusory and defendant did not have access to available information, we find that it was incumbent upon the motion court to conduct a hearing to determine whether there were sufficient exigent circumstances to justify the forced warrantless entry... . **People v Chamlee, 2014 NY Slip Op 05921, 1st Dept 8-21-14**

Totality of the Circumstances Amounted to "Reasonable Suspicion Criminal Activity Was Afoot" Justifying Request to Search Interior and Trunk of Car Driven by Defendant

The First Department, over a dissent, determined the totality of the circumstances justified asking defendant to consent to the search of the interior and trunk of the car defendant was driving. Heroin was found in the trunk. The vehicle stop was justified by observation of a traffic infraction. The "founded suspicion that criminal activity was afoot" was demonstrated by defendant's admission that his license was suspended, his lack of identification and the officers' observations prior to the arrest. The dissent argued that the actions observed prior to the vehicle stop were not sufficient to raise suspicion defendant had participated in a drug transaction, and therefore the request to search the vehicle was not justified, and, even if justified, consent was not voluntarily given:

> Once defendant revealed that his license was suspended, the officer had probable cause to arrest him for a misdemeanor (Vehicle and Traffic Law [VTL] § 511) and was entitled to conduct a search of his person incident to the arrest ... . In order to ask defendant for his consent to search the car, however, the police needed a founded suspicion that criminality was afoot ... . We conclude that based on the totality of known circumstances, the police had a founded suspicion that criminality was afoot. That suspicion justified a common-law inquiry in the form of a request for defendant to consent to a search of the car, which also included the subsequent request to search the trunk ... . While nervousness, by itself, does not establish a founded suspicion of criminality ..., here it was coupled with other relevant factors, including the observed interaction between defendant and an unidentified man, defendant's admission that he was driving with a suspended license, his complete inability to provide any form of identification, that the car's registration was in the name of someone other than defendant or his passenger, and defendant's expressed concern that he would face reincarceration for a VTL infraction ... .

> The request for defendant's consent to search the trunk of the car was reasonably related in scope to the circumstances that justified the interference in the first place ... . Thus, the same founded suspicion that permitted the police to ask for consent to search the car extended to the request to search the trunk ... . * * * While defendant is correct that any concern the police may have had about some illegal object hidden under the passenger seat dissipated after the interior of the car was searched by the police, the other factors still present, which included driving without a license, identification and apparent connection to the registered owner of the car, supported a basis to request consent for a more thorough search of the vehicle. Contrary to the conclusion reached by the dissent, there was more than continued nervousness to support the request to search the trunk. **People v Mercado, 2014 NY Slip Op 06010, 1st Dept 8-28-14**

Failure to Inform Defense Counsel of the Specific Contents of Jury Notes and the Intended Responses Required Reversal in Two Cases

The Second Department reversed defendant's conviction because the trial judge mishandled a jury note. The jury requested a readback of a witness' testimony. The judge did not give defense counsel notice of the specific content of the note and ordered the readback of only the direct testimony, not the cross. The error required reversal in the absence of an objection, because defense counsel was never apprised of the specific contents of the note or given an opportunity to provide input:

> [T]he trial court's core responsibility under the statute is both to give meaningful notice to counsel of the specific content of the jurors' request —in order to ensure counsel's opportunity to frame intelligent suggestions for the fairest and least prejudicial response— and to provide a meaningful response to the jury'" ... . "A court's failure to supply a meaningful notice or response constitutes error affecting the mode of proceedings, and therefore presents a question of law for appellate review even in the absence of a timely objection" ... . While a timely objection to an alleged O'Rama error may be required where the jury requests a readback and "defense counsel . . . [has] knowledge of the substance of the court's intended response" ... , here, it is not evident from the record that defense counsel was aware that the trial court would give only part of a witness's testimony in response to a jury note, such as the one at issue here, requesting a readback. By failing to apprise counsel of the content of the note and the substance of its intended response before calling in the jury, the trial court "failed to meet its core responsibilities of providing defense counsel with meaningful notice and an opportunity to provide input so that the court could give the jury a meaningful response" ... . **People v Morris, 2014 NY Slip Op 06000, 2nd Dept 8-27-14**

The Second Department reversed defendant's conviction in another case because the judge did not apprise defense counsel of the specific contents of jury notes, or of the judge's intended responses, before responding to the notes in open court:

> By failing to apprise counsel of the contents of the notes and the substance of its intended responses before calling in the jury, the trial court "failed to meet its core responsibilities of providing defense counsel with meaningful notice and an opportunity to provide input so that the court could give the jury a meaningful response" ... . **People v Sydoriak, 2014 NY Slip Op 06004, 2nd Dept 8-27-14**

CRIMINAL LAW/APPEALS

Clause in Appeal-Waiver Agreement Which Purported to Vacate Plea and Sentence Upon the Filing of a Notice of Appeal Unenforceable

The First Department determined defendant's waiver of his right to appeal was not adequately explained by the sentencing court and further determined a clause in the waiver agreement is unenforceable. The Clause purported to vacate the plea and sentence if a notice of appeal is filed:

> ,,,[W]e agree with defendant that the clause in the waiver agreement that purportedly treats the filing of a notice of appeal by defendant as a motion to vacate the judgment to be unenforceable. Specifically, the waiver form included the following clause:
>
> > "If the defendant or the defendant's attorney files a notice of appeal that is not limited by a statement to the effect that the appeal is solely with respect to a constitutional speedy trial claim or legality of the sentence, they agree that the District Attorney and or Court may deemed such filing to be a motion by the defendant to vacate the conviction and sentence, and will result, upon the application and consent of the District Attorney, in the plea and sentence being vacated and this indictment being restored to its pre-pleading status."
>
> This clause is unenforceable because there is no statutory authority to vacate a judgment under these circumstances (CPL 440.10,,,).

Further, this language discourages defendants from filing notices of appeal even when they have claims that cannot be waived, such as one concerning the lawfulness of the waiver or the plea agreement itself. "[A]n agreement to waive appeal does not foreclose appellate review in all situations" ... . If the agreement to waive were itself sufficient to foreclose appellate review, "the court would then be deprived of the very jurisdictional predicate it needs as a vehicle for reviewing the issues that survive the waiver" ... . The language in the written waiver, in essence, purports to prevent appellate claims that have been found by the courts to be "unwaivable" precisely because of their constitutional import ... . **People v Santiago 2014 NY Slip Op 05493, 1st Dept 7-24-14**

CRIMINAL LAW/EVIDENCE

Hearsay Evidence of Another's Admission to the Crime Warranted a Hearing Pursuant to Defendant's Motion to Set Aside the Conviction

The Third Department determined newly discovered evidence, including hearsay evidence of the admission of another (Melton) to the commission of the crime, warranted a hearing pursuant to the defendant's motion to set aside his conviction:

> "[A] defendant has a fundamental right to offer into evidence the admission of another to the crime with which he or she is charged" ... . "Depriving a defendant of the opportunity to offer into evidence another person's admission to the crime with which he or she has been charged, even though that admission may only be offered as a hearsay statement, may deny a defendant his or her fundamental right to present a defense" ... . The People's claims regarding Melton's unwillingness to testify were themselves hearsay, and simply created issues of fact as to whether he was available and, if not, whether his posttrial statements were admissible as declarations against his penal interest ... . A statement is admissible under this hearsay exception if (1) the declarant is unavailable because of death, absence or a refusal to testify on constitutional grounds, (2) the declarant knew when making the declaration that it was contrary to his or her penal interest, (3) he or she had competent knowledge of the facts, and (4) other independent evidence supports the reliability and trustworthiness of the declaration ... . Where, as here, the statement at issue tends to exculpate a criminal defendant, a more lenient standard of reliability is applied than to inculpatory statements; an exculpatory declaration is admissible if competent independent evidence "establishes a reasonable possibility that the statement might be true" .. . . **People v Sheppard, 2014 NY Slip Op 04982, 3rd Dept 7-3-14**

Evidence which Should Have Been Presented In the People's Direct Case Should Not Have Been Allowed in Rebuttal

The Second Department determined the trial court erred in allowing the People to present more evidence after the defense rested. The charges were based upon allegations the defendant caused injuries to her baby by shaking the baby. The People's evidence demonstrated the defendant denied knowing that shaking the baby could cause injury. The People were allowed to present evidence, after the defense had rested, that a nurse had explained the dangers of shaking to the defendant:

> A court has the discretion to permit a party to present evidence in rebuttal, which, more properly, should have been presented in that party's original case (see CPL 260.30[7]...). The Court of Appeals has approved the exercise of this discretion where the evidence proffered relates to an element of the offense which is "simple to prove and not seriously contested, and reopening the case does not unduly prejudice the defense" ... .
>
> Here, the missing element of the People's case was not a simple, uncontested fact, but, instead, was the mens rea of the subject offense ... . Indeed, the People's own evidence established that the defendant denied knowing that her actions could result in injury to the child. Furthermore, the parties' expert witnesses " hotly contested'" ... whether shaking could cause the type of injuries at issue and, if so, how much force would be necessary to cause such injuries, and there was no evidence that the defendant knew of the point when rocking or shaking could become potentially injurious.
>
> Because this case does not fit within "the narrow circumstances where . . . the missing element is simple to prove and not seriously contested, and reopening the case does not unduly prejudice the defense" ..., the Supreme Court improvidently exercised its discretion in granting the People's application to present the nurse's testimony in rebuttal. Without this testimony, the People's evidence was legally insufficient to establish the mens rea element of endangering the welfare of a child beyond a reasonable doubt ... . **People v Robinson, 2014 NY Slip Op 04970, 2nd Dept 7-2-2014**

Grand Jury Testimony Given a Year After the Relevant Event Should Not Have Been Admitted as "Past Recollection Recorded"---New Trial Ordered

After noting that the defendant, who refused to sign a written waiver of his right to remain silent, waived the right by agreeing to speak to the police, the Second Department determined grand jury testimony, given a year after the relevant event, should not have been allowed in evidence as past recollection recorded:

> "The requirements for admission of a memorandum of a past recollection are generally stated to be that the witness observed the matter recorded, the recollection was fairly fresh when recorded or adopted, the witness can presently testify that the record correctly represented his [or her] knowledge and recollection when made, and the witness lacks sufficient present recollection of the recorded information" ... . In light of the one-year gap between the time the witness allegedly heard the defendant's alleged inculpatory statements and the witness's grand jury testimony, the People failed to establish that the witness's recollection of the matter was "fairly fresh when recorded or adopted" during the grand jury proceeding ... . **People v Wilkinson, 2014 NY Slip Op 05661, 2nd Dept 8-6-14**

CRIMINAL LAW/PAROLE

Parole Board's Role and Court's Review Role Explained in Depth

The Third Department, in an extensive and detailed decision, over a dissent, determined petitioner had been properly denied parole, despite his extraordinary achievements in prison, including his earning bachelor's and master's degrees. The petitioner was convicted of felony murder in connection with the death of a police officer:

> [T]he record establishes that the Board acknowledged petitioner's extensive rehabilitative success along with the additional statutory factors, but placed greater emphasis on the seriousness of petitioner's crime in its determination that release would be incompatible with the welfare of society and so deprecate the seriousness of the crime as to undermine respect for the law, as it is "entitled" to do ... . We are thus constrained to affirm — to do otherwise is to implicitly overrule the decades of our well-settled jurisprudence set forth above ... . **Matter of Hamilton v New York State Div of Parole, 2014 NY Slip Op 05487, 3rd Dept 7-24-14**

CRIMINAL LAW/RIGHT TO CONFRONT WITNESSES/EVIDENCE

Defense Counsel Should Have Been Allowed to Cross-Examine Cooperating Accomplice/Witness to Demonstrate Motivation and Bias

The First Department, in a full-fledged opinion by Justice Acosta, determined that the curtailment of cross-examination of a cooperating witness deprived defendant of his right to confront the witnesses against him. Four were charged in a robbery. One of the four, referred to as "M," entered a cooperation agreement and testified against the defendant. Defense counsel was prohibited from asking M a line of questions intended to reveal M's motivation and bias:

> Here, defendant sought ... [to question] M. in an attempt to cast doubt on his credibility by revealing his bias and motive to fabricate testimony. Defense counsel's theory was that M. had implicated defendant in the prior uncharged robberies in order to bolster the value of his cooperation agreement with the People. This was unquestionably an appropriate trial strategy, since "exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination" ... . That M. intended to invoke his Fifth Amendment privilege and refuse to answer the questions does not abrogate defendant's Sixth Amendment right of confrontation. As an accomplice witness, M.'s credibility, bias, and motive to fabricate were not collateral issues ... . Therefore, defense counsel should have been permitted to question him on the prior crimes. If he subsequently invoked his Fifth Amendment privilege, the trial court should have gone as far as striking all or some of his direct testimony ... . At a minimum, the court should have pursued the "least drastic relief" (typically reserved for "collateral matters or cumulative testimony concerning credibility") by instructing the jury that it could consider M.'s invocation of the Fifth Amendment in determining his credibility ... . **People v McLeod, 2014 NY Slip Op 05926, 1st Dept 8-21-14**

Allowing the Prosecutor to Tell the Jury in Summation that the Person Who Provided the Police with a Tip Must Have Identified the Defendant as the Perpetrator Was Reversible Error---The Prosecutor Effectively Told the Jury Another "Witness" Had Identified the Defendant, But that "Witness" Did Not Testify and Could Not, Therefore, Be Cross-Examined

The Second Department reversed defendant's conviction because the prosecutor, in summation, had

improperly been allowed to tell the jury that the person who provided the police with a tip must have identified the defendant as the perpetrator. Because the person who provided the tip did not testify, the defendant was effectively deprived of the opportunity to cross-examine a "witness against him:"

> During summation, the prosecutor strongly implied that whoever had provided the tip had implicated the defendant: "Someone calls 577-TIPS . . . . [The detective] gets this information and where does he go? 82-01 Rockaway Beach Boulevard, make a left out of the elevator. I'm looking for a guy named Rick who lives on the sixth floor. Ricardo Benitez." After defense counsel's objection to this remark was overruled, the prosecutor continued: "Gave Detective Lopez the following address. 82-01 Rockaway Beach Boulevard, 6B. Rick. Ladies and gentlemen, I introduce you to Rick." Defense counsel again objected, but the Supreme Court again overruled the objection.
>
> The only purpose of the prosecutor's improper comments was to suggest to the jury, in this one-witness identification case, that the complainant was not the only person who had implicated the defendant in the commission of the robbery (see People v Mendez, 22 AD3d 688, 689). Moreover, in overruling defense counsel's objections, the Supreme Court "legitimized" the prosecutor's improper remarks (People v Lloyd, 115 AD3d 766, 769). The defendant, of course, was given no opportunity to cross-examine the unnamed witness who had allegedly provided the tip ... . The evidence against the defendant was not overwhelming, so there is no basis for the application of harmless error analysis ... . To the extent that the defendant failed to preserve the claim by specific objection, we reach the issue in the exercise of our interest of justice jurisdiction, and reverse the judgment ... . **People v Benitez, 2014 NY Slip Op 05890, 2nd Dept 8-20-14**

DEFAMATION

Defamation Action Brought by Judge Against a Reporter Properly Dismissed---Although the Reporter Made Defamatory Statements Which Were Not Privileged, the Judge Failed to Raise a Question of Fact About Malice as a Motivation

In a full-fledged opinion by Justice Saxe, the First Department affirmed the dismissal of a defamation action brought by a judge against a reporter. The court determined that the reporter had made inaccurate statements which were defamatory and which were not privileged under the Civil Rights Law. However, because the judge was a public figure, the New York Times v Sullivan "malice" standard applied and, the court determined, the judge was unable to raise a question of fact about malice as a motivation for the reporting:

> Although we agree with Justice Martin that the published columns were susceptible of a defamatory interpretation, were not protected opinion, and were not privileged under Civil Rights Law § 74, that is not the end of the inquiry; Justice Martin had to also clear the demanding hurdle presented by the standard set in New York Times Co. v Sullivan (376 US 254, 279-280 [1964]). Since he is a public figure, he had the burden of showing, with convincing clarity, actual malice — that is, that the author and publisher of the columns acted with reckless disregard for the truth ... . "The standard is a subjective one, focusing on the speaker's state of mind" ... . This standard of "convincing clarity" applies even on a motion for summary judgment ... .
>
> "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication" ... . "[I]t is essential that the First Amendment protect some erroneous publications as well as true ones" ... . Therefore, to prevail, Justice Martin was required to offer a showing tending to establish that Louis " in fact entertained serious doubts as to the truth of his publication,' or acted with a high degree of awareness of [its] probable falsity'" ... . **Martin v Daily News LP, 2014 NY Slip Op 05369, 1st Dept 7-17-14**

DEFAMATION/CIVIL RIGHTS LAW

Statement by Reporter About a Judicial Proceeding Entitled to Absolute Privilege

The Fourth Department determined a reporter's (Velez-Mitchell;s) statements about a judicial proceeding were entitled to absolute privilege under Civil Rights Law 74. The report concerned a lawsuit brought by a transgender woman and included reference to a DVD the woman had received from plaintiff Most Holy Family Monastery (MHFM). The DVD was entitled "Death and the Journey to Hell." The plaintiff contended the report falsely asserted that the Most Holy Family Monastery advocated putting homosexuals to death:

> ...[D]efendants are entitled to the absolute privilege set forth in Civil Rights Law § 74 ... . The ... statement was made in the context of the interview conducted by Velez-Mitchell, which concerned, inter alia, pending judicial proceedings commenced by the woman in California after her

personal information had allegedly been misused by the DMV employee. During the interview, the woman and her attorney explained that the woman had obtained a temporary restraining order against the DMV employee based upon that employee's misuse of her personal information, and that she had thereafter received the package from MHFM. The broadcast of the interview was twice promoted as a transgender woman "suing," and a caption beneath the woman's image stated, inter alia, "Transgender Woman Suing DMV." Velez-Mitchell questioned a former prosecutor regarding the viability of an anticipated lawsuit against the DMV, and the woman's attorney stated that "[t]he Human Rights Commission filed a complaint" concerning the incident and the "big picture is about privacy and the legal right to have [one's] privacy protected."

"When examining a claim of libel, we do not view statements in isolation. Instead, [t]he publication must be considered in its entirety when evaluating the defamatory effect of the words' " ... . Here, "[r]ealistically considered," the first statement provided background facts for the woman's claims in pending and anticipated judicial proceedings, and the broadcast as a whole was a " substantially accurate' " report of the judicial proceedings ... . Consequently, the first statement is entitled to the absolute privilege set forth in Civil Rights Law § 74. **Dimond v Time Warner Inc, 2014 NY Slip Op 05060, 4th Dept 7-3-14**

DISABILITY RETIREMENT BENEFITS (POLICE OFFICERS)

Police Officer's Tripping Over a Fire Hose at the Scene of a Fire Was Not a "Service-Related Accident"

The First Department, over a dissent, determined that a police officer who tripped over a fire hose at the scene of a fire was entitled to ordinary (ODR) , as opposed to accidental (ADR), disability retirement benefits:

> Not every line of duty injury will result in an award of ADR ... . When the denial of ADR benefits to a police officer is the result of a tie vote by the Board of Trustees, this Court is required to uphold the denial unless "it can be determined as a matter of law on the record that the disability was the natural and proximate result of a service-related accident" ... . Thus, the issue before us is whether, reviewing the record, it can be said, as a matter of law, that petitioner's disability was the natural and proximate result of a service-related accident.
>
> In the context of ADR benefits, the Court of Appeals has defined an accident as a " sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact,'" while " an injury which occurs without an unexpected event as the result of activity undertaken in the performance of ordinary employment duties, considered in view of the particular employment in question, is not an accidental injury'" ... . It is petitioner's burden to establish that his injuries resulted from an accident as defined in the context of ADR ... .
>
> Normal risks in most jobs are not unexpected * * *.
>
> While it is true that petitioner was a police officer, not a firefighter, it cannot be said as a matter of law that his ordinary employment duties did not include responding to a fire emergency. As the Board of Trustees had before it some credible evidence of lack of causation, it did not err as a matter of law in concluding that petitioner's disability was not the result of an accident within the meaning of Administrative Code § 13-252 ... . Finally, contrary to the dissent, we do not regard the charging of fire hoses at the scene of a fire as a sudden, fortuitous, or unexpected event. **Matter of Pastalove v Kelly, 2014 NY Slip Op 05922, 1st Dept 8-21-14**

EDUCATION LAW/ADMINISTRATIVE LAW

Former Assistant Principal Entitled to Full Report Generated In Response to Her Allegations of Harassment and Discrimination Against Superintendent

The Third Department determined a former assistant principal was entitled to the full report generated by special counsel at the request of the school board in response to her allegations of harassment and discrimination against the school superintendent:

> In our view, the [school] Board's interpretation [of its regulation] is inconsistent with the language of the regulation, which is mandatory and dictates that the complainant and the accused will have received at least one report "pertaining to the investigation/outcome of the formal complaint" prior to the Board holding a hearing on the matter. Even assuming that [counsel who wrote the report] was appointed to perform only the complaint officer's role — as opposed to the superintendent's role — in the adjudicatory structure set forth in the regulation, a complainant is entitled to a copy of the complaint officer's report under the regulation. Nevertheless, respondents failed to provide either the complainant or this Court with a copy of the report. **Matter of Yager v Massena Cent**

SchooL Dist, 2014 NY Slip Op 05014, 3rd Dept 7-3-14

EDUCATION LAW/CIVIL PROCEDURE

Petition to Vacate Hearing Officer's Decision Terminating Petitioner (a School Administrator) Was Not Properly Served Upon a "School Officer"

The petitioner, an elementary school administrator, was terminated for misconduct after a hearing. Petitioner then filed a petition to vacate the hearing officer's (HO's) decision. Supreme Court dismissed the petition as untimely and improperly served. The Fourth Department, over a two-justice dissent, determined the petition was timely, but it was not properly served. The dissenters argued that the petition was not timely filed as well:

> ...[W]e conclude that the phrase "receipt of the hearing officer's decision" in Education Law § 3020-a (5) (a) refers to the receipt of such decision from the SED [State Education Department]. We thus reject respondents' contention that section 3020-a provides that the 10-day period in which to appeal runs from the receipt of the HO's decision by email, not the receipt of the HO's decision through mail sent by the SED. Rather, we agree with petitioner that, by concluding that the 10-day period to appeal commenced upon petitioner's receipt of the HO's decision by email, the court rendered the notification process contained in Education Law § 3020-a (4) superfluous. * * *
>
> ...[W]e agree with the court that petitioner's service of the petition was defective. The decision of the Second Department in Matter of Franz v Board of Educ. of Elwood Union Free Sch. Dist. (112 AD2d 934 ...) is instructive. There, "[t]he notice of petition was personally delivered to [the] respondent [Board of Education]'s secretary," whom the Second Department concluded was "not a school officer' as set forth in . . . Education Law [§ 2 (13)]" (id. at 935). In support of that conclusion, the Second Department noted that "[t]he courts of this State have consistently required strict compliance with the statutory procedures for the institution of claims against the State and its governmental subdivisions, and where the Legislature has designated a particular public officer for the receipt of service of process, we are without authority to substitute another" ... . We likewise conclude here that the payroll clerk employed in the District's business office was not a "school officer" under the Education Law. **Matter of Puchalski v Depew Union Free School Dist..., 2014 NY Slip Op 05271, 4th Dept 7-11-14**

EMINENT DOMAIN

Flawed Appraisals Would Not Allow a Determination of the Highest and Best Use of the Taken Land

The Third Department determined the appraisal reports submitted for both side were flawed such that the highest and best use of the taken land could not be determined. The matter was sent back to the Court of Claims. The court explained the operative principles:

> When private property is appropriated for public use, just compensation must be paid, which requires that the owner be placed in the financial position that he or she would have occupied had the property not been taken ... . Upon a partial taking of real property, an owner is not only entitled to the value of the land taken — i.e., direct damages — but also to consequential damages, which consist of the diminution in value of the owner's remaining land as a result of the taking or the use of the property taken ... . Damages must be measured based upon the fair market value of the property as if it were being put to its highest and best use on the date of the appropriation, whether or not the property was being used in such manner at that time ... . **Matter of State of New York..., 2014 NY Slip Op 05002, 3rd Dept 7-3-14**

Highest and Best Use is Measure of Damages--- Unconsummated Purchase Contract Is Valid Proof of Value

The Second Department explained the measure of damages for a taking (highest and best use) and determined an unconsummated purchase contract was valid proof of value:

> "The measure of damages must reflect the fair market value of the property in its highest and best use on the date of the taking, regardless of whether the property is being put to such use at the time" ... . The determination of highest and best use must be based upon evidence of a use which reasonably could or would be made of the property in the near future ... . Here, contrary to the Sewer District's contentions, Split Rock satisfied its burden of demonstrating that the highest and best use of the subject property was for the commercial development of an office center.
>
> A property's market value is defined as " the amount which one desiring but not compelled to purchase will pay under ordinary conditions to a seller who desires but is not compelled to sell'" ... . "[T]he purchase price set in the course of an arm's length transaction of recent vintage, if not

explained away as abnormal in any fashion, is evidence of the highest rank' to determine the true value of the property at that time" ... . **Matter of Western Ramapo Sewer Extension Project, 2014 NY Slip Op 05889, 2nd Dept 8-20-14**

ENVIRONMENTAL LAW/MUNICIPAL LAW

Petitioners Did Not Have Standing to Contest County's Negative Declaration After a SEQRA Review

The Fourth Department determined petitioners did not have standing to contest the county's negative declaration pursuant to a State Environmental Quality Review Act (SEQRA) review. The action involved the county's permitting the Monroe County Fair and Recreation Association, Inc. to operate a four-day agricultural festival on county land:

> Where, as here, the proceeding does not involve a "zoning-related issue . . . , there is no presumption of standing to raise a SEQRA challenge" based solely on a party's proximity ... . In such a situation, parties seeking to establish standing must establish that the injury of which they complain "falls within the zone of interests,' or concerns, sought to be promoted or protected" ..., and that they "would suffer direct harm, injury that is in some way different from that of the public at large" ... . Contrary to petitioners' contention, we conclude that the court properly determined that the environmental effects relied on by each petitioner to establish his or her standing are no different in either kind or degree from that suffered by the general public ... . We further conclude that the alleged environmentally related injuries are too speculative and conjectural to demonstrate an actual and specific injury-in-fact ... . Thus, the court did not err in concluding that none of the petitioners has standing ... . **Matter of Kindred v Monroe County, 2014 NY Slip Op 05069, 4th Dept 7-3-14**

EVIDENCE

Court Should Not Have Precluded Expert Evidence About the Quality of Representation Received by Indigent Defendants

The Third Department determined Supreme Court (acting as the trier of fact) should not have precluded the presentation of expert evidence in a case concerning the quality of legal services received by indigent criminal defendants:

> Under familiar rules, expert opinions are admissible on subjects involving professional or scientific knowledge or skill not within the range of ordinary training or intelligence" of the trier of fact ... . "[T]his principle applies to testimony regarding both 'the ultimate questions and those of lesser significance'" ... . Notably, expert testimony is "appropriate to clarify a wide range of issues calling for the application of accepted professional standards" ... .
>
> Here, the experts possess the requisite skill, training, education, knowledge and/or experience to qualify as experts on the operation of indigent defense systems and the evaluation of such systems in light of prevailing professional standards ... . * * *
>
> At its core, this litigation is about system-wide conditions relating to and affecting the delivery of public defense — such as caseloads, funding and oversight, among others — and whether these conditions in the defendant counties are such that "the basic constitutional mandate for the provision of counsel to indigent defendants at all critical stages is at risk of being left unmet" ... . By virtue of their extensive experience, the experts possess specialized knowledge with respect to the operation of public defense systems, the professional standards applicable to such systems, and the impact of systemic shortcomings on the provision of counsel to indigent criminal defendants at all critical stages. Such particularized knowledge is, manifestly, beyond that of a typical Supreme Court Justice, whose experience is oft confined to case-by-case determinations ... . **Hurrell-Harring v State of New York 2014 NY Slip Op 05010, 3rd Dept 7-3-14**

EVIDENCE/CIVIL PROCEDURE/REAL PROPERTY LAW/MORTGAGES

The Requirements of Certificates of Conformity and Authenticity (Re: the Admissibility of Out-of-State Affidavits) Explained

The Second Department, in a full-fledged opinion by Justice Dillon, reversed Supreme Court finding that an out-of-state affidavit re: the assignment of a note and mortgage was in admissible form and could therefore be considered in support of plaintiff's summary judgment motion. The court explained that, because the document was notarized, no "certificate of authentication" was needed, and the "certificate of conformity" which was provided was adequate under New York law:

> Here, the affidavit of Josh Mills was necessary for the plaintiff to establish the assignment to it of the subject mortgage and note and the defendants'

default in payment. The primary issue on this appeal is whether Mills's out-of-state affidavit was sworn to and conformed in a manner rendering it admissible in this state under CPLR 2309(c). * * *

The "certificate" required by CPLR 2309(c), commonly referred to in case law as a "certificate of conformity," must contain language attesting that the oath administered in the foreign state was taken in accordance with the laws of that jurisdiction or the law of New York (see Real Property Law § 299-a[1]). A "certificate of conformity" is separate and distinct from a "certificate of authentication," which attests to the oathgiver's authority under the foreign jurisdiction to administer oaths ... . * * *

A combined reading of CPLR 2309(c) and Real Property Law §§ 299 and 311(5) leads to the inescapable conclusion that where, as here, a document is acknowledged by a foreign state notary, a separate "certificate of authentication" is not required to attest to the notary's authority to administer oaths ... . * * *

Nevertheless, CPLR 2309(c) requires that even when a notary is the foreign acknowledging officer, there must still be a "certificate of conformity" to assure that the oath was administered in a manner consistent with either the laws of New York or of the foreign state. In other words, a certificate of conformity is required whenever an oath is acknowledged in writing outside of New York by a non-New York notary, and the document is proffered for use in New York litigation. * * *

Here, the Supreme Court erred in concluding that the Mills affidavit was not accompanied by a certificate of conformity, as the "Uniform, All Purpose Certificate of Acknowledgment," appended to the Mills affidavit, substantially conformed with the template requirement of Real Property Law § 309-b and constituted a certificate of conformity. * * * **Midfirst Bank v Agho, 2014 NY Slip OP 05778, 2nd Dept 8-13-14**

FAMILY LAW

Family Court Should Have Determined Child Eligible to Apply for Special Immigrant Juvenile Status

The Second Department reversed Family Court finding that an order making the requisite Special Immigrant Juvenile Status findings should have been granted:

> Here the Family Court properly found that the child is under the age of 21, unmarried, and that it would not be in his best interests to be returned to Honduras ... . In addition, inasmuch as the Family Court granted the guardianship petition, the child is dependent upon a juvenile court or legally committed to an individual appointed by a state or juvenile court within the meaning of 8 USC § 1101(a)(27)(J)(i)... . However, contrary to the court's determination, based upon our independent factual review, we find that the record, including detailed affidavits from the child, fully supports the petitioner's contention that, because his father neglected and abandoned him, reunification with his father is not a viable option ... . The fact that the child's mother did not also neglect and abandon him does not preclude the issuance of the order requested ... . **Matter of Miguel C, -N, 2014 NY Slip Op 04923, 2nd Dept 7-2-14**

Same result in **Matter of Gabriela Y U M..., 2014 NY Slip Op 04937, 2nd Dept 7-2-14**

Procedure Used by Family Court in Custody-Modification Proceeding Did Not Meet the Criteria for a Fact-Finding Hearing

The Third Department determined the proceeding Family Court used in a custody-modification proceeding did not meet the criteria for the required fact-finding hearing:

> Family Court erred in failing to conduct a fact-finding hearing. The final appearance was not a true hearing; the parties should have been "afforded a full and fair opportunity to be heard" ... . While Family Court stated at the outset of the August 2013 appearance that the matter was set for a hearing that day, the court then allowed each party to deliver a long, unsworn narrative comprised mostly of hearsay — as the court had permitted the parties to do at each previous appearance. After the parties had discussed their views of the situation for an extended time, they were asked to swear to the statements they had made, following which the court rendered a determination without any opportunity for the parties to avail themselves of the usual attributes of a hearing, including the opportunity to present opening and closing statements, to present any other evidence or to conduct cross-examination (see id.). Thus, the court erred in modifying the prior order without holding a fact-finding hearing ... . **Matter of McCullough v Harris, 2014 NY Slip Op 04984, 3rd Dept 7-3-14**

Summary Judgment Properly Awarded in Derivative Child-Neglect Proceeding

The Third Department determined summary judgment was properly awarded in a derivative child-neglect

proceeding, based in large part on findings made in prior neglect proceedings:

> "'Although it is a drastic procedural device, Family Court is authorized to grant summary judgment in a neglect proceeding where no triable issue of fact exists'" ... . Neglect or abuse of one child typically may not serve as the sole support for a finding of derivative abuse or neglect; however, where the proof of "past neglect and abuse demonstrably 'evidence[s] fundamental flaws in the respondent's understanding of the duties of parenthood, proof of abuse or neglect of other children is alone sufficient to sustain a finding of abuse or neglect of another child'" ... . A prior determination should be "sufficiently proximate in time to reasonably conclude that the problematic conditions continue to exist" ..., but "there is no 'bright-line, temporal rule beyond which we will not consider older child protective determinations'" ... .
>
> Here, petitioner established a prima facie case for summary judgment with the affidavit of its counsel setting forth the prior proceedings, the Family Court records of such proceedings and an affidavit from a caseworker. The nature of the acts that Family Court had found in the 2010 proceedings as having been perpetrated upon a child entrusted to respondent's care established a fundamental defect in respondent's understanding of parental duties. The caseworker set forth, among other things, respondent's failure to complete preventive services, including sex offender treatment. Although respondent's affidavit in opposition offered explanations for his inability to complete some services, he acknowledged that he had not yet completed sex offender treatment. Given the nature of the 2008 acts found in the 2010 proceedings, together with the fact that respondent is still in, but has not yet successfully completed, sex offender treatment, we are unpersuaded that Family Court erred in granting summary judgment... . **Matter of Ilonni I..., 2014 NY Slip Op 04987, 3rd Dept 7-3-14**

Child Should Have Been Placed with Grandmother---Placement Criteria Explained

The Second Department determined Family Court should not have denied the petition to place the child with the grandmother. The court explained the placement procedure and criteria:

> Family Court Act § 1017 sets out the steps to be followed in determining the appropriate placement of a child when the child is initially removed from his or her home. When the decision to remove the child was made, the DSS was obligated to locate the child's relatives, including her grandmother, and inform them of the pendency of the proceeding and of the opportunity for becoming foster parents or for seeking custody or care of the child (see Family Ct Act § 1017[1]). The Family Court was then required to determine if the child could suitably reside with any such relative (see Family Ct Act § 1017[1][a], [b]). If a suitable relative existed, the Family Court would either place the child with that relative or with the local commissioner of social services with directions to allow the child to reside with that relative pending his or her approval as a foster parent (see Family Ct Act § 1017[2][a]). Only if no suitable relative could be located would the Family Court consider whether another placement would be appropriate (see Family Ct Act former § 1017[2][b]). With respect to an out-of-state relative, Social Services Law § 374-a requires that an ICPC home study must first be conducted before placing the child with that individual.
>
> "One purpose of Family Court Act § 1017 is to help safeguard the infant's physical, mental and emotional well-being. . . Placement with a suitable relative can help the child by maintaining family ties and reducing the trauma of removal. In making a determination of placement [the] Family Court must consider not only the custodian's ability to provide adequate shelter, but all the facts and circumstances relevant to the child's best interest" ... . **Matter of Paige G, 2014 NY Slip Op 05182, 2nd Dept 7-9-14**

Where There Has Been a Failure of a Material Condition of a Judicial Instrument of Surrender (of Guardianship and Custody of a Child), the Parent May Bring an Action to Revoke the Surrender Instrument

The Third Department, in a full-fledged opinion by Justice Devine, determined, where a parent agrees to surrender guardianship and custody of a child pursuant to a judicial instrument of surrender, a substantial failure of a material condition of the instrument allows the parent to bring an action to revoke the instrument. In this case the persons specified in the surrender would not adopt the child:

> In Matter of Christopher F. (supra), we were presented with a biological parent's application to revoke a judicial instrument of surrender. We concluded that, although no procedures beyond notification of the parent were set forth in the statute at that time (see Social Services Law § 383-c [6] [former (c)], as added by L 1990, ch 479, § 2), "based upon our common-sense interpretation of the applicable statutory framework," the failure of the provision of the

surrender instrument conditioning the biological parent's surrender on adoption of the child by the person specified in the surrender "permitted [the biological parent] to revoke her consent to the adoption" ... . Accordingly, we granted the parent's application for revocation of the judicial surrender. "'The Legislature is . . . presumed to be aware of the decisional and statute law in existence at the time of an enactment'" ... . Since the subsequent statutory amendments did nothing to abrogate or replace the relevant portions of our holding in Matter of Christopher F. (260 AD2d at 99-101), we conclude that, when there has been a substantial failure of a material condition of a judicial instrument of surrender, the procedure we endorsed in Matter of Christopher F. (supra) remains the appropriate procedure. In such a circumstance, the surrendering parent may bring an application before the court — either by petition or by motion — for revocation of the instrument (see id. at 101). **Matter of Bentley XX, 2014 NY Slip Op 05222, 3rd Dept 7-10-14**

Substantial Evidence Supported Finding that Allowing a Child to Wander Away Near a Four-Lane Highway Constituted Maltreatment

The Third Department determined the Commissioner of Children and Family Services properly denied a petition to have a report maintained by the Central Register of Child Abuse and Maltreatment amended to be unfounded and expunged. Petitioner called law enforcement because her grandchild had wandered away from her front yard and was found unharmed about 200 yards away. There was no fence and the home faced a four-lane highway:

> Substantial evidence supports the finding of maltreatment. In order to establish maltreatment, the agency was required "to demonstrate by a fair preponderance of the evidence that 'the child's physical, mental or emotional condition ha[d] been impaired or [was] in imminent danger of becoming impaired as a result of the [caregiver's] failure to exercise a minimum degree of care'" in providing the child with appropriate supervision ... . Upon review of such an administrative determination, "this Court's inquiry is limited to whether the decision is rational and supported by substantial evidence" ... . A determination is supported by substantial evidence "when reasonable minds could adequately accept the conclusion or ultimate fact based on the relevant proof" ... .
>
> Although petitioner's home is at the end of a dead-end street, testimony by respondent Michelle Kelley, a caseworker for the Saratoga County Department of Social Services, and photographs introduced into evidence established that the home also faces a four-lane divided highway with a speed limit ranging from 45 to 55 miles per hour. Notably, the same evidence showed that there is no fence, or any similar physical barrier, directly between petitioner's front yard and this highway. **Matter of Cheryl Z v Carrion, 2014 NY Slip Op 05226, 3rd Dept 7-1014**

As a Matter of Discretion, the Court Can Grant a Separate Property Credit for Property Which Was Originally Separate But Which Was "Transmuted" into Marital Property (Overruling Precedent)---the Credit Was Properly Denied Here

The Third Department determined that, under the facts of the case, Supreme Court properly denied the wife a credit for the marital home which originally was her separate property. The wife subsequently put the property in both her and her husband's names and the property was used to consolidate the debts of both husband and wife. However, the Third Department took the opportunity to explain that property which is originally separate but which is then "transmuted" to marital property can be the basis of a separate-property credit, overruling a case relied upon by Supreme Court to deny the credit. The credit can be applied as a matter of discretion:

> ...[T]o the limited extent that Campfield [95 AD3d 1429] may be read to limit a court's discretion to award a separate property credit to a spouse, like the wife, who transmutes separate property into marital property without changing the nature of the property itself, it should no longer be followed. As we have subsequently noted without reference to the way in which a marital asset was acquired, credits are often given for the value of the former separate property (see Murray v Murray, 101 AD3d at 1321). We have also subsequently explained that the decision to award a separate property origination credit in such a situation is a determination left to the sound discretion of Supreme Court (see Alecca v Alecca, 111 AD3d at 1128; Murray v Murray, 101 AD3d at 1321). Therefore, our own jurisprudence subsequent to Campfield indicates that such credit is not precluded as a matter of law when separate property has been transmuted into marital property. **Myers v Myers, 2014 NY Slip Op 05228, 3rd Dept 7-10-14**

Deposit of Separate Funds in a Joint Account for One Month Converted the Separate Funds to Marital Property

The First Department interpreted a prenuptial agreement using standard contract-interpretation rules. The court

determined that the terms of the agreement allowed the husband a separate property credit for each property to which he contributed $1 million of his separate funds. The court noted that the husband was not entitled to a separate property credit for $8.5 million paid for a Park Avenue apartment because the funds were first deposited in a joint account, converting them to marital property:

> The husband is not entitled to a credit for the $8.5 million paid from the parties' joint account at closing on the Park Avenue apartment. Although those funds were previously his separate property, they became marital property when he transferred them into the joint account. Since the husband's transfer of separate funds into a joint account transformed those funds into marital property for all purposes, when funds from that joint account were then used for the purchase of the parties' apartment, there was no use of separate property for the acquisition of the apartment. In any event, there is no evidence that the joint account was established only for convenience, or that the fund transfer was merely transitory, since the funds remained in the joint account for a month ... . **Babbio v Babbio, 2014 NY Slip Op 05365, 1st Dept 7-17-14**

Failure to Trace the Allegedly Separate Funds Used for the Purchase of Property During the Marriage Allows the Court to Treat the Property as Marital

The Second Department found a lot of mistakes in the division of property and the support awards made by Supreme Court. The discussion of each category of mistake is substantive enough to be instructive. With respect to an improperly awarded separate property credit, the court explained that a party's failure to trace the source of the funds for a purchase made during the marriage allows the court to treat the property as marital:

> "Property acquired during the marriage is presumed to be marital property and the party seeking to overcome such presumption has the burden of proving that the property in dispute is separate property" ... . Here, BSH was formed and the building was acquired during the marriage, and the plaintiff failed to meet his burden of tracing the use of claimed separate funds to establish that they were used for the purchase of his portion of the property's acquisition costs ... . Marital property is to be viewed broadly, while separate property is to be viewed narrowly ... . Where, as here, a party fails to trace sources of money claimed to be separate property, a court may treat it as marital property... . **Hymowitz v Hymowitz, 2014 NY Slip Op 05306, 2nd Dept 7-16-14**

Child's Move To Connecticut Did Not Strip New York of Jurisdiction and Did Not Justify Finding that New York Was an Inconvenient Forum

The Second Department determined Family Court erred when it determined the child's moving to Connecticut removed the child from its jurisdiction. The court further noted that Family Court erred when it state that, even if it had jurisdiction, it would decline to exercise it. The Second Department determined the analysis of the statutory factors favored New York's continued jurisdiction:

> Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, codified in Article 5-A of the Domestic Relations Law (hereinafter UCCJEA), a court in this State that has made an initial custody determination has exclusive continuing jurisdiction over that determination until it finds, as is relevant here, that the child does not have a "significant connection" with New York, and "substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships" (Domestic Relations Law § 76-a[1][a]...). Here, while the subject child moved to Connecticut to live with her father approximately eight months before the mother petitioned to modify a prior order of custody so as to award her sole custody of the child, the record reveals that the child retained a significant connection to New York, including attending school and having frequent visitation with her mother in New York, and that substantial evidence was available in this state concerning her present and future welfare ... . The child's significant connection to Connecticut does not diminish her significant connection to New York as well ... .
>
> A court of this State that has jurisdiction under the UCCJEA may decline to exercise it if it finds 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]...). However, the court is required to consider the factors set forth in Domestic Relations Law § 76-f(2)(a)-(h) before determining that New York is an inconvenient forum ... . The Family Court failed to do so here. However, we need not remit the matter to the Family Court, Queens County, for consideration of the statutory factors because the record is sufficient for this Court to consider and evaluate those factors ... . Consideration of the relevant statutory factors, including the nature and location of relevant evidence, and the Family Court's greater familiarity than the courts of Connecticut with the facts and issues underlying the mother's modification petition, supports a conclusion that New York is not an inconvenient

forum ... . **Matter of Mojica v Denson, 2014 NY Slip Op 05882, 2nd Dept 8-20-14**

Failing to Award Interim Attorney's and Expert Witness Fees to Nonmonied Spouse Was an Abuse of Discretion

The Second Department, noting the great income disparity between husband and wife, determined Supreme Court abused its discretion when it failed to award interim attorney's fees and expert witness fees to the wife:

> "Domestic Relations Law § 237 provides that in any action for a divorce, the court may direct either spouse to pay counsel fees directly to the attorney of the other spouse to enable the other party to carry on or defend the action as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties" (... see Domestic Relations Law § 237). "The statute provides that there shall be a rebuttable presumption that counsel fees shall be awarded to the less monied spouse" ... . "Such an award is intended to ensure that the nonmonied spouse will be able to litigate the action, and do so on equal footing with the monied spouse'" ... . "The issue of interim counsel fees is controlled by the equities of the case and the financial circumstances of the parties" ... . "An award of interim counsel fees to the nonmonied spouse will generally be warranted where there is a significant disparity in the financial circumstances of the parties" ... . "Accordingly, courts should not defer requests for interim counsel fees to the trial court, and should normally exercise their discretion to grant such a request made by the nonmonied spouse, in the absence of good cause—for example, where the requested fees are unsubstantiated or clearly disproportionate to the amount of legal work required in the case —articulated by the court in a written decision" ... .
>
> Here, the Supreme Court improvidently exercised its discretion in referring the defendant's motion for interim counsel fees to the trial court for determination. The evidence before the Supreme Court revealed a gross disparity in the parties' income, that the defendant is the nonmonied spouse, and that the plaintiff's income in 2010, when he filed a separate tax return, exceeded $27,000,000 ... . This evidence demonstrated that the defendant lacks the resources to litigate this action. **Carlin v Carlin, 2014 NY Slip Op 05938, 2nd Dept 8-27-14**

FAMILY LAW/EVIDENCE

Admissible Hearsay Concerning the Child's Injuries and Evidence Relevant to the Child's Motivation to Lie Should Not Have Been Excluded from the Neglect Proceeding

The Second Department determined Family Court erred in excluding evidence from a neglect proceeding. The excluded evidence included hearsay statements by a police officer included in the Investigative Progress notes indicating the child's (Jonell H's) bruises were not severe, and evidence relevant to the child's motivation to lie:

> At the fact-finding hearing, the Family Court erred in excluding from evidence Investigation Progress notes dated April 18, 2010, indicating that a police officer had informed a caseworker that the officer had visited Jonell H. shortly after the alleged neglect took place and observed that the bruises on her right arm were "not serious" and that "[t]here [are] not other visible bruises/marks observed" on her. These notes were admissible under the business records exception to the hearsay rule since the caseworker was under a duty to maintain a comprehensive case record for Jonell H., and the officer had a duty to report his or her observations of her condition ... .
>
> The Family Court also erred in precluding the mother from calling four particular witnesses to testify. Those witnesses would have given testimony pertaining to Jonell H.'s motivation to lie. Extrinsic proof tending to establish a reason to fabricate is never collateral and may not be excluded on that ground ... . Similarly, the court should not have excluded from evidence Family Service Progress notes containing statements by Jonell H.'s foster parents relevant to her motivation to lie. Foster parents are "employees who [are] under a business duty to timely record and report all matters concerning the physical, mental, and emotional conditions of the children in their care to the foster care agency" ... . **Matter of Grayson J, 2014 NY Slip Op 04934, 2nd Dept 7-2-14**

FAMILY LAW/JUVENILE DELINQUENCY/CRIMINAL LAW

Police Did Not Have Sufficient Information to Justify Request that 12-Year-Old Lift His Shirt--Weapon Recovered After Juvenile's Refusal (and a Police Pursuit) Should Have Been Suppressed

The Second Department determined the police did not have sufficient information to justify a request that

appellant, who was 12 years old, to lift his shirt. The weapon found on the appellant's person should have been suppressed:

> At issue here is whether the officers could ask the appellant to lift his shirt, even after he refused, and then pursue him as he fled the scene. Based upon a founded suspicion that criminal activity is afoot, the subject may be asked to produce identification ..., may be asked whether he has weapons, and may be asked to remove his hands from his pockets ... . However, asking a person to open his or her coat is an "intrusive step" which requires sufficient evidence of criminal activity to permit more than an inquiry by the police ... . Here, the police acknowledge they did not see an object until they took their "intrusive step" of demanding that the appellant lift up the front of his shirt after he refused to do so, whereupon a police officer pursued him with his gun drawn.
>
> The appellant had the "right to be let alone" ... . The police may lawfully pursue an individual if they have a reasonable suspicion that he or she has committed or is about to commit a crime ... . However, in this case, the police only acquired a basis to pursue the appellant after they took the intrusive step of demanding that he raise the front of his shirt and saw the butt of a gun. Since the pursuit of the appellant was unlawful, the gun which he abandoned in response to the pursuit should have been suppressed... . **Matter of Shakir J, 2014 NY Slip Op 05336, 2nd Dept 7-16-14**

FRAUD/DAMAGES

Fraud Cause of Action Seeking Only Lost Profits as Damages Must Be Dismissed

The Third Department determined that plaintiff's fraud cause of action could not go forward because plaintiff sought only lost profits as damages. Also dismissed and briefly discussed were "conspiracy to commit fraud (not a valid separate cause of action)," prima facie tort and a demand for punitive damages:

> Plaintiff's cause of action alleging fraud requires "a misrepresentation or omission of a material fact known to be false and made with the intent to deceive, as well as justifiable reliance and damages" ... . * * * "The true measure of damage [for fraud] is indemnity for the actual pecuniary loss sustained as the direct result of the wrong or what is known as the out-of-pocket rule" ... . Damages for fraudulent acts should "compensate plaintiffs for what they lost because of the fraud, not for what they might have gained" ... . As plaintiff does not dispute that it seeks only the lost profit it anticipated earning as a result of conveying the property to BLP, defendants are entitled to summary judgment dismissing the first cause of action ... .
>
> Plaintiff's second cause of action alleging a conspiracy to commit fraud must also be dismissed because "'a mere conspiracy to commit a [tort] is never of itself a cause of action'" ... . Plaintiff's third cause of action for prima facie tort "requires a showing of an intentional infliction of harm, without excuse or justification, by an act or series of acts that would otherwise be lawful" ... . Significantly, "[s]uch acts must be motivated solely by malevolence" ... . Plaintiff ... makes no claim that defendants were motivated — even in part — by malevolence. As for plaintiff's fourth cause of action for declaratory relief, it too must be dismissed as entirely unnecessary under the circumstances here ... .
>
> Nor, in light of our determination that plaintiff failed to establish its causes of action for fraud and prima facie tort, is this a case for punitive damages. There is no basis upon which to conclude that defendants' conduct "'evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations'" ... . **Route 217, LLC v Greeg, 2014 NY Slip Op 04998, 3rd Dept 7-3-14**

FREEDOM OF INFORMATION LAW (FOIL)/MUNICIPAL LAW/PUBLIC OFFICERS LAW

FOIL Request Should Not Have Been Denied---Questions of Fact About Ability to Retrieve Documents

The Second Department determined there were questions of fact whether the Long Island Power Authority (LIPA) was required to retrieve documents pursuant to petitioner's Freedom of Information Law (FOIL) request. The court explained the applicable criteria:

> The Legislature has declared that "government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article" (Public Officers Law § 84...). The term "record" is defined to mean "any information kept, held, filed, produced or reproduced by, with or for an agency . . . in any physical form whatsoever including . . . papers [and] computer tapes or discs" (Public Officers Law § 86[4]). With limited exceptions, FOIL does not "require any entity to prepare any record not possessed or maintained

by such entity" (Public Officers Law § 89[3][a]...). However, "[a]ny programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested by a person or to allow the transferred record to be read or printed shall not be deemed to be the preparation or creation of a new record" (Public Officers Law § 89[3][a]). An agency may not deny a request because it was too voluminous or burdensome if the request could be satisfied by engaging an outside service (see Public Officers Law § 89[3][a]). Moreover, an agency may recover the costs of engaging an outside service from the person or entity making such a request (see Public Officers Law § 89[3][a]).

"[T]he burden of proof rests solely with the [agency] to justify the denial of access to the requested records" ... . This burden must be met "in more than just a plausible fashion" ... .

Here, the Supreme Court erred in denying the amended petition and dismissing the proceeding, as there are triable issues of fact as to whether the petitioner requested data or records that could be retrieved or extracted with reasonable effort, whether the requests required the creation of new records, and whether the cost of the retrieval could be passed on to the petitioner (see CPLR 7804[h]...). **Matter of County of Suffolk v Long Is Power Authority, 2014 NY Slip Op 05540, 2nd Dept 7-30-14**

INSURANCE LAW

Material Misrepresentation Justified Rescission of Policy

The Second Department determined that plaintiff's representation to the insurance carrier that the property was a two-family dwelling, when it actually was a three-family dwelling, was a material misrepresentation justifying rescission of the policy:

"To establish the right to rescind an insurance policy, an insurer must show that its insured made a material misrepresentation of fact when he or she secured the policy" ... . "A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented" ... . "To establish materiality as a matter of law, the insurer must present documentation concerning its underwriting practices, such as underwriting manuals, bulletins, or rules pertaining to similar risks, that show that it would not have issued the same policy if the correct information had been disclosed in the application" ... . * * *

...[T]he defendant submitted an affidavit from its underwriting manager and its "Homeowners Selection Rules," which showed that it would not have issued the same policy if the application had disclosed that the subject premises was a three-family dwelling ... . **Lema v Tower Ins Co of NY, 2014 NY Slip Op 05162, 2nd Dept 7-9-14**

Policy Language Interpreted to Support Plaintiff's Allegation the Insurer Was Timely Notified of Injured Worker's Claim

The Fourth Department, over a two-justice dissent, reversed Supreme Court finding that the documentary evidence did not demonstrate the insurer had not been timely notified of the claim (within the meaning of the policy language) as a matter of law. In the course of the decision, the court interpreted the policy terms "occurrence," "claim" and "suit" as well as the phrase "see to it that defendant was notified:"

Initially, we conclude that the December 2009 letter was a notice of an "occurrence . . . which may result in a claim" and not a "claim" under the policy. The terms "occurrence," "claim," and "suit" are separately used in the policy, and thus each term must be " deemed to have some meaning' " ... . The policy defines "[o]ccurrence" as "an accident." The term "[c]laim" is not defined in the policy, but such term has been interpreted to mean " an assertion of legally cognizable damage,' " i.e., " a type of demand that can be defended, settled and paid by the insurer' " ... . Here, the December 2009 letter "neither makes any demand for payment nor advises that legal action will be forthcoming" ... . Rather, the letter advised plaintiff that [the injured worker] had retained an attorney in connection with personal injuries he had sustained during the course of his work on the construction project, requested that plaintiff forward the letter to its insurance carrier, and warned plaintiff that failure to notify its carrier could result in a denial of coverage and "personal responsibility for any obligations that may arise" from [the] accident.

We further conclude that the January 2010 letter and form ... sent to defendant at plaintiff's request satisfied the insured's duty under the policy to "see to it" that defendant was notified of the occurrence "as soon as practicable" .... Contrary to the court's conclusion, the policy did not require that written notice of an occurrence come directly from plaintiff; it simply required that plaintiff "see to it" that defendant was "notified" ... . Moreover, to the extent that the phrase "see to it that we are notified" is ambiguous, that ambiguity must be construed in plaintiff's favor ... . Inasmuch as the

> January 2010 letter constituted notice of an "occurrence," we conclude that the May 2010 letter constituted notice of a "claim" or "suit" based upon [the injured worker's] April 15, 2010 commencement of the underlying action. We therefore agree with plaintiff that the court erred in dismissing the complaint against defendant inasmuch as the documentary evidence does not conclusively establish a defense to plaintiff's claim as a matter of law... . **Spoleta Constr LLC v Aspen Ins UK Ltd, 2014 NY Slip Op 05250, 4th Dept 7-11-14**

Disclaimer of Coverage Unreasonably Untimely as a Matter of Law

The Second Department determined the defendant insurer's disclaimer of coverage was unreasonably untimely as a matter of law:

> An insurance company has an affirmative obligation to provide written notice of a disclaimer of coverage as soon as is reasonably possible, even where the policyholder's own notice of the claim to the insurer is untimely ... . Here, the defendant learned by January 6, 2012, at the latest, about the underlying personal injury action. The defendant was aware by that date of the grounds for disclaimer of coverage ... . Nevertheless, it did not disclaim coverage until March 28, 2012, almost three months later, a delay that, under the circumstances of this case, is unreasonable as a matter of law ... . **Darling Ferreira v Global Liberty Ins Co of NY, 2014 NY Slip Op 05409, 2nd Dept 7-23-14**

Supplemental Uninsured/Underinsured Motorist (SUM) Provision Triggered When an Individual Would Be Afforded More Coverage by the Policy with the SUM Provision

The Second Department determined that the supplementary uninsured/underinsured motorist (SUM) provision was triggered when the policy with the provision (the GEICO policy) had a $300,000 single limit liability and the policy which paid out the claim (the Allstate policy) was a "split limit" policy with a $300,000 per accident limit and a $100,000 per person limit. The injured party was paid the $100,000 limit under the Allstate policy:

> Benefits under a SUM policy, when SUM coverage is purchased at the option of the insured, are available "if the limits of liability under all bodily injury liability bonds and insurance policies of another motor vehicle liable for damages are in a lesser amount than the bodily injury liability insurance limits of coverage" provided by the insured's policy (Insurance Law § 3420[f][2][A]...). "The necessary analytical step, then, is to place the insured in the shoes of the tortfeasor and ask whether the insured would have greater bodily injury coverage under the circumstances than the tortfeasor actually has" ... . The determination of whether SUM benefits are available "requires a comparison of each policy's bodily injury liability coverage as it in fact operates under the policy terms applicable to that particular coverage" ... . "Only by doing that comparison is it possible to make the required determination: whether the tortfeasor has less bodily injury liability coverage than the insured" ... .
>
> Here, a comparison of the two policies at issue, in light of the particular circumstances of this case, demonstrates that an individual ... would be afforded greater per-person bodily liability injury coverage under the GEICO policy than under the Allstate policy. **Matter of Government Empls Ins Co v Lee, 2014 NY Slip Op 05642, 2nd Dept 8-6-14**

INSURANCE LAW/CONFLICT OF LAWS

Law of Contracts, Not Law of Torts, Applied to Conflict of Laws Analysis Concerning Motor Vehicle Insurance Policy

The Second Department determined the law of contracts, as opposed to the law of torts, controlled which state law applied. The case involved a car accident in Florida and an insurance policy issued in New York:

> It is undisputed that this conflict of law question, although arising in the context of a motor vehicle accident, must be resolved by the conflict of law rules relevant to contracts, not torts ... . Generally, "the courts apply the more flexible center of gravity' or grouping of contacts' inquiry, which permits consideration of the spectrum of significant contacts' in order to determine which State has the most significant contacts to the particular contract dispute" ... . "In general, significant contacts in a case involving contracts, in addition to the place of contracting, are 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" ... . As to insurance contracts specifically, significance has been attached to the " local law of the state which the parties understood was to be the principal location of the insured risk . . . unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 [of the Restatement] to the transaction and the parties'" ... . In the case of a noncommercial vehicle, which is by its nature mobile, the principal location of the

insured risk is the place where the vehicle is to be principally garaged ... .

Here, as the Supreme Court correctly noted, the insurance contract at issue was written to conform to the laws, rules and regulations of New York State, and was obtained in New York by Brand, a New York resident, from an insurance company doing business in New York. Furthermore, Brand served the demand for SUM [supplemental uninsured/underinsured motorist] arbitration upon the American Arbitration Association in New York. Applying the grouping of contacts inquiry to these facts, New York has the most significant contacts with the parties and the contract. Indeed, such a conclusion would be in conformity with the reasonable expectations of the contracting parties. **Matter of Unitrin Direct/Warner Ins co v Brand, 2014 NY Slip Op 05887, 2nd Dept 8-20-14**

INSURANCE LAW/NO-FAULT

Denial of "Defective" No-Fault Claim (on Form UB-40) Was of No Effect---Failure to Respond Within 30 Days to a Subsequent "Correct" Claim (on Form NF-5) Precluded Insurer from Raising Defenses to the Claim

The Second Department determined the insurer's denial of a defective claim was of no effect and the insurer's failure to respond to the valid claim within 30 days precluded raising defenses to the claim:

> [The insurer] contends that the 30-day period commenced when it received the Form UB-04 in December 2011, that it timely requested verification of the claim, and that, after it received the medical records, it timely denied the claim in January 2012. [the hospital] could not commence the 30-day clock anew by submitting the same claim several months later ... .
>
> We conclude that the Supreme Court erred in denying [the hospital's] motion for summary judgment on the complaint and in granting [the insurer's] cross motion for summary judgment dismissing the complaint. Under our decision in Sound Shore [106 AD3d 157], the 30-day period for [the insurer] to pay or deny the claim did not begin to run until March 26, 2012, when [the hospital] submitted the Form NF-5, which contained the information needed. Because [the insurer] did not pay or deny the claim within 30 days thereafter, it was precluded from raising defenses. In other words, the defective "claim" submitted in December 2011 did not start the 30-day clock, so [the insurer's] denial in January 2012 was of no effect ... . **Mount Sinai Hosp v New York Cent Mut Fire Ins Co, 2014 NY Slip Op 05779, 2nd Dept 8-13-14**

INSURANCE LAW/WORKERS' COMPENSATION

Action Against Broker for Failure to Procure Correct Coverage Should Not Have Been Dismissed/Question of Injured Worker's Employment Status Must First Be Determined by the Workers' Compensation Board

The Second Department determined that a cause of action alleging the insurance broker (Crystal) failed to purchase adequate insurance in response to a request from the insured (Mariani) should not have been dismissed. The insured's worker was injured on the job and the insurer disclaimed coverage because the policy did not cover subcontractors. The Second Department also determined that it was up to the Workers' Compensation Board to first determine the injured worker's employment status and Supreme Court should not inject itself into that question until the Board acts:

> "An insurance agent or broker . . . may be held liable under theories of breach of contract or negligence for failing to procure insurance . . . An insured must show that the agent or broker failed to discharge the duties imposed by the agreement to obtain insurance, either by proof that it breached the agreement or because it failed to exercise due care in the transaction" ... . Crystal was not entitled to judgment as a matter of law because it failed to establish, prima facie, that it procured the adequate coverage that Mariani had engaged it to procure ... . **Siekkeli v Mark Mariani Inc, 2014 Slip Op 05319, 2nd Dept 7-16-14**

INTENTIONAL TORTS/MUNICIPAL LAW/NEGLIGENCE

Sheriff's (Lack of) Liability Under Respondeat Superior, Elements of Malicious Prosection, Abuse of Process, False Imprisonment and Libel Per Se Explained

In a lengthy and detailed decision the Fourth Department explained the negligence actions against the sheriff based on respondeat superior were properly dismissed, the action for malicious prosecution was properly dismissed (because the underlying criminal action was not dismissed on the merits and could be renewed), but the actions for abuse of process, false imprisonment, and libel per se should not have been dismissed. The decision is too lengthy to summarize here, but it includes detailed explanations of the sheriff's immunity from suit under respondeat superior and the elements of malicious prosecution, abuse of process, false imprisonment, and libel per se. The action stemmed

from the allegation plaintiff was falsely accused of stealing a computer. **D'Amico v Correctional Med Care Inc, 2014 NY Slip Op -5737, 4th Dept 8-8-14**

JUDGE'S COMPENSATION/SEPARATION OF POWERS

Judges Not Entitled to Retroactive Monetary Damages Re: Legislature's Failure to Enact Cost of Living Increases Since 2000

The First Department, with concurring and dissenting opinions, affirmed Supreme Court's declining to award the plaintiffs-judges retroactive monetary damages based upon the legislature's failure to enact cost of living increases since 2000. In his concurring opinion, Justice Tom determined that the Court of Appeals, in Matter of Maron v Silver, 14 NYU3d 230 (2010), did not authorize the courts to award such damages, rather the Court of Appeals left it to the legislature to remedy the problem:

> There is no lingering question whether the legislature acted properly during the time period when judges' salary remained stagnant for years - it did not - nor was there any serious controversy regarding the merits of an increase in judicial compensation. Now that the legislature has acted, the issue presented is whether the pay increases that were authorized were themselves constitutionally deficient. However, plaintiffs are conflating an understandable lack of satisfaction with the financial outcome with an analysis more properly relegated to the constitutionality of the process. Relatedly, we are constrained by the text of the Court of Appeals decision, in Maron, which analyzed the prior process in terms of the conflict between the legislature's constitutional prerogatives, and its budgetary policies that are outside the purview of those boundaries. * * *
>
> In the final analysis, however, the viability of the remedy which plaintiffs seek is solely governed by the existing Court of Appeals ruling. The decision did not directly define the outer boundaries of judicial power should the legislature not provide for retroactive compensation, but seemingly left the nature and extent of compensation with the legislature. Thus, I do not find that the legislature, having abandoned its constitutionally offensive policy of linkage when recently increasing judicial salaries, has constitutionally offended by acting only prospectively, nor do I see a basis to conclude that the directives of the Court of Appeals were transgressed. **Larabee v Governor of the State of NY, 2014 NY Slip Op 05246, 1st Dept 7-10-14**

LABOR LAW

Cleaning Cement Truck After Cement-Delivery Not Covered by Labor Law 240

The Fourth Department, over a dissent, determined plaintiff was not engaged in an activity protected by Labor Law 240 at the time of the injury. Plaintiff had just delivered concrete to the defendant farm and was cleaning his truck when he fell from a ladder attached to the truck:

> ...[W]e agree with defendant that the activity in which plaintiff was engaged at the time of his injury, i.e., the routine cleaning of his employer's cement truck after making a delivery, "was not the kind of undertaking for which the Legislature sought to impose liability under Labor Law § 240' " ... . Specifically, plaintiff "was not engaged in the erection, demolition, repairing, altering, painting, cleaning or pointing' of a building or structure' within the intended meaning of Labor Law § 240 (1)" ... . Rather, he was "engaged in routine maintenance" of the cement truck, "which is not a protected activity under Labor Law § 240 (1)" ... .
>
> We reject the dissent's view that this case is distinguishable from Koch because the plaintiff in that case was "merely a delivery driver" while "there is evidence here that plaintiff operated the machinery of the cement truck to assist in the pouring of the concrete as part of the construction of the silo." Any such distinction, even if supported by the record, is irrelevant to the applicability of Labor Law § 240 (1). **Bish v Odell Farms Partnership, 2014 NY Slip Op 05063, 4th Dept 7-3-14**

Plaintiff's Labor Law 240 and 200 Actions Against the Town Should Have Been Dismissed---Although the Town Hired Plaintiff to Do Work on the Town's Right of Way, the Accident Occurred on Adjacent Private Property---Labor Law 200 Action Against the Property Owners Should Not Have Been Dismissed

The Fourth Department, over a dissent, determined the Labor Law 240 and 200 actions against the town should have been dismissed because the injury occurred on private land, not town land. The court further determined that the Labor Law 200 action against the landowners (the Hersheys) should not have been dismissed because the owners did not demonstrate as a matter of law their lack of notice of the dangerous condition. The plaintiff had been hired by the town to do sidewalk and driveway work on the town's right of way next to the Hersheys' property. The plaintiff was parking a backhoe on the Hersheys' property, with the Hersheys' permission, when it tipped over into a ravine:

> ...[W]e agree with the Town that the court erred in denying the Town's motion for summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) causes of action against it, inasmuch as the Town is not an "owner" for purposes of those statutes ... . It is well settled that "the term owner' is not limited to the titleholder of the property where the accident occurred and encompasses a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit' " ... . Here, the accident occurred well outside of the Town's right-of-way, and the Town had no other interest in or legal authority over the landing area, which was located entirely on the Hersheys' private property ... . The Town established that it was Kenneth Hershey, not the Town, who gave plaintiff permission to park in the landing area; that the Town had no authority to grant such permission to plaintiff; and that Kenneth Hershey directed plaintiff where to park. Further, the Town established that the landing area was not part of the construction site ... . No work was being performed in the landing area, and the landing area was not contiguous or in proximity to the construction site ... . Moreover, the Town established that it was not necessary for plaintiff to park the backhoe in the landing area. The Town provided plaintiff with parking in a municipal garage, which was located a few miles from the work site. Plaintiff, however, testified at his deposition that he chose to use the landing area because it was closer to the work site and more "convenient" to do so ... . **Farruggia v Town of Penfield, 2014 NY Slip Op 4th Dept 7-3-14**

Questions of Fact Raised About Labor Law 240(1), 240(6) and 200 Causes of Action---Labor Law 200 Actions Are Not Limited to Construction Work (Question of Fact About Unsafe Work Site Will Support Labor Law 200 Cause of Action)

The Fourth Department noted that Labor Law 200 causes of action are not limited to construction work and, with respect to one of the defendants, a question of fact had been raised about the safety of the work site. Plaintiff was injured when he drove a forklift over plywood covering a pit used to store linens in an industrial laundry operation. Questions of fact had also been raised about whether work being done by the plaintiff was covered by Labor Law 240(1) and Labor Law 240 (6). With respect to the Labor Law 240(1) cause of action against two of the defendants, the court wrote:

> ...[T]he court properly denied [defendants'] respective motions for summary judgment with respect to the Labor Law § 240 (1) claim because there are issues of fact whether plaintiff was engaged in an activity covered by that section. To fall under the protection of Labor Law § 240 (1), "the task in which an injured employee was engaged must have been performed during the erection, demolition, repairing, [or] altering . . . of a building or structure' " or must have "involve[d] . . . such activities" ... . Here, the parties' submissions raise an issue of fact whether plaintiff himself was "altering" or making a "significant physical change to the configuration or composition of the building or structure" at the time of his injury ... . Specifically, the record is unclear whether plaintiff was in the process of simply moving a "towel folder," which would not afford him the protection of section 240 (1) ..., unless that activity "was . . . ancillary" to the ongoing renovation work ... ; or, whether he was removing an old machine weighing approximately 1,000 pounds and then installing and securing to the cement floor a new machine as a replacement, which would afford him the protection of section 240 (1) ... . **Foots v Consolidated Bldg Contrs Inc, 2014 NY Slip Op 05058, 4th Dept 7-3-14**

"Cleaning" Within the Meaning of Labor Law 240(1) Explained

The Second Department determined defendants were not entitled to summary judgment dismissing plaintiff's Labor Law 240(1) action. Plaintiff fell from a 20-foot ladder while cleaning windows. The defendants were unable to demonstrate that the activity plaintiff was engaged in was not covered by Labor Law 240(1):

> Labor Law § 240(1) provides protection for those workers performing maintenance that involves painting, cleaning, or pointing ... . Other than commercial window cleaning, which is afforded protection pursuant to the statute ..., whether an activity is considered "cleaning" for the purpose of Labor Law § 240(1) depends on certain factors. An activity is not considered "cleaning" when (1) it is performed on a routine or recurring basis as part of the ordinary maintenance and care of commercial premises, (2) does not require specialized equipment or expertise, (3) usually involves insignificant elevation risks comparable to those encountered during typical domestic or household cleaning, and (4) is unrelated to any ongoing construction, renovation, painting, alteration, or repair project ... . "Whether [an] activity is cleaning' is an issue for the court to decide after reviewing all of the factors. The presence or absence of any one is not necessarily dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the other" ... .

> The evidence submitted by the defendants in support of their motion failed to establish, prima facie, that the plaintiff's activity at the time of the accident could not be characterized as "cleaning" under Labor Law § 240(1). The evidence did not definitively demonstrate that the plaintiff was performing a routine task or that it was a task that involved an insignificant elevation risk which was comparable to those risks inherent in typical household cleaning ... . **Pena v Varet & Bogart LLC, 2014 NY Slip Op 05524, 2nd Dept 7-30-14**

Fall Into a Three-to-Four-Foot-Deep Hole Is Not an Elevation-Related Event Under Labor Law 240(1)

The Fourth Department determined that falling into a hole is not an "elevation-related event" within the meaning of Labor Law 240(1). The court further determined that regulation requiring that an excavation near a "sidewalk, street or highway or other area lawfully frequented by any person..." be guarded or covered did not apply to employees at a work site. With respect to the elevation requirement for section 240(1), the court wrote:

> Where, as here, a plaintiff falls into a hole while walking at ground level, the plaintiff's injury "[is] not caused by [defendants'] failure to provide or erect necessary safety devices in response to elevation-related hazards,' and, accordingly, the protections of Labor Law § 240 (1) do not apply" ... . The cases relied upon by plaintiff are factually distinguishable because they involve falls into excavated areas, as opposed to mere holes in the ground such as the one here ... . Unlike the excavation cases, this is not a case where protective devices enumerated in Labor Law § 240 (1), e.g., "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, [and] ropes" were designed to apply... . **Wrobel v Town of Pendelton, 2014 NY Slip Op 05738, 4th Dept 8-8-14**

Labor Law 200 Action Is Not Based Upon Supervision or Control of Plaintiff's Work, But Rather on the Property Owner's Creation or Failure to Remedy a Dangerous Condition

The Second Department noted that a negligence case of action pursuant to Labor Law 200 is not based upon supervision or control over the plaintiff's work, but rather is based upon whether the property owner (the Town)ncreated or failed to remedy a dangerous condition:

> The Supreme Court also properly denied those branches of the Town's motion which were for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action insofar as asserted against it. Before the Supreme Court and on appeal, in support of these branches of its motion, the Town focused exclusively upon its alleged lack of supervision of, or control over, the plaintiff's work. That argument is only relevant where the claimed injury arises from the manner in which the work is performed ... . Where, as here, the injury arises from an allegedly defective or dangerous condition on the premises, the allegedly unsecured and improperly stored electrical wire, a property owner will be liable under a theory of common-law negligence, as codified by Labor Law § 200, when the owner created the alleged dangerous or defective condition, or failed to remedy a dangerous or defective condition of which it had actual or constructive notice ... . **Baumann v Town of Islip, 2014 NY Slip Op 05825, 2nd Dept 8-20-14**

Failure to Identify in the Complaint and Bill of Particulars the Specific Code Provision(s) Alleged to Have Been Violated Is Not Fatal to a Labor Law 241(6) Cause of Action

The Second Department noted that the failure to identify, in the complaint and bill of particulars, the specific code provision alleged to have been violated (in support of a Labor Law 241(6) cause of action) is not a fatal defect:

> Although a plaintiff asserting a Labor Law § 241(6) cause of action must allege a violation of a specific and concrete provision of the Industrial Code ..., the failure to identify the code provision in the complaint or bill of particulars is not fatal to such a claim ... . Here, the plaintiff's belated allegations that Cook violated 12 NYCRR 23-1.21(b)(1), 23-1.21(b)(3)(i), 23-1.21(b)(3)(iv), 23-1.21(b)(4)(ii), and 23-1.21(e)(2) involved no new factual allegations, raised no new theories of liability, and caused no prejudice ... . Moreover, these code provisions set forth specific, rather than general, safety standards, and are sufficient to support a Labor Law § 241(6) cause of action ... . **Przyborowski v A&M Cook LLC, 2014 NY Slip Op 05852, 2nd Dept 8-20-14**

Subcontractor Which Supervised Plaintiff's Work Was An Agent for the General Contractor

The Second Department determined a subcontractor which assumed a supervisory role over plaintiff's work was liable under Labor Law 240(1) as an agent of the general contractor:

> To hold a defendant liable as an agent of the general contractor for violations of Labor Law §§ 240(1) and 241(6), there must be a showing that it had the authority to supervise and control the work ... . "The determinative factor is whether the party had the right to exercise control over the

work, not whether it actually exercised that right" ... . Where the owner or general contractor does in fact delegate the duty to conform to the requirements of the Labor Law to a third-party subcontractor, the subcontractor becomes the statutory agent of the owner or general contractor ... . **Van Blerkom v America Painting LLC, 2014 NY Slip Op 05858, 2nd Dept 8-20-14**

Labor Law 240(1) Is a Self-Executing Statute Containing Its Own Specific Safety Measures--- Compliance With Other Safety Requirements (OSHA, for example) Irrelevant

The Second Department determined plaintiff's motion for summary judgment pursuant to Labor Law 240(1) should have been granted. A perimeter warning system had been set up on the roof of a building. But plaintiff's work required that he be close to the edge of the roof, outside the perimeter warning system barrier. Plaintiff fell from the roof. Evidence that the perimeter warning system complied with OSHA and other recognized industry practices did not raise a question of fact:

> Labor Law § 240(1) is "a self-executing statute which, contain[s] its own specific safety measures," the violation of which provides an independent legal basis for liability, regardless of whether there was compliance with federal regulations or general industry standards ... . **Cruz v Cablevision Sys Corp, 2014 NY Slip Op 05943, 2nd Dept 8-27-14**

LABOR LAW/COMMON LAW INDEMNIFICATION

Block Falling from Pallet Covered Under Labor Law 240(1)/Criteria for Common Law Indemnification Explained

The Second Department determined injury from a stone block falling from a pallet was covered by Labor Law 240(1). The court also explained the requirements for common law indemnification:

> The defendants failed to establish their prima facie entitlement to judgment as a matter of law. Labor Law § 240(1) mandates that owners and contractors "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, 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 a person so employed." The statute imposes absolute liability on owners and contractors whose failure to "provide proper protection to workers employed on a construction site" proximately causes injury to a worker ... . The defendants failed to show that the injured plaintiff's alleged injuries resulted from a general hazard encountered at a construction site and were not "the direct consequence of a failure to provide" an adequate device of the sort enumerated in Labor Law § 240(1) ... . Those devices are intended to protect "against a risk arising from a physically significant elevation differential" (id. at 603). The defendants' submissions did not establish that the accident was not the result of a failure to provide a protective device contemplated by the statute ... . * * *
>
> The key element of a cause of action for common-law indemnification is not a duty running from the indemnitor to the injured party, but rather, is a separate duty owed the indemnitee by the indemnitor ... . " Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine'"... . **Desena v North Shore Hebrew Academy, 2014 NY Slip Op 05149, 2nd Dept 7-9-14**

LABOR LAW/MUNICIPAL LAW

Contractor Was a Statutory Agent for the Owner for Purposes of the Labor Law Causes of Action

The First Department explained that a contractor (Bovis) with the authority to direct plaintiff's work became a statutory agent for the city with respect to the Labor Law 240(1) and 241(6) causes of action:

> ...[T]he undisputed evidence established that Bovis was a statutory agent for the City since it possessed and exercised supervisory control and authority over the work being done ... . " When the work giving rise to [the duty to conform to the requirements of section 240(1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor'" ... . Bovis's own superintendent testified that Bovis functioned as the "eyes and ears" of the City for the subject construction project, and it had broad responsibility under its contract to coordinate and supervise the work of the four prime contractors, including plaintiff's employer ... . **Johnson v City of New York, 2014 NY Slip Op 05698, 1st Dept 8-7-14**

LANDLORD-TENANT/EQUITABLE RENEWAL OF LEASE

Question of Fact Whether Tenants Entitled to Equitable Renewal of Lease

The Second Department determined issues of fact were raised concerning whether the tenants should be allowed to remain in the leased premises. Although the written option to renew the lease was never executed, the tenants alleged that oral assurances the tenants could remain were made by the landlord:

> Although the documentary evidence conclusively established that the [tenants] failed to exercise the option to renew in accordance with the express terms of the lease ...., contrary to [the landlord's] contention, that evidence failed to conclusively establish that the [tenants] were not entitled to equitable renewal of the lease. Equity will intervene to relieve a commercial tenant's failure to timely exercise an option to renew in accordance with the terms of the lease where "(1) the tenant's failure to exercise the option in a timely fashion resulted from an honest mistake or inadvertence, (2) the nonrenewal of the lease would result in a substantial forfeiture by the tenant, and (3) the landlord would not be prejudiced by the renewal" ... .
>
> Here, the record reveals the existence of issues of fact as to whether the [tenants'] failure to exercise the option in accordance with the terms of the lease resulted from their mistaken belief that alleged discussions with [tenant's agent] were sufficient to exercise the option, whether nonrenewal of the lease would result in the [tenants'] substantial forfeiture of a benefit as a result of the loss of valuable goodwill that they established at the present location, and whether [the landlord] would suffer prejudice if the lease were renewed... . **Waterfalls Italian Cuisine Inc v Tamarin, 2014 NY Slip Op 05323, 2nd Dept 7-16-14**

MENTAL HYGIENE LAW

Sex Offender May Not Avoid Civil Commitment Proceeding by Renouncing Citizenship and Leaving the Country

The Third Department determined the respondent in a Mental Hygiene Law 10.06 proceeding (called a SOMTA proceeding) to determine whether he, as a sex offender, should be committed to a secure mental health treatment facility, could not defeat the proceeding by renouncing his citizenship and leaving the country:

> It is well established that "Congress has broad authority to set the conditions and procedures that an individual must satisfy in order to renounce his [or her] citizenship" ... . In accord with its authority, Congress enacted 8 USC § 1481, which, in relevant part, provides that "[a] person who is a national of the United States whether by birth or naturalization, shall lose his [or her] nationality by voluntarily performing [certain enumerated] acts with the intention of relinquishing United States nationality" ... . A citizen seeking to renounce his or her nationality must make an application therefor and, generally, must be outside the United States to do so ... . To this end, respondent argues that the SOMTA petition must be dismissed so that he may be released from DOCCS's custody in order to leave the United States and return to Israel, where he will effectuate his expatriation... .
>
> We flatly reject this argument, which presupposes, among other things, that respondent would actually exit this country if he were released from custod. Even if he did leave, the state is not required to bear the risk that petitioner — an experienced international fugitive — would not return to New York thereafter. In any event, at this juncture, respondent remains a United States citizen confined in New York who is a sex offender alleged to have a mental abnormality and in need of civil management, and petitioner continues to have a legitimate interest in protecting society from the risks he poses... . **Matter of State of New York v Horowitz, 2014 NY Slip Op 05001, 3rd Dept 7-3-14**

Portion of Assisted Outpatient Treatment (AOT) Order Not Supported by Testimony Should Not Have Been Included

The Second Department determined Supreme Court did not have the authority, under Mental Hygiene Law 9.60, to go beyond the treatment plan and recommendations testified about by the psychiatrist in a proceeding to order Raymond G to comply with Assisted Outpatient Treatment (AOT). In the absence of any recommendations about Raymond G's use of his car, the court ordered the impoundment of his car. The Second Department reversed that part of the AOT order and explained what can be included in an AOT order under the terms of the controlling statute:

> Mental Hygiene Law § 9.60, commonly known as Kendra's Law, "provides a framework for the judicial authorization of involuntary outpatient treatment programs for persons suffering from mental illnesses" (Matter of William C., 64 AD3d

277, 279). It sets forth, inter alia, the types of outpatient services that may be ordered by the court as part of an AOT plan, the requirements for the petition, and the procedures for a hearing on the petition (see Mental Hygiene Law § 9.60[a][1]; [e][2]-[3]; [h][1]). * * *

The statute requires that the petition be accompanied by an affirmation or affidavit of an examining physician who recommends AOT (see Mental Hygiene Law § 9.60[e][3][I]), and directs that the court "shall not order [AOT]" unless it is provided with a proposed written treatment plan developed by a physician appointed by the applicable community services or hospital director, which includes "all categories of services, as set forth in [§ 9.60(a)(1)], which such physician recommends that the [patient] receive," "no later than the date of the hearing on the petition" (Mental Hygiene Law § 9.60[i][1]). Further, the statute provides that the court "shall not order [AOT] unless [the] physician appearing on behalf of [the] director testifies to explain the written proposed treatment plan [and] state[s] the categories of [AOT] recommended, the rationale for each such category, [and] facts which establish that such treatment is the least restrictive alternative" (Mental Hygiene Law § 9.60[i][3]).

Following the hearing, the court "may" order AOT if it finds by "clear and convincing evidence that the [patient] meets the criteria for [AOT], and there is no appropriate and feasible less restrictive alternative" (Mental Hygiene Law § 9.60[j][2]). The order must include specific findings "by clear and convincing evidence that the proposed treatment is the least restrictive treatment appropriate and feasible for the [patient]," and "state an [AOT] plan, which shall include all categories of [AOT], as set forth in [§ 9.60(a)(1)], which the [patient] is to receive" (Mental Hygiene Law § 9.60[j][2]). The order "shall not include any such category that has not been recommended in both the proposed written treatment plan and the [physician's hearing] testimony" (Mental Hygiene Law § 9.60[j][2]). **Matter of Raymond G..., 2014 NY Slip Op 05183, 2nd Dept 7-9-14**

MORTGAGES

Attributes of Equitable Mortgage Explained

In affirming the denial of plaintiff's motion for summary judgment based upon allegations of the existence of an equitable mortgage, the Fourth Department explained the attributes of an equitable mortgage:

"Equity generally will keep an encumbrance alive, or consider it extinguished, as will best serve the purposes of justice' " ... . "The whole doctrine of equitable mortgages is founded upon [the] cardinal maxim of equity which regards that as done which has been agreed to be done, and ought to have been done" ... .

" [A]n equitable mortgage may be constituted by any writing from which the intention so to do may be gathered, and an attempt to make a legal mortgage, which fails for the want of some solemnity, is valid in equity' " ... . "While [a] court will impose an equitable mortgage where the facts surrounding a transaction evidence that the parties intended that a specific piece of property is to be held or transferred to secure an obligation' . . . , it is necessary that an intention to create such a charge clearly appear from the language and the attendant circumstances' " . .. . **Canandaigua Natl Bank & Trust Co v Palmer, 2014 NY Slip Op 05263, 4th Dept 7-11-14**

Purchaser of Mortgage Was Not a "Bona Fide Encumbrancer"---Another Previously Filed Mortgage Was the Operative Mortgage

The Second Department determined Deutsche Bank did not "win the race" to the recording office (so as to cut off another filed mortgage) and was not a "bona fide encumbrancer" because the person living in the mortgaged premises and paying taxes on the property was not consistent with Deutsche Bank's mortgage:

"[T]o cut off a prior lien, such as a mortgage, the purchaser must have no knowledge of the outstanding lien and win the race to the recording office" ... . * * *

" [W]here a purchaser has knowledge of any fact, sufficient to put him on inquiry as to the existence of some right or title in conflict with [what] he is about to purchase, he is presumed either to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim, to be considered as a bona fide purchaser'" ... . "Similarly, a mortgagee is under a duty to make an inquiry where it is aware of facts that would lead a reasonable, prudent lender to make inquiries of the circumstances of the transaction at issue'" ... . " Actual possession of real estate is sufficient notice to a person proposing to take a mortgage on the property, and to all the world of the existence of any right which the person in possession is able to establish'" ... . **Mortgage Elec Registration Sys Inc v Pagan, 2014 NY Slip Op 05309, 2nd Dept 7-16-14**

MUNICIPAL LAW/CIVIL PROCEDURE/ARTICLE 78

Matter Determined After a Public Hearing, As Opposed to a Quasi-Judicial Evidentiary Hearing, Is Reviewed Under the "Arbitrary and Capricious," Not "Substantial Evidence," Standard/Village's Higher Rate for Water Delivered to Customers Outside Its Borders Was Rational

The Second Department determined that, because there was a public hearing, not a quasi-judicial evidentiary hearing, on whether the village could charge a higher rate for water supplied outside its borders, Supreme Court should have determined the matter under the arbitrary and capricious standard. In applying that standard, the Second Department found the higher rate had a rational basis:

> The Supreme Court erred in characterizing the proceeding as one in the nature of certiorari in which the "substantial evidence" inquiry applied (CPLR 7804[g]). Rate-making determinations may be considered "judicial in the sense that they are reviewable by certiorari or a proceeding in the nature of certiorari" where notice and a hearing are prescribed by statute ... . However, "there are different types of hearings with different legal consequences" ... . Here, the Village Code required the Board to conduct a hearing in advance of changing the rates it charged for water service, and the Board held a public hearing, as opposed to a quasi-judicial evidentiary hearing (see Code of the Village of Williston Park § 225-20[A]). As such, judicial review of the determination was limited to "whether the determination was affected by an error of law, or was arbitrary and capricious or an abuse of discretion, or was irrational" ... . * * *
>
> The Board's determination to increase rates was rational, and was not arbitrary and capricious or illegal. A municipal water supplier may charge a higher rate to customers outside its borders, including other municipalities, so long as the difference has a rational basis ... . Moreover, a municipal corporation operating a public water utility is entitled to earn a "fair return" on its investment in the utility's facilities "over and above costs of operation and necessary and proper reserves" in addition to "an amount equivalent to taxes which [the utility], if privately owned, would pay to such municipal corporation" (General Municipal Law § 94; see NY Const art IX, § 1[f]). The actual rate the Board determined to charge also was rational ... . In addition, the petitioner has not made any showing that the profits earned by the Incorporated Village of Williston Park under the new rate schedule, as compared to the "value of the property used and useful in such public utility service, over and above costs of operation and necessary and proper reserves," were in excess of a "fair return" ... . **Matter of Board of Trustees of Inc Vil of Williston v Board of Trustees of Inc Vil of Williston Park, 2014 NY Slip Op 05179, 2nd Dept 7-9-14**

MUNICIPAL LAW/WHISTLEBLOWER LAW

Action Seeking Equitable Relief Under the Whistleblower Law Can Be Severed from the Action Seeking Monetary Damages and Proceed Despite Failure to Serve Notice of Claim as Required by the General Municipal Law

The First Department, in a full-fledged opinion by Justice Feinman, determined that an action brought under the Whistleblower Law (Civil Service Law 75-b), which sought both monetary damages and equitable relief (reinstatement), could be severed such that the failure to file a notice of claim would not preclude the equitable action. Plaintiff alleged that he was terminated from his engineering position at the Harlem Hospital after he complained about an administrative action concerning the hospital's air conditioning system which plaintiff felt could lead to violations of state and federal health standards:

> The discussions if not the holdings in cases brought in New York seem to establish a rule that when a case is brought against a municipality or governmental agency and sounds in equity, no notice of claim is required unless the notice requirement specifically includes equitable claims. Claims in equity also seeking substantial damages, on the other hand, will be dismissed or may be severed and the monetary claims dismissed if no notice of claim has been filed. Claims brought under the Whistleblower Law are something of an exception: although the usual common relief, i.e., reinstatement, is equitable in nature, a notice of claim seems to be required even under narrow notice provisions such as General Municipal Law § 50-i. * * *
>
> Where a whistleblower claim seeks both equity and monetary damages, but no notice of claim was filed, there is no reason not to treat the claim as we have sometimes treated claims brought against a municipality seeking significant amounts of money damages in addition to resolving the complained-of conditions, that is to say, the equitable portion of the claim can be severed from the claims for monetary damages, and the latter dismissed ... .
>
> Thus, we conclude that in a whistleblower case, a plaintiff whose claim falls under the jurisdiction of

General Municipal Law § 50-e or other narrow statutory notice requirements, should be permitted, if requested, to pursue his or her equitable claim for reinstatement, and any other equitable claim, notwithstanding the absence of the notice of claim required. This would ameliorate the perceived harshness of dismissing whistleblower cases because notices of claim were not filed, even though these cases are not claims of personal injury or damage to real or personal property, as set forth in General Municipal Law § 50-i. It would also, and perhaps more importantly, support the underlying purpose of the Whistleblower Law, which is to reduce risks to the public health and safety by permitting employees to report uncorrected violations or wrongful governmental action by an employer, when the employer has some conflict that prevents that employer from protecting the public (Civil Service Law § 75-b[2][a]). **Rose v New York City Health & Hosps Corp, 2014 NY Slip Op 06013, 1st Dept 8-28-14**

NEGLIGENCE

Proof Vehicle Was Stolen at the Time of the Accident Defeated Action Based Upon Vehicle-Owner's Vicarious Liability

The Second Department determined defendant's evidence that her vehicle had been stolen at the time of the accident entitled her to summary judgment in an action based upon the vehicle-owner's vicarious liability:

> Vehicle and Traffic Law § 388(1) provides that, with the exception of bona fide commercial lessors of motor vehicles, which are exempt from vicarious liability by virtue of federal law ..., the owner of a motor vehicle shall be liable for the negligence of one who operates the vehicle with the owner's express or implied consent ... . This statute creates a presumption that the driver was using the vehicle with the owner's express or implied permission ..., which only may be rebutted by substantial evidence sufficient to show that the vehicle was not operated with the owner's consent ... . Evidence that a vehicle was stolen at the time of the accident will rebut the presumption of permissive use ... . **Fuentes v Virgil, 2014 NY Slip Op 04899, 2nd Dept 7-2-14**

Lack of Notice of Alleged Dangerous Condition Established by Custodian's Testimony

The Second Department determined that the testimony of the school custodian that he had inspected the floor shortly before plaintiff allegedly slipped and fell on accumulated water entitled the defendant school to summary judgment:

> " To impose liability on a defendant for a slip and fall on an allegedly dangerous condition on a floor, there must be evidence that the dangerous condition existed, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time'" ... . " A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected'" ... . "To meet its initial burden on the issue of lack of constructive notice, [a] defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" ... .
>
> Here, the Board of Education established its prima facie entitlement to judgment as a matter of law by submitting, inter alia, the deposition testimony of the custodian engineer assigned to clean the school. He testified that he inspects the school, including the bathrooms, every morning to make sure that it is safe and clean. He further testified that he had last inspected the subject bathroom approximately two to two and one-half hours before the infant plaintiff allegedly was injured, and that there was no liquid on the floor at that time. The Board of Education also submitted the affidavit of a school administrator who averred that the school had not received any complaints regarding water on the floor of the subject bathroom between the time of the inspection and the time of the alleged accident. Additionally, the Board of Education submitted the deposition testimony of the infant plaintiff's mother, who admitted that, prior to the accident, the infant plaintiff never complained to her about water accumulation on the bathroom floors ... . **Farren v Board of Educ of City of NY, 2014 NY Slip Op 04896, 2nd Dept 7-2-14**

Amendment of Notice of Claim Including Substantive Changes to the Facts and New Theories of Liability Should Not Have Been Allowed---Original Notice of Claim Inadequate

The Second Department reversed Supreme Court finding that plaintiff's motion to amend the notice of claim should have been denied and the complaint dismissed:

> Amendments to notices of claim are appropriate only to correct good faith and nonprejudicial "technical mistakes, defects, or omissions, not substantive changes in the theory of liability" ... . Here, the Supreme Court improvidently exercised

its discretion in granting the plaintiff's cross motion for leave to serve and file an amended notice of claim. The proposed amendments to the notice of claim included substantive changes to the facts, adding that the plaintiff was injured after he climbed a ladder to go over a fence, changing the situs of the accident, and identifying the plaintiff as a worker at the site. The proposed amendments to the notice of claim also added a theory of liability under the Labor Law. Such changes are not technical in nature and are not permitted as late-filed amendments to a notice of claim under General Municipal Law § 50-e(6) ... . Granting leave to serve and file the proposed amended notice of claim would prejudice the Housing Authority by depriving it of the opportunity to promptly and meaningfully investigate the claim ... .

Moreover, the Supreme Court should have granted the Housing Authority's motion to dismiss the complaint insofar as asserted against it on the ground that the notice of claim was inadequate. A notice of claim must provide timely notice of the essential facts and legal theories supporting the claims alleged in the complaint ... . The test of the sufficiency of a notice of claim is whether it includes enough information to enable the defendant to promptly investigate the allegations at issue ... . The plaintiff's original notice of claim did not sufficiently apprise the Housing Authority of the relevant facts or legal theories supporting the plaintiff's claims to enable the Housing Authority to promptly and adequately investigate the allegations at issue in the complaint, resulting in prejudice to the Housing Department ... . **Ahmed v New York City Hous Auth, 2014 NY Slip Op 04883, 2nd Dept 7-2-14**

Pedestrian's Action, In Violation of City Pedestrian Rules, Was the Proximate Cause of Pedestrian's Injuries (Pedestrian Was Struck by a Car)

The Second Department determined Supreme Court properly refused to set aside the verdict in favor of the defendant. Plaintiff, a pedestrian, had been struck by a car just as he stepped off the curb in violation of city rules for pedestrians:

Here, a fair interpretation of the evidence supported the jury's finding that an unknown operator of a motor vehicle involved in an accident with the plaintiff, a pedestrian, was not negligent. Rules of City of New York Department of Transportation (34 RCNY) § 4-04(b)(1), entitled "Operators to yield to pedestrians in crosswalk," provides that "[w]hen traffic control signals or pedestrian control signals are not in place or not in operation, the operator of a vehicle shall yield the right of way to a pedestrian crossing a roadway within a crosswalk when the pedestrian is in the path of the vehicle or is approaching so closely thereto as to be in danger." Rules of City of New York Department of Transportation (34 RCNY) § 4-04(b)(2), entitled "Right of way in crosswalks," provides that "[p]edestrians shall not cross in front of oncoming vehicles. Notwithstanding the provisions of (1) of this subdivision (b), no pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the operator to yield." Rules of City of New York Department of Transportation (34 RCNY) § 4-04(c)(2) provides that "[n]o pedestrian shall cross any roadway at an intersection except within a cross-walk." According to the plaintiff, he stepped off a sidewalk approximately one car length away from the corner in an attempt to cross Rockaway Beach Boulevard at Beach 96th Street in Queens. The plaintiff conceded that there was no designated crosswalk at that intersection. Almost immediately after the plaintiff had stepped off the curb, his leg came into contact with the right side of the unidentified motor vehicle after he had walked approximately two feet into the roadway. Thus, there was ample evidence adduced at trial from which the jury could have reasonably found that the plaintiff violated Rules of City of New York Department of Transportation (34 RCNY) §§ 4-04(b)(2) and (c)(2), and that those violations, rather than any conduct on the part of the unknown motorist, proximately caused the accident ... . **Rivera v Motor Veh Acc Indem Corp, 2014 NY Slip Op 04911, 2nd Dept 7-2-14**

Resident Who Assisted Supervising Physician But Who Exercised No Independent Medical Judgment Entitled to Summary Judgment

The Fourth Department determined defendant should have been granted summary judgment in a medical malpractice action. Defendant was a resident who assisted the supervising physician (Dr. Hall). The court determined defendant had demonstrated he exercised no independent medical judgment during the treatment of the plaintiff (David Green):

It is well settled that a "resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene" .. . Here, in support of his motion, defendant submitted evidence establishing that defendant Walter Hall, M.D., the supervising physician, conducted the

initial meeting with plaintiff David Green, the patient. Defendant also submitted evidence establishing that Dr. Hall supervised defendant throughout all of the surgeries involved, reviewed all notes that defendant wrote, determined which surgical method would be used, decided to discontinue the first operation to obtain further information about the cyst or tumor that was to be excised, and decided to perform the subsequent operations. Furthermore, "[a]lthough the evidence demonstrated that [defendant] played an active role in [Dr. Hall's] procedure, it did not demonstrate the exercise of independent medical judgment" by defendant ... . **Green v Hall, 2014 NY Slip Op 05084, 4th Dept 7-3-14**

No Sanction for Automatic Destruction of Video Recordings of Accident Scene after 21 Days---Counsels' Original Request for Video Recording at the Time of the Accident Was Complied With---Counsel Subsequently Asked for Six Hours of Recording Prior to the Accident---By the Time of that Request the Videotape Had Been Automatically Destroyed

The First Department, over a dissent, determined Supreme Court properly denied plaintiff's motion for sanctions based upon allegations of spoliation of evidence. In response to plaintiff's counsel's initial request, 84 seconds of videotape depicting plaintiff's slip and fall were preserved. Subsequently plaintiff's attorney requested video of the six hours preceding the accident. By that time, however, the tapes had been automatically erased:

> On a motion for spoliation sanctions, the moving party must establish that (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a "culpable state of mind," which may include ordinary negligence; and (3) the destroyed evidence was relevant to the moving party's claim or defense ... . In deciding whether to impose sanctions, courts look to the extent that the spoliation of evidence may prejudice a party, and whether a particular sanction is necessary as a matter of elementary fairness ... . The burden is on the party requesting sanctions to make the requisite showing ... . * * *
>
> While it is true that a plaintiff is entitled to inspect tapes to determine whether the area of an accident is depicted and "should not be compelled to accept defendant's self-serving statement concerning the contents of the destroyed tapes" ... , this principle does not translate into an obligation on a defendant to preserve hours of tapes indefinitely each time an incident occurs on its premises in anticipation of a plaintiff's request for them. That obligation would impose an unreasonable burden on property owners and lessees. **Duluc v AC & L Food Corp, 2014 NY Slip Op 05243, 1st Dept 7-10-14**

Jury's Finding a Party Was at Fault But Such Fault Was Not the Proximate Cause of the Accident Should Not Have Been Set Aside as Inconsistent and Against the Weight of the Evidence

The Second Department determined plaintiff's motion to set aside the verdict as contrary to the weight of the evidence should not have been granted. Plaintiff was injured when he dove to catch a ball in an area which had poles sticking up out of the ground. The plaintiff, who was 10 years old at the time, knew the poles were there. The jury found that the property owner was at fault but that such fault was not the proximate cause of the accident. The Second Department held that the verdict was not inconsistent and against the weight of the evidence:

> "A jury's finding that a party was at fault but that such fault was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" ... . " [W]here there is a reasonable view of the evidence under which it is not logically impossible to reconcile a finding of negligence but no proximate cause, it will be presumed that, in returning such a verdict, the jury adopted that view'" ... . Here, a fair interpretation of the evidence supports the conclusion that the infant plaintiff's own negligence was the sole proximate cause of his accident ... . **Henry v Town of Hempstead, 2014 NY Slip Op 05157, 2nd Dept 7-9-14**

Whether Lost Evidence Was Relevant to Plaintiff's Case Presented a Jury Question---Only If the Jury Determines the Evidence Was Relevant Can the Jury Consider the Adverse Inference Charge for Spoliation of Evidence

The Second Department determined there was a question of fact whether the failure to preserve a broken jar, the cause of plaintiff's injury, warranted an adverse inference charge. Whether the jar was relevant to the plaintiff's case was a question raised by conflicting expert opinions. The question of fact must first be resolved by the jury before the adverse inference charge could be applied by the jury:

> While the lesser sanction of an adverse inference may be appropriate for spoliation of the subject jar ..., under the circumstances of this case, an issue of fact exists as to whether spoliation of relevant

evidence occurred. The sanction of an adverse inference for spoliation of evidence is not warranted when the evidence destroyed is not relevant to the ultimate issues to be determined in the case ... .[T]he plaintiff submitted an expert affidavit averring that she could have determined how long the jar had been broken by analyzing the mold contained in the jar, and the defendant submitted an expert affidavit disputing that such a conclusion could have been reached. If the opinion of the defendant's expert were credited, then an adverse inference would not be warranted, because the lost evidence would not have been relevant to the plaintiff's case ... . Thus, this issue of fact should be placed before the jury, along with the inferences to be drawn therefrom ... . The jury should be instructed that, if it credits the opinion of the defendant's expert that no conclusion could have been reached with reasonable certainty regarding how long the jar had been broken by analyzing the mold contained in the jar, then no adverse inference should be drawn against the defendant. On the other hand, the jury should be advised that, if it credits the opinion of the plaintiff's expert that she could have determined how long the jar had been broken by analyzing the mold inside, then it would be permitted to draw an adverse inference against the defendant ... . **Pennachio v Costco Wholesale Corp, 2014 NY Slip Op 05165, 2nd Dept 7-9-14**

Riser In Church Was Not an Actionable Condition

The Second Department determined a riser, upon which plaintiff allegedly tripped, was an open and obvious and not inherently dangerous:

> The injured plaintiff allegedly tripped and fell over a 5½-inch-high, single-step riser while exiting a church pew. * * *
>
> While a landowner has a duty to maintain its premises in a reasonably safe manner ..., a landowner has no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous ... . Here, the defendant established its entitlement to judgment as a matter of law by submitting evidence that the subject riser was open and obvious and not inherently dangerous ... . The evidence presented by the plaintiffs in opposition, including the affidavit of their expert, failed to raise a triable issue of fact ... . **Coppola v Cure of Ars RC Church, 2014 NY Slip Op 05297, 2nd Dept 7-16-17**

Triable Issues of Fact Re: Whether Property Owner Liable for Allowing Third Parties to Operate Remote Control Cars On Its Parking Lot---Motorcyclist Injured When Attempting to Avoid a Remote Controlled Car

The Second Department determined summary judgment was properly denied to the property owner (Farmingdale) which was aware its parking lot was being used for radio remote control cars. Plaintiff alleged he was injured when he tried to avoid a remote control car while riding his motorcycle:

> "A property owner, or one in possession or control of property, has a duty to take reasonable measures to control the foreseeable conduct of third parties on the property to prevent them from intentionally harming or creating an unreasonable risk of harm to others" ... . However, "[t]his duty [only] arises when there is an ability and opportunity to control such conduct, and an awareness of the need to do so" ... . A property owner cannot be held to a duty to take protective measures unless it is shown that he either knows or has reason to know from past experience " that there is a likelihood of conduct on the part of third persons . . . which is likely to endanger the safety of the visitor'" ... .
>
> Under the circumstances here, Farmingdale failed to eliminate all triable issues of fact as to whether it had the knowledge, authority, or opportunity to control the conduct of the third parties operating the radio remote control cars in the subject parking lot, and as to whether the conduct of the third parties in the parking lot posed a reasonably foreseeable risk of harm to others ... . **Tiranno v Warthog Inc, 2014 NY Slip Op 05322, 2nd Dept 7-16-14**

Questions of Fact Whether Picnic Table Near the Edge of a Porch Was a Dangerous Condition and Whether the Condition Was Open and Obvious

The Third Department determined questions of fact had been raised about whether defendant created a dangerous condition in placing a picnic table near the edge of a porch that had no railing and whether the condition was open and obvious. Plaintiff got up from the picnic table and fell off the edge of the porch, which was less than 29 inches from the ground (it was alleged no railing was required by the applicable codes):

> ...[The]evidence is sufficient to raise issues of fact as to whether defendant created a dangerous condition by negligently placing the picnic table close to the porch's edge and failing to demarcate or guard this ledge ... . Factual issues also exist as to whether defendant's negligence, if any, was

the proximate cause of Hannah's injury, as this is not a case "'where only one conclusion may be drawn from the established facts'" ... .

Defendant also claims that it had no duty to warn of the alleged dangerous condition created by the unguarded drop-off at the porch's edge, as any such hazard was open and obvious as a matter of law. "It is axiomatic that a landowner has no duty to warn of an open and obvious condition that is readily observable by the normal use of one's senses, and this postulate applies to adults and minors alike" ... . However, a landowner [*3]has a duty to warn against even known or obvious dangers where he or she "has reason to expect or anticipate that a person's attention may be distracted, so that he or she will not discover what is obvious, or will forget what he or she has discovered, or fail to protect himself or herself against it" ... . Here, upon considering all of the surrounding circumstances, including the nature and layout of the event being hosted by defendant ..., we find that triable issues of fact exist as to whether the drop-off constituted an open and obvious hazard such that defendant was relieved of its duty to warn ... . **Jankite v Scoresby Hose Co, 2014 NY Slip Op 05390, 3rd Dept 7-17-14**

Plaintiff's Decedent Fell to His Death in a Gorge on Property Owned by Cornell University---Questions of Fact Re: Whether Plaintiff's Decedent Was "Hiking" within the Meaning of the General Obligations Law (which Would Relieve the University of Liability) and Whether the Dangerous Condition Was Open and Obvious

The Third Department determined questions of fact had been raised about whether plaintiff's decedent was "hiking" within the meaning of the General Obligations Law when he fell into a gorge to his death on property owned by defendant Cornell University in Ithaca. The court also determined there was a question of fact whether the dangerous condition was open and obvious:

Defendant maintains that it is shielded from liability by General Obligations Law § 9-103 (1) (a), which, as pertinent here, "grants a special immunity to owners . . . from the usual duty to keep places safe" when individuals use their property for specified recreational activities, including hiking ... . The enumerated activities covered under the statute "are essentially self-explanatory" .... "Hiking" has been described as "traveling through the woods on foot" ... and as "traversing land 'by foot or snowshoe for the purpose of pleasure or exercise'" ... . Comparatively, this Court recently determined that a person walking her dogs on a paved walkway was not engaged in "hiking" under the statute .... With one exception not applicable here, a person engaged in one of the enumerated activities is "presumed to be doing so for recreational purposes" without regard to his or her subjective intent ....

The critical determination is whether decedent's activity constituted "hiking" under the statute. As described, he ran down the gorge trail and, in that literal sense, was "traveling through the woods on foot," or "hiking," as defined in Sega v State of New York ... . The statute, however, speaks to specified recreational categories reflecting the intent of the Legislature "to allow or encourage more people to use more accessible land for recreational enjoyment" ... . Viewing the facts in the light most favorable to plaintiffs, the nonmoving party, we agree with Supreme Court that, under the distinctive fact pattern presented, defendant did not establish, as a matter of law, that decedent was "hiking" within the embrace of General Obligations Law § 9-103 (1) (a) at the time of his death ... . * * *

...[A] question of fact remains as to whether the cliff's edge was visible and obvious or presented a latent, dangerous condition necessitating an appropriate warning... . **King v Cornell Univ, 2014 NY Slip Op 05393, 3rd Dept 7-17-14**

Questions of Fact Whether Handrail Which Did Not Extend to the Top of the Stairs Constituted a Dangerous Condition Which Proximately Caused Plaintiff's Fall

The Third Department determined the fact that a handrail did not extend to the top of the stairs raised a question of fact about a dangerous condition of which the defendant had constructive notice:

The fact that the handrail only starts at the third step down the staircase presents a question for a factfinder to resolve as to whether this placement created a dangerous condition ... .

Further, defendant did not meet its prima facie burden of demonstrating that the lack of a handrail extending to the top of the stairs did not cause or contribute to claimant's fall ... . "Even if [claimant's] fall was precipitated by a misstep, given her testimony that she reached out to try to stop her fall, there is an issue of fact as to whether the absence of a handrail [at the top of the stairs] was a proximate cause of her injury" ... . Likewise, the fact that claimant had used the stairs in the past and may have been aware of the defective condition did not defeat her claim but, rather, this "may be considered by a jury in assessing comparative negligence"... . **Carter v**

State of New York, 2014 NY Slip Op 05394, 3rd Dept 7-17-14

Mother Could Not Maintain a Cause of Action for Emotional Harm Based Upon the Death of Her Baby---Although the Baby Was "Pre-Viable" and Unconscious, the Baby Was Born Alive and the Mother Suffered No Independent Injury

The First Department determined mother could not bring a cause of action for emotional harm as a result of the death of her premature baby. Although the baby was "pre-viable," the baby was born alive and the mother suffered no independent injury.

The mother's argument that the fact that the baby was "pre-viable" unconscious and lived for only a few hours distinguished this case from the controlling cases was rejected:

> Plaintiff argues that the rationale of Mendez v Bhattacharya (15 Misc 3d 974) should be applied to this case. In Mendez, the infant had an Apgar score of one at one minute and zero at five minutes (15 Misc 3d at 981). It was uncontroverted that "even if there was a technical sign of life due to the lingering heartbeat, the child was not viable, since there was no other sign of life besides the momentary heartbeat" (id. at 982). The infant had no respiration and efforts to resuscitate by mechanical ventilation and CPR were unsuccessful (id. at 981). The court found that under those facts, the presence of a "momentary heartbeat" did not rise to the level of a live birth within the purview of the Broadnax and Sheppard-Mobley decisions, and therefore the plaintiff mother had a viable cause of action for emotional distress (id. at 983).
>
> That is clearly not the situation before us. To accept plaintiff's contention that, where there is a live birth but the infant never attains consciousness, a mother should be permitted to maintain a cause of action for emotional distress would impermissibly expand the narrow holdings in Broadnax and Sheppard-Mobley. Plaintiff was entitled to bring a wrongful death action on behalf of the estate of the person who was injured, i.e., the infant who survived, albeit briefly ... . **Levin v New York City Health & Hosps Corp..., 2014 NY Slip Op 05492, 1st Dept 7-24-14**

Water Tracked In from Sidewalk Cleaning Raised Question of Fact About Creation of a Dangerous Condition in a Slip and Fall Case---Open and Obvious Condition Relieves Owner of Duty to Warn But Not Duty to Keep Premises Safe

The First Department determined there were questions of fact about whether the independent contractor which cleaned the sidewalks adjacent to defendants' office building created the dangerous condition. The sidewalks were cleaned by hosing them down. It was alleged that water tracked in from the sidewalks created a slippery condition, causing plaintiff's fall. The court noted that an open and obvious condition relieves the owner of a duty to warn, but does not the duty to maintain the premises in a reasonably safe condition:

> In this case a jury could reasonably conclude that the defendants created a dangerous condition in the course of cleaning the sidewalk by hosing down the perimeter of the building without taking precautions to keep water from being tracked onto the marble lobby floor. Slippery conditions created by defendants in the course of cleaning a premises can give rise to liability ... . Tracked-in water that creates a slippery floor can be a dangerous condition ... . While reasonable care does not require an owner to completely cover a lobby floor with mats to prevent injury from tracked-in water ..., it may require the placement of at least some mats ... . Since there is evidence supporting a conclusion that there were no mats on the floor near the entrance, there is an issue for the jury concerning whether the defendants exercised reasonable care, including whether they took reasonable precautions against foreseeable risks of an accident while cleaning the sidewalk during a busy work morning.
>
> Defendants' contention that the water on the sidewalk was open and obvious does not warrant summary judgment dismissing the complaint. An open and obvious condition relieves the owner of a duty to warn about the danger, but not of the duty to maintain the premises in a reasonably safe condition ... . **DiVetri v ABM Janitorial Serv Inc, 2014 NY Slip Op 05494, 1st Dept 7-24-14**

Failure to Specifically Demonstrate When Area Where Fall Occurred Was Last Inspected or Cleaned Required Denial of Summary Judgment

The Second Department determined the defendant did not meet its burden of demonstrating a lack of constructive notice of the condition of the stairway where plaintiff fell (allegedly the presence of dirty paper and urine):

> Although the defendant submitted an affidavit from the supervisor of the caretaker assigned to clean the subject building on the day immediately preceding the plaintiff's nighttime accident, that affidavit was insufficient to establish when the stairway was last inspected and cleaned relative to the plaintiff's fall. The affidavit was conclusory and only referred, in a general manner, to the janitorial schedule followed on normal weekdays. Moreover, another caretaker testified at his deposition, and the defendant concedes, that the normal weekday janitorial schedule was not in effect on the day preceding the plaintiff's accident, which was the Thanksgiving holiday. Since the defendant did not provide evidence regarding any specific cleaning or inspection of the area in question on that day, the defendant failed to make a prima facie showing of entitlement to judgment as a matter of law... . **Williams v New York City Hous Auth, 2014 NY Slip Op 05425, 2nd Dept 7-23-14**

Diving Into Shallow Water Raised Questions of Fact Re: Foreseeability and Defendants' Negligence

The Third Department determined questions of fact had been raised about foreseeability and negligence in an action based upon plaintiff's diving into shallow water incurring a spinal injury. The incident occurred in April on an unusually hot day:

> The dynamic of this case is that the accident occurred on an unseasonably warm spring day, well before the swimming season would normally commence. With the lake levels reduced, plaintiff's professed expectations of water depth were tragically proven unfounded. Compounding the problem, as explained by plaintiff's wife, was the fact that the water was not clear enough to see the bottom. Despite plaintiff's initial protests about going in the water, the fact remains it was extremely hot, the children had been swimming and plaintiff was wearing swim trunks. [Defendant] acknowledged that "[i]t wouldn't have surprised [him] for them to get in the water." Under these circumstances, whether it was foreseeable that plaintiff would dive into the water presents a question of fact for the trier of fact to resolve ... . Whether defendants breached their duty of care by failing to inform plaintiff of the reduced water level also remains a question of fact .. . Correspondingly, a triable issue of fact remains as to whether plaintiff was actually aware of the depth of the water and dove in reckless disregard of his own safety. As such, his conduct cannot be characterized as a superseding cause as a matter of law ... . **Toyryla v Denis, 2014 NY Slip Op 05483, 3rd Dept 7-24-14**

Fact that a Condition May Be Open and Obvious Does Not Eliminate Property Owner's Duty to Keep Premises Reasonably Safe

The Second Department determined summary judgment should not have been granted to the defendants in a slip and fall case. Plaintiff tripped on a dolly or "pallet jack" which was low to the ground and had been left in an aisle of defendants' store. The fact that the presence of the dolly was open and obvious did not eliminate the defendants' obligation to keep the premises safe:

> Proof that a dangerous condition is open and obvious does not preclude a finding of liability against an owner for failure to maintain property in a safe condition ... . While such proof is relevant to the issue of the plaintiff's comparative negligence, a hazard that is open and obvious "may be rendered a trap for the unwary where the condition is obscured or the plaintiff distracted" ... . "The determination of [w]hether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances'" ..., and whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case ... .
>
> Here, the defendants contend that, even if they created the condition at issue, they are entitled to judgment as a matter of law because the pallet jack in the aisle was an open and obvious condition, and not inherently dangerous. However, viewing the evidence in the light most favorable to the plaintiff, the defendants failed to eliminate all triable issues of fact as to whether the pallet jack was inherently dangerous ..., and failed to establish prima facie that they maintained the premises in a reasonably safe condition... . **Russo v Home Goods, Inc, 2014 NY Slip Op 05529, 2nd Dept 7-30-14**

Drug Treatment and Drug Testing Facilities Do Not Have a Duty to Provide the Test Results With a Disclaimer Indicating the Tests Were Done According to "Clinical," Not "Forensic," Standards---Here the "Clinical" Results Were Disseminated and Used In Court Proceedings

The Second Department, in a full-fledged opinion by Justice Skelos, with a concurring memorandum, determined that a substance abuse treatment facility (Daytop) and a drug testing laboratory (Bendiner) could not be liable for damages stemming from the dissemination of the results of drug tests (affecting Family Court and Drug Court proceedings). The plaintiffs did not claim that the testing procedures were flawed or that the test results were false. Rather, they claimed that, because the tests were done for "clinical," not "forensic," purposes, the results should have

included a disclaimer indicating that they should not be used in court proceedings. The Second Department refused to extend the duty owed to the plaintiffs by the defendants beyond the duty to ensure accurate test results:

> Landon (91 AD3d 79, aff'd 22 NY3d 1) makes clear that there is a duty running from a drug testing laboratory to the subject of a drug test despite the lack of a contractual relationship between those parties. Further, it cannot be gainsaid that Daytop owes some duty of reasonable care to individuals it treats. The question presented here, as to both defendants, concerns the proper scope of that duty. More particularly, the question is whether the defendants' duty of reasonable care includes the duty to label or place a disclaimer on a report, so as to indicate that the results are to be used only for clinical purposes. * * *
> We conclude ... that Bendiner did not have a duty to the plaintiffs to label its drug test results with a disclaimer, and that Daytop, when reporting the results to the drug treatment courts, did not have a duty to the plaintiffs to provide a disclaimer indicating that the positive test results were to be used for clinical purposes only. **Braverman v Bendiner & Schlesinger Inc, 2014 NY Slip Op 05618, 2nd Dept 8-6-14**

Failure to Submit Management Agreement Required Dismissal of Property Managing Agent's Motion for Summary Judgment in a Slip and Fall Case---the Terms of the Agreement Determine the Agent's Liability

The Second Department determined that the property managing agent, in a slip and fall case, did not eliminate all triable issues of fact concerning liability for plaintiff's fall on black ice because it did not submit a copy of the managing agreement with its motion for summary judgment:

> As a general rule, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of that property ... . A duty of care on the part of a managing agent may arise where there is a comprehensive and exclusive management agreement between the agent and the owner that displaces the owner's duty to safely maintain the premises ... . Here, in moving for summary judgment, the ... defendants failed to submit a copy of the written management agreement. Consequently, they failed to establish, prima facie, that the managing agent owed no duty of care to the plaintiff ... . **Calabro v Harbour at Blue Point Home Owners Assn Inc, 2014 NY Slip Op 05620, 2nd Dept 8-6-14**

Criteria for "Trivial Defect" and "Open and Obvious" Explained

The Second Department determined the defendants' motion for summary judgment in a slip and fall case was properly denied. The plaintiff tripped over a lock on sidewalk-level doors adjacent to the defendants' property (the defendants were the property owner and the tenant in possession). The defendants unsuccessfully argued the defect was trivial and open and obvious. The court summarized the relevant law:

> An owner or tenant in possession of realty owes a duty to maintain the property in a reasonably safe condition ... . "[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, liability will not be imposed for trivial defects which do not constitute a trap or nuisance ... . "In determining whether a defect is trivial as a matter of law, a court must examine all of the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect, along with the time, place, and circumstances of the injury" ... .
>
> While a possessor of real property has a duty to maintain that property in a reasonably safe condition ..., there is no duty to protect or warn against an open and obvious condition, which as a matter of law is not inherently dangerous ... . "Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances" ... . "A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" ... . **Doughim v M & US Prop Inc, 2014 NY Slip Op 05623, 2nd Dept 8-6-14**

Disposing of Key Evidence Warranted Striking of Answer

The Second Department determined Supreme Court properly struck the defendant's answer and awarded summary judgment to plaintiffs on liability because the defendant disposed of crucial evidence after having been asked to preserve it. Students were directed to stand on a grate to pose for a class picture. The grate collapsed and the students fell eleven feet. The defendant disposed of the grate:

> Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, that party may be

sanctioned under CPLR 3126 ... . Since the Supreme Court has broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence ..., it may, under appropriate circumstances, impose a sanction even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided the spoliator was on notice that the evidence might be needed for future litigation ... .

Here, the Supreme Court providently exercised its discretion in striking the defendant's answers and thereupon awarding the plaintiffs summary judgment on the issue of liability pursuant to CPLR 3126. The record demonstrates that the defendant disposed of the grate involved in the accident after having received a written demand from one of the infant plaintiff's attorneys that the grate be preserved for inspection by the plaintiffs and their experts. Moreover, the plaintiffs demonstrated that they were unduly prejudiced by the defendant's conduct in disposing of the grate. **Biniachvili v Yeshivat Shaare Torah Inc, 2014 NY Slip Op 05826, 2nd Dept 8-20-14**

Golfer Assumed the Risk of Tripping on Grate in Golf-Cart Path

The Second Department determined the doctrine of primary assumption of the risk precluded a suit by a golfer who tripped on a grate in a golf-cart path:

Under the doctrine of primary assumption of the risk, "by engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" ... . Those risks include risks associated with the construction of the playing surface and any open and obvious condition on it ... . Here, contrary to the plaintiffs' contention, the defendants established their prima facie entitlement to judgment as a matter of law on the ground that the doctrine of primary assumption of risk applied ... . **Simon v Hamlet Windwatch Dev LLC, 2014 NY Slip Op 05855, 2nd Dept 8-20-14**

Question of Fact Whether School Breached Its Duty to Supervise and/or Its Duty to Provide Adequate Nursing Care

The Second Department determined the defendant school district failed to eliminate triable issues of fact concerning whether it breached its duty to supervise and/or provide adequate nursing care to the student plaintiff. Plaintiff had cut his finger and fainted while the cut was being attended to by the school nurse. Plaintiff allegedly suffered a head injury when he fell to the floor:

The defendant moved for summary judgment dismissing the complaint. In support of its motion, the defendant submitted, inter alia, the plaintiff's school medical records, the transcript of the plaintiff's General Municipal Law § 50-h hearing testimony, and the transcript of the plaintiff's deposition testimony. This evidence failed to eliminate triable issues of fact as to whether the school was on notice that the plaintiff had a prior history of fainting and as to whether the plaintiff informed the nurse on the day of the incident that he was feeling lightheaded. Under these circumstances, the defendant failed to make a prima facie showing that it did not breach its duty to supervise the plaintiff in loco parentis ... and/or breach its separate duty to provide the plaintiff with adequate nursing care, which proximately caused the plaintiff's injuries ... . **Barragan v City School Dist of New Rochelle, 2014 NY Slip Op 05934, 2nd Dept 8-27-14**

NEGLIGENCE/CIVIL PROCEDURE

Black Letter Law Re: Rear-End Collisions and Premature Summary Judgment Motions Explained

In affirming the grant of summary judgment to the plaintiff in a rear-end collision case, the Second Department provided the black letter law on rear-end collisions and on whether a summary judgment motion is premature:

When the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle ... . Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident ... . "A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision" ... . * * *

CPLR 3212(f) provides, in relevant part, that a court may deny a motion for summary judgment "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may 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' " ... . A party who contends

that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant (see CPLR 3212[f]...). "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" ... . **Singh v Avis Rent A Car Sys Inc, 2014 NY Slip Op 05320, 2nd Dept 7-16-14**

NEGLIGENCE/EVIDENCE

Statement Made Before Any Possible Motive to Falsify Should Have Been Admitted to Rebut Assertion of Recent Fabrication

The Second Department determined the trial court committed reversible error by excluding a statement made to medical personnel by the infant plaintiff. It was crucial to the plaintiff's case to demonstrate that she was injured falling from the monkey bars at the school's playground. The case sounded in negligent supervision and students plaintiff's age were not permitted on the monkey bars. When receiving medical treatment plaintiff said she fell from the monkey bars and her statement was included in the medical records. The Second Department deemed the statement admissible to rebut the assertion of recent fabrication and, in addition, because the statement was germane to her treatment:

> The Supreme Court erred in precluding the plaintiffs from admitting the proffered medical record into evidence and in denying their renewed request to introduce the medical record. Ordinarily, "[t]he testimony of an impeached or discredited witness may not be supported or bolstered by proving that he [or she] has made similar declarations out of court" ... . However, an out-of-court statement "made at a time before a motive to falsify exists may be received in evidence after the testimony of the witness is attacked as a recent fabrication" ... . Here, the focus of the defense was not merely that the infant plaintiff was mistaken or that she was confused or could not recall her accident, but that she was coached to tell a "false story well after the event" and, as such, it was a recent fabrication ... . Moreover, the statement fell within another exception to the hearsay rule, as it was germane to the infant plaintiff's medical treatment on the date of the incident .... **Nelson v Friends of Associated Beth Rivka School for Girls, 2014 NY Slip Op 04908, 2nd Dept 7-2-14**

NEGLIGENCE/LANDLORD-TENANT

Building Owner Entitled to Summary Judgment in Slip and Fall Case Based Upon Tracked In Water (Inclement Weather)--Tenant Ordinarily Does Not Have a Duty of Care Re: Common Areas

The Second Department determined the building owner was entitled to summary judgment in a slip and fall case based upon water tracked in during inclement weather. The court noted that a tenant does not have a duty of care with respect to the condition of common areas of the building:

> "In a slip-and-fall case, the defendant moving for summary judgment has the burden of demonstrating, prima facie, that it did not create the alleged hazardous condition or have actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" ... . Moreover, a property owner is not obligated to provide a constant remedy to the problem of water being tracked into a building during inclement weather ..., and has no obligation to cover all of its floors with mats or to continuously mop up all moisture resulting from tracked-in precipitation ... . A tenant ordinarily owes no duty of care with respect to a dangerous condition in a common area of a building ... .
>
> The owner and the tenant, on their respective motions, established their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against each of them. In support of their motions, the owner and the tenant each presented evidence that it had not created the alleged defective condition. The owner also presented evidence that it had neither actual nor constructive notice of the alleged defective condition, i.e., the alleged presence of water on the vestibule floor of the subject building. **Paduano v 686 Forest Ave LLC, 2014 NY Slip Op 05415, 2nd Dept 7-23-14**

NEGLIGENCE/MEDICAL MALPRACTICE

Question of Fact Whether Hospital Vicariously Liable for Actions of Non-Employees

The Third Department determined there was a question of fact whether defendant hospital could be held vicariously liable for the actions of nonemployee doctors with respect to plaintiff's decedent who was initially treated in the emergency room. The court explained the applicable law:

> Under settled law, a hospital ordinarily may not be held liable for the negligent acts of treating physicians who are not hospital employees ... .

Vicarious liability for malpractice on the part of nonemployee physicians may be imposed, however, on a theory of ostensible or apparent agency ... . "'Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority' to act on behalf of the principal" ... . Consequently, "a hospital may [face vicarious liability] for the acts of independent physicians if the patient enters the hospital through the emergency room and seeks treatment from the hospital, not from a particular physician" ... . **Friedland v Vassar Bros Med Ctr, 2014 NY Slip Op 05388, 3rd Dept 7-17-14**

NEGLIGENCE/MEDICAL MALPRACTICE/CIVIL PROCEDURE

Plaintiff Should Have Been Allowed to Add Doctor to Medical Malpractice Action After the Statute of Limitations Had Run---All the Relation-Back Criteria Were Met

The Second Department, reversing Supreme Court, found that the relation-back doctrine allowed the addition of a doctor (Persky) to a malpractice action after the statute of limitations had run. Several notes in decedent's medical records were signed by the doctor and the decedent died soon after she was discharged from the hospital, which plaintiff alleged was premature. The court explained the relevant law:

> "The relation-back doctrine, which is codified in CPLR 203(b), allows a claim asserted against a defendant in an amended complaint to relate back to claims previously asserted against a codefendant for statute of limitations purposes where the two defendants are united in interest'" ... . In order for a claim asserted against a new defendant to relate back to the date the claim was filed against another defendant, the plaintiff must establish that (1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new defendant is united in interest with the original defendant, and by reason of that relationship can be charged with notice of the institution of the action such that he or she will not be prejudiced in maintaining a defense on the merits; and (3) the new defendant knew or should have know that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him or her as well ... . "The linchpin' of the relation-back doctrine is whether the new defendant had notice within the applicable limitations period" ... .
>
> it was not reasonable for Persky to conclude that the plaintiff intended to proceed only against the defendants named in the original summons and complaint, especially since the decedent died soon after she was discharged from the hospital, and the complaint asserted specific allegations of negligence relating to the decedent's premature hospital discharge ... . In addition, contrary to the conclusion of the Supreme Court, the plaintiff demonstrated that the failure to originally name Persky as a defendant was the result of a mistake, and there was no need to show that such mistake was excusable ... . **Roseman v Baranowski, 2014 NY Slip Op 05635, 2nd Dept 8-6-14**

Driver with Right of Way Who Strikes a Vehicle Which Suddenly Enters the Right of Way Is Free from Negligence (No Need to Apply the Emergency Doctrine)/Emergency Doctrine Does Not Automatically Absolve a Driver of Liability

The Fourth Department noted that a driver with the right of way who strikes a vehicle which suddenly enters his or her path is free of negligence absent speeding or some other negligent conduct (no need to apply the emergency doctrine). The court further noted that the emergency doctrine does not automatically absolve a person of liability. Here there was a question whether the brakes on the vehicle confronted with the emergency were maintained properly and whether swerving was reasonable:

> The existence of an emergency and the reasonableness of a driver's response thereto generally constitute issues of fact" ... . We conclude that there are issues of fact whether the Marriotts' maintenance of their pickup truck was adequate and thus whether the brake failure was truly unexpected and without any fault on their part. Moreover, it cannot be concluded as a matter of law that swerving to the right in order to avoid rear-ending the garbage truck was a reasonable reaction to the emergency created by the loss of brakes on the pickup truck. **Colangelo v Marriott, 2014 NY Slip Op 05746, 4th Dept 8-8-14**

NEGLIGENCE/MEDICAL MALPRACTICE/EVIDENCE

Party Moving for Summary Judgment May Not Submit Expert Affidavits With the Identity of the Expert Redacted

In the summary judgment context, the Third Department determined the moving party in a medical malpractice action, unlike the non-moving party, could not submit affidavits from experts with the names of the experts redacted:

In order to establish a prima facie entitlement to judgment as a matter of law, defendants were required to "tender[] sufficient, competent, admissible evidence demonstrating the absence of any genuine issue of fact" ... . Among other submissions, defendants provided an affidavit from a medical expert whose identity was redacted and who opined on the appropriateness of plaintiff's medical care and the adequacy of the warnings given to plaintiff. Defendants also submitted an unredacted version of the affidavit for Supreme Court's in camera review. Because defendants were the movants for summary judgment, their submission of an anonymous expert affidavit was incompetent evidence not proper for consideration upon the motion ... .

While the Legislature has allowed for some protection from disclosure of the identities of medical experts during "[t]rial preparation" (CPLR 3101 [d] [1] [i]), and, consistent with this intention, courts have found it appropriate to allow nonmovants in the summary judgment context to also withhold experts' identities from their adversaries upon the reasoning that such parties did not choose to abandon the disclosure protections provided during trial preparation ..., the Legislature has shown no broad intention of protecting experts from accountability at the point where their opinions are employed for the purpose of judicially resolving a case or a cause of action. Further, we see no compelling reason to allow for such anonymity that would outweigh the benefit that accountability provides in promoting candor ... . Requiring a movant to reveal an expert's identity in such circumstances would allow a nonmovant to meaningfully pursue information such as whether that expert has ever espoused a contradictory opinion, whether the individual is actually a recognized expert and whether that individual has been discredited in the relevant field prior to any possible resolution of the case on the motion ... . Further, any expert who anticipates a future opportunity to espouse a contradictory opinion would be on notice that public record could be used to hold him or her to account for any unwarranted discrepancy between such opinions ... . For these reasons, we will not consider the incompetent affidavit of defendants' medical expert. **Rivera v Albany Med Ctr Hosp, 2014 NY Slip Op 05236, 3rd Dept 7-10-14**

NEGLIGENCE/MUNICIPAL LAW

Village's Actual Notice of a Sidewalk Defect Does Not Override Written Notice Requirement

The Second Department determined that actual notice of a defect in a sidewalk does not override the requirement of written notice. The abutting landowner had notified Village personnel of the defect orally and the Village architect had indicated the defect would be repaired:

> The Village established its prima facie entitlement to judgment as a matter of law by submitting, inter alia, the affidavit of its Village Clerk, who averred that her search of the Village's records revealed no prior written notice of any hazardous condition on the sidewalk where the accident occurred ... . In opposition, the plaintiff and the homeowners failed to raise a triable issue of fact. Their submissions failed to show that the Village affirmatively created the alleged hazardous condition ..., or caused the alleged hazardous condition to occur by its special use of the sidewalk .... Actual notice of the alleged hazardous condition does not override the statutory requirement of prior written notice of a sidewalk defect ... . **Velho v Village of Sleepy Hollow, 2014 NY Slip Op 04916, 2nd Dept 7-2-14**

Police Officer Involved In Accident Acted Appropriately In an Emergency Operation--- Defendants Not Liable As a Matter of Law

The Fourth Department determined the city's motion for summary judgment should have granted in an action resulting from a collision with a police vehicle responding to an emergency. The court determined the defendants demonstrated as a matter of law that the officer did not act with conscious indifference to the consequences of his actions:

> At the time of the collision, defendant officer was responding to a police call and was therefore operating an authorized emergency vehicle while involved in an emergency operation ... . We further conclude that, by failing to yield the right of way while attempting to execute a left turn at a green light, defendant officer was "engage[d] in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b)" ... , i.e., he was "exercis[ing one of] the privileges set forth in" the statute at the time of the accident (§ 1104 [a]...).
>
> We further conclude that defendants established as a matter of law that defendant officer's conduct did not rise to the level of reckless disregard for the safety of others ..., and that plaintiff failed to

raise a triable issue of fact in opposition to the cross motion ... . Defendant officer testified that, as he was approaching the intersection in a southbound direction, the only traffic he observed was a line of northbound vehicles waiting to turn left. When he reached the intersection, he stopped for a "few seconds" to ensure that the intersection was clear. Defendant officer testified that he could see a distance of approximately three car lengths in the right northbound lane and that he did not see any traffic in that lane when he started his turn. He then "cre[pt] into the intersection, making sure . . . nobody was passing on the right of the vehicles stopped to make a left." Plaintiff similarly testified that there was a line of cars in the northbound lane preparing to turn left, that she "veered to the right" around the line of cars in order to proceed straight through the intersection, and that the accident occurred in the intersection. We thus conclude that, "[g]iven the evidence of precautions taken by [defendant officer] before he attempted his [left] turn, . . . he did not act with conscious indifference' to the consequences of his actions" ... . **Williams v Fassinger, 2014 NY Slip Op 05085, 4th Dept 7-3-14**

Allegation in Notice of Claim that Defendant Failed to Maintain a Stairway Was Sufficient to Encompass the Allegation the Handrail Was Obstructed and Could Not Be Used

In a slip and fall case, the First Department, over a two-justice dissent, reversing Supreme Court, determined that a notice of claim which generally alleged a failure to maintain a stairway in the vicinity of the second floor landing was sufficient to encompass allegations in the bill of particulars that the handrail was obstructed and could not be used:

> Plaintiff's claim that defendant failed to maintain the handrail along the stairway at or near the second floor may be fairly inferred from the notice of claim, which alleged that defendant was negligent in maintaining the second floor landing area ... . The notice of claim alleged generally that defendant failed to maintain stairway "A" in the vicinity of the second floor landing, causing plaintiff's injury. The bill of particulars merely amplified the allegations of negligence concerning the landing area by further specifying that defendant had failed to maintain the handrail at the landing area... . **Thomas v New York City Hous Auth, 2014 NY Slip Op 05696, 1st Dept 8-7-14**

Prejudice to County Investigation Stemming from Plaintiff's Describing the Wrong Location of the Slip and Fall in the Notice of Claim Precluded Plaintiff from Amending the Notice

The Second Department determined that the failure to correctly describe the location of the slip and fall in the initial notice of claim prejudiced the investigation of the incident by the county. Therefore, Supreme Court should not have granted plaintiff's motion to amend the notice of claim:

> A court may, in its discretion, grant a motion for leave to amend a notice of claim which has been served where it determines that two conditions have been met: first, the mistake, omission, irregularity, or defect must have been made in good faith; and second, it must appear that the public corporation has not been prejudiced thereby ... . Since bad faith by the plaintiff was not asserted, the only issue presented here is whether service of the amended notice of claim would prejudice the County. The record indicates that the plaintiff's incorrect information as to the accident location prejudiced the County in its ability to conduct a prompt and meaningful investigation of the accident site ... . **Murtha v Town of Huntington, 2014 NY Slip Op 05633, 2nd Dept 8-6-14**

Criteria for Granting Leave to Serve a Late Notice of Claim Explained

The Second Department determined Supreme Court had properly granted plaintiff's motion for leave to serve a late notice of claim. The infant plaintiff was injured at school and there was no doubt the school was aware of the injury, and the background of the injury, at the time it occurred. The court included a succinct summary of the applicable analytical criteria:

> General Municipal Law § 50-e(5) permits a court, in its discretion, to extend the time to serve a notice of claim ... . Whether the public corporation acquired timely actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter is seen as a factor which should be accorded great weight in determining whether or not to grant leave to serve a late notice of claim ... . "In order to have actual knowledge of the essential facts constituting the claim, the public corporation must have knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the notice of claim; the public corporation need not have specific notice of the theory or theories themselves" ... .

> Other factors a court must consider in determining whether to grant leave to serve a late notice of claim are: (1) whether the claimant was an infant or mentally or physically incapacitated; (2) whether the claimant had a reasonable excuse for the failure to serve a timely notice of claim; and (3) whether the delay would substantially prejudice the public corporation in maintaining its defense (see General Municipal Law § 50-e[5]...). The presence or absence of any one of these factors is not necessarily determinative ... . **Kellman v Hauppauge Union Free School Dist, 2014 NY Slip Op 05844, 2nd Dept 8-20-14**

Firefighter Injured in Apartment Fire Which Stemmed from the Use of a Cooking Stove to Provide Heat Can Sue the Owner of the Apartment House Based Upon the Owner's Failure to Provide Adequate Heat

The Second Department determined that an injured firefighter had stated a cause of action pursuant to General Municipal Law 205-a against the owner of an apartment building based upon owner's failure to provide adequate heat in the apartments. The fire in which the firefighter was injured was started when a child put paper in the open flame of a stove burner which the child's mother had turned on to provide heat:

> ... Multiple Dwelling Law § 79 ...and Administrative Code of the City of New York § 27-2029, ...require ...that, between October 1 and May 31, a landlord provide heat sufficient to maintain a temperature of 68 degrees Fahrenheit between the hours of 6 a.m. and 10 p.m. * * *
>
> General Municipal Law § 205-a affords firefighters and their survivors a statutory cause of action for line-of-duty injuries resulting from negligent noncompliance with the requirements of any governmental statutes, ordinances, rules, orders, and requirements ... . "To establish a defendant's liability under General Municipal Law § 205-a, a plaintiff firefighter must identify the statute or ordinance with which the defendant failed to comply, describe the manner in which the firefighter was injured, and set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm to the firefighter'" ... . The statute or ordinance identified must be part of a "well-developed body of law and regulation" that imposes "clear legal duties" or mandates the "performance or nonperformance of specific acts" ... .
>
> * * * ... [T]he plaintiff made the requisite showing that Multiple Dwelling Law § 79 and Administrative Code of City of N.Y. § 27-2029 are part of well-developed bodies of law and regulation that impose clear legal duties, or mandate the performance or nonperformance of specific acts ... . Both provisions mandate the performance of specific acts. Moreover, failure to comply with the provisions can result in criminal sanctions (see Multiple Dwelling Law § 304; Administrative Code City of N.Y. § 27-2118[a]). "Where criminal liability may be imposed, we would be hard put to find a more well-developed body of law and regulation that imposes clear duties" ... . Thus, Multiple Dwelling Law § 79 and Administrative Code § 27-2029 can properly serve as predicates for liability under General Municipal Law § 205-a. **Paolicelli v Fieldbridge Assoc LLC, 2014 NY Slip Op 05849, 2nd Dept 8-20-14**

Seriousness of Injuries Warranted Allowing Service of Late Notice of Claim

The Second Department determined that the seriousness of plaintiff's injuries justify granting leave to serve a late notice of claim:

> In this case, the extremely serious and incapacitating injuries that the claimant suffered in the underlying car accident reasonably excused the minimal delay in seeking leave to serve a late notice of claim against the County of Nassau (see General Municipal Law § 50-e[5]...). The record further demonstrates that the County acquired actual knowledge of the facts underlying the claim within the 90-day statutory period or within a reasonable time thereafter .... Finally, under the circumstances of this case, the County was not prejudiced by the delay in serving the notice of claim ... . **Matter of Lopez v County of Nassau, 2014 NY Slip Op 05879, 2nd Dept 8-20-14**

NEGLIGENCE/MUNICIPAL LAW/EDUCATION LAW

Request to File Late Notice of Claim Against School District Stemming from Alleged Sexual Abuse of the Plaintiff by a Teacher Should Not Have Been Granted---School Did Not Have Actual Notice---No Good Reason for Delay in Filing

The Third Department determined the request to file a late notice of claim against a school district should have been denied. The underlying action relates to alleged sexual abuse of a student (plaintiff) by a teacher. The plaintiff and the teacher had initially both denied the existence of relationship. Therefore, the court determined the school did not have actual knowledge of it. The lack of actual knowledge coupled with the delay in filing the notice of claim after the plaintiff turned 18 required denial of the application:

..."[I]n determining whether to permit service of a late notice of claim, the court must consider all relevant facts and circumstances, including whether (1) the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or a reasonable time thereafter, (2) the [plaintiff] was an infant at the time the claim arose and, if so, whether there was a nexus between the [plaintiff's] infancy and the failure to serve a timely notice of claim, (3) the [plaintiff] demonstrated a reasonable excuse for the failure to serve a timely notice of claim, and (4) the public corporation was substantially prejudiced by the delay in its ability to maintain its defense on the merits" ... . Although no one factor is determinative ... , the case law makes clear that actual knowledge "is a factor which should be accorded great weight" ... . Notably, actual knowledge of the essential facts underlying the claim requires more than "mere notice of the underlying occurrence" ... and the fact that some sort of injury occurred... . **Babcock v Walton Cent School Dist, 2014 NY Slip Op 05013, 3rd Dept 7-3-14**

NEGLIGENCE/MUNICIPAL LAW/FAMILY LAW

Criteria Re: Counties' and Foster Care Agencies' Liability for the Acts of Foster Parents Explained

In dismissing a complaint against a foster care agency based upon the alleged failure of the foster parent to seek medical care for the foster child, the Second Department explained the relevant law:

> Counties and foster care agencies cannot be vicariously liable for the negligent acts of foster parents, who are essentially contract service providers ... .
>
> However, counties and foster care agencies may be sued to recover damages for negligence in the selection of foster parents and in supervision of the foster home ... . In order to establish its prima facie entitlement to judgment as a matter of law dismissing so much of the complaint as alleged that it engaged in negligent placement and supervision, the appellant had to establish, prima facie, that it did not have sufficiently specific knowledge or notice of the alleged dangerous conduct which caused the infant's injuries ... . In other words, the appellant had to show that the third-party acts could not have been reasonably anticipated ... . **Keizer v SCO Family of Servs, 2014 NY Slip Op 06630, 2nd Dept 8-6-14**

NEGLIGENCE/MUNICIPAL LAW/GOVERNMENTAL IMMUNITY

Delay In Arrival of an Ambulance During a Snow Storm Not Actionable

The causes of action against the city based upon delay in the arrival of an ambulance during a snow storm were dismissed. The Second Department determined that both the ambulance service and the snow removal were governmental functions and, in the absence of a special relationship with the decedent, were not actionable:

> A municipal emergency response system is "a classic governmental, rather than proprietary, function" ... . Contrary to the plaintiffs' contentions, the amended complaint fails to allege any facts tending to show that there was any "justifiable reliance" on any promise made to the decedent by the defendants. Accordingly, the amended complaint fails to state facts from which it could be found that there was a special relationship between the decedent and the defendants and, therefore, the amended complaint does not state a viable cause of action against the defendants based upon their alleged negligence in responding to the plaintiffs' 911 call ... . **Estate of Radvin v City of New York, 2014 NY Slip Op 05302, 2nd Dept 7-16-17**

City Can Not Be Held Liable for Injuries Caused by Attacking Dogs About Which Complaints Had Been Made---No Special Relationship Between Plaintiff's Decedent and City

The Second Department determined no special relationship existed between plaiintiff's decedent and the city such that the city could be held liable for the alleged failure to address complaints about the dogs which attacked plaintiff's decedent, who died from the injuries. The court explained why none of the criteria for a special relationship applied:

> " A special relationship can be formed in three ways: (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation'" ... .
>
> As for the first way of forming a special relationship, contrary to the plaintiff's contention, a private right of action may not be fairly implied from Agriculture and Markets Law (hereinafter AML) § 123 ... . The Supreme Court properly determined that the recognition of a private right

of action would be inconsistent with the legislative scheme underlying AML § 123 ... . Accordingly, no special relationship was created between the City and the decedent through the breach of a statutory duty.

As for the second way of forming a special relationship, the City met its prima facie burden of demonstrating its entitlement to judgment as a matter of law by submitting evidence that it did not voluntarily assume a duty toward the decedent. To demonstrate that a municipality voluntarily assumed an affirmative duty and a plaintiff justifiably relied on the municipality's undertaking, four elements must be shown: "(1) an assumption by a municipality, through promises or actions, of an affirmative duty to act on behalf of the injured party; (2) knowledge on the part of a municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" ... . Here, the City established and the plaintiff concedes that the decedent never made direct contact with the City, and the circumstances here did not give rise to one of the narrow exceptions to this requirement ... . The absence of direct contact negates the existence of a special relationship pursuant to the City's voluntary assumption of a duty to the decedent ... .

As for the third way of forming a special relationship, which has been recognized in only rare circumstances, the City must affirmatively act to place the plaintiff in harm's way ... . Contrary to the plaintiff's contention, the evidence established, prima facie, that the City did not take positive direction and control in the face of a known, blatant, and dangerous safety violation. **Sutton v City of New York, 2014 NY Slip Op 05421, 2nd Dept 7-23-14**

Town Not Liable for Negligently Picking Up Personal Items from Driveway During Garbage Collection---Garbage Collection Is a Ministerial Function---No Special Relationship with Plaintiff

The Second Department determined the town was not liable for picking up items plaintiff had placed in his driveway to dry out after a storm. The items were picked up as "bulk garbage" prior to the date bulk-garbage collection was slated to begin:

> Garbage collection is considered a governmental function ... . A municipality cannot be held liable for negligence in the performance of discretionary acts, but can be held liable for negligence in the performance of ministerial acts, if there is a special relationship between the plaintiff and the defendant ... . The difference between ministerial or discretionary acts is described thusly: " discretionary or quasi-judicial acts involve 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'"... . Garbage collection falls within the definition of a ministerial function.
>
> A special relationship based upon a duty voluntarily assumed by the municipality requires proof of the following elements: " (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking'" ... . No facts were alleged indicating that the defendants undertook an affirmative duty to act on behalf of the plaintiff. Therefore, no basis was alleged to impose liability upon the defendants, based on the negligent destruction of property. **Katz v Town of Clarkstown NY, NY Slip Op 05843, 2nd Dept 8-20-14**

Ordinance Making Abutting Property Owners Responsible for Removal of Ice and Snow from a Sidewalk Did Not Impose Tort Liability on Abutting Property Owner

The Second Department determined that an abutting property owner (Atlantic) could not be held liable for an ice/snow slip and fall on a sidewalk in the absence of an ordinance specifically imposing tort liability on the property owner, even where, as here, an ordinance made the property owner responsible for removal of ice and snow:

> "Unless a statute or ordinance clearly imposes liability upon an abutting landowner, only a municipality may be held liable for the negligent failure to remove snow and ice from a public sidewalk" ... . Although section 229-6 of the Code of the Village of Ossining (hereinafter the Village Code) requires a landowner to remove snow and ice from abutting public sidewalks, it does not specifically impose tort liability for a breach of that duty ... . "In the absence of a statute or ordinance imposing liability, the owner of property abutting a public sidewalk will be held liable only where it, or someone on its behalf, undertook snow and ice removal efforts which made the naturally occurring conditions more hazardous" ... . In their pleadings, the plaintiffs did not allege that the

Atlantic defendants created the icy condition. Rather, the pleadings alleged that the Atlantic defendants were negligent in, inter alia, failing to remove snow and ice from the sidewalk. Since the Atlantic defendants established that section 229-6 of the Village Code did not impose tort liability upon them for a failure to remove snow and ice from the sidewalk, they demonstrated their prima facie entitlement to judgment as a matter of law ... . **Palka v Village of Ossining, 2014 NY Slip Op 05848, 2nd Dept 8-20-14**

Memorialized Telephone Notification About Pothole Does Not Satisfy Written Notice Requirement--- Inadequate Repair Is Not Sufficient to Demonstrate Municipality Created the Dangerous Condition

The Second Department determined Supreme Court should have dismissed the complaint against the village because the village did not receive written notice of the pothole which allegedly caused plaintiff's injury. The court noted that phone calls to the village about the pothole, even if memorialized in writing, did not meet the written notice requirement. The court also noted that an inadequate repair of the pothole is not enough to demonstrate the village created the defect:

> The plaintiff contends that there is a triable issue of fact as to whether the Village received prior written notice of the defect, because the oral notice provided by residents of the street, including voicemail, could have been reduced to writing by an employee of the Village. However, Hempstead Village Code § 39-1 requires that "written notice of said defect causing the injuries or damages was actually given to the Village Clerk." There are no provisions permitting other types of notice, such as a written acknowledgment of oral notice ... . Therefore, a verbal or telephonic communication which was reduced to writing by the Village would not satisfy the prior written notice requirement ... .
>
> In Yarborough v City of New York (10 NY3d 726), the Court of Appeals noted that once the municipality establishes lack of written notice, "the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule —that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality." A negligent repair of the defective condition is insufficient to establish that the municipality affirmatively created the defect ... . To fall within the exception, the repair must immediately result in a dangerous condition ..., which made the defective condition more dangerous than it was before any efforts were made to repair it ... . **Wilson v Incorporated Vil of Hempstead, 2014 NY Slip Op 05861, 2nd Dept 8-20-14**

City Personnel's Responses to Medical Emergency Were Discretionary and Therefore Could Not Be the Basis for Liability On the Part of the City

The Second Department determined that actions of city personnel with respect to responding to plaintiff's (Mason's) medical emergency were discretionary and could not therefore subject the city to liability:

> Under the doctrine of governmental function immunity, " [g]overnment action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general'" ... .
>
> Here, the City defendants met their burden of establishing their prima facie entitlement to judgment as a matter of law by demonstrating that their actions were discretionary. The City defendants' dispatcher exercised discretion in deciding which type of ambulance to send to Mason's home, based upon the information provided in the 911 call. The EMTs exercised their discretion in calling for an ALS ambulance based upon the amount of blood loss and Mason's difficulty breathing, in declining the assistance of the police officers who responded to the scene, and in requiring Mason to wait for the ALS paramedics in her apartment. Similarly, the City defendants' paramedics exercised their discretion in reassessing Mason's condition upon their arrival at the scene and in administering an IV prior to transporting her to the hospital. The aforementioned allegedly negligent actions of the ambulance dispatcher, the EMTs, and the paramedics were discretionary and, therefore, may not be a basis for liability... . **Dixon v City of New York, 2014 NY Slip Op 05946, 2nd Dept 8-27-14**

NEGLIGENCE/MUNICIPAL LAW/GOVERNMENTAL IMMUNITY/CIVIL RIGHTS (1983)

Negligence and "1983" Causes of Action Against the City and/or City Employees Stemming from the Alleged Failure to Provide Medical Assistance to a Rikers Island Inmate Reinstated

The First Department, reversing Supreme Court, determined there were triable issues of fact concerning whether corrections officers breached a duty to protect the decedent, an inmate at Rikers Island, by failing to respond to decedent's medical emergency. The court also determined there were triable issues of fact

concerning a 1983 action against one of the city employees based upon her alleged "deliberate indifference" to decedent's "serious medical needs." The court noted that the 1983 action against the city, alleging deliberate indifference, was properly dismissed:

> Dozens of eyewitnesses provided conflicting accounts regarding, among other things, the timing of the officers' calls for medical assistance, and whether resuscitative efforts undertaken before medical personnel arrived were performed by the officers or whether other inmates took such measures in the face of inaction by the officers. Plaintiffs' expert affirmation raised triable issues of fact as to the adequacy of the officers' response and the soundness of defendants' expert's opinions. The City's reliance on governmental immunity is unavailing, since there are triable issues of fact as to whether the death was caused in part by a negligent failure to comply with mandatory rules and regulations of the New York City Department of Corrections (DOC), requiring, among other things, that correction officers respond immediately in a medical emergency, and that officers who are trained and certified in CPR administer CPR where appropriate ... .
>
> The court correctly dismissed the § 1983 claim against the City. ... There is ... no evidence of a "policy or custom" evincing deliberate indifference to the rights of inmates ... . "Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action" ... . "Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights" ... . **Luckey v City of New York, 2014 NY Slip Op 05697, 1st Dept 8-7-14**

NEGLIGENCE/MUNICIPAL LAW/GOVERNMENTAL IMMUNITY/VEHICLE AND TRAFFIC LAW

Ordinary Negligence Standard Applied Where Ambulance (Responding to an Emergency) Struck Plaintiff Who Was Lawfully in the Crosswalk/Questions of Fact Whether There Was a "Special Relationship" Between the City's Crossing Guard and the Plaintiff, and Whether the Crossing Guard Was Performing Ministerial, Rather than Discretionary, Functions (Such that the City Could Be Held Liable)

In a case involving a pedestrian who was lawfully crossing a street when struck by an ambulance responding to an emergency, in the presence of a city employee acting as a crossing guard, the Second Department determined that ordinary negligence standards applied to the ambulance (not the "emergence" "reckless disregard" standard of Vehicle and Traffic Law 1104) and that there were questions of fact whether the city was liable based upon a "special relationship" with the plaintiff and whether the city was liable because the crossing guard was performing ministerial, rather than discretionary, functions:

> Failure to abide by the provisions set forth in Vehicle and Traffic Law §§ 1111 (duty to yield to pedestrians in crosswalk) and 1112 (pedestrian has right of way), which was the injury-causing conduct at issue here, is not privileged conduct pursuant to Vehicle and Traffic Law § 1104(b). As the injury-producing conduct was not specifically exempted from the rules of the road by Vehicle and Traffic Law § 1104(b), the principles of ordinary negligence apply ... . * * *
>
> "To impose liability [upon a municipality], there must be a duty that runs from the municipality to the plaintiff. We have recognized a narrow class of cases in which a duty is born of a special relationship between the plaintiff and the governmental entity" ... . One of the ways that a special relationship arises is when the municipality "assumes a duty that generates justifiable reliance by the person who benefits from the duty" ... . * * *
>
> Further, "[g]overnment action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff apart from any duty to the public in general" ... . Here, the City defendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them on the basis that the crossing guard's actions were discretionary. Based on their

submissions in support of their cross motion, and under the circumstances here, the City defendants failed to eliminate all triable issues of fact as to whether the crossing guard's actions constituted ministerial governmental functions ... . **Benn v New York Presbyt Hosp, 2014 NY Slip Op 05615, 2nd Dept 8-6-14**

NEGLIGENCE/NUISANCE/TRESPASS/ PRODUCTS LIABILITY/TOXIC TORTS/ENVIRONMENTAL LAW/CIVIL PROCEDURE

County Water Authority Had Standing to Bring Action Based Upon the Chemical Contamination of Its Wells---CPLR 214-c Governs Actions Based Upon Contamination---Action Was Untimely

The Second Department, in a full-fledged opinion by Justice Hinds-Radix, determined that the plaintiff Suffolk County Water Authority (SCWA) had standing to bring a negligence/nuisance/trespass/products liability action against defendants alleging contamination of wells caused by chemicals (PCE and TCE). However, the court determined the action was barred as untimely by CPLR 214-c. In the course of the opinion, the court explained what the "two-injury" rule is in the context of a continuing wrong. The court determined that CPLR 214-c was designed to eliminate the continuing-wrong statute of limitations calculation in contamination cases. In addition, the court explained the difference between latent and patent injuries with respect to CPLR 214-c:

> Generally, a plaintiff has standing to sue if it has suffered an injury in fact ... in some way different from that of the public at large and within the zone of interests to be protected by relevant statutory and regulatory provisions ... .
>
> We reject the movants' contention that the SCWA lacked standing to seek damages for injury to 115 wells where the PCE contamination level fell below the MCL (federal and state "maximum contamination level" for PCE). The MCL is only a regulatory standard which governs conduct in supplying water to the public. While the MCL may be helpful in determining whether an injury has occurred, the MCL does not set a bar below which an injury cannot have occurred ... . Similarly, the MCL does not define whether an injury has occurred, since contamination below that level could result in some injury, such as increased monitoring costs ... . It is undisputed that the SCWA has expended resources in its effort to address the widespread contamination, even at wells where the contamination has not risen to or exceeded the MCL. Thus, the SCWA has alleged that it has suffered an injury for which it may seek redress, irrespective of the level of contamination. * * *
>
> CPLR 214-c was enacted in 1986 to ameliorate the effect of a line of cases which held that toxic tort claims accrued upon the impact or exposure to the substance, even though the resulting injury or illness did not manifest itself until some time later ... . CPLR 214-c provides for a three-year limitations period for actions to recover damages for injuries to person or property "caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property" (CPLR 214-c[2]). The three-year period is "computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier" (CPLR 214-c[2]...). For the purposes of CPLR 214-c, "discovery occurs when, based upon an objective level of awareness of the dangers and consequences of the particular substance, the injured party discovers the primary condition on which the claim is based'" ... . **Suffolk County Water Auth v Dow Chem Co, 2014 NY Slip Op 05420, 2nd Dept 7-23-14**

NEGLIGENCE/PRODUCTS LIABILITY/INDEMNIFICATION

Where the Manufacturer Was Not At Fault in a Products Liability Action, the Retailer Is Not Entitled to Indemnification for the Costs of Defending the Action from the Manufacturer

The Fourth Department determined a downstream retailer (GE) was not entitled to indemnification from and upstream manufacturer (Carrier) when both have been absolved of fault in a products liability action. The basis of the action was a fire which was alleged to have been caused by an air conditioner manufactured by Carrier and marketed and sold by GE. It was ultimately determined the fire was not caused by the air conditioner. GE sought indemnification from Carrier for the costs associated with the lawsuit:

> The issue in this case is whether GE, a downstream retailer, is entitled to recoup its costs in defending a products liability action from Carrier, an upstream manufacturer, when they both are ultimately absolved of liability. We conclude that GE is not entitled to recoupment, and we therefore affirm.
>
> Indemnification is grounded in the equitable principle that the party who has committed a wrong should pay for the consequences of that

wrong ... . Thus, New York courts have consistently held that "common-law indemnification lies only against those who are actually at fault" ..., i.e., the "actual wrongdoer" ... . In the products liability context, a manufacturer is held accountable as a "wrongdoer" when it releases a defective product into the stream of commerce ..., and "innocent" sellers who merely distribute the defective product are entitled to indemnification from the at-fault manufacturer ... . That common-law right of indemnification "encompasses the right to recover attorneys' fees, costs, and disbursements incurred in connection with defending the suit brought by the injured party" ... . * * *

Where, as here, it is ultimately determined that the subject product is free from defect, there is no "fault" or "wrongdoing" on the part of the manufacturer... . **Bigelow v General Elec Co, 2014 NY Slip Op 05727, 2nd Dept 8-8-14**

NEGLIGENCE/WRONGFUL CONVICTION AND IMPRISONMENT

Claimant's Inculpatory Statement Demonstrated to Be Product of Police Misconduct

Fourth Department affirmed the judgment against the state for wrongfull conviction and imprisonment. After nine years of imprisonment for attempted murder, another came forward and credibly confessed to the crime. The claimant was released and sued the state. The state argued on appeal that, because the claimant made an inculpatory statement, the proof that he did not bring about his own conviction was insufficient. In rejecting that argument, the court explained:

> Claimant consistently maintained his innocence and contended that his inculpatory statement was coerced. "[A] coerced false confession does not bar recovery under section 8-b because it is not the claimant's own conduct' within the meaning of the statute" ... . It is well settled that "[t]he voluntariness of a confession can only be determined through an examination of the totality of the circumstances surrounding the confession" ... . "Relevant criteria include the duration and conditions of detention, the manifest attitude of the police toward the detainee, the existence of threat or inducement, and the age, physical state and mental state of the detainee" ... . The use or misuse of a polygraph examination is also a factor to be considered in determining whether there was impermissible coercion ... .
>
> Here, we conclude that the record fully supports the court's determination that claimant's inculpatory statement was the product of police misconduct ... . Claimant was awake for 34 hours before making his only inculpatory statement, which was the second statement he made. He had been interrogated for 15 hours in a six- by eight-foot windowless room. He ate nothing and drank only one can of soda and, although he was a heavy smoker, he had no cigarettes in the prior four or five hours. He remained under the severe emotional trauma of having seen his wife in a horrible bloodied and battered condition. Claimant was advised that, if he took a polygraph exam and passed, he would be permitted to go home.
>
> Notably, the polygraph operator expressed significant concern to fellow officers about the reliability of the polygraph exam because claimant was "somewhat physiologically unresponsive to the polygraph." **Gristwood v State of New York, 2014 NY Slip Op 05259, 4th Dept 7-11-14**

NEGLIGENCE/WRONGFUL DEATH/RESPONDEAT SUPERIOR

Off-Duty Corrections Officer Was Not Acting Within the Scope of His Employment When Decedent Was Shot

The Second Department determined that an off-duty corrections officer (Maldonado) was not acting within the scope of his employment when he shot and killed a man:

> "Under the doctrine of respondeat superior, an employer can be held vicariously liable for the torts committed by an employee acting within the scope of the employment" ... . "An act is considered to be within the scope of employment if it is performed while the employee is engaged generally in the business of his [or her] employer, or if his [or her] act may be reasonably said to be necessary or incidental to such employment" ... . However, an employer may not be held vicariously liable for its employee's alleged tortious conduct if, at the time of the underlying incident, the employee was acting solely for personal motives unrelated to the furtherance of the employer's business ... .
>
> Here, the claimant's decedent was shot by an off-duty New York State Corrections Officer, Emilio Maldonado, after a dispute. The record showed, inter alia, that Maldonado was assaulted by the claimant's decedent and his brother following a traffic dispute. At the time of the incident, Maldonado was driving his personal vehicle, and was accompanied by family members. He was carrying his own privately-owned weapon as well as a badge. * * *

Although Maldonado testified in a related criminal action that he intended or planned to "cuff" and detain the assailants, it is undisputed that he never took any affirmative steps toward effecting a detention. In particular, he did not order the assailants to halt, and he did not physically attempt to handcuff or detain them. It is also undisputed that after the shooting, Maldonado did not attempt to detain the fleeing assailants. Under these circumstances, the claimant failed to raise a triable issue of fact as to whether Maldonado acted within the scope of his official duties... . **Wood v State of New York, 2014 NY Slip Op 05173, 7-9-14**

PARTNERSHIP LAW/CIVIL PROCEDURE

Criteria for Appointment of Temporary Receiver to Wind Up Dissolution of Partnership Not Met

The Second Department determined Supreme Court should not have appointed a receiver to wind up the dissolution of a partnership because the criteria for the appointment (irreparable loss or waste of property) had not been met:

> The Supreme Court improvidently exercised its discretion in granting that branch of the plaintiffs' motion which was pursuant to CPLR 6401 for the appointment of a temporary receiver to wind up the affairs of a partnership ... and to liquidate and distribute its assets. "A party moving for the appointment of a temporary receiver must submit clear and convincing evidence of irreparable loss or waste to the subject property and that a temporary receiver is needed to protect their interests'" (...see CPLR 6401[a]...). Here, the plaintiffs failed to make a "clear evidentiary showing that property of the [partnership] was in danger of being removed from the state, or lost, materially injured or destroyed'" ... . Accordingly, that branch of the plaintiffs' motion which was for the appointment of a temporary receiver should have been denied. **Magee v Magee, 2014 NY Slip Op 05845, 2nd Dept 8-20-14**

REAL ESTATE

Sellers Entitled to Keep Downpayment Based Upon Purchaser's Failure to Close on Law Day

The Second Department determined Supreme Court should have granted the sellers' motion for summary judgment and allowed the sellers to keep the purchaser's downpayment based upon the purchaser's failure to close on the date set by a "time-of-the-essence" demand. The court explained the applicable law as follows:

> "To prevail on a cause of action for the return of a down payment on a contract for the sale of real property, the plaintiff must establish that the defendant breached or repudiated the contract and that the plaintiff was ready, willing, and able to perform on the closing date" ... . "While a vendee can recover his [or her] money paid on the contract from a vendor who defaults on law day without a showing of tender or even of willingness and ability to perform where the vendor's title is incurably defective, a tender and demand are required to put the vendor in default where his [or her] title could be cleared without difficulty in a reasonable time" ... . The seller in such a case is entitled to "a reasonable time beyond law day to make his [or her] title good" ... . "[W]hile a purchaser must normally first tender performance and demand good title to place a seller in default, when the vendor is given notice of the defect prior to the scheduled closing date and does nothing to correct it until after the closing date, the purchaser need not tender performance as such tender would be meaningless'" ... . "[W]here a seller seeks to hold a purchaser in breach of contract, the seller must establish that [he or she] was ready, willing, and able to perform on the time-of-the-essence closing date, and that the purchaser failed to demonstrate a lawful excuse for its failure to close" ... . * * *
>
> ...[T]he sellers demonstrated, prima facie, that they were given no notice of the alleged defect, and that the purchaser was therefore required to appear at closing and tender her performance ... . Furthermore, under these circumstances, the sellers were entitled to a reasonable adjournment to allow them to address the purchaser's objections, notwithstanding the fact that they had declared that time was of the essence ... . Moreover, the sellers satisfied their prima facie burden of demonstrating that they were ready, willing, and able to perform on the time-of-the-essence closing date, and that the purchaser failed to demonstrate a lawful excuse for her failure to close ... . **Martocci v Schneider, 2014 NY Slip Op -5308, 2nd Dept 7-16-14**

REAL PROPERTY

Adverse Possession Criteria Explained

The Second Department determined the acquisition of title to property by adverse possession had been demonstrated. The court explained the criteria as follows:

> ...[T]he respondents..., who sought to obtain title to the subject property by adverse possession, were obligated to prove that the possession was hostile and under claim of right, actual, open and notorious, exclusive, and continuous for a period of 10 years ... . Further, because the adverse possession claim was not founded upon a written instrument, in order to obtain title to the subject property, the respondents were obligated to establish, in accordance with the law in effect at the time the claim allegedly ripened ..., that they " usually cultivated, improved, or substantially enclosed the land'" ... . "Because the acquisition of title by adverse possession is not favored under the law, these elements" had to "be proven by clear and convincing evidence" ... . **Scalamander Cove LLC v Bachmann, 2014 NY Slip Op 04914, 2nd Dept 7-2-14**

Easement Grants Only the Right to Ingress and Egress, Not a Right to the Physical Passageway Itself

The Third Department determined Supreme Court should not have ordered defendant to remove a gravel driveway. The easement over defendant's land gave plaintiffs the right of ingress and egress. Installing the gravel driveway did not impair plaintiff's right to ingress and egress:

> "[W]here the intention in granting an easement is to afford only a right of ingress and egress, it is the right of passage, and not any right in a physical passageway itself, that is granted to the easement holder" ... . Accordingly, "in the absence of a demonstrated intent to provide otherwise, a landowner burdened by an express easement of ingress and egress may narrow it, cover it over, gate it or fence it off, so long as the easement holder's right of passage is not impaired" ... .
>
> Here, the deed establishing the right-of-way states that it is "for the purpose of ingress and egress to" plaintiffs' property. The uncontroverted evidence established that, while the turnaround was previously comprised of hard-packed dirt, defendant installed a gravel driveway on the turnaround. Plaintiffs did not submit any evidence establishing that the gravel driveway impeded their use of the turnaround. Although plaintiffs established that they had a right of passage for the purpose of ingress and egress, they failed to further establish that defendant's addition of a gravel driveway impaired that right to any extent. **Thibodeau v Martin, 2014 NY Slip Op 04996, 3rd Dept 7-3-14**

Defendant Failed to Prove Three Elements of Adverse Possession

The Third Department determined that defendant failed to demonstrate it had acquired plaintiff's property by adverse possession:

> To establish adverse possession, defendant was required to demonstrate, by clear and convincing evidence, that its possession was "(1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required [10-year] period" ... . Additionally, where, as here, the claim of right is not founded upon a written instrument, it was necessary for defendant to "establish that the land was 'usually cultivated or improved' or 'protected by a substantial inclosure'" ... . Upon our review of the record, we agree with Supreme Court's conclusion that defendant failed to raise an issue of fact with respect to more than one of these elements.
>
> Specifically, defendant has failed to establish that its use of the disputed parcel was continuous or exclusive * * * [and] ... defendant presented no evidence that it cultivated or improved the disputed parcel during the relevant period. **Salerno v CE Kill Inc, 2014 NY Slip Op 05224, 3rd Dept 7-10-14**

REAL PROPERTY TAX LAW

First Appellate Decision Addressing the Computation After Default of a Delinquent Tax Installment Agreement

In a tax foreclosure proceeding based upon the alleged default of the respondent in making installment payments on the taxes owed, the Third Department, in finding County Court had not correctly determined the redemption amount correctly, explained, in a full-fledged opinion by Justice McCarthy, how the calculation should be made:

> We begin with the statutory requirements for installment agreements, as relevant to a default. RPTL 1184 (6) calls for amortization of interest over the period of the agreement and says that each installment payment is due on the last day of the month. RPTL 1184 (7) refers to RPTL 924-a for the applicable interest rate, which here is 12% per annum or 1% per month (see RPTL 924-a [1], [2]). Pursuant to RPTL 1184 (7), "[i]f an installment is not paid" by its due date, "interest shall be added at the applicable rate for each month or portion thereof until paid. In addition, if an installment is not paid by the end of the

fifteenth calendar day after the payment due date, a late charge of [5%] of the overdue payment shall be added." In the event of a default, the taxing authority has "the right to require the entire unpaid balance, with interest and late charges, to be paid in full" (RPTL 1184 [8] [b]), and can also go forward with foreclosure or enforce the collection of the delinquent tax lien pursuant to any other applicable law (see RPTL 1184 [8] [b]). * * *

We start by explaining how to calculate "the entire unpaid balance." Although the statute may be complex, we find that its language is unambiguous and, therefore, we must give effect to its plain meaning ... . Respondent acknowledges that it failed to pay the September, October and November 2011 installment payments. The "entire unpaid balance" must be figured as of the date that petitioner demanded that the balance be paid in full (or accelerated it), which occurred here after the September installment payment was overdue. When that payment was not paid by its due date, 1% interest should have begun to accrue (see RPTL 1184 [7])[FN3]. The statute calls for interest to be added if "an installment" is not paid, so this interest should be calculated on the overdue September installment payment. In addition, a 5% late charge should have been added for the September installment payment because that payment was overdue by more than 15 days (see RPTL 1184 [7] [imposing late charge of 5% "of the overdue payment"]). So the amount owed as of the date of acceleration, but before acceleration occurred, included the amount of the September installment payment, plus 1% interest on that installment payment amount from the day after the September payment was due until the date of acceleration, plus 5% of the September installment payment amount as a late charge. Adding that sum of September's payment, interest and late charge to the remaining unpaid principal as of the date of acceleration (covering what would have been the October and November installment payments, but not including the amortized interest for those months as those payments were not yet due under the agreement) will produce "the entire unpaid balance."

From the time that the balance was demanded (or accelerated), 1% interest per month is due on that amount until the property was redeemed. Although interest is still calculated at 1%, this interest rate is not determined under the statutory provisions dealing with interest on installment agreement payments (see RPTL 1184 [6], [7]), but is determined under the default provision of RPTL 1184 (8) (b) that allows petitioner to enforce the collection of the delinquent tax lien pursuant to any other applicable law (i.e., RPTL 924-a, which addresses interest on tax delinquencies). **Matter of County of Ulster..., 2014 NY Slip Op 05398, 3rd Dept 7-17-14**

Mistaken Classification of Property Resulting In a Much Too Large Tax Bill Was a "Clerical Error" Which Could Be Corrected by the City Department of Finance---No Need for Property Owner to Commence a Tax Certiorari Proceeding

The Second Department, in a full-fledged opinion by Justice Leventhal, over a dissent, determined that the petitioner could challenge a mistaken classification of his property (which resulted in a property tax more than $40,000 too high) through an Article 78 proceeding finding that a tax certiorari proceeding under the Real Property Tax Law (RPTL) was not the exclusive vehicle for the challenge. The Article 78 proceeding was timely, a tax certiorari proceeding would not have been timely. The mistake was deemed a "clerical error" which could have been corrected by the NYC Department of Finance (DOF) pursuant to City Administrative Code sectionn 11-206:

> We agree with the petitioner that the DOF's determination, at the very least, suggests that it misapprehended both the relief sought by the petitioner as well as its authority to grant the relief actually requested. Administrative Code § 11-206 vests the DOF with the discretion to correct tax assessments that are erroneous due to a clerical error or to an error of description; the DOF's authority is not limited to transcription errors or arithmetical errors. Moreover, contrary to the DOF's representation in the letter dated March 24, 2011, the authority to correct such an error pursuant to Administrative Code § 11-206 does not lie with the Tax Commissioner or the judiciary. Therefore, the Supreme Court erred in granting the respondents' motion pursuant to CPLR 3211(a)(5) and (7) to dismiss the petition on the grounds that it fails to state a cause of action and that the proceeding was time-barred. **Matter of Better World Real Estate Group v New York City Dept of Fin, 2014 NY Slip Op 05786, 2nd Dept 8-13-14**

Action Based Upon Misclassification of Property Must Be Brought Under Article 7 of the Real Property Tax Law

In determining that an action based on the allegation property had been misclassified must be brought under article 7 of the Real Property Tax Law (RPTL), the Second Department explained when a plenary action challenging property tax can and cannot be maintained:

> In general, the proper method for challenging excessive or unlawful real property tax assessments is by the commencement of a tax certiorari proceeding pursuant to RPTL article 7 ... . Such a proceeding, which must be commenced within 30 days after the filing of the final assessment roll, can challenge an assessment as being excessive, unequal, or unlawful, or as resulting from the property being misclassified (see RPTL 702[2]; 706[1]).
>
> The procedures of RPTL article 7 need not be followed, and a plenary action may be commenced collaterally attacking the assessment where the challenge is that the taxing authority has exceeded its power, such as by effectively withdrawing a previously recognized exemption ... . A collateral attack may also be mounted where the challenge is based upon "the method employed in the assessment involving several properties rather than the overvaluation or undervaluation of specific properties" ... .
>
> Here, all of the allegations regarding the assessment stem from the Board's determination that the subject property should be classified as "Class two" property on the 2007/2008 tax roll ... . As the Supreme Court properly pointed out, a challenge to this alleged misclassification had to be asserted in a proceeding pursuant to RPTL article 7 ... . **Tricarico v County of Nassau, 2014 NY Slip Op 05857, 2nd Dept 8-20-14**

REAL PROPERTY TAX LAW/MUNICIPAL LAW/WARRANT REQUIREMENT

In the Context of a Challenge to the Tax Assessment of a Home, the Town Must Obtain a Warrant Based Upon Probable Cause Before It Can Enter the Home (Over the Homeowner's Objection) to Inspect it

The Second Department, in a full-fledged opinion by Justice Dickerson, determined that the Town did not make the requisite showing to justify an inspection of the interior of petitioner's home. Petitioner had challenged the tax assessment of her property. Supreme Court had ruled the Town could enter petitioner's home to inspect it. The Second Department reversed, finding that Supreme Court improperly placed the burden on the petitioner to demonstrate why inspection should not be allowed. The burden should have been placed on the Town to make a showing that a warrant allowing entry of the home was supported by probable cause:

> We hold that the Town respondents bore the burden of demonstrating their entitlement to enter the petitioner's home over her objections. The petitioner bore no burden, in the first instance, to demonstrate her right to preclude the Town respondents from entering into her home against her will. The right to be free from unreasonable searches is granted by the Fourth Amendment, and made applicable to the States and their subdivisions by virtue of the Fourteenth Amendment (see Mapp v Ohio, 367 US 643), though this right is by no means absolute. By directing the petitioner to move to preclude the Town's appraiser from conducting an interior appraisal inspection of her home, the Supreme Court improperly shifted, from the Town respondents, the burden of demonstrating their entitlement to enter into the petitioner's home, to the petitioner to demonstrate her right to preclude the Town respondents from sending an agent into her home. We further hold that, based on a proper balancing of the Town respondents' interest in conducting the inspection against the petitioner's Fourth Amendment rights, and the privacy invasion that such a "search" would entail, the Town respondents failed to satisfy their burden. * * *
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> Since the Town respondents sought entry into the petitioner's home to have the Town's appraiser conduct an inspection of the premises, the Town respondents were required to obtain a warrant upon a showing of probable cause. By directing the petitioner to move to preclude the Town respondents from conducting an interior inspection of her home, the Supreme Court improperly shifted the burden from the Town respondents to demonstrate their entitlement to entry into the petitioner's home upon a showing of probable cause, to the petitioner to demonstrate her right to deny entry to the Town respondents ... . "[B]y erroneously requiring [the] petitioner[ ] to move to preclude, the court did not properly evaluate the reasonableness of the inspections sought by respondents, i.e., the court did not conduct the necessary Fourth Amendment analysis balancing respondents' need for interior inspections against the invasion of petitioner['s] privacy interests that such inspections would entail" ... . **Matter of Jacobowitz v Board of Assessors for the Town of Cornwall, 2014 NY Slip Op 05544, 2nd Dept 7-30-14**

REAL PROPERTY TAX LAW/RELIGION

Parcels of Land Entitled to Tax Exempt Status Despite Alleged Violations of Building and Fire Code

The Third Department determined three parcels of land were entitled to tax exempt status, based upon the use of the land for religious and charitable purposes, despite alleged building and fire code violations:

RPTL 420-a (1) (a) provides, in relevant part, that "[r]eal property owned by a corporation or association organized or conducted exclusively for religious [or] charitable . . . purposes . . . and used exclusively for carrying out thereupon\. . . such purposes . . . shall be exempt from taxation as [therein] provided." To demonstrate entitlement to this exemption, "(1) the [petitioning] entity must be organized exclusively for purposes enumerated in the statute, (2) the property in question must be used primarily for the furtherance of such purposes, . . . (3) no pecuniary profit, apart from reasonable compensation, may inure to the benefit of any officers, members, or employees, and (4) the [petitioning] entity may not be simply used as a guise for profit-making" ... . Notably, "a property owner seeking a real property tax exemption which demonstrates that it is a not-for-profit entity whose tax-exempt status has been recognized by the Internal Revenue Service and whose property is used solely for [charitable] purposes has made a presumptive showing of entitlement to [the] exemption" ... . * * *

...[B]ecause the alleged violations do not divest petitioner of its ability to use the affected parcels for religious or charitable purposes, such violations cannot operate to deprive petitioner of a tax exemption to which it otherwise has demonstrated entitlement. To the extent that respondents believe that petitioner is not in compliance with all relevant provisions of the Town's building and fire code, their remedy is to issue a stop work order or pursue whatever enforcement proceedings may be available. **Oorah Inc v Town of Jefferson, 2014 NY Slip Op 05387, 3rd Dept 7-17-14**

RETIREMENT AND SOCIAL SECURITY LAW

Aggravation of Prior Injury Entitled Petitioner to Disability Benefits

Reversing the Comptroller, the Third Department determined that aggravation of a prior injury entitled petitioner to disability benefits:

> This Court has repeatedly held that "'when a preexisting dormant disease is aggravated by an accident, thereby causing a disability that did not previously exist, the accident is responsible for the ensuing disability'" ,,, . Here, although the Retirement System's expert speculated that petitioner may have had some low level symptoms that he had learned to manage, there is no dispute that petitioner was not incapacitated prior to the February 2009 incident. The expert characterized the exacerbation of petitioner's underlying conditions after that point as temporary, but could not explain why petitioner's conceded disability had not resolved as of the date of the hearing, 3½ years after the accident. Under these circumstances, the Comptroller's determination is not supported by substantial evidence and must be annulled ... . **Matter of Scannella v New York State Comptroller, 2014 NY Slip Op 05007, 3rd Dept 7-3-14**

TRUSTS AND ESTATES

Surrogate's Court Properly Declined to Suspend the Fiduciaries' Letters Testamentary and Letters of Trusteeship Pending a Hearing to Determine the Contested Facts

The Second Department determined Surrogate's Court properly declined to suspend the fiduciaries' letters testamentary and letters of trusteeship pending the outcome of an accounting proceeding. Although allegations of comingling property would support such a suspension, the allegations were contested and it would be an abuse of discretion to order the suspension without a hearing:

> The removal of a fiduciary pursuant to SCPA 711 and 719 is equivalent to "a judicial nullification of the testator's choice and may only be decreed when the grounds set forth in the relevant statutes have been clearly established" ... .
>
> Nevertheless, pursuant to SCPA 719(7), "letters [issued to a fiduciary] may be suspended, modified or revoked, or a lifetime trustee removed or his powers suspended or modified, without process. . . . [w]here he mingles the funds of the estate with his own or deposits them with any person, association or corporation . . . in an account other than as fiduciary" (SCPA 719[7] [emphasis added]). Fiduciary letters also may be suspended without process "[w]here any of the facts provided in 711 are brought to the attention of the court" (SCPA 719[10]).
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> However, as noted in Matter of Duke (87 NY2d 465),
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> > "[w]hile the Surrogate is clearly granted the exceptional authority to summarily remove executors without the formality of commencing a separate proceeding, the authority to exercise the ultimate sanction summarily is not absolute. The Surrogate may remove without a hearing only where the misconduct is established by undisputed facts or concessions, where the fiduciary's in-court conduct causes such facts to be within the court's knowledge, or where facts warranting amendment of

> letters are presented to the court during a related evidentiary proceeding" (Matter of Duke, 87 NY2d at 472-473 [internal citations omitted; emphasis added]).
>
> Thus, revoking a fiduciary's letters without a hearing pursuant to SCPA 719 will constitute an abuse of discretion "where the facts are disputed, where conflicting inferences may be drawn therefrom . . . or where there are claimed mitigating facts that, if established, would render summary removal an inappropriate remedy" ... .
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> Contrary to the appellants' contention, the allegations in this case are sharply disputed and give rise to conflicting inferences regarding the Fiduciaries' alleged misconduct. **Matter of Mercer, 2014 NY Slip Op 05186, 2nd Dept 7-9-14**

Petitioner Sufficiently Alleged She Is a Nonmarital Child of the Decedent---Probate Decree Properly Vacated

The Second Department determined Surrogate's Court properly vacated a probate decree based upon petitioner's assertion she is a nonmarital child of the decedent:

> Here, the petitioner ... sufficiently alleged that the decedent ... "openly and notoriously acknowledged [her] as his own [child]" and, thus, she may be entitled to inherit from him (EPTL 4-1.2[a][2][C][ii]...). Accordingly, the Surrogate's Court properly denied the executor's motion pursuant to CPLR 3211(a) to dismiss the petition.
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> " Because vacatur disrupts the orderly process of administration and creates a continual aura of uncertainty and nonfinality, a probate decree will be vacated only in extraordinary circumstances'" ... . "However, it is equally true that the Court should also be slow to say that an injustice may not be corrected'" ... . "A petitioner seeking to vacate a probate decree must establish with some degree of probability that his claim is well founded, and that, if afforded an opportunity, he will be able to substantiate it'" ... . An application to vacate a probate decree is committed to the discretion of the court ... . Here, the petitioner showed with some degree of probability that she is a nonmarital child of the decedent and that, if afforded an opportunity, she will be able to substantiate her claim. **Matter of Saginario, 2014 NY Slip Op 05192, 2nd Dept 7-9-14**

"Confidential Relationship" With Decedent Not Demonstrated As a Matter of Law

The Third Department determined Supreme Court properly ruled that petitioners had not demonstrated, as a matter of law, the existence of a confidential relationship between the decedent and respondent. Where a confidential relationship is demonstrated, the stronger party has the burden of showing by clear and convinciing evidence that a particular transaction from which the stronger party benefitted was not the result of undue influence. The court explained the operative criteria for a confidential relationship:

> A confidential relationship is one that is "of such a character as to render it certain that [the parties] do not deal on terms of equality" ... . Such inequality may occur from either one party's "superior knowledge of the matter derived from a fiduciary relation, or from an overmastering influence" or from the other's "weakness, dependence, or trust justifiably reposed" on the stronger party ... .
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> The limited issue presented on this appeal is whether Supreme Court erred when it declined to find, as a matter of law, that there was a confidential relationship between respondent and decedent. The basis for petitioners' claim that such a relationship existed was, in part, the familial relationship between respondent and decedent. A familial relationship, however, is not necessarily a confidential relationship ... . Importantly, the existence of a confidential relationship is ordinarily a factual determination based upon "evidence of other facts or circumstances showing inequality or controlling influence"... . **Matter of Bonczyk v Williams, 2014 NY Slip Op 05231, 3rd Dept 7-10-14**

No Contest Clause Was Not Triggered by Offering Will for Probate or Questioning Actions of Named Executor(s)

The Third Department, in a full-fledged opinion by Justice Peters, over a dissent, determined that a no contest clause in a will was not triggered by offering the will for probate and was not triggered by questioning the actions of the named executors. The beneficiary of a 2006 will, who had been excluded from the 2011 will, sought to probate the 2006 will. The petitioners then sought probate of the 2011 will when the executors failed to do so. The beneficiary of the 2006 will argued that the no contest clause in the 2011 will had thereby been triggered:

> While enforceable, no contest clauses are disfavored and must be strictly construed ... . The no contest provision at issue provides for

revocation of a beneficiary's interest if the beneficiary "contest[s] the probate or validity of [the] Will or any provision thereof, or . . . institute[s] . . . any proceeding to . . . prevent any provision [of the Will] from being carried out in accordance with its terms." Here, petitioners did not contest the validity of the will or any of its provisions by seeking to admit the will to probate ... . Rather, given that [the beneficiary of the 2006 will who had been excluded as a beneficiary from the 2011 will] had already offered the 2006 will for probate nearly two months earlier, they reasonably undertook to probate the 2011 will themselves after the nominated executor and successor executor thereunder failed to do so.

To the extent that petitioners sought letters of administration, we cannot conclude that, by including the no contest clause in his will, decedent intended to preclude a beneficiary from challenging or otherwise questioning the conduct of a fiduciary. **Matter of Prevratil, 2014 NY Slip Op 05478, 3rd Dept 7-24-14**

Husband, Criminally Responsible for the Death of His Mother-in-Law, Could Not Inherit the Mother-in-Law's Estate Indirectly After the Death of His Wife

The Second Department, in a full-fledged opinion by Justice Hall, determined the husband, Brandon, who was criminally responsible for the death his mother-in-law, could not inherit the mother-in-law's estate indirectly after the death of his wife, Deanna:

> The principle that a wrongdoer may not profit from his or her wrongdoing is deeply rooted in this State's common law. In 1889, the Court of Appeals decided the seminal case of Riggs v Palmer (115 NY 506) . In Riggs, a grandson, who had intentionally killed his grandfather in order to ensure his inheritance, was prevented from inheriting under the grandfather's will. In reaching this determination, the Court of Appeals held that, "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime" (id. at 511). In short, the Riggs rule "prevents wrongdoers from acquiring a property interest, or otherwise profiting from their own wrongdoing" ... . * * *
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> The issue here is whether the Riggs doctrine may be extended to prevent a wrongdoer from indirectly profiting from his or her own wrongdoing. More specifically, we are asked to determine whether Brandon may inherit assets of the decedent's estate indirectly through Deanna's estate. While it is clear that Brandon would not be able to inherit from the decedent's estate directly, the issue of whether he may do so indirectly through Deanna's estate is less settled. Indeed, this is an issue of first impression, as there is no appellate precedent from New York addressing whether the Riggs doctrine applies where a killer seeks to inherit assets from his or her victim indirectly through the estate of a person not implicated in the unlawful killing. * * *
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> Here ... there is a clear causal link between the wrongdoing and the benefits sought ... . But for Brandon's killing of the decedent, the estate of Deanna would not likely include any assets from the decedent's estate. Furthermore, since only a relatively short period of time elapsed between the decedent's death and the death of Deanna, it is clear that Deanna's estate would include assets traceable to the decedent. Indeed, according to [the] petition for letters of administration, Deanna's estate consists only of funds Deanna received as beneficiary of the decedent's retirement plan, and the expected inheritance from the decedent. Significantly, the decedent's estate has not yet been distributed to Deanna's estate, and no commingling of any funds between the two estates has occurred.
>
> Under these circumstances, the Surrogate's Court appropriately exercised its equitable powers (see SCPA 201[2]) in extending the Riggs doctrine to prevent Brandon from inheriting any portion of the decedent's estate through the estate of Deanna ... . **Matter of Dianne Edwards, 2014 NY Slip Op 05873, 2nd Dept 8-20-14**

UNEMPLOYMENT INSURANCE

Adjunct Professor Entitled to Unemployment Benefits Between Spring and Fall Semesters

The Third Department determined an adjunct professor who taught two courses in the spring and was offered two courses in the fall was entitled to unemployment benefits for the period between the spring and fall semesters:

> A professional employed by an educational institution is precluded from receiving unemployment insurance benefits for the period between two successive academic years when he or she has received a reasonable assurance of continued employment" ... . "[T]he question of whether a claimant received a reasonable assurance of reemployment for the following academic year is a question of fact and, if the Board's findings in that regard are supported by substantial evidence, they will not be disturbed". ... . Here, the Board found that reasonable assurance was lacking, based upon a contingency in the employer's offer that current full-time professors could, at any time up to the

first day of classes, displace claimant and teach the courses assigned to him themselves. Under these circumstances, we conclude that the Board's decision is supported by substantial evidence and, therefore, it will not be disturbed. **Matter of Cardin ..., 2014 NY Slip Op 04995, 3rd Dept 7-3-14**

Anesthesiologist Was Not an Employee

The Third Department determined an anesthesiologist was not an employee of QPMA:

> Where, as here, the work of medical professionals is involved, the relevant inquiry is whether the purported employer retained "'overall control' . . . 'over important aspects of the services performed other than results or means'" ... .
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> Here, undisputed evidence was presented that, after QPMA referred claimant to PCSC, claimant set her own work schedule, performed all services at PCSC's location, used PCSC's supplies and equipment, and wore surgical scrubs bearing PCSC's logo. Claimant's per diem rate of pay of $1,000 per day was agreed to by her and a principal of QPMA, and QPMA paid her twice a month. Notably, however, QPMA did not issue claimant a W2 form, have a written contract with her, verify her credentials, retain any supervisory authority over her, provide her with performance reviews or evaluations, or maintain medical records related to her services. In addition, claimant paid her own malpractice insurance and licensing fees, was not reimbursed for travel expenses and was not restricted from working for others. Significantly, it was PCSC that dealt with any complaints related to claimant's services. Although QPMA was responsible for referring another anesthesiologist if claimant was unable to perform her duties, the record as a whole does not demonstrate that QPMA retained sufficient overall control over important aspects of claimant's work to be considered claimant's employer... . **Matter of Jean-Pierre ..., 2014 NY Slip Op 05397, 3rd Dept 7-17-14**

Tutors Are Employees Entitled to Unemployment Insurance

The Third Department affirmed the Unemployment Insurance Appeals Board' determination that tutors were employees of "Ivy League" entitled to unemployment insurance:

> This Court previously has held that "an organization which screens the services of professionals, pays them at a set rate and then offers their services to clients exercises sufficient control to create and employment relationship" ... . Here, there is no question that Ivy League screened, interviewed and conducted a criminal background check with respect to prospective tutors, paid the tutors affiliated with it an agreed-upon hourly rate based upon documentation submitted by the tutors and matched individual clients with the tutor that it deemed best suited for that particular client's needs. Additionally, pursuant to the terms of the written agreement governing Ivy League's relationship with each individual tutor, Ivy League restricted the tutor's solicitation of Ivy League's clients — both during the period of time encompassed by the particular contract and for three years thereafter. **Matter of Ivy League Tutoring Connection Inc..., 2014 NY Slip Op 05481, 3rd Dept 7-24-14**

WORKERS' COMPENSATION

Work-Related Call to Coworker Which Triggered Harassment by Coworker's Husband Was Proper Basis for Workers' Compensation Benefits

The Third Department determined the claimant was properly awarded workers' compensation benefits for exacerbation of post traumatic stress disorder. A work-related phone call made by the claimant to a coworker caused the coworker's husband to suspect a romantic relationship between claimant and the coworker. The coworker's husband undertook a course of threatening conduct which culminated in an unsuccessful murder-for-hire plot:

> Whether the injury producing event arose out of and in the course of claimant's employment depends upon whether it "originated in work-related differences or purely from personal animosity" ... . If there is "any nexus, however slender, between the motivation for the assault and employment," an award of workers' compensation benefits is appropriate ... . Here, the work-related phone call from claimant to his coworker's home was the basis for the subsequent harassment of claimant at his place of employment, the employer's internal investigation and claimant's request for a transfer — all of which exacerbated claimant's preexisting stress disorder. As the record reveals no connection between claimant and the coworker's husband outside of claimant's work-related duties, the Board properly found the required nexus between the threatening conduct that exacerbated claimant's preexisting condition and claimant's employment ... **Matter of Mosley v Hannaford Bros Co, 2014 NY Slip Op 04997, 3rd Dept 7-3-14**

Psychological Injury Related to Threat of Violence Compensable

The Third Department determined psychological injury stemming from a surgeon's threat of physical violence made to the claimant (a physician's assistant) during a surgical procedure was a compensable injury:

> "For a mental injury premised on work-related stress to be compensable, the stress must be greater than that which usually occurs in the normal work environment . . .[, which is] a factual question for the Board to resolve" ... . Here, the employer argues that the surgeon's verbal threat could not give rise to a compensable stress claim, noting mitigating factors such as the presence of others in the operating room and claimant's familiarity with the surgeon's "difficult" personality. However, in adopting the findings of the Workers' Compensation Law Judge, the Board determined that claimant's uncontroverted psychiatric diagnoses were caused by the incident, and that, under the circumstances here, threats of physical violence made by her supervisor constituted greater stress than that which normally occurs in similar work environments. Inasmuch as such determination is supported by substantial evidence and this Court cannot "reject the Board's choice simply because a contrary determination would have been reasonable," it must be upheld ... . **Matter of Lucke v Ellis Hosp, 2014 NY Slip Op 05009, 3rd Dept 7-3-14**

Precedent Precluded Denial of Benefits

The Third Department, reversing the Workers' Compensation Board, determined precedent required that benefits be afforded the claimant because his testimony he was engaged in a job search was deemed credible by the Board:

> ..."[E]ven though there is in the record substantial evidence to support the determination made," the Board's "failure to conform to [its] precedent will . . . require reversal on the law as arbitrary" if the Board has failed to explain the reason for its departure ... . As relevant here, the Board has previously determined that a claimant remains attached to the labor market when he or she is actively participating in, among other things, a job-location service — such as One-Stop Career Centers — or Board-approved vocational rehabilitation, and that a claimant's credible testimony regarding that participation is sufficient to establish attachment to the labor market (see Employer: Classic Bindery, Inc., 2011 WL 3612749, *2, 2011 NY Wrk Comp LEXIS 3997, *5-6 [WCB No. G021 5031, July 27, 2011]). The Board here expressly found claimant's testimony that he was actively participating with One-Stop to be credible but, because claimant did not provide documentation of his participation, the Board concluded that he failed to adequately demonstrate attachment to the labor market. The Board purported to rely upon a prior decision, Employer: American Axle ..., in determining that documentation was necessary but, while American Axle held that documentary evidence of active participation in One-Stop constitutes evidence of attachment to the labor market, it required documentary evidence only in connection with a claimant's independent job search (id.). American Axle, therefore, does not provide an adequate basis for distinguishing Classic Bindery. **Matter of Winters v Advance Auto Parts, 2014 NY Slip Op 05005, 3rd Dept 7-3-14**

Costs Properly Assessed Against Carrier for Instituting Proceedings Without Reasonable Ground

The Third Department affirmed the Workers' Compensation Board's assessment of costs against the carrier for instituting proceedings without reasonable ground:

> Workers' Compensation Law § 114-a (3) (i) permits the Board to assess costs against a party who has "instituted or continued [a proceeding before the Board] without reasonable ground." Here, the carrier previously had been warned that counsel's failure to respond to its request for an updated work search history — standing alone — would be insufficient to reopen the underlying claim and, more to the point, was apprised "in very clear terms of the requirements for [the] supporting evidence necessary to reopen this claim on the question of whether . . . claimant ha[d] voluntarily removed herself from or [wa]s no longer attached to the labor market." Despite that express directive, the carrier nonetheless made a second request to reopen premised solely upon counsel's failure to respond to the carrier's request for additional information. Under these circumstances, we discern no abuse of discretion in the Board's decision to assess costs against the carrier ... . **Matter of Bailey v Achieve Rehab & Nursing, 2014 NY Slip Op 05475, 3rd Dept 7-24-14**

WORKERS' COMPENSATION/EMPLOYMENT LAW

Receipt of Workers' Compensation Benefits from General Employer Precluded Lawsuit by Special Employee Against Special Employer

The Second Department determined plaintiff, who was deemed a special employee of the defendant, could not sue the special employer for an on-the-job injury because she received Workers' Compensation benefits from her general employer. The court explained the relevant law, including the criteria for a special employee:

> "[T]he receipt of workers' compensation benefits is the exclusive remedy that a worker may obtain against an employer for losses suffered as a result of an injury sustained in the course of employment" ... . " A person may be deemed to have more than one employer for purposes of the Workers' Compensation Law, a general employer and a special employer'" ... . "A special employee is one who is transferred for a limited time of whatever duration to the service of another,' and limited liability inures to the benefit of both the general and special employer" ... .
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> "[A] person's categorization as a special employee is usually a question of fact"... . However, "the determination of special employment status may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact" ... . "Many factors are weighed in deciding whether a special employment relationship exists, and generally no single one is decisive . . . Principal factors include who has the right to control the employee's work, who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer's or the general employer's business . . . The most significant factor is who controls and directs the manner, details, and ultimate result of the employee's work" ... .
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> "The receipt of Workers' Compensation benefits from a general employer precludes an employee from commencing a negligence action against a special employer" ... . **Munion v Trustees of Columbia Univ in City of NY, 2014 NY Slip Op 05964, 2nd Dept 8-27-14**

ZONING

Criteria for Standing to Contest Zoning Variances Explained

The Second Department determined the petitioners did not have standing to contest zoning variances granted for property .69 miles from where the petitioners live:

> To establish standing, a petitioner must show that he or she "would suffer direct injury different from that suffered by the public at large, and that the injury asserted falls within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted" ... . "Injury-in-fact may arise from the existence of a presumption established by the allegations demonstrating close proximity to the subject property or, in the absence of such a presumption, the existence of an actual and specific injury" ... . Here, the appellants failed to satisfy these requirements.
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> The appellants live .69 miles away from the subject beach club. Thus, they are not entitled to a presumption of injury ... . Their allegations of injury-in-fact due to overcrowding and congestion are purely speculative ... . Moreover, the alleged injuries are not specific to the appellants and distinguishable from those suffered by the public at large... . **Matter of Radow v Bpoard of Appeals of Town of Hempstead, 2014 NY Slip Op 05645, 2nd Dept 8-6-14**

Special Exception/Special Use Permit Criteria Explained

In finding that petitioner's application for a special use permit was properly denied, the Second Department explained the relevant law:

> "Unlike a variance which gives permission to an owner to use property in a manner inconsistent with a local zoning ordinance, a special exception gives permission to use property in a way that is consistent with the zoning ordinance, although not necessarily allowed as of right" ... . The burden of proof on an applicant seeking a special exception, commonly known as a special use permit, is lighter than that carried by an applicant for a zoning variance ... . A denial of a special use permit must be supported by evidence in the record and may not be based solely upon community objection ... . However, where evidence supporting the denial exists, deference must be given to the discretion of the authorized board, and a court may not substitute its own judgment for that of the authorized board, even if

a contrary determination is supported by the record ... .

Here, evidence in the record, including testimony by experts in traffic and real estate and by neighboring property owners, supports the findings of the Board of Trustees of the Incorporated Village of Mineola (hereinafter the Board) that the proposed expansion of the subject day care facility into vacant retail space would result in a dangerous traffic situation, an over-intensification of land use with respect to available parking, and a hazard with respect to the provision of emergency services. **Matter of Smyles v Board of Trustees of Inc Vil of Mineola, 2014 NY Slip Op 05991, 2nd Dept 8-27-14**

PROHIBITION

Possible Error of Law Committed by Judge Did Not Warrant a Prohibition Action

The Fourth Department determined the prosecutor's prohibition action against a judge should have been dismissed. The judge had ordered a competency hearing to determine if the complainant in a criminal case was competent to testify in light of her intoxication:

Here, petitioner argued —and Supreme Court agreed — that respondent acted in excess of her authority in ordering a competency hearing because a witness' level of intoxication at the time of the incident in question and its effect on his or her ability to recall the events has no bearing on whether such witness is competent to testify at trial. It is manifest, however, that a trial court has the authority to make a preliminary inquiry as to a witness' competency to testify at trial (see CPL 60.20 [1]...). As such, any error in respondent's decision to hold a competency hearing would, at most, amount to a mere substantive error of law that does not justify the invocation of this extraordinary remedy. "[P]rohibition will not lie as a means of seeking collateral review of mere trial errors of substantive law or procedure, however egregious the error may be, and however cleverly the error may be characterized by counsel as an excess of jurisdiction or power" ... . **Matter of Getman, 2014 NY Slip Op 05012, 3rd Dept 7-3-14**

COURT OF APPEALS

CRIMINAL LAW

Grossly Negligent and Reckless Driving Did Not Support Conviction for Depraved Indifference Murder

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a dissent, determined that the actions of the defendant, who killed a pedestrian during a police chase, did not meet the criteria for depraved indifference murder. Although the defendant drove in a grossly negligent and reckless manner, there was evidence he took measures to avoid injuries to others and therefore was not indifferent to the effects of his actions:

> A person is guilty of depraved indifference murder when, "[u]nder circumstances evincing a depraved indifference to human life [such person] recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person" (Penal Law § 125.25 [2]). Depraved indifference is a culpable mental state which "is best understood as an utter disregard for the value of human life" ... . Thus, "a depraved and utterly indifferent actor is someone who does not care if another is injured or killed" (id. [internal quotation marks and citation omitted]). Due to the wanton nature of this mens rea, "depraved indifference murder properly applies only to a small, and finite, category of cases where the conduct is at least as morally reprehensible as intentional murder" ... .
>
> A defendant who knowingly pursues risky behavior that endangers others does not necessarily evince depraved indifference by engaging in that conduct. As we have explained, "[a] person who is depravedly indifferent is not just willing to take a grossly unreasonable risk to human life — that person does not care how the risk turns out" ... . "The element of depraved indifference to human life comprises both depravity and indifference, and has meaning independent of recklessness and the gravity of the risk created" ... . In short, the mens rea of depraved indifference will rarely be established by risky behavior alone. **People v Maldonado, 2014 NY Slip Op 04878, Ct App 7-1-14**

CRIMINAL LAW/FREEDOM OF SPEECH

Albany County Cyberbullying Criminal Statute Overly Broad

The Court of Appeals, in a full-fledged opinion by Judge Graffeo, over a dissent, determined that a statute passed by the Albany County Legislature, aimed at criminalizing cyberbullying, was too vague and broad to survive strict scrutiny under the First Amendment:

> Based on the text of the statute at issue, it is evident that Albany County "create[d] a criminal prohibition of alarming breadth"... . The language of the local law embraces a wide array of applications that prohibit types of protected speech far beyond the cyberbullying of children ... . As written, the Albany County law in its broadest sense criminalizes "any act of communicating . . . by mechanical or electronic means . . . with no legitimate . . . personal . . . purpose, with the intent to harass [or] annoy. . . another person." On its face, the law covers communications aimed at adults, and fictitious or corporate entities, even though the county legislature justified passage of the provision based on the detrimental effects that cyberbullying has on school-aged children. The county law also lists particular examples of covered communications, such as "posting statements on the internet or through a computer or email network, disseminating embarrassing or sexually explicit photographs; disseminating private, personal, false or sexual information, or sending hate mail." But such methods of expression are not limited to instances of cyberbullying — the law includes every conceivable form of electronic communication, such as telephone conversations, a ham radio transmission or even a telegram. In addition, the provision pertains to electronic communications that are meant to "harass, annoy . . . taunt . . . [or] humiliate" any person or entity, not just those that are intended to "threaten, abuse . . . intimidate, torment . . . or otherwise inflict significant emotional harm on" a child. In considering the facial implications, it appears that the provision would criminalize a broad spectrum of speech outside the popular understanding of cyberbullying, including, for example: an email disclosing private information about a corporation or a telephone conversation meant to annoy an adult. **People v Marquan M, 2014 NY Slip Op 04881, Ct App 7-1-14**

NEGLIGENCE/PRODUCTS LIABILITY

Reversible Error to Give a Modified Malpractice Jury Instruction in a Negligent/Defective Design Case

The Court of Appeals, in a full-fledged opinion by Judge Smith, over a dissent, reversed a $10 million judgment against Volvo, finding that one of the jury instructions, which was a modified version of the jury instruction for a malpractice case, should not have been given. The plaintiff lost a leg when the ignition of the manual transmission car was switched on and the car lurched forward, pinning the plaintiff. A central issue in the trial was whether the car should have been equipped with a device which would have prevented the car from starting when it was in gear. In addition to the jury instruction issue, the court discussed the redundancy of instructions for negligent design and defective design, the appeal as of right and by permission pursuant to CPLR 5601 and 5602, and the inconsistency of the verdict. With respect to the malpractice jury instruction, the court wrote:

> [PJI 2:15] should not have been given in this case. It was designed for malpractice cases. As the Committee on Pattern Jury Instructions says: "The principle stated in the pattern charge is the underlying basis of malpractice actions" (1A NY PJI3d 2:15 at 259 [2014]). The Committee goes on to say that "[t]he principle extends to skilled trades and to professions not generally thought of in connection with malpractice" (id.), but we know of no basis for including automobile manufacturers in that category. This is not a malpractice case, but a negligent design or (what amounts to the same thing) a design defect case.
>
> PJI 2:15 is reserved for malpractice cases because the standards of care applicable to malpractice cases and to other negligence cases are different. In a malpractice case against, for example, a doctor or a lawyer, the defendant is generally held to the level of skill and care used by others in the community who practice the same profession ... . In negligence cases generally, by contrast, the jury must compare the defendant's conduct to that of a reasonable person under like circumstances (Restatement [Second] of Torts § 283...). In negligent design/design defect cases, the reasonable-person standard has been given more specific form: the question is whether the product is one as to which "if the design defect were known at the time of manufacture, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner" ... . **Reis v Volvo Cars of N Am, 2014 NY Slip Op 04880, Ct App 7-1-14**

PARTNERSHIP LAW/ATTORNEY'S FEES

Unearned Hourly Fees and Contingency Fees Are Not the Property of a Dissolved Law Partnership

The Court of Appeals, in a full-fledged opinion by Judge Read, determined that unearned hourly fees and contingency fees are not the property of a dissolved law firm such that a bankruptcy trustee can reach them on behalf of creditors:

> In New York, clients have always enjoyed the "unqualified right to terminate the attorney-client relationship at any time" without any obligation other than to compensate the attorney for "the fair and reasonable value of the completed services" ... . In short, no law firm has a property interest in future hourly legal fees because they are "too contingent in nature and speculative to create a present or future property interest" ..., given the client's unfettered right to hire and fire counsel. Because client matters are not partnership property, the trustees' reliance on Partnership Law § 4 (4) is misplaced.
>
> ... New York courts have never suggested that a law firm owns anything with respect to a client matter other than yet-unpaid compensation for legal services already provided. Appellate Division decisions dealing with unfinished business claims in the context of contingency fee arrangements uniformly conclude that the dissolved partnership is entitled only to the "value" of its services... . **Matter of In re: Thelen LLP, 2014 NY Slip Op 04879, Ct App 7-1-14**

The Latest Report from the Intergovernmental Panel on Climate Change is Sobering and Frightening; The Debate About Fracking in New York Should Be Over

The Intergovernmental Panel on Climate Change (IPCC) just issued a new report and its conclusions are horrifying. Noam Chomsky, in a September 5, 2014, Op-Ed on Truthout.org (http://truth-out.org/opinion/item/26000-owl-of-minervas-view-isis-and-our-times) began his description of the report's conclusions with a chilling reference to the "likely end of the era of civilization…:"

> **The likely end of the era of civilization is foreshadowed in a new draft report by the Intergovernmental Panel on Climate Change**, the generally conservative monitor of what is happening to the physical world.
> The report concludes that increasing greenhouse gas emissions risk "severe, pervasive and irreversible impacts for people and ecosystems" over the coming decades. The world is nearing the temperature when loss of the vast ice sheet over Greenland will be unstoppable. Along with melting Antarctic ice, that could raise sea levels to inundate major cities as well as coastal plains.
> The era of civilization coincides closely with the geological epoch of the Holocene, beginning over 11,000 years ago. The previous Pleistocene epoch lasted 2.5 million years. Scientists now suggest that a new epoch began about 250 years ago, the Anthropocene, the period when human activity has had a dramatic impact on the physical world. The rate of change of geological epochs is hard to ignore.
> One index of human impact is the extinction of species, now estimated to be at about the same rate as it was 65 million years ago when an asteroid hit the Earth. That is the presumed cause for the ending of the age of the dinosaurs, which opened the way for small mammals to proliferate, and ultimately modern humans. Today, it is humans who are the asteroid, condemning much of life to extinction. **The IPCC report reaffirms that the "vast majority" of known fuel reserves must be left in the ground to avert intolerable risks to future generations. Meanwhile the major energy corporations make no secret of their goal of exploiting these reserves and discovering new ones**. * * * [emphasis added]

A rational population would no longer be debating whether fracking should be allowed in New York.

The following are excerpts from the official summary of the IPCC report Chomsky referenced (entitled "Climate Change 2014, Impacts, Adaptation and Vulnerability, Summary for Policymakers" and located at http://www.climatechange2013.org/images/report/WG1AR5_SPM_FINAL.pdf). The summary succinctly describes the effects of climate change (linked to greenhouse gas emissions) on both ecological and societal systems:

> **Freshwater resources**
>
> Freshwater-related risks of climate change increase significantly with increasing greenhouse gas concentrations … . The fraction of global population experiencing water scarcity and the fraction affected by major river floods increase with the level of warming in the 21st century.
> Climate change over the 21st century is projected to reduce renewable surface water and groundwater resources significantly in most dry subtropical regions …, intensifying competition for water among sectors … . In presently dry regions, drought frequency will likely increase by the end of the 21st century … . In contrast, water resources are projected to increase at high latitudes …

. Climate change is projected to reduce raw water quality and pose risks to drinking water quality even with conventional treatment, due to interacting factors: increased temperature; increased sediment, nutrient, and pollutant loadings from heavy rainfall; increased concentration of pollutants during droughts; and disruption of treatment facilities during floods … . * * *

Terrestrial and freshwater ecosystems

A large fraction of both terrestrial and freshwater species faces increased extinction risk under projected climate change during and beyond the 21st century, especially as climate change interacts with other stressors, such as habitat modification, over-exploitation, pollution, and invasive species … . Extinction risk is increased under all RCP scenarios, with risk increasing with both magnitude and rate of climate change. Many species will be unable to track suitable climates under mid- and high-range rates of climate change … during the 21st century … . Lower rates of change … will pose fewer problems. … Some species will adapt to new climates. Those that cannot adapt sufficiently fast will decrease in abundance or go extinct in part or all of their ranges. Management actions, such as maintenance of genetic diversity, assisted species migration and dispersal, manipulation of disturbance regimes (e.g., fires, floods), and reduction of other stressors, can reduce, but not eliminate, risks of impacts to terrestrial and freshwater ecosystems due to climate change, as well as increase the inherent capacity of ecosystems and their species to adapt to a changing climate … .

Within this century, magnitudes and rates of climate change associated with medium- to high-emission scenarios … pose high risk of abrupt and irreversible regional-scale change in the composition, structure, and function of terrestrial and freshwater ecosystems, including wetlands … . Examples that could lead to substantial impact on climate are the boreal-tundra Arctic system … and the Amazon forest … . Carbon stored in the terrestrial biosphere (e.g., in peatlands, permafrost, and forests) is susceptible to loss to the atmosphere as a result of climate change, deforestation, and ecosystem degradation … . Increased tree mortality and associated forest dieback is projected to occur in many regions over the 21st century, due to increased temperatures and drought …. . Forest dieback poses risks for carbon storage, biodiversity, wood production, water quality, amenity, and economic activity.

Coastal systems and low-lying areas

Due to sea level rise projected throughout the 21st century and beyond, coastal systems and low-lying areas will increasingly experience adverse impacts such as submergence, coastal flooding, and coastal erosion … .The population and assets projected to be exposed to coastal risks as well as human pressures on coastal ecosystems will increase significantly in the coming decades due to population growth, economic development, and urbanization … . The relative costs of coastal adaptation vary strongly among and within regions and countries for the 21st century. Some low-lying developing countries and small island states are expected to face very high impacts that, in some cases, could have associated damage and adaptation costs of several percentage points of GDP.

Marine systems

Due to projected climate change by the mid 21st century and beyond, global marine-species redistribution and marine-biodiversity reduction in sensitive regions will challenge the sustained provision of fisheries productivity and other ecosystem services … . Spatial shifts of marine species due to projected warming will cause high-latitude invasions and high local-extinction rates in the tropics and semi-enclosed seas … . Species richness and fisheries catch potential are projected to increase, on average, at mid and high latitudes … and decrease at tropical latitudes … . … The progressive expansion of oxygen minimum zones and anoxic “dead zones” is projected to further constrain fish habitat. Open-ocean net primary production is projected to redistribute and, by 2100, fall globally under all RCP scenarios. Climate change adds to the threats of over-fishing and other non-climatic stressors, thus complicating marine management regimes … .

For medium- to high-emission scenarios …, ocean acidification poses substantial risks to marine ecosystems, especially polar ecosystems and coral reefs, associated with impacts on the physiology, behavior, and population dynamics of individual species from phytoplankton to animals … . Highly calcified mollusks, echinoderms, and reef-building corals are more sensitive than crustaceans … and fishes … , with potentially detrimental consequences for fisheries and livelihoods. … Ocean acidification acts together with other global changes (e.g., warming, decreasing oxygen levels) and with local changes (e.g., pollution, eutrophication) (high confidence). Simultaneous drivers, such as warming and ocean acidification, can lead to interactive, complex, and amplified impacts for species and ecosystems.

Food security and food production systems

For the major crops (wheat, rice, and maize) in tropical and temperate regions, climate change without adaptation is projected to negatively impact production for local temperature increases of 2°C or more above late-20th-century levels, although individual locations may benefit … . Projected impacts vary across crops and regions and adaptation scenarios, with about 10% of projections for the period 2030–2049 showing yield gains of more than 10%, and about 10% of projections showing yield losses of more than25%, compared to the late 20th century. After 2050 the risk of more severe yield impacts increases and depends on the level of warming. … Climate change is projected to progressively increase inter-annual variability of crop yields in many regions. These projected impacts will occur in the context of rapidly rising crop demand.

All aspects of food security are potentially affected by climate change, including food access, utilization, and price stability … . Redistribution of marine fisheries catch potential towards higher latitudes poses risk of reduced supplies, income, and employment in tropical countries, with potential implications for food security … . Global temperature increases of ~4°C or more above late-20th-century levels, combined with increasing food demand, would pose large risks to food security globally and regionally (high confidence). Risks to food security are generally greater in low-latitude areas.

Urban areas

Many global risks of climate change are concentrated in urban areas … . Steps

that build resilience and enable sustainable development can accelerate successful climate-change adaptation globally. Heat stress, extreme precipitation, inland and coastal flooding, landslides, air pollution, drought, and water scarcity pose risks in urban areas for people, assets, economies, and ecosystems … . Risks are amplified for those lacking essential infrastructure and services or living in poor-quality housing and exposed areas. Reducing basic service deficits, improving housing, and building resilient infrastructure systems could significantly reduce vulnerability and exposure in urban areas. Urban adaptation benefits from effective multi-level urban risk governance, alignment of policies and incentives, strengthened local government and community adaptation capacity, synergies with the private sector, and appropriate financing and institutional development … . Increased capacity, voice, and influence of low-income groups and vulnerable communities and their partnerships with local governments also benefit adaptation.

Rural areas

Major future rural impacts are expected in the near term and beyond through impacts on water availability and supply, food security, and agricultural incomes, including shifts in production areas of food and non-food crops across the world … . These impacts are expected to disproportionately affect the welfare of the poor in rural areas, such as female-headed households and those with limited access to land, modern agricultural inputs, infrastructure, and education. Further adaptations for agriculture, water, forestry, and biodiversity can occur through policies taking account of rural decision-making contexts. Trade reform and investment can improve market access for small-scale farms … .

Key economic sectors and services

For most economic sectors, the impacts of drivers such as changes in population, age structure, income, technology, relative prices, lifestyle, regulation, and governance are projected to be large relative to the impacts of climate change … . Climate change is projected to reduce energy demand for heating and increase energy demand for cooling in the residential and commercial sectors …. Climate change is projected to affect energy sources and technologies differently, depending on resources (e.g., water flow, wind, insolation), technological processes (e.g., cooling), or locations (e.g., coastal regions, floodplains) involved. More severe and/or frequent extreme weather events and/or hazard types are projected to increase losses and loss variability in various regions and challenge insurance systems to offer affordable coverage while raising more risk-based capital, particularly in developing countries. Large-scale public-private risk reduction initiatives and economic diversification are examples of adaptation actions.

Global economic impacts from climate change are difficult to estimate. Economic impact estimates completed over the past 20 years vary in their coverage of subsets of economic sectors and depend on a large number of assumptions, many of which are disputable, and many estimates do not account for catastrophic changes, tipping points, and many other factors. With these recognized limitations, the incomplete estimates of global annual economic losses for additional temperature increases of ~2°C are between 0.2 and 2.0% of income (±1 standard deviation around the mean) … . Losses are more likely than not to be

greater, rather than smaller, than this range … . Additionally, there are large differences between and within countries. Losses accelerate with greater warming …, but few quantitative estimates have been completed for additional warming around 3°C or above. Estimates of the incremental economic impact of emitting carbon dioxide lie between a few dollars and several hundreds of dollars per tonne of carbon … . Estimates vary strongly with the assumed damage function and discount rate.

Human health

Until mid-century, projected climate change will impact human health mainly by exacerbating health problems that already exist … . Throughout the 21st century, climate change is expected to lead to increases in ill-health in many regions and especially in developing countries with low income, as compared to a baseline without climate change … . Examples include greater likelihood of injury, disease, and death due to more intense heat waves and fires …; increased likelihood of under-nutrition resulting from diminished food production in poor regions …; risks from lost work capacity and reduced labor productivity in vulnerable populations; and increased risks from food- and water-borne diseases … and vector-borne diseases … . Positive effects are expected to include modest reductions in cold-related mortality and morbidity in some areas due to fewer cold extremes …, geographical shifts in food production …, and reduced capacity of vectors to transmit some diseases. But globally over the 21st century, the magnitude and severity of negative impacts are projected to increasingly outweigh positive impacts … . The most effective vulnerability reduction measures for health in the near term are programs that implement and improve basic public health measures such as provision of clean water and sanitation, secure essential health care including vaccination and child health services, increase capacity for disaster preparedness and response, and alleviate poverty (very high confidence).

By 2100 for the high-emission scenario …, the combination of high temperature and humidity in some areas for parts of the year is projected to compromise normal human activities, including growing food or working outdoors … .

Human security

Climate change over the 21st century is projected to increase displacement of people … . Displacement risk increases when populations that lack the resources for planned migration experience higher exposure to extreme weather events, in both rural and urban areas, particularly in developing countries with low income. Expanding opportunities for mobility can reduce vulnerability for such populations. Changes in migration patterns can be responses to both extreme weather events and longer-term climate variability and change, and migration can also be an effective adaptation strategy. There is low confidence in quantitative projections of changes in mobility, due to its complex, multi-causal nature.

Climate change can indirectly increase risks of violent conflicts in the form of civil war and inter-group violence by amplifying well-documented drivers of these conflicts such as poverty and economic shocks … . Multiple lines of evidence relate climate variability to these forms of conflict.

The impacts of climate change on the critical infrastructure and territorial integrity of many states are expected to

influence national security policies … . For example, land inundation due to sea level rise poses risks to the territorial integrity of small island states and states with extensive coastlines. Some transboundary impacts of climate change, such as changes in sea ice, shared water resources, and pelagic fish stocks, have the potential to increase rivalry among states, but robust national and intergovernmental institutions can enhance cooperation and manage many of these rivalries.

Livelihoods and poverty

Throughout the 21st century, climate-change impacts are projected to slow down economic growth, make poverty reduction more difficult, further erode food security, and prolong existing and create new poverty traps, the latter particularly in urban areas and emerging hotspots of hunger … . Climate-change impacts are expected to exacerbate poverty in most developing countries and create new poverty pockets in countries with increasing inequality, in both developed and developing countries. In urban and rural areas, wage-labor-dependent poor households that are net buyers of food are expected to be particularly affected due to food price increases, including in regions with high food insecurity and high inequality (particularly in Africa), although the agricultural self- employed could benefit. Insurance programs, social protection measures, and disaster risk management may enhance long-term livelihood resilience among poor and marginalized people, if policies address poverty and multidimensional inequalities

The Senate Judiciary Committee Endorsed a Constitutional Amendment to Overturn Citizens United and McCutcheon

On July 10, 2014, the Senate Judiciary Committee voted to endorse an amendment to the US Constitution designed to overturn US Supreme Court rulings which have effectively eliminated all limits on money spent (by corporations and unions) to influence elections and on donations to individual campaigns. The proposed amendment reads:

> SECTION 1: To advance democratic self-government and political equality, and to protect the integrity of government and the electoral process, Congress and the States may regulate and set reasonable limits on the raising and spending of money by candidates and others to influence elections.
>
> SECTION 2. Congress and the States shall have power to implement and enforce this article by appropriate legislation, and may distinguish between natural persons and corporations or other artificial entities created by law, including by prohibiting such entities from spending money to influence elections.
>
> SECTION 3. Nothing in this article shall be construed to grant Congress or the States the power to abridge the freedom of the press.

McCutcheon v Federal Election Commission (134 S. Ct. 1434 (2014))--- Justice Breyer's Dissent

One of the cases the proposed amendment seeks to overturn is McCutcheon v Federal Election Commission, decided in April, 2014. McCutcheon removed all limits on donations to political campaigns.

Justice Breyer, in a dissenting opinion joined by Justices Ginsburg, Sotomayer and Kagan, outlined the dangerous effects of the majority's ruling. In the excerpt quoted below, Justice Breyer explained how the "chain of communication" between politicians and the people is broken by unlimited campaign contributions:

> Nearly 40 years ago in Buckley v. Valeo, 424 U. S. 1 (1976) (per curiam), this Court considered the constitutionality of laws that imposed limits upon the overall amount a single person can contribute to all federal candidates, political parties, and committees taken together. The Court held that those limits did not violate the Constitution. … .
>
> The Buckley Court focused upon the same problem that concerns the Court today, and it wrote:
>
> > "The overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid." 424 U. S., at 38.
>
> Today a majority of the Court overrules this holding. It is wrong to do so. Its

conclusion rests upon its own, not a record-based, view of the facts. Its legal analysis is faulty: It misconstrues the nature of the competing constitutional interests at stake. It understates the importance of protecting the political integrity of our governmental institutions. It creates a loophole that will allow a single individual to contribute millions of dollars to a political party or to a candidate's campaign. Taken together with Citizens United v. Federal Election Comm'n, 558 U. S. 310 (2010), today's decision eviscerates our Nation's campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve.

The plurality concludes that the aggregate contribution limits "`unnecessar[ily] abridg[e]'" First Amendment rights … . It notes that some individuals will wish to "spen[d] `substantial amounts of money in order to communicate [their] political ideas through sophisticated' means." … . Aggregate contribution ceilings limit an individual's ability to engage in such "broader participation in the democratic process," while insufficiently advancing any legitimate governmental objective. … . Hence, the plurality finds, they violate the Constitution.

…[T]he plurality says that given the base limits on contributions to candidates and political committees, aggregate limits do not further any independent governmental objective worthy of protection. And that is because, given the base limits, "[s]pending large sums of money in connection with elections" does not "give rise to . . . corruption.",,, In making this argument, the plurality relies heavily upon a narrow definition of "corruption" that excludes efforts to obtain "`influence over or access to' elected officials or political parties." … . * * *

The plurality's … claim—that large aggregate contributions do not "give rise" to "corruption"—is plausible only because the plurality defines "corruption" too narrowly. The plurality describes the constitutionally permissible objective of campaign finance regulation as follows: "Congress may target only a specific type of corruption—`quid pro quo' corruption." … . It then defines quid pro quo corruption to mean no more than "a direct exchange of an official act for money"—an act akin to bribery…. . It adds specifically that corruption does not include efforts to "garner `influence over or access to' elected officials or political parties." … . Moreover, the Government's efforts to prevent the "appearance of corruption" are "equally confined to the appearance of quid pro quo corruption," as narrowly defined. …. In the plurality's view, a federal statute could not prevent an individual from writing a million dollar check to a political party (by donating to its various committees), because the rationale for any limit would "dangerously broade[n] the circumscribed definition of quid pro quo corruption articulated in our prior cases." … .

This critically important definition of "corruption" is inconsistent with the Court's prior case law… . * * *
In reality, as the history of campaign finance reform shows and as our earlier cases on the subject have recognized, the anticorruption interest that drives Congress to regulate campaign contributions is a far broader, more important interest than the plurality acknowledges. It is an interest in maintaining the integrity of our public governmental institutions. And it is an interest rooted in the Constitution and in the First Amendment itself.

Consider at least one reason why the First Amendment protects political speech. Speech does not exist in a vacuum. Rather, political communication seeks to secure government action. A politically oriented "marketplace of ideas" seeks to form a public opinion that can and will influence elected representatives.

This is not a new idea. Eighty-seven years ago, Justice Brandeis wrote that the First Amendment's protection of speech was "essential to effective democracy." Whitney v. California, 274 U. S. 357, 377 (1927) (concurring opinion). Chief Justice Hughes reiterated the same idea shortly thereafter: "A fundamental principle of our constitutional system" is the "maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people." Stromberg v. California, 283 U. S. 359, 369 (1931) (emphasis added). In Citizens United, the Court stated that "[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." 558 U. S., at 339 (emphasis added).

The Framers had good reason to emphasize this same connection between political speech and governmental action. An influential 18th-century continental philosopher had argued that in a representative democracy, the people lose control of their representatives between elections, during which interim periods they were "in chains." J. Rousseau, An Inquiry Into the Nature of the Social Contract 265-266 (transl. 1791).

The Framers responded to this criticism both by requiring frequent elections to federal office, and by enacting a First Amendment that would facilitate a "chain of communication between the people, and those, to whom they have committed the exercise of the powers of government." J. Wilson, Commentaries on the Constitution of the United States of America 30-31 (1792). This "chain" would establish the necessary "communion of interests and sympathy of sentiments" between the people and their representatives, so that public opinion could be channeled into effective governmental action. The Federalist No. 57, p. 386 (J. Cooke ed. 1961) (J. Madison); accord, T. Benton, 1 Abridgement of the Debates of Congress, from 1789 to 1856, p. 141 (1857) (explaining that the First Amendment will strengthen American democracy by giving "`the people'" a right to "`publicly address their representatives,'" "`privately advise them,'" or "`declare their sentiments by petition to the whole body'" (quoting James Madison)). Accordingly, the First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which collective speech matters.

What has this to do with corruption? It has everything to do with corruption. Corruption breaks the constitutionally necessary "chain of communication" between the people and their representatives. It derails the essential speech-to-government-action tie. Where enough money calls the tune, the general public will not be heard. Insofar as corruption cuts the link between political thought and political action, a free marketplace of political ideas loses its point. That is one reason why the Court has stressed the constitutional importance of Congress' concern that a few large donations not drown out the voices of the many. See, e.g., Buckley, 424 U. S., at 26-27.

That is also why the Court has used the phrase "subversion of the political process" to describe circumstances in

which "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns." NCPAC, 470 U. S., at 497. See also Federal Election Comm'n v. National Right to Work Comm., 459 U. S. 197, 208 (1982) (the Government's interests in preventing corruption "directly implicate the integrity of our electoral process" (internal quotation marks and citation omitted)). See generally R. Post, Citizens Divided: Campaign Finance Reform and the Constitution 7-16, 80-94 (forthcoming 2014) (arguing that the efficacy of American democracy depends on "electoral integrity" and the responsiveness of public officials to public opinion).

The "appearance of corruption" can make matters worse. It can lead the public to believe that its efforts to communicate with its representatives or to help sway public opinion have little purpose. And a cynical public can lose interest in political participation altogether. See Nixon v. Shrink Missouri Government PAC, 528 U. S. 377, 390 (2000) ("[T]he cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance"). Democracy, the Court has often said, cannot work unless "the people have faith in those who govern." United States v. Mississippi Valley Generating Co., 364 U. S. 520, 562 (1961).
The upshot is that the interests the Court has long described as preventing "corruption" or the "appearance of corruption" are more than ordinary factors to be weighed against the constitutional right to political speech. Rather, they are interests rooted in the First Amendment itself. They are rooted in the constitutional effort to create a democracy responsive to the people—a government where laws reflect the very thoughts, views, ideas, and sentiments, the expression of which the First Amendment protects. Given that end, we can and should understand campaign finance laws as resting upon a broader and more significant constitutional rationale than the plurality's limited definition of "corruption" suggests. We should see these laws as seeking in significant part to strengthen, rather than weaken, the First Amendment. To say this is not to deny the potential for conflict between (1) the need to permit contributions that pay for the diffusion of ideas, and (2) the need to limit payments in order to help maintain the integrity of the electoral process. But that conflict takes place within, not outside, the First Amendment's boundaries.

Citizens United v Federal Election Commission (558 U. S. 310 (2010))---Justice Stevens' Dissent

The proposed constitutional amendment also seeks to overturn the Supreme Court's ruling in Citizens United v Federal Election Commission, decided in January, 2010. In Citizens the Court struck down a federal law which placed limits upon "corporations and unions … using their general treasury funds to make independent expenditures for speech defined as 'electioneering communication' or for speech expressly advocating the election or defeat of a candidate. 2 U.S.C. [section] 441b."

Justice Breyer, in his dissent, explained why corporations, i.e. "fictional persons," should not be afforded the same First Amendment rights as are "real persons":

> …[T]here are substantial reasons why a legislature might conclude that unregulated general treasury expenditures will give corporations "unfai[r] influence" in the electoral process…, and distort public debate in ways that undermine rather than advance the interests of listeners. The

legal structure of corporations allows them to amass and deploy financial resources on a scale few natural persons can match. The structure of a business corporation, furthermore, draws a line between the corporation's economic interests and the political preferences of the individuals associated with the corporation; the corporation must engage the electoral process with the aim "to enhance the profitability of the company, no matter how persuasive the arguments for a broader or conflicting set of priorities," Brief for American Independent Business Alliance as Amicus Curiae 11; see also ALI, Principles of Corporate Governance: Analysis and Recommendations § 2.01(a), p. 55 (1992) ("[A] corporation . . . should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain"). In a state election … the interests of nonresident corporations may be fundamentally adverse to the interests of local voters. Consequently, when corporations grab up the prime broadcasting slots on the eve of an election, they can flood the market with advocacy that bears "little or no correlation" to the ideas of natural persons or to any broader notion of the public good …. The opinions of real people may be marginalized. "The expenditure restrictions of [2 U.S.C.] § 441b are thus meant to ensure that competition among actors in the political arena is truly competition among ideas." …

In addition to this immediate drowning out of noncorporate voices, there may be deleterious effects that follow soon thereafter. Corporate "domination" of electioneering …can generate the impression that corporations dominate our democracy. When citizens turn on their televisions and radios before an election and hear only corporate electioneering, they may lose faith in their capacity, as citizens, to influence public policy. A Government captured by corporate interests, they may come to believe, will be neither responsive to their needs nor willing to give their views a fair hearing. The predictable result is cynicism and disenchantment: an increased perception that large spenders "`call the tune'" and a reduced "`willingness of voters to take part in democratic governance.'" … . To the extent that corporations are allowed to exert undue influence in electoral races, the speech of the eventual winners of those races may also be chilled. Politicians who fear that a certain corporation can make or break their reelection chances may be cowed into silence about that corporation. On a variety of levels, unregulated corporate electioneering might diminish the ability of citizens to "hold officials accountable to the people," … and disserve the goal of a public debate that is "uninhibited, robust, and wide-open"… . At the least, I stress again, a legislature is entitled to credit these concerns and to take tailored measures in response.

The majority's unwillingness to distinguish between corporations and humans similarly blinds it to the possibility that corporations' "war chests" and their special "advantages" in the legal realm …may translate into special advantages in the market for legislation. When large numbers of citizens have a common stake in a measure that is under consideration, it may be very difficult for them to coordinate resources on behalf of their position. The corporate form, by contrast, "provides a simple way to channel rents to only those who have paid their dues, as it were. If you do not own stock, you do not benefit from the larger dividends or appreciation in the stock price caused by the passage of private interest legislation." … . Corporations, that is, are uniquely

equipped to seek laws that favor their owners, not simply because they have a lot of money but because of their legal and organizational structure. Remove all restrictions on their electioneering, and the door may be opened to a type of rent seeking that is "far more destructive" than what noncorporations are capable of. Ibid. It is for reasons such as these that our campaign finance jurisprudence has long appreciated that "the `differing structures and purposes' of different entities `may require different forms of regulation in order to protect the integrity of the electoral process.'" … .

The Court's facile depiction of corporate electioneering assumes away all of these complexities. Our colleagues ridicule the idea of regulating expenditures based on "nothing more" than a fear that corporations have a special "ability to persuade," … as if corporations were our society's ablest debaters and viewpoint-neutral laws … were created to suppress their best arguments. In their haste to knock down yet another straw man, our colleagues simply ignore the fundamental concerns of the …legislatures that have passed laws … to safeguard the integrity, competitiveness, and democratic responsiveness of the electoral process.

All of the majority's theoretical arguments turn on a proposition with undeniable surface appeal but little grounding in evidence or experience, "that there is no such thing as too much speech," … . If individuals in our society had infinite free time to listen to and contemplate every last bit of speech uttered by anyone, anywhere; and if broadcast advertisements had no special ability to influence elections apart from the merits of their arguments (to the extent they make any); and if legislators always operated with nothing less than perfect virtue; then I suppose the majority's premise would be sound.

In the real world, we have seen, corporate domination of the airwaves prior to an election may decrease the average listener's exposure to relevant viewpoints, and it may diminish citizens' willingness and capacity to participate in the democratic process.

None of this is to suggest that corporations can or should be denied an opportunity to participate in election campaigns or in any other public forum (much less that a work of art such as Mr. Smith Goes to Washington may be banned), or to deny that some corporate speech may contribute significantly to public debate. What it shows, however, is that …"concern about corporate domination of the political process," … reflects more than a concern to protect governmental interests outside of the First Amendment. It also reflects a concern to facilitate First Amendment values by preserving some breathing room around the electoral "marketplace" of ideas…, the marketplace in which the actual people of this Nation determine how they will govern themselves. The majority seems oblivious to the simple truth that laws [limiting corporate speech] do not merely pit the anticorruption interest against the First Amendment, but also pit competing First Amendment values against each other.

There are, to be sure, serious concerns with any effort to balance the First Amendment rights of speakers against the First Amendment rights of listeners. But when the speakers in question are not real people and when the appeal to "First Amendment principles" depends almost entirely on the listeners' perspective…, it becomes necessary to consider how listeners will actually be affected.