NEW YORK APPELLATE DIGEST, LLC

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Covering All Four Departments of the Appellate Division of the New York State Supreme Court, as Well as the New York State Court of Appeals.

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Major Categories Addressed In The Digest This Month:

Appellate Division:

Animal Law, Attorneys, Civil Procedure, Civil Rights Law, Contract Law, Criminal Law, Debtor-Creditor, Defamation, Disciplinary Hearings, Employment Law, Environmental Law, Family Law, Foreclosure, Freedom Of Information Law (Foil),Intentional Torts, Insurance Law, Labor Law-Construction Law, Mental Hygiene Law, Municipal Law, Negligence, Real Property Actions And Proceedings Law, Social Services Law, Trusts And Estates, Unemployment Insurance, Workers' Compensation Law.

Court Of Appeals:

Civil Procedure, Contract Law, Criminal Law, Landlord-Tenant, Municipal Law, Negligence, Retirement And Social Security Law, Securities.

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ANIMAL LAW.

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The Fourth Department, reversing Supreme Court, determined plaintiff's motion for summary judgment should not have been granted and defendants' cross-motion for summary judgment should have been granted in this dog bite case. Defendant Garrett was dog-sitting Lily, a pit bull owned by defendant Hunt, in a fenced yard. Plaintiff brought her dog, Chloe, into the yard and Lily lunged at Chloe. A few minutes later Lily again lunged at Chloe and plaintiff was bitten. The Fourth Department found that the two attacks constituted a single event and defendants demonstrated they were not aware of Lily's vicious propensities:

> ... [D]efendants established as a matter of law that they lacked actual or constructive knowledge that Lily had any vicious propensities ... . We agree with defendants that the confrontation between the dogs was only one event, rather than two separate incidents as found by the court. Given the fact that only minutes passed between the two confrontations, we conclude that defendants did not acquire actual or constructive notice of any vicious propensities based on the initial confrontation. We likewise conclude that the court erred in denying that part of defendants' cross motion for summary judgment dismissing the negligence cause of action. It is well settled that " [c]ases involving injuries inflicted by domestic animals may only proceed under strict liability based on the owner's knowledge of the animal's vicious propensities, not on theories of common-law negligence' " ... . **Russell v Hunt, 2018 NY Slip Op 00750, Fourth Dept 2-2-18**

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ANIMAL LAW.

DEFENDANTS DEMONSTRATED THEY DID NOT HAVE NOTICE OF THE DOG'S VICIOUS PROPENSITIES, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED IN THIS DOG BITE CASE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendants' motion for summary judgment in this dog bite case should have been granted. Defendants demonstrated they did not have actual or constructive notice of the dog's vicious propensities:

> Since at least 1816 ... , "the law of this state has been that the owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities" ... . '[T]here is no cause of action in negligence as against the owner of a dog who causes injury, but one may assert a claim in strict liability against a dog owner for harm caused by the dog's vicious propensities when the owner knew or should have known of those propensities" ... . **S.K. v Kobee, 2018 NY Slip Op 00770, Fourth Dept 2-2-18**

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SURROGATE'S COURT, IN AWARDING ATTORNEY'S FEES FOR THE PETITION FOR JUDICIAL SETTLEMENT AND FINAL ACCOUNTING REGARDING A TRUST, DID NOT MAKE THE REQUIRED FINDINGS, MATTER REMITTED (FOURTH DEPT).

The Fourth Department remitted the matter to Surrogate's Court for a determination of the reasonableness of the attorney's fees Surrogate's Court had awarded petitioner. Petitioner trustee filed a petition for judicial settlement and final accounting regarding a trust. Surrogate's Court awarded attorney's fees to the petitioner but did not make the required findings:

> We ... agree with objectants that the Surrogate erred in approving the attorneys' fees, costs and disbursements requested by petitioner without considering the required factors. "It is well settled that, in determining the proper amount of attorneys' fees and costs, the court should consider the time spent, the difficulties involved in the matters in which the services were rendered, the nature of the services, the amount involved, the professional standing of the counsel, and the results obtained' " ... .Here, the Surrogate failed to make any findings with respect to the Potts factors [Matter of Potts, 213 App Div 59, 62], and we are therefore unable to review the Surrogate's implicit determination that the attorneys' fees, costs and disbursements are reasonable ... . We therefore modify the decree by vacating the award of attorneys' fees, costs and disbursements, and we remit the matter to Surrogate's Court for a determination whether those fees, costs and disbursements are reasonable, following a hearing if necessary ... . **Matter of JPmorgan Chase Bank, N.A., 2018 NY Slip Op 00775, Fourth Dept 2-2-18**

CIVIL PROCEDURE

CIVIL PROCEDURE (MOTION TO RENEW, BASED UPON A CHANGE IN THE LAW, MADE WHEN THE CASE WAS NO LONGER PENDING, WAS UNTIMELY (FOURTH DEPT))/RENEW, MOTION TO (CIVIL PROCEDURE, MOTION TO RENEW, BASED UPON A CHANGE IN THE LAW, MADE WHEN THE CASE WAS NO LONGER PENDING, WAS UNTIMELY (FOURTH DEPT))/CPLR 2221 (MOTION TO RENEW, BASED UPON A CHANGE IN THE LAW, MADE WHEN THE CASE WAS NO LONGER PENDING, WAS UNTIMELY (FOURTH DEPT))

CIVIL PROCEDURE.

MOTION TO RENEW, BASED UPON A CHANGE IN THE LAW, MADE WHEN THE CASE WAS NO LONGER PENDING, WAS UNTIMELY (FOURTH DEPT).

The Fourth Department determined the plaintiff's motion to renew, based upon a change in the law, made when the case was no longer pending, was properly denied as untimely. A case relied upon in deciding the motion had been disavowed by the Second Department:

> CPLR 2221 (e) does not impose a time limit on motions for leave to renew, unlike motions for leave to reargue, which must be made before the expiration of the time in which to take an appeal ... . A motion based on a change in the law formerly was considered a motion for leave to reargue, with the same time limit, i.e., before the time to appeal the order expired ... . Over time, the rule evolved to allow such a motion "where the case was still pending, either in the trial court or on appeal" .. . The Court of Appeals explained ... that denying as untimely a motion for leave to reargue based on a change in the law "might at times seem harsh, [but] there must be an end to lawsuits" ... .
>
> After the statute was amended in 1999 to specify that a motion based on a change in the law is a motion for leave to renew, courts have nevertheless properly continued to impose a time limit on motions based on a change in law ... ... "[T]here is no indication in the legislative history of an intention to change the rule regarding the finality of judgments" ... . Here, the case was no longer pending when plaintiff made his motion for leave to renew based on a change in the law, and we therefore conclude that the motion insofar as it sought leave to renew was untimely ... . **Redeye v Progressive Ins. Co., 2018 NY Slip Op 00763, Fourth Dept 2-2-18**

CIVIL PROCEDURE (REPLY PAPERS, GOOD CAUSE FOR DELAY IN FILING A DISPOSITIVE MOTION CAN NOT BE RAISED FOR THE FIRST TIME IN REPLY PAPERS, COURT SHOULD NOT HAVE CONSIDERED THE MOTION (FOURTH DEPT))/REPLY PAPERS (GOOD CAUSE FOR DELAY IN FILING A DISPOSITIVE MOTION CAN NOT BE RAISED FOR THE FIRST TIME IN REPLY PAPERS, COURT SHOULD NOT HAVE CONSIDERED THE MOTION (FOURTH DEPT))/GOOD CAUSE (GOOD CAUSE FOR DELAY IN FILING A DISPOSITIVE MOTION CAN NOT BE RAISED FOR THE FIRST TIME IN REPLY PAPERS, COURT SHOULD NOT HAVE CONSIDERED THE MOTION (FOURTH DEPT))/REPLY PAPERS (GOOD CAUSE FOR DELAY IN FILING A DISPOSITIVE MOTION CAN NOT BE RAISED FOR THE FIRST TIME IN REPLY PAPERS, COURT SHOULD NOT HAVE CONSIDERED THE MOTION (FOURTH DEPT))/CPLR 3212 (REPLY PAPERS, GOOD CAUSE FOR DELAY IN FILING A DISPOSITIVE MOTION CAN NOT BE RAISED FOR THE FIRST TIME IN REPLY PAPERS, COURT SHOULD NOT HAVE CONSIDERED THE MOTION (FOURTH DEPT))/SUMMARY JUDGMENT (GOOD CAUSE FOR DELAY IN FILING A DISPOSITIVE MOTION CAN NOT BE RAISED FOR THE FIRST TIME IN REPLY PAPERS, COURT SHOULD NOT HAVE CONSIDERED THE MOTION (FOURTH DEPT))

CIVIL PROCEDURE.

GOOD CAUSE FOR DELAY IN FILING A DISPOSITIVE MOTION CAN NOT BE RAISED FOR THE FIRST TIME IN REPLY PAPERS, COURT SHOULD NOT HAVE CONSIDERED THE MOTION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that it is improper for a court to consider whether there was "good cause" for making an untimely dispositive motion when the "good cause" argument is raised for the first time in the reply papers:

> Defendants' summary judgment motion was made 618 days after the deadline set forth in the court's scheduling order and 204 days after the filing of the note of issue. Defendants did not make the motion in time to be heard on the court's November 21, 2016 motion calendar. Nonetheless, defendants' moving papers failed to address the issue of "good cause" required to make a summary judgment motion more than 120 days after the filing of the note of issue or after the date established by the court in a scheduling order (CPLR 3212 [a]...). Plaintiffs opposed the motion on the ground that it was untimely. It was only in reply papers that defendants addressed the issue of "good cause." The court considered the merits of the motion, granted summary judgment to defendants and dismissed the complaint. That was error.
>
> It is well settled that it is improper for a court to consider the "good cause" proffered by a movant if it is presented for the first time in reply papers... . Defendants also failed to move to vacate the note of issue. The motion should thus have been denied as untimely (see CPLR 3212 [a]), and the court should have declined to reach the merits. **Mitchell v City of Geneva, 2018 NY Slip Op 00740, Fourth Dept 2-2-18**

CIVIL PROCEDURE (SUMMARY JUDGMENT MOTIONS, DEFENDANT DOCTOR'S MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN GRANTED, DEFENDANT RELIED ON PLAINTIFF'S SUBMISSIONS, WHICH SHOULD NOT HAVE BEEN CONSIDERED, A RARE EXPLANATION OF HOW APPELLATE COURTS ANALYZE SUMMARY JUDGMENT MOTIONS (FOURTH DEPT))/SUMMARY JUDGMENT (CIVIL PROCEDURE, ANALYSIS OF SUMMARY JUDGMENT MOTIONS, DEFENDANT DOCTOR'S MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN GRANTED, DEFENDANT RELIED ON PLAINTIFF'S SUBMISSIONS, WHICH SHOULD NOT HAVE BEEN CONSIDERED, A RARE EXPLANATION OF HOW APPELLATE COURTS ANALYZE SUMMARY JUDGMENT MOTIONS (FOURTH DEPT))

CIVIL PROCEDURE.

DEFENDANT DOCTOR'S MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN GRANTED, DEFENDANT RELIED ON PLAINTIFF'S SUBMISSIONS, WHICH SHOULD NOT HAVE BEEN CONSIDERED, A RARE EXPLANATION OF HOW APPELLATE COURTS ANALYZE SUMMARY JUDGMENT MOTIONS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that defendant doctor's motion for summary judgment on statute of limitations grounds in this medical malpractice action should not have been granted. If the action had sounded in battery, it would have been untimely. But the doctor's papers did not demonstrate the action sounded in battery, as opposed to medical malpractice. Therefore the motion should have been denied without considering plaintiff's papers, on which defendant relied for the "battery" argument:

> It is well established that "[a] party moving for summary judgment must demonstrate that the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment' in the moving party's favor" ... . Thus, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" ... . "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" ... , "and every available inference must be drawn in the [non-moving party's] favor" ... . "The moving party's [f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*' " ... . **Palumbo v Bristol-Myers Squibb Co., 2018 NY Slip Op 00749, Fourth Dept 2-2-18**

CIVIL PROCEDURE (MOTION TO COMPEL ACCEPTANCE OF A LATE ANSWER SHOULD HAVE BEEN GRANTED (SECOND DEPT))/ANSWER (CIVIL PROCEDURE, MOTION TO COMPEL ACCEPTANCE OF A LATE ANSWER SHOULD HAVE BEEN GRANTED (SECOND DEPT))/CPLR 2004 (MOTION TO COMPEL ACCEPTANCE OF A LATE ANSWER SHOULD HAVE BEEN GRANTED (SECOND DEPT))

CIVIL PROCEDURE.

MOTION TO COMPEL ACCEPTANCE OF A LATE ANSWER SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to compel plaintiff to accept an answer which was two days late should have been granted pursuant to CPLR 2004:

CPLR 2004 provides that, "[e]xcept where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed." Given the strong public policy favoring the resolution of cases on the merits, "the Supreme Court may compel a plaintiff to accept an untimely answer (see CPLR 2004, 3012[d]) where the record demonstrates that there was only a short delay in appearing or answering the complaint, that there was no willfulness on the part of the defendant, that there would be no prejudice to the plaintiff, and that a potentially meritorious defense exists"... . Here, in light of the defendant's brief and unintentional delay in serving its answer, the lack of prejudice to the plaintiff, and the existence of a potentially meritorious defense, the Supreme Court improvidently exercised its discretion in denying the defendant's motion pursuant to CPLR 2004 to compel the plaintiff to accept its late answer ... . **Baldwin Rte. 6, LLC v Bernad Creations, Ltd., 2018 NY Slip Op 01039, Second Dept 2-14-19**

CIVIL PROCEDURE (SUBJECT MATTER JURISDICTION, MATTER ERRONEOUSLY TRANSFERRED TO A COURT WITHOUT SUBJECT MATTER JURISDICTION (CIVIL COURT) CAN BE RETRANSFERRED TO THE CORRECT COURT (SUPREME COURT) AFTER JUDGMENT, THE CIVIL COURT JUDGMENT IS VOID AND CANNOT BE ADOPTED BY THE SUPREME COURT (SECOND DEPT))/JURISDICTION, SUBJECT MATTER (MATTER ERRONEOUSLY TRANSFERRED TO A COURT WITHOUT SUBJECT MATTER JURISDICTION (CIVIL COURT) CAN BE RETRANSFERRED TO THE CORRECT COURT (SUPREME COURT) AFTER JUDGMENT, THE CIVIL COURT JUDGMENT IS VOID AND CANNOT BE ADOPTED BY THE SUPREME COURT (SECOND DEPT))/CPLR 325(b) (SUBJECT MATTER JURISDICTION, MATTER ERRONEOUSLY TRANSFERRED TO A COURT WITHOUT SUBJECT MATTER JURISDICTION (CIVIL COURT) CAN BE RETRANSFERRED TO THE CORRECT COURT (SUPREME COURT) AFTER JUDGMENT, THE CIVIL COURT JUDGMENT IS VOID AND CANNOT BE ADOPTED BY THE SUPREME COURT (SECOND DEPT))/SUBJECT MATTER JURISDICTION (MATTER ERRONEOUSLY TRANSFERRED TO A COURT WITHOUT SUBJECT MATTER JURISDICTION (CIVIL COURT) CAN BE RETRANSFERRED TO THE CORRECT COURT (SUPREME COURT) AFTER JUDGMENT, THE CIVIL COURT JUDGMENT IS VOID AND CANNOT BE ADOPTED BY THE SUPREME COURT (SECOND DEPT))

CIVIL PROCEDURE.

MATTER ERRONEOUSLY TRANSFERRED TO A COURT WITHOUT SUBJECT MATTER JURISDICTION (CIVIL COURT) CAN BE RETRANSFERRED TO THE CORRECT COURT (SUPREME COURT) AFTER JUDGMENT, THE CIVIL COURT JUDGMENT IS VOID AND CANNOT BE ADOPTED BY THE SUPREME COURT (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Dillon, addressing two issues of first impression, determined: (1) a matter erroneously transferred to a court which did not have subject matter jurisdiction (Civil Court) can be retransferred to the correct court (Supreme Court); and (2) after the matter is retransferred the error cannot be remedied in Supreme Court by adopting the disposition of the Civil Court, which is void. The fact that the Civil Court judge was an Acting Supreme Court Justice did not afford subject matter jurisdiction to the Civil Court:

> While Judge Marrazzo, by virtue of his designation as an Acting Justice of the Supreme Court, would have been authorized to preside over the trial of this matter had it been pending in the Supreme Court, the same cannot be said for the trial in the Civil Court where the Administrative Order had no administrative or substantive relevance.
>
> Where subject matter jurisdiction is concerned, courts, including our own, may not cut corners. As a matter of both constitutional adherence and public policy, the Appellate Division must guard against courts acting outside of their subject matter jurisdiction, even if they do so unwittingly, in good faith, or in furtherance of judicial economy. Accordingly, we hold that the duties of an Acting Justice of the Supreme Court directed to matters pending in the

> Supreme Court operate only as to actions and proceedings pending in that particular court, and not for cases litigated elsewhere. ...
>
> ... [S]ince the Civil Court was without jurisdiction to try the instant matter, rendering the trial and judgment void, its findings of fact and conclusions of law cannot as a matter of comity, res judicata, law of the case, or otherwise, be recognized by the Supreme Court upon its CPLR 325(b) removal of the action, and cannot provide a basis for the Supreme Court judgment presently on appeal. **Caffrey v North Arrow Abstract & Settlement Servs., Inc., 2018 NY Slip Op 01043, Second Dept 2-14-18**

CIVIL PROCEDURE (LONG ARM JURISDICTION, OHIO GUN DEALER WHO SOLD GUN USED TO SHOOT PLAINTIFF IN NEW YORK DID NOT HAVE THE REQUISITE MINIMUM CONTACTS WITH NEW YORK, EXERCISING JURISDICTION OVER THE OHIO GUN DEALER, THEREFORE, WOULD VIOLATE DUE PROCESS (FOURTH DEPT))/CONSTITUTIONAL LAW (LONG ARM JURISDICTION, DUE PROCESS, OHIO GUN DEALER WHO SOLD GUN USED TO SHOOT PLAINTIFF IN NEW YORK DID NOT HAVE THE REQUISITE MINIMUM CONTACTS WITH NEW YORK, EXERCISING JURISDICTION OVER THE OHIO GUN DEALER, THEREFORE, WOULD VIOLATE DUE PROCESS (FOURTH DEPT)) /DUE PROCESS (LONG ARM JURISDICTION, MINIMUM CONTACTS, OHIO GUN DEALER WHO SOLD GUN USED TO SHOOT PLAINTIFF IN NEW YORK DID NOT HAVE THE REQUISITE MINIMUM CONTACTS WITH NEW YORK, EXERCISING JURISDICTION OVER THE OHIO GUN DEALER, THEREFORE, WOULD VIOLATE DUE PROCESS (FOURTH DEPT))/MINIMUM CONTACTS (LONG ARM JURISDICTION, OHIO GUN DEALER WHO SOLD GUN USED TO SHOOT PLAINTIFF IN NEW YORK DID NOT HAVE THE REQUISITE MINIMUM CONTACTS WITH NEW YORK, EXERCISING JURISDICTION OVER THE OHIO GUN DEALER, THEREFORE, WOULD VIOLATE DUE PROCESS (FOURTH DEPT)) /LONG ARM JURISDICTION (MINIMUM CONTACTS, OHIO GUN DEALER WHO SOLD GUN USED TO SHOOT PLAINTIFF IN NEW YORK DID NOT HAVE THE REQUISITE MINIMUM CONTACTS WITH NEW YORK, EXERCISING JURISDICTION OVER THE OHIO GUN DEALER, THEREFORE, WOULD VIOLATE DUE PROCESS (FOURTH DEPT))/JURISDICTION, LONG ARM OHIO GUN DEALER WHO SOLD GUN USED TO SHOOT PLAINTIFF IN NEW YORK DID NOT HAVE THE REQUISITE MINIMUM CONTACTS WITH NEW YORK, EXERCISING JURISDICTION OVER THE OHIO GUN DEALER, THEREFORE, WOULD VIOLATE DUE PROCESS (FOURTH DEPT))/CPLR 302 (LONG ARM JURISDICTION, OHIO GUN DEALER WHO SOLD GUN USED TO SHOOT PLAINTIFF IN NEW YORK DID NOT HAVE THE REQUISITE MINIMUM CONTACTS WITH NEW YORK, EXERCISING JURISDICTION OVER THE OHIO GUN DEALER, THEREFORE, WOULD VIOLATE DUE PROCESS (FOURTH DEPT))

CIVIL PROCEDURE, CONSTITUTIONAL LAW.

OHIO GUN DEALER WHO SOLD GUN USED TO SHOOT PLAINTIFF IN NEW YORK DID NOT HAVE THE REQUISITE MINIMUM CONTACTS WITH NEW YORK, EXERCISING JURISDICTION OVER THE OHIO GUN DEALER, THEREFORE, WOULD VIOLATE DUE PROCESS (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Peradotto, reversing Supreme Court, determined New York courts could not exercise jurisdiction over an Ohio gun dealer, Brown, who, in Ohio, sold a handgun to an illegal gun trafficker from New York (Bostic). The handgun was ultimately used in New York to shoot the plaintiff. The Fourth Department, applying a federal due process "minimum contacts" analysis, concluded that to exercise jurisdiction over Brown would violate due process:

> ... CPLR 302 (a) (3) (ii) requires an evaluation of whether Brown "expect[ed] or should reasonably [have] expect[ed his] act[s] to have consequences in [New York]." ... * * *

> ... [W]e conclude that Brown lacks the minimum contacts with New York that are a prerequisite to the exercise of jurisdiction over him. Brown's submissions established that Great Lakes was an Ohio retailer permitted to sell guns within Ohio only and, during the relevant period from 1996 to 2005, it did not maintain a website, had no business telephone listing, did not advertise in New York, and made its retail sales and transfers to customers present in Ohio ... . The evidence submitted by plaintiffs in opposition does not tend to establish that Brown "purposefully reach[ed] out beyond' " Ohio and into New York ... . Brown did not, for example, engage in a purposeful distribution arrangement thereby evincing an effort to serve the market for firearms in New York ... .
>
> ... Brown's knowledge that guns sold to Bostic might end up being resold in New York if Bostic's ostensible plan or hope came to fruition in the future is insufficient to establish the requisite minimum contacts with New York because such circumstances demonstrate, at most, Brown's awareness of the mere possibility that the guns could be transported to and resold in New York ... . **Williams v Beemiller, Inc., 2018 NY Slip Op 00939, Fourth Dept 2-9-18**

CIVIL PROCEDURE (JURY TRIAL, PLAINTIFF WAS ENTITLED TO A JURY TRIAL ON THE ISSUE OF THE APPROPRIATE DISCOUNT RATE TO BE APPLIED TO A JURY VERDICT IN THIS BREACH OF CONTRACT ACTION (FOURTH DEPT))/DAMAGES (JURY TRIAL, PLAINTIFF WAS ENTITLED TO A JURY TRIAL ON THE ISSUE OF THE APPROPRIATE DISCOUNT RATE TO BE APPLIED TO A JURY VERDICT IN THIS BREACH OF CONTRACT ACTION (FOURTH DEPT))/DISCOUNT RATE (DAMAGES, JURY TRIAL, PLAINTIFF WAS ENTITLED TO A JURY TRIAL ON THE ISSUE OF THE APPROPRIATE DISCOUNT RATE TO BE APPLIED TO A JURY VERDICT IN THIS BREACH OF CONTRACT ACTION (FOURTH DEPT))/JURY TRIAL (BREACH OF CONTRACT, DISCOUNT RATE, PLAINTIFF WAS ENTITLED TO A JURY TRIAL ON THE ISSUE OF THE APPROPRIATE DISCOUNT RATE TO BE APPLIED TO A JURY VERDICT IN THIS BREACH OF CONTRACT ACTION (FOURTH DEPT))/CONTRACT LAW (DAMAGES, JURY TRIAL, PLAINTIFF WAS ENTITLED TO A JURY TRIAL ON THE ISSUE OF THE APPROPRIATE DISCOUNT RATE TO BE APPLIED TO A JURY VERDICT IN THIS BREACH OF CONTRACT ACTION (FOURTH DEPT))

CIVIL PROCEDURE, CONTRACT LAW.

PLAINTIFF WAS ENTITLED TO A JURY TRIAL ON THE ISSUE OF THE APPROPRIATE DISCOUNT RATE TO BE APPLIED TO A JURY VERDICT IN THIS BREACH OF CONTRACT ACTION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, in a case sent back by the Court of Appeals for a determination of the appropriate discount rate on a jury verdict in a breach of contract action, held the plaintiff's request for a jury trial on the issue should have been granted:

> ... [I]t is undisputed that, prior to the original trial in this matter, plaintiff demanded a jury trial on all issues. During that trial, "[o]ver the [plaintiff's] objection, the jury was provided with a verdict form that did not allow for any damages discount" ... . Although the Court of Appeals remitted the matter for the purpose of establishing a discount rate, it did not indicate whether the discount rate should be determined by the trial court or a jury. Nevertheless, prior to the trial that is the subject of this appeal, plaintiff renewed its request for a jury, which the court denied. Contrary to defendant's contention, neither article 50-A nor article 50-B of the CPLR requires that the discount rate be determined by the court. As the Court of Appeals stated, this is a breach of contract action... . Article 50-A deals with periodic payment of judgments in actions concerning medical and dental malpractice, and article 50-B deals with periodic payment of judgments in actions concerning personal injury, injury to property, and wrongful death. Furthermore, we conclude that Toledo v Iglesia Ni Christo (18 NY3d 363 [2012]) does not require the trial court to

determine the discount rate in this case inasmuch as Toledo was a wrongful death case within the purview of CPLR article 50-B. **Village of Herkimer v County of Herkimer, 2018 NY Slip Op 00756, Fourth Dept 2-2-18**

CIVIL PROCEDURE (FOREIGN MONEY JUDGMENTS, PLAINTIFF DID NOT DEMONSTRATE ANY BASIS FOR IN PERSONAM OR IN REM JURISDICTION BY THE NEW YORK COURTS, PROCEEDING TO ENFORCE AN ALBANIAN MONEY JUDGMENT PURSUANT TO ARTICLE 53 OF THE CPLR SHOULD HAVE BEEN DISMISSED (FIRST DEPT))/DEBTOR-CREDITOR (FOREIGN MONEY JUDGMENTS, PLAINTIFF DID NOT DEMONSTRATE ANY BASIS FOR IN PERSONAM OR IN REM JURISDICTION BY THE NEW YORK COURTS, PROCEEDING TO ENFORCE AN ALBANIAN MONEY JUDGMENT PURSUANT TO ARTICLE 53 OF THE CPLR SHOULD HAVE BEEN DISMISSED (FIRST DEPT))/CORPORATION LAW (FOREIGN MONEY JUDGMENTS, PLAINTIFF DID NOT DEMONSTRATE ANY BASIS FOR IN PERSONAM OR IN REM JURISDICTION BY THE NEW YORK COURTS, PROCEEDING TO ENFORCE AN ALBANIAN MONEY JUDGMENT PURSUANT TO ARTICLE 53 OF THE CPLR SHOULD HAVE BEEN DISMISSED (FIRST DEPT))/FOREIGN MONEY JUDGMENTS (PLAINTIFF DID NOT DEMONSTRATE ANY BASIS FOR IN PERSONAM OR IN REM JURISDICTION BY THE NEW YORK COURTS, PROCEEDING TO ENFORCE AN ALBANIAN MONEY JUDGMENT PURSUANT TO ARTICLE 53 OF THE CPLR SHOULD HAVE BEEN DISMISSED (FIRST DEPT))/JURISDICTION (CIVIL PROCEDURE, FOREIGN MONEY JUDGMENTS, PLAINTIFF DID NOT DEMONSTRATE ANY BASIS FOR IN PERSONAM OR IN REM JURISDICTION BY THE NEW YORK COURTS, PROCEEDING TO ENFORCE AN ALBANIAN MONEY JUDGMENT PURSUANT TO ARTICLE 53 OF THE CPLR SHOULD HAVE BEEN DISMISSED (FIRST DEPT))/CPLR ARTICLE 53 (FOREIGN MONEY JUDGMENTS, PLAINTIFF DID NOT DEMONSTRATE ANY BASIS FOR IN PERSONAM OR IN REM JURISDICTION BY THE NEW YORK COURTS, PROCEEDING TO ENFORCE AN ALBANIAN MONEY JUDGMENT PURSUANT TO ARTICLE 53 OF THE CPLR SHOULD HAVE BEEN DISMISSED (FIRST DEPT))

CIVIL PROCEDURE, DEBTOR-CREDITOR, CORPORATION LAW.

PLAINTIFF DID NOT DEMONSTRATE ANY BASIS FOR IN PERSONAM OR IN REM JURISDICTION BY THE NEW YORK COURTS, PROCEEDING TO ENFORCE AN ALBANIAN MONEY JUDGMENT PURSUANT TO ARTICLE 53 OF THE CPLR SHOULD HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, in an extensive full-fledged opinion by Justice Friedman, reversing Supreme Court, determined New York courts did not have jurisdiction to enforce an Albanian judgment. The opinion is too detailed to fairly summarize here. The court explained the criteria for the enforcement of foreign money judgments under article 53 of the CPLR (Uniform Foreign Money-Judgments Recognition Act), and the applicability of Daimler AG v Bauman, 571 US ___, 134 S Ct 746 (2014) and Abu Dhabi Commercial Bank PJSC v Saad Trading, Contr. & Fin. Servs. Co.m 117 AD3d 609 (1st Dept 2014) to a CPLR article 53 proceeding. The plaintiff did not claim it had any basis for in personam or in rem jurisdiction in New York and relied upon the Abu Dhabi case for the argument such a jurisdictional demonstration was not required:

> To go beyond Abu Dhabi and hold, as [plaintiff] urges, that no jurisdictional nexus is ever required for a proceeding under article 53, even if the defendant asserts substantive defenses to recognition of the foreign judgment, would be a substantial departure from the prior general understanding of the law. For example, the Restatement (Third) of Foreign Relations Law takes the position that the creditor on a foreign country judgment "must establish a basis for the exercise of jurisdiction by the enforcing court over the judgment debtor or his property" (§ 481, Comment g). **AlbaniaBEG Ambient Sh.p.k. v Enel S.p.A., 2018 NY Slip Op 00928, First Dept 2-8-18**

CIVIL PROCEDURE (EVIDENCE, PLAINTIFF'S FAILURE TO MAKE A REASONABLE EFFORT TO PRODUCE A FORMER EMPLOYEE FOR DEPOSITION BY DEFENDANT WARRANTED PRECLUDING PLAINTIFF FROM PRESENTING TESTIMONY BY THE FORMER EMPLOYEE, HOWEVER PRECLUSION OF SECONDARY AND HEARSAY EVIDENCE RELATING TO THE FORMER EMPLOYEE, WHICH WOULD PRECLUDE PLAINTIFF FROM ASSERTING ITS CLAIM, WAS AN ABUSE OF DISCRETION (FOURTH DEPT))/EVIDENCE (CIVIL PROCEDURE, PLAINTIFF'S FAILURE TO MAKE A REASONABLE EFFORT TO PRODUCE A FORMER EMPLOYEE FOR DEPOSITION BY DEFENDANT WARRANTED PRECLUDING PLAINTIFF FROM PRESENTING TESTIMONY BY THE FORMER EMPLOYEE, HOWEVER PRECLUSION OF SECONDARY AND HEARSAY EVIDENCE RELATING TO THE FORMER EMPLOYEE, WHICH WOULD PRECLUDE PLAINTIFF FROM ASSERTING ITS CLAIM, WAS AN ABUSE OF DISCRETION (FOURTH DEPT))/CPLR 3126 EVIDENCE, PLAINTIFF'S FAILURE TO MAKE A REASONABLE EFFORT TO PRODUCE A FORMER EMPLOYEE FOR DEPOSITION BY DEFENDANT WARRANTED PRECLUDING PLAINTIFF FROM PRESENTING TESTIMONY BY THE FORMER EMPLOYEE, HOWEVER PRECLUSION OF SECONDARY AND HEARSAY EVIDENCE RELATING TO THE FORMER EMPLOYEE, WHICH WOULD PRECLUDE PLAINTIFF FROM ASSERTING ITS CLAIM, WAS AN ABUSE OF DISCRETION (FOURTH DEPT))/CORPORATION LAW (CIVIL PROCEDURE, EVIDENCE, PLAINTIFF'S FAILURE TO MAKE A REASONABLE EFFORT TO PRODUCE A FORMER EMPLOYEE FOR DEPOSITION BY DEFENDANT WARRANTED PRECLUDING PLAINTIFF FROM PRESENTING TESTIMONY BY THE FORMER EMPLOYEE, HOWEVER PRECLUSION OF SECONDARY AND HEARSAY EVIDENCE RELATING TO THE FORMER EMPLOYEE, WHICH WOULD PRECLUDE PLAINTIFF FROM ASSERTING ITS CLAIM, WAS AN ABUSE OF DISCRETION (FOURTH DEPT))

CIVIL PROCEDURE, CORPORATION LAW, EVIDENCE.

PLAINTIFF CORPORATION'S FAILURE TO MAKE A REASONABLE EFFORT TO PRODUCE A FORMER EMPLOYEE FOR DEPOSITION BY DEFENDANT WARRANTED PRECLUDING PLAINTIFF FROM PRESENTING TESTIMONY BY THE FORMER EMPLOYEE PURSUANT TO CPLR 3126, HOWEVER PRECLUSION OF SECONDARY AND HEARSAY EVIDENCE RELATING TO THE FORMER EMPLOYEE, WHICH WOULD PRECLUDE PLAINTIFF FROM ASSERTING ITS CLAIM, WAS AN ABUSE OF DISCRETION (FOURTH DEPT).

The Fourth Department determined Supreme Court properly found that plaintiff corporation did not make sufficient efforts to produce a former employer to be deposed by defendant in this breach of contract action, and therefore properly precluded plaintiff from presenting the former employee's testimony. However, the Fourth Department held that Supreme Court abused its discretion when it precluded any secondary or hearsay evidence related to the former employee, which would preclude plaintiff from asserting its claim:

> Generally, where there is no evidence that a corporation exercises control over a former employee, that corporation cannot be held responsible for the former employee's refusal to appear for a deposition ... . Here, however, the firm representing plaintiff undertook the representation of that former employee, implicitly conceding control over the former employee ... . When the court ordered plaintiff's attorney to make every reasonable effort to secure the former employee's appearance for a deposition, plaintiff's attorney merely sent a letter notifying the former employee that the attorney was supposed to make additional efforts to secure her presence. There is no evidence that any actual efforts to secure her appearance were made. We thus agree with the court that plaintiff should be precluded from presenting testimony from the former employee.
>
> We conclude, however, that the court abused its discretion in precluding plaintiff from relying on any secondary or hearsay evidence related to the former employee. There was no order compelling the production of such evidence that plaintiff was alleged to have violated, and the court did not find a willful failure to disclose such evidence. **Hypercel Corp. v Stampede Presentation Prods., Inc., 2018 NY Slip Op 00936, Fourth Dept 2-9-18**

CIVIL PROCEDURE (REPLY PAPERS, OKAY FOR BANK TO SUBMIT RENEWED POWER OF ATTORNEY IN REPLY PAPERS, POWER OF ATTORNEY SUBMITTED WITH MOTION PAPERS HAD APPARENTLY EXPIRED AND DEFENDANTS RAISED THE ISSUE IN ANSWERING PAPERS (SECOND DEPT))/REPLY PAPERS (CIVIL PROCEDURE, OKAY FOR BANK TO SUBMIT RENEWED POWER OF ATTORNEY IN REPLY PAPERS, POWER OF ATTORNEY SUBMITTED WITH MOTION PAPERS HAD APPARENTLY EXPIRED AND DEFENDANTS RAISED THE ISSUE IN ANSWERING PAPERS (SECOND DEPT))/FORECLOSURE (CIVIL PROCEDURE, REPLY PAPERS, OKAY FOR BANK TO SUBMIT RENEWED POWER OF ATTORNEY IN REPLY PAPERS, POWER OF ATTORNEY SUBMITTED WITH MOTION PAPERS HAD APPARENTLY EXPIRED AND DEFENDANTS RAISED THE ISSUE IN ANSWERING PAPERS (SECOND DEPT))

CIVIL PROCEDURE, FORECLOSURE.

OKAY FOR BANK TO SUBMIT RENEWED POWER OF ATTORNEY IN REPLY PAPERS, POWER OF ATTORNEY SUBMITTED WITH MOTION PAPERS HAD APPARENTLY EXPIRED AND DEFENDANTS RAISED THE ISSUE IN ANSWERING PAPERS (SECOND DEPT).

The Second Department determined Supreme Court properly considered the submission of a renewed power of attorney in reply papers in this foreclosure proceeding. Apparently the power of attorney submitted with the bank's motion papers had expired:

> Contrary to the appellants' contention, the Supreme Court properly considered a renewed power of attorney submitted by the plaintiff in reply to the appellants' opposition to its motion. "The function of reply papers is to address arguments made in opposition to the position taken by the movant"... . Here, the renewed power of attorney submitted by the plaintiff was offered in response to the appellants' argument made in opposition that the plaintiff's affidavit of merit, signed by the assistant vice president of its servicing agent, was invalid because it was signed after the original power of attorney submitted by the plaintiff had expired. The renewed power of attorney merely clarified that the plaintiff's servicing agent continued to have the authority to act on behalf of the plaintiff at the time the affidavit was signed ... . **Bank of N.Y. Mellon v Hoshmand, 2018 NY Slip Op 00818, Second Dept 2-7-18**

CIVIL PROCEDURE (MOTION TO DISCONTINUE THIS REAL PROPERTY TAX ASSESSMENT CHALLENGE PROPERLY DENIED, CRITERIA EXPLAINED, SUA SPONTE MERGER OF PARCELS, RELIEF NOT REQUESTED BY THE PARTIES, WAS AN ABUSE OF DISCRETION (SECOND DEPT))/DISCONTINUANCE (MOTION TO DISCONTINUE THIS REAL PROPERTY TAX ASSESSMENT CHALLENGE PROPERLY DENIED, CRITERIA EXPLAINED, SUA SPONTE MERGER OF PARCELS, RELIEF NOT REQUESTED BY THE PARTIES, WAS AN ABUSE OF DISCRETION (SECOND DEPT))/SUA SPONTE (MOTION TO DISCONTINUE THIS REAL PROPERTY TAX ASSESSMENT CHALLENGE PROPERLY DENIED, CRITERIA EXPLAINED, SUA SPONTE MERGER OF PARCELS, RELIEF NOT REQUESTED BY THE PARTIES, WAS AN ABUSE OF DISCRETION (SECOND DEPT))/REAL PROPERTY TAX LAW (MOTION TO DISCONTINUE THIS REAL PROPERTY TAX ASSESSMENT CHALLENGE PROPERLY DENIED, CRITERIA EXPLAINED, SUA SPONTE MERGER OF PARCELS, RELIEF NOT REQUESTED BY THE PARTIES, WAS AN ABUSE OF DISCRETION (SECOND DEPT))

CIVIL PROCEDURE, REAL PROPERTY TAX LAW.

MOTION TO DISCONTINUE THIS REAL PROPERTY TAX ASSESSMENT CHALLENGE PROPERLY DENIED, CRITERIA EXPLAINED, SUA SPONTE MERGER OF PARCELS, RELIEF NOT REQUESTED BY THE PARTIES, WAS AN ABUSE OF DISCRETION (SECOND DEPT).

The Second Department determined Supreme Court properly denied petitioner's motion to discontinue the action which challenged the tax assessments of several lots. Supreme Court abused its discretion, however, when it, sua sponte, directed merger of several parcels into a single tax lot:

> A motion for leave to discontinue an action is addressed to the sound discretion of the court ... , and generally should be granted unless the discontinuance would prejudice a substantial right of another party, circumvent an order of the court, avoid the consequences of a potentially adverse determination, or produce other improper results ... .
>
> In this case, the Supreme Court providently exercised its discretion in denying the petitioner's motion, since the record supports the conclusion that the requested discontinuance would prejudice the respondents' ability to defend against the proceeding ... , and was improperly sought to avoid the consequences of a potentially adverse determination and to obtain an improper result.
>
> However, the Supreme Court improvidently exercised its discretion by, sua sponte, directing that the six parcels be merged into a single tax lot. "Generally, a court may, in its discretion, 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'" .. . Here, the court failed to abide by this principle. None of the parties sought merger of the parcels or similar relief, merger of all the parcels at issue into one tax lot is not supported by the record, and merger of all the parcels could be potentially prejudicial to the petitioner. **Matter of Blauvelt Mini-Mall, Inc. v Town of Orangetown, 2018 NY Slip Op 01051, Second Dept 2-14-18**

CIVIL PROCEDURE (DISCOVERY, TAX RETURNS, DEFENDANTS IN THIS WRONGFUL DEATH CASE WERE ENTITLED TO DISCOVERY TAX RETURNS TO DETERMINE WHETHER THE MOTHER AND FATHER WERE MARRIED AT THE TIME OF MOTHER'S DEATH, IF SO, THE STATUTE OF LIMITATIONS HAD PASSED (FOURTH DEPT))/DISCOVERY (TAX RETURNS, DEFENDANTS IN THIS WRONGFUL DEATH CASE WERE ENTITLED TO DISCOVERY TAX RETURNS TO DETERMINE WHETHER THE MOTHER AND FATHER WERE MARRIED AT THE TIME OF MOTHER'S DEATH, IF SO, THE STATUTE OF LIMITATIONS HAD PASSED (FOURTH DEPT))/TAX RETURNS (CIVIL PROCEDURE, DISCOVERY, DEFENDANTS IN THIS WRONGFUL DEATH CASE WERE ENTITLED TO DISCOVERY TAX RETURNS TO DETERMINE WHETHER THE MOTHER AND FATHER WERE MARRIED AT THE TIME OF MOTHER'S DEATH, IF SO, THE STATUTE OF LIMITATIONS HAD PASSED (FOURTH DEPT))/STATUTE OF LIMITATIONS (WRONGFUL DEATH, DISCOVERY, TAX RETURNS, DEFENDANTS IN THIS WRONGFUL DEATH CASE WERE ENTITLED TO DISCOVERY TAX RETURNS TO DETERMINE WHETHER THE MOTHER AND FATHER WERE MARRIED AT THE TIME OF MOTHER'S DEATH, IF SO, THE STATUTE OF LIMITATIONS HAD PASSED (FOURTH DEPT))/WRONGFUL DEATH (DISCOVERY, TAX RETURNS, DEFENDANTS IN THIS WRONGFUL DEATH CASE WERE ENTITLED TO DISCOVERY TAX RETURNS TO DETERMINE WHETHER THE MOTHER AND FATHER WERE MARRIED AT THE TIME OF MOTHER'S DEATH, IF SO, THE STATUTE OF LIMITATIONS HAD PASSED (FOURTH DEPT))/TRUSTS AND ESTATES (WRONGFUL DEATH, DISCOVERY, TAX RETURNS, DEFENDANTS IN THIS WRONGFUL DEATH CASE WERE ENTITLED TO DISCOVERY TAX RETURNS TO DETERMINE WHETHER THE MOTHER AND FATHER WERE MARRIED AT THE TIME OF MOTHER'S DEATH, IF SO, THE STATUTE OF LIMITATIONS HAD PASSED (FOURTH DEPT))

CIVIL PROCEDURE, TRUSTS AND ESTATES.

DEFENDANTS IN THIS WRONGFUL DEATH CASE WERE ENTITLED TO DISCOVERY OF TAX RETURNS TO DETERMINE WHETHER THE MOTHER AND FATHER WERE MARRIED AT THE TIME OF MOTHER'S DEATH, IF SO, THE STATUTE OF LIMITATIONS HAD PASSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendants in this wrongful death case were entitled to discovery of tax returns to determine whether the parents of the plaintiff-children were married. If the parents were married when mother died, the statute of limitations had passed:

> Individual tax returns are generally not discoverable unless the movant makes a " requisite showing that [the] tax returns [are] indispensable to [the] litigation and that [the] relevant information possibly contained therein [is] unavailable from other sources' " ... . A wrongful death action has a two-year statute of limitations from the date of the decedent's death... Where the sole distributee is an infant, the statute is tolled "until appointment of a guardian or the majority of the sole distributee, whichever is earlier"... . Where, however, the decedent is married and the surviving spouse is thus a distributee of the estate, the infancy toll does not apply because the spouse "was available both to seek appointment as the personal representative of the estate and to commence an action on behalf of the children in a timely fashion" ... . **Has K'Paw Mu v Lyon, 2018 NY Slip Op 00687, Fourth Dept 2-2-18**

CIVIL RIGHTS LAW

CIVIL RIGHTS LAW (SLAPP SUITS, ACTION BY YARD WASTE BUSINESS WAS A STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION (SLAPP), DEFAMATION AND RELATED CLAIMS AGAINST NEIGHBOR BASED ON STATEMENT MADE BY THE NEIGHBOR ABOUT THE OPERATION OF THE YARD WASTE BUSINESS SHOULD HAVE BEEN DISMISSED (THIRD DEPT))/ENVIRONMENTAL LAW (SLAPP SUITS, ACTION BY YARD WASTE BUSINESS WAS A STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION (SLAPP), DEFAMATION AND RELATED CLAIMS AGAINST NEIGHBOR BASED ON STATEMENT MADE BY THE NEIGHBOR ABOUT THE OPERATION OF THE YARD WASTE BUSINESS SHOULD HAVE BEEN DISMISSED (THIRD DEPT))/DEFAMATION (SLAPP SUITS, ACTION BY YARD WASTE BUSINESS WAS A STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION (SLAPP), DEFAMATION AND RELATED CLAIMS AGAINST NEIGHBOR BASED ON STATEMENT MADE BY THE NEIGHBOR ABOUT THE OPERATION OF THE YARD WASTE BUSINESS SHOULD HAVE BEEN DISMISSED (THIRD DEPT))/SLAPP SUITS (ACTION BY YARD WASTE BUSINESS WAS A STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION (SLAPP), DEFAMATION AND RELATED CLAIMS AGAINST NEIGHBOR BASED ON STATEMENT MADE BY THE NEIGHBOR ABOUT THE OPERATION OF THE YARD WASTE BUSINESS SHOULD HAVE BEEN DISMISSED (THIRD DEPT))

CIVIL RIGHTS LAW, ENVIRONMENTAL LAW, DEFAMATION.

ACTION BY YARD WASTE BUSINESS WAS A STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION (SLAPP), DEFAMATION AND RELATED CLAIMS AGAINST NEIGHBOR BASED ON STATEMENTS MADE BY THE NEIGHBOR ABOUT THE OPERATION OF THE YARD WASTE BUSINESS SHOULD HAVE BEEN DISMISSED (THIRD DEPT).

The Third Department, modifying Supreme Court, determined that defendants demonstrated the suit against them was a strategic lawsuit against public participation (SLAPP). Therefore plaintiff's motion to dismiss the defendants' anti-SLAPP counterclaim was properly denied. Plaintiff operated a yard-waste-related business. Defendants lived on neighboring properties and had made statements about odors and contamination related to the yard waste. Because the court determined this was a SLAPP suit, the complaint against a defendant based upon statements made by the defendant about plaintiff's yard waste business (alleging defamation, interference with a a business relationship, inter alia) should have been dismissed:

> It is undisputed that, in 2007, plaintiffs registered with the Department of Environmental Conservation (hereinafter DEC) as a yard waste composting facility that accepts between 3,000 to 10,000 cubic yards of waste per year ... . Lawful operation of plaintiffs' composting facility requires DEC permission and ongoing compliance with all applicable regulations and is subject to oversight by DEC ... . In light of the fact that operations pursuant to a registration require DEC permission and are subject to continuing DEC oversight, Supreme Court properly concluded that plaintiffs are public permittees, as defined by Civil Rights Law § 76-a (1) (b) ... .
>
> We also conclude that the relevant conduct challenged in this action — defendants' statements about plaintiffs and the operations conducted at their property — establishes that the action is materially related to plaintiffs' registered yard composting facility. ...
>
> Inasmuch as we have determined that this action involves public petition and participation, to avoid dismissal of the complaint against [defendant] Merced, plaintiffs must demonstrate that any statement they allege she made "was made with knowledge of its falsity or with reckless disregard of whether it was false" (Civil Rights Law § 76-a [2]...) . Plaintiffs failed to meet this burden. **Edwards v Martin, 2018 NY Slip Op 01238, Third Dept 2-22-18**

CONTRACT LAW

CONTRACT LAW (ALLEGATIONS IN COMPLAINT AND AFFIDAVIT SUBMITTED IN RESPONSE TO A MOTION TO DISMISS MUST BE TREATED AS TRUE, PLAINTIFF RAISED A QUESTION OF FACT WHETHER RELEASE PROCURED BY FRAUD (SECOND DEPT))/RELEASES (ALLEGATIONS IN COMPLAINT AND AFFIDAVIT SUBMITTED IN RESPONSE TO A MOTION TO DISMISS MUST BE TREATED AS TRUE, PLAINTIFF RAISED A QUESTION OF FACT WHETHER RELEASE PROCURED BY FRAUD (SECOND DEPT))/FRAUD (RELEASES, ALLEGATIONS IN COMPLAINT AND AFFIDAVIT SUBMITTED IN RESPONSE TO A MOTION TO DISMISS MUST BE TREATED AS TRUE, PLAINTIFF RAISED A QUESTION OF FACT WHETHER RELEASE PROCURED BY FRAUD (SECOND DEPT))/CIVIL PROCEDURE (MOTION TO DISMISS, ALLEGATIONS IN COMPLAINT AND AFFIDAVIT SUBMITTED IN RESPONSE TO A MOTION TO DISMISS MUST BE TREATED AS TRUE, PLAINTIFF RAISED A QUESTION OF FACT WHETHER RELEASE PROCURED BY FRAUD (SECOND DEPT))/CPLR 3211 (a)(5) (ALLEGATIONS IN COMPLAINT AND AFFIDAVIT SUBMITTED IN RESPONSE TO A MOTION TO DISMISS MUST BE TREATED AS TRUE, PLAINTIFF RAISED A QUESTION OF FACT WHETHER RELEASE PROCURED BY FRAUD (SECOND DEPT))

CONTRACT LAW, CIVIL PROCEDURE.

ALLEGATIONS IN COMPLAINT AND AFFIDAVIT SUBMITTED IN RESPONSE TO A MOTION TO DISMISS MUST BE TREATED AS TRUE, PLAINTIFF RAISED A QUESTION OF FACT WHETHER RELEASE PROCURED BY FRAUD (SECOND DEPT).

The Second Department determined defendants' motion to dismiss the complaint in this personal injury action, based upon a release signed by the plaintiff, was properly denied. Plaintiff submitted an affidavit which, together with the complaint, raised the issue whether the release was procured by fraud:

> "In resolving a motion for dismissal pursuant to CPLR 3211(a)(5), the plaintiff's allegations are to be treated as true, all inferences that reasonably flow therefrom are to be resolved in his or her favor, and where, as here, the plaintiff has submitted an affidavit in opposition to the motion, it is to be construed in the same favorable light" ... . "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the cause of action may not be maintained because of . . . [a] release" (CPLR 3211[a][5]). However, a motion pursuant to CPLR 3211(a)(5) to dismiss a complaint on the basis of a release "should be denied where fraud or duress in the procurement of the release is alleged" ... .
>
> Here, in support of their motion to dismiss the complaint, the defendants submitted an affidavit of their insurance carrier's claims representative and a copy of the release signed by the plaintiff, which, by its terms, barred the instant action against them ... . In opposition, however, the plaintiff's allegations were sufficient to raise a question of fact as to whether the defendants procured the release by fraud, whether the release was signed by the plaintiff under circumstances which indicate unfairness, and whether it was "not fairly and knowingly made" ... . **Sacchetti-Virga v Bonilla, 2018 NY Slip Op 01210, Second Dept 2-21-18**

CONTRACT LAW (UNEXECUTED CONTRACT THAT COULD NOT BE COMPLETED WITHIN A LIFETIME NOT ENFORCEABLE, ATTORNEY WHO REPRESENTED THE DEFENDANT LLC SHOULD HAVE BEEN DISQUALIFIED IN THIS ACTION BROUGHT ON BEHALF OF A DECEASED MEMBER (SECOND DEPT))/STATUTE OF FRAUDS (UNEXECUTED CONTRACT THAT COULD NOT BE COMPLETED WITHIN A LIFETIME NOT ENFORCEABLE, ATTORNEY WHO REPRESENTED THE DEFENDANT LLC SHOULD HAVE BEEN DISQUALIFIED IN THIS ACTION BROUGHT ON BEHALF OF A DECEASED MEMBER (SECOND DEPT))/GENERAL OBLIGATIONS LAW (STATUTE OF FRAUDS, UNEXECUTED CONTRACT THAT COULD NOT BE COMPLETED WITHIN A LIFETIME NOT ENFORCEABLE, ATTORNEY WHO REPRESENTED THE DEFENDANT LLC SHOULD HAVE BEEN DISQUALIFIED IN THIS ACTION BROUGHT ON BEHALF OF A DECEASED MEMBER (SECOND DEPT))/CORPORATION LAW (ATTORNEYS, CONFLICT OF INTEREST, UNEXECUTED CONTRACT THAT COULD NOT BE COMPLETED WITHIN A LIFETIME NOT ENFORCEABLE, ATTORNEY WHO REPRESENTED THE DEFENDANT LLC SHOULD HAVE BEEN DISQUALIFIED IN THIS ACTION BROUGHT ON BEHALF OF A DECEASED MEMBER (SECOND DEPT))/LIMITED LIABILITY COMPANY LAW (ATTORNEYS, CONFLICT OF INTEREST, UNEXECUTED CONTRACT THAT COULD NOT BE COMPLETED WITHIN A LIFETIME NOT ENFORCEABLE, ATTORNEY WHO REPRESENTED THE DEFENDANT LLC SHOULD HAVE BEEN DISQUALIFIED IN THIS ACTION BROUGHT ON BEHALF OF A DECEASED MEMBER (SECOND DEPT))/ATTORNEYS (CONFLICT OF INTEREST, UNEXECUTED CONTRACT THAT COULD NOT BE COMPLETED WITHIN A LIFETIME NOT ENFORCEABLE, ATTORNEY WHO REPRESENTED THE DEFENDANT LLC SHOULD HAVE BEEN DISQUALIFIED IN THIS ACTION BROUGHT ON BEHALF OF A DECEASED MEMBER (SECOND DEPT))/CONFLICT OF INTEREST (ATTORNEYS, LIMITED LIABILITY COMPANY LAW, (UNEXECUTED CONTRACT THAT COULD NOT BE COMPLETED WITHIN A LIFETIME NOT ENFORCEABLE, ATTORNEY WHO REPRESENTED THE DEFENDANT LLC SHOULD HAVE BEEN DISQUALIFIED IN THIS ACTION BROUGHT ON BEHALF OF A DECEASED MEMBER (SECOND DEPT))

CONTRACT LAW, LIMITED LIABILITY COMPANY LAW, ATTORNEYS.

UNEXECUTED CONTRACT THAT COULD NOT BE COMPLETED WITHIN A LIFETIME NOT ENFORCEABLE, ATTORNEY WHO REPRESENTED THE DEFENDANT LLC SHOULD HAVE BEEN DISQUALIFIED IN THIS ACTION BROUGHT ON BEHALF OF A DECEASED MEMBER (SECOND DEPT).

The Second Department, modifying Supreme Court, determined plaintiff's breach of contract action based upon an unexecuted contract which could not be completed within a lifetime was properly granted. Plaintiff's decedent was a member of a limited liability company (Ocean Rich) which had taken out a life insurance policy for plaintiff's decedent, payable to Ocean State. The agreement which was never signed would have required that the proceeds of the policy be used to buy out plaintiff's decedent's share of the LLC. The Second Department further determined counsel for the defendant LLC should be disqualified because he had represented the LLC before plaintiff's decedent's death:

> ... [T]he defendants demonstrated their prima facie entitlement to judgment as a matter of law dismissing the causes of action to recover damages for breach of contract, breach of the implied covenant of good faith and fair dealing, and tortious interference with contract, by submitting evidence that the agreement was never executed by the members of Ocean Rich, and therefore does not satisfy the statute of frauds. ... Since the alleged promise upon which the plaintiff relied—that Ocean Rich would purchase the decedent's interest in it from his estate with the proceeds of the subject insurance policy—could not, by its terms, "be completed before the end of a lifetime," the Supreme Court properly granted [defendants' motion for summary judgment]. ...
>
> ... [T]he plaintiff alleged in an affidavit that the defendants' counsel was involved in the formation of Ocean Rich, and the defendants' counsel admitted that he had represented Ocean Rich in "various past matters." Counsel's prior representation of Ocean Rich "was in fact represent[ation of] its [three] shareholders," whose competing interests are at issue in this action ... . Likewise, counsel's involvement in the formation of Ocean Rich and his representation of it against third parties was "substantially related" to the present action... . Since the defendants' counsel was "in a position to receive relevant confidences" from the decedent, whose estate's interests "are now adverse to the defendant[s'] interests," the Supreme Court should have granted that branch of the plaintiff's cross motion which was to disqualify the defendants' counsel ... . **Deerin v Ocean Rich Foods, LLC, 2018 NY Slip Op 00820, Second Dept 2-7-18**

CONTRACT LAW (PLAINTIFF ALLEGED CONTINUING BREACHES OF CONTRACT, AIDING AND ABETTING FRAUD, NEGLIGENT MISREPRESENTATION AND AIDING AND ABETTING BREACH OF FIDUCIARY DUTY FOR THE DURATION OF THE WORKERS' COMPENSATION TRUST, WHICH WAS TERMINATED 25 DAYS BEFORE THE EXPIRATION OF THE SIX YEAR STATUTE OF LIMITATIONS, THOSE CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (THIRD DEPT))/ FRAUD (PLAINTIFF ALLEGED CONTINUING BREACHES OF CONTRACT, AIDING AND ABETTING FRAUD, NEGLIGENT MISREPRESENTATION AND AIDING AND ABETTING BREACH OF FIDUCIARY DUTY FOR THE DURATION OF THE WORKERS' COMPENSATION TRUST, WHICH WAS TERMINATED 25 DAYS BEFORE THE EXPIRATION OF THE SIX YEAR STATUTE OF LIMITATIONS, THOSE CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (THIRD DEPT))/MISREPRESENTATION (PLAINTIFF ALLEGED CONTINUING BREACHES OF CONTRACT, AIDING AND ABETTING FRAUD, NEGLIGENT MISREPRESENTATION AND AIDING AND ABETTING BREACH OF FIDUCIARY DUTY FOR THE DURATION OF THE WORKERS' COMPENSATION TRUST, WHICH WAS TERMINATED 25 DAYS BEFORE THE EXPIRATION OF THE SIX YEAR STATUTE OF LIMITATIONS, THOSE CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (THIRD DEPT))/FIDUCIARY DUTY, BREACH OF PLAINTIFF ALLEGED CONTINUING BREACHES OF CONTRACT, AIDING AND ABETTING FRAUD, NEGLIGENT MISREPRESENTATION AND AIDING AND ABETTING BREACH OF FIDUCIARY DUTY FOR THE DURATION OF THE WORKERS' COMPENSATION TRUST, WHICH WAS TERMINATED 25 DAYS BEFORE THE EXPIRATION OF THE SIX YEAR STATUTE OF LIMITATIONS, THOSE CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (THIRD DEPT))/CIVIL PROCEDURE (STATUTE OF LIMITATIONS, PLAINTIFF ALLEGED CONTINUING BREACHES OF CONTRACT, AIDING AND ABETTING FRAUD, NEGLIGENT MISREPRESENTATION AND AIDING AND ABETTING BREACH OF FIDUCIARY DUTY FOR THE DURATION OF THE WORKERS' COMPENSATION TRUST, WHICH WAS TERMINATED 25 DAYS BEFORE THE EXPIRATION OF THE SIX YEAR STATUTE OF LIMITATIONS, THOSE CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (THIRD DEPT))/STATUTE OF LIMITATIONS (PLAINTIFF ALLEGED CONTINUING BREACHES OF CONTRACT, AIDING AND ABETTING FRAUD, NEGLIGENT MISREPRESENTATION AND AIDING AND ABETTING BREACH OF FIDUCIARY DUTY FOR THE DURATION OF THE WORKERS' COMPENSATION TRUST, WHICH WAS TERMINATED 25 DAYS BEFORE THE EXPIRATION OF THE SIX YEAR STATUTE OF LIMITATIONS, THOSE CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (THIRD DEPT))/WORKERS' COMPENSATION TRUST (PLAINTIFF ALLEGED CONTINUING BREACHES OF CONTRACT, AIDING AND ABETTING FRAUD, NEGLIGENT MISREPRESENTATION AND AIDING AND ABETTING BREACH OF FIDUCIARY DUTY FOR THE DURATION OF THE WORKERS' COMPENSATION TRUST, WHICH WAS TERMINATED 25 DAYS BEFORE THE EXPIRATION OF THE SIX YEAR STATUTE OF LIMITATIONS, THOSE CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (THIRD DEPT))/INSURANCE LAW (WORKERS'S COMPENSATION TRUST, PLAINTIFF ALLEGED CONTINUING BREACHES OF CONTRACT, AIDING AND ABETTING FRAUD, NEGLIGENT MISREPRESENTATION AND AIDING AND ABETTING BREACH OF FIDUCIARY DUTY FOR THE DURATION OF THE WORKERS' COMPENSATION TRUST, WHICH WAS TERMINATED 25 DAYS BEFORE THE EXPIRATION OF THE SIX YEAR STATUTE OF LIMITATIONS, THOSE CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (THIRD DEPT))

CONTRACT LAW, FRAUD, CIVIL PROCEDURE.

PLAINTIFF ALLEGED CONTINUING BREACHES OF CONTRACT, AIDING AND ABETTING FRAUD, NEGLIGENT MISREPRESENTATION AND AIDING AND ABETTING BREACH OF FIDUCIARY DUTY FOR THE DURATION OF THE DEBT-RIDDEN WORKERS' COMPENSATION TRUST, WHICH WAS TERMINATED 25 DAYS BEFORE THE EXPIRATION OF THE SIX YEAR STATUTE OF LIMITATIONS, THOSE CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (THIRD DEPT).

The Third Department, modifying Supreme Court, determined the causes of action for breach of contract, aiding and abetting fraud and negligent misrepresentation, and aiding and abetting a breach of fiduciary duty should not have been dismissed as time barred. The underlying suit is based on the allegation that defendant insurance broker was on the board of a Workers' Compensation trust, which plaintiff had joined, and which was $82 million in debt. The Third Department held that the six-year statute of limitations applied to all the (above-described) causes of action and the complaint alleged continuing breaches throughout the period of membership in the trust, which terminated 25 days before the expiration of the statute of limitations (i.e., the six-year period before the suit was brought extended back to March 24, 2008, and the trust was terminated on April 17, 2008):

> ... [T]he amended complaint alleges continuing contractual obligations on the part of defendant and specifies that the various acts and omissions constituting the breaches occurred "[t]hroughout the entire course of [p]laintiff's membership in the [t]rust." Deeming these allegations as true and according them every favorable inference, as we

must ... , we conclude that defendant failed to make the requisite prima facie showing that plaintiff's breach of contract claim is time-barred in its entirety ... .

[P]laintiff's causes of action for negligent misrepresentation and aiding and abetting fraud are timely insofar as they allege conduct occurring [during the 25 day window]. ...

... [W]e disagree with Supreme Court's conclusion that the entirety of plaintiff's aiding and abetting breach of fiduciary duty claim is governed by a three-year statute of limitations. Because plaintiff does not seek equitable relief, a six-year statute of limitations period applies to a breach of fiduciary duty cause of action if "an allegation of fraud is essential to" such claim ... . While a claim of fraud generally requires an affirmative misrepresentation, "fraud may also result from a fiduciary's failure to disclose material facts when the fiduciary had a duty to disclose and acted with the intent to deceive" ... . **Krog Corp. v Vanner Group, Inc., 2018 NY Slip Op 00876, Third Dept 2-8-18**

CONTRACT LAW (MEDICAL MALPRACTICE, COMPLAINT ALLEGING BREACH OF A CONTRACT TO PROVIDE MEDICAL SERVICES PROPERLY DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION (SECOND DEPT))/MEDICAL MALPRACTICE (CONTRACT LAW, COMPLAINT ALLEGING BREACH OF A CONTRACT TO PROVIDE MEDICAL SERVICES PROPERLY DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION (SECOND DEPT))

CONTRACT LAW, MEDICAL MALPRACTICE.

COMPLAINT ALLEGING BREACH OF A CONTRACT TO PROVIDE MEDICAL SERVICES PROPERLY DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION (SECOND DEPT).

The Second Department determined plaintiff's breach of contract action in this medical malpractice case was properly dismissed for failure to state a cause of action:

... [A] cause of action to recover damages for breach of contract to provide medical services "will withstand a test to its legal sufficiency only where it is based upon an express special promise to effect a cure or to accomplish some definite result"... . Here, the plaintiff's allegations, even supplemented by her affidavit submitted in opposition to the defendants' motion to dismiss the complaint, failed to state a cause of action to recover damages for breach of contract to provide medical services. The plaintiff's allegations as to the formation and terms of any alleged contract are vague and entirely conclusory. Moreover, the alleged damages, which are in the nature of pain and suffering, are not recoverable in a cause of action to recover damages for breach of contract to provide medical services ... . **Detringo v South Is. Family Med., LLC, 2018 NY Slip Op 00821, Second Dept 2-7-18**

CONTRACT LAW (PLAINTIFF'S SILENCE COUPLED WITH GOING FORWARD TO ENTER THE LEASE CONSTITUTED ACCEPTANCE OF THE REAL ESTATE BROKER'S COUNTEROFFER FOR THE BROKERAGE FEE (SECOND DEPT))/COUNTEROFFER (CONTRACT LAW, REAL ESTATE, PLAINTIFF'S SILENCE COUPLED WITH GOING FORWARD TO ENTER THE LEASE CONSTITUTED ACCEPTANCE OF THE REAL ESTATE BROKER'S COUNTEROFFER FOR THE BROKERAGE FEE (SECOND DEPT))/REAL ESTATE (BROKERAGE FEE, CONTRACT LAW, PLAINTIFF'S SILENCE COUPLED WITH GOING FORWARD TO ENTER THE LEASE CONSTITUTED ACCEPTANCE OF THE REAL ESTATE BROKER'S COUNTEROFFER FOR THE BROKERAGE FEE (SECOND DEPT))/SILENCE (CONTRACT LAW, COUNTEROFFER, PLAINTIFF'S SILENCE COUPLED WITH GOING FORWARD TO ENTER THE LEASE CONSTITUTED ACCEPTANCE OF THE REAL ESTATE BROKER'S COUNTEROFFER FOR THE BROKERAGE FEE (SECOND DEPT))

CONTRACT LAW, REAL ESTATE.

PLAINTIFF'S SILENCE COUPLED WITH GOING FORWARD TO ENTER THE LEASE CONSTITUTED ACCEPTANCE OF THE REAL ESTATE BROKER'S COUNTEROFFER FOR THE BROKERAGE FEE (SECOND DEPT).

The First Department determined plaintiff's silence after defendant real estate broker's counteroffer for the brokerage fee, coupled with plaintiff's going ahead to enter the lease procured by the broker, constituted acceptance of the counteroffer:

> ...[T]he plaintiff established, prima facie, its entitlement to a judgment declaring that the brokerage commission due was five percent of the rent for the first five years of the lease agreement by submitting evidence that the defendant did not reject the counteroffer, but instead proceeded to have its client enter into the lease agreement. "While mere silence, when not misleading, cannot be construed as acceptance, a counteroffer may be accepted by conduct"... . The defendant's conduct of moving forward with the lease agreement upon receiving the plaintiff's counteroffer established that the objective manifestation of the parties' intent was an agreement to the brokerage rate set forth in the counteroffer ... . **Gator Hillside Vil., LLC v Schuckman Realty, Inc., 2018 NY Slip Op 01178, Second Dept 2-21-18**

CRIMINAL LAW

CRIMINAL LAW (INCOMPLETE JURY INSTRUCTION ON THE DEFINITION OF 'BUILDING' REQUIRED A NEW TRIAL IN THIS BURGLARY PROSECUTION (FOURTH DEPT))/JURY INSTRUCTIONS (CRIMINAL LAW, BURGLARY, (INCOMPLETE JURY INSTRUCTION ON THE DEFINITION OF 'BUILDING' REQUIRED A NEW TRIAL IN THIS BURGLARY PROSECUTION (FOURTH DEPT))/BURGLARY (JURY INSTRUCTIONS, INCOMPLETE JURY INSTRUCTION ON THE DEFINITION OF 'BUILDING' REQUIRED A NEW TRIAL IN THIS BURGLARY PROSECUTION (FOURTH DEPT))/BUILDING (DEFINITION, BURGLARY STATUTE, INCOMPLETE JURY INSTRUCTION ON THE DEFINITION OF 'BUILDING' REQUIRED A NEW TRIAL IN THIS BURGLARY PROSECUTION (FOURTH DEPT))

CRIMINAL LAW.

INCOMPLETE JURY INSTRUCTION ON THE DEFINITION OF 'BUILDING' REQUIRED A NEW TRIAL IN THIS BURGLARY PROSECUTION (FOURTH DEPT).

The Fourth Department determined defendant was entitled to a new trial because the court did not properly instruct the jury on the definition of a "building" within the meaning of the burglary statute:

> ... "[T]he court instructed the jurors that a dwelling is a building which is usually occupied by a person lodging therein at night. A bedroom in a home, where there is more than one tenant, may be considered independent of the rest of the house and may be considered a separate dwelling within a building.' The court, however, failed to include the part of the definition of building that would require the jury to determine whether the house at issue consisted of two or more units' and whether the bedroom at issue was a unit that was separately secured or occupied' (Penal Law § 140.00 [2]). Consequently, given the omission of the definition of ["unit"] and/or ["separately secured or occupied,"] the instruction did not adequately convey the meaning of ["building"] to the jury and instead created a great likelihood of confusion such that the degree of precision required for a jury charge was not met' " ... . **People v Downey, 2018 NY Slip Op 00758, Fourth Dept 2-2-18**

CRIMINAL LAW (REPUGNANT VERDICTS, PETITION TO PROHIBIT RETRIAL OF A MANSLAUGHTER COUNT DENIED, ALTHOUGH THE FOURTH DEPARTMENT DISMISSED THE COUNT AFTER DETERMINING THE VERDICT WAS REPUGNANT, THE COURT OF APPEALS, AGREEING THAT THE VERDICT WAS REPUGNANT, HELD THAT THE PEOPLE COULD SEEK A SECOND INDICTMENT (FOURTH DEPT))/REPUGNANT VERDICTS (CRIMINAL LAW, PETITION TO PROHIBIT RETRIAL OF A MANSLAUGHTER COUNT DENIED, ALTHOUGH THE FOURTH DEPARTMENT DISMISSED THE COUNT AFTER DETERMINING THE VERDICT WAS REPUGNANT, THE COURT OF APPEALS, AGREEING THAT THE VERDICT WAS REPUGNANT, HELD THAT THE PEOPLE COULD SEEK A SECOND INDICTMENT (FOURTH DEPT))

CRIMINAL LAW.

PETITION TO PROHIBIT RETRIAL OF A MANSLAUGHTER COUNT DENIED, ALTHOUGH THE FOURTH DEPARTMENT DISMISSED THE COUNT AFTER DETERMINING THE VERDICT WAS REPUGNANT, THE COURT OF APPEALS, AGREEING THAT THE VERDICT WAS REPUGNANT, HELD THAT THE PEOPLE COULD SEEK A SECOND INDICTMENT (FOURTH DEPT).

The Fourth Department dismissed an Article 78 petition seeking to prohibit retrial in a manslaughter case. The Fourth Department had dismissed the manslaughter count after determining the verdict was repugnant. The Court of Appeals agreed the verdict was repugnant but held that dismissal of the was not required:

> Petitioner was convicted of manslaughter in the first degree as a hate crime ... and criminal possession of a weapon in the third degree ... . On appeal from the judgment of conviction, we determined that the verdict convicting him of manslaughter in the first degree as a hate crime yet acquitting him of manslaughter in the first degree was inconsistent, i.e., " legally impossible,' " inasmuch as all of the elements of manslaughter in the first degree are elements of manslaughter in the first degree as a hate crime ... . We thus modified the judgment by reversing that part convicting him of manslaughter in the first degree as a hate crime and dismissing that count of the indictment.
>
> The Court of Appeals agreed that "the jury's verdict was inconsistent, and thus repugnant" ... , but disagreed with our remedy of dismissal. The Court explained that there is "no constitutional or statutory provision that mandates dismissal for a repugnancy error," ... and that "a repugnant verdict does not always signify that a defendant has been convicted of a crime on which the jury actually found that he did not commit an essential element" ... . As a result, the Court determined that the People could "resubmit the crime of first-degree manslaughter as a hate crime to a new grand jury" ... . **Matter of DeLee v Brunetti, 2018 NY Slip Op 00742, Fourth Dept 2-2-18**

CRIMINAL LAW (PAROLE, JUVENILES, FOR INMATES WHO COMMITTED CRIMES AS JUVENILES, THEIR YOUTH MUST BE TAKEN INTO CONSIDERATION IN PAROLE DETERMINATIONS (SECOND DEPT))PAROLE (JUVENILE OFFENDERS, FOR INMATES WHO COMMITTED CRIMES AS JUVENILES, THEIR YOUTH MUST BE TAKEN INTO CONSIDERATION IN PAROLE DETERMINATIONS (SECOND DEPT)

CRIMINAL LAW.

FOR INMATES WHO COMMITTED CRIMES AS JUVENILES, THEIR YOUTH MUST BE TAKEN INTO CONSIDERATION IN PAROLE DETERMINATIONS (SECOND DEPT).

The Second Department affirmed Supreme Court's ruling sending the matter back for a de novo parole interview. Petitioner was 17 when he committed murder and is now 50. Pursuant to a decision from the Third Department, the parole board has decided to include an inmate's youth at the time of the crime in making parole determinations:

> ... [W]e deem it appropriate to affirm the judgment that annulled the Parole Board's determination and remitted the matter to the Parole Board for a de novo interview before a different panel. The petitioner is entitled to a meaningful opportunity for release in which the Parole Board considers, inter alia, his youth at the time of the commission of the crimes and its attendant circumstances ... . **Matter of Putland v New York State Dept. of Corr. & Community Supervision, 2018 NY Slip Op 00837, Second Dept 2-7-18**

CRIMINAL LAW (SECOND FELONY OFFENDER STATUS CANNOT BE BASED UPON A PRIOR FEDERAL DRUG CONSPIRACY CONVICTION (FOURTH DEPT))/SENTENCING (SECOND FELONY OFFENDER STATUS CANNOT BE BASED UPON A PRIOR FEDERAL DRUG CONSPIRACY CONVICTION (FOURTH DEPT))/SECOND FELONY OFFENDER (SECOND FELONY OFFENDER STATUS CANNOT BE BASED UPON A PRIOR FEDERAL DRUG CONSPIRACY CONVICTION (FOURTH DEPT))

CRIMINAL LAW.

SECOND FELONY OFFENDER STATUS CANNOT BE BASED UPON A PRIOR FEDERAL DRUG CONSPIRACY CONVICTION (FOURTH DEPT).

The Fourth Department determined defendant should not have been sentenced as a second felony offender based upon a prior federal drug conspiracy conviction:

> "It is well settled that, under New York's strict equivalency standard for convictions rendered in other jurisdictions, a federal conviction for conspiracy to commit a drug crime may not serve as a predicate felony for sentencing purposes" ... . We therefore modify the order by granting that part of defendant's motion pursuant to CPL 440.20 seeking to vacate the sentence, and we remit the matter to Supreme Court to resentence defendant as a nonpredicate felon ... . **People v Hamn, 2018 NY Slip Op 00961, Fourth Dept 2-9-18**

CRIMINAL LAW (DEFENDANT'S MOTION TO DISMISS THE INDICTMENT ON SPEEDY TRIAL GROUNDS SHOULD NOT HAVE BEEN GRANTED, THE UNAVAILABILITY OF A WITNESS AND THE RELATED ADJOURNMENT SHOULD NOT HAVE BEEN CHARGED TO THE PEOPLE (FOURTH DEPT))/SPEEDY TRIAL (CRIMINAL LAW, DEFENDANT'S MOTION TO DISMISS THE INDICTMENT ON SPEEDY TRIAL GROUNDS SHOULD NOT HAVE BEEN GRANTED, THE UNAVAILABILITY OF A WITNESS AND THE RELATED ADJOURNMENT SHOULD NOT HAVE BEEN CHARGED TO THE PEOPLE (FOURTH DEPT))

CRIMINAL LAW.

DEFENDANT'S MOTION TO DISMISS THE INDICTMENT ON SPEEDY TRIAL GROUNDS SHOULD NOT HAVE BEEN GRANTED, THE UNAVAILABILITY OF A WITNESS AND THE RELATED ADJOURNMENT SHOULD NOT HAVE BEEN CHARGED TO THE PEOPLE (FOURTH DEPT).

The Fourth Department, reversing County Court, determined defendant's motion to dismiss the indictment on speedy trial grounds should not have been granted. The delay attributed to the unavailability of a witness and the related adjournment should not have been charged to the People:

> We agree with the People that a witness's one-day unavailability while her father is undergoing heart surgery is an excludable delay that was "occasioned by exceptional circumstances" ... . Moreover, the ensuing 21-day adjournment until February 2, 2017 was attributable to the court and not chargeable to the People ... , inasmuch as the People had requested a one-day adjournment and "any period of an adjournment in excess of that actually requested by the People is excluded" ... . **People v Barnett, 2018 NY Slip Op 00968, Fourth Dept 2-9-18**

CRIMINAL LAW (YOUTHFUL OFFENDER, SENTENCING COURT IS OBLIGATED TO CONSIDER YOUTHFUL OFFENDER STATUS, DESPITE THE ABSENCE OF ANY MENTION OF IT IN THE PLEA OFFER (FOURTH DEPT))/YOUTHFUL OFFENDER (CRIMINAL LAW, SENTENCING COURT IS OBLIGATED TO CONSIDER YOUTHFUL OFFENDER STATUS, DESPITE THE ABSENCE OF ANY MENTION OF IT IN THE PLEA OFFER (FOURTH DEPT))/SENTENCING (YOUTHFUL OFFENDER, SENTENCING COURT IS OBLIGATED TO CONSIDER YOUTHFUL OFFENDER STATUS, DESPITE THE ABSENCE OF ANY MENTION OF IT IN THE PLEA OFFER (FOURTH DEPT))/PLEA AGREEMENT (CRIMINAL LAW, YOUTHFUL OFFENDER, SENTENCING COURT IS OBLIGATED TO CONSIDER YOUTHFUL OFFENDER STATUS, DESPITE THE ABSENCE OF ANY MENTION OF IT IN THE PLEA OFFER (FOURTH DEPT))

CRIMINAL LAW.

SENTENCING COURT IS OBLIGATED TO CONSIDER YOUTHFUL OFFENDER STATUS, DESPITE THE ABSENCE OF ANY MENTION OF IT IN THE PLEA OFFER (FOURTH DEPT).

The Fourth Department, vacating defendant's sentence, noted that the failure to mention youthful offender treatment in a plea offer does not constrain the court from considering it:

> There is no dispute that defendant was eligible ... for youthful offender treatment (see CPL 720.10). Nevertheless, based on comments that the court made in denying defendant's request for youthful offender treatment, it appears that the court believed that it was constrained to deny defendant's request simply because it was not contemplated by the People's plea offer. ...

"Compliance with CPL 720.20 (1) requires the sentencing court to actually consider and make an independent determination of whether an eligible youth is entitled to youthful offender treatment" ... . Inasmuch as the Court of Appeals has held that CPL 720.20 (1) mandates "that there be a youthful offender determination in every case where the defendant is eligible, even where the defendant . . . agrees to forgo it as part of a plea bargain" ... , a new sentencing proceeding is required... . **People v Hobbs, 2018 NY Slip Op 00995, Fourth Dept 2-9-18**

CRIMINAL LAW (JUSTIFICATION DEFENSE, JURY SHOULD HAVE BEEN INSTRUCTED IT COULD CONSIDER THE ACTIONS OF COMPLAINANT'S HUSBAND IN DETERMINING WHETHER THE JUSTIFICATION DEFENSE APPLIED IN THIS ASSAULT CASE (SECOND DEPT))/JUSTIFICATION DEFENSE (JURY SHOULD HAVE BEEN INSTRUCTED IT COULD CONSIDER THE ACTIONS OF COMPLAINANT'S HUSBAND IN DETERMINING WHETHER THE JUSTIFICATION DEFENSE APPLIED IN THIS ASSAULT CASE (SECOND DEPT))/JURY INSTRUCTIONS (CRIMINAL LAW, JUSTIFICATION DEFENSE, JURY SHOULD HAVE BEEN INSTRUCTED IT COULD CONSIDER THE ACTIONS OF COMPLAINANT'S HUSBAND IN DETERMINING WHETHER THE JUSTIFICATION DEFENSE APPLIED IN THIS ASSAULT CASE (SECOND DEPT))

CRIMINAL LAW.

JURY SHOULD HAVE BEEN INSTRUCTED IT COULD CONSIDER THE ACTIONS OF COMPLAINANT'S HUSBAND IN DETERMINING WHETHER THE JUSTIFICATION DEFENSE APPLIED IN THIS ASSAULT CASE (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the jury should have been instructed that it could consider the actions of the complainant's husband in this assault case. The defendant raised the justification defense. The altercation leading to the assault charge involved both the complainant and her husband:

... [A] new trial is required because the trial court erroneously declined the defendant's request that the jury be instructed that it could consider the actions of the complainant's husband in determining whether the defendant's use of force was justified ... . Contrary to the People's contention, the error cannot be deemed harmless, as the evidence to establish that the defendant was not justified was not overwhelming, and the jury may have reached a different conclusion had a proper and complete justification instruction been given ... . Significantly, the defendant's case rested on finding that he was justified in responding to the actions of the complainant's husband ... . **People v Lijo, 2018 NY Slip Op 01081, Second Dept 2-14-18**

CRIMINAL LAW (SUPERIOR COURT INFORMATION, RESTITUTION, NO NEED TO SPECIFY CRIME TO BE COMMITTED DURING A CHARGED BURGLARY IN THE SUPERIOR COURT INFORMATION, RESTITUTION FOR AN UNCHARGED BURGLARY IMPROPERLY ORDERED (THIRD DEPT))/BURGLARY (SUPERIOR COURT INFORMATION, RESTITUTION, NO NEED TO SPECIFY CRIME TO BE COMMITTED DURING A CHARGED BURGLARY IN THE SUPERIOR COURT INFORMATION, RESTITUTION FOR AN UNCHARGED BURGLARY IMPROPERLY ORDERED (THIRD DEPT))/SUPERIOR COURT INFORMATION (SCI) (BURGLARY, NO NEED TO SPECIFY CRIME TO BE COMMITTED DURING A CHARGED BURGLARY IN THE SUPERIOR COURT INFORMATION, RESTITUTION FOR AN UNCHARGED BURGLARY IMPROPERLY ORDERED (THIRD DEPT))/RESTITUTION (BURGLARY, RESTITUTION FOR AN UNCHARGED BURGLARY IMPROPERLY ORDERED (THIRD DEPT))

CRIMINAL LAW.

NO NEED TO SPECIFY CRIME TO BE COMMITTED DURING A CHARGED BURGLARY IN THE SUPERIOR COURT INFORMATION, RESTITUTION FOR AN UNCHARGED BURGLARY IMPROPERLY ORDERED (THIRD DEPT).

The Third Department determined the superior court information (SCI) charging burglary did not need to specify the crime to be committed during the robbery. The court further found that it was error to impose restitution for a burglary which was not charged in SCI:

> Defendant further asserts that the SCI is jurisdictionally defective because it did not identify the underlying crime that he intended to commit during the burglary. We are not persuaded. "A charging instrument that incorporates by reference the statutory provisions applicable to the crime charged has been held to allege the material elements of the crime sufficiently to survive a jurisdictional challenge"... . Here, the SCI specifically referenced Penal Law § 140.20, which defines burglary in the third degree. Significantly, the statute does not specify that the underlying crime must be identified (see Penal Law § 140.20), nor has this been held to be a requirement... . Consequently, we find that the SCI validly charged defendant with two counts of burglary in the third degree, to which he pleaded guilty. ...
>
> As for the restitution award, the People concede that County Court erroneously included the amount of $31,000 as compensation to the owner of the Halfmoon restaurant when there was no accusatory instrument filed charging defendant with any crimes related thereto. We must agree. "Penal Law § 60.27 permits a trial court to require restitution arising from 'the offense for which a defendant was convicted, as well as any other offense that is part of the same criminal transaction or that is contained in any other accusatory instrument disposed of by any plea of guilty by the defendant to an offense'" ... . **People v Suits, 2018 NY Slip Op 01098, Third Dept 2-15-18**

CRIMINAL LAW (DEFENSE COUNSEL, DURING VOIR DIRE, RELIED ON THE PEOPLE'S REPRESENTATION THAT THE COMPLAINANT WOULD NOT TESTIFY, BEFORE OPENING STATEMENTS DEFENSE COUNSEL WAS INFORMED THE COMPLAINANT WOULD TESTIFY, NEW TRIAL ORDERED (FIRST DEPT))/VOIR DIRE (CRIMINAL LAW, DEFENSE COUNSEL, DURING VOIR DIRE, RELIED ON THE PEOPLE'S REPRESENTATION THAT THE COMPLAINANT WOULD NOT TESTIFY, BEFORE OPENING STATEMENTS DEFENSE COUNSEL WAS INFORMED THE COMPLAINANT WOULD TESTIFY, NEW TRIAL ORDERED (FIRST DEPT))/WITNESSES (CRIMINAL LAW, DEFENSE COUNSEL, DURING VOIR DIRE, RELIED ON THE PEOPLE'S REPRESENTATION THAT THE COMPLAINANT WOULD NOT TESTIFY, BEFORE OPENING STATEMENTS DEFENSE COUNSEL WAS INFORMED THE COMPLAINANT WOULD TESTIFY, NEW TRIAL ORDERED (FIRST DEPT))

CRIMINAL LAW.

DEFENSE COUNSEL, DURING VOIR DIRE, RELIED ON THE PEOPLE'S REPRESENTATION THAT THE COMPLAINANT WOULD NOT TESTIFY, BEFORE OPENING STATEMENTS DEFENSE COUNSEL WAS INFORMED THE COMPLAINANT WOULD TESTIFY, NEW TRIAL ORDERED (FIRST DEPT).

The First Department, reversing defendant's conviction, determined defense counsel had relied, during voir dire, on the People's representation that the complainant could not be located and would not testify. After voir dire, but before opening statements, defense counsel was informed the complainant had been found and would testify:

> The People had omitted the complainant from their witness list because they were unable to locate him in the two years between the incident and the trial. However, after the jury was selected, and just before opening arguments, they advised the court that they had located the complainant, and the court permitted him to testify the next day.
>
> Defense counsel clearly "relied to her detriment on her expectation that the People would not call this witness," the sole eyewitness to the incident, and was substantially prejudiced by the change of course... . Defense counsel had used voir dire to question jurors about other issues, including their ability to evaluate videotape evidence, believing that this would be the main evidence in the case, and she had not questioned prospective jurors about their ability to impartially evaluate a victim's testimony. In addition, because the defense had represented to the jury during voir dire that no complainant would appear, the complainant's appearance at trial would undermine the defense's credibility.
>
> Thus, as counsel pointed out, her questioning and selection of jurors was geared entirely to a trial without the complainant's testimony, and was totally unsuited to a trial with his testimony. **People v Kyser, 2018 NY Slip Op 01160, Frist Dept 2-20-18**

CRIMINAL LAW (JUSTIFICATION DEFENSE, JURY SHOULD HAVE BEEN INSTRUCTED ON THE JUSTIFICATION DEFENSE, THERE WAS EVIDENCE THE DECEDENT WAS ADVANCING TOWARD DEFENDANT, THROWING PUNCHES AND TRYING TO GRAB THE GUN DEFENDANT WAS HOLDING (FIRST DEPT))/JUSTIFICATION DEFENSE (CRIMINAL LAW, JURY SHOULD HAVE BEEN INSTRUCTED ON THE JUSTIFICATION DEFENSE, THERE WAS EVIDENCE THE DECEDENT WAS ADVANCING TOWARD DEFENDANT, THROWING PUNCHES AND TRYING TO GRAB THE GUN DEFENDANT WAS HOLDING (FIRST DEPT))/JURY INSTRUCTIONS (CRIMINAL LAW, JUSTIFICATION DEFENSE, JURY SHOULD HAVE BEEN INSTRUCTED ON THE JUSTIFICATION DEFENSE, THERE WAS EVIDENCE THE DECEDENT WAS ADVANCING TOWARD DEFENDANT, THROWING PUNCHES AND TRYING TO GRAB THE GUN DEFENDANT WAS HOLDING (FIRST DEPT))

CRIMINAL LAW.

JURY SHOULD HAVE BEEN INSTRUCTED ON THE JUSTIFICATION DEFENSE, THERE WAS EVIDENCE THE DECEDENT WAS ADVANCING TOWARD DEFENDANT, THROWING PUNCHES AND TRYING TO GRAB THE GUN DEFENDANT WAS HOLDING (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Richter, over a two-justice dissent, determined that the request that the jury be instructed on the justification defense in this manslaughter case should have been granted. There was evidence that the decedent, Cabbagestalk, was aggressively striking the defendant and trying to grab a gun defendant was holding:

> ... [A] jury could conclude that defendant reasonably believed that Cabbagestalk, who was younger and taller than defendant, and just two feet away, would gain control of defendant's gun ... . A jury could also reasonably conclude that Cabbagestalk's statement to defendant — "[Y]ou going to pull a gun out, you better use it" — constituted a threat that if defendant did not use the gun, Cabbagestalk would take the gun and use it to shoot defendant. This is particularly true in light of the evidence that Cabbagestalk was advancing toward defendant, throwing punches at his face, and grabbing for the gun at the same time he made the threat. **People v Brown, 2018 NY Slip Op 01173, First Dept 2-20-18**

CRIMINAL LAW (DEFENDANT SHOT ANOTHER HUNTER AND WAS CHARGED WITH AND CONVICTED OF (RECKLESS) ASSAULT SECOND, DEFENSE REQUEST FOR A JURY INSTRUCTION ON (NEGLIGENT) ASSAULT THIRD SHOULD HAVE BEEN GRANTED, NEW TRIAL ORDERED (THIRD DEPT))/ASSAULT (CRIMINAL LAW, DEFENDANT SHOT ANOTHER HUNTER AND WAS CHARGED WITH AND CONVICTED OF (RECKLESS) ASSAULT SECOND, DEFENSE REQUEST FOR A JURY INSTRUCTION ON (NEGLIGENT) ASSAULT THIRD SHOULD HAVE BEEN GRANTED, NEW TRIAL ORDERED (THIRD DEPT))/HUNTERS (CRIMINAL LAW, DEFENDANT SHOT ANOTHER HUNTER AND WAS CHARGED WITH AND CONVICTED OF (RECKLESS) ASSAULT SECOND, DEFENSE REQUEST FOR A JURY INSTRUCTION ON (NEGLIGENT) ASSAULT THIRD SHOULD HAVE BEEN GRANTED, NEW TRIAL ORDERED (THIRD DEPT))

CRIMINAL LAW.

DEFENDANT SHOT ANOTHER HUNTER AND WAS CHARGED WITH AND CONVICTED OF (RECKLESS) ASSAULT SECOND, DEFENSE REQUEST FOR A JURY INSTRUCTION ON (NEGLIGENT) ASSAULT THIRD SHOULD HAVE BEEN GRANTED, NEW TRIAL ORDERED (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined defendant's request for a jury instruction on a lesser included offense should have been granted. Defendant shot another hunter and was charged with assault second. Defendant requested a jury instruction on assault third which was denied:

> Defendant argued that the jury could reasonably find from the trial proof that he did not act recklessly so as to commit assault in the second degree (see Penal Law § 120.05 [4]), but did behave negligently so as to commit assault in the third degree ... . Recklessness and criminal negligence are achingly close to one another; a reckless defendant "perceives the risk, but consciously disregards it," while a criminally negligent defendant "negligently fails to perceive the risk" altogether ... . A jury distinguishes between the two by considering "the evidence . . . relating to the mental state of the defendant at the time of the crime"... .
>
> ... [D]efendant knew that the victim had permission to hunt on the property where the shooting occurred, but also told investigators that he had seen no sign of the victim or anyone else in the three weeks that he had been hunting in the area. The victim confirmed that the area was not frequented by hunters, testifying that he had never seen another person in the 30 years that he had hunted there and saw human tracks for the first time the week before he was shot. There was no proof that defendant recalled the advice given at a hunting safety class, which he took 20 years prior, to be certain of his target before opening fire. Even if he did, however, he told investigators that he opened fire after hearing what he thought were deer horns rubbing against branches and watched what he thought was a deer but was, in reality, the stooped-over victim in a camouflage jacket. Viewing this evidence in the light most favorable to defendant ... , the jury could have reasonably found that defendant did not disregard, but instead failed to perceive, an unjustifiable risk of injury to the victim when he opened fire without sufficient observation... . County Court therefore erred in refusing to charge the lesser included offense of assault in the third degree ... . **People v Lavalley, 2018 NY Slip Op 01223, Third Dept 2-22-18**

CRIMINAL LAW (JUDICIAL DIVERSION HEARING, ONCE AN ALCOHOL AND SUBSTANCE ABUSE EVALUATION WAS ORDERED THE CASE SHOULD HAVE BEEN TRANSFERRED TO THE DRUG TREATMENT COURT FOR THE JUDICIAL DIVERSION HEARING, CONVICTION REVERSED (THIRD DEPT))/JUDICIAL DIVERSION HEARING (CRIMINAL LAW, ONCE AN ALCOHOL AND SUBSTANCE ABUSE EVALUATION WAS ORDERED THE CASE SHOULD HAVE BEEN TRANSFERRED TO THE DRUG TREATMENT COURT FOR THE JUDICIAL DIVERSION HEARING, CONVICTION REVERSED (THIRD DEPT))/DRUG TREATMENT COURT (JUDICIAL DIVERSION HEARING, ONCE AN ALCOHOL AND SUBSTANCE ABUSE EVALUATION WAS ORDERED THE CASE SHOULD HAVE BEEN TRANSFERRED TO THE DRUG TREATMENT COURT FOR THE JUDICIAL DIVERSION HEARING, CONVICTION REVERSED (THIRD DEPT))/ALCOHOL AND SUBSTANCE ABUSE EVALUATION (CRIMINAL LAW, ONCE AN ALCOHOL AND SUBSTANCE ABUSE EVALUATION WAS ORDERED THE CASE SHOULD HAVE BEEN TRANSFERRED TO THE DRUG TREATMENT COURT FOR THE JUDICIAL DIVERSION HEARING, CONVICTION REVERSED (THIRD DEPT))

CRIMINAL LAW.

ONCE AN ALCOHOL AND SUBSTANCE ABUSE EVALUATION WAS ORDERED THE CASE SHOULD HAVE BEEN TRANSFERRED TO THE DRUG TREATMENT COURT FOR THE JUDICIAL DIVERSION HEARING, CONVICTION REVERSED (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined that the judicial diversion hearing should have been presided over by a judge in the Drug Treatment Court, not County Court:

> ... County Court was not designated by the Administrative Judge for the Third Judicial District to preside over the drug treatment court in Sullivan County. ... Accordingly, while County Court had jurisdiction to hear the subject felony case ... , once an alcohol and substance abuse evaluation was ordered for defendant ... — for the express purpose of determining whether he was eligible for judicial diversion — the case should have been referred to the designated Superior Court for drug treatment pursuant to 22 NYCRR part 143. Accordingly, under the circumstances presented, we find that County Court was without authority to preside over defendant's judicial diversion hearing ... . **People v Lee, 2018 NY Slip Op 01216, Third Dept 2-22-18**

CRIMINAL LAW (PAROLE, CHAIRMAN OF THE BOARD OF PAROLE SHOULD NOT HAVE BEEN HELD IN CONTEMPT FOR FAILURE TO HOLD A DE NOVO PAROLE HEARING AS ORDERED BY THE ARTICLE 78 COURT, THE EXECUTIVE LAW DOES NOT CALL FOR A HEARING IN THIS CONTEXT, ONLY AN INTERVIEW (SECOND DEPT))/PAROLE (CHAIRMAN OF THE BOARD OF PAROLE SHOULD NOT HAVE BEEN HELD IN CONTEMPT FOR FAILURE TO HOLD A DE NOVO PAROLE HEARING AS ORDERED BY THE ARTICLE 78 COURT, THE EXECUTIVE LAW DOES NOT CALL FOR A HEARING IN THIS CONTEXT, ONLY AN INTERVIEW (SECOND DEPT))/ADMINISTRATIVE LAW (PAROLE BOARD, CHAIRMAN OF THE BOARD OF PAROLE SHOULD NOT HAVE BEEN HELD IN CONTEMPT FOR FAILURE TO HOLD A DE NOVO PAROLE HEARING AS ORDERED BY THE ARTICLE 78 COURT, THE EXECUTIVE LAW DOES NOT CALL FOR A HEARING IN THIS CONTEXT, ONLY AN INTERVIEW (SECOND DEPT))

CRIMINAL LAW, ADMINISTRATIVE LAW.

CHAIRMAN OF THE BOARD OF PAROLE SHOULD NOT HAVE BEEN HELD IN CONTEMPT FOR FAILURE TO HOLD A DE NOVO PAROLE HEARING AS ORDERED BY THE ARTICLE 78 COURT, THE EXECUTIVE LAW DOES NOT CALL FOR A HEARING IN THIS CONTEXT, ONLY AN INTERVIEW (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the chairperson of the Board of Parole should not have been held in civil contempt for a purported failure to follow Supreme Court's order. After an inmate contested the denial of parole in an Article 78 action, Supreme Court granted the inmate's petition and ordered the parole board to hold a de novo parole "hearing." The parole board conducted a parole "interview." The inmate then moved to hold the parole board chairperson in contempt for failing to conduct a "hearing." The opinion is comprehensive and too detailed to fairly summarize here. In a nutshell, the Second Department determined the Executive Law does not call for a "hearing" in this context, only an "interview:"

> Pursuant to the relevant provisions of the Executive Law governing the Board's procedures, we conclude that the court was without authority to order a de novo evidentiary "hearing," as the petitioner was only entitled to a de novo parole release "interview" and review (see Executive Law § 259-i[2][a][i]). Applying our well-established contempt jurisprudence, it cannot be said that the language employed in the judgment ... , was clear and unambiguous since the Board could have reasonably understood and interpreted the judgment as directing it to conduct a de novo interview consistent with the requirements of the controlling statutory language. Contempt findings are inappropriate where, as here, there can be a legitimate disagreement about what the terms of an order or judgment actually mean ... . The Board endeavored to comply with the judgment ... , by providing a de novo parole release interview with a reconsideration of the petitioner's record consistent with its statutory mandate under the Executive Law and consistent with its common practices. **Matter of Banks v Stanford, 2018 NY Slip Op 00829, Second Dept 2-7-18**

CRIMINAL LAW (PERIODS OF POSTRELEASE SUPERVISION MERGE AND CANNOT RUN CONSECUTIVELY (FOURTH DEPT))/SENTENCING (PERIODS OF POSTRELEASE SUPERVISION MERGE AND CANNOT RUN CONSECUTIVELY (FOURTH DEPT))/POSTRELEASE SUPERVISION (PERIODS OF POSTRELEASE SUPERVISION MERGE AND CANNOT RUN CONSECUTIVELY (FOURTH DEPT))/APPEALS (CRIMINAL LAW, ILLEGAL SENTENCE MUST BE CORRECTED EVEN IF ISSUE NOT RAISED ON APPEAL (FOURTH DEPT))

CRIMINAL LAW, APPEALS.

PERIODS OF POSTRELEASE SUPERVISION MERGE AND CANNOT RUN CONSECUTIVELY, ILLEGAL SENTENCE MUST BE CORRECTED EVEN IF ISSUE NOT RAISED ON APPEAL (FOURTH DEPT).

The Fourth Department noted that periods of postrelease supervision cannot run consecutively. An illegal sentence must be corrected even if the issue is not raised on appeal:

> ... [T]he court erred in directing that the periods of postrelease supervision run consecutively to the periods of postrelease supervision imposed in appeal No. 1 ... . "Penal Law § 70.45 (5) (c) requires that the periods of postrelease supervision merge and are satisfied by the service of the longest unexpired term" ... . We cannot allow an illegal sentence to stand ... and we therefore modify the judgment ... accordingly. **People v Mcmillian, 2018 NY Slip Op 00649, Fourth Dept 2-2-18**

CRIMINAL LAW (FAILURE TO INSTRUCT JURY THAT AN ACQUITTAL ON THE TOP COUNT BASED ON THE JUSTIFICATION DEFENSE PRECLUDED CONSIDERATION OF THE REMAINING CHARGES REQUIRED REVERSAL IN THE INTEREST OF JUSTICE (FIRST DEPT))/APPEALS (CRIMINAL LAW, FAILURE TO INSTRUCT JURY THAT AN ACQUITTAL ON THE TOP COUNT BASED ON THE JUSTIFICATION DEFENSE PRECLUDED CONSIDERATION OF THE REMAINING CHARGES REQUIRED REVERSAL IN THE INTEREST OF JUSTICE (FIRST DEPT))/JUSTIFICATION DEFENSE (CRIMINAL LAW, FAILURE TO INSTRUCT JURY THAT AN ACQUITTAL ON THE TOP COUNT BASED ON THE JUSTIFICATION DEFENSE PRECLUDED CONSIDERATION OF THE REMAINING CHARGES REQUIRED REVERSAL IN THE INTEREST OF JUSTICE (FIRST DEPT))

CRIMINAL LAW, APPEALS.

FAILURE TO INSTRUCT JURY THAT AN ACQUITTAL ON THE TOP COUNT BASED ON THE JUSTIFICATION DEFENSE PRECLUDED CONSIDERATION OF THE REMAINING CHARGES REQUIRED REVERSAL IN THE INTEREST OF JUSTICE (FIRST DEPT).

The First Department, reversing Supreme Court in the interest of justice (error not preserved), determined that the judge's failure to instruct the jury that a not guilty verdict on the top count based on the justification defense precluded consideration of the remaining charges was reversible error. The top count was attempted murder and defendant was convicted of assault second degree:

> ... [T]the court's charge failed to convey that an acquittal on the top count of attempted second-degree murder based on a finding of justification would preclude consideration of the remaining charges. We find that this error was not harmless and that it warrants reversal in the interest of justice ... . **People v Marcucci, 2018 NY Slip Op 00634, First Dept 2-1-18**

CRIMINAL LAW (YOUTHFUL OFFENDER, ALTHOUGH THERE WAS NO ABUSE OF DISCRETION BY COUNTY COURT, APPELLATE COURT VACATED THE CONVICTION AND ADJUDICATED DEFENDANT A YOUTHFUL OFFENDER IN THE INTEREST OF JUSTICE (FOURTH DEPT))/APPEALS (CRIMINAL LAW, INTEREST OF JUSTICE, YOUTHFUL OFFENDER, ALTHOUGH THERE WAS NO ABUSE OF DISCRETION BY COUNTY COURT, APPELLATE COURT VACATED THE CONVICTION AND ADJUDICATED DEFENDANT A YOUTHFUL OFFENDER IN THE INTEREST OF JUSTICE (FOURTH DEPT))/YOUTHFUL OFFENDER (CRIMINAL LAW, ALTHOUGH THERE WAS NO ABUSE OF DISCRETION BY COUNTY COURT, APPELLATE COURT VACATED THE CONVICTION AND ADJUDICATED DEFENDANT A YOUTHFUL OFFENDER IN THE INTEREST OF JUSTICE (FOURTH DEPT))

CRIMINAL LAW, APPEALS.

ALTHOUGH THERE WAS NO ABUSE OF DISCRETION BY COUNTY COURT, APPELLATE COURT VACATED THE CONVICTION AND ADJUDICATED DEFENDANT A YOUTHFUL OFFENDER IN THE INTEREST OF JUSTICE (FOURTH DEPT).

The Fourth Department vacated defendant's conviction and adjudicated defendant a youthful offender in the interest of justice (no abuse of discretion). The only factor weighing against youthful offender treatment was the seriousness of the crime, an armed felony:

> In determining whether to afford such treatment to a defendant, a court must consider "the gravity of the crime and manner in which it was committed, mitigating circumstances, defendant's prior criminal record, prior acts of violence, recommendations in the presentence reports, defendant's reputation, the level of cooperation with authorities, defendant's attitude toward society and respect for the law, and the prospects for rehabilitation and hope for a future constructive life" ... . Here, the only factor weighing against affording defendant youthful offender treatment is the seriousness of the crime ... . Defendant was 17 years old at the time of the crime and had no prior criminal record or history of violence. Defendant has accepted responsibility for his actions and expressed genuine remorse. The presentence report recommended youthful offender treatment, and the record establishes that defendant has the capacity for a productive and law-abiding future.
>
> Although we do not conclude, after weighing the appropriate factors, that the court abused its discretion in denying defendant youthful offender status, we nevertheless choose to exercise our discretion in the interest of justice by reversing the judgment, vacating the conviction, and adjudicating defendant a youthful offender, and we remit the matter to County Court for sentencing on the adjudication ... . **People v Keith B.J., 2018 NY Slip Op 00734, Fourth Dept 2-2-18**

CRIMINAL LAW (SECOND FELONY OFFENDERS, APPEALS, SECOND FELONY OFFENDER STATUS CANNOT BE BASED UPON A FELONY DEFINED IN THE CORRECTIONS LAW, AS OPPOSED TO THE PENAL LAW, ILLEGAL SENTENCE MUST BE CORRECTED EVEN WHERE THERE IS A WAIVER OF APPEAL AND THE ISSUE WAS NOT RAISED BELOW OR ON APPEAL (FOURTH DEPT))/SENTENCING (SECOND FELONY OFFENDER STATUS CANNOT BE BASED UPON A FELONY DEFINED IN THE CORRECTIONS LAW, AS OPPOSED TO THE PENAL LAW, ILLEGAL SENTENCE MUST BE CORRECTED EVEN WHERE THERE IS A WAIVER OF APPEAL AND THE ISSUE WAS NOT RAISED BELOW OR ON APPEAL (FOURTH DEPT))/SECOND FELONY OFFENDERS (SECOND FELONY OFFENDER STATUS CANNOT BE BASED UPON A FELONY DEFINED IN THE CORRECTIONS LAW, AS OPPOSED TO THE PENAL LAW, ILLEGAL SENTENCE MUST BE CORRECTED EVEN WHERE THERE IS A WAIVER OF APPEAL AND THE ISSUE WAS NOT RAISED BELOW OR ON APPEAL (FOURTH DEPT))/APPEALS (CRIMINAL LAW, SECOND FELONY OFFENDER STATUS CANNOT BE BASED UPON A FELONY DEFINED IN THE CORRECTIONS LAW, AS OPPOSED TO THE PENAL LAW, ILLEGAL SENTENCE MUST BE CORRECTED EVEN WHERE THERE IS A WAIVER OF APPEAL AND THE ISSUE WAS NOT RAISED BELOW OR ON APPEAL (FOURTH DEPT))/CORRECTIONS LAW (SECOND FELONY OFFENDER STATUS CANNOT BE BASED UPON A FELONY DEFINED IN THE CORRECTIONS LAW, AS OPPOSED TO THE PENAL LAW, ILLEGAL SENTENCE MUST BE CORRECTED EVEN WHERE THERE IS A WAIVER OF APPEAL AND THE ISSUE WAS NOT RAISED BELOW OR ON APPEAL (FOURTH DEPT))/ILLEGAL SENTENCE (SECOND FELONY OFFENDERS, APPEALS, SECOND FELONY OFFENDER STATUS CANNOT BE BASED UPON A FELONY DEFINED IN THE CORRECTIONS LAW, AS OPPOSED TO THE PENAL LAW, ILLEGAL SENTENCE MUST BE CORRECTED EVEN WHERE THERE IS A WAIVER OF APPEAL AND THE ISSUE WAS NOT RAISED BELOW OR ON APPEAL (FOURTH DEPT))/INTERNET IDENTIFIERS, FAILURE TO REGISTER (CORRECTIONS LAW, SECOND FELONY OFFENDERS, APPEALS, SECOND FELONY OFFENDER STATUS CANNOT BE BASED UPON A FELONY DEFINED IN THE CORRECTIONS LAW, AS OPPOSED TO THE PENAL LAW, ILLEGAL SENTENCE MUST BE CORRECTED EVEN WHERE THERE IS A WAIVER OF APPEAL AND THE ISSUE WAS NOT RAISED BELOW OR ON APPEAL (FOURTH DEPT))

CRIMINAL LAW, APPEALS.

SECOND FELONY OFFENDER STATUS CANNOT BE BASED UPON A FELONY DEFINED IN THE CORRECTIONS LAW, AS OPPOSED TO THE PENAL LAW, ILLEGAL SENTENCE MUST BE CORRECTED EVEN WHERE THERE IS A WAIVER OF APPEAL AND THE ISSUE WAS NOT RAISED BELOW OR ON APPEAL (FOURTH DEPT).

The Fourth Department noted than an illegal sentence must be corrected even where there has been a waiver of appeal, and even where the issue was not raised below or on appeal. Here defendant was sentenced as a second felony offender, which is not proper when the underlying felony is defined in the Correction Law, not in the Penal Law:

> ... [I]t is well settled that "even a valid waiver of the right to appeal will not bar [review of] an illegal sentence" ... , and we note that the sentence imposed by the court on count three of the superior court information, i.e., a determinate term of incarceration for failure to register internet identifiers as a class D felony, is illegal. That crime is defined in the Correction Law, and "only a person convicted of a felony defined by the Penal Law may be sentenced as a second felony offender" to a determinate term of incarceration ... . "Although [the] issue was not raised before the [sentencing] court or on appeal, we cannot allow an [illegal] sentence to stand" ... . **People v Mcdonald, 2018 NY Slip Op 00657, Fourth Dept 2-2-18**

CRIMINAL LAW (DEFENDANT'S PLEA ALLOCATION NEGATED AN ESSENTIAL ELEMENT OF THE OFFENSE, PRESERVATION OF THE ERROR NOT REQUIRED, GUILTY PLEA VACATED (THIRD DEPT))/APPEALS (CRIMINAL LAW, DEFENDANT'S PLEA ALLOCATION NEGATED AN ESSENTIAL ELEMENT OF THE OFFENSE, PRESERVATION OF THE ERROR NOT REQUIRED, GUILTY PLEA VACATED (THIRD DEPT))/GUILTY PLEA (DEFENDANT'S PLEA ALLOCATION NEGATED AN ESSENTIAL ELEMENT OF THE OFFENSE, PRESERVATION OF THE ERROR NOT REQUIRED, GUILTY PLEA VACATED (THIRD DEPT))/ALLOCUTION (CRIMINAL LAW, DEFENDANT'S PLEA ALLOCATION NEGATED AN ESSENTIAL ELEMENT OF THE OFFENSE, PRESERVATION OF THE ERROR NOT REQUIRED, GUILTY PLEA VACATED (THIRD DEPT))/PRESERVATION (CRIMINAL LAW, APPEALS, DEFENDANT'S PLEA ALLOCATION NEGATED AN ESSENTIAL ELEMENT OF THE OFFENSE, PRESERVATION OF THE ERROR NOT REQUIRED, GUILTY PLEA VACATED (THIRD DEPT))

CRIMINAL LAW, APPEALS.

DEFENDANT'S PLEA ALLOCUTION NEGATED AN ESSENTIAL ELEMENT OF THE OFFENSE, PRESERVATION OF THE ERROR NOT REQUIRED, GUILTY PLEA VACATED (THIRD DEPT).

The Third Department, reversing defendant's conviction by guilty plea, determined that defendant's plea colloquy negated an essential element of the offense (criminal contempt). An exception to the preservation requirement applied:

> "[W]here a pleading defendant's recitation of the facts of his or her offense clearly casts doubt on his or her guilt and the court makes no further inquiry, the defendant does not have to preserve a claim of fatal error in the allocution because . . . 'the court's attention should have been instantly drawn to the problem, and the salutary purpose of the preservation rule is arguably not jeopardized'" ... . Here, defendant stated during her plea allocution that she did not intend to violate the underlying order of protection, thus negating an element of criminal contempt in the first degree... . Although County Court promptly responded and afforded defendant an opportunity to again consult with her counsel, further discussion was then held off the record. Thus, we are unable to ascertain from the record whether the court conducted the requisite further inquiry to ensure that defendant understood the elements of the crime to which she was pleading guilty and that the plea was knowing, voluntary and intelligent ... . **People v Busch-scardino, 2018 NY Slip Op 01218, Third Dept 2-22-18**

CRIMINAL LAW (YOUTHFUL OFFENDER, COUNTY COURT DID NOT MAKE THE STATUTORY FINDINGS REQUIRED FOR DETERMINING DEFENDANT'S APPLICATION FOR YOUTHFUL OFFENDER STATUS IN THIS SEXUAL OFFENSE CASE, WAIVER OF APPEAL DID NOT PRECLUDE CHALLENGE ON APPEAL, SENTENCE VACATED AND MATTER REMITTED (THIRD DEPT))/APPEALS (CRIMINAL LAW, YOUTHFUL OFFENDER, YOUTHFUL OFFENDER, COUNTY COURT DID NOT MAKE THE STATUTORY FINDINGS REQUIRED FOR DETERMINING DEFENDANT'S APPLICATION FOR YOUTHFUL OFFENDER STATUS IN THIS SEXUAL OFFENSE CASE, WAIVER OF APPEAL DID NOT PRECLUDE CHALLENGE ON APPEAL, SENTENCE VACATED AND MATTER REMITTED (THIRD DEPT))/YOUTHFUL OFFENDER (COUNTY COURT DID NOT MAKE THE STATUTORY FINDINGS REQUIRED FOR DETERMINING DEFENDANT'S APPLICATION FOR YOUTHFUL OFFENDER STATUS IN THIS SEXUAL OFFENSE CASE, WAIVER OF APPEAL DID NOT PRECLUDE CHALLENGE ON APPEAL, SENTENCE VACATED AND MATTER REMITTED (THIRD DEPT))/SEX OFFENSES (YOUTHFUL OFFENDER, COUNTY COURT DID NOT MAKE THE STATUTORY FINDINGS REQUIRED FOR DETERMINING DEFENDANT'S APPLICATION FOR YOUTHFUL OFFENDER STATUS IN THIS SEXUAL OFFENSE CASE, WAIVER OF APPEAL DID NOT PRECLUDE CHALLENGE ON APPEAL, SENTENCE VACATED AND MATTER REMITTED (THIRD DEPT))

CRIMINAL LAW, APPEALS.

COUNTY COURT DID NOT MAKE THE STATUTORY FINDINGS REQUIRED FOR DETERMINING DEFENDANT'S APPLICATION FOR YOUTHFUL OFFENDER STATUS IN THIS SEXUAL OFFENSE CASE, WAIVER OF APPEAL DID NOT PRECLUDE CHALLENGE ON APPEAL, SENTENCE VACATED AND MATTER REMITTED (THIRD DEPT).

The Third Department, vacating defendant's sentence, determined County Court failed to place on the record the statutory factors to be weighed in determining youthful offender status. The waiver of appeal did not foreclose the challenge on appeal:

> ... County Court's comments regarding defendant's application for youthful offender status failed to satisfy the statutory mandate of CPL 720.10. An appeal waiver does not foreclose a defendant's challenge that a court failed to make the requisite on-the-record determinations regarding youthful offender treatment ... . Pursuant to CPL 720.10 (3), "a youth who has been convicted of . . . criminal sexual act in the first degree . . . is an eligible youth if the court determines that one or more of the following factors exist: (i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution." Where, as here, the only barrier to youthful offender status is an enumerated sex offense (see CPL 720.10 [2] [a]), "the court is required to determine on the record whether the defendant is an eligible youth by considering the presence or absence of the factors set forth in CPL 720.10 (3)"... . This determination is mandatory, without regard to whether it has been requested or purportedly waived ... . **People v Martz, 2018 NY Slip Op 01222, Third Dept 2-22-18**

CRIMINAL LAW (BRADY MATERIAL, PROSECUTOR'S FAILURE TO PROVIDE THE DEFENSE WITH INFORMATION ABOUT FAVORABLE TREATMENT AFFORDED A WITNESS IN EXCHANGE FOR HIS TESTIMONY, AND THE PROSECUTOR'S FAILURE TO CORRECT THE WITNESS'S MISLEADING TESTIMONY, REQUIRED REVERSAL AND A NEW TRIAL (SECOND DEPT))/ATTORNEYS (CRIMINAL LAW, BRADY MATERIAL PROSECUTOR'S FAILURE TO PROVIDE THE DEFENSE WITH INFORMATION ABOUT FAVORABLE TREATMENT AFFORDED A WITNESS IN EXCHANGE FOR HIS TESTIMONY, AND THE PROSECUTOR'S FAILURE TO CORRECT THE WITNESS'S MISLEADING TESTIMONY, REQUIRED REVERSAL AND A NEW TRIAL (SECOND DEPT))/BRADY MATERIAL (CRIMINAL LAW, , PROSECUTOR'S FAILURE TO PROVIDE THE DEFENSE WITH INFORMATION ABOUT FAVORABLE TREATMENT AFFORDED A WITNESS IN EXCHANGE FOR HIS TESTIMONY, AND THE PROSECUTOR'S FAILURE TO CORRECT THE WITNESS'S MISLEADING TESTIMONY, REQUIRED REVERSAL AND A NEW TRIAL (SECOND DEPT))/PROSECUTORIAL MISCONDUCT (CRIMINAL LAW, BRADY MATERIAL PROSECUTOR'S FAILURE TO PROVIDE THE DEFENSE WITH INFORMATION ABOUT FAVORABLE TREATMENT AFFORDED A WITNESS IN EXCHANGE FOR HIS TESTIMONY, AND THE PROSECUTOR'S FAILURE TO CORRECT THE WITNESS'S MISLEADING TESTIMONY, REQUIRED REVERSAL AND A NEW TRIAL (SECOND DEPT))

CRIMINAL LAW, ATTORNEYS.

PROSECUTOR'S FAILURE TO PROVIDE THE DEFENSE WITH INFORMATION ABOUT FAVORABLE TREATMENT AFFORDED A WITNESS IN EXCHANGE FOR HIS TESTIMONY, AND THE PROSECUTOR'S FAILURE TO CORRECT THE WITNESS'S MISLEADING TESTIMONY, REQUIRED REVERSAL AND A NEW TRIAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to vacate his conviction, based upon the People's failure to provide exculpatory information and correct a witness's testimony, required reversal and a new trial. A witness, Avitto, called by the People testified defendant made inculpatory statements (re: the murder charge) while they were in jail together. At trial the Avitto testified he received no benefit from the People in exchange for his testimony. However, after a hearing, it appeared there had been an informal agreement to provide Avitto with favorable treatment in return for his testimony. Avitto was facing a serious charge and needed to complete a drug program to qualify for a shorter sentence. Even though Avitto was not doing well in the drug program, and in fact had left the program, he was allowed to stay out of jail and continue to attempt to complete the program:

> The evidence at issue here—Avitto's immediate contact with the police ... , after leaving the drug program, his subsequent court appearance with detectives and the prosecutor ... , when he was released on his own recognizance, as well as his ability to remain out of custody despite poor progress in his drug treatment and numerous violations—was of such a nature that the jury could have found that, despite Avitto's protestations to the contrary, "there was indeed a tacit understanding" between Avitto and the prosecution that he would receive or hoped to receive a benefit for his testimony ... . This evidence was material in nature, and its nondisclosure prejudiced the defendant, as it constituted impeachment material and tended to show a motivation for Avitto to lie ... .
>
> Accordingly, the prosecutor was not only required to disclose this evidence to the defendant, but was further required to clarify "the record by disclosing all the details of what had actually transpired" between the District Attorney's office and Avitto ... . The prosecutor further had the obligation to correct any misleading or false testimony given by Avitto at trial regarding his contact with detectives and the prosecutor, and his progression in drug treatment ... . These errors were further compounded when the prosecutor reiterated and emphasized Avitto's misleading testimony during summation ... . **People v Giuca, 2018 NY Slip Op 00846, Second Dept 2-7-18**

CRIMINAL LAW (DEFENDANT DEMONSTRATED HE WOULD NOT HAVE PLED GUILTY HAD HIS COUNSEL TOLD HIM DEPORTATION WAS MANDATORY, CONVICTION REVERSED (SECOND DEPT))/ATTORNEYS (CRIMINAL LAW, DEFENDANT DEMONSTRATED HE WOULD NOT HAVE PLED GUILTY HAD HIS COUNSEL TOLD HIM DEPORTATION WAS MANDATORY, CONVICTION REVERSED (SECOND DEPT))/GUILTY PLEA (DEPORTATION CONSEQUENCES, DEFENDANT DEMONSTRATED HE WOULD NOT HAVE PLED GUILTY HAD HIS COUNSEL TOLD HIM DEPORTATION WAS MANDATORY, CONVICTION REVERSED (SECOND DEPT))/IMMIGRATION (CRIMINAL LAW, DEPORTATION, DEFENDANT DEMONSTRATED HE WOULD NOT HAVE PLED GUILTY HAD HIS COUNSEL TOLD HIM DEPORTATION WAS MANDATORY, CONVICTION REVERSED (SECOND DEPT))

CRIMINAL LAW, ATTORNEYS.

DEFENDANT DEMONSTRATED HE WOULD NOT HAVE PLED GUILTY HAD HIS COUNSEL TOLD HIM DEPORTATION WAS MANDATORY, CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined defendant demonstrated a reasonable probability that he would not have pled guilty had he been told by his attorney that deportation was mandatory:

> ... [W]e agree with the defendant's contention that the legal representation he received at the plea proceeding was deficient inasmuch as the plea minutes show that the defendant's counsel, who was aware that the defendant was a noncitizen, advised him only that pleading guilty to a drug felony "may affect his [immigration] status" (emphasis added). Such advice was erroneous given that a felony drug conviction involving cocaine made the defendant's deportation mandatory ... , and where, as here, the deportation consequence is clear, counsel's duty to give correct advice is equally clear ... .
>
> In order for the defendant to obtain vacatur of his plea of guilty based on a Padilla violation, he must also establish that " there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial'" ... . The Supreme Court, in its report, expressed the view that the evidence in the record, as supplemented by the defendant's testimony at the hearing conducted upon remittal, evinced a reasonable probability that the defendant would not have pleaded guilty but for counsel's incorrect advice regarding the immigration consequences of his plea, and would have insisted instead on going to trial. We agree, and discern no reason to disturb the credibility determinations made by the court ... . **People v Loaiza, 2018 NY Slip Op 01201, Second Dept 2-21-18**

CRIMINAL LAW (ATTORNEYS, DEFENSE COUNSEL TOOK A POSITION ADVERSE TO HER CLIENT'S MOTION TO WITHDRAW HIS PLEA, SENTENCE VACATED AND MATTER REMITTED FOR ASSIGNMENT OF A NEW ATTORNEY FOR THE MOTION (THIRD DEPT))/ATTORNEYS (CRIMINAL LAW, DEFENSE COUNSEL TOOK A POSITION ADVERSE TO HER CLIENT'S MOTION TO WITHDRAW HIS PLEA, SENTENCE VACATED AND MATTER REMITTED FOR ASSIGNMENT OF A NEW ATTORNEY FOR THE MOTION (THIRD DEPT))

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL TOOK A POSITION ADVERSE TO HER CLIENT'S MOTION TO WITHDRAW HIS PLEA, SENTENCE VACATED AND MATTER REMITTED FOR ASSIGNMENT OF A NEW ATTORNEY FOR THE MOTION (THIRD DEPT).

The Third Department, vacating defendant's sentence, determined County County should have assigned a new attorney after defense counsel took a position adverse to her client's motion to withdraw his plea:

> At sentencing, defense counsel appropriately advised County Court that, although she had counseled defendant regarding the potential consequences of withdrawing his guilty plea, and despite her legal advice to the contrary, defendant nevertheless wished to proceed with such a motion. Defendant thereafter set forth various reasons as to why he believed he was entitled to the requested relief. In response to County Court's subsequent inquiries, however, defense counsel made comments that, in our view, could be construed as undermining the very arguments that defendant had raised in support of his motion. Accordingly, once defense counsel took a position that was adverse to defendant, County Court should have assigned a new attorney to represent him on his motion to withdraw his plea ... . **People v Oliver, 2018 NY Slip Op 01221, Third Dept 2-22-18**

CRIMINAL LAW (DEPORTATION, DEFENDANT WAS NOT AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE WAS TOLD ONLY OF POTENTIAL IMMIGRATION CONSEQUENCES OF HIS PLEA, MATTER REMANDED TO ALLOW DEFENDANT TO MAKE A MOTION TO VACATE HIS PLEA (FIRST DEPT))/ATTORNEYS (CRIMINAL LAW, DEPORTATION, DEFENDANT WAS NOT AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE WAS TOLD ONLY OF POTENTIAL IMMIGRATION CONSEQUENCES OF HIS PLEA, MATTER REMANDED TO ALLOW DEFENDANT TO MAKE A MOTION TO VACATE HIS PLEA (FIRST DEPT))/INEFFECTIVE ASSISTANCE (CRIMINAL LAW, DEPORTATION, DEFENDANT WAS NOT AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE WAS TOLD ONLY OF POTENTIAL IMMIGRATION CONSEQUENCES OF HIS PLEA, MATTER REMANDED TO ALLOW DEFENDANT TO MAKE A MOTION TO VACATE HIS PLEA (FIRST DEPT))/DEPORTATION (CRIMINAL LAW, ATTORNEYS, DEFENDANT WAS NOT AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE WAS TOLD ONLY OF POTENTIAL IMMIGRATION CONSEQUENCES OF HIS PLEA, MATTER REMANDED TO ALLOW DEFENDANT TO MAKE A MOTION TO VACATE HIS PLEA (FIRST DEPT))/PLEA, MOTION TO VACATE (CRIMINAL LAW, DEPORTATION, DEFENDANT WAS NOT AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE WAS TOLD ONLY OF POTENTIAL IMMIGRATION CONSEQUENCES OF HIS PLEA, MATTER REMANDED TO ALLOW DEFENDANT TO MAKE A MOTION TO VACATE HIS PLEA (FIRST DEPT))/IMMIGRATION (CRIMINAL LAW, DEFENDANT WAS NOT AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE WAS TOLD ONLY OF POTENTIAL IMMIGRATION CONSEQUENCES OF HIS PLEA, MATTER REMANDED TO ALLOW DEFENDANT TO MAKE A MOTION TO VACATE HIS PLEA (FIRST DEPT))

CRIMINAL LAW, ATTORNEYS, IMMIGRATION.

DEFENDANT WAS NOT AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE WAS TOLD ONLY OF POTENTIAL IMMIGRATION CONSEQUENCES OF HIS PLEA, MATTER REMANDED TO ALLOW DEFENDANT TO MAKE A MOTION TO VACATE HIS PLEA (FIRST DEPT).

The First Department determined defendant was not afforded effective assistance of counsel because he was told only that his plea had potential immigration consequences when in fact deportation was mandatory:

> Defendant was deprived of effective assistance when his counsel advised him that his plea would have "potential immigration consequences," where it is clear that his drug-related conviction would trigger mandatory deportation under 8 USC § 1227(a)(2)(B)(I) ... . The remarks made by counsel on the record are sufficient to permit review on direct appeal ... . Thus, we hold this matter in abeyance to afford defendant the opportunity to move to vacate his plea upon a showing that there is a reasonable probability that he would not have pleaded guilty had he been made aware of the deportation consequences of his plea. **People v Pequero, 2018 NY Slip Op 00619, First Dept 2-1-18**

CRIMINAL LAW (CLOSURE OF COURTROOM BASED UPON WITNESS'S FEAR WAS PROPER (FIRST DEPT))/CLOSURE OF COURTROOM (CRIMINAL LAW, CLOSURE OF COURTROOM BASED UPON WITNESS'S FEAR WAS PROPER (FIRST DEPT))/PUBLIC TRIAL (CRIMINAL LAW, CLOSURE OF COURTROOM BASED UPON WITNESS'S FEAR WAS PROPER (FIRST DEPT))/CONSTITUTIONAL LAW (CRIMINAL LAW, PUBLIC TRIAL, CLOSURE OF COURTROOM BASED UPON WITNESS'S FEAR WAS PROPER (FIRST DEPT))

CRIMINAL LAW, CONSTITUTIONAL LAW.

CLOSURE OF COURTROOM BASED UPON WITNESS'S FEAR WAS PROPER (FIRST DEPT).

The First Department noted that the closure of the courtroom during a prosecution witness's testimony was proper in this gang-related murder case:

> The record established an overriding interest in partially, and later completely, closing the courtroom during the testimony of an identifying eyewitness (see Waller v Georgia, 467 US 39, 48 [1984]), and the other requirements of Waller were likewise satisfied as to both closures. The witness's "extreme fear of testifying in open court was sufficient to establish an overriding interest" ... , because the witness's inability to testify without the closures at issue "could have severely undermined the truth seeking function of the court" ... in this gang-related murder case. ...
>
> ... [T]he court conducted a hearing at which the witness testified that he previously had been threatened for cooperating with the prosecution in another trial, that he had heard threats made against potential prosecution witnesses in the present case, and that he and his family lived in the same neighborhood where the shooting occurred. The court was entitled to credit the witness's testimony that he felt threatened by defendant's cousin and could not testify in his presence ... . Although the cousin did not make any direct threats to the witness, he appeared to be closely associated with a person who did so. **People v Sharp, 2018 NY Slip Op 00623, First Dept 2-1-18**

CRIMINAL LAW (POSSESSION OF A WEAPON, CODEFENDANT WAS SEEN ENTERING A CAR WITH A WEAPON WHICH WAS LATER FOUND ON THE SIDE OF THE ROAD, STATUTORY PRESUMPTION THAT THE WEAPON WAS POSSESSED BY ALL IN THE CAR DID NOT APPLY, DEFENDANT'S POSSESSION OF A WEAPON CONVICTION REVERSED (FOURTH DEPT))/EVIDENCE (CRIMINAL LAW, POSSESSION OF A WEAPON, CODEFENDANT WAS SEEN ENTERING A CAR WITH A WEAPON WHICH WAS LATER FOUND ON THE SIDE OF THE ROAD, STATUTORY PRESUMPTION THAT THE WEAPON WAS POSSESSED BY ALL IN THE CAR DID NOT APPLY, DEFENDANT'S POSSESSION OF A WEAPON CONVICTION REVERSED (FOURTH DEPT))/WEAPON, POSSESSION OF (CODEFENDANT WAS SEEN ENTERING A CAR WITH A WEAPON WHICH WAS LATER FOUND ON THE SIDE OF THE ROAD, STATUTORY PRESUMPTION THAT THE WEAPON WAS POSSESSED BY ALL IN THE CAR DID NOT APPLY, DEFENDANT'S POSSESSION OF A WEAPON CONVICTION REVERSED (FOURTH DEPT))/PENAL LAW 265.15 (POSSESSION OF A WEAPON, STATUTORY PRESUMPTION, CODEFENDANT WAS SEEN ENTERING A CAR WITH A WEAPON WHICH WAS LATER FOUND ON THE SIDE OF THE ROAD, STATUTORY PRESUMPTION THAT THE WEAPON WAS POSSESSED BY ALL IN THE CAR DID NOT APPLY, DEFENDANT'S POSSESSION OF A WEAPON CONVICTION REVERSED (FOURTH DEPT))

CRIMINAL LAW, EVIDENCE.

CODEFENDANT WAS SEEN ENTERING A CAR WITH A WEAPON WHICH WAS LATER FOUND ON THE SIDE OF THE ROAD, STATUTORY PRESUMPTION THAT THE WEAPON WAS POSSESSED BY ALL IN THE CAR DID NOT APPLY, DEFENDANT'S POSSESSION OF A WEAPON CONVICTION REVERSED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction for possession of a weapon, determined the evidence was legally insufficient to support the conviction. A co-defendant was seen (by the police) getting into a car with the weapon. Defendant also got into the car. The police followed. Before the police pulled the car over, when the car was out of sight, the weapon was thrown out of the car. A cell phone found near the weapon was tied to the defendant, but the weapon was not. The statutory presumption that a weapon in a vehicle is possessed by all in the vehicle did not apply because the weapon was in the possession of a codefendant when he got into the car:

> We agree with defendant that the evidence is legally insufficient to support the conviction. There is no evidence that he owned or was operating the vehicle, nor is there evidence that he engaged in any other activity that would support a finding that he constructively possessed the weapon... Furthermore, the statutory presumption of possession set forth in Penal Law § 265.15 (3) also does not apply here. The statute provides that "[t]he presence in an automobile, other than a stolen one or a public omnibus, of any firearm . . . is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon . . . is found" ... . The statute further provides, however, that the presumption does not apply, inter alia, "if such weapon . . . is found upon the person of one of the occupants therein" (§ 265.15 [3] [a]). Here, the weapon was not found in the vehicle, and the codefendant was holding it while he was observed entering the vehicle. Consequently, "the evidence is clearcut and leads to the sole conclusion that the weapon was . . . upon the person" of the codefendant ... .
>
> The People's contention that defendant threw the weapon out the window, or assisted the codefendant in doing so, because it was found on the right side of the vehicle is based on speculation. Finally, the People introduced no evidence that would support a finding that defendant possessed the weapon as an accomplice. **People v Willingham, 2018 NY Slip Op 00733, Fourth Dept 2-2-18**

CRIMINAL LAW (NO WARRANT NEEDED FOR CELL SITE LOCATION INFORMATION, THE TERM 'PERSON' IN THE ARSON SECOND STATUTE REFERS TO A LIVING PERSON, BECAUSE THE VICTIMS WERE NOT ALIVE WHEN THE FIRE WAS SET, THE CONVICTION WAS REDUCED TO ARSON THIRD (FOURTH DEPT))/EVIDENCE (CRIMINAL LAW, NO WARRANT NEEDED FOR CELL SITE LOCATION INFORMATION, THE TERM 'PERSON' IN THE ARSON SECOND STATUTE REFERS TO A LIVING PERSON, BECAUSE THE VICTIMS WERE NOT ALIVE WHEN THE FIRE WAS SET, THE CONVICTION WAS REDUCED TO ARSON THIRD (FOURTH DEPT))/CELL SITE LOCATION INFORMATION (CSIL) (CRIMINAL LAW, NO WARRANT NEEDED FOR CELL SITE LOCATION INFORMATION, THE TERM 'PERSON' IN THE ARSON SECOND STATUTE REFERS TO A LIVING PERSON, BECAUSE THE VICTIMS WERE NOT ALIVE WHEN THE FIRE WAS SET, THE CONVICTION WAS REDUCED TO ARSON THIRD (FOURTH DEPT))/SEARCH AND SEIZURE (CELL SITE LOCATION INFORMATION, NO WARRANT NEEDED FOR CELL SITE LOCATION INFORMATION (FOURTH DEPT))/CELL PHONES (CRIMINAL LAW, CELL SITE LOCATION INFORMATION, NO WARRANT NEEDED FOR CELL SITE LOCATION INFORMATION (FOURTH DEPT))

CRIMINAL LAW, EVIDENCE.

NO WARRANT NEEDED FOR CELL SITE LOCATION INFORMATION, THE TERM 'PERSON' IN THE ARSON SECOND STATUTE REFERS TO A LIVING PERSON, BECAUSE THE VICTIMS WERE NOT ALIVE WHEN THE FIRE WAS SET, THE CONVICTION WAS REDUCED TO ARSON THIRD (FOURTH DEPT).

The Fourth Department, in a comprehensive decision dealing with several substantive issues not summarized here, affirmed defendant's first degree murder (four counts) and burglary convictions, and reduced the arson second degree conviction to arson third degree. The victims were not alive when the fire was set. The definition of "person" (in the Arson second statute) was interpreted to refer to a living person. In addition, the court held that the motion to suppress the cell site location information (CSLI), which the police obtained without a warrant, and which placed defendant in the town where the crime was committed at the time of the crime, was properly denied:

> As the Fifth Circuit Court of Appeals has written, "[w]e understand that cell phone users may reasonably want their location information to remain private, just as they may want their trash, placed curbside in opaque bags . . . or the view of their property from 400 feet above the ground . . . to remain so. But the recourse for these desires is in the market or the political process: in demanding that service providers do away with such records (or anonymize them) or in lobbying elected representatives to enact statutory protections. The Fourth Amendment, safeguarded by the courts, protects only reasonable expectations of privacy" (Application of U.S. for Historical Cell Site Data, 724 F3d at 615).
>
> With respect to defendant's state constitutional challenge, we conclude that "there is no sufficient reason' to afford cell site location information at issue here greater protection under the state constitution than it is afforded under the federal constitution" ... . **People v Taylor, 2018 NY Slip Op 00709, Fourth Dept 2-2-18**

CRIMINAL LAW (EVIDENCE, HEARSAY, POSSESSION OF A FORGED INSTRUMENT CONVICTION REVERSED, NO FOUNDATION FOR TWO CATEGORIES OF HEARSAY EVIDENCE (FOURTH DEPT))/EVIDENCE (CRIMINAL LAW, HEARSAY, POSSESSION OF A FORGED INSTRUMENT CONVICTION REVERSED, NO FOUNDATION FOR TWO CATEGORIES OF HEARSAY EVIDENCE (FOURTH DEPT))/HEARSAY (CRIMINAL LAW, POSSESSION OF A FORGED INSTRUMENT CONVICTION REVERSED, NO FOUNDATION FOR TWO CATEGORIES OF HEARSAY EVIDENCE (FOURTH DEPT))/BUSINESS RECORDS (HEARSAY, POSSESSION OF A FORGED INSTRUMENT CONVICTION REVERSED, NO FOUNDATION FOR TWO CATEGORIES OF HEARSAY EVIDENCE (FOURTH DEPT))

CRIMINAL LAW, EVIDENCE.

POSSESSION OF A FORGED INSTRUMENT CONVICTION REVERSED, NO FOUNDATION FOR TWO CATEGORIES OF HEARSAY EVIDENCE (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction for possession of a forged instrument (counterfeit check), determined two categories of hearsay evidence were improperly admitted without foundation:

> ... [T]he court "erred in admitting in evidence a printout of electronic data that was displayed on a computer screen [after] defendant presented a check, the allegedly forged instrument, to a bank teller. The People failed to establish that the printout falls within the business records exception to the hearsay rule . . . [because they] presented no evidence that the data displayed on the computer screen, resulting in the printout, was entered in the regular course of business" ... .
>
> ... [T]he court improperly admitted an investigator's testimony about the results of a search he ran in a credit bureau's commercial database for email addresses and a telephone number contained in a cover letter that enclosed the counterfeit check defendant tried to cash. The People failed to establish the requisite foundation for this testimony inasmuch as the investigator did not testify that he "is familiar with the practices of [the] company that produced the records at issue" and that he "generally relies upon such records" ... . **People v Jones, 2018 NY Slip Op 00710, Fourth Dept 2-2-18**

CRIMINAL LAW (MURDER CONVICTION REVERSED AS AGAINST THE WEIGHT OF THE EVIDENCE (FOURTH DEPT))/EVIDENCE (CRIMINAL LAW, MURDER CONVICTION REVERSED AS AGAINST THE WEIGHT OF THE EVIDENCE (FOURTH DEPT))/AGAINST THE WEIGHT OF THE EVIDENCE (CRIMINAL LAW, MURDER CONVICTION REVERSED AS AGAINST THE WEIGHT OF THE EVIDENCE (FOURTH DEPT))

CRIMINAL LAW, EVIDENCE.

MURDER CONVICTION REVERSED AS AGAINST THE WEIGHT OF THE EVIDENCE (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction and dismissing the indictment, over a two-justice dissent, determined the defendant's murder conviction was against the weight of the evidence. The majority stated that the evidence demonstrated the defendant was probably guilty, but did not rise to proof beyond a reasonable doubt. The dissenters stated they "agreed" with the majority's "implicit" determination that there was sufficient evidence to support the verdict, but they disagreed with the majority's conclusion that the conviction was against the weight of the evidence. The decision describes the evidence in great detail which cannot be fairly summarized here. In a nutshell, there was evidence the defendant went into a motel room with the victim, where the victim was found dead. But the majority noted there was

other evidence to suggest the victim had left the motel room at some point and someone other than the defendant was also in the room:

> The People's case thus rested on three pillars of circumstantial evidence: (1) the fact that defendant entered the hotel with the victim at approximately 7:00 p.m., some 15 hours before his dead body was found in the hotel room; (2) the fact that defendant repeatedly lied to the police when he said that he did not know the victim and had never met him; and (3) the fact that the victim's vehicle was found abandoned on a city street approximately six-tenths of a mile from defendant's residence.
>
> ... [D]efendant's presence in the room, although incriminating, is by no means conclusive considering that other people may have been in the room with the victim and that the Medical Examiner could not determine the time of death. As for defendant's lies to the police, it appears that he may not have been living as an openly gay man—he had a girlfriend and children from different women— and he may have said that he did not know the victim so as not to reveal his sexual orientation. Finally, although the presence of the vehicle so close to defendant's residence is suspicious, the victim was known to drive around the city looking for sexual partners ... . * * *
>
> Although the police cannot be faulted for arresting defendant, nor the People for prosecuting him, the evidence at trial simply failed to prove defendant's guilt beyond a reasonable doubt. There are too many unanswered questions for us to be comfortable that the right person is serving a life sentence for the victim's murder.
>
> **From the dissent:** We agree with the implicit determination of our colleagues that there is sufficient evidence to support the jury's verdict of murder in the second degree ... , but we respectfully disagree with their conclusion that the verdict is against the weight of the evidence. **People v Carter, 2018 NY Slip Op 00711, Fourth Dept 2-2-18**

CRIMINAL LAW (FRISK OF DEFENDANT WAS NOT JUSTIFIED BY REASONABLE SUSPICION, SEIZED WEAPON SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT))/EVIDENCE (CRIMINAL LAW, SUPPRESSION, FRISK OF DEFENDANT WAS NOT JUSTIFIED BY REASONABLE SUSPICION, SEIZED WEAPON SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT))/SEARCH AND SEIZURE (FRISK OF DEFENDANT WAS NOT JUSTIFIED BY REASONABLE SUSPICION, SEIZED WEAPON SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT))/STREET STOPS (FRISK OF DEFENDANT WAS NOT JUSTIFIED BY REASONABLE SUSPICION, SEIZED WEAPON SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT))/SUPPRESS, MOTION TO (CRIMINAL LAW, FRISK OF DEFENDANT WAS NOT JUSTIFIED BY REASONABLE SUSPICION, SEIZED WEAPON SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT))

CRIMINAL LAW, EVIDENCE.

FRISK OF DEFENDANT WAS NOT JUSTIFIED BY REASONABLE SUSPICION, SEIZED WEAPON SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the arresting officer did not have cause to frisk the defendant, which revealed a weapon. The motion to suppress the weapon should have been granted. The officer had responded to a call about a shooting at a bar which described the suspect as a male Hispanic. The officer found a bullet fragment and some blood in a parking lot and he approached a group of people who were about 10 to 25 feet away. One person in the group appeared to the officer to be a male Hispanic. Someone in the group said they didn't hear or see anything. The officer then frisked the defendant, who is black, not Hispanic:

> ... [T]he police had an objective, credible reason to approach the group of five people in the parking lot and to request information in light of the report of a shooting at or near that location at some unidentified earlier time. Thus, we conclude that the police encounter was lawful at its inception... . The People correctly concede, however, that the officer's encounter with defendant constituted a level three forcible detention under the four-tiered De Bour framework ..., and thus required "a reasonable suspicion that [defendant] was involved in a felony or misdemeanor" ... .
>
> We conclude that, "[b]ecause of the lack of correspondence between defendant's appearance and the description of the suspected [shooter that was] transmitted to the officer[] . . . , the officer[] had no basis for concluding that the reported crime had been committed by defendant" ... . "Nor can the [frisk of defendant] and seizure of the gun be justified as having been in the interests of the officer['s] safety, since there was no testimony that the officer[] believed defendant to be carrying a weapon" ... ,and the People presented no other evidence establishing that the officer had reason to fear for his safety ... . **People v Roberts, 2018 NY Slip Op 00725, Fourth Dept 2-2-18**

CRIMINAL LAW (INSUFFICIENT EVIDENCE TO SUPPORT CONVICTION FOR ENDANGERING THE WELFARE OF A CHILD, MOTHER TRANSPORTED DEAD BODY IN A CAR IN WHICH FOUR YEAR OLD DAUGHTER WAS RIDING, TWO JUSTICE DISSENT (FOURTH DEPT))/ENDANGERING THE WELFARE OF A CHILD (EVIDENCE, INSUFFICIENT EVIDENCE TO SUPPORT CONVICTION FOR ENDANGERING THE WELFARE OF A CHILD, MOTHER TRANSPORTED DEAD BODY IN A CAR IN WHICH FOUR YEAR OLD DAUGHTER WAS RIDING, TWO JUSTICE DISSENT (FOURTH DEPT))/EVIDENCE (ENDANGERING THE WELFARE OF A CHILD, INSUFFICIENT EVIDENCE TO SUPPORT CONVICTION FOR ENDANGERING THE WELFARE OF A CHILD, MOTHER TRANSPORTED DEAD BODY IN A CAR IN WHICH FOUR YEAR OLD DAUGHTER WAS RIDING, TWO JUSTICE DISSENT (FOURTH DEPT))

CRIMINAL LAW, EVIDENCE.

INSUFFICIENT EVIDENCE TO SUPPORT CONVICTION FOR ENDANGERING THE WELFARE OF A CHILD, MOTHER TRANSPORTED DEAD BODY IN A CAR IN WHICH FOUR YEAR OLD DAUGHTER WAS RIDING, TWO JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the evidence was not sufficient to support endangering the welfare of a child. The child's mother was convicted of killing the victim and transporting the victim's body in a car when her four-year-old daughter was in the car:

> We agree with defendant, however, that her conviction of endangering the welfare of a child is not based on legally sufficient evidence, and we therefore modify the judgment accordingly. The charge arose from defendant allegedly having her four-year-old child accompany her when she transported the victim's body to her mother's house. Viewing the evidence in support of that charge in the light most favorable to the People ... , we conclude that the People failed to establish beyond a reasonable doubt that the child's riding in the car with the victim's body was likely to result in harm to the physical, mental, or moral welfare of the child ... . Specifically, the People presented no evidence that the child was aware that the victim's body was in the car or that the child was upset or bothered by any smells or sights in the car or later at his grandmother's house ... . **People v Chase, 2018 NY Slip Op 00935, Fourth Dept 2-9-18**

CRIMINAL LAW (EVIDENCE, EVIDENCE OF SERIOUS PHYSICAL INJURY INSUFFICIENT IN THIS GANG ASSAULT CASE (FIRST DEPT))/EVIDENCE (CRIMINAL LAW, EVIDENCE OF SERIOUS PHYSICAL INJURY INSUFFICIENT IN THIS GANG ASSAULT CASE (FIRST DEPT))/PHYSICAL INJURY (CRIMINAL LAW, EVIDENCE, EVIDENCE OF SERIOUS PHYSICAL INJURY INSUFFICIENT IN THIS GANG ASSAULT CASE (FIRST DEPT))

CRIMINAL LAW, EVIDENCE.

EVIDENCE OF SERIOUS PHYSICAL INJURY INSUFFICIENT IN THIS GANG ASSAULT CASE (FIRST DEPT).

The First Department determined the proof of serious physical injury in this gang assault case was insufficient:

> The evidence was legally insufficient to establish that the injuries sustained by the victim constituted serious physical injury (see Penal Law § 10.00[10]), an element of gang assault in the first degree ... . Although there was testimony that the victim still had some physical effects of the assault at the time of trial, the evidence on this was limited and, in any event, the record before the jury did not show that the injury was such that a reasonable observer would find the victim's appearance distressing or objectionable ... . It is also undisputed that the victim's injuries did not impair his general health ... . **People v Garay, 2018 NY Slip Op 01117, First Dept 2-15-18**

CRIMINAL LAW (VIOLATION OF PROBATION DETERMINATION CANNOT BE BASED SOLELY ON GRAND JURY MINUTES, WHICH CONSTITUTE HEARSAY, PROBATION REINSTATED (FIRST DEPT))/EVIDENCE (CRIMINAL LAW, VIOLATION OF PROBATION DETERMINATION CANNOT BE BASED SOLELY ON GRAND JURY MINUTES, WHICH CONSTITUTE HEARSAY, PROBATION REINSTATED (FIRST DEPT))/HEARSAY (CRIMINAL LAW, VIOLATION OF PROBATION DETERMINATION CANNOT BE BASED SOLELY ON GRAND JURY MINUTES, WHICH CONSTITUTE HEARSAY, PROBATION REINSTATED (FIRST DEPT))/GRAND JURY MINUTES (HEARSAY, VIOLATION OF PROBATION DETERMINATION CANNOT BE BASED SOLELY ON GRAND JURY MINUTES, WHICH CONSTITUTE HEARSAY, PROBATION REINSTATED (FIRST DEPT))/PROBATION (VIOLATION OF PROBATION DETERMINATION CANNOT BE BASED SOLELY ON GRAND JURY MINUTES, WHICH CONSTITUTE HEARSAY, PROBATION REINSTATED (FIRST DEPT))

CRIMINAL LAW, EVIDENCE.

VIOLATION OF PROBATION DETERMINATION CANNOT BE BASED SOLELY ON GRAND JURY MINUTES, WHICH CONSTITUTE HEARSAY, PROBATION REINSTATED (FIRST DEPT).

The First Department, reversing Supreme Court and reinstating defendant's sentence of probation, determined the finding that defendant had violated a condition of probation was improperly based entirely on grand jury minutes, which constituted hearsay:

> A finding, by a preponderance of the evidence, that a defendant has violated a condition of probation ... may not be based on hearsay evidence alone ... . Here, on several occasions during the probation revocation hearing, the court indicated that its determination that defendant had violated probation by traveling outside the jurisdiction without permission, and by failing to lead a law abiding life, was based solely on the grand jury minutes related to his 2012 indictment (which was dismissed for lack of jurisdiction and did not result in a conviction) ... . One of these statements, in which the court stated that "the government prevailed by the properly unsealed and complete [g]rand

> [j]ury minutes," occurred directly after defense counsel explicitly argued that the court could not base a finding of a violation solely on the grand jury minutes, which constituted hearsay.
>
> Based on this record, regardless of whether there was other evidence in the record that might have satisfied the requirement for "a residuum of competent legal evidence" ... , we are compelled to find that the court's determination was based on hearsay alone and therefore cannot stand. **People v Hubel, 2018 NY Slip Op 01154, First Dept 2-20-18**

CRIMINAL LAW (CONSTRUCTIVE POSSESSION, DEFENDANT'S PRESENCE IN A METH LAB DID NOT DEMONSTRATE CONSTRUCTIVE POSSESSION OF THE CONTRABAND, METH-RELATED CONVICTIONS REVERSED (THIRD DEPT))/EVIDENCE (CRIMINAL LAW, CONSTRUCTIVE POSSESSION, DEFENDANT'S PRESENCE IN A METH LAB DID NOT DEMONSTRATE CONSTRUCTIVE POSSESSION OF THE CONTRABAND, METH-RELATED CONVICTIONS REVERSED (THIRD DEPT))/CONSTRUCTIVE POSSESSION (CRIMINAL LAW, DEFENDANT'S PRESENCE IN A METH LAB DID NOT DEMONSTRATE CONSTRUCTIVE POSSESSION OF THE CONTRABAND, METH-RELATED CONVICTIONS REVERSED (THIRD DEPT))/POSSESSION (CRIMINAL LAW, CONSTRUCTIVE POSSESSION, DEFENDANT'S PRESENCE IN A METH LAB DID NOT DEMONSTRATE CONSTRUCTIVE POSSESSION OF THE CONTRABAND, METH-RELATED CONVICTIONS REVERSED (THIRD DEPT))/METHAMPHETAMINE (CRIMINAL LAW, CONSTRUCTIVE POSSESSION, DEFENDANT'S PRESENCE IN A METH LAB DID NOT DEMONSTRATE CONSTRUCTIVE POSSESSION OF THE CONTRABAND, METH-RELATED CONVICTIONS REVERSED (THIRD DEPT))

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S PRESENCE IN A METH LAB DID NOT DEMONSTRATE CONSTRUCTIVE POSSESSION OF THE CONTRABAND, METH-RELATED CONVICTIONS REVERSED (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined defendant's presence in a meth lab was not sufficient to demonstrate constructive possession of the contraband in the lab:

> A defendant's mere presence in the same location as contraband is insufficient to establish constructive possession ... . Knowledge that the contraband is present is insufficient, standing alone, to show constructive possession... . Some factors that courts may consider in determining whether a defendant constructively possessed contraband are the defendant's proximity to the contraband, whether the defendant had keys to the location where the contraband was found, whether the contraband was in plain view, evidence that the defendant had used some of the drugs (when drugs are the contraband at issue), and whether there is witness testimony that the contraband belonged to the defendant ... .
>
> The evidence at trial demonstrated that defendant and [codefendant] Yerian had been in the garage with [codefendant] Alberts for approximately one hour when the officer arrived. There was no evidence that defendant lived in the house or garage, kept any of his personal belongings there or had keys to the property... . When the officer observed defendant in the workshop area, which measured approximately 10 to 12 feet by 20 to 24 feet, defendant was sitting on a stool in front of a bench, not touching anything. No contraband was recovered from defendant himself, nor did the proof establish that he owned or had even touched any of the contraband. **People v Maricle, 2018 NY Slip Op 01217, Third Dept 2-22-18**

CRIMINAL LAW (DEPORTATION, COURT WAS REQUIRED TO INFORM DEFENDANT OF THE DEPORTATION CONSEQUENCES OF HIS PLEA, DESPITE DEFENDANT'S ERRONEOUS STATEMENT TO THE COURT THAT HE IS A US CITIZEN, DEFENDANT ALLOWED TO MOVE TO VACATE HIS PLEA (FIRST DEPT))/IMMIGRATION (CRIMINAL LAW, COURT WAS REQUIRED TO INFORM DEFENDANT OF THE DEPORTATION CONSEQUENCES OF HIS PLEA, DESPITE DEFENDANT'S ERRONEOUS STATEMENT TO THE COURT THAT HE IS A US CITIZEN, DEFENDANT ALLOWED TO MOVE TO VACATE HIS PLEA (FIRST DEPT))/DEPORTATION CRIMINAL LAW, COURT WAS REQUIRED TO INFORM DEFENDANT OF THE DEPORTATION CONSEQUENCES OF HIS PLEA, DESPITE DEFENDANT'S ERRONEOUS STATEMENT TO THE COURT THAT HE IS A US CITIZEN, DEFENDANT ALLOWED TO MOVE TO VACATE HIS PLEA (FIRST DEPT))/PLEA, MOTION TO VACATE (CRIMINAL LAW, DEPORTATION, COURT WAS REQUIRED TO INFORM DEFENDANT OF THE DEPORTATION CONSEQUENCES OF HIS PLEA, DESPITE DEFENDANT'S ERRONEOUS STATEMENT TO THE COURT THAT HE IS A US CITIZEN, DEFENDANT ALLOWED TO MOVE TO VACATE HIS PLEA (FIRST DEPT))

CRIMINAL LAW, IMMIGRATION.

COURT WAS REQUIRED TO INFORM DEFENDANT OF THE DEPORTATION CONSEQUENCES OF HIS PLEA, DESPITE DEFENDANT'S ERRONEOUS STATEMENT TO THE COURT THAT HE IS A US CITIZEN, DEFENDANT ALLOWED TO MOVE TO VACATE HIS PLEA (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, over an extensive dissent, determined defendant should be afforded the opportunity to move to vacate his guilty plea because the court did not inform him of the deportation consequences. Although the probation report indicated defendant was not a US citizen and was undocumented, the defendant, who had a history of mental illness, told the court, when asked, the he was a US citizen. The First Department held that all defendants must be informed of the deportation consequences for non-citizens:

> In People v Peque (22 NY3d 168 [2013]...), the Court of Appeals held that before accepting a plea, due process requires that a court "apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to a felony" ... . The Court reasoned that "fundamental fairness . . . requires a trial court to make a noncitizen defendant aware of the risk of deportation because deportation frequently results from a noncitizen's guilty plea and constitutes a uniquely devastating deprivation of liberty" ... . Accordingly, "a noncitizen defendant convicted of a removable crime can hardly make a voluntary and intelligent choice among the alternative courses of action'" unless informed of the possibility of deportation ... .
>
> Defendant's statement to the court that he was a citizen did not absolve the court of its obligations pursuant to Peque. Notably, Peque did not condition the need to give this warning on whether or not the court has reason to believe the defendant is not a citizen. The warning mandated by Peque is required whether the defendant is a citizen or not. Indeed, the Court of Appeals recognized that in order to protect the rights of the large number of noncitizen defendants pleading guilty to felonies in the state, it was necessary to "make all defendants aware that, if they are not United States citizens," pleading guilty to a felony might lead to deportation ... . **People v Palmer, 2018 NY Slip Op 00638, First Dept 2-1-18**

CRIMINAL LAW (SEX OFFENDER REGISTRATION ACT, DEFENDANT DID NOT WAIVE HIS RIGHT TO BE PRESENT AT THE SORA HEARING, NEW HEARING ORDERED (SECOND DEPT))/SEX OFFENDER REGISTRATION ACT (SORA) (DEFENDANT DID NOT WAIVE HIS RIGHT TO BE PRESENT AT THE SORA HEARING, NEW HEARING ORDERED (SECOND DEPT))

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT DID NOT WAIVE HIS RIGHT TO BE PRESENT AT THE SORA HEARING, NEW HEARING ORDERED (SECOND DEPT).

The Second Department, reversing County Court, noted that a defendant has the right to be present at a SORA hearing, and here the defendant did not waive that right:

> "A sex offender facing risk level classification under [SORA] has a due process right to be present at the SORA hearing" ... . While a defendant may waive the right to be present at the hearing, in order to establish a valid waiver it must be shown, inter alia, that "the defendant was advised of the hearing date, of his right to be present, and that the hearing would be conducted in his absence"... . Here, there is no evidence that the defendant was notified of the adjourned hearing date. Therefore, as the People correctly concede, the record fails to establish that the defendant voluntarily waived his right to be present at the hearing ... . **People v Hunt, 2018 NY Slip Op 01087, Second Dept 2-14-18**

DEBTOR-CREDITOR

DEBTOR-CREDITOR (DEFENDANT'S MOTION TO VACATE THE DEFAULT JUDGMENT ON THE GROUND THAT THE ISSUING COURT DID NOT HAVE PERSONAL JURISDICTION SHOULD NOT HAVE BEEN DISMISSED EVEN THOUGH THE JUDGMENT HAD BEEN SATISFIED BY A PROPERTY EXECUTION, IF DEFENDANT CAN DEMONSTRATE A LACK OF PERSONAL JURISDICTION, THE JUDGMENT WILL BE A NULLITY (FOURTH DEPT))/CIVIL PROCEDURE (PERSONAL JURISDICTION, DEFAULT JUDGMENT, DEFENDANT'S MOTION TO VACATE THE DEFAULT JUDGMENT ON THE GROUND THAT THE ISSUING COURT DID NOT HAVE PERSONAL JURISDICTION SHOULD NOT HAVE BEEN DISMISSED EVEN THOUGH THE JUDGMENT HAD BEEN SATISFIED BY A PROPERTY EXECUTION, IF DEFENDANT CAN DEMONSTRATE A LACK OF PERSONAL JURISDICTION, THE JUDGMENT WILL BE A NULLITY (FOURTH DEPT))/DEFAULT JUDGMENT (PERSONAL JURISDICTION, (DEFENDANT'S MOTION TO VACATE THE DEFAULT JUDGMENT ON THE GROUND THAT THE ISSUING COURT DID NOT HAVE PERSONAL JURISDICTION SHOULD NOT HAVE BEEN DISMISSED EVEN THOUGH THE JUDGMENT HAD BEEN SATISFIED BY A PROPERTY EXECUTION, IF DEFENDANT CAN DEMONSTRATE A LACK OF PERSONAL JURISDICTION, THE JUDGMENT WILL BE A NULLITY (FOURTH DEPT))/PERSONAL JURISDICTION (DEFAULT JUDGMENT, DEFENDANT'S MOTION TO VACATE THE DEFAULT JUDGMENT ON THE GROUND THAT THE ISSUING COURT DID NOT HAVE PERSONAL JURISDICTION SHOULD NOT HAVE BEEN DISMISSED EVEN THOUGH THE JUDGMENT HAD BEEN SATISFIED BY A PROPERTY EXECUTION, IF DEFENDANT CAN DEMONSTRATE A LACK OF PERSONAL JURISDICTION, THE JUDGMENT WILL BE A NULLITY (FOURTH DEPT))

DEBTOR-CREDITOR, CIVIL PROCEDURE.

DEFENDANT'S MOTION TO VACATE THE DEFAULT JUDGMENT ON THE GROUND THAT THE ISSUING COURT DID NOT HAVE PERSONAL JURISDICTION SHOULD NOT HAVE BEEN DISMISSED EVEN THOUGH THE JUDGMENT HAD BEEN SATISFIED BY A PROPERTY EXECUTION, IF DEFENDANT CAN DEMONSTRATE A LACK OF PERSONAL JURISDICTION, THE JUDGMENT WILL BE A NULLITY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the defendant did have standing to move to vacate a default judgment on the ground that the court which issued the judgment did not have personal jurisdiction over the defendant. The judgment had been satisfied by a property execution on the defendant's bank account:

> Where, as here, a defendant moves to vacate a default judgment on the ground that the court that rendered the judgment lacked personal jurisdiction over the defendant ... a finding in favor of the defendant would mean that the judgment was "a nullity" . It necessarily follows that, "if a judgment is a nullity, it never legally existed so as to become extinguished by payment" ... .
>
> In addition, inasmuch as plaintiff levied the judgment amount with interest by a property execution on defendant's bank account, we conclude that defendant did not voluntarily pay and satisfy the judgment ... . Thus, it cannot be said that she waived the defense of lack of personal jurisdiction ... . **Cach, LLC v Ryan, 2018 NY Slip Op 00755, Fourth Dept 2-2-18**

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DEFAMATION

DEFAMATION (COMPETENCE ASSESSMENT WRITTEN BY DEFENDANT CONCERNING PLAINTIFF, A DOCTOR WHOSE PATIENT DIED DURING SURGERY, WAS PROTECTED BY THE COMMON INTEREST QUALIFIED PRIVILEGE AND WAS AN EXPRESSION OF PURE OPINION (FOURTH DEPT))/COMMON INTEREST PRIVILEGE (DEFAMATION, COMPETENCE ASSESSMENT WRITTEN BY DEFENDANT CONCERNING PLAINTIFF, A DOCTOR WHOSE PATIENT DIED DURING SURGERY, WAS PROTECTED BY THE COMMON INTEREST QUALIFIED PRIVILEGE AND WAS AN EXPRESSION OF PURE OPINION (FOURTH DEPT))/OPINION (DEFAMATION, COMPETENCE ASSESSMENT WRITTEN BY DEFENDANT CONCERNING PLAINTIFF, A DOCTOR WHOSE PATIENT DIED DURING SURGERY, WAS PROTECTED BY THE COMMON INTEREST QUALIFIED PRIVILEGE AND WAS AN EXPRESSION OF PURE OPINION (FOURTH DEPT))/PRIVILEGE (DEFAMATION, COMPETENCE ASSESSMENT WRITTEN BY DEFENDANT CONCERNING PLAINTIFF, A DOCTOR WHOSE PATIENT DIED DURING SURGERY, WAS PROTECTED BY THE COMMON INTEREST QUALIFIED PRIVILEGE AND WAS AN EXPRESSION OF PURE OPINION (FOURTH DEPT))/QUALIFIED PRIVILEGE (DEFAMATION, COMPETENCE ASSESSMENT WRITTEN BY DEFENDANT CONCERNING PLAINTIFF, A DOCTOR WHOSE PATIENT DIED DURING SURGERY, WAS PROTECTED BY THE COMMON INTEREST QUALIFIED PRIVILEGE AND WAS AN EXPRESSION OF PURE OPINION (FOURTH DEPT))

DEFAMATION, PRIVILEGE.

COMPETENCE ASSESSMENT WRITTEN BY DEFENDANT CONCERNING PLAINTIFF, A DOCTOR WHOSE PATIENT DIED DURING SURGERY, WAS PROTECTED BY THE COMMON INTEREST QUALIFIED PRIVILEGE AND WAS AN EXPRESSION OF PURE OPINION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined a report written by defendant concerning plaintiff-doctor's competence was protected by the common interest qualified privilege and was the expression of pure opinion. The competence assessment was done after one of plaintiff's patients died during surgery:

> Plaintiff, a doctor employed by defendant Kaleida Health (Kaleida), performed a surgery in which the patient died. As a result of this incident, and pursuant to Kaleida policy, plaintiff underwent a neuropsychological competence assessment by Ralph Benedict, M.D. (defendant). Defendant thereafter submitted a written report detailing his findings and opinions to both Kaleida's internal review body and plaintiff's personal physician. ...
>
> "It is well settled that summary judgment is properly granted [dismissing a defamation cause of action] where a qualified privilege obtains and the plaintiff[] offer[s] an insufficient showing of actual malice" ... . Here, defendant established as a matter of law that his written report and associated oral commentary were protected both by the " common interest' " qualified privilege ... . In opposition, plaintiff failed to raise a triable issue of fact on the issue of actual malice ... .
>
> We further agree with defendant that the court erred in denying that part of his motion with respect to the defamation causes of action on the alternative ground that the allegedly defamatory statements are expressions of pure opinion ... . "Expressions of opinion . . . are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation" ... . **Shenoy v Kaleida Health, 2018 NY Slip Op 01008, Fourth Dept 2-9-18**

DISCIPLINARY HEARINGS

DISCIPLINARY HEARINGS (INMATES) (PETITIONER WAS DENIED HIS RIGHT TO CALL WITNESSES, NEW HEARING ORDERED (FOURTH DEPT))

DISCIPLINARY HEARINGS (INMATES).

PETITIONER WAS DENIED HIS RIGHT TO CALL WITNESSES, NEW HEARING ORDERED (FOURTH DEPT).

The Fourth Department annulled the determination and ordered a new disciplinary hearing because petitioner was denied his right to call witnesses:

> "An inmate has a right to call witnesses at a disciplinary hearing so long as the testimony is not immaterial or redundant and poses no threat to institutional safety or correctional goals" ... . Respondent correctly concedes that the Hearing Officer violated petitioner's right to call witnesses as provided in the regulations ... . Inasmuch as a good faith reason for denying the witnesses appears in the record, only petitioner's regulatory right, not his constitutional right, to call those witnesses was violated, and thus the proper remedy is a new hearing ... . **Matter of Adams v Annucci, 2018 NY Slip Op 00695, Fourth Dept 2-2-18**

EMPLOYMENT LAW

NEGLIGENCE (ACCOUNTANT MALPRACTICE, SEEKING ATTORNEY'S FEES FOR THE CLASS ACTION PURSUANT TO THE FEDERAL FAIR LABOR STANDARDS ACT (FLSA) CONSTITUTED SEEKING INDEMNIFICATION WHICH IS PROHIBITED BY THE ACT, THE BREACH OF CONTRACT ACTION IS NOT DUPLICATIVE OF THE ACCOUNTANT MALPRACTICE ACTION (FOURTH DEPT))/EMPLOYMENT LAW (FAIR LABOR STANDARDS ACT, SEEKING ATTORNEY'S FEES FOR THE CLASS ACTION PURSUANT TO THE FEDERAL FAIR LABOR STANDARDS ACT (FLSA) CONSTITUTED SEEKING INDEMNIFICATION WHICH IS PROHIBITED BY THE ACT, THE BREACH OF CONTRACT ACTION IS NOT DUPLICATIVE OF THE ACCOUNTANT MALPRACTICE ACTION (FOURTH DEPT))/FAIR LABOR STANDARDS ACT (FLSA) (SEEKING ATTORNEY'S FEES FOR THE CLASS ACTION PURSUANT TO THE FEDERAL FAIR LABOR STANDARDS ACT (FLSA) CONSTITUTED SEEKING INDEMNIFICATION WHICH IS PROHIBITED BY THE ACT, THE BREACH OF CONTRACT ACTION IS NOT DUPLICATIVE OF THE ACCOUNTANT MALPRACTICE ACTION (FOURTH DEPT))/ACCOUNTANT MALPRACTICE (THE BREACH OF CONTRACT ACTION IS NOT DUPLICATIVE OF THE ACCOUNTANT MALPRACTICE ACTION (FOURTH DEPT))

EMPLOYMENT LAW, ACCOUNTANT MALPRACTICE.

SEEKING ATTORNEY'S FEES FOR THE CLASS ACTION PURSUANT TO THE FEDERAL FAIR LABOR STANDARDS ACT (FLSA) CONSTITUTED SEEKING INDEMNIFICATION WHICH IS PROHIBITED BY THE ACT, THE BREACH OF CONTRACT ACTION IS NOT DUPLICATIVE OF THE ACCOUNTANT MALPRACTICE ACTION (FOURTH DEPT).

The Fourth Department, modifying Supreme Court, determined the request for attorney's fees in this accountant malpractice action constituted a request for indemnification which was prohibited by the Federal Fair Labor Standards Act (FLSA). Plaintiffs alleged they hired defendant-accountants to make sure plaintiffs were in compliance with overtime compensation and wage notice requirements of the FLSA. Plaintiffs were subsequently sued on related claims and sought recover of the attorney's fees expended to settle the suit. The Fourth Department noted that the breach of contract action was not the same as the accountant malpractice action, but that the negligence and breach of fiduciary duty actions were duplicative of the breach of contract action:

> It is well established that "there is no right of contribution or indemnity for employers found liable under the FLSA" ... , and the FLSA preempts any conflicting provisions of state labor laws, including those of New York ... . A party may not avoid this bar on indemnity by seeking indemnification damages through other legal theories ... . In view of the foregoing, we agree with defendants that seeking attorneys' fees associated with that underlying class action is a request for indemnity ... . * * *
>
> .. .[w]e reject defendants' contention that the breach of contract cause of action is duplicative of the accounting malpractice cause of action. The breach of contract cause of action is based on allegations that defendants breached their agreements with plaintiffs by failing to perform certain services, and that plaintiffs are entitled to recover all compensation paid to defendants for those unperformed services. That is separate and distinct from the allegations in the accounting malpractice cause of action, which seeks damages based on allegations that defendants did perform services pursuant to the contract but failed to comply with the accepted standards of care. **Delphi Healthcare PLLC v Petrella Phillips LLP, 2018 NY Slip Op 01012, Fourth Dept 2-9-18**

EMPLOYMENT LAW (NON-SOLICITATION AGREEMENT WAS THE PRODUCT OF OVERREACHING AND WILL NOT BE ENFORCED (FOURTH DEPT))/CONTRACT LAW (NON-SOLICITATION AGREEMENT WAS THE PRODUCT OF OVERREACHING AND WILL NOT BE ENFORCED (FOURTH DEPT))/NON-SOLICITATION AGREEMENT (EMPLOYMENT LAW, NON-SOLICITATION AGREEMENT WAS THE PRODUCT OF OVERREACHING AND WILL NOT BE ENFORCED (FOURTH DEPT))/CONTRACT LAW (NON-SOLICITATION AGREEMENT WAS THE PRODUCT OF OVERREACHING AND WILL NOT BE ENFORCED (FOURTH DEPT))

EMPLOYMENT LAW, CONTRACT LAW.

NON-SOLICITATION AGREEMENT WAS THE PRODUCT OF OVERREACHING AND WILL NOT BE ENFORCED (FOURTH DEPT).

The Fourth Department determined Supreme Court correctly found, after a bench trial, that a non-solicitation agreement between defendant Johnson and her employers (plaintiffs) should not be enforced because the agreement was the product of overreaching:

> Plaintiffs had the burden of demonstrating that, in imposing the terms of the non-solicitation covenant, they did not engage in "overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct, but ha[d] in good faith sought to protect a legitimate interest" ... , and they did not meet that burden. The evidence established that the non-solicitation covenant was imposed as a condition of Johnson's employment, after she had left her former employer and her position there had been filled, which belies plaintiffs' contention that Johnson's bargaining position was equal or superior to theirs... . In addition, plaintiffs required all employees, regardless of position, to sign an agreement containing a non-solicitation covenant as a condition of employment, which undercuts plaintiffs' contention that the covenant was necessary to protect their legitimate business interests ... . Finally, the fact that the agreement provides for partial enforcement of the non-solicitation covenant, which is clearly over-broad under New York law, casts doubt on plaintiffs' good faith in imposing the covenant on Johnson ... . **Brown & Brown, Inc. v Johnson, 2018 NY Slip Op 00728, Fourth Dept 2-2-18**

ENVIRONMENTAL LAW

ENVIRONMENTAL LAW (LAND FILL, CIVIL PROCEDURE, NONPARTY, WHICH WISHED TO PURCHASE PROPERTY FOR USE AS A LAND FILL, PROPERLY ALLOWED TO INTERVENE IN A LAWSUIT BY THE PROPERTY OWNERS SEEKING TO DECLARE INVALID A LOCAL LAW WHICH PROHIBITED EXPANSION OF THE LAND FILL (FOURTH DEPT))/CIVIL PROCEDURE (ENVIRONMENTAL LAW, LAND FILL, NONPARTY, WHICH WISHED TO PURCHASE PROPERTY FOR USE AS A LAND FILL, PROPERLY ALLOWED TO INTERVENE IN A LAWSUIT BY THE PROPERTY OWNERS SEEKING TO DECLARE INVALID A LOCAL LAW WHICH PROHIBITED EXPANSION OF THE LAND FILL (FOURTH DEPT))/LAND FILL (ENVIRONMENTAL LAW, CIVIL PROCEDURE, NONPARTY, WHICH WISHED TO PURCHASE PROPERTY FOR USE AS A LAND FILL, PROPERLY ALLOWED TO INTERVENE IN A LAWSUIT BY THE PROPERTY OWNERS SEEKING TO DECLARE INVALID A LOCAL LAW WHICH PROHIBITED EXPANSION OF THE LAND FILL (FOURTH DEPT))/INTERVENE, MOTION TO (ENVIRONMENTAL LAW, CIVIL PROCEDURE, NONPARTY, WHICH WISHED TO PURCHASE PROPERTY FOR USE AS A LAND FILL, PROPERLY ALLOWED TO INTERVENE IN A LAWSUIT BY THE PROPERTY OWNERS SEEKING TO DECLARE INVALID A LOCAL LAW WHICH PROHIBITED EXPANSION OF THE LAND FILL (FOURTH DEPT))/CPLR 1012, 1013 (MOTION TO INTERVENE, ENVIRONMENTAL LAW, LAND FILL, NONPARTY, WHICH WISHED TO PURCHASE PROPERTY FOR USE AS A LAND FILL, PROPERLY ALLOWED TO INTERVENE IN A LAWSUIT BY THE PROPERTY OWNERS SEEKING TO DECLARE INVALID A LOCAL LAW WHICH PROHIBITED EXPANSION OF THE LAND FILL (FOURTH DEPT))

ENVIRONMENTAL LAW, CIVIL PROCEDURE.

NONPARTY, WHICH WISHED TO PURCHASE PROPERTY FOR USE AS A LAND FILL, PROPERLY ALLOWED TO INTERVENE IN A LAWSUIT BY THE PROPERTY OWNERS SEEKING TO DECLARE INVALID A LOCAL LAW WHICH PROHIBITED EXPANSION OF THE LAND FILL (FOURTH DEPT).

The Fourth Department determined a waste management company (Sealand), which had sought to purchase property for use as a land fill, was properly allowed to intervene in an action to determine the validity of a local law which prohibited expansion of the existing land fill:

> Upon a timely motion, a nonparty is permitted to intervene as of right in an action involving property where the nonparty "may be affected adversely by the judgment" ... . Additionally, after considering "whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party," a court may, in its discretion, permit a nonparty to intervene when, inter alia, the nonparty's "claim or defense and the main action have a common question of law or fact" ... . "Whether intervention is sought as a matter of right under CPLR 1012 (a), or as a matter of discretion under CPLR 1013, is of little practical significance since a timely motion for leave to intervene should be granted, in either event, where the intervenor has a real and substantial interest in the outcome of the proceedings" ... . * * *
>
> Here, although Sealand did not seek to intervene until several years after it knew its interests in the property may be implicated in the dispute, we conclude that the court did not abuse its discretion in granting the motion inasmuch as Sealand's intervention will not delay resolution of the action and defendants will not suffer prejudice ... . Sealand does not seek to assert any new claims or to conduct extensive additional discovery but rather, in essence, seeks only to continue the challenge to the 2007 Law on causes of action that remain unresolved despite lengthy litigation ... . Where, as here, there is no "showing of prejudice resulting from delay in seeking intervention, the motion should not be denied as untimely" ... . **Jones v Town of Carroll, 2018 NY Slip Op 01010, Fourth Dept 2-9-18**

FAMILY LAW

FAMILY LAW (NEGLECT, MENTAL ILLNESS, NEGLECT STEMMING FROM MOTHER'S MENTAL ILLNESS NOT PROVEN, FAMILY COURT REVERSED (SECOND DEPT))/NEGLECT (FAMILY LAW, MENTAL ILLNESS, NEGLECT STEMMING FROM MOTHER'S MENTAL ILLNESS NOT PROVEN, FAMILY COURT REVERSED (SECOND DEPT))/MENTAL ILLNESS (FAMILY LAW, NEGLECT, NEGLECT STEMMING FROM MOTHER'S MENTAL ILLNESS NOT PROVEN, FAMILY COURT REVERSED (SECOND DEPT))

FAMILY LAW.

NEGLECT STEMMING FROM MOTHER'S MENTAL ILLNESS NOT PROVEN, FAMILY COURT REVERSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that neglect based upon mother's mental illness had not been demonstrated:

> ... [T]he petitioner failed to establish that the mother received inadequate psychiatric treatment for her mental illness, or that her alleged untreated mental illness placed the child at imminent risk of harm. The evidence demonstrated that the mother, who was homeless at the time that she became pregnant and had relapsed into using heroin just a few months earlier, managed to obtain housing at a shelter for high-risk pregnant women, sought out appropriate prenatal care which included visits with a social worker, maintained compliance with a methadone treatment program which included weekly counseling sessions, and regularly took the psychotropic medications that were being prescribed to her by a licensed psychiatrist. The evidence also indicated that the mother interacted appropriately with the child in the hospital following the child's birth ... . The petitioner failed to present competent medical evidence that the treatment the mother was receiving failed to address her mental health needs or was otherwise improper in light of her mental health history ... . **Matter of Bella S. (Sarah S.), 2018 NY Slip Op 01069, Second Dept 2-14-18**

FAMILY LAW (AMBIGUITY IN THE STIPULATION OF SETTLEMENT WAS RESOLVED BY LANGUAGE IN THE QUALIFIED DOMESTIC RELATIONS ORDER (QDRO), THE LANGUAGE IN THE QUDRO SHOULD HAVE CONTROLLED THE INTERPRETATION OF THE STIPULATION (SECOND DEPT))/STIPULATION OF SETTLEMENT (FAMILY LAW, AMBIGUITY IN THE STIPULATION OF SETTLEMENT WAS RESOLVED BY LANGUAGE IN THE QUALIFIED DOMESTIC RELATIONS ORDER (QDRO), THE LANGUAGE IN THE QUDRO SHOULD HAVE CONTROLLED THE INTERPRETATION OF THE STIPULATION (SECOND DEPT))/SUPPLEMENTAL EMPLOYEE RETIREMENT PLAN (SERP) (FAMILY LAW, AMBIGUITY IN THE STIPULATION OF SETTLEMENT WAS RESOLVED BY LANGUAGE IN THE QUALIFIED DOMESTIC RELATIONS ORDER (QDRO), THE LANGUAGE IN THE QUDRO SHOULD HAVE CONTROLLED THE INTERPRETATION OF THE STIPULATION (SECOND DEPT))/QUALIFIED DOMESTIC RELATIONS ORDER (QDRO) (FAMILY LAW, AMBIGUITY IN THE STIPULATION OF SETTLEMENT WAS RESOLVED BY LANGUAGE IN THE QUALIFIED DOMESTIC RELATIONS ORDER (QDRO), THE LANGUAGE IN THE QUDRO SHOULD HAVE CONTROLLED THE INTERPRETATION OF THE STIPULATION (SECOND DEPT))

FAMILY LAW.

AMBIGUITY IN THE STIPULATION OF SETTLEMENT WAS RESOLVED BY LANGUAGE IN THE QUALIFIED DOMESTIC RELATIONS ORDER (QDRO), THE LANGUAGE IN THE QDRO SHOULD HAVE CONTROLLED THE INTERPRETATION OF THE STIPULATION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that an ambiguity in the stipulation of settlement involving the supplemental employee retirement plan (SERP) should have been resolved by the language of the qualified domestic relations order (QDRO):

> Courts must interpret matrimonial stipulations of settlement using the standards of contract interpretation ... . A QDRO can only convey rights agreed upon by the parties in their underlying stipulation of settlement... . Courts "cannot reform an agreement to conform to what it thinks is proper, if the parties have not assented to such a reformation" ... . Here, however, the parties assented to a reformation of their stipulation of settlement in a manner that resolves the ambiguity of its SERP [supplemental employee retirement plan] language by mutually consenting to the language of the QDRO that was entered by the Supreme Court ... . The QDRO states that the parties "consent[ed] to the submission of th[e] order," and it was signed by the attorneys representing both parties. The QDRO directed the use of a standard Majauskas formula for dividing, inter alia, the SERP. While the terms of a QDRO must ordinarily yield to the terms of an underlying matrimonial stipulation of settlement or judgment ... , here, the circumstances warrant otherwise as the QDRO resolved an ambiguity in the language of the underlying stipulation, and further, was submitted for entry upon the consent of both parties. * * *
>
> Accordingly, the Supreme Court should have interpreted the stipulation of settlement in light of the 2002 QDRO, which granted to the plaintiff a one-half share, as per the formula set forth therein, in the subject 401(k) account and SERP as of the date of the retirement of the defendant ... . **Palaia v Palaia, 2018 NY Slip Op 01076, Second Dept 2-14-18**

FAMILY LAW (NEGLECT, MENTAL ILLNESS, NO CAUSAL CONNECTION BETWEEN FATHER'S MENTAL ILLNESS AND ACTUAL OR POTENTIAL HARM TO THE CHILD, NEGLECT FINDING VACATED (SECOND DEPT))/NEGLECT (FAMILY LAW, MENTAL ILLNESS, NO CAUSAL CONNECTION BETWEEN FATHER'S MENTAL ILLNESS AND ACTUAL OR POTENTIAL HARM TO THE CHILD, NEGLECT FINDING VACATED (SECOND DEPT))/MENTAL ILLNESS (FAMILY LAW, NEGLECT, NO CAUSAL CONNECTION BETWEEN FATHER'S MENTAL ILLNESS AND ACTUAL OR POTENTIAL HARM TO THE CHILD, NEGLECT FINDING VACATED (SECOND DEPT))

FAMILY LAW.

NO CAUSAL CONNECTION BETWEEN FATHER'S MENTAL ILLNESS AND ACTUAL OR POTENTIAL HARM TO THE CHILD, NEGLECT FINDING VACATED (SECOND DEPT).

The Second Department, reversing Family Court, determined that a causal connection between father's mental illness and actual or potential harm to the child (Kyle) had not been demonstrated. The neglect finding was vacated:

> While parental neglect may be based on mental illness, proof of a parent's mental illness alone will not support a finding of neglect ... . Rather, the petitioner must adduce evidence sufficient to "establish a causal connection between the parent's condition, and the actual or potential harm to the [child]"... .
>
> In this case, we agree with the father and the attorney for the children that ACS [Administration for Children's Services] failed to establish that there was a causal connection between the father's mental illness and any actual or potential harm to Kyle ... . The evidence did not establish that the father's mental illness, for which he was receiving treatment, precluded him from being able to care for Kyle, or placed Kyle's physical, mental, or emotional condition in imminent danger of becoming impaired ... . **Matter of Geoffrey D. (Everton D.), 2018 NY Slip Op 01185, Second Dept 2-21-18**

FAMILY LAW (PATERNITY PETITION SHOULD HAVE BEEN DISMISSED ON EQUITABLE ESTOPPEL GROUNDS IN THIS ARTIFICIAL INSEMINATION CASE (SECOND DEPT))/ARTIFICIAL INSEMINATION (FAMILY LAW, PATERNITY PETITION SHOULD HAVE BEEN DISMISSED ON EQUITABLE ESTOPPEL GROUNDS IN THIS ARTIFICIAL INSEMINATION CASE (SECOND DEPT))/PATERNITY (ARTIFICIAL INSEMINATION, (PATERNITY PETITION SHOULD HAVE BEEN DISMISSED ON EQUITABLE ESTOPPEL GROUNDS IN THIS ARTIFICIAL INSEMINATION CASE (SECOND DEPT))/EQUITABLE ESTOPPEL (FAMILY LAW, PATERNITY PETITION SHOULD HAVE BEEN DISMISSED ON EQUITABLE ESTOPPEL GROUNDS IN THIS ARTIFICIAL INSEMINATION CASE (SECOND DEPT))

FAMILY LAW.

PATERNITY PETITION SHOULD HAVE BEEN DISMISSED ON EQUITABLE ESTOPPEL GROUNDS IN THIS ARTIFICIAL INSEMINATION CASE (SECOND DEPT).

The Second Department, reversing Family Court, determined the paternity petition should have been dismissed on equitable estoppel grounds. Petitioner provided semen for the artificial insemination of mother, who is married to her same sex partner. The artificial insemination was not done by a doctor in accordance with Domestic Relations Law 73, so the statutory presumption of legitimacy did not apply. The parties agreed in a "Three-Party Donor Contract" that the petitioner would not have parental rights or responsibilities:

> ... [I]t is undisputed that all of the parties intended that the petitioner would not be a parent to the child, even if they did contemplate some amount of contact after birth. The petitioner was not present at the child's birth, and was not named on her birth certificate. Despite the fact that he was undeniably aware of the child's birth and his possible claim to paternity, the petitioner waited more than three years to assert his claim of parentage. During that time, the child has lived with and been cared for exclusively by the respondents, each of whom has developed a loving parental relationship with her. Although the petitioner asserts that he has had some contact with the child, he does not claim that he has developed a parental relationship with the child or that she recognizes him as a father. Significantly, the petitioner acknowledges that he does not actually seek a parental role, only that he wants a legal right to visitation with the child. Under these circumstances, we find that a hearing was unnecessary, and it is in the child's best interests to dismiss the paternity petition on the ground of equitable estoppel ... Under the particular circumstances presented here, it would be unjust and inequitable to disrupt the child's close parental relationship with each of the respondents and permit the petitioner take a parental role when he has knowingly acquiesced in the development of a close relationship between the child and another parent figure ... . **Matter of Joseph O. v Danielle B., 2018 NY Slip Op 01192, Second Dept 2-21-18**

FAMILY LAW (ADOPTION, LEGAL GUARDIAN'S PETITION TO ADOPT CHILD SHOULD NOT HAVE BEEN DENIED BASED SOLELY UPON THE GUARDIAN'S CRIMINAL HISTORY (SECOND DEPT))/ADOPTION (LEGAL GUARDIAN'S PETITION TO ADOPT CHILD SHOULD NOT HAVE BEEN DENIED BASED SOLELY UPON THE GUARDIAN'S CRIMINAL HISTORY (SECOND DEPT))

FAMILY LAW.

LEGAL GUARDIAN'S PETITION TO ADOPT CHILD SHOULD NOT HAVE BEEN DENIED BASED SOLELY UPON THE GUARDIAN'S CRIMINAL HISTORY (SECOND DEPT).

The Second Department, reversing Family Court, determined the legal guardian's petition to adopt the child should not have been denied solely based upon petitioner's criminal history. The criminal history was 20 years old and petitioner had been the child's legal guardian for five years:

> A court must determine whether a proposed adoption is in the best interests of the child ... . The court should consider all the relevant factors ... . "[P]erfection is not demanded of adoptive parents" ... , and "even an unacceptable record of misconduct by adoptive parents may be mitigated by evidence that the proposed adoptive child is healthy and happy and considers petitioners to be his [or her] parents" ... .
>
> Here, the Family Court erred in determining that the adoption was not in the child's best interests based solely on the petitioner's criminal history. The court should have received evidence and considered other factors relevant to the issue. This is particularly true since the petitioner had been appointed the child's permanent guardian and had served in that role for over five years, which was most of the child's life, and all of the petitioner's convictions occurred more than 20 years before he commenced this proceeding ... . **Matter of Isabella (Charles O.), 2018 NY Slip Op 01309, Second Dept 2-28-18**

FAMILY LAW (THE AUTOMATIC ORDERS WHICH PRECLUDE TRANSFER OF MARITAL PROPERTY WHILE DIVORCE PROCEEDINGS ARE PENDING CANNOT BE USED AS THE BASIS FOR CIVIL CONTEMPT AFTER THE JUDGMENT OF DIVORCE (SECOND DEPT))/DOMESTIC RELATIONS LAW (THE AUTOMATIC ORDERS WHICH PRECLUDE TRANSFER OF MARITAL PROPERTY WHILE DIVORCE PROCEEDINGS ARE PENDING CANNOT BE USED AS THE BASIS FOR CIVIL CONTEMPT AFTER THE JUDGMENT OF DIVORCE (SECOND DEPT))/MARITAL PROPERTY (THE AUTOMATIC ORDERS WHICH PRECLUDE TRANSFER OF MARITAL PROPERTY WHILE DIVORCE PROCEEDINGS ARE PENDING CANNOT BE USED AS THE BASIS FOR CIVIL CONTEMPT AFTER THE JUDGMENT OF DIVORCE (SECOND DEPT))/DIVORCE (THE AUTOMATIC ORDERS WHICH PRECLUDE TRANSFER OF MARITAL PROPERTY WHILE DIVORCE PROCEEDINGS ARE PENDING CANNOT BE USED AS THE BASIS FOR CIVIL CONTEMPT AFTER THE JUDGMENT OF DIVORCE (SECOND DEPT))/CONTEMPT (FAMILY LAW, DIVORCE, THE AUTOMATIC ORDERS WHICH PRECLUDE TRANSFER OF MARITAL PROPERTY WHILE DIVORCE PROCEEDINGS ARE PENDING CANNOT BE USED AS THE BASIS FOR CIVIL CONTEMPT AFTER THE JUDGMENT OF DIVORCE (SECOND DEPT))/AUTOMATIC ORDERS (FAMILY LAW, DIVORCE, MARITAL PROPERTY, THE AUTOMATIC ORDERS WHICH PRECLUDE TRANSFER OF MARITAL PROPERTY WHILE DIVORCE PROCEEDINGS ARE PENDING CANNOT BE USED AS THE BASIS FOR CIVIL CONTEMPT AFTER THE JUDGMENT OF DIVORCE (SECOND DEPT))

FAMILY LAW.

THE AUTOMATIC ORDERS WHICH PRECLUDE TRANSFER OF MARITAL PROPERTY WHILE DIVORCE PROCEEDINGS ARE PENDING CANNOT BE USED AS THE BASIS FOR CIVIL CONTEMPT AFTER THE JUDGMENT OF DIVORCE (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Duffy, determined the automatic orders which preclude the transfer of marital property ("the Property") when a divorce proceeding is pending cannot be the basis of a contempt order after the judgment of divorce. Here the wife learned the husband had sold a marital asset while the divorce was pending and the court, based upon the automatic orders, after judgment, found the husband in contempt and ordered payment of a purge amount to the wife under threat of incarceration:

> At the time the defendant sold the Property, both Domestic Relations Law § 236(B)(2)(b) and 22 NYCRR 202.16-a were in full force and effect. As is relevant to this appeal, each provision, with language that virtually mirrors the other, precludes either of the parties in a matrimonial action from transferring or in any way disposing of marital assets such as the Property without the written consent of the other party or order of the court, except under certain circumstances not applicable to this case ... . The automatic orders are binding upon a plaintiff upon commencement of the matrimonial action and upon a defendant upon service of the summons or summons and complaint ... . * * *
>
> Upon entry of a judgment of divorce, the purpose of the automatic orders ends, and, when the life of the automatic orders thus expires, the statutory remedies for their enforcement fall at the same time ... . Here, after the judgment of divorce was entered, the automatic orders ceased to exist for the purposes of enforcement ... given that the judgment of divorce was the final determination of the action and, along with legally ending the marriage of the parties, disposed of all outstanding issues relating to the division of the parties' property, the award of maintenance, child custody, and other marital issues ... . * * *
>
> ... [T]he unavailability of civil contempt as a remedy to enforce the terms of the automatic orders after the entry of the judgment of divorce does not render this plaintiff without available remedies. For example, vacatur of the judgment of divorce based on newly discovered evidence, a civil contempt motion for a violation of the judgment of divorce, a proceeding to enforce the terms of the judgment of divorce or to obtain an order directing the payment of 50% of the value of the Property which was awarded to the plaintiff in the judgment of divorce, or amendment of the judgment of divorce are all remedies that the plaintiff could have sought ... . **Spencer v Spencer, 2018 NY Slip Op 01348, Second Dept 2-28-18**

FAMILY LAW (FAMILY COURT SHOULD NOT HAVE REFUSED TO ALLOW FATHER TO REPRESENT HIMSELF IN THIS CUSTODY PROCEEDING (SECOND DEPT))/CUSTODY (FAMILY LAW, FAMILY COURT SHOULD NOT HAVE REFUSED TO ALLOW FATHER TO REPRESENT HIMSELF IN THIS CUSTODY PROCEEDING (SECOND DEPT))/ATTORNEYS (FAMILY LAW, FAMILY COURT SHOULD NOT HAVE REFUSED TO ALLOW FATHER TO REPRESENT HIMSELF IN THIS CUSTODY PROCEEDING (SECOND DEPT))/PRO SE (FAMILY LAW, FAMILY COURT SHOULD NOT HAVE REFUSED TO ALLOW FATHER TO REPRESENT HIMSELF IN THIS CUSTODY PROCEEDING (SECOND DEPT))

FAMILY LAW, ATTORNEYS.

FAMILY COURT SHOULD NOT HAVE REFUSED TO ALLOW FATHER TO REPRESENT HIMSELF IN THIS CUSTODY PROCEEDING (SECOND DEPT).

The Second Department, reversing Family Court, determined father's desire to represent himself in this custody proceeding should have been honored by the court. Family Court had ordered that father be allowed only supervised visitation until he retained counsel:

> The father had a statutory right to counsel in these Family Court proceedings... . However, he also had the right to waive counsel and proceed pro se, provided he waived his right to counsel knowingly, intelligently, and voluntarily... . "Where a respondent has made a knowing, intelligent, and voluntary choice to represent himself or herself, forcing a lawyer upon [him or her] is contrary to his [or her] basic right to defend himself [or herself]"' ... .
>
> Where a party unequivocally and timely asserts the right to self-representation, the court must conduct a searching inquiry to ensure that the waiver of the right to counsel is knowing, intelligent, and voluntary ... . "While there is no rigid formula to the court's inquiry, there must be a showing that the party was aware of the dangers and disadvantages of proceeding without counsel" ... . The Court of Appeals has stated that the better practice is to ask the party about his or her age, education, occupation, previous exposure to legal procedures, and other relevant factors bearing on a competent, intelligent, and voluntary waiver ... .
>
> Here, the father unequivocally and timely asserted his right to represent himself in the Family Court proceedings. The Family Court engaged in a searching inquiry of the father, which revealed that he knowingly, intelligently, and voluntarily waived his right to counsel, and that it was his desire and personal choice to proceed pro se. The court properly warned him of the perils of self-representation, which he acknowledged. The father is a tax attorney, and his relative ignorance of family law did not justify the court's denial of his request, as mere ignorance of the law is insufficient to deprive one of the right to self-representation ... . **Matter of Aleman v Lansch, 2018 NY Slip Op 01303, Second Dept, 2-28-18**

FAMILY LAW (CHILD SUPPORT, FAMILY COURT SHOULD NOT HAVE REFUSED TO ALLOW A SETTLEMENT OF THIS CHILD SUPPORT PROCEEDING, MOTHER AGREED FATHER'S JAIL SENTENCE SHOULD BE SUSPENDED IN RETURN FOR FATHER'S AGREEMENT TO PAY (FOURTH DEPT))/CHILD SUPPORT (STIPULATION, FAMILY COURT SHOULD NOT HAVE REFUSED TO ALLOW A SETTLEMENT OF THIS CHILD SUPPORT PROCEEDING, MOTHER AGREED FATHER'S JAIL SENTENCE SHOULD BE SUSPENDED IN RETURN FOR FATHER'S AGREEMENT TO PAY (FOURTH DEPT))/CIVIL PROCEDURE (FAMILY COURT, STIPULATION, CHILD SUPPORT, FAMILY COURT SHOULD NOT HAVE REFUSED TO ALLOW A SETTLEMENT OF THIS CHILD SUPPORT PROCEEDING, MOTHER AGREED FATHER'S JAIL SENTENCE SHOULD BE SUSPENDED IN RETURN FOR FATHER'S AGREEMENT TO PAY (FOURTH DEPT))/STIPULATION (FAMILY COURT, CHILD SUPPORT, FAMILY COURT SHOULD NOT HAVE REFUSED TO ALLOW A SETTLEMENT OF THIS CHILD SUPPORT PROCEEDING, MOTHER AGREED FATHER'S JAIL SENTENCE SHOULD BE SUSPENDED IN RETURN FOR FATHER'S AGREEMENT TO PAY (FOURTH DEPT))/SETTLEMENT (FAMILY COURT, CHILD SUPPORT, STIPULATION, FAMILY COURT SHOULD NOT HAVE REFUSED TO ALLOW A SETTLEMENT OF THIS CHILD SUPPORT PROCEEDING, MOTHER AGREED FATHER'S JAIL SENTENCE SHOULD BE SUSPENDED IN RETURN FOR FATHER'S AGREEMENT TO PAY (FOURTH DEPT))

FAMILY LAW, CIVIL PROCEDURE.

FAMILY COURT SHOULD NOT HAVE REFUSED TO ALLOW A SETTLEMENT OF THIS CHILD SUPPORT PROCEEDING, MOTHER AGREED FATHER'S JAIL SENTENCE SHOULD BE SUSPENDED IN RETURN FOR FATHER'S AGREEMENT TO PAY (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined Family Court should not have refused to allow a settlement of this child support proceeding by stipulation. The court had directed that father be jailed for six months for failure to pay child support. Mother agreed that the jail sentence should be suspended in return for immediate payment of $3000 and future payments father could make because of a construction job he had just started:

> We agree with the father that the court erred in refusing to allow the parties to enter into the settlement agreement ... . "Stipulations of settlement are favored by the courts and not lightly cast aside" ... . "As a general matter, open court stipulations are especially favored by the courts inasmuch as they promote efficient dispute resolution, timely management of court calendars, and the integrity of the litigation process' " ... Under the circumstances of this case, we conclude that the court erred in refusing to allow the parties to settle the matter, and we therefore reverse the order and remit the matter to Family Court for further proceedings. If the parties no longer wish to settle, we direct the court to hold a new confirmation hearing. **Matter of Soldato v Feketa, 2018 NY Slip Op 00989, Fourth Dept 2-9-18**

FAMILY LAW (STIPULATION OF SETTLEMENT, SUPREME COURT, SUA SPONTE, SET ASIDE AN IN-COURT STIPULATION OF SETTLEMENT IN A DIVORCE ACTION, NEITHER PARTY REQUESTED THAT RELIEF, STIPULATION REINSTATED (SECOND DEPT))/STIPULATIONS (FAMILY LAW, SUPREME COURT, SUA SPONTE, SET ASIDE AN IN-COURT STIPULATION OF SETTLEMENT IN A DIVORCE ACTION, NEITHER PARTY REQUESTED THAT RELIEF, STIPULATION REINSTATED (SECOND DEPT))/CIVIL PROCEDURE (SUA SPONTE, FAMILY LAW, STIPULATIONS, SUPREME COURT, SUA SPONTE, SET ASIDE AN IN-COURT STIPULATION OF SETTLEMENT IN A DIVORCE ACTION, NEITHER PARTY REQUESTED THAT RELIEF, STIPULATION REINSTATED (SECOND DEPT))/SUA SPONTE (STIPULATIONS, FAMILIY LAW, SUPREME COURT, SUA SPONTE, SET ASIDE AN IN-COURT STIPULATION OF SETTLEMENT IN A DIVORCE ACTION, NEITHER PARTY REQUESTED THAT RELIEF, STIPULATION REINSTATED (SECOND DEPT))

FAMILY LAW, CIVIL PROCEDURE.

SUPREME COURT, SUA SPONTE, SET ASIDE AN IN-COURT STIPULATION OF SETTLEMENT IN A DIVORCE ACTION, NEITHER PARTY REQUESTED THAT RELIEF, STIPULATION REINSTATED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the in-court stipulation of settlement in a divorce action should not have been set aside. Neither party requested that the stipulation be set aside:

> The defendant contends that the Supreme Court erred in, sua sponte, setting aside the stipulation. We agree. Neither the decedent nor the defendant requested that the court set aside the stipulation ... . Moreover, stipulations of settlement are favored by the courts and not lightly cast aside. "Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation" ... . Here, the court did not conclude that any of these grounds were present. **Estate of Michael Reid v Reid, 2018 NY Slip Op 01044, Second Dept 2-14-18**

FAMILY LAW (NEGLECT FINDING NOT SUPPORTED BY THE EVIDENCE (FOURTH DEPT))/NEGLECT (NEGLECT FINDING NOT SUPPORTED BY THE EVIDENCE (FOURTH DEPT))/EVIDENCE (FAMILY LAW, NEGLECT FINDING NOT SUPPORTED BY THE EVIDENCE (FOURTH DEPT))

FAMILY LAW, EVIDENCE.

NEGLECT FINDING NOT SUPPORTED BY THE EVIDENCE, CRITERIA EXPLAINED (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the evidence did not support the neglect finding:

> ... [W]e agree with the mother that the court erred in determining that she neglected the child inasmuch as the AFC [attorney for the child] failed to meet her burden of establishing by a preponderance of the evidence that the "child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired" as a consequence of the mother's failure to exercise a minimum degree of care ... . It is well established that "any impairment to the child[ ] must be clearly attributable to the unwillingness or inability of the mother to exercise a minimum degree of care toward' [the child] . . . , rather than what may be deemed undesirable parental behavior' " ... . "Indeed, the statutory test is minimum degree of care — not maximum, not best, not ideal" ... . Here, the court concluded that, "on one hand, [the mother] may simply be a mother determined to protect her child. On the other hand, she may be a woman determined to cause emotional harm to the father of their child. In either case, the

consequence of this course of action may be emotional harm to [the child]" (emphasis added). While the record establishes that the mother's conduct has been troubling at times, "there is no indication in the record that the child was . . . impaired or in imminent danger of impairment of her physical, mental, or emotional condition as a result of any acts committed by [the mother]" ... . **Matter of Ellie Jo L.H., 2018 NY Slip Op 00934, Fourth Dept 2-9-18**

FAMILY LAW (SPECIAL IMMIGRANT JUVENILE STATUS, FAMILY COURT SHOULD HAVE MADE FINDINGS TO ALLOW THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS (SECOND DEPT))/IMMIGRATION LAW (FAMILY LAW, SPECIAL IMMIGRANT JUVENILE STATUS), FAMILY COURT SHOULD HAVE MADE FINDINGS TO ALLOW THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS (SECOND DEPT))/SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) (FAMILY COURT SHOULD HAVE MADE FINDINGS TO ALLOW THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS (SECOND DEPT))

FAMILY LAW, IMMIGRATION LAW.

FAMILY COURT SHOULD HAVE MADE FINDINGS TO ALLOW THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS (SECOND DEPT).

The Second Department, reversing Family Court, determined Family Court should have made the findings to enable the child to petition for special immigrant juvenile state (SIJS):

> ... [W]here, as here, the Family Court's credibility determination is not supported by the record, this Court is free to make its own credibility assessments and overturn the determination of the hearing court... . Based upon our independent factual review, we conclude that the record supports a finding that reunification of the child with his mother is not a viable option based upon parental neglect. The record reflects that the mother failed to meet the educational needs of the child ... . The child testified that, although he was prevented from attending school by gang members who beat him while walking to school, the mother did not arrange for transportation, which was within her financial means, but instead, told him to stay home. Additionally, the child was expelled from one school due to excessive tardiness, and he failed the seventh grade ... . Further, the mother did not provide adequate supervision, often leaving the then eight-year-old child home alone at night in the neighborhood where he had encountered the gang violence ... . **Matter of Dennis X. G. D. V., 2018 NY Slip Op 01073, Second Dept 2-14-18**

FAMILY LAW (CUSTODY, INABILITY TO AGREE ON CHILD'S RELIGIOUS TRAINING CONSTITUTED A CHANGE IN CIRCUMSTANCES WARRANTING THE AWARD OF SOLE CUSTODY TO MOTHER (SECOND DEPT))/CUSTODY (FAMILY LAW, INABILITY TO AGREE ON CHILD'S RELIGIOUS TRAINING CONSTITUTED A CHANGE IN CIRCUMSTANCES WARRANTING THE AWARD OF SOLE CUSTODY TO MOTHER (SECOND DEPT))/RELIGION (FAMILY LAW, CUSTODY, INABILITY TO AGREE ON CHILD'S RELIGIOUS TRAINING CONSTITUTED A CHANGE IN CIRCUMSTANCES WARRANTING THE AWARD OF SOLE CUSTODY TO MOTHER (SECOND DEPT))

FAMILY LAW, RELIGION.

INABILITY TO AGREE ON CHILD'S RELIGIOUS TRAINING CONSTITUTED A CHANGE IN CIRCUMSTANCES WARRANTING THE AWARD OF SOLE CUSTODY TO MOTHER (SECOND DEPT).

The Second Department determined the parents' inability to agree on the child's religious training, together with the father's threat to take to child to Morocco if she were not raised as a "true Muslim," warranted awarding sole custody to mother:

> " In order to modify an existing custody arrangement, there must be a showing of a subsequent change of circumstances so that modification is required to protect the best interests of the child'"... . Here, the parties' inability to agree on the child's religious training, which was an issue that had not been addressed in the parties' July 2009 stipulation of settlement, constituted a change in circumstances. The change in the child's relationship with the father based on the child's fear of his displeasure if she were not a "true Muslim," and her belief that he threatened to abscond with her to Morocco, also contributed to the change in circumstances warranting modification ... .
>
> The evidence established that the only issue on which the parents disagreed was the religion in which the child should be raised and to what degree she should be expected to observe the tenets of each parent's religion. The award to the mother of sole decision-making authority with respect to religion is in the child's best interests, and the award of parenting time to each parent on his or her respective religious holidays will continue to allow the child to be exposed to both parents' religions ... . **Matter of Baalla v Baalla, 2018 NY Slip Op 01050, Second Dept 2-14-18**

FORECLOSURE

FORECLOSURE (FORECLOSURE ACTION SHOULD NOT HAVE BEEN DISMISSED AS UNTIMELY FOR TWO DISTINCT REASONS, THE 2007 COMPLAINT WAS DISMISSED FOR LACK OF STANDING AND THEREFORE DID NOT SERVE TO ACCELERATE THE DEBT, THE SECOND ACTION, BROUGHT BY A SUCCESSOR IN INTEREST, WAS STARTED WITHIN SIX MONTHS OF THE DISMISSAL OF THE INITIAL ACTION AND WAS THEREFORE TIMELY UNDER CPLR 205 [a] (SECOND DEPT))/CIVIL PROCEDURE (FORECLOSURE, STATUTE OF LIMITATIONS, ORECLOSURE ACTION SHOULD NOT HAVE BEEN DISMISSED AS UNTIMELY FOR TWO DISTINCT REASONS, THE 2007 COMPLAINT WAS DISMISSED FOR LACK OF STANDING AND THEREFORE DID NOT SERVE TO ACCELERATE THE DEBT, THE SECOND ACTION, BROUGHT BY A SUCCESSOR IN INTEREST, WAS STARTED WITHIN SIX MONTHS OF THE DISMISSAL OF THE INITIAL ACTION AND WAS THEREFORE TIMELY UNDER CPLR 205 [a] (SECOND DEPT))/CPLR 205[a] (FORECLOSURE ACTION SHOULD NOT HAVE BEEN DISMISSED AS UNTIMELY FOR TWO DISTINCT REASONS, THE 2007 COMPLAINT WAS DISMISSED FOR LACK OF STANDING AND THEREFORE DID NOT SERVE TO ACCELERATE THE DEBT, THE SECOND ACTION, BROUGHT BY A SUCCESSOR IN INTEREST, WAS STARTED WITHIN SIX MONTHS OF THE DISMISSAL OF THE INITIAL ACTION AND WAS THEREFORE TIMELY UNDER CPLR 205 [a] (SECOND DEPT))

FORECLOSURE, CIVIL PROCEDURE.

FORECLOSURE ACTION SHOULD NOT HAVE BEEN DISMISSED AS UNTIMELY FOR TWO DISTINCT REASONS, THE 2007 COMPLAINT WAS DISMISSED FOR LACK OF STANDING AND THEREFORE DID NOT SERVE TO ACCELERATE THE DEBT, THE SECOND ACTION, BROUGHT BY A SUCCESSOR IN INTEREST, WAS STARTED WITHIN SIX MONTHS OF THE DISMISSAL OF THE INITIAL ACTION AND WAS THEREFORE TIMELY UNDER CPLR 205 [a] (SECOND DEPT).

The Second Department, reversing Supreme Court, over a two-justice dissent, determined defendant's motion to dismiss the foreclosure complaint as time-barred should have been denied. The first foreclosure action was started in 2007. The defendant's default did not automatically accelerate the debt because the language in the note and mortgage made acceleration optional. Although the 2007 complaint sought to accelerate the debt, the complaint was dismissed for lack of standing and therefore could not be relied upon as evidence the debt was accelerated. The Second Department also considered, and found valid, an argument raised below but not considered by Supreme Court, i.e., the current action was started within six months of the dismissal of the 2007 action and was therefore timely pursuant to CPLR 205 [a]. This rationale was deemed applicable even though the parties which commenced to two actions were not technically the same:

> ... [I]nasmuch as the acceleration provisions in the note and mortgage were made optional at the discretion of the holder and were not automatically triggered upon Rose Gordon's default (see generally 1-4 Bergman on New York Mortgage Foreclosures § 4.03[2017]), the allegation in the 2007 complaint that Rose Gordon defaulted on March 1, 2007, did not constitute evidence that the mortgage was accelerated on that date ... . * * *
>
> ... [T]he prior plaintiff in the 2007 action did not have standing to commence that action because it was not the holder of the note and mortgage at the time that the 2007 action was commenced. Accordingly, service of the 2007 complaint was ineffective to constitute a valid exercise of the option to accelerate the debt, since the prior plaintiff did not have the authority to accelerate the debt or to sue to foreclose at that time ... .
>
> Although, as a general matter, only the plaintiff in the original action is entitled to the benefits of CPLR 205(a), the Court of Appeals has nevertheless recognized an exception to this general rule under certain circumstances where the plaintiff in the new action is seeking to enforce "the rights of the plaintiff in the original action"... . More specifically to the facts here, this Court has recently held that "a plaintiff in a mortgage foreclosure action which

meets all of the other requirements of the statute is entitled to the benefit of CPLR 205(a) where . . . it is the successor in interest as the current holder of the note"... .

Here, even assuming that there were no questions of fact as to whether the plaintiffs in the 2007 and 2013 actions were legally distinct entities, the plaintiff in this action is entitled to the benefit of CPLR 205(a). As the assignee and subsequent holder of the note and mortgage, the plaintiff in the 2013 action had a statutory right, pursuant to CPLR 1018, to continue the 2007 action in the place of the prior plaintiff once the assignment occurred in 2009, even in the absence of a formal substitution ... . **U.S. Bank N.A. v Gordon, 2018 NY Slip Op 01349, Second Dept 2-28-18**

FORECLOSURE (ALTHOUGH THE BANK'S MOTION FOR SUMMARY JUDGMENT WAS NOT OPPOSED, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED, THE BANK DID NOT DEMONSTRATE STANDING WITH EVIDENCE ADMISSIBLE UNDER THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE (SECOND DEPT))/EVIDENCE (FORECLOSURE, ALTHOUGH THE BANK'S MOTION FOR SUMMARY JUDGMENT WAS NOT OPPOSED, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED, THE BANK DID NOT DEMONSTRATE STANDING WITH EVIDENCE ADMISSIBLE UNDER THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE (SECOND DEPT))/STANDING (FORECLOSURE, ALTHOUGH THE BANK'S MOTION FOR SUMMARY JUDGMENT WAS NOT OPPOSED, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED, THE BANK DID NOT DEMONSTRATE STANDING WITH EVIDENCE ADMISSIBLE UNDER THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE (SECOND DEPT))/HEARSAY (FORECLOSURE, ALTHOUGH THE BANK'S MOTION FOR SUMMARY JUDGMENT WAS NOT OPPOSED, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED, THE BANK DID NOT DEMONSTRATE STANDING WITH EVIDENCE ADMISSIBLE UNDER THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE (SECOND DEPT))/BUSINESS RECORDS (FORECLOSURE, HEARSAY, ALTHOUGH THE BANK'S MOTION FOR SUMMARY JUDGMENT WAS NOT OPPOSED, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED, THE BANK DID NOT DEMONSTRATE STANDING WITH EVIDENCE ADMISSIBLE UNDER THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE (SECOND DEPT))

FORECLOSURE, EVIDENCE.

ALTHOUGH THE BANK'S MOTION FOR SUMMARY JUDGMENT WAS NOT OPPOSED, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED, THE BANK DID NOT DEMONSTRATE STANDING WITH EVIDENCE ADMISSIBLE UNDER THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank's unopposed motion for summary judgment in this foreclosure action should not have been granted. Defendants raised the issue of plaintiff's standing in their answer to the complaint. The bank's proof of standing was not admissible under the business records exception to the hearsay rule:

"A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is the holder or assignee of the underlying note at the time the action is commenced" ... . "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation" ... .

The plaintiff attempted to establish its standing by submitting an affidavit of Jillian Thrasher, a contract management coordinator at Ocwen Loan Servicing, LLC (hereinafter Ocwen), the plaintiff's loan servicer. Thrasher averred, in relevant part, that her affidavit was based upon her review of Ocwen's business records, and that upon review of such records, the note was physically transferred to the plaintiff on December 1, 2006. The plaintiff failed

> to demonstrate that the records relied upon by Thrasher were admissible under the business records exception to the hearsay rule (see CPLR 4518[a]) because Thrasher, an employee of Ocwen, did not attest that she was personally familiar with the plaintiff's record-keeping practices and procedures ... . **US Bank N.A. v Ballin, 2018 NY Slip Op 01212, Second Dept 2-21-18**

FORECLOSURE (EVIDENCE OF STANDING DID NOT MEET THE REQUIREMENTS OF THE BUSINESS RECORDS HEARSAY EXCEPTION, SUPREME COURT SHOULD NOT HAVE DONE INTERNET RESEARCH TO MAKE A SUA SPONTE FINDING THAT THE BANK HAD STANDING (SECOND DEPT))/EVIDENCE (FORECLOSURE, EVIDENCE OF STANDING DID NOT MEET THE REQUIREMENTS OF THE BUSINESS RECORDS HEARSAY EXCEPTION, SUPREME COURT SHOULD NOT HAVE DONE INTERNET RESEARCH TO MAKE A SUA SPONTE FINDING THAT THE BANK HAD STANDING (SECOND DEPT))/CPLR 4518 (EVIDENCE OF STANDING DID NOT MEET THE REQUIREMENTS OF THE BUSINESS RECORDS HEARSAY EXCEPTION, SUPREME COURT SHOULD NOT HAVE DONE INTERNET RESEARCH TO MAKE A SUA SPONTE FINDING THAT THE BANK HAD STANDING (SECOND DEPT))/SUA SPONTE (INTERNET RESEARCH, SUPREME COURT SHOULD NOT HAVE DONE INTERNET RESEARCH TO MAKE A SUA SPONTE FINDING THAT THE BANK HAD STANDING (SECOND DEPT))/INTERNET RESEARCH BY COURT (SUPREME COURT SHOULD NOT HAVE DONE INTERNET RESEARCH TO MAKE A SUA SPONTE FINDING THAT THE BANK HAD STANDING (SECOND DEPT))

FORECLOSURE, EVIDENCE.

EVIDENCE OF STANDING DID NOT MEET THE REQUIREMENTS OF THE BUSINESS RECORDS HEARSAY EXCEPTION, SUPREME COURT SHOULD NOT HAVE DONE INTERNET RESEARCH TO MAKE A SUA SPONTE FINDING THAT THE BANK HAD STANDING (SECOND DEPT).

The Second Department determined plaintiff bank's (OneWest's) motion for summary judgment should have been denied because standing was not demonstrated with evidence meeting the business records hearsay exception requirements. The Second Department criticized Supreme Court for doing its own Internet research and making a sua sponte finding that OneWest had standing:

> In support of its motion, OneWest submitted the affidavit of Jillian Thrasher, an employee of its loan servicer, who averred that OneWest was the holder of the note, which is endorsed in blank, and assignee of the mortgage at the time the action was commenced. However, OneWest failed to demonstrate the admissibility of the records that Thrasher relied upon under the business records exception to the hearsay rule (see CPLR 4518[a]), since she did not attest that she was personally familiar with OneWest's record-keeping practices and procedures ... . Insofar as the Supreme Court reached its determination that OneWest had standing by, sua sponte, "independently tak[ing] judicial notice of the FDIC website," this Court has repeatedly cautioned against such independent Internet investigations, especially when conducted without providing notice or an opportunity for the parties to be heard ... . **OneWest Bank, FSB v Berino, 2018 NY Slip Op 01318, Second Dept 2-28-18**

FORECLOSURE (BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF THE REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION PROPERLY DENIED (SECOND DEPT))/EVIDENCE (FORECLOSURE, (BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF THE REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION PROPERLY DENIED (SECOND DEPT))/REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) (FORECLOSURE, BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF THE REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION PROPERLY DENIED (SECOND DEPT))/BUSINESS RECORDS (HEARSAY, FORECLOSURE, BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF THE REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION PROPERLY DENIED (SECOND DEPT))/HEARSAY (FORECLOSURE, BUSINESS RECORDS EXCEPTION, BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF THE REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION PROPERLY DENIED (SECOND DEPT))

FORECLOSURE, EVIDENCE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW.

BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF THE REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION PROPERLY DENIED (SECOND DEPT).

The Second Department determined plaintiff bank's motion for summary judgment in this foreclosure action was properly denied. Although the bank demonstrating standing to bring the action, it did not demonstrate compliance with the notice provisions of Real Property Actions and Proceedings Law (RPAPL) 1304 with admissible evidence:

> ... [S]ince the defendant raised the issue of compliance with RPAPL 1304 as an affirmative defense in his answer, the plaintiff was required to make a prima facie showing of compliance with RPAPL 1304 ... . The plaintiff failed to make the requisite showing. In support of its motion, the plaintiff submitted the affidavit of Sherry Benight, an officer of Select Portfolio Servicing, Inc. (hereinafter SPS), the loan servicer, along with two copies of a 90-day notice addressed to the defendant and a proof of filing statement pursuant to RPAPL 1306 from the New York State Banking Department. While mailing may be proved by documents meeting the requirements of the business records exception to the hearsay rule, Benight, in her affidavit, did not aver that she was familiar with the plaintiff's mailing practices and procedures, and therefore did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed ... . Moreover, the plaintiff failed to demonstrate, prima facie, that the notices included a list of five housing counseling agencies, as required by the statute (see RPAPL 1304[2]). Although Benight stated in her affidavit that the notices included such a list, the copies of the notices submitted merely included information about contacting a hotline that would provide "free personalized advice from housing counseling agencies certified by the U.S. Department of Housing and Urban Development." **Bank of Am., N.A. v Wheatley, 2018 NY Slip Op 01175, Second Dept 2-21-18**

FREEDOM OF INFORMATION LAW (FOIL)

FREEDOM OF INFORMATION LAW (FOIL) (TRAFFIC AND PARKING VIOLATIONS AGENCY IS A HYBRID AGENCY PLAYING BOTH JUDICIAL AND PROSECUTORIAL ROLES, ALTHOUGH DOCUMENTS RELATING TO THE JUDICIAL ROLE ARE EXEMPT FROM FOIL, DOCUMENTS RELATING TO THE PROSECUTORIAL ROLE ARE NOT (SECOND DEPT))/TRAFFIC AND PARKING VIOLATIONS AGENCY (FOIL, TRAFFIC AND PARKING VIOLATIONS AGENCY IS A HYBRID AGENCY PLAYING BOTH JUDICIAL AND PROSECUTORIAL ROLES, ALTHOUGH DOCUMENTS RELATING TO THE JUDICIAL ROLE ARE EXEMPT FROM FOIL, DOCUMENTS RELATING TO THE PROSECUTORIAL ROLE ARE NOT (SECOND DEPT))

FREEDOM OF INFORMATION LAW (FOIL).

TRAFFIC AND PARKING VIOLATIONS AGENCY IS A HYBRID AGENCY PLAYING BOTH JUDICIAL AND PROSECUTORIAL ROLES, ALTHOUGH DOCUMENTS RELATING TO THE JUDICIAL ROLE ARE EXEMPT FROM FOIL DISCLOSURE, DOCUMENTS RELATING TO THE PROSECUTORIAL ROLE ARE NOT (SECOND DEPT).

The Second Department sent the matter back to Supreme Court to determine whether documents sought by petitioner under the Freedom of Information Law (FOIL) were exempt from disclosure. The documents (re: the photo speed monitoring system) are held by the Nassau Court Traffic and Parking Violations Agency (TPVA). Supreme Court found that the TPVA was exempt from as part of the judiciary. However, although part of the TPVA's role is judicial, there are aspects of the agency which are prosecutorial. Supreme Court should have reviewed the documents to see whether the judiciary exemption applies to all the requested documents:

> FOIL applies to "agency" records, but its definition of "agency" expressly excludes the "judiciary" ... . FOIL defines "judiciary" as "the courts of the state, including any municipal or district court, whether or not of record" ... , the Court of Appeals stated that for purposes of jurisdiction over certain matters, the TPVA is "an arm of the District Court," so that matters pending in the TPVA are considered to be pending in the District Court. Accordingly, it is indisputable that, at least for certain purposes, the TPVA is part of the judiciary. The Supreme Court erred, however, in holding that the TPVA is entirely judicial and thus not subject to FOIL at all. The Court of Appeals expressly recognized in Matter of Dolce v Nassau County Traffic & Parking Violations Agency that the TPVA is a "hybrid agency that exercises both prosecutorial and adjudicatory responsibilities," and that the prosecutorial function is "distinct from the adjudicatory function" (id. at 498). Accordingly, to the extent that a TPVA record concerns the nonadjudicatory responsibilities of the TPVA, it is not exempt from disclosure under the definition of "agency" in Public Officers Law § 86(3). Without examination of the records that the petitioner seeks, the Supreme Court cannot make a determination as to whether they are exempt from disclosure as records of the "judiciary" ... . **Matter of Law Offs. of Cory H. Morris v County of Nassau, 2018 NY Slip Op 00835, Second Dept 2-7-18**

INTENTIONAL TORTS

INTENTIONAL TORTS (CIVIL CONSPIRACY CANNOT BE BROUGHT AS AN INDEPENDENT TORT IN NEW YORK (SECOND DEPT))/CIVIL CONSPIRACY (CIVIL CONSPIRACY CANNOT BE BROUGHT AS AN INDEPENDENT TORT IN NEW YORK (SECOND DEPT))/CONSPIRACY, CIVIL (CIVIL CONSPIRACY CANNOT BE BROUGHT AS AN INDEPENDENT TORT IN NEW YORK (SECOND DEPT))

INTENTIONAL TORTS, CIVIL CONSPIRACY.

CIVIL CONSPIRACY CANNOT BE BROUGHT AS AN INDEPENDENT TORT IN NEW YORK (SECOND DEPT).

The Second Department, in affirming the dismissal of a complaint, noted that a civil conspiracy cause of action cannot be brought as a stand-alone tort in New York. There must be a conspiracy to commit an underlying tort. Because the underlying tort cause of action here, fraud, was dismissed, the civil conspiracy must also be dismissed:

> New York does not recognize civil conspiracy to commit a tort as an independent cause of action ... . However, a plaintiff may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort, and establish that those actions were part of a common scheme ... . Under New York law, "[i]n order to properly plead a cause of action to recover damages for civil conspiracy, the plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement" ... . Here, since the underlying tort of fraud was properly dismissed, the cause of action alleging civil conspiracy to commit fraud was also properly dismissed, since it stands or falls with the underlying tort ... . **McSpedon v Levine, 2018 NY Slip Op 00826, Second Dept 2-7-18**

INSURANCE LAW

INSURANCE LAW (ALL RISK ARTWORK INSURANCE DID NOT COVER DEFECTIVE TITLE, ALLEGATIONS DID NOT DEMONSTRATE A FIDUCIARY RELATIONSHIP BETWEEN INSURED AND BROKERS (FIRST DEPT))/ARTWORK, STOLEN (INSURANCE LAW, STOLEN ARTWORK, ALL RISK ARTWORK INSURANCE DID NOT COVER DEFECTIVE TITLE, ALLEGATIONS DID NOT DEMONSTRATE A FIDUCIARY RELATIONSHIP BETWEEN INSURED AND BROKERS (FIRST DEPT))/BROKERS (INSURANCE LAW, ALL RISK ARTWORK INSURANCE DID NOT COVER DEFECTIVE TITLE, ALLEGATIONS DID NOT DEMONSTRATE A FIDUCIARY RELATIONSHIP BETWEEN INSURED AND BROKERS (FIRST DEPT))/FIDUCIARY DUTY (INSURANCE LAW, BROKERS, ALL RISK ARTWORK INSURANCE DID NOT COVER DEFECTIVE TITLE, ALLEGATIONS DID NOT DEMONSTRATE A FIDUCIARY RELATIONSHIP BETWEEN INSURED AND BROKERS (FIRST DEPT))/TITLE (INSURANCE LAW, STOLEN ARTWORK, ALL RISK ARTWORK INSURANCE DID NOT COVER DEFECTIVE TITLE, ALLEGATIONS DID NOT DEMONSTRATE A FIDUCIARY RELATIONSHIP BETWEEN INSURED AND BROKERS (FIRST DEPT))/SPECIAL RELATIONSHIP (INSURANCE LAW, BROKERS, ALL RISK ARTWORK INSURANCE DID NOT COVER DEFECTIVE TITLE, ALLEGATIONS DID NOT DEMONSTRATE A FIDUCIARY RELATIONSHIP BETWEEN INSURED AND BROKERS (FIRST DEPT))

INSURANCE LAW.

ALL RISK ARTWORK INSURANCE DID NOT COVER DEFECTIVE TITLE, ALLEGATIONS DID NOT DEMONSTRATE A FIDUCIARY RELATIONSHIP BETWEEN INSURED AND BROKERS (FIRST DEPT).

The First Department determined an all-risk artwork insurance policy did not cover contractual liability to purchasers of stolen art which was returned to the owner. In addition, the court determined the allegations in the complaint against the insurance brokers were insufficient to allege a fiduciary relationship:

> "[D]efective title is clearly not a physical loss or damage . . . from any external cause" ... . Despite the fact that the phrase "loss or damage" in the policy was not qualified by terms such as "direct" or "physical," "[w]e may not, under the guise of strict construction, rewrite a policy to bind the insurer to a risk that it did not contemplate and for which it has not been paid" ... . "Title insurance has been regarded as a separate type of contract not falling within any of the three basic classes of insurance. . . . It is not reasonable to interpret a policy so broadly that it becomes another type of policy altogether" ... .
>
> The ... causes of action, against the insurance broker defendants, were properly dismissed, with leave to replead ... for a "special relationship" with the broker defendants ... . "Although the parties' relationship lasted a considerable period of time and defendant [broker] assured plaintiff that his insurance needs were being met, these circumstances are not so exceptional as to support imposition of a fiduciary duty upon defendant"... . A longstanding relationship alone is insufficient to establish a special relationship between plaintiff and the broker defendants. **Dae Assoc., LLC v AXA Art Ins. Corp., 2018 NY Slip Op 01026, First Dept 2-13-18**

INSURANCE LAW (NO-FAULT, RESPONDENT FELL USING A WALKER TO GET OFF A BUS, HER INJURY RESULTED FROM USE OR OPERATION OF A MOTOR VEHICLE, NO-FAULT BENEFITS PROPERLY AWARDED (FIRST DEPT))/NO-FAULT BENEFITS (INSURANCE LAW, RESPONDENT FELL USING A WALKER TO GET OFF A BUS, HER INJURY RESULTED FROM USE OR OPERATION OF A MOTOR VEHICLE, NO-FAULT BENEFITS PROPERLY AWARDED (FIRST DEPT))/BUSES (INSURANCE LAW, NO-FAULT, RESPONDENT FELL USING A WALKER TO GET OFF A BUS, HER INJURY RESULTED FROM USE OR OPERATION OF A MOTOR VEHICLE, NO-FAULT BENEFITS PROPERLY AWARDED (FIRST DEPT))

INSURANCE LAW.

RESPONDENT FELL USING A WALKER TO GET OFF A BUS, HER INJURY RESULTED FROM USE OR OPERATION OF A MOTOR VEHICLE, NO-FAULT BENEFITS PROPERLY AWARDED (FIRST DEPT).

The First Department determined no-fault benefits were properly awarded to respondent, who fell using a walker to exit a bus. Although the lift device was used when respondent got on the bus, the driver refused to activate the lift device when respondent got off. Respondent's injury was deemed to stem form the use or operation of a motor vehicle:

> Here, the bus driver activated the lift device of the bus to assist Valerie Mathis when she boarded the bus. Subsequently, when she was exiting the bus, the bus driver refused to activate the lift device or to lower the bus. As a result, she was forced to place her walker out in the street, and then fell over while attempting to exit the bus.
>
> Thus, the arbitrator and master arbitrator rationally found that the bus was a "proximate cause" of the injury and that the accident involved the "use or operation" of a motor vehicle within the meaning of Insurance Law § 5104(a). **Matter of New York City Tr. Auth. v Physical Medicine & Rehab of NY PC, 2018 NY Slip Op 01260, First Dept 2-22-18**

INSURANCE LAW (ACCEPTING THE ALLEGATIONS AS TRUE FOR PURPOSES OF A MOTION TO DISMISS, INSURANCE AGENT AND HIS EMPLOYERS OWED PLAINTIFF, THE BENEFICIARY OF DECEDENT'S LIFE INSURANCE POLICY, A DUTY OF CARE WITH RESPECT TO THE ISSUANCE OF THE POLICY, RELATIONSHIP WAS CLOSE TO PRIVITY (THIRD DEPT))/NEGLIGENCE (INSURANCE LAW, ACCEPTING THE ALLEGATIONS AS TRUE FOR PURPOSES OF A MOTION TO DISMISS, INSURANCE AGENT AND HIS EMPLOYERS OWED PLAINTIFF, THE BENEFICIARY OF DECEDENT'S LIFE INSURANCE POLICY, A DUTY OF CARE WITH RESPECT TO THE ISSUANCE OF THE POLICY, RELATIONSHIP WAS CLOSE TO PRIVITY (THIRD DEPT))/PRIVITY (INSURANCE LAW, NEGLIGENCE, (ACCEPTING THE ALLEGATIONS AS TRUE FOR PURPOSES OF A MOTION TO DISMISS, INSURANCE AGENT AND HIS EMPLOYERS OWED PLAINTIFF, THE BENEFICIARY OF DECEDENT'S LIFE INSURANCE POLICY, A DUTY OF CARE WITH RESPECT TO THE ISSUANCE OF THE POLICY, RELATIONSHIP WAS CLOSE TO PRIVITY (THIRD DEPT))

INSURANCE LAW, NEGLIGENCE.

ACCEPTING THE ALLEGATIONS AS TRUE FOR PURPOSES OF A MOTION TO DISMISS, INSURANCE AGENT AND HIS EMPLOYERS OWED PLAINTIFF, THE BENEFICIARY OF DECEDENT'S LIFE INSURANCE POLICY, A DUTY OF CARE WITH RESPECT TO THE ISSUANCE OF THE POLICY, RELATIONSHIP WAS CLOSE TO PRIVITY (THIRD DEPT).

The Third Department, modifying Supreme Court, in a decision dealing with several substantive insurance and employment issues not summarized here, determined that plaintiff, as the beneficiary of her husband's life insurance

policy, had sufficiently alleged she was in a relationship close to privity such that the insurance agent (Pontillo) and his employers owed her a duty of care. Plaintiff's suit stemmed from the insurers' denial of coverage based upon material misrepresentations in the decedent's application (not mentioning substance abuse):

> Plaintiff was the intended beneficiary of the ReliaStar policy from the moment when decedent applied for the policy. She further alleged that she was linked to Pontillo by his status as a family member and trusted financial advisor and that Pontillo knew not only that the policy was intended to ensure plaintiff's financial well-being in the event of decedent's death, but that she would rely upon his expertise in preparing a valid application for it. Accepting these allegations as true, they show "an affirmative assumption of a duty of care to a specific party, [plaintiff,] for a specific purpose, regardless of whether there was a contractual relationship" ... . As Supreme Court correctly determined, this alleged "reliance by . . . plaintiff that was 'the end and aim of the transaction'" ... constituted "a relationship so close as to approach that of privity" and created a duty of care toward her that permitted a negligence claim against Pontillo and his purported employers ... . V**estal v Pontillo, 2018 NY Slip Op 01236, Third Dept 2-22-18**

LABOR LAW-CONSTRUCTION LAW

LABOR LAW-CONSTRUCTION LAW (PLAINTIFF TESTIFIED HE DID NOT CHECK THE POSITION OR LOCKING MECHANISM OF THE A-FRAME LADDER HE FELL FROM, PLAINTIFF'S SUMMARY JUDGMENT MOTION IN THIS LABOR LAW 240(1) ACTION SHOULD NOT HAVE BEEN GRANTED, DISSENT DISAGREED (FOURTH DEPT))/LADDERS (LABOR LAW-CONSTRUCTION LAW, PLAINTIFF TESTIFIED HE DID NOT CHECK THE POSITION OR LOCKING MECHANISM OF THE A-FRAME LADDER HE FELL FROM, PLAINTIFF'S SUMMARY JUDGMENT MOTION IN THIS LABOR LAW 240(1) ACTION SHOULD NOT HAVE BEEN GRANTED, DISSENT DISAGREED (FOURTH DEPT))

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF TESTIFIED HE DID NOT CHECK THE POSITION OR LOCKING MECHANISM OF THE A-FRAME LADDER HE FELL FROM, PLAINTIFF'S SUMMARY JUDGMENT MOTION IN THIS LABOR LAW 240(1) ACTION SHOULD NOT HAVE BEEN GRANTED, DISSENT DISAGREED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice well-reasoned dissent, determined plaintiff's motion for summary judgment in this Labor Law 240(1) action should not have been granted. Plaintiff was injured when he fell from the A-frame ladder. Plaintiff testified that he might not have checked the positioning of the ladder or the locking mechanism:

> We agree with defendant that Supreme Court erred in granting plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240 (1). "In order to establish his entitlement to judgment on liability as a matter of law, plaintiff was required to show that the statute was violated and the violation proximately caused his injury' "... . Plaintiff did not know why the ladder wobbled or shifted, and he acknowledged that he might not have checked the positioning of the ladder or the locking mechanism, despite having been aware of the need to do so. We thus conclude that plaintiff failed to meet his initial burden on the motion. "[T]here is a plausible view of the evidence—enough to raise a fact question—that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident" ... .

From the dissent: The fact that plaintiff could not identify why the ladder shifted does not undermine his entitlement to partial summary judgment because a plaintiff who falls from a ladder that "malfunction[s] for no apparent reason" is entitled to "a presumption that the ladder . . . was not good enough to afford proper protection" ... . Although plaintiff testified at his deposition that he did not recall whether he checked the positioning of the ladder or checked that it was "locked into place," he also testified that the ladder was upright and "fully open" near the middle of a small room, and we conclude that it would be unduly speculative for a jury to infer from plaintiff's testimony that the sole proximate cause of the accident was his alleged failure to check its positioning or its locking mechanism ... . **Bonczar v American Multi-Cinema, Inc., 2018 NY Slip Op 00712, Fourth Dept 2-2-18**

LABOR LAW-CONSTRUCTION LAW (PLAINTIFF'S SUMMARY JUDGMENT MOTION PROPERLY GRANTED IN THIS LABOR LAW 240(1) ACTION, PLAINTIFF WAS ATTEMPTING TO EMPTY A 300 POUND BIN INTO A DUMPSTER, FIVE TO SEVEN FOOT HEIGHT DIFFERENTIAL NOT DE MINIMUS (FIRST DEPT))

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF'S SUMMARY JUDGMENT MOTION PROPERLY GRANTED IN THIS LABOR LAW 240(1) ACTION, PLAINTIFF WAS ATTEMPTING TO EMPTY A 300 POUND BIN INTO A DUMPSTER, FIVE TO SEVEN FOOT HEIGHT DIFFERENTIAL NOT DE MINIMUS (FIRST DEPT).

The First Department determined plaintiff's motion for summary judgment in this Labor Law 240(1) action was properly granted. Plaintiff was attempting to lift a 300-pound laundry bin to empty debris into a dumpster. There were no safety devices and the five-to-seven foot height differential was not de minimus. **Miller v 177 Ninth Ave. Condominium, 2018 NY Slip Op 00905, First Dept 2-8-18**

LABOR LAW -CONSTRUCTION LAW (QUESTIONS OF FACT WHETHER DEFENDANT WAS A GENERAL CONTRACTOR OR AGENT OF THE OWNER, WHETHER DEFENDANT HAD CONTROL OVER THE WORK SITE AND NOTICE OF A DANGEROUS CONDITION, AND WHETHER THE INJURY WAS THE RESULT OF THE ABSENCE OR FAILURE OF A SAFETY DEVICE IN THIS LABOR LAW 240 (1), 241 (6) AND 200 ACTION (FOURTH DEPT))/GENERAL CONTRACTOR (LABOR LAW-CONSTRUCTION LAW, QUESTIONS OF FACT WHETHER DEFENDANT WAS A GENERAL CONTRACTOR OR AGENT OF THE OWNER, WHETHER DEFENDANT HAD CONTROL OVER THE WORK SITE AND NOTICE OF A DANGEROUS CONDITION, AND WHETHER THE INJURY WAS THE RESULT OF THE ABSENCE OR FAILURE OF A SAFETY DEVICE IN THIS LABOR LAW 240 (1), 241 (6) AND 200 ACTION (FOURTH DEPT))/OWNER, AGENT OF (LABOR LAW-CONSTRUCTION LAW, QUESTIONS OF FACT WHETHER DEFENDANT WAS A GENERAL CONTRACTOR OR AGENT OF THE OWNER, WHETHER DEFENDANT HAD CONTROL OVER THE WORK SITE AND NOTICE OF A DANGEROUS CONDITION, AND WHETHER THE INJURY WAS THE RESULT OF THE ABSENCE OR FAILURE OF A SAFETY DEVICE IN THIS LABOR LAW 240 (1), 241 (6) AND 200 ACTION (FOURTH DEPT))/FALLING OBJECTS LABOR LAW-CONSTRUCTION LAW, QUESTIONS OF FACT WHETHER DEFENDANT WAS A GENERAL CONTRACTOR OR AGENT OF THE OWNER, WHETHER DEFENDANT HAD CONTROL OVER THE WORK SITE AND NOTICE OF A DANGEROUS CONDITION, AND WHETHER THE INJURY WAS THE RESULT OF THE ABSENCE OR FAILURE OF A SAFETY DEVICE IN THIS LABOR LAW 240 (1), 241 (6) AND 200 ACTION (FOURTH DEPT))

LABOR LAW-CONSTRUCTION LAW.

QUESTIONS OF FACT WHETHER (1) DEFENDANT WAS A GENERAL CONTRACTOR OR AGENT OF THE OWNER, (2) WHETHER DEFENDANT HAD CONTROL OVER THE WORK SITE AND NOTICE OF A DANGEROUS CONDITION, AND (3) WHETHER THE INJURY WAS THE RESULT OF THE ABSENCE OR FAILURE OF A SAFETY DEVICE IN THIS LABOR LAW 240 (1), 241 (6) AND 200 ACTION (FOURTH DEPT).

The Fourth Department, over a two-justice partial dissent, determined that there were questions of fact whether defendant BGB was liable under Labor Law 240 (1) and 241 (6) as a general contractor or agent of the owner, and whether BGB was liable under Labor Law 200 because of its control over the work site and notice of the dangerous condition. In addition the Fourth Department determined there was a question of fact whether the lintel over a doorway fell on plaintiff because of the absence of a safety device (Labor Law 240 (1)). The dissent argued that no safety device was required as a matter of law. With respect to whether BGB was a general contractor or agent of the owner, and whether BGB could be liable under Labor Law 200, the court wrote:

> "An entity is a contractor within the meaning of Labor Law § 240 (1) and § 241 (6) if it had the power to enforce safety standards and choose responsible subcontractors . . . , and an entity is a general contractor if, in addition thereto, it was responsible for coordinating and supervising the . . . project" ... . In addition, an entity that serves as "a construction manager may be vicariously liable as an agent of the property owner . . . where the manager had the ability to control the activity which brought about the injury' "... . Here, BGB's own submissions raise triable issues of fact whether BGB had the authority to supervise or control the injury-producing work, and thus whether it may be held liable as a general contractor or an agent of the owner ... .
>
> With regard to plaintiff's Labor Law § 200 and common-law negligence causes of action against BGB, we conclude that, contrary to BGB's contention on its cross appeal, it failed to eliminate triable issues of fact whether it had " control over the work site and actual or constructive notice of the dangerous condition' " that allegedly caused plaintiff's injuries ... . **Robinson v Sprague Wash. Sq., LLC, 2018 NY Slip Op 01007, Fourth Dept 2-9-18**

LABOR LAW-CONSTRUCTION LAW (PLAINTIFF'S DECEDENT WAS PROVIDED WITH A SAFETY LINE AND A HARNESS WHICH HE WAS NOT USING WHEN HE FELL THROUGH A SKYLIGHT, FAILURE TO USE THE SAFETY LINE WAS THE SOLE PROXIMATE CAUSE OF THE FALL, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT))/SOLE PROXIMATE CAUSE (LABOR LAW-CONSTRUCTION LAW, PLAINTIFF'S DECEDENT WAS PROVIDED WITH A SAFETY LINE AND A HARNESS WHICH HE WAS NOT USING WHEN HE FELL THROUGH A SKYLIGHT, FAILURE TO USE THE SAFETY LINE WAS THE SOLE PROXIMATE CAUSE OF THE FALL, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT))/SAFETY LINE (LABOR LAW-CONSTRUCTION LAW, PLAINTIFF'S DECEDENT WAS PROVIDED WITH A SAFETY LINE AND A HARNESS WHICH HE WAS NOT USING WHEN HE FELL THROUGH A SKYLIGHT, FAILURE TO USE THE SAFETY LINE WAS THE SOLE PROXIMATE CAUSE OF THE FALL, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT))

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF'S DECEDENT WAS PROVIDED WITH A SAFETY LINE AND A HARNESS WHICH HE WAS NOT USING WHEN HE FELL THROUGH A SKYLIGHT, FAILURE TO USE THE SAFETY LINE WAS THE SOLE PROXIMATE CAUSE OF THE FALL, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined that defendants' motion for summary judgment on the Labor Law 240 (1) cause of action should have been granted. Plaintiff's decedent was provided with a harness and told to remain tied off at all times. Plaintiff fell through an opening in the roof when he was not tied off:

> Contrary to plaintiff's argument, a fall through an unguarded opening in the floor of a construction site constitutes a violation of Labor Law § 240(1) only where a safety device adequate to prevent such a fall was not provided ... .. A safety line and harness may be an adequate safety device for a person working over an open area or near an elevated edge ... .
>
> Defendants established prima facie that plaintiff's decedent was the sole proximate cause of his accident with evidence that a harness and safety rope system was in place on the roof, that the decedent had been instructed to remain tied off at all times while on the roof, and that he could not have reached the skylight through which he fell if he had remained tied off. **Guaman v City of New York, 2018 NY Slip Op 01025, First Dept 2-13-15**

LABOR LAW-CONSTRUCTION LAW (EVIDENCE OF DEBRIS ON FLOOR WAS SUFFICIENT TO RAISE A QUESTION OF FACT WHETHER DEFENDANTS WERE LIABLE UNDER LABOR LAW 241(6) AND 200, PLAINTIFF STEPPED INTO A HOLE BUT DID NOT KNOW WHETHER THE HOLE WAS OBSCURED BY THE DEBRIS (FIRST DEPT))

LABOR LAW-CONSTRUCTION LAW.

EVIDENCE OF DEBRIS ON FLOOR WAS SUFFICIENT TO RAISE A QUESTION OF FACT WHETHER DEFENDANTS WERE LIABLE UNDER LABOR LAW 241(6) AND 200, PLAINTIFF STEPPED INTO A HOLE BUT DID NOT KNOW WHETHER THE HOLE WAS OBSCURED BY THE DEBRIS (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined defendants were not entitled to summary judgment on the Labor Law 241(6) and Labor Law 200 causes of action. Plaintiff testified he stepped into a hole. He testified the floor was strewn with debris but he did not know if the hole was covered by debris. The court noted that a defendant need not supervise or control plaintiff's work to be liable under Labor Law 200:

> In support of his Labor Law § 241(6) claim against the owner defendants, plaintiff relies 12 NYCRR 23-1.7(e)(2), which states: "Working Areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed."
>
> ... Although plaintiff could not state with certainty whether or not the garbage and debris actually covered the hole, when his extensive deposition testimony is viewed in its entirety, an inference may be drawn that strewn garbage and debris obscured his view of the floor and hid the hole from him, even if it did not actually cover it, thereby creating a hazardous condition. ...
>
> "Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" ... . Proof of the defendants' supervision and control over a plaintiff's work is not required ... . **Licata v AB Green Gansevoort, LLC, 2018 NY Slip Op 01023, First Dept 2-13-18**

LABOR LAW-CONSTRUCTION LAW (8 TO 12 INCH HEIGHT DIFFERENTIAL NOT ACTIONABLE, LABOR LAW 240 (1) CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED (FIRST DEPT))/ELEVATION-RELATED RISK (LABOR LAW-CONSTRUCTION LAW, 8 TO 12 INCH HEIGHT DIFFERENTIAL NOT ACTIONABLE, LABOR LAW 240 (1) CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED (FIRST DEPT))

LABOR LAW-CONSTRUCTION LAW.

8 TO 12 INCH HEIGHT DIFFERENTIAL NOT ACTIONABLE, LABOR LAW 240 (1) CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's Labor Law 240 (1) cause of action should have been dismissed. Plaintiff was injured when a cart he was moving slipped off a makeshift ramp. The height differential was 8 to 12 inches, which did not present an actionable elevation-related risk:

Plaintiff was allegedly injured in the course of rolling a four-wheeled cart filled with about 100 to 200 pounds of materials over an unsecured, makeshift plywood ramp which bridged an approximately five- or six-inch gap between a truck bed to a loading dock, when the ramp slipped out of place and landed on the truck bed, and the cart descended, pulling on plaintiff's arms and causing injuries. Plaintiff admitted that the vertical distance from the surface of the truck bed to the surface of the dock was about 8 to 12 inches, which under the circumstances, does not constitute a physically significant elevation differential covered by Labor Law § 240(1) ... . Plaintiff's injury was not proximately caused by a failure to protect him from any elevation-related risks posed by the distance of almost four feet from the floor to the surface of the dock, since plaintiff remained on the dock while the cart became wedged in the gap between the truck bed and the dock, and there is no evidence that the gap was large enough to pose a significant risk of any hazardous descent to the floor. **Sawczyszyn v New York Univ., 2018 NY Slip Op 01120, First Dept 2-15-18**

LABOR LAW-CONSTRUCTION LAW (LADDER MOVED FOR NO APPARENT REASON, PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) ACTION (FIRST DEPT))/LADDERS (LABOR LAW-CONSTRUCTION LAW, LADDER MOVED FOR NO APPARENT REASON, PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) ACTION (FIRST DEPT))

LABOR LAW-CONSTRUCTION LAW.

LADDER MOVED FOR NO APPARENT REASON, PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) ACTION (FIRST DEPT).

The First Department determined plaintiff's summary judgment motion on his Labor Law 240 (1) action was properly granted. Plaintiff alleged the ladder he was standing on suddenly moved:

Plaintiff established his entitlement to partial summary judgment on the Labor Law § 240(1) claim through his testimony that he was caused to fall to the ground when the unsecured ladder on which he was standing suddenly shifted and kicked out from underneath him ... .

Defendants' opposition failed to raise a triable issue of fact. None of coworkers who provided affidavits actually witnessed plaintiff fall from the ladder, and they did not contradict his testimony that the ladder suddenly moved. Although defendants also submitted an unsworn accident report containing a statement from a coworker that plaintiff lost his balance and fell, this did not contradict plaintiff's consistent testimony that he fell because the ladder suddenly moved... .. Furthermore, defendants' reliance on O'Brien v Port Auth. of N.Y. & N.J. (29 NY3d 27 [2017]) is misplaced because that case, which found an issue of fact about whether a slippery exterior staircase provided adequate protection to the plaintiff, left intact the presumption that Labor Law § 240(1) is violated where, as here, a ladder collapses or malfunctions for no apparent reason ... . **Rom v Eurostruct, Inc., 2018 NY Slip Op 01262, First Dept 2-22-18**

LABOR LAW-CONSTRUCTION LAW (PROPERTY OWNER LIABLE FOR PLAINTIFF'S FALL FROM A LADDER UNDER LABOR LAW 240 (1) WHILE WORKING FOR A TENANT, EVEN IF THE OWNER WAS NOT AWARE THE TENANT HIRED THE PLAINTIFF, WHERE ONLY HEARSAY EVIDENCE IS OFFERED IN OPPOSITION TO SUMMARY JUDGMENT, A QUESTION OF FACT IS NOT RAISED (FIRST DEPT))/EVIDENCE (SUMMARY JUDGMENT, HEARSAY, PROPERTY OWNER LIABLE FOR PLAINTIFF'S FALL FROM A LADDER UNDER LABOR LAW 240 (1) WHILE WORKING FOR A TENANT, EVEN IF THE OWNER WAS NOT AWARE THE TENANT HIRED THE PLAINTIFF, WHERE ONLY HEARSAY EVIDENCE IS OFFERED IN OPPOSITION TO SUMMARY JUDGMENT, A QUESTION OF FACT IS NOT RAISED (FIRST DEPT))/HEARSAY (SUMMARY JUDGMENT, PROPERTY OWNER LIABLE FOR PLAINTIFF'S FALL FROM A LADDER UNDER LABOR LAW 240 (1) WHILE WORKING FOR A TENANT, EVEN IF THE OWNER WAS NOT AWARE THE TENANT HIRED THE PLAINTIFF, WHERE ONLY HEARSAY EVIDENCE IS OFFERED IN OPPOSITION TO SUMMARY JUDGMENT, A QUESTION OF FACT IS NOT RAISED (FIRST DEPT))/SUMMARY JUDGMENT (HEARSAY, PROPERTY OWNER LIABLE FOR PLAINTIFF'S FALL FROM A LADDER UNDER LABOR LAW 240 (1) WHILE WORKING FOR A TENANT, EVEN IF THE OWNER WAS NOT AWARE THE TENANT HIRED THE PLAINTIFF, WHERE ONLY HEARSAY EVIDENCE IS OFFERED IN OPPOSITION TO SUMMARY JUDGMENT, A QUESTION OF FACT IS NOT RAISED (FIRST DEPT))

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

PROPERTY OWNER LIABLE FOR PLAINTIFF'S FALL FROM A LADDER (UNDER LABOR LAW 240 (1)) WHILE WORKING FOR A TENANT, EVEN IF THE OWNER WAS NOT AWARE THE TENANT HIRED THE PLAINTIFF, WHERE ONLY HEARSAY EVIDENCE IS OFFERED IN OPPOSITION TO SUMMARY JUDGMENT, A QUESTION OF FACT IS NOT RAISED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) claim based upon a fall from a ladder. The court noted that the property owner was liable even if the property owner was unaware the plaintiff had been hired by a tenant (here a deli, also a defendant). The deli owner had provided the A-frame ladder which moved side to side and fell to the ground. The court noted that the defendant owner's opposition papers were entirely hearsay, which cannot defeat summary judgment:

> Plaintiff's fall from an unsecured ladder establishes a violation of the statute ... for which defendant property owner is liable, even if the tenant contracted for the work without the owner's knowledge ... . Plaintiff sufficiently identified the location of the deli at his deposition, and also stated that the deli owner offered him money to paint the sign.
>
> In opposition, defendant failed to raise an issue of fact sufficient to defeat summary judgment. The statements of the owner of the deli and the deli worker were unsworn and inadmissible as hearsay. It should be noted that in the over 2 ½ years since the statements were taken, defendant never attempted to obtain affidavits from these witnesses or attempted to depose them, proffering their statements only after plaintiff had moved for summary judgment. Indeed, in its responses to discovery requests, defendant affirmatively represented that it was "not presently in possession of any statements from witnesses to the accident."
>
> While hearsay statements may be offered in opposition to a motion for summary judgment, hearsay statements cannot defeat summary judgment "where it is the only evidence upon which the opposition to summary judgment is predicated" ... . **Gonzalez v 1225 Ogden Deli Grocery Corp., 2018 NY Slip Op 01280, First Dept 2-27-18**

LABOR LAW-CONSTRUCTION LAW (THE LABOR LAW 240(1), 241(6) AND 200 CAUSES OF ACTION WERE PROPERLY DISMISSED BECAUSE PLAINTIFF WAS NOT INVOLVED IN THE RELEVANT WORK, HOWEVER THE COMMON LAW NEGLIGENCE CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED BECAUSE IT WAS BASED ON THE CREATION AND/OR NOTICE OF A DANGEROUS CONDITION (FOURTH DEPT))/NEGLIGENCE (THE LABOR LAW 240(1), 241(6) AND 200 CAUSES OF ACTION WERE PROPERLY DISMISSED BECAUSE PLAINTIFF WAS NOT INVOLVED IN THE RELEVANT WORK, HOWEVER THE COMMON LAW NEGLIGENCE CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED BECAUSE IT WAS BASED ON THE CREATION AND/OR NOTICE OF A DANGEROUS CONDITION (FOURTH DEPT))/SLIP AND FALL (THE LABOR LAW 240(1), 241(6) AND 200 CAUSES OF ACTION WERE PROPERLY DISMISSED BECAUSE PLAINTIFF WAS NOT INVOLVED IN THE RELEVANT WORK, HOWEVER THE COMMON LAW NEGLIGENCE CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED BECAUSE IT WAS BASED ON THE CREATION AND/OR NOTICE OF A DANGEROUS CONDITION (FOURTH DEPT))

LABOR LAW-CONSTRUCTION LAW, NEGLIGENCE.

THE LABOR LAW 240(1), 241(6) AND 200 CAUSES OF ACTION WERE PROPERLY DISMISSED BECAUSE PLAINTIFF WAS NOT INVOLVED IN THE RELEVANT WORK, HOWEVER THE COMMON LAW NEGLIGENCE CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED BECAUSE IT WAS BASED ON THE CREATION AND NOTICE OF A DANGEROUS CONDITION (FOURTH DEPT).

The Fourth Department determined the Labor Law 240(1), 241(6) and 200 causes of action were properly dismissed, but the common law negligence cause of action should not have been dismissed. Plaintiff, a funeral director, was inspecting a grave which had been covered with plywood when he stepped on the plywood and fell into the grave. The Labor Law causes of action did not apply because plaintiff was not engaged in any relevant work at the time of the fall. However there were questions of fact whether defendants created or had notice of a dangerous condition:

> With respect to Labor Law § 240 (1), defendants met their burden of establishing as a matter of law that plaintiff "was neither among the class of workers . . . nor performing the type of work . . . that Labor Law § 240 (1) is intended to protect" ... , and plaintiffs failed to raise a triable issue of fact... . Defendants further established that plaintiff was not entitled to the protection of Labor Law § 241 (6) inasmuch as his inspection of the grave site in his capacity as a funeral director had no direct connection with the alteration or excavation work ... , and plaintiffs failed to raise a triable issue of fact ... . Finally, the court properly granted summary judgment dismissing the Labor Law § 200 claim because, while that statute is not limited to construction work ... , it does not apply where, as here, the plaintiff was "not permitted or suffered to work on a building or structure at the accident site" ... .
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> ... [D]efendants "were required to establish as a matter of law that they did not exercise any supervisory control over the general condition of the premises or that they neither created nor had actual or constructive notice of the dangerous condition on the premises"... . Defendants' own submissions establish that each had some level of supervisory control over the premises. Moreover, it is undisputed that [defendant] Wolcott dug the grave and placed plywood over it, thus creating and having actual notice of the condition that plaintiffs allege was dangerous. Further, while [defendant] Oakwood established that it did not create the dangerous condition, it "failed to establish as a matter of law that the condition was not visible and apparent or that it had not existed for a sufficient length of time before the accident to permit [Oakwood] or [its] employees to discover and remedy it," and it thereby failed to establish that it lacked constructive notice of it ... . **Solecki v Oakwood Cemetery Assn., 2018 NY Slip Op 00692, Fourth Dept 2-2-18**

MENTAL HYGIENE LAW

MENTAL HYGIENE LAW (INSUFFICIENT SHOWING THAT SEX OFFENDER'S VIOLATION OF NON-SEXUAL TERMS OF HIS STRICT AND INTENSIVE SUPERVISION AND TREATMENT (SIST) JUSTIFIED A FINDING HE IS UNABLE TO CONTROL SEXUAL MISCONDUCT, COMMITMENT TO LOCKED FACILITY REVERSED (FOURTH DEPT))/STRICT AND INTENSIVE SUPERVISION AND TREATMENT (SIST) (MENTAL HYGIENE LAW, INSUFFICIENT SHOWING THAT SEX OFFENDER'S VIOLATION OF NON-SEXUAL TERMS OF HIS STRICT AND INTENSIVE SUPERVISION AND TREATMENT (SIST) JUSTIFIED A FINDING HE IS UNABLE TO CONTROL SEXUAL MISCONDUCT, COMMITMENT TO LOCKED FACILITY REVERSED (FOURTH DEPT))/SEX OFFENDERS (MENTAL HYGIENE LAW, NSUFFICIENT SHOWING THAT SEX OFFENDER'S VIOLATION OF NON-SEXUAL TERMS OF HIS STRICT AND INTENSIVE SUPERVISION AND TREATMENT (SIST) JUSTIFIED A FINDING HE IS UNABLE TO CONTROL SEXUAL MISCONDUCT, COMMITMENT TO LOCKED FACILITY REVERSED (FOURTH DEPT))/CIVIL COMMITMENT (SEX OFFENDERS, MENTAL HYGIENE LAW, INSUFFICIENT SHOWING THAT SEX OFFENDER'S VIOLATION OF NON-SEXUAL TERMS OF HIS STRICT AND INTENSIVE SUPERVISION AND TREATMENT (SIST) JUSTIFIED A FINDING HE IS UNABLE TO CONTROL SEXUAL MISCONDUCT, COMMITMENT TO LOCKED FACILITY REVERSED (FOURTH DEPT))

MENTAL HYGIENE LAW.

INSUFFICIENT SHOWING THAT SEX OFFENDER'S VIOLATION OF NON-SEXUAL TERMS OF HIS STRICT AND INTENSIVE SUPERVISION AND TREATMENT (SIST) JUSTIFIED A FINDING HE IS UNABLE TO CONTROL SEXUAL MISCONDUCT, COMMITMENT TO LOCKED FACILITY REVERSED (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice DeMoyer, reversing County Court, determined that there was an insufficient showing that respondent sex offender's non-sexual violations of the terms of his strict and intensive supervision and treatment (SIST) (alcohol abuse) justified a finding he has an inability to control sexual misconduct:

> ... [A] Mental Hygiene Law § 10.03 (e) finding of "inability" based on nonsexual SIST violations will satisfy the Michael M. [24 NY3d 649] standard only when such violations bear a close causative relationship to sex offending. Such a relationship is missing here. It is simply not true — as the State claims — that "there is a significant link between respondent's alcohol use disorder and his sex offenses" or that his sex offending is "fueled by his drug and alcohol use." A review of the record citations upon which the State relies for those propositions reveals only that respondent was intoxicated during his sex offending decades ago, and that alcohol use "increases his impulsivity and makes [him] more likely to act out." ... [N]o expert has testified that respondent's substance abuse is "strongly fused" or otherwise inextricably intertwined with his sex offending ... . At most, the expert testimony in this case shows that respondent's alcohol use is colocated with his sex offending (and, for that matter, with every other facet of his life), and that alcohol disinhibits him from resisting the urge to offend sexually. But this testimony is virtually identical to the expert testimony ... is inadequate to meet the State's burden under Michael M. **Matter of State of New York v George N., 2018 NY Slip Op 00942, Fourth Dept 2-8-16**

MENTAL HYGIENE LAW (SEX OFFENDER, CIVIL COMMITMENT, A DIAGNOSIS OF UNSPECIFIED PARAPHILIC DISORDER IS NOT ACCEPTED IN THE PSYCHIATRIC OR PSYCHOLOGICAL COMMUNITIES, EXPERT EVIDENCE ABOUT THE DISORDER SHOULD NOT HAVE BEEN ADMITTED IN THIS SEX OFFENDER CIVIL COMMITMENT TRIAL (SECOND DEPT))/SEX OFFENDERS (CIVIL COMMITMENT, A DIAGNOSIS OF UNSPECIFIED PARAPHILIC DISORDER IS NOT ACCEPTED IN THE PSYCHIATRIC OR PSYCHOLOGICAL COMMUNITIES, EXPERT EVIDENCE ABOUT THE DISORDER SHOULD NOT HAVE BEEN ADMITTED IN THIS SEX OFFENDER CIVIL COMMITMENT TRIAL (SECOND DEPT))/CIVIL COMMITMENT (SEX OFFENDERS, MENTAL HYGIENE LAW, A DIAGNOSIS OF UNSPECIFIED PARAPHILIC DISORDER IS NOT ACCEPTED IN THE PSYCHIATRIC OR PSYCHOLOGICAL COMMUNITIES, EXPERT EVIDENCE ABOUT THE DISORDER SHOULD NOT HAVE BEEN ADMITTED IN THIS SEX OFFENDER CIVIL COMMITMENT TRIAL (SECOND DEPT))/UNSPECIFIED PARAPHILIC DISORDER (MENTAL HYGIENE LAW, SEX OFFENDERS, CIVIL COMMITMENT, A DIAGNOSIS OF UNSPECIFIED PARAPHILIC DISORDER IS NOT ACCEPTED IN THE PSYCHIATRIC OR PSYCHOLOGICAL COMMUNITIES, EXPERT EVIDENCE ABOUT THE DISORDER SHOULD NOT HAVE BEEN ADMITTED IN THIS SEX OFFENDER CIVIL COMMITMENT TRIAL (SECOND DEPT))

MENTAL HYGIENE LAW.

A DIAGNOSIS OF UNSPECIFIED PARAPHILIC DISORDER IS NOT ACCEPTED IN THE PSYCHIATRIC OR PSYCHOLOGICAL COMMUNITIES, EXPERT EVIDENCE ABOUT THE DISORDER SHOULD NOT HAVE BEEN ADMITTED IN THIS SEX OFFENDER CIVIL COMMITMENT TRIAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the *Frye* hearing did not demonstrate that diagnosis of unspecified paraphilic disorder has achieved general acceptance in the psychiatric and psychological communities. Therefore the expert evidence on the disorder should not have been admitted at the trial to determine whether appellant sex offender should be subject to civil commitment:

> At the Frye hearing, Dr. David Thornton and Dr. Kostas Katsavdakis, who testified for the State, and Dr. Joe Scroppo, who testified on behalf of the appellant, agreed that the forensic use of the diagnosis of unspecified paraphilic disorder, which was added to the latest edition of the Diagnostic and Statistical Manual of Mental Disorders (hereinafter DSM-5) in 2013, was problematic and controversial, since there was no clear definition or criteria for the proposed disorder. Moreover, all of the experts testified that there was no research demonstrating the reliability of the unspecified paraphilic disorder diagnosis after its introduction in the DSM-5 in 2013. Notably, the experts were not aware of any published research, clinical trials, or field studies regarding unspecified paraphilic disorder.
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> Accordingly, we conclude that the State failed to establish that the diagnosis of unspecified paraphilic disorder has achieved general acceptance in the psychiatric and psychological communities so as to make expert testimony on that diagnosis admissible, and as such, that diagnosis should not have been admitted at the appellant's trial. Since the admission of this testimony was not harmless, we remit the matter to the Supreme Court, Nassau County, for a new trial on the issue of mental abnormality, excluding evidence of the unspecified paraphilic disorder diagnosis, and, if necessary, a new dispositional hearing. **Matter of State of New York v Hilton C., 2018 NY Slip Op 01071, Second Dept 2-14-18**

MENTAL HYGIENE LAW (SEX OFFENDER, CIVIL COMMITMENT, A DIAGNOSIS OF PARAPHIILIA NOS (NONCONSENT) IS NOT ACCEPTED IN THE PSYCHIATRIC OR PSYCHOLOGICAL COMMUNITIES, EXPERT EVIDENCE ABOUT THE DISORDER SHOULD NOT HAVE BEEN ADMITTED IN THIS SEX OFFENDER CIVIL COMMITMENT TRIAL (SECOND DEPT))/SEX OFFENDERS (CIVIL COMMITMENT, A DIAGNOSIS OF PARAPHILIA NOS (NONCONSENT) IS NOT ACCEPTED IN THE PSYCHIATRIC OR PSYCHOLOGICAL COMMUNITIES, EXPERT EVIDENCE ABOUT THE DISORDER SHOULD NOT HAVE BEEN ADMITTED IN THIS SEX OFFENDER CIVIL COMMITMENT TRIAL (SECOND DEPT))/CIVIL COMMITMENT (SEX OFFENDERS, MENTAL HYGIENE LAW, A DIAGNOSIS OF PARAPHILIA NOS (NONCONSENT) IS NOT ACCEPTED IN THE PSYCHIATRIC OR PSYCHOLOGICAL COMMUNITIES, EXPERT EVIDENCE ABOUT THE DISORDER SHOULD NOT HAVE BEEN ADMITTED IN THIS SEX OFFENDER CIVIL COMMITMENT TRIAL (SECOND DEPT))/UNSPECIFIED PARAPHILIC DISORDER (MENTAL HYGIENE LAW, SEX OFFENDERS, CIVIL COMMITMENT, A DIAGNOSIS OF PARAPHILIA NOS (NONCONSENT) IS NOT ACCEPTED IN THE PSYCHIATRIC OR PSYCHOLOGICAL COMMUNITIES, EXPERT EVIDENCE ABOUT THE DISORDER SHOULD NOT HAVE BEEN ADMITTED IN THIS SEX OFFENDER CIVIL COMMITMENT TRIAL (SECOND DEPT))

MENTAL HYGIENE LAW.

A DIAGNOSIS OF PARAPHILIA NOS (NONCONSENT) IS NOT ACCEPTED IN THE PSYCHIATRIC OR PSYCHOLOGICAL COMMUNITIES, EXPERT EVIDENCE ABOUT THE DISORDER SHOULD NOT HAVE BEEN ADMITTED IN THIS SEX OFFENDER CIVIL COMMITMENT TRIAL (SECOND DEPT).

The Second Department determined that Supreme Court properly found, after a *Frye* hearing ordered by the Second Department and held after the trial, the diagnosis of paraphilia NOS (nonconsent) is not generally accepted in the psychiatric and psychological communities. The evidence should not have been admitted at the sex offender's civil commitment trial:

> The evidence at the Frye hearing showed that there was no clear definition or criteria for the diagnosis, the diagnosis could not be reliably distinguished from other motivations for rape, the articles offered in support of the diagnosis did not reflect a wide, significant, or well-rounded body of research supporting the validity of the diagnosis, and the diagnosis was repeatedly rejected for inclusion in the Diagnostic and Statistical Manual of Mental Disorders (hereinafter DSM) or in the DSM appendix ... . Thus, evidence of the paraphilia NOS (nonconsent) diagnosis should not have been admitted at trial. Since the error was not harmless, the matter must be remitted to the Supreme Court, Queens County, for a new trial on the issue of mental abnormality, excluding evidence of the paraphilia NOS (nonconsent) diagnosis, and, if necessary, a new dispositional hearing. **Matter of State of New York v Richard S., 2018 NY Slip Op 01072, Second Dept 2-14-18**

MENTAL HYGIENE LAW (PETITIONER, UPSTATE UNIVERSITY HOSPITAL, SHOULD NOT HAVE BEEN ORDERED TO PAY THE ALLEGED INCAPACITATED PERSON'S (AIP'S) COURT-APPOINTED ATTORNEY'S FEES OR THE COURT EVALUATOR'S FEE IN THIS SUCCESSFUL MENTAL HYGIENE LAW PROCEEDING FOR THE APPOINTMENT OF A GUARDIAN (FOURTH DEPT))/MUNICIPAL LAW (COURT-APPOINTED ATTORNEY'S FEES, MENTAL HYGIENE LAW, PETITIONER, UPSTATE UNIVERSITY HOSPITAL, SHOULD NOT HAVE BEEN ORDERED TO PAY THE ALLEGED INCAPACITATED PERSON'S (AIP'S) COURT-APPOINTED ATTORNEY'S FEES OR THE COURT EVALUATOR'S FEE IN THIS SUCCESSFUL MENTAL HYGIENE LAW PROCEEDING FOR THE APPOINTMENT OF A GUARDIAN (FOURTH DEPT))/ATTORNEYS (COURT-APPOINTED ATTORNEY'S FEES, MENTAL HYGIENE LAW, PETITIONER, UPSTATE UNIVERSITY HOSPITAL, SHOULD NOT HAVE BEEN ORDERED TO PAY THE ALLEGED INCAPACITATED PERSON'S (AIP'S) COURT-APPOINTED ATTORNEY'S FEES OR THE COURT EVALUATOR'S FEE IN THIS SUCCESSFUL MENTAL HYGIENE LAW PROCEEDING FOR THE APPOINTMENT OF A GUARDIAN (FOURTH DEPT))/ATTORNEY'S FEES (COURT-APPOINTED ATTORNEY'S FEES, MENTAL HYGIENE LAW, PETITIONER, UPSTATE UNIVERSITY HOSPITAL, SHOULD NOT HAVE BEEN ORDERED TO PAY THE ALLEGED INCAPACITATED PERSON'S (AIP'S) COURT-APPOINTED ATTORNEY'S FEES OR THE COURT EVALUATOR'S FEE IN THIS SUCCESSFUL MENTAL HYGIENE LAW PROCEEDING FOR THE APPOINTMENT OF A GUARDIAN (FOURTH DEPT))/COURT EVALUATORS (MENTAL HYGIENE LAW, FEES, PETITIONER, UPSTATE UNIVERSITY HOSPITAL, SHOULD NOT HAVE BEEN ORDERED TO PAY THE ALLEGED INCAPACITATED PERSON'S (AIP'S) COURT-APPOINTED ATTORNEY'S FEES OR THE COURT EVALUATOR'S FEE IN THIS SUCCESSFUL MENTAL HYGIENE LAW PROCEEDING FOR THE APPOINTMENT OF A GUARDIAN (FOURTH DEPT))/GUARDIANSHIP (MENTAL HYGIENE LAW, PETITIONER, UPSTATE UNIVERSITY HOSPITAL, SHOULD NOT HAVE BEEN ORDERED TO PAY THE ALLEGED INCAPACITATED PERSON'S (AIP'S) COURT-APPOINTED ATTORNEY'S FEES OR THE COURT EVALUATOR'S FEE IN THIS SUCCESSFUL MENTAL HYGIENE LAW PROCEEDING FOR THE APPOINTMENT OF A GUARDIAN (FOURTH DEPT))/ALLEGED INCAPACITATED PERSON (AIP) (MENTAL HYGIENE LAW, PETITIONER, UPSTATE UNIVERSITY HOSPITAL, SHOULD NOT HAVE BEEN ORDERED TO PAY THE ALLEGED INCAPACITATED PERSON'S (AIP'S) COURT-APPOINTED ATTORNEY'S FEES OR THE COURT EVALUATOR'S FEE IN THIS SUCCESSFUL MENTAL HYGIENE LAW PROCEEDING FOR THE APPOINTMENT OF A GUARDIAN (FOURTH DEPT))

MENTAL HYGIENE LAW, MUNICIPAL LAW, ATTORNEYS.

PETITIONER, UPSTATE UNIVERSITY HOSPITAL, SHOULD NOT HAVE BEEN ORDERED TO PAY THE ALLEGED INCAPACITATED PERSON'S (AIP'S) COURT-APPOINTED ATTORNEY'S FEES OR THE COURT EVALUATOR'S FEE IN THIS SUCCESSFUL MENTAL HYGIENE LAW PROCEEDING FOR THE APPOINTMENT OF A GUARDIAN (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that the court should not have directed the petitioner, Upstate University Hospital, to pay the court-appointed attorney's fees and the court evaluator's fees in this proceeding to appoint a guardian for an alleged incapacitated person (AIP). The petition to appoint a guardian was successful and the AIP did not die during the proceedings. The court-appointed attorney should be paid pursuant to the County Law article 18-B, and the court did not have the authority to require petitioner to pay the court evaluator's fee. The Fourth Department further determined Supreme Court did not abuse its discretion by failing to appoint Mental Hygiene Legal Services to represent the AIP:

> Article 81 of the Mental Hygiene Law provides that the court may appoint an attorney to represent the AIP, and that petitioner may be directed to pay for such services where the petition is dismissed or the AIP dies before the proceeding is concluded ... . In all cases, "[t]he court shall determine the reasonable compensation for the mental hygiene legal service or any attorney appointed pursuant to" that statute ... . Nevertheless, "the statute is silent as to the source of funds for payment of counsel [where, as here,] the AIP is indigent"... . Despite that silence, it is well settled that "the Legislature, by providing for the assignment of counsel for indigents in the Mental Hygiene Law, intended, by necessary implication, to authorize the court to compensate counsel" ... , and it is likewise well settled that the court should direct that requests for such compensation should be determined "in accordance with the procedures set forth in County Law article 18-B" ... . Thus, the court erred in directing petitioner to pay those fees.
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> We also agree with the contention of petitioner in appeal No. 3 that the court erred in directing it to pay the fees requested by the court evaluator. Where, as here, a court appoints a court evaluator pursuant to Mental Hygiene Law § 81.09 (a) and then "grants a petition, the court may award a reasonable compensation to a court evaluator, including the mental hygiene legal service, payable by the estate of the allegedly incapacitated person" ... . The statute further provides that a court may direct petitioner to pay for the services of a court evaluator only where the

court "denies or dismisses a petition," or the AIP "dies before the determination is made in the petition" ... . Therefore, "notwithstanding Supreme Court's broad discretion to award reasonable fees in Mental Hygiene Law article 81 proceedings . . . , [inasmuch as] petitioner was successful [and the AIP is alive], the court was without authority to ascribe responsibility to petitioner for payment of the court evaluator's fees" ... . **Matter of Buttiglieri (Ferrel J.B.), 2018 NY Slip Op 00738, Fourth Dept 2-2-18**

MUNICIPAL LAW

MUNICIPAL LAW (IN THIS SLIP AND FALL CASE, PLAINTIFF DID NOT DEMONSTRATE THE ALLEGED DANGEROUS CONDITION WAS CREATED IMMEDIATELY AFTER THE CITY COMPLETED WORK, THE CITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT))/NEGLIGENCE (MUNICIPAL LAW, IN THIS SLIP AND FALL CASE, PLAINTIFF DID NOT DEMONSTRATE THE ALLEGED DANGEROUS CONDITION WAS CREATED IMMEDIATELY AFTER THE CITY COMPLETED WORK, THE CITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT))/SLIP AND FALL (MUNICIPAL LAW, (IN THIS SLIP AND FALL CASE, PLAINTIFF DID NOT DEMONSTRATE THE ALLEGED DANGEROUS CONDITION WAS CREATED IMMEDIATELY AFTER THE CITY COMPLETED WORK, THE CITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT))/SIDEWALKS (IN THIS SLIP AND FALL CASE, PLAINTIFF DID NOT DEMONSTRATE THE ALLEGED DANGEROUS CONDITION WAS CREATED IMMEDIATELY AFTER THE CITY COMPLETED WORK, THE CITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT))

MUNICIPAL LAW, NEGLIGENCE.

IN THIS SLIP AND FALL CASE, PLAINTIFF DID NOT DEMONSTRATE THE ALLEGED DANGEROUS CONDITION WAS CREATED IMMEDIATELY AFTER THE CITY COMPLETED WORK, THE CITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the city's motion for summary judgment in this slip and fall case should have been granted. Plaintiff alleged that work done on the area (between the curb and the sidewalk) where she fell created a dangerous condition. The work was done a year before the fall. The city would be liable only if the dangerous condition was immediately created by the work, not if the condition developed over time:

> Although plaintiff submitted evidence that defendant may have created the sinkhole by improperly excavating and backfilling the excavated area, we agree with defendant that plaintiff failed to proffer evidence that the depression "was present immediately after completion of the work" ... . Indeed, it is well settled that the affirmative negligence exception " does not apply to conditions that develop over time' " ... . **Burke v City of Rochester, 2018 NY Slip Op 00769, Fourth Dept 2-2-18**

MUNICIPAL LAW (NEGLIGENCE, DRAINAGE SYSTEM, CITY'S OWN PAPERS RAISED A QUESTION OF FACT WHETHER FLOODING WAS CAUSED BY A FAILURE TO MAINTAIN A STORM DRAINAGE SYSTEM, CITY'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/NEGLIGENCE (MUNICIPAL LAW, DRAINAGE SYSTEM, CITY'S OWN PAPERS RAISED A QUESTION OF FACT WHETHER FLOODING WAS CAUSED BY A FAILURE TO MAINTAIN A STORM DRAINAGE SYSTEM, CITY'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/STORM DRAINAGE SYSTEM (MUNICIPAL LAW, NEGLIGENCE CITY'S OWN PAPERS RAISED A QUESTION OF FACT WHETHER FLOODING WAS CAUSED BY A FAILURE TO MAINTAIN A STORM DRAINAGE SYSTEM, CITY'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))

MUNICIPAL LAW, NEGLIGENCE.

CITY'S OWN PAPERS RAISED A QUESTION OF FACT WHETHER FLOODING WAS CAUSED BY A FAILURE TO MAINTAIN A STORM DRAINAGE SYSTEM, CITY'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant city's motion for summary judgment in this drainage-system maintenance case should not have been granted. Plaintiff alleged the city's failure to maintain a storm drainage system caused flooding. The city argued the flooding was caused by an "act of God." The Fourth Department noted that city's own papers raised a question of fact whether the failure to clean the system regularly caused the flooding:

> Defendant submitted the affidavits of its commissioner of public works and its senior engineer, who averred that there is a "trash rack" located in the rear of plaintiff's property that is used to filter debris from the water entering the underground drainage system from a nearby ravine. If too much debris builds up in the trash rack, it will block the flow of water into the drainage system and flood plaintiff's premises. According to the deposition testimony of a member of plaintiff limited liability company, which testimony defendant also submitted, such flooding occurred previously in 2006 and caused severe property damage. The senior engineer averred that, to prevent flooding on plaintiff's property, defendant's employees periodically inspect and maintain the ravine. Plaintiff's member, however, testified that defendant's employees rarely came to the property to clear debris from the trash rack. **2305 Genesee St., LLC v City of Utica, 2018 NY Slip Op 00745, Fourth Dept 2-2-18**

MUNICIPAL LAW (TRAFFIC ACCIDENTS, POTHOLES, VERBAL NOTICE TO CITY ABOUT POTHOLES, EVEN IF REDUCED TO WRITING, DOES NOT SATISFY THE WRITTEN NOTICE PREREQUISITE FOR CITY LIABILITY, PLAINTIFF ALLEGED A TRAFFIC ACCIDENT WAS CAUSED BY POTHOLES (FOURTH DEPT))/NEGLIGENCE (MUNICIPAL LAW, TRAFFIC ACCIDENTS, POTHOLES, VERBAL NOTICE TO CITY ABOUT POTHOLES, EVEN IF REDUCED TO WRITING, DOES NOT SATISFY THE WRITTEN NOTICE PREREQUISITE FOR CITY LIABILITY, PLAINTIFF ALLEGED A TRAFFIC ACCIDENT WAS CAUSED BY POTHOLES (FOURTH DEPT))/TRAFFIC ACCIDENTS (MUNICIPAL LAW, POTHOLES, VERBAL NOTICE TO CITY ABOUT POTHOLES, EVEN IF REDUCED TO WRITING, DOES NOT SATISFY THE WRITTEN NOTICE PREREQUISITE FOR CITY LIABILITY, PLAINTIFF ALLEGED A TRAFFIC ACCIDENT WAS CAUSED BY POTHOLES (FOURTH DEPT))/POTHOLES (MUNICIPAL LAW, NEGLIGENCE, TRAFFIC ACCIDENTS, VERBAL NOTICE TO CITY ABOUT POTHOLES, EVEN IF REDUCED TO WRITING, DOES NOT SATISFY THE WRITTEN NOTICE PREREQUISITE FOR CITY LIABILITY, PLAINTIFF ALLEGED A TRAFFIC ACCIDENT WAS CAUSED BY POTHOLES (FOURTH DEPT))/WRITTEN NOTICE (MUNICIPAL LAW, NEGLIGENCE, TRAFFIC ACCIDENTS, VERBAL NOTICE TO CITY ABOUT POTHOLES, EVEN IF REDUCED TO WRITING, DOES NOT SATISFY THE WRITTEN NOTICE PREREQUISITE FOR CITY LIABILITY, PLAINTIFF ALLEGED A TRAFFIC ACCIDENT WAS CAUSED BY POTHOLES (FOURTH DEPT))

MUNICIPAL LAW, NEGLIGENCE.

VERBAL NOTICE TO CITY ABOUT POTHOLES, EVEN IF REDUCED TO WRITING, DOES NOT SATISFY THE WRITTEN NOTICE PREREQUISITE FOR CITY LIABILITY, PLAINTIFF ALLEGED A TRAFFIC ACCIDENT WAS CAUSED BY POTHOLES (FOURTH DEPT).

The Fourth Department, reversing Supreme Court in this traffic accident case, noted that verbal notice to the city about potholes, even if reduced to writing, does not satisfy the written notice prerequisite for the city's liability:

> Defendant established that it lacked prior written notice of a defective or unsafe condition in the road, and plaintiff failed to meet its burden of demonstrating that an exception to the general rule is applicable... . Contrary to plaintiff's contention, it is well established that "verbal or telephonic communication to a municipal body that is reduced to writing [does not] satisfy a prior written notice requirement" ... . **Tracy v City of Buffalo, 2018 NY Slip Op 00704, Fourth Dept 2-2-18**

MUNICIPAL LAW (NEGLIGENCE, NOTICE OF CLAIM, ALTHOUGH DEFENDANT NYC HEALTH AND HOSPITALS CORPORATION (HHC) DID NOT HAVE TIMELY KNOWLEDGE OF THE ACTUAL FACTS CONSTITUTING PETITIONER'S MEDICAL MALPRACTICE CLAIM, THE FAILURE TO PROVIDE THE MEDICAL RECORDS UPON REQUEST JUSTIFIED GRANTING THE PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM (FIRST DEPT))/NOTICE OF CLAIM (MUNICIPAL LAW, ALTHOUGH DEFENDANT NYC HEALTH AND HOSPITALS CORPORATION (HHC) DID NOT HAVE TIMELY KNOWLEDGE OF THE ACTUAL FACTS CONSTITUTING PETITIONER'S MEDICAL MALPRACTICE CLAIM, THE FAILURE TO PROVIDE THE MEDICAL RECORDS UPON REQUEST JUSTIFIED GRANTING THE PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM (FIRST DEPT))/MEDICAL MALPRACTICE (MUNICIPAL LAW, NOTICE OF CLAIM, ALTHOUGH DEFENDANT NYC HEALTH AND HOSPITALS CORPORATION (HHC) DID NOT HAVE TIMELY KNOWLEDGE OF THE ACTUAL FACTS CONSTITUTING PETITIONER'S MEDICAL MALPRACTICE CLAIM, THE FAILURE TO PROVIDE THE MEDICAL RECORDS UPON REQUEST JUSTIFIED GRANTING THE PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM (FIRST DEPT))

MUNICIPAL LAW, NEGLIGENCE, MEDICAL MALPRACTICE.

ALTHOUGH DEFENDANT NYC HEALTH AND HOSPITALS CORPORATION (HHC) DID NOT HAVE TIMELY KNOWLEDGE OF THE ACTUAL FACTS CONSTITUTING PETITIONER'S MEDICAL MALPRACTICE CLAIM, THE FAILURE TO PROVIDE THE MEDICAL RECORDS UPON REQUEST JUSTIFIED GRANTING THE PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM (FIRST DEPT).

The First Department, over an extensive dissent, determined Supreme Court properly allowed petitioner (Townsend) to file a late notice of claim against the NYC Health and Hospitals Corporation (HHC). Petitioner had been treated for a lacerated thumb. Petitioner did not learn a tendon had been torn until after the 90-day period for filing a notice of claim had passed. He hired an attorney shortly thereafter. The attorney requested petitioner's medical records from HHC but had not received them by the time the statute of limitations was about to run out. At that point the attorney petitioned for leave to file a late notice of claim. Although HHC did not have timely actual knowledge of the nature of the malpractice claim, because the torn tendon was not mentioned in the HHC medical records, the petitioner's excuse for not filing the notice of claim (HHC's failure to provide the medical records) was deemed sufficient:

> The actual knowledge requirement "contemplates actual knowledge of the essential facts constituting the claim,' not knowledge of a specific legal theory" ... . Facts found in medical records that merely "suggest" the possibility of malpractice are insufficient, as a plaintiff must demonstrate a hospital's actual knowledge of negligent acts or omissions which result in injury to a plaintiff ... . Supreme Court correctly found that HHC did not acquire actual knowledge of Townson's malpractice claim through the medical records.
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> The dissent concedes that Townson ... did not learn of [his] torn tendon until March 19, 2015, after the 90-day period had expired. The dissent argues that Townson's excuse may have been reasonable had he requested leave to file shortly after March 19, 2015, when he learned of the torn tendon. In the dissent's view the delay in serving the notice of claim is not excusable.
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> We disagree. Townson's claim of malpractice is premised upon a theory that the emergency room failed to evaluate whether internal, connective soft tissue damage resulted from the deep laceration. Townson's counsel, at the time he was retained, which was immediately after Townson had learned of the torn tendon, promptly sent a request to HHC for the medical records to discern the viability of Townson's malpractice claim, but HHC failed to respond on multiple occasions ... . **Matter of Townson v New York City Health & Hosps. Corp., 2018 NY Slip Op 00607, First Dept 2-1-18**

NEGLIGENCE

NEGLIGENCE (SAILING, ASSUMPTION OF THE RISK, QUESTION OF FACT WHETHER BEGINNING SAILOR ASSUMED THE RISK OF INJURY WHEN TRYING TO RIGHT A CAPSIZED BOAT, DEFENDANTS PROVIDED NO CAPSIZE-RECOVERY TRAINING (FOURTH DEPT))/ASSUMPTION OF RISK (SAILING, QUESTION OF FACT WHETHER BEGINNING SAILOR ASSUMED THE RISK OF INJURY WHEN TRYING TO RIGHT A CAPSIZED BOAT, DEFENDANTS PROVIDED NO CAPSIZE-RECOVERY TRAINING (FOURTH DEPT))/SAILING (ASSUMPTION OF RISK, QUESTION OF FACT WHETHER BEGINNING SAILOR ASSUMED THE RISK OF INJURY WHEN TRYING TO RIGHT A CAPSIZED BOAT, DEFENDANTS PROVIDED NO CAPSIZE-RECOVERY TRAINING (FOURTH DEPT))

NEGLIGENCE.

QUESTION OF FACT WHETHER BEGINNING SAILOR ASSUMED THE RISK OF INJURY WHEN TRYING TO RIGHT A CAPSIZED BOAT, DEFENDANTS PROVIDED NO CAPSIZE-RECOVERY TRAINING (FOURTH DEPT).

The Fourth Department determined defendants' motion for summary judgment was properly denied because there was a question of fact whether the assumption of the risk defense applied in this boating accident case. Plaintiff was in a beginner's sailing program. Her boat capsized and she was struck by the boom when she attempt to right it. Defendants had not provided any capsize-recovery training:

> "The assumption of [the] risk doctrine applies as a bar to liability where a consenting participant in sporting or recreational activities is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks' "... . "However, the doctrine of primary assumption of [the] risk will not serve as a bar to liability if the risk is unassumed, concealed, or unreasonably increased" ... . Here, even assuming, arguendo, that defendants established as a matter of law that plaintiff assumed the risks inherent in sailing, we conclude that plaintiff raised triable issues of fact whether defendants unreasonably increased the risks associated with sailing by failing to provide any capsize recovery training to plaintiff and by letting plaintiff sail on the lake under the weather conditions present on the day of the accident ... . **Ulin v Hobart & William Smith Colls., 2018 NY Slip Op 00985, Fourth Dept 2-9-18**

NEGLIGENCE (PLAINTIFF STRUCK BY A LACROSSE BALL THROWN BY A COACH DURING PRACTICE, THE ACTION WAS NOT PRECLUDED BY EITHER THE SIGNED WAIVER OR THE DOCTRINE OF ASSUMPTION OF THE RISK (FOURTH DEPT))/ASSUMPTION OF RISK (PLAINTIFF STRUCK BY A LACROSSE BALL THROWN BY A COACH DURING PRACTICE, THE ACTION WAS NOT PRECLUDED BY EITHER THE SIGNED WAIVER OR THE DOCTRINE OF ASSUMPTION OF THE RISK (FOURTH DEPT)/WAIVER (LACROSSE INJURY, PLAINTIFF STRUCK BY A LACROSSE BALL THROWN BY A COACH DURING PRACTICE, THE ACTION WAS NOT PRECLUDED BY EITHER THE SIGNED WAIVER OR THE DOCTRINE OF ASSUMPTION OF THE RISK (FOURTH DEPT))/LACROSSE (ASSUMPTION OF THE RISK, PLAINTIFF STRUCK BY A LACROSSE BALL THROWN BY A COACH DURING PRACTICE, THE ACTION WAS NOT PRECLUDED BY EITHER THE SIGNED WAIVER OR THE DOCTRINE OF ASSUMPTION OF THE RISK (FOURTH DEPT))

NEGLIGENCE.

PLAINTIFF STRUCK BY A LACROSSE BALL THROWN BY A COACH DURING PRACTICE, THE ACTION WAS NOT PRECLUDED BY EITHER THE SIGNED WAIVER OR THE DOCTRINE OF ASSUMPTION OF THE RISK (FOURTH DEPT).

The Fourth Department determined plaintiff lacrosse player's action was not barred by a waiver or the doctrine of assumption of the risk. Plaintiff was in a ground ball drill when a coach through a ball at her head, injuring her. The coach's act was arguably grossly negligent, reckless or intentional, and therefore not covered by the waiver or the doctrine of assumption of the risk:

> Here, plaintiff's complaint and affidavit include allegations that the actions of defendants were grossly negligent and extremely reckless. Contrary to defendants' contention, the written waiver does not bar plaintiff's action inasmuch as a waiver is not enforceable with respect to allegations of grossly negligent conduct ... .
>
> ... [I]t is well settled that a person who voluntarily participates in a recreational activity such as lacrosse "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"... . "Such a person, however, will not assume the risks of reckless or intentional conduct, nor will a claim be barred where the conditions caused by the defendants' negligence are unique and created a dangerous condition over and above the usual dangers that are inherent' in the activity" ... . **Tauro v Gait, 2018 NY Slip Op 00952, Fourth Dept 2-9-18**

NEGLIGENCE (PEDESTRIANS, TRAFFIC ACCIDENTS, PLAINTIFF WALKED INTO THE REAR OF A TRACTOR TRAILER WHICH WAS MAKING A RIGHT TURN, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/TRAFFIC ACCIDENTS (PEDESTRIANS, PLAINTIFF WALKED INTO THE REAR OF A TRACTOR TRAILER WHICH WAS MAKING A RIGHT TURN, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/PEDESTRIANS (TRAFFIC ACCIDENTS, PLAINTIFF WALKED INTO THE REAR OF A TRACTOR TRAILER WHICH WAS MAKING A RIGHT TURN, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))

NEGLIGENCE.

PLAINTIFF WALKED INTO THE REAR OF A TRACTOR TRAILER WHICH WAS MAKING A RIGHT TURN, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' (truck owner's and driver's) motion for summary judgment in this pedestrian traffic accident case should have been granted. Plaintiff was injured by the rear portion of a tractor trailer which had completed 85% of a right turn:

> ... [T]he plaintiff allegedly was walking on a sidewalk ... . After she stepped off the sidewalk onto the street, her right foot came into contact with the rear of a tractor-trailer that was making a right turn. ... The plaintiff allegedly did not see the tractor-trailer prior to the impact. ...
>
> ... [T]he plaintiff was the sole proximate cause of the accident ... . The evidence ... established that the plaintiff failed to see what was there to be seen and walked into the path of the rear of the tractor-trailer. **Faulknor v Gina's Trucking, Inc., 2018 NY Slip Op 01045, Second Dept 2-14-18**

NEGLIGENCE (SLIP AND FALL, TENANT ABUTTING SIDEWALK DID NOT DEMONSTRATE THAT IT DID NOT CLEAR ICE AND SNOW FROM THE SIDEWALK AND THAT IT DID NOT EXACERBATE THE DANGEROUS CONDITION, MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY DENIED (SECOND DEPT))/SLIP AND FALL (SIDEWALKS, TENANT ABUTTING SIDEWALK DID NOT DEMONSTRATE THAT IT DID NOT CLEAR ICE AND SNOW FROM THE SIDEWALK AND THAT IT DID NOT EXACERBATE THE DANGEROUS CONDITION, MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY DENIED (SECOND DEPT))/SIDEWALKS (SLIP AND FALL, TENANT ABUTTING SIDEWALK DID NOT DEMONSTRATE THAT IT DID NOT CLEAR ICE AND SNOW FROM THE SIDEWALK AND THAT IT DID NOT EXACERBATE THE DANGEROUS CONDITION, MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY DENIED (SECOND DEPT))

NEGLIGENCE.

TENANT ABUTTING SIDEWALK DID NOT DEMONSTRATE THAT IT DID NOT CLEAR ICE AND SNOW FROM THE SIDEWALK AND THAT IT DID NOT EXACERBATE THE DANGEROUS CONDITION, MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY DENIED (SECOND DEPT).

The Second Department determined the defendant's (CVS's) motion for summary judgment in this sidewalk slip and fall case was properly denied. CVS did not demonstrate that it made no efforts to clear the sidewalk and that it did not exacerbate the dangerous condition:

CVS failed to demonstrate its prima facie entitlement to judgment as a matter of law dismissing the second third-party complaint and all cross claims asserted against it. CVS failed to make a prima facie showing that it made no efforts to clear snow and ice from the sidewalk on which the plaintiff fell prior to the accident. Further, CVS failed to make a prima facie showing that any snow and ice removal efforts undertaken by it or by persons on its behalf did not exacerbate the hazardous condition which allegedly contributed to the plaintiff's accident ... . **Hurk-McLeod v Slope Park Assoc., LLC, 2018 NY Slip Op 01047, Second Dept 2-14-18**

NEGLIGENCE (SLIP AND FALL, QUESTIONS OF FACT RAISED ABOUT ADEQUACY OF SNOW REMOVAL AND SALTING, AS WELL AS LIGHTING, IN THIS PARKING LOT SLIP AND FALL CASE, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT))/SLIP AND FALL (QUESTIONS OF FACT RAISED ABOUT ADEQUACY OF SNOW REMOVAL AND SALTING, AS WELL AS LIGHTING, IN THIS PARKING LOT SLIP AND FALL CASE, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT))/LIGHTING (NEGLIGENCE, SLIP AND FALL,QUESTIONS OF FACT RAISED ABOUT ADEQUACY OF SNOW REMOVAL AND SALTING, AS WELL AS LIGHTING, IN THIS PARKING LOT SLIP AND FALL CASE, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT))/SNOW REMOVAL (NEGLIGENCE, SLIP AND FALL, QUESTIONS OF FACT RAISED ABOUT ADEQUACY OF SNOW REMOVAL AND SALTING, AS WELL AS LIGHTING, IN THIS PARKING LOT SLIP AND FALL CASE, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT))

NEGLIGENCE.

QUESTIONS OF FACT RAISED ABOUT ADEQUACY OF SNOW REMOVAL AND SALTING, AS WELL AS LIGHTING, IN THIS PARKING LOT SLIP AND FALL CASE, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendant property owner's cross motion to dismiss the complaint should not have been granted in this slip and fall case. Plaintiff (Torgersen) had raised questions of fact whether defendant's snow removal and salting efforts were sufficient, and whether the lighting in the parking lot was adequate:

Torgersen claimed in an affidavit that his legs kicked out from under him on ice that was covered by snow and obscured by poor lighting. This account did not directly conflict with his prior deposition testimony — in which he gave a similar account of his fall, said the lighting was not "very good" and was cut off while trying to answer the only question posed regarding the presence of ice — and the discrepancies between them "raised a credibility issue" but did not warrant rejecting the affidavit out of hand ... . Plaintiffs further provided the affidavit of another tenant who stated that she observed Torgersen fall as he described. The tenant saw a large patch of ice when she came to assist him and asserted, among other things, that no one salted the parking lot when it was plowed that day and that the poor plowing and salting at the complex had been the subject of complaints. The latter allegation ran counter to proof provided by defendant and Larkin [snow removal contractor], but there is no stated reason why the other tenant would misrepresent what had occurred and, in any event, "a court may not assess credibility on a summary judgment motion 'unless it clearly appears that the issues are not genuine, but feigned'" ... . It is by no means clear here.

Considering the foregoing "in the light most favorable to plaintiffs as the opponents of summary judgment"... , material issues of fact exist regarding the role ice and poor lighting played in Torgersen's fall and whether the ice was due to inadequate salting by Larkin or defendant's employees and should "reasonably have [been] discovered and remedied" by defendant ... . **Torgersen v A&f Black Cr. Realty, LLC, 2018 NY Slip Op 01237, Third Dept 2-22-18**

NEGLIGENCE (SLIP AND FALL, DEFENDANT DID NOT MAKE A PRIMA FACIE SHOWING THE CRACK OVER WHICH PLAINTIFF TRIPPED WAS TRIVIAL, THEREFORE THE BURDEN NEVER SHIFTED TO PLAINTIFF TO RAISE A QUESTION OF FACT, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT))/SLIP AND FALL (TRIVIAL DEFECT, DEFENDANT DID NOT MAKE A PRIMA FACIE SHOWING THE CRACK OVER WHICH PLAINTIFF TRIPPED WAS TRIVIAL, THEREFORE THE BURDEN NEVER SHIFTED TO PLAINTIFF TO RAISE A QUESTION OF FACT, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT))/TRIVIAL DEFECT (SLIP AND FALL, DEFENDANT DID NOT MAKE A PRIMA FACIE SHOWING THE CRACK OVER WHICH PLAINTIFF TRIPPED WAS TRIVIAL, THEREFORE THE BURDEN NEVER SHIFTED TO PLAINTIFF TO RAISE A QUESTION OF FACT, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT))

NEGLIGENCE.

DEFENDANT DID NOT MAKE A PRIMA FACIE SHOWING THE CRACK OVER WHICH PLAINTIFF TRIPPED WAS TRIVIAL, THEREFORE THE BURDEN NEVER SHIFTED TO PLAINTIFF TO RAISE A QUESTION OF FACT, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT).

The Second Department determined defendant did not meet its prima facie burden to demonstrate the crack in a concrete floor was trivial in this slip and fall case. Therefore the burden never shifted to plaintiff to raise a question of fact. Defendant's motion for summary judgment was properly denied:

> Generally, the issue of whether a dangerous or defective condition exists on the property of another depends on the facts of each case and is a question of fact for the jury ... . However, a property owner may not be held liable for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip ... . In determining whether a defect is trivial, the court must examine all of the facts presented, including the "width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" ... .
>
> "A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact" ... . Contrary to the defendant's contention, it failed to establish, prima facie, that the alleged defective condition was trivial as a matter of law and therefore not actionable ... . **Cortes v Taravella Family Trust, 2018 NY Slip Op 01301, Second Dept 2-28-18**

NEGLIGENCE (SLIP AND FALL, STAIRS, PLAINTIFF COULD NOT IDENTIFY THE CAUSE OF HER STAIRCASE FALL, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED (SECOND DEPT))/SLIP AND FALL (STAIRS, PLAINTIFF COULD NOT IDENTIFY THE CAUSE OF HER STAIRCASE FALL, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED (SECOND DEPT))/STAIRS (SLIP AND FALL, PLAINTIFF COULD NOT IDENTIFY THE CAUSE OF HER STAIRCASE FALL, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED (SECOND DEPT))

NEGLIGENCE.

PLAINTIFF COULD NOT IDENTIFY THE CAUSE OF HER STAIRCASE FALL, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED (SECOND DEPT).

The Second Department determined defendant's motion for summary judgment in this slip and fall case was properly granted because the plaintiff could not identify the cause of her staircase fall. The allegation that the staircase lacked a handrail in violation of the building code did not raise a question of fact:

> In support of its motion, the defendant established its prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff was unable to identify the cause of her fall ... . In opposition, the plaintiff failed to raise a triable issue of fact ... . The plaintiff's conclusory assertion that the absence of a handrail on the side of the stairs where she fell constituted a building code violation was insufficient to defeat the defendant's motion. **Morchyk v Acadia 3780-3858 Nostrand Ave., LLC, 2018 NY Slip Op 01302, Second Dept 2-28-18**

NEGLIGENCE (TRAFFIC ACCIDENTS, ALTHOUGH DEFENDANT VIOLATED THE VEHICLE AND TRAFFIC LAW BY TURNING LEFT INTO PLAINTIFF'S PATH, DEFENDANT RAISED A QUESTION OF FACT ABOUT WHETHER PLAINTIFF WAS SPEEDING (SECOND DEPT))/TRAFFIC ACCIDENTS (ALTHOUGH DEFENDANT VIOLATED THE VEHICLE AND TRAFFIC LAW BY TURNING LEFT INTO PLAINTIFF'S PATH, DEFENDANT RAISED A QUESTION OF FACT ABOUT WHETHER PLAINTIFF WAS SPEEDING (SECOND DEPT))/VEHICLE AND TRAFFIC LAW (ALTHOUGH DEFENDANT VIOLATED THE VEHICLE AND TRAFFIC LAW BY TURNING LEFT INTO PLAINTIFF'S PATH, DEFENDANT RAISED A QUESTION OF FACT ABOUT WHETHER PLAINTIFF WAS SPEEDING (SECOND DEPT))

NEGLIGENCE.

ALTHOUGH DEFENDANT VIOLATED THE VEHICLE AND TRAFFIC LAW BY TURNING LEFT INTO PLAINTIFF'S PATH, DEFENDANT RAISED A QUESTION OF FACT ABOUT WHETHER PLAINTIFF WAS SPEEDING (SECOND DEPT).

The Second Department determined plaintiff's motion for summary judgment in this traffic accident case was properly denied. Plaintiff made out a prima facie case by demonstrating defendant, Gavitt, made a left turn across the plaintiff's path and plaintiff entered an intersection. However Gavitt raised a question of fact by alleging plaintiff was speeding:

> Here, the plaintiff demonstrated, prima facie, that Gavitt was negligent in violating Vehicle and Traffic Law § 1141 "by making a left turn into the path of oncoming traffic without yielding the right of way to the plaintiff when the turn could not be made with reasonable safety"... . The undisputed fact that Gavitt was, in fact, unable to complete his left turn " without being struck by [the plaintiff's] vehicle'" ... demonstrates that he violated Vehicle and Traffic Law § 1141 by failing to "yield the right of way to any vehicle approaching from the opposite direction which [was] . . . so

close as to constitute an immediate hazard" ... . "Regardless of which vehicle entered the intersection first, [the plaintiff], as the driver with the right-of-way, was entitled to anticipate that [Gavitt] would obey traffic laws which required [him] to yield"... .

The plaintiff also demonstrated, prima facie, that Gavitt's negligence was the sole proximate cause of the accident, and that the plaintiff was not comparatively at fault in the happening of the accident. In this regard, the plaintiff testified at his deposition that he was traveling at 25 miles per hour immediately prior to the accident and, upon seeing Gavitt commence making the left turn in front of him, he immediately applied his brakes in an attempt to avoid colliding with Gavitt's vehicle, but he was unable to avoid the collision ... .

In opposition to the plaintiff's prima facie showing, however, the defendants raised a triable issue of fact as to whether the plaintiff was traveling at an excessive rate of speed immediately prior to the accident and whether he could have avoided the accident through the exercise of reasonable care ... . **Shashaty v Gavitt, 2018 NY Slip Op 01347, Second Dept 2-28-18**

NEGLIGENCE (TRAFFIC ACCIDENTS, PLAINTIFF COLLIDED WITH DEFENDANTS' BLACK ANGUS BULL IN THE ROADWAY ON A DARK RAINY NIGHT, EVEN ASSUMING DEFENDANTS' NEGLIGENCE PURSUANT TO THE DOCTRINE OF RES IPSA LOQUITUR, PLAINTIFF DID NOT DEMONSTRATE HER FREEDOM FROM COMPARATIVE NEGLIGENCE, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/ANIMAL LAW (TRAFFIC ACCIDENTS, PLAINTIFF COLLIDED WITH DEFENDANTS' BLACK ANGUS BULL IN THE ROADWAY ON A DARK RAINY NIGHT, EVEN ASSUMING DEFENDANTS' NEGLIGENCE PURSUANT TO THE DOCTRINE OF RES IPSA LOQUITUR, PLAINTIFF DID NOT DEMONSTRATE HER FREEDOM FROM COMPARATIVE NEGLIGENCE, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/RES IPSA LOQUITUR (ESCAPED ANIMALS, PLAINTIFF COLLIDED WITH DEFENDANTS' BLACK ANGUS BULL IN THE ROADWAY ON A DARK RAINY NIGHT, EVEN ASSUMING DEFENDANTS' NEGLIGENCE PURSUANT TO THE DOCTRINE OF RES IPSA LOQUITUR, PLAINTIFF DID NOT DEMONSTRATE HER FREEDOM FROM COMPARATIVE NEGLIGENCE, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/TRAFFIC ACCIDENTS (ESCAPED ANIMALS, PLAINTIFF COLLIDED WITH DEFENDANTS' BLACK ANGUS BULL IN THE ROADWAY ON A DARK RAINY NIGHT, EVEN ASSUMING DEFENDANTS' NEGLIGENCE PURSUANT TO THE DOCTRINE OF RES IPSA LOQUITUR, PLAINTIFF DID NOT DEMONSTRATE HER FREEDOM FROM COMPARATIVE NEGLIGENCE, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))

NEGLIGENCE, ANIMAL LAW.

PLAINTIFF COLLIDED WITH DEFENDANTS' BLACK ANGUS BULL IN THE ROADWAY ON A DARK RAINY NIGHT, EVEN ASSUMING DEFENDANTS' NEGLIGENCE PURSUANT TO THE DOCTRINE OF RES IPSA LOQUITUR, PLAINTIFF DID NOT DEMONSTRATE HER FREEDOM FROM COMPARATIVE NEGLIGENCE, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this car-animal accident case should not have been granted. Although, based upon the doctrine of res ipsa loquitur, the presence of defendants' black angus bull in the roadway may have constituted negligence, plaintiff did not demonstrate she could not have avoided the accident by lowering her speed on that dark and rainy night:

Cattle are classified as "domestic animal[s]" in Agriculture and Markets Law § 108 (7), and it is well established that "a landowner or the owner of an animal may be liable under ordinary tort-law principles when a farm animal—i.e., a

domestic animal as that term is defined in Agriculture and Markets Law § 108 (7)—is negligently allowed to stray from the property on which the animal is kept" ... . Here, "defendants were in exclusive control of the [bull] and the fences surrounding the pasture where [it was] kept" and, because cattle "do not generally wander unattended on public streets in the absence of negligence"... , we conclude that the court properly inferred defendants' negligence as a starting point in determining their motion.

We further conclude that defendants failed to rebut the inference of negligence inasmuch as they failed to submit proof that "the animal's presence on the [road] was not caused by [their] negligence" ... , or "that something outside of [defendants'] control" allowed the bull to escape ... .

Plaintiff's burden on her motion was to establish both that defendants were negligent as a matter of law, and that she was free of comparative fault ... . Even assuming, arguendo, that plaintiff met her burden with respect to defendants' alleged negligence, we conclude that she failed to meet her burden with respect to her own alleged comparative negligence. ... [T]here is an issue of fact whether slower travel would have enabled plaintiff to avoid the collision, and that issue must be determined by a jury ... . **Catalano v Heiden Val. Farms, 2018 NY Slip Op 00759, Fourth Dept 2-2-18**

NEGLIGENCE (DAMAGES, PLAINTIFFS' MOTION TO SET ASIDE THE JURY'S DAMAGES AWARD IN THIS PERSONAL INJURY CASE SHOULD NOT HAVE BEEN GRANTED, THE JURY WAS FREE TO DISREGARD EXPERT OPINION (FOURTH DEPT))/CIVIL PROCEDURE (PLAINTIFFS' MOTION TO SET ASIDE THE JURY'S DAMAGES AWARD IN THIS PERSONAL INJURY CASE SHOULD NOT HAVE BEEN GRANTED, THE JURY WAS FREE TO DISREGARD EXPERT OPINION (FOURTH DEPT))/EVIDENCE (EXPERT OPINION, DAMAGES, PLAINTIFFS' MOTION TO SET ASIDE THE JURY'S DAMAGES AWARD IN THIS PERSONAL INJURY CASE SHOULD NOT HAVE BEEN GRANTED, THE JURY WAS FREE TO DISREGARD EXPERT OPINION (FOURTH DEPT))/EXPERT OPINION (DAMAGES, LAINTIFFS' MOTION TO SET ASIDE THE JURY'S DAMAGES AWARD IN THIS PERSONAL INJURY CASE SHOULD NOT HAVE BEEN GRANTED, THE JURY WAS FREE TO DISREGARD EXPERT OPINION (FOURTH DEPT))/DAMAGES (PERSONAL INJURY, PLAINTIFFS' MOTION TO SET ASIDE THE JURY'S DAMAGES AWARD IN THIS PERSONAL INJURY CASE SHOULD NOT HAVE BEEN GRANTED, THE JURY WAS FREE TO DISREGARD EXPERT OPINION (FOURTH DEPT))/CPLR 4404 (PLAINTIFFS' MOTION TO SET ASIDE THE JURY'S DAMAGES AWARD IN THIS PERSONAL INJURY CASE SHOULD NOT HAVE BEEN GRANTED, THE JURY WAS FREE TO DISREGARD EXPERT OPINION (FOURTH DEPT))

NEGLIGENCE, CIVIL PROCEDURE, EVIDENCE.

PLAINTIFFS' MOTION TO SET ASIDE THE JURY'S DAMAGES AWARD IN THIS PERSONAL INJURY CASE SHOULD NOT HAVE BEEN GRANTED, THE JURY WAS FREE TO DISREGARD EXPERT OPINION (FOURTH DEPT).

The Fourth Department, modifying Supreme Court, reinstated the jury's damages award in this personal injury case. Plaintiffs moved to set aside the damages award unless the defendant stipulated to an increased amount and Supreme Court granted the motion. The Fourth Department explained that the jury was free to disregard expert opinion and the jury could have concluded that plaintiff had exaggerated her injuries or that the injuries were preexisting:

"It is well settled that the amount of damages to be awarded for personal injuries is primarily a question for the jury . . . , the judgment of which is entitled to great deference based upon its evaluation of the evidence, including conflicting expert testimony" ... .. Thus, "even in cases where there is evidence which could support a conclusion different from that of a jury, its verdict will still be accorded great deference and respect so long as there is credible evidence to support its interpretation" ... . In addition, " a jury is at liberty to reject an expert's opinion if it finds the facts to be different from those which formed the basis for the opinion or if, after careful consideration of all the

evidence in the case, it disagrees with the opinion' "... . In short, "[w]here the verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view" ... . **Mecca v Buffalo Niagara Convention Ctr. Mgt. Corp., 2018 NY Slip Op 00735, Fourth Dept 2-2-18**

NEGLIGENCE (SLIP AND FALL, STORM IN PROGRESS EVIDENCE IN THIS SIDEWALK SLIP AND FALL CASE INSUFFICIENT, EVIDENCE SUBMITTED IN REPLY PAPERS SHOULD NOT HAVE BEEN CONSIDERED, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/SLIP AND FALL (STORM IN PROGRESS EVIDENCE IN THIS SIDEWALK SLIP AND FALL CASE INSUFFICIENT, EVIDENCE SUBMITTED IN REPLY PAPERS SHOULD NOT HAVE BEEN CONSIDERED, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/SIDEWALKS (SLIP AND FALL, STORM IN PROGRESS EVIDENCE IN THIS SIDEWALK SLIP AND FALL CASE INSUFFICIENT, EVIDENCE SUBMITTED IN REPLY PAPERS SHOULD NOT HAVE BEEN CONSIDERED, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/CIVIL PROCEDURE (REPLY PAPERS, STORM IN PROGRESS EVIDENCE IN THIS SIDEWALK SLIP AND FALL CASE INSUFFICIENT, EVIDENCE SUBMITTED IN REPLY PAPERS SHOULD NOT HAVE BEEN CONSIDERED, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/REPLY (CIVIL PROCEDURE, STORM IN PROGRESS EVIDENCE IN THIS SIDEWALK SLIP AND FALL CASE INSUFFICIENT, EVIDENCE SUBMITTED IN REPLY PAPERS SHOULD NOT HAVE BEEN CONSIDERED, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/EVIDENCE (CIVIL PROCEDURE, REPLY PAPERS, STORM IN PROGRESS EVIDENCE IN THIS SIDEWALK SLIP AND FALL CASE INSUFFICIENT, EVIDENCE SUBMITTED IN REPLY PAPERS SHOULD NOT HAVE BEEN CONSIDERED, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))

NEGLIGENCE, CIVIL PROCEDURE, EVIDENCE.

STORM IN PROGRESS EVIDENCE IN THIS SIDEWALK SLIP AND FALL CASE INSUFFICIENT, EVIDENCE SUBMITTED IN REPLY PAPERS SHOULD NOT HAVE BEEN CONSIDERED, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this sidewalk slip and fall case should have been denied. The evidence of a storm in progress was insufficient. The climatological analysis report submitted in the reply papers should not have been considered. There was no evidence when the sidewalk was last inspected prior to the fall:

> ... [T]he defendants submitted a copy of the transcript of the plaintiff's deposition, at which she testified that light rain began to fall about 15 minutes prior to her accident, and that no precipitation fell the day before the accident. The defendants also submitted a copy of the transcript of the deposition of the office manager [the occupant of the abutting property], who testified that she had no recollection of the weather conditions on the day of the accident. The office manager also did not know when the sidewalk was last inspected or what it looked like within a reasonable time prior to the accident. The defendants also submitted video footage and screen shots from a security camera, but this evidence was not probative because it did not clearly depict the surface where the plaintiff slipped. Finally, the defendants submitted a climatological analysis report which was not signed and notarized, and therefore not admissible ... .
>
> The defendants submitted a signed and notarized climatological analysis report with their reply papers. However, the Supreme Court should not have considered that report, as it was improperly submitted for the first time with the reply papers ... . **Brandimarte v Liat Holding Corp., 2018 NY Slip Op 01042, Second Dept 2-14-18**

NEGLIGENCE (THIRD PARTY ASSAULT, SECURITY COMPANY, PLAINTIFF'S NEGLIGENCE ACTION AGAINST A SECURITY COMPANY HIRED BY KMART SHOULD HAVE BEEN DISMISSED, PLAINTIFF WAS INJURED IN A FIGHT WITH A KMART EMPLOYEE, PLAINTIFF WAS NOT A THIRD PARTY BENEFICIARY OF THE CONTRACT BETWEEN KMART AND THE SECURITY COMPANY, PLAINTIFF DID NOT RELY ON THE PERFORMANCE OF THE SECURITY COMPANY'S DUTIES, AND THE SECURITY COMPANY DID NOT FULLY DISPLACE KMART'S DUTY TO PROVIDE SECURITY (FIRST DEPT))/ASSAULT, LIABILITY FOR THIRD PARTY (SECURITY COMPANY, PLAINTIFF'S NEGLIGENCE ACTION AGAINST A SECURITY COMPANY HIRED BY KMART SHOULD HAVE BEEN DISMISSED, PLAINTIFF WAS INJURED IN A FIGHT WITH A KMART EMPLOYEE, PLAINTIFF WAS NOT A THIRD PARTY BENEFICIARY OF THE CONTRACT BETWEEN KMART AND THE SECURITY COMPANY, PLAINTIFF DID NOT RELY ON THE PERFORMANCE OF THE SECURITY COMPANY'S DUTIES, AND THE SECURITY COMPANY DID NOT FULLY DISPLACE KMART'S DUTY TO PROVIDE SECURITY (FIRST DEPT))/ESPINAL (THIRD PARTY ASSAULT LIABILITY, SECURITY COMPANY, PLAINTIFF'S NEGLIGENCE ACTION AGAINST A SECURITY COMPANY HIRED BY KMART SHOULD HAVE BEEN DISMISSED, PLAINTIFF WAS INJURED IN A FIGHT WITH A KMART EMPLOYEE, PLAINTIFF WAS NOT A THIRD PARTY BENEFICIARY OF THE CONTRACT BETWEEN KMART AND THE SECURITY COMPANY, PLAINTIFF DID NOT RELY ON THE PERFORMANCE OF THE SECURITY COMPANY'S DUTIES, AND THE SECURITY COMPANY DID NOT FULLY DISPLACE KMART'S DUTY TO PROVIDE SECURITY (FIRST DEPT))/SECURITY COMPANIES (LIABILITY FOR THIRD PARTY ASSAULT, PLAINTIFF'S NEGLIGENCE ACTION AGAINST A SECURITY COMPANY HIRED BY KMART SHOULD HAVE BEEN DISMISSED, PLAINTIFF WAS INJURED IN A FIGHT WITH A KMART EMPLOYEE, PLAINTIFF WAS NOT A THIRD PARTY BENEFICIARY OF THE CONTRACT BETWEEN KMART AND THE SECURITY COMPANY, PLAINTIFF DID NOT RELY ON THE PERFORMANCE OF THE SECURITY COMPANY'S DUTIES, AND THE SECURITY COMPANY DID NOT FULLY DISPLACE KMART'S DUTY TO PROVIDE SECURITY (FIRST DEPT))/CONTRACT, TORT LIABILITY BASED UPON PLAINTIFF'S NEGLIGENCE ACTION AGAINST A SECURITY COMPANY HIRED BY KMART SHOULD HAVE BEEN DISMISSED, PLAINTIFF WAS INJURED IN A FIGHT WITH A KMART EMPLOYEE, PLAINTIFF WAS NOT A THIRD PARTY BENEFICIARY OF THE CONTRACT BETWEEN KMART AND THE SECURITY COMPANY, PLAINTIFF DID NOT RELY ON THE PERFORMANCE OF THE SECURITY COMPANY'S DUTIES, AND THE SECURITY COMPANY DID NOT FULLY DISPLACE KMART'S DUTY TO PROVIDE SECURITY (FIRST DEPT))/CONTRACT LAW (TORT LIABILITY STEMMING FROM, ESPINAL CRITERIA, PLAINTIFF WAS INJURED IN A FIGHT WITH A KMART EMPLOYEE, PLAINTIFF WAS NOT A THIRD PARTY BENEFICIARY OF THE CONTRACT BETWEEN KMART AND THE SECURITY COMPANY, PLAINTIFF DID NOT RELY ON THE PERFORMANCE OF THE SECURITY COMPANY'S DUTIES, AND THE SECURITY COMPANY DID NOT FULLY DISPLACE KMART'S DUTY TO PROVIDE SECURITY (FIRST DEPT))

NEGLIGENCE, CONTRACT LAW.

PLAINTIFF'S NEGLIGENCE ACTION AGAINST A SECURITY COMPANY HIRED BY KMART SHOULD HAVE BEEN DISMISSED, PLAINTIFF WAS INJURED IN A FIGHT WITH A KMART EMPLOYEE, PLAINTIFF WAS NOT A THIRD PARTY BENEFICIARY OF THE CONTRACT BETWEEN KMART AND THE SECURITY COMPANY, PLAINTIFF DID NOT RELY ON THE PERFORMANCE OF THE SECURITY COMPANY'S DUTIES, AND THE SECURITY COMPANY DID NOT FULLY DISPLACE KMART'S DUTY TO PROVIDE SECURITY (ESPINAL FACTORS) (FIRST DEPT).

The First Department, reversing Supreme Court, determined that plaintiff's negligence action against a security company (US Security) hired by Kmart did not state a cause of action for tort liability stemming from a contract (Espinal criteria). Plaintiff was injured in a fight with a Kmart employee in a Kmart store. The First Department held that plaintiff was not a third party beneficiary of the contract between Kmart and US Security, did not rely to his detriment on the performance of US Security's duties, and US Security did not entirely supplant Kmart's duty to secure the store:

> Plaintiff was not an intended third-party beneficiary of the contract between Kmart and U.S. Security, which contains a "No Third Party Beneficiaries" clause ... .
>
> Nor can a duty be imposed on U.S. Security on the ground either that plaintiff relied to his detriment on the continued performance of U.S. Security's contractual duties or that U.S. Security had entirely displaced Kmart's duty to secure its store ... . Plaintiff's affidavit says nothing about having knowledge of the contract between Kmart and U.S. Security or about detrimental reliance on U.S. Security's continued performance thereunder ... .
>
> As for entire displacement, while the written scope of U.S. Security's services included "the protection of ... customers ... in the Premises," the deposition testimony of the loss prevention manager at the relevant Kmart store

makes it clear that, in actual practice, U.S. Security's services at that store were limited to deterring shoplifting ... . Furthermore, U.S. Security did not totally displace Kmart's duty to secure its store, because Kmart retained supervisory authority over the security guards and required U.S. Security's staff to complete training in accordance with its (Kmart's) safety policies and procedures ... . **Santiago v K Mart Corp., 2018 NY Slip Op 01296, First Dept 2-27-18**

NEGLIGENCE (TRAFFIC ACCIDENT CASE REMITTED FOR A DETERMINATION WHETHER THE STATE WAS LIABLE UNDER A SECOND IMPACT THEORY, EVEN THOUGH THE STATE WAS NOT RESPONSIBLE FOR CAUSING THE DRIVER TO COLLIDE WITH THE STEEL BEAMS ACROSS THE ENTRANCES TO THE CLOSED BRIDGE, THE STEEL BEAMS WERE WELDED TO THE BRIDGE AT A HEIGHT WHICH ALLOWED A CAR TO PASS UNDER THEM, CONSTITUTING A DANGEROUS CONDITION AS A MATTER OF LAW (FOURTH DEPT))/COURT OF CLAIMS (TRAFFIC ACCIDENT CASE REMITTED FOR A DETERMINATION WHETHER THE STATE WAS LIABLE UNDER A SECOND IMPACT THEORY, EVEN THOUGH THE STATE WAS NOT RESPONSIBLE FOR CAUSING THE DRIVER TO COLLIDE WITH THE STEEL BEAMS ACROSS THE ENTRANCES TO THE CLOSED BRIDGE, THE STEEL BEAMS WERE WELDED TO THE BRIDGE AT A HEIGHT WHICH ALLOWED A CAR TO PASS UNDER THEM, CONSTITUTING A DANGEROUS CONDITION AS A MATTER OF LAW (FOURTH DEPT))/TRAFFIC ACCIDENTS (TRAFFIC ACCIDENT CASE REMITTED FOR A DETERMINATION WHETHER THE STATE WAS LIABLE UNDER A SECOND IMPACT THEORY, EVEN THOUGH THE STATE WAS NOT RESPONSIBLE FOR CAUSING THE DRIVER TO COLLIDE WITH THE STEEL BEAMS ACROSS THE ENTRANCES TO THE CLOSED BRIDGE, THE STEEL BEAMS WERE WELDED TO THE BRIDGE AT A HEIGHT WHICH ALLOWED A CAR TO PASS UNDER THEM, CONSTITUTING A DANGEROUS CONDITION AS A MATTER OF LAW (FOURTH DEPT))/SECOND IMPACT THEORY (TRAFFIC ACCIDENT CASE REMITTED FOR A DETERMINATION WHETHER THE STATE WAS LIABLE UNDER A SECOND IMPACT THEORY, EVEN THOUGH THE STATE WAS NOT RESPONSIBLE FOR CAUSING THE DRIVER TO COLLIDE WITH THE STEEL BEAMS ACROSS THE ENTRANCES TO THE CLOSED BRIDGE, THE STEEL BEAMS WERE WELDED TO THE BRIDGE AT A HEIGHT WHICH ALLOWED A CAR TO PASS UNDER THEM, CONSTITUTING A DANGEROUS CONDITION AS A MATTER OF LAW (FOURTH DEPT))/HIGHWAYS AND ROADS (TRAFFIC ACCIDENT CASE REMITTED FOR A DETERMINATION WHETHER THE STATE WAS LIABLE UNDER A SECOND IMPACT THEORY, EVEN THOUGH THE STATE WAS NOT RESPONSIBLE FOR CAUSING THE DRIVER TO COLLIDE WITH THE STEEL BEAMS ACROSS THE ENTRANCES TO THE CLOSED BRIDGE, THE STEEL BEAMS WERE WELDED TO THE BRIDGE AT A HEIGHT WHICH ALLOWED A CAR TO PASS UNDER THEM, CONSTITUTING A DANGEROUS CONDITION AS A MATTER OF LAW (FOURTH DEPT))

NEGLIGENCE, COURT OF CLAIMS.

TRAFFIC ACCIDENT CASE REMITTED FOR A DETERMINATION WHETHER THE STATE WAS LIABLE UNDER A SECOND IMPACT THEORY, EVEN THOUGH THE STATE WAS NOT RESPONSIBLE FOR CAUSING THE DRIVER TO COLLIDE WITH THE STEEL BEAMS ACROSS THE ENTRANCES TO THE CLOSED BRIDGE, THE STEEL BEAMS WERE WELDED TO THE BRIDGE AT A HEIGHT WHICH ALLOWED A CAR TO PASS UNDER THEM, CONSTITUTING A DANGEROUS CONDITION AS A MATTER OF LAW (FOURTH DEPT).

The Fourth Department, modifying (reversing) the Court of Claims, determined the "dangerous condition" cause of action brought on behalf of plaintiff's decedent should not have been dismissed. The driver passed two signs indicating the bridge ahead was closed, drove through a sign that was in the middle of the road flanked by barricades, and then struck a beam at the entrance to the bridge which spanned the width of the bridge. The driver was killed instantly but the car continued and struck another similar beam spanning the other end of the bridge, injuring plaintiff's decedent (who died the next day). The plaintiff alleged, under a "second impact" theory, the beams, which were welded at a height which allowed a vehicle to pass under under them, constituted a dangerous condition which was the proximate cause of death. The Fourth Department held the beams constituted a dangerous condition as a matter of law:

> ... [T]he court erred in dismissing the claim insofar as it alleges that defendants created a dangerous condition that constituted a proximate cause of decedent's injuries. We therefore modify the judgment accordingly. Although defendant State of New York is not an insurer of its roads and highways ... , it "has an obligation to provide and maintain adequate and proper barriers along its highways" ... . Here, we conclude that defendants' decision to weld a steel box beam across the front of the Bridge, at a height that allowed a motor vehicle to proceed under the beam, constituted the creation of a dangerous condition as a matter of law ... .
>
> ... [C]aimant proceeded under a "second-impact theory whereby she contended, not that [defendants] caused the accident, but that [their] negligence . . . was [a] proximate cause of . . . decedent's injury"... . The fact that no negligent act of defendants caused the vehicle to collide with the steel box beam is irrelevant. The point to be addressed is whether the steel box beam was a substantial factor in aggravating decedent's injuries and causing his death ... . **Reames v State of New York, 2018 NY Slip Op 00713, Fourth Dept 2-2-18**

NEGLIGENCE (POLICE REPORT WAS NOT AUTHENTICATED AND WAS NOT SUBMITTED IN ADMISSIBLE FORM, THEREFORE IT COULD NOT BE CONSIDERED ON THE SUMMARY JUDGMENT MOTION IN THIS CAR-BICYCLE ACCIDENT CASE, PLAINTIFF DID NOT ELIMINATE A QUESTION OF FACT ABOUT WHETHER SHE WAS COMPARATIVELY NEGLIGENT IN NOT SEEING WHAT SHOULD HAVE BEEN SEEN (FOURTH DEPT))/EVIDENCE (POLICE REPORT WAS NOT AUTHENTICATED AND WAS NOT SUBMITTED IN ADMISSIBLE FORM, THEREFORE IT COULD NOT BE CONSIDERED ON THE SUMMARY JUDGMENT MOTION IN THIS CAR-BICYCLE ACCIDENT CASE, PLAINTIFF DID NOT ELIMINATE A QUESTION OF FACT ABOUT WHETHER SHE WAS COMPARATIVELY NEGLIGENT IN NOT SEEING WHAT SHOULD HAVE BEEN SEEN (FOURTH DEPT))/POLICE REPORTS (EVIDENCE, POLICE REPORT WAS NOT AUTHENTICATED AND WAS NOT SUBMITTED IN ADMISSIBLE FORM, THEREFORE IT COULD NOT BE CONSIDERED ON THE SUMMARY JUDGMENT MOTION IN THIS CAR-BICYCLE ACCIDENT CASE, PLAINTIFF DID NOT ELIMINATE A QUESTION OF FACT ABOUT WHETHER SHE WAS COMPARATIVELY NEGLIGENT IN NOT SEEING WHAT SHOULD HAVE BEEN SEEN (FOURTH DEPT))/TRAFFIC ACCIDENTS (POLICE REPORT WAS NOT AUTHENTICATED AND WAS NOT SUBMITTED IN ADMISSIBLE FORM, THEREFORE IT COULD NOT BE CONSIDERED ON THE SUMMARY JUDGMENT MOTION IN THIS CAR-BICYCLE ACCIDENT CASE, PLAINTIFF DID NOT ELIMINATE A QUESTION OF FACT ABOUT WHETHER SHE WAS COMPARATIVELY NEGLIGENT IN NOT SEEING WHAT SHOULD HAVE BEEN SEEN (FOURTH DEPT))/BICYCLES (POLICE REPORT WAS NOT AUTHENTICATED AND WAS NOT SUBMITTED IN ADMISSIBLE FORM, THEREFORE IT COULD NOT BE CONSIDERED ON THE SUMMARY JUDGMENT MOTION IN THIS CAR-BICYCLE ACCIDENT CASE, PLAINTIFF DID NOT ELIMINATE A QUESTION OF FACT ABOUT WHETHER SHE WAS COMPARATIVELY NEGLIGENT IN NOT SEEING WHAT SHOULD HAVE BEEN SEEN (FOURTH DEPT))

NEGLIGENCE, EVIDENCE.

POLICE REPORT WAS NOT AUTHENTICATED AND WAS NOT SUBMITTED IN ADMISSIBLE FORM, THEREFORE IT COULD NOT BE CONSIDERED ON THE SUMMARY JUDGMENT MOTION IN THIS CAR-BICYCLE ACCIDENT CASE, PLAINTIFF DID NOT ELIMINATE A QUESTION OF FACT ABOUT WHETHER SHE WAS COMPARATIVELY NEGLIGENT IN NOT SEEING WHAT SHOULD HAVE BEEN SEEN (FOURTH DEPT).

The Fourth Department determined defendants' motion for summary judgment in this car-bicycle accident case was properly denied. The police report was not authenticated and was not submitted in admissible form, so it could not be considered. The defendant driver failed to eliminate a question of fact whether she was comparatively negligent for failing to see what should have been seen:

> Although "reports of police officers made upon their own observation and while carrying out their police duties are generally admissible in evidence"... , the report in this case was inadmissible because it was "not authenticated"

and, "[b]ecause the report was not submitted in evidentiary form, it should not have been considered on the summary judgment motion" ... . Here ... the parties failed to "provide[] an acceptable excuse" for failing to tender the evidence in admissible form ... .

With respect to the merits, " [w]hether a plaintiff [or defendant] is comparatively negligent is almost invariably a question of fact and is for the jury to determine in all but the clearest cases' " ... . In support of their motion, defendants submitted the deposition testimony of defendant, which raised a question of fact regarding her attentiveness as she drove her vehicle... . It is well settled that every driver of a motor vehicle has "the common-law duty to see that which he [or she] should have seen . . . through the proper use of his [or her] senses' " ... , and that "a motorist is required to keep a reasonably vigilant lookout for bicyclists, . . . and to operate the vehicle with reasonable care to avoid colliding with anyone on the road" ... . Here, the evidence submitted by defendants established that defendant had an unobstructed view of the street as plaintiff's bicycle approached her vehicle, yet she failed to see him or his bicycle prior to the collision. Thus, we conclude that defendants "failed to establish that there was nothing [defendant] could do to avoid the accident and therefore failed to establish that she was free of comparative fault" ... . **Chilinski v Maloney, 2018 NY Slip Op 00744, Fourth Dept 2-2-18**

NEGLIGENCE (ELEVATOR MAINTENANCE, LANDLORD-TENANT, ELEVATOR MALFUNCTION WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S DECEDENT'S DEATH, PLAINTIFF'S DECEDENT HAD SUFFERED CARDIAC ARREST BEFORE SHE WAS TRANSFERRED TO THE ELEVATOR, HOUSING AUTHORITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT))/ELEVATORS (NEGLIGENCE, LANDLORD-TENANT, ELEVATOR MALFUNCTION WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S DECEDENT'S DEATH, PLAINTIFF'S DECEDENT HAD SUFFERED CARDIAC ARREST BEFORE SHE WAS TRANSFERRED TO THE ELEVATOR, HOUSING AUTHORITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT))/LANDLORD-TENANT (ELEVATORS, NEGLIGENCE, ELEVATOR MALFUNCTION WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S DECEDENT'S DEATH, PLAINTIFF'S DECEDENT HAD SUFFERED CARDIAC ARREST BEFORE SHE WAS TRANSFERRED TO THE ELEVATOR, HOUSING AUTHORITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT))/PROXIMATE CAUSE (ELEVATOR MALFUNCTION, LANDLORD-TENANT, ELEVATOR MALFUNCTION WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S DECEDENT'S DEATH, PLAINTIFF'S DECEDENT HAD SUFFERED CARDIAC ARREST BEFORE SHE WAS TRANSFERRED TO THE ELEVATOR, HOUSING AUTHORITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT))

NEGLIGENCE, LANDLORD-TENANT.

ELEVATOR MALFUNCTION WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S DECEDENT'S DEATH, PLAINTIFF'S DECEDENT HAD SUFFERED CARDIAC ARREST BEFORE SHE WAS TRANSFERRED TO THE ELEVATOR, HOUSING AUTHORITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department determined the New York City Housing Authority's (NYCHA's) motion for summary judgment in this negligent elevator-maintenance case should have been granted. Plaintiff's decedent had an asthma attack and suffered cardiac arrest in her apartment. When moving plaintiff's decedent to an ambulance, the building elevator malfunctioned and stopped for at least several minutes. The NYCHA did not demonstrate that the elevator was in good working order or that the NYCHA had no notice the elevator malfunctioned. However, the NYCHA was able to demonstrate the elevator malfunction was not the proximate cause of plaintiff's decedent's death. The evidence supported the conclusion death occurred in the apartment:

... NYCHA presented unrefuted evidence demonstrating that the decedent's cardiac rhythm was asystole, a dire form of cardiac arrest in which the heart stops beating and there is no electrical activity in the heart, and that she showed no signs of life in the hour between the arrival of emergency personnel and her transfer into the elevator, despite the emergency responders' continuous resuscitative efforts. Furthermore, NYCHA's medical expert stated that "[t]he prolonged and unsuccessful resuscitative course in an asystolic patient is associated with an extremely poor outcome" and that "the decedent's obesity made resuscitative efforts more difficult and further reduced [her]

likelihood of survival." Thus, he opined, "within a reasonable degree of medical certainty[,]. .. the outcome for the decedent would [not] have changed had the transport time within the elevator been shorter."

By these facts and its expert's opinion, NYCHA demonstrated its prima facie entitlement to judgment as a matter of law by showing that the stoppage of its elevator, and resulting delay of the decedent's arrival at the hospital, were not a proximate cause of the decedent's death. **Lebron v New York City Hous. Auth., 2018 NY Slip Op 01116, First Dept 2-15-18**

NEGLIGENCE (MEDICAL MALPRACTICE, ALTHOUGH THE RESIDENT SEVERED PLAINTIFF'S NERVE DURING SURGERY, THE RESIDENT WAS UNDER THE SUPERVISION OF PLAINTIFF'S SURGEON AND EXERCISED NO INDEPENDENT JUDGMENT, MALPRACTICE ACTION AGAINST THE RESIDENT SHOULD HAVE BEEN DISMISSED (FOURTH DEPT))/MEDICAL MALPRACTICE (ALTHOUGH THE RESIDENT SEVERED PLAINTIFF'S NERVE DURING SURGERY, THE RESIDENT WAS UNDER THE SUPERVISION OF PLAINTIFF'S SURGEON AND EXERCISED NO INDEPENDENT JUDGMENT, MALPRACTICE ACTION AGAINST THE RESIDENT SHOULD HAVE BEEN DISMISSED (FOURTH DEPT))/INDEPENDENT JUDGMENT (MEDICAL MALPRACTICE, ALTHOUGH THE RESIDENT SEVERED PLAINTIFF'S NERVE DURING SURGERY, THE RESIDENT WAS UNDER THE SUPERVISION OF PLAINTIFF'S SURGEON AND EXERCISED NO INDEPENDENT JUDGMENT, MALPRACTICE ACTION AGAINST THE RESIDENT SHOULD HAVE BEEN DISMISSED (FOURTH DEPT))

NEGLIGENCE, MEDICAL MALPRACTICE.

ALTHOUGH THE RESIDENT SEVERED PLAINTIFF'S NERVE DURING SURGERY, THE RESIDENT WAS UNDER THE SUPERVISION OF PLAINTIFF'S SURGEON AND EXERCISED NO INDEPENDENT JUDGMENT, MALPRACTICE ACTION AGAINST THE RESIDENT SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, modifying Supreme Court, determined the medical malpractice against the resident (O'Donnell) who assisted the plaintiff's surgeon (Weise) should have been dismissed. Although the resident severed a nerve during the bone drilling procedure, the resident was under the supervision of the surgeon and exercised no independent judgment. Therefore the action against the resident and the hospital (Crouse Hospital), as the resident's employer, should have been dismissed:

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" ... . Even where a resident "play[s] an active role in [plaintiff's] procedure," the resident cannot commit malpractice unless he or she was shown to have exercised some " independent medical judgment' " ... . Here, it is undisputed that plaintiff was Wiese's patient, and Wiese determined the type of surgery to be performed on plaintiff. The deposition testimony of O'Donnell and Wiese establishes that O'Donnell was acting as a resident under Wiese's direction and supervision during the procedure. Indeed, Wiese testified at his deposition and averred in his affidavit that he supervised O'Donnell's selection of the location and angle of the drill, and that he made the decision to stop drilling. We therefore conclude that O'Donnell and Crouse Hospital met their burden on the motion by establishing that O'Donnell did not exercise independent medical judgment with respect to his operation of the drill, and plaintiff failed to raise an issue of fact ... . **Blendowski v Wiese, 2018 NY Slip Op 00973, Fourth Dept 2-9-18**

NEGLIGENCE (MEDICAL MALPRACTICE, QUESTION OF FACT WHETHER RESIDENT EXERCISED INDEPENDENT JUDGMENT IN THIS MEDICAL MALPRACTICE CASE, MAKING THE RESIDENT AND HOSPITAL POTENTIALLY LIABLE (FIRST DEPT))/MEDICAL MALPRACTICE (QUESTION OF FACT WHETHER RESIDENT EXERCISED INDEPENDENT JUDGMENT IN THIS MEDICAL MALPRACTICE CASE, MAKING THE RESIDENT AND HOSPITAL POTENTIALLY LIABLE (FIRST DEPT))/INDEPENDENT JUDGMENT (MEDICAL MALPRACTICE, QUESTION OF FACT WHETHER RESIDENT EXERCISED INDEPENDENT JUDGMENT IN THIS MEDICAL MALPRACTICE CASE, MAKING THE RESIDENT AND HOSPITAL POTENTIALLY LIABLE (FIRST DEPT))/RESIDENTS (MEDICAL MALPRACTICE, QUESTION OF FACT WHETHER RESIDENT EXERCISED INDEPENDENT JUDGMENT IN THIS MEDICAL MALPRACTICE CASE, MAKING THE RESIDENT AND HOSPITAL POTENTIALLY LIABLE (FIRST DEPT))/HOSPITALS (MEDICAL MALPRACTICE, QUESTION OF FACT WHETHER RESIDENT EXERCISED INDEPENDENT JUDGMENT IN THIS MEDICAL MALPRACTICE CASE, MAKING THE RESIDENT AND HOSPITAL POTENTIALLY LIABLE (FIRST DEPT))

NEGLIGENCE, MEDICAL MALPRACTICE.

QUESTION OF FACT WHETHER RESIDENT EXERCISED INDEPENDENT JUDGMENT IN THIS MEDICAL MALPRACTICE CASE, MAKING THE RESIDENT AND HOSPITAL POTENTIALLY LIABLE (FIRST DEPT).

The First Department determined there was a question of fact whether a resident exercised independent judgment in this medical malpractice case, making the resident and his employer (the hospital) potentially liable. Plaintiff's decedent was intoxicated when given Valium:

> Plaintiff's decedent was brought into St. Barnabas Hospital by the police in an intoxicated and agitated condition. He was then chemically sedated with Valium. Two and one-half hours later, he "flatlined," and, while resuscitative efforts were made, he did not awaken and was declared "brain dead" four days later.
>
> Appellants contend that Dr. McGrath cannot be held liable for medical malpractice because, as a resident, he did not exercise independent medical judgment when he chose the type and dosage of sedative to use on decedent. However, the deposition testimony of the attending physician, defendant Dr. Rao, raised an issue of fact as to whether Dr. McGrath was permitted to, and in fact did, exercise independent medical judgment in deciding on the amount and type of sedation to administer, so that he may be held liable, and St. Barnabas Hospital may be held vicariously liable ... . **Burnett-Joseph v McGrath, 2018 NY Slip Op 01137, First Dept 2-15-18**

NEGLIGENCE (MEDICAL MALPRACTICE, PLAINTIFF'S ASSERTION OF A NEW THEORY OF LIABILITY IN THE PAPERS ANSWERING DEFENDANT HOSPITAL'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN CONSIDERED, SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT))/MEDICAL MALPRACTICE (CIVIL PROCEDURE, PLAINTIFF'S ASSERTION OF A NEW THEORY OF LIABILITY IN THE PAPERS ANSWERING DEFENDANT HOSPITAL'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN CONSIDERED, SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT))/CIVIL PROCEDURE (MEDICAL MALPRACTICE, PLAINTIFF'S ASSERTION OF A NEW THEORY OF LIABILITY IN THE PAPERS ANSWERING DEFENDANT HOSPITAL'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN CONSIDERED, SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT))/SUMMARY JUDGMENT (ANSWERING PAPERS, PLAINTIFF'S ASSERTION OF A NEW THEORY OF LIABILITY IN THE PAPERS ANSWERING DEFENDANT HOSPITAL'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN CONSIDERED, SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT))

NEGLIGENCE, MEDICAL MALPRACTICE, CIVIL PROCEDURE.

PLAINTIFF'S ASSERTION OF A NEW THEORY OF LIABILITY IN THE PAPERS ANSWERING DEFENDANT HOSPITAL'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN CONSIDERED, SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the hospital's (Crouse Hospital's) motion for summary judgment in this medical malpractice action should have been granted. The defendant doctor was not a hospital employee and no hospital employee was named in the complaint or bill of particulars. The plaintiff, in answering the hospital's summary judgment motion, claimed for the first time that two nurses were negligent. That new theory of recovery could not defeat the motion:

> Following discovery, the hospital moved for summary judgment dismissing the complaint against it, contending that the physician defendant was not its employee and that the hospital therefore could not be held vicariously liable for his alleged negligence. In opposing the motion, plaintiff did not address the hospital's contention with respect to the physician defendant's employment status and instead argued for the first time that two of the hospital's nurses were negligent and that the hospital was vicariously liable for their actions. In our view, that is a new theory of recovery and thus could not be used by plaintiff to defeat the hospital's motion ... . We note that plaintiff did not move to amend the bill of particulars to allege that the hospital was vicariously liable for the nurses' negligence. Inasmuch as plaintiff did not dispute that the hospital was not vicariously liable for the alleged negligence of the physician defendant, there was no basis to deny the motion, which we now grant. **DeMartino v Kronhaus, 2018 NY Slip Op 00974, Fourth Dept 2-9-18**

NEGLIGENCE (QUESTIONS OF FACT (1) WHETHER DEFENDANTS WERE CASUAL SELLERS OF THE GAS PUMPS SOLD TO A SCRAP YARD AND THEREFORE OWED NO DUTY OF CARE TO THE INJURED PLAINTIFF AND (2) WHETHER DEFENDANTS OWED PLAINTIFF A DUTY OF CARE BECAUSE THE PRESENCE OF GASOLINE IN THE PUMP WHICH EXPLODED WAS NOT OPEN AND OBVIOUS (FOURTH DEPT))/CASUAL SELLERS (NEGLIGENCE, QUESTIONS OF FACT (1) WHETHER DEFENDANTS WERE CASUAL SELLERS OF THE GAS PUMPS SOLD TO A SCRAP YARD AND THEREFORE OWED NO DUTY OF CARE TO THE INJURED PLAINTIFF AND (2) WHETHER DEFENDANTS OWED PLAINTIFF A DUTY OF CARE BECAUSE THE PRESENCE OF GASOLINE IN THE PUMP WHICH EXPLODED WAS NOT OPEN AND OBVIOUS (FOURTH DEPT))/OPEN AND OBVIOUS (NEGLIGENCE, DUTY TO WARN, QUESTIONS OF FACT (1) WHETHER DEFENDANTS WERE CASUAL SELLERS OF THE GAS PUMPS SOLD TO A SCRAP YARD AND THEREFORE OWED NO DUTY OF CARE TO THE INJURED PLAINTIFF AND (2) WHETHER DEFENDANTS OWED PLAINTIFF A DUTY OF CARE BECAUSE THE PRESENCE OF GASOLINE IN THE PUMP WHICH EXPLODED WAS NOT OPEN AND OBVIOUS (FOURTH DEPT))/WARN, DUTY TO (NEGLIGENCE, OPEN AND OBVIOUS, QUESTIONS OF FACT (1) WHETHER DEFENDANTS WERE CASUAL SELLERS OF THE GAS PUMPS SOLD TO A SCRAP YARD AND THEREFORE OWED NO DUTY OF CARE TO THE INJURED PLAINTIFF AND (2) WHETHER DEFENDANTS OWED PLAINTIFF A DUTY OF CARE BECAUSE THE PRESENCE OF GASOLINE IN THE PUMP WHICH EXPLODED WAS NOT OPEN AND OBVIOUS (FOURTH DEPT))/PRODUCTS LIABILITY (QUESTIONS OF FACT (1) WHETHER DEFENDANTS WERE CASUAL SELLERS OF THE GAS PUMPS SOLD TO A SCRAP YARD AND THEREFORE OWED NO DUTY OF CARE TO THE INJURED PLAINTIFF AND (2) WHETHER DEFENDANTS OWED PLAINTIFF A DUTY OF CARE BECAUSE THE PRESENCE OF GASOLINE IN THE PUMP WHICH EXPLODED WAS NOT OPEN AND OBVIOUS (FOURTH DEPT))

NEGLIGENCE, PRODUCTS LIABILITY.

QUESTIONS OF FACT (1) WHETHER DEFENDANTS WERE CASUAL SELLERS OF THE GAS PUMPS SOLD TO A SCRAP YARD AND THEREFORE OWED NO DUTY OF CARE TO THE INJURED PLAINTIFF AND (2) WHETHER DEFENDANTS OWED PLAINTIFF A DUTY OF CARE BECAUSE THE PRESENCE OF GASOLINE IN THE PUMP WHICH EXPLODED WAS NOT OPEN AND OBVIOUS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendants' motion for summary judgment should not have been granted. Defendants sold used gas pumps to a scrap yard, stating that the pumps had been drained of gasoline. When one of the pumps was sent to the shredder it exploded, injuring plaintiff. The other pumps were found to have one to two gallons of gasoline in them. The Fourth Department held there was a question of fact whether defendants were casual sellers of gas pumps and therefore did not owe plaintiff a duty of care. The Fourth Department further held that, even if defendants were casual sellers of gas pumps, there was a question of fact whether they owed a duty of care to plaintiff because the hazard was not open and obvious:

> Although it is well settled that casual or occasional sellers of products do "not undertake the special responsibility for public safety assumed by those in the business of regularly supplying those products"... , the evidence submitted by defendants in support of their motion failed to establish that their sale of gas pumps was "wholly incidental" to their business of installing and servicing petroleum distribution systems ... .
>
> Even assuming, arguendo, that defendants were merely casual sellers of used gas pumps, we cannot conclude as a matter of law that defendants owed no duty to plaintiff. Even casual sellers owe a duty to warn of dangers that are not open and obvious or readily discernable ... . **Rosario v Monroe Mech. Servs., Inc., 2018 NY Slip Op 00732, Fourth Dept 2-2-18**

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (ABUTTING PROPERTY OWNER PROPERLY GRANTED A LICENSE PURSUANT TO REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 881 TO ENTER NEIGHBOR'S PROPERTY TO PAINT A FENCE (FOURTH DEPT))/FENCES (ABUTTING PROPERTY OWNER PROPERLY GRANTED A LICENSE PURSUANT TO REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 881 TO ENTER NEIGHBOR'S PROPERTY TO PAINT A FENCE (FOURTH DEPT))/LICENSE (RPAPL 881) (ABUTTING PROPERTY OWNER PROPERLY GRANTED A LICENSE PURSUANT TO REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 881 TO ENTER NEIGHBOR'S PROPERTY TO PAINT A FENCE (FOURTH DEPT))/REAL PROPERTY (ABUTTING PROPERTY OWNER PROPERLY GRANTED A LICENSE PURSUANT TO REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 881 TO ENTER NEIGHBOR'S PROPERTY TO PAINT A FENCE (FOURTH DEPT))

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW.

ABUTTING PROPERTY OWNER PROPERLY GRANTED A LICENSE PURSUANT TO REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 881 TO ENTER NEIGHBOR'S PROPERTY TO PAINT A FENCE (FOURTH DEPT).

The Fourth Department determined Supreme Court properly granted petitioner a license pursuant to Real Property Actions and Proceedings Law (RPAPL) 881 to enter respondent's property to paint petitioner's fence. The fact that petitioner built the fence too close to the property line did not preclude the granting of the license:

> ... [W]e conclude that, in the absence of a statutory definition, the usual and commonly understood meaning of the words "improvement" and/or "repair" encompasses the painting of the wooden fence in this case ... .That interpretation is supported by the legislative history, which establishes that the legislature—in recognition that the nature of abutting properties often requires property owners to access the neighboring property in order to make improvements or repairs to their own—intended to encourage such improvements or repairs by removing unreasonable obstacles to efforts to prevent blight and deterioration ... . **Stuck v Hickmott, 2018 NY Slip Op 01013, Fourth Dept 2-9-18**

SOCIAL SERVICES LAW

SOCIAL SERVICES LAW (FOOD STAMPS, ALTHOUGH THE CHILD SUPPORT INCOME FOR TWO CHILDREN IN COLLEGE WAS COUNTED AS PART OF THE HOUSEHOLD INCOME, THE TWO COLLEGE STUDENTS WERE PROPERLY NOT COUNTED FOR FOOD STAMP ELIGIBILITY, THE DENIAL OF FOOD STAMPS WAS PROPER (SECOND DEPT))/FOOD STAMPS (ALTHOUGH THE CHILD SUPPORT INCOME FOR TWO CHILDREN IN COLLEGE WAS COUNTED AS PART OF THE HOUSEHOLD INCOME, THE TWO COLLEGE STUDENTS WERE PROPERLY NOT COUNTED FOR FOOD STAMP ELIGIBILITY, THE DENIAL OF FOOD STAMPS WAS PROPER (SECOND DEPT))/SUPPLEMENTAL NUTRITIONAL ASSISTANCE PROGRAM (SNAP) (FOOD STAMPS, ALTHOUGH THE CHILD SUPPORT INCOME FOR TWO CHILDREN IN COLLEGE WAS COUNTED AS PART OF THE HOUSEHOLD INCOME, THE TWO COLLEGE STUDENTS WERE PROPERLY NOT COUNTED FOR FOOD STAMP ELIGIBILITY, THE DENIAL OF FOOD STAMPS WAS PROPER (SECOND DEPT))/SNAP (FOOD STAMPS, ALTHOUGH THE CHILD SUPPORT INCOME FOR TWO CHILDREN IN COLLEGE WAS COUNTED AS PART OF THE HOUSEHOLD INCOME, THE TWO COLLEGE STUDENTS WERE PROPERLY NOT COUNTED FOR FOOD STAMP ELIGIBILITY, THE DENIAL OF FOOD STAMPS WAS PROPER (SECOND DEPT))

SOCIAL SERVICES LAW.

ALTHOUGH THE CHILD SUPPORT INCOME FOR TWO CHILDREN IN COLLEGE WAS COUNTED AS PART OF THE HOUSEHOLD INCOME, THE TWO COLLEGE STUDENTS WERE PROPERLY NOT COUNTED FOR FOOD STAMP ELIGIBILITY, THE DENIAL OF FOOD STAMPS WAS PROPER (SECOND DEPT).

The Second Department determined the Commissioner of the NYS Office of Temporary and Disability Assistance properly interpreted the food stamp regulations. Petitioner's application to continue her Supplemental Nutritional Assistance Program (SNAP) (food stamp) benefits was denied. Petitioner had five children, two in college. The two college students were not counted as part of the household for SNAP purposes but the child support income petitioner received for the two college students was counted. So petitioner's income was deemed too high for food stamp eligibility:

> Pursuant to 7 CFR 273.7(a)(1), "[a]s a condition of eligibility for SNAP benefits, each household member not exempt under paragraph (b)(1) of this section must comply with the following SNAP work requirements," including registering for work. According to 7 CFR 273.7(b)(1)(viii), students enrolled at least half time in institutions of higher education are only exempt if they meet "the student eligibility requirements listed in" 7 CFR 273.5(b), which includes students under 18, students with special needs, students in work study programs, or students employed for a minimum of 20 hours per week.
>
> Similarly, 18 NYCRR 387.16(d) provides for the inclusion of income from nonhousehold members who have been disqualified for an intentional program violation, ineligible alien status, failure to attest to citizenship or alien status, or failure to comply with a food stamp work registration or work requirement as provided in 18 NYCRR 385.3. Under 18 NYCRR 385.3 and 18 NYCRR 387.1(jj), such students are not exempt from work requirements, and are not eligible for food stamps. Pursuant to 18 NYCRR 387.16(d) their income has to be included in household income.
>
> The college students were not employed a minimum of 20 hours per week or otherwise eligible for an exemption. Accordingly, their income was properly included in household income. **Matter of Leggio v Devine, 2018 NY Slip Op 01312, Second Dept 2-28-18**

TRUSTS AND ESTATES

TRUSTS AND ESTATES (RELEASE SIGNED BY ONE OF THE BENEFICIARIES OF THE WILL, RELEASING THE EXECUTOR FROM LIABILITY STEMMING FROM THE ADMINISTRATION OF THE ESTATE, WAS NOT VALID BECAUSE THE BENEFICIARY WAS NOT FULLY INFORMED ABOUT THE VALUE OF THE SECURITIES IN THE ESTATE, AND THE EFFECTS OF LEAVING A TRUST UNFUNDED, SURROGATE'S COURT IMPROPERLY PLACED THE BURDEN OF DEMONSTRATING THE RELEASE WAS INVALID ON THE BENEFICIARY (FOURTH DEPT))/RELEASES (TRUSTS AND ESTATES, RELEASE SIGNED BY ONE OF THE BENEFICIARIES OF THE WILL, RELEASING THE EXECUTOR FROM LIABILITY STEMMING FROM THE ADMINISTRATION OF THE ESTATE, WAS NOT VALID BECAUSE THE BENEFICIARY WAS NOT FULLY INFORMED ABOUT THE VALUE OF THE SECURITIES IN THE ESTATE, AND THE EFFECTS OF LEAVING A TRUST UNFUNDED, SURROGATE'S COURT IMPROPERLY PLACED THE BURDEN OF DEMONSTRATING THE RELEASE WAS INVALID ON THE BENEFICIARY (FOURTH DEPT))/EXECUTORS (RELEASE SIGNED BY ONE OF THE BENEFICIARIES OF THE WILL, RELEASING THE EXECUTOR FROM LIABILITY STEMMING FROM THE ADMINISTRATION OF THE ESTATE, WAS NOT VALID BECAUSE THE BENEFICIARY WAS NOT FULLY INFORMED ABOUT THE VALUE OF THE SECURITIES IN THE ESTATE, AND THE EFFECTS OF LEAVING A TRUST UNFUNDED, SURROGATE'S COURT IMPROPERLY PLACED THE BURDEN OF DEMONSTRATING THE RELEASE WAS INVALID ON THE BENEFICIARY (FOURTH DEPT))

TRUSTS AND ESTATES.

RELEASE SIGNED BY ONE OF THE BENEFICIARIES OF THE WILL, RELEASING THE EXECUTOR FROM LIABILITY STEMMING FROM THE ADMINISTRATION OF THE ESTATE, WAS NOT VALID BECAUSE THE BENEFICIARY WAS NOT FULLY INFORMED ABOUT THE VALUE OF THE SECURITIES IN THE ESTATE, AND THE EFFECTS OF LEAVING A TRUST UNFUNDED, SURROGATE'S COURT IMPROPERLY PLACED THE BURDEN OF DEMONSTRATING THE RELEASE WAS INVALID ON THE BENEFICIARY (FOURTH DEPT).

The Fourth Department, reversing Surrogate's Court, determined that a release drawn up by the initial executor, who died, was not valid because the objectant, a beneficiary of the will who signed the release, was not informed that the value of the securities in the estate had declined significantly and was not informed of the ramifications of the executor's decision to leave a trust unfunded. Surrogate's Court had erroneously placed the burden of demonstrating the release was invalid on the objectant:

> ... [T]he Surrogate improperly shifted the burden from petitioners to objectant to prove that the release was fraudulently obtained and erred in determining that the release is valid. With releases, "as in other instances of dealing between a fiduciary and the person for whom he [or she] is acting, there must be proof of full disclosure by the [executor] of the facts of the situation and the legal rights of the beneficiary" ... . A release should be subject to careful scrutiny, and the executor must affirmatively demonstrate full disclosure of "material facts which he [or she] knew or should have known" ... . "The mere absence of misrepresentation, fraud, or undue influence in the obtaining of a release is not sufficient to insulate the release from a subsequent attack by the beneficiaries; the fiduciary must affirmatively demonstrate that the beneficiaries were made aware of the nature and legal effect of the transaction in all its particulars" ... . Here, petitioners' burden of proving that full disclosure was provided was improperly shifted to objectant, i.e., the beneficiary who challenged the validity of the release.
>
> Decedent's will contemplated equal bequests to objectant and his sister (decedent's children). There was a substantial discrepancy in the value of the properties decedent left to each child, however, and most of objectant's inheritance was to come from the liquidation of the estate's securities. The will also directed that the trust be funded in the maximum sum allowable to benefit decedent's children and their descendants. Objectant and the executor were named as co-trustees of the trust. Accurate information concerning the current value of the estate's securities

and the propriety of defunding the trust in contravention of the will was therefore highly material to objectant. **Matter of Alford, 2018 NY Slip Op 00752, Fourth Dept 2-2-18**

TRUSTS AND ESTATES (BECAUSE THERE WAS ONLY ONE ORIGINAL WILL, NOT MULTIPLE ORIGINALS, THE INABILITY TO FIND A WILL UPON DECEDENT'S DEATH DID NOT GIVE RISE TO THE PRESUMPTION OF REVOCATION BY THE DECEDENT (FOURTH DEPT))/WILLS (PRESUMPTION OF REVOCATION, BECAUSE THERE WAS ONLY ONE ORIGINAL WILL, NOT MULTIPLE ORIGINALS, THE INABILITY TO FIND A WILL UPON DECEDENT'S DEATH DID NOT GIVE RISE TO THE PRESUMPTION OF REVOCATION BY THE DECEDENT (FOURTH DEPT))/REVOCATION, PRESUMPTION OF (WILLS, BECAUSE THERE WAS ONLY ONE ORIGINAL WILL, NOT MULTIPLE ORIGINALS, THE INABILITY TO FIND A WILL UPON DECEDENT'S DEATH DID NOT GIVE RISE TO THE PRESUMPTION OF REVOCATION BY THE DECEDENT (FOURTH DEPT))

TRUSTS AND ESTATES.

BECAUSE THERE WAS ONLY ONE ORIGINAL WILL, NOT MULTIPLE ORIGINALS, THE INABILITY TO FIND A WILL UPON DECEDENT'S DEATH DID NOT GIVE RISE TO THE PRESUMPTION OF REVOCATION BY THE DECEDENT (FOURTH DEPT).

The Fourth Department affirmed Surrogate's Court's finding that there was only one original will, a finding made upon remittal from the Court of Appeals. Because no will was found upon decedent's death, and because, in the initial Surrogate's Court proceeding, there was conflicting evidence about whether there was one will, with three copies, or four original wills, the presumption of revocation by the decedent had not been rebutted (the decedent could have possessed an original will). In the post-remittal proceeding, Surrogate's Court determined petitioner, the sole beneficiary of the will, had proven there was only one will, not multiple original wills. Because, upon remittal, Surrogate's Court found there was only one original will, the presumption of revocation by the decedent did not arise (because the decedent could not have possessed an original). The wills were drawn for decedent and her ex-husband. Petitioner, the ex-husband's father, was made alternate beneficiary. When decedent and her ex-husband were divorced, the will as it related to the ex-husband was revoked by operation of law, triggering the petitioner's alternate beneficiary status. The objectants are decedent's parents and brothers:

> Contrary to objectants' contention, it cannot be said that the Surrogate erred in crediting the ex-husband's testimony that he and decedent each signed one original will, one original power of attorney, and one original health care proxy, and that the attorney's office made three photocopies of each of those estate planning documents. Despite the uncertainty with respect to the ex-husband's testimony at the initial hearing, his testimony at the hearing upon remittal unequivocally clarified that there was only one original of each of six estate planning documents, i.e., his will, power of attorney, and health care proxy, and decedent's will, power of attorney, and health care proxy. We conclude that the other instances of inconsistent testimony alleged by objectants have no bearing on the issue whether decedent executed only one original will and were otherwise adequately clarified by the ex-husband. **Matter of Lewis, 2018 NY Slip Op 00941, Fourth Dept 2-9-18**

TRUSTS AND ESTATES (NOT-FOR-PROFIT CORPORATION LAW PETITION TO DISINTER THE REMAINS OF ARCHBISHOP FULTON SHEEN AND MOVE THEM FROM ST PATRICK'S CATHEDRAL TO PEORIA ILLINOIS SHOULD NOT HAVE BEEN GRANTED WITHOUT A HEARING (FIRST DEPT))/CORPORATION LAW (DISINTERMENT, NOT-FOR-PROFIT CORPORATION LAW PETITION TO DISINTER THE REMAINS OF ARCHBISHOP FULTON SHEEN AND MOVE THEM FROM ST PATRICK'S CATHEDRAL TO PEORIA ILLINOIS SHOULD NOT HAVE BEEN GRANTED WITHOUT A HEARING (FIRST DEPT))/NOT FOR PROFIT CORPORATION LAW (DISINTERMENT, NOT-FOR-PROFIT CORPORATION LAW PETITION TO DISINTER THE REMAINS OF ARCHBISHOP FULTON SHEEN AND MOVE THEM FROM ST PATRICK'S CATHEDRAL TO PEORIA ILLINOIS SHOULD NOT HAVE BEEN GRANTED WITHOUT A HEARING (FIRST DEPT))/DISINTERMENT (NOT-FOR-PROFIT CORPORATION LAW PETITION TO DISINTER THE REMAINS OF ARCHBISHOP FULTON SHEEN AND MOVE THEM FROM ST PATRICK'S CATHEDRAL TO PEORIA ILLINOIS SHOULD NOT HAVE BEEN GRANTED WITHOUT A HEARING (FIRST DEPT))/CEMETERIES (DISINTERMENT, NOT-FOR-PROFIT CORPORATION LAW PETITION TO DISINTER THE REMAINS OF ARCHBISHOP FULTON SHEEN AND MOVE THEM FROM ST PATRICK'S CATHEDRAL TO PEORIA ILLINOIS SHOULD NOT HAVE BEEN GRANTED WITHOUT A HEARING (FIRST DEPT))

TRUSTS AND ESTATES, CORPORATION LAW.

NOT-FOR-PROFIT CORPORATION LAW PETITION TO DISINTER THE REMAINS OF ARCHBISHOP FULTON SHEEN AND MOVE THEM FROM ST PATRICK'S CATHEDRAL TO PEORIA ILLINOIS SHOULD NOT HAVE BEEN GRANTED WITHOUT A HEARING (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Richter, over a two-justice dissent, determined a hearing must be held to decide whether the remains of Archbishop Fulton Sheen should be removed from St. Patrick's Cathedral in New York City to Peoria, Illinois, in anticipation of Archbishop Sheen's Sainthood. The affidavits submitted by Archbishop Sheen's relatives, stating that the Archbishop would have wanted his remains moved to Illinois, and the Archbishop's long-time close friend, stating that the Archbishop expressed a wish that his remains be in New York, required a hearing. The petition court had granted the petition for removal of the remains to Illinois:

> In June 2016, petitioner brought a proceeding pursuant to Not-For-Profit Corporation Law § 1510(e) seeking to disinter the remains of Archbishop Sheen for removal and transfer to a crypt located in St. Mary's Cathedral in Peoria. Petitioner submitted the affidavits of her three siblings, all of whom fully support and consent to the transfer ... .
>
> A body may be disinterred upon the consent of the cemetery owner, the owners of the lot, and certain specified relatives of the deceased (Not-For-Profit Corporation Law § 1510[e]). If such consent cannot be obtained, a court may grant permission to disinter ... . There must be a showing of "[g]ood and substantial reasons" before disinterment is allowed ... . Although "each case is dependent upon its own peculiar facts and circumstances" ... , "[t]he paramount factor a court must consider in granting permission to disinter is the known desires of the decedent" ... . "Among other factors, a court must also consider the desires of the decedent's next of kin" ... . Where issues of fact have been raised concerning the decedent's wishes, the court should order a hearing ... . **Matter of Cunningham v Trustees of St. Patrick's Cathedral, 2018 NY Slip Op 00815, First Dept 2-6-18**

TRUSTS AND ESTATES (FLAWED ACKNOWLEDGMENTS IN A PRENUPTIAL AGREEMENT, WHICH DID NOT INCLUDE THE STATEMENT THAT THE PARTIES WERE KNOWN TO THE NOTARIES, CAN BE CURED BY AFFIDAVITS SUBMITTED TO THE COURT BY THE NOTARIES (SECOND DEPT))/PRENUPTIAL AGREEMENTS (TRUSTS AND ESTATES, FLAWED ACKNOWLEDGMENTS IN A PRENUPTIAL AGREEMENT, WHICH DID NOT INCLUDE THE STATEMENT THAT THE PARTIES WERE KNOWN TO THE NOTARIES, CAN BE CURED BY AFFIDAVITS SUBMITTED TO THE COURT BY THE NOTARIES (SECOND DEPT))/NOTARIES (FLAWED ACKNOWLEDGMENTS IN A PRENUPTIAL AGREEMENT, WHICH DID NOT INCLUDE THE STATEMENT THAT THE PARTIES WERE KNOWN TO THE NOTARIES, CAN BE CURED BY AFFIDAVITS SUBMITTED TO THE COURT BY THE NOTARIES (SECOND DEPT))/ACKNOWLEDGMENTS (NOTARIES, TRUSTS AND ESTATES, LAWED ACKNOWLEDGMENTS IN A PRENUPTIAL AGREEMENT, WHICH DID NOT INCLUDE THE STATEMENT THAT THE PARTIES WERE KNOWN TO THE NOTARIES, CAN BE CURED BY AFFIDAVITS SUBMITTED TO THE COURT BY THE NOTARIES (SECOND DEPT))/FAMILY LAW (PRENUPTIAL AGREEMENTS, FLAWED ACKNOWLEDGMENTS IN A PRENUPTIAL AGREEMENT, WHICH DID NOT INCLUDE THE STATEMENT THAT THE PARTIES WERE KNOWN TO THE NOTARIES, CAN BE CURED BY AFFIDAVITS SUBMITTED TO THE COURT BY THE NOTARIES (SECOND DEPT))

TRUSTS AND ESTATES, FAMILY LAW.

FLAWED ACKNOWLEDGMENTS IN A PRENUPTIAL AGREEMENT, WHICH DID NOT INCLUDE THE STATEMENT THAT THE PARTIES WERE KNOWN TO THE NOTARIES, CAN BE CURED BY AFFIDAVITS SUBMITTED TO THE COURT BY THE NOTARIES (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Austin, determined Surrogate's Court properly denied the wife's (Irene's) motion to dismiss the husband's estate's petition to invalidate Irene's notice of spousal election. Irene and her husband who had both been married before, signed a prenuptial agreement that they would not make a claim to each other's estates. There was no question both parties signed the agreement, but essential language was missing from the acknowledgments, taken by their respective attorneys as notaries. Both attorneys submitted affidavits stating that the signers were known to them at the time of signing, the information missing from the acknowledgments. The question came down to whether, by submitting the prenuptial agreement with the invalid acknowledgments, Irene demonstrated conclusively that the petition could not succeed. The Second Department determined the flaw in the acknowledgments can be cured, and the motion to dismiss was therefore properly denied:

> In Galetta v Galetta (21 NY3d 186), the Court of Appeals left unanswered the question of whether a defective acknowledgment of a prenuptial agreement could be remedied by extrinsic proof provided by the notary public who took a party's signature. For the reasons that follow, we conclude that such proof can remedy a defective acknowledgment. Accordingly, we affirm the order of the Surrogate's Court, which denied the appellant's motion to dismiss a petition to invalidate her notice of spousal election. **Matter of Koegel, 2018 NY Slip Op 00833, Second Dept 2-7-18**

UNEMPLOYMENT INSURANCE

UNEMPLOYMENT INSURANCE (ALTHOUGH THE EMPLOYER HAD CAUSE TO FIRE CLAIMANT FOR TARDINESS AND ABSENCES, CLAIMANT'S ACTIONS DID NOT DISQUALIFY HER FROM RECEIVING UNEMPLOYMENT INSURANCE BENEFITS (THIRD DEPT))/DISQUALIFYING MISCONDUCT (UNEMPLOYMENT INSURANCE, ALTHOUGH THE EMPLOYER HAD CAUSE TO FIRE CLAIMANT FOR TARDINESS AND ABSENCES, CLAIMANT'S ACTIONS DID NOT DISQUALIFY HER FROM RECEIVING UNEMPLOYMENT INSURANCE BENEFITS (THIRD DEPT))/TARDINESS (UNEMPLOYMENT INSURANCE, ALTHOUGH THE EMPLOYER HAD CAUSE TO FIRE CLAIMANT FOR TARDINESS AND ABSENCES, CLAIMANT'S ACTIONS DID NOT DISQUALIFY HER FROM RECEIVING UNEMPLOYMENT INSURANCE BENEFITS (THIRD DEPT))/ABSENCES (UNEMPLOYMENT INSURANCE, ALTHOUGH THE EMPLOYER HAD CAUSE TO FIRE CLAIMANT FOR TARDINESS AND ABSENCES, CLAIMANT'S ACTIONS DID NOT DISQUALIFY HER FROM RECEIVING UNEMPLOYMENT INSURANCE BENEFITS (THIRD DEPT))

UNEMPLOYMENT INSURANCE.

ALTHOUGH THE EMPLOYER HAD CAUSE TO FIRE CLAIMANT FOR TARDINESS AND ABSENCES, CLAIMANT'S ACTIONS DID NOT DISQUALIFY HER FROM RECEIVING UNEMPLOYMENT INSURANCE BENEFITS (THIRD DEPT).

The Third Department determined that, although the employer had cause to fire the claimant for tardiness and absences, substantial evidence supported the Board's finding her tardiness and absences did disqualify her from receiving unemployment benefits. Although claimant had been informed that her tardiness and absences were not acceptable, she was never informed that she could be fired as a result. Claimant was not fired until after she put in a claim for workers' compensation benefits after an injury at work:

> ... "[W]hether a claimant's actions rise to the level of disqualifying misconduct is a factual issue for the Board to resolve, and not every mistake, exercise of poor judgment or discharge for cause will rise to the level of misconduct"... . The Board's determination in this regard will not be disturbed if it is supported by substantial evidence ... .
>
> The record reveals that, although claimant's tardiness and attendance problems began in December 2014, she was not served with any notices of discipline until May 4, 2015, just after her work-related injury. Claimant's immediate supervisor testified that she instructed claimant on the proper procedure for entering her work hours into the computer system and told her that she had to be at work between the hours of 9:00 a.m. and 5:00 p.m. In fact, claimant received emails in December 2014 and March 2015 reminding her of these requirements. She was not, however, advised that adverse employment consequences would result if she did not follow the proper protocol. Likewise, the notices of discipline did not set forth the disciplinary measures that would be taken if claimant continued to engaged in the objectionable behavior. Furthermore, claimant's termination occurred shortly after she was placed on suspension without affording her an opportunity to correct her behavior ... . Under the circumstances presented, although the employer had cause to discharge claimant, she did not exhibit a willful and wanton disregard of the employer's interest rising to the level of disqualifying misconduct ... . **Matter of Jelic (Ama Research Labs. Inc.--Commissioner of Labor), 2018 NY Slip Op 00588, Third Dept 2-1-18**

UNEMPLOYMENT INSURANCE (CLAIMANT ENROLLED IN A BARBER TRAINING PROGRAM AFTER HIS REGULAR UNEMPLOYMENT BENEFITS HAD RUN OUT, HE WAS NOT ENTITLED TO ADDITIONAL BENEFITS (THIRD DEPT))/TRAINING PROGRAMS (UNEMPLOYMENT INSURANCE, CLAIMANT ENROLLED IN A BARBER TRAINING PROGRAM AFTER HIS REGULAR UNEMPLOYMENT BENEFITS HAD RUN OUT, HE WAS NOT ENTITLED TO ADDITIONAL BENEFITS (THIRD DEPT))/LABOR LAW 599 (UNEMPLOYMENT INSURANCE, CLAIMANT ENROLLED IN A BARBER TRAINING PROGRAM AFTER HIS REGULAR UNEMPLOYMENT BENEFITS HAD RUN OUT, HE WAS NOT ENTITLED TO ADDITIONAL BENEFITS (THIRD DEPT))

UNEMPLOYMENT INSURANCE.

CLAIMANT ENROLLED IN A BARBER TRAINING PROGRAM AFTER HIS REGULAR UNEMPLOYMENT BENEFITS HAD RUN OUT, HE WAS NOT ENTITLED TO ADDITIONAL BENEFITS (THIRD DEPT).

The Third Department determined claimant was not entitled to additional unemployment benefits in connection with his enrolling in a barber training program. Claimant did not enroll in the program until after his regular unemployment benefits had been exhausted:

> Labor Law § 599 provides an avenue whereby a claimant who participates in an approved training program may be eligible for additional unemployment insurance benefits after his or her regular benefits are exhausted" ... . However, in order to receive benefits under this statute, the claimant "must have been accepted into an approved program, or demonstrated an application for such a program, while still receiving regular unemployment benefits" ... . Here, it is undisputed that claimant's regular unemployment benefits were exhausted more than a month before he filed his application for additional benefits under Labor Law § 599. In view of this, and in the absence of any legal authority excusing the delay, we find that substantial evidence supports the Board's decision. **Matter of Simpson (Commissioner of Labor), 2018 NY Slip Op 00594, Third Dept 2-1-18**

WORKERS' COMPENSATION LAW

WORKERS' COMPENSATION (OCCUPATIONAL DISEASE VERSUS ACCIDENTAL INJURY, SUBSTANTIAL EVIDENCE DID NOT SUPPORT THE BOARD'S FINDING THAT CLAIMANT'S SHOULDER INJURY WAS AN OCCUPATIONAL DISEASE, AS OPPOSED TO AN ACCIDENTAL INJURY (THIRD DEPT))/OCCUPATIONAL DISEASE (WORKERS' COMPENSATION, SUBSTANTIAL EVIDENCE DID NOT SUPPORT THE BOARD'S FINDING THAT CLAIMANT'S SHOULDER INJURY WAS AN OCCUPATIONAL DISEASE, AS OPPOSED TO AN ACCIDENTAL INJURY (THIRD DEPT))/ACCIDENTAL INJURY (WORKERS' COMPENSATION, SUBSTANTIAL EVIDENCE DID NOT SUPPORT THE BOARD'S FINDING THAT CLAIMANT'S SHOULDER INJURY WAS AN OCCUPATIONAL DISEASE, AS OPPOSED TO AN ACCIDENTAL INJURY (THIRD DEPT))

WORKERS' COMPENSATION LAW.

SUBSTANTIAL EVIDENCE DID NOT SUPPORT THE BOARD'S FINDING THAT CLAIMANT'S SHOULDER INJURY WAS AN OCCUPATIONAL DISEASE, AS OPPOSED TO AN ACCIDENTAL INJURY (THIRD DEPT).

The Third Department determined substantial evidence did not support the Board's conclusion that claimant's shoulder injury was an occupational disease, as opposed to an accidental injury. Claimant alleged his torn rotator cuff was caused by unloading a wheelbarrow, which he did as part of his job filling potholes:

> The employer contends that substantial evidence does not support the Board's establishment of the claim as an occupational disease. Rather, it maintains that the shoulder injury should be classified as an accidental injury and, as such, the claim is untimely under Workers' Compensation Law § 18. An occupational disease is statutorily defined as "a disease resulting from the nature of the employment and contracted therein" ... . Significantly, in order to establish an occupational disease, a claimant must demonstrate a "recognizable link" between his or her affliction and a "distinctive feature" of his or her employment ... . * * *
>
> Even accepting, as did the Board, that claimant injured his shoulder unloading the wheelbarrow, we agree with the employer that the injury should be classified as accidental and not as an occupational disease. The proof failed to demonstrate that claimant's shoulder injury was attributable to repetitive movements associated with moving heavy wheelbarrow loads of asphalt or performing other manual duties during his short period of employment as a laborer with the highway department. To the contrary, claimant testified that the onset of shoulder pain occurred during a definitive event at work when he was emptying a wheelbarrow filled with asphalt. Consequently, we find that there is a lack of substantial evidence evincing a recognizable link between claimant's shoulder injury and a distinctive feature of his job as is necessary to establish his claim for an occupational disease ... . **Matter of Yonkosky v Town of Hamburg, 2018 NY Slip Op 00586, Third Dept 2-1-18**

WORKERS' COMPENSATION LAW (OCCUPATIONAL DISEASE, BACK AND NECK INJURIES PROPERLY RULED AN OCCUPATIONAL DISEASE RESULTING FROM REPETITIVE LIFTING AND CARRYING (THIRD DEPT))/OCCUPATIONAL DISEASE (WORKERS' COMPENSATION LAW, BACK AND NECK INJURIES PROPERLY RULED AN OCCUPATIONAL DISEASE RESULTING FROM REPETITIVE LIFTING AND CARRYING (THIRD DEPT))

WORKERS' COMPENSATION LAW.

BACK AND NECK INJURIES PROPERLY RULED AN OCCUPATIONAL DISEASE RESULTING FROM REPETITIVE LIFTING AND CARRYING (THIRD DEPT).

The Third Department determined claimant demonstrated his back and neck injuries constituted an occupational disease related to his lifting and mix heavy containers of compound and applying the compound to walls and ceilings:

> "In order for an occupational disease to be established, the claimant must establish a recognizable link between his or her condition and a distinctive feature of his or her employment"... . Claimant testified that his job required lifting and carrying containers of plastering compound weighing roughly 50 pounds and using the compound to hang sheetrock for eight hours a day, five or six days a week, for over 30 years. Samuel Kim, a neurosurgeon, opined that claimant suffered from chronic neck and back pain and degenerative disc disease in his cervical and lumbar spine and that the condition was consistent with a history of repetitive movement, and Yong Kim, claimant's treating physician, attributed claimant's back pain to "repetitive use at work." In light of the foregoing, and given that no contrary medical opinions were presented, the Board's determination that claimant suffered from an occupational disease resulting from repetitive stress is supported by substantial evidence and will not be disturbed ... . **Matter of Garcia v MCI Interiors, Inc., 2018 NY Slip Op 00873, Third Dept 2-8-18**

WORKERS' COMPENSATION LAW (JURISDICTION, INJURY OUTSIDE NEW YORK, NEW YORK HAD JURISDICTION OVER AN INJURY THAT OCCURRED OUTSIDE NEW YORK (THIRD DEPT))/JURISDICTION (WORKERS' COMPENSATION LAW, INJURY OUTSIDE NEW YORK, NEW YORK HAD JURISDICTION OVER AN INJURY THAT OCCURRED OUTSIDE NEW YORK (THIRD DEPT))

WORKERS' COMPENSATION LAW.

ALTHOUGH DECEDENT, A NEW YORK RESIDENT, WORKED FOR A PENNSYLVANIA COMPANY, NEW YORK HAD JURISDICTION OVER AN INJURY THAT OCCURRED OUTSIDE NEW YORK (THIRD DEPT).

The Third Department determined New York could exercise jurisdiction over an injury that occurred outside New York. Decedent was a New York resident working for a Pennsylvania company:

> The Board has jurisdiction over a claim for an injury occurring outside of New York where there are "sufficient significant contacts" between the employment and New York ... . A variety of factors must be taken into account in the fact-finding required to assess jurisdiction, "including where the employee resides, where the employee was hired, the location of the employee's employment and the employer's offices, whether the employee was expected to return to New York after completing out-of-state work for the employer and the extent to which the employer

conducted business in New York" ... . The Board's determination as to the existence of jurisdiction will not be disturbed if it is supported by substantial evidence ... .

At the hearing, decedent testified that, while he was living in New York, he was hired by the employer during a phone call and that he thereafter went to Pennsylvania for a four-day orientation before he began driving for the employer. He further explained that he continued to live in New York and that, during the two-year period prior to his accident, he had made 17 deliveries to locations in New York, which was significantly more deliveries than he had made to Pennsylvania. Decedent also described his "home base" as being in New York and testified that the employer would contact him at his home in New York about jobs. After decedent was injured, the employer assisted in securing medical care for him in New York and selecting a doctor for him there. Decedent acknowledged that the dispatcher from whom he received calls was located in Pennsylvania. Decedent further explained that, after he was injured, the employer helped secure him light-duty work in New York for which the employer paid him, and the record contains a letter to decedent explaining that the employer had sought assistance in securing him such a position and that it was "an extension of [his] employment" with the employer. **Matter of Galster v Keen Transp., Inc., 2018 NY Slip Op 01105, Second Dept 2-14-18**

WORKERS'S COMPENSATION LAW (EXCLUSIVITY OF A WORKERS' COMPENSATION REMEDY PRECLUDED SUIT AGAINST AN EMPLOYEE OF A PERSON EMPLOYED BY PLAINTIFF'S EMPLOYER, THE NYC DEPARTMENT OF EDUCATION, IN THIS SLIP AND FALL CASE (SECOND DEPT))/EDUCATION-SCHOOL LAW (WORKERS' COMPENSATION, EXCLUSIVITY OF A WORKERS' COMPENSATION REMEDY PRECLUDED SUIT AGAINST AN EMPLOYEE OF A PERSON EMPLOYED BY PLAINTIFF'S EMPLOYER, THE NYC DEPARTMENT OF EDUCATION, IN THIS SLIP AND FALL CASE (SECOND DEPT))/SLIP AND FALL (WORKERS' COMPENSATION, EXCLUSIVITY OF A WORKERS' COMPENSATION REMEDY PRECLUDED SUIT AGAINST AN EMPLOYEE OF A PERSON EMPLOYED BY PLAINTIFF'S EMPLOYER, THE NYC DEPARTMENT OF EDUCATION, IN THIS SLIP AND FALL CASE (SECOND DEPT))/EMPLOYMENT LAW (NYC DEPARTMENT OF EDUCATION, WORKERS' COMPENSATION, INDIRECT SYSTEM OF EMPLOYMENT, EXCLUSIVITY OF A WORKERS' COMPENSATION REMEDY PRECLUDED SUIT AGAINST AN EMPLOYEE OF A PERSON EMPLOYED BY PLAINTIFF'S EMPLOYER, THE NYC DEPARTMENT OF EDUCATION, IN THIS SLIP AND FALL CASE (SECOND DEPT))/INDIRECT SYSTEM OF EMPLOYMENT (NYC DEPARTMENT OF EDUCATION, WORKERS' COMPENSATION, EXCLUSIVITY OF A WORKERS' COMPENSATION REMEDY PRECLUDED SUIT AGAINST AN EMPLOYEE OF A PERSON EMPLOYED BY PLAINTIFF'S EMPLOYER, THE NYC DEPARTMENT OF EDUCATION, IN THIS SLIP AND FALL CASE (SECOND DEPT))

WORKERS' COMPENSATION LAW, EDUCATION-SCHOOL LAW. EMPLOYMENT LAW.

EXCLUSIVITY OF A WORKERS' COMPENSATION REMEDY PRECLUDED SUIT AGAINST AN EMPLOYEE OF A PERSON EMPLOYED BY PLAINTIFF'S EMPLOYER, THE NYC DEPARTMENT OF EDUCATION, IN THIS SLIP AND FALL CASE (SECOND DEPT).

The Second Department determined the exclusivity of a Workers' Compensation remedy precluded plaintiff's suit against an employee who worked for someone employed by plaintiff's employer (NYC Department of Education, DOE). Plaintiff slipped and fell on a wet floor in a school cafeteria:

Here, the New York City Department of Education (hereinafter DOE) employed Pedersen as a custodian engineer. As part of an "indirect system" of employment adopted by the DOE, Pedersen then employed Galant as a custodial assistant. Because the plaintiff was a DOE employee and Galant was employed by Pedersen, who also was a DOE employee, the plaintiff and Galant were "in the same employ" within the meaning of the Workers' Compensation Law (Workers' Compensation Law § 29[6] ...). Therefore, Workers' Compensation benefits were the

plaintiff's exclusive remedy with respect to Galant ... . **Lupton v Pedersen, 2018 NY Slip Op 01048, Second Dept 2-14-18**

WORKERS' COMPENSATION LAW (ALTHOUGH THE PEDESTRIAN-CAR ACCIDENT OCCURRED ON A ROAD OWNED BY DEFENDANT'S AND PLAINTIFF'S EMPLOYER AS DEFENDANT WAS LEAVING WORK, THE DEFENDANT WAS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN THE ACCIDENT OCCURRED, PLAINTIFF IS NOT RESTRICTED TO A WORKERS' COMPENSATION LAW REMEDY (THIRD DEPT))/TRAFFIC ACCIDENTS (WORKERS' COMPENSATION LAW, ALTHOUGH THE PEDESTRIAN-CAR ACCIDENT OCCURRED ON A ROAD OWNED BY DEFENDANT'S AND PLAINTIFF'S EMPLOYER AS DEFENDANT WAS LEAVING WORK, THE DEFENDANT WAS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN THE ACCIDENT OCCURRED, PLAINTIFF IS NOT RESTRICTED TO A WORKERS' COMPENSATION LAW REMEDY (THIRD DEPT))/NEGLIGENCE (WORKERS' COMPENSATION LAW, ALTHOUGH THE PEDESTRIAN-CAR ACCIDENT OCCURRED ON A ROAD OWNED BY DEFENDANT'S AND PLAINTIFF'S EMPLOYER AS DEFENDANT WAS LEAVING WORK, THE DEFENDANT WAS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN THE ACCIDENT OCCURRED, PLAINTIFF IS NOT RESTRICTED TO A WORKERS' COMPENSATION LAW REMEDY (THIRD DEPT))/EMPLOYMENT LAW (WORKERS' COMPENSATION LAW, ALTHOUGH THE PEDESTRIAN-CAR ACCIDENT OCCURRED ON A ROAD OWNED BY DEFENDANT'S AND PLAINTIFF'S EMPLOYER AS DEFENDANT WAS LEAVING WORK, THE DEFENDANT WAS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN THE ACCIDENT OCCURRED, PLAINTIFF IS NOT RESTRICTED TO A WORKERS' COMPENSATION LAW REMEDY (THIRD DEPT))

WORKERS' COMPENSATION LAW, EMPLOYMENT LAW, NEGLIGENCE.

ALTHOUGH THE PEDESTRIAN-CAR ACCIDENT OCCURRED ON A ROAD OWNED BY DEFENDANT'S AND PLAINTIFF'S EMPLOYER AS DEFENDANT WAS LEAVING WORK, THE DEFENDANT WAS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN THE ACCIDENT OCCURRED, PLAINTIFF IS NOT RESTRICTED TO A WORKERS' COMPENSATION LAW REMEDY (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that plaintiff was not restricted to a Worker's Compensation Law remedy in this pedestrian-car accident case. Both plaintiff and defendant were employed by the Culinary Institute of America (CIA). The accident occurred on a private CIA road as defendant was leaving work. The Third Department determined the accident was not related to defendant's work:

> The parties' submissions reveal that the accident occurred on Campus Drive, which plaintiff described as a ring road encircling the campus — a description consistent with the campus map submitted by defendant. Defendant essentially maintains that because Campus Drive is a private road maintained by the CIA, he necessarily was acting within the scope of his employment when the accident took place. There is support for the premise that going to or from work while on the employer's premises is considered an incident of the employment ... . By comparison, accidents occurring on a public street outside working hours are generally not considered to arise out of the employment absent some nexus between the access route and the employer's premises... .
>
> Even accepting that Campus Drive is a private road, the submissions demonstrate that the CIA encourages the public to frequent the restaurants on campus and it opened up Campus Drive for general use by the public. There is nothing in this record indicating that the accident was precipitated by any special hazard or incident related to defendant's employment. To the contrary, the accident allegedly occurred when defendant slowed down but did not stop as plaintiff was in the crosswalk. Such an accident is a common risk shared by the general public traveling on Campus Drive... . We conclude that defendant's workday ended when he left the parking lot to drive home and,

thus, as a matter of law, defendant was not acting within the scope of his employment at the time of the accident. **Siegel v Garibaldi, 2018 NY Slip Op 01239, Third Dept 2-22-18**

COURT OF APPEALS

CIVIL PROCEDURE

CIVIL PROCEDURE (DISCOVERY, FACEBOOK, NO SPECIAL RULES APPLY TO DISCOVERY OF FACEBOOK POSTS IN A PERSONAL INJURY ACTION, THE SCOPE OF DISCOVERY SHOULD BE BASED UPON RELEVANCE TO THE ACTION BALANCED AGAINST PRIVACY CONCERNS (CT APP))/DISCOVERY (FACEBOOK, NO SPECIAL RULES APPLY TO DISCOVERY OF FACEBOOK POSTS IN A PERSONAL INJURY ACTION, THE SCOPE OF DISCOVERY SHOULD BE BASED UPON RELEVANCE TO THE ACTION BALANCED AGAINST PRIVACY CONCERNS (CT APP))/FACEBOOK (DISCOVERY, NO SPECIAL RULES APPLY TO DISCOVERY OF FACEBOOK POSTS IN A PERSONAL INJURY ACTION, THE SCOPE OF DISCOVERY SHOULD BE BASED UPON RELEVANCE TO THE ACTION BALANCED AGAINST PRIVACY CONCERNS (CT APP))

CIVIL PROCEDURE.

NO SPECIAL RULES APPLY TO DISCOVERY OF FACEBOOK POSTS IN A PERSONAL INJURY ACTION, THE SCOPE OF DISCOVERY SHOULD BE BASED UPON RELEVANCE TO THE ACTION BALANCED AGAINST PRIVACY CONCERNS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, reversing the appellate division, clarified the standards to be applied to a defendant's discovery request for Facebook posts in a personal injury case. Plaintiff was injured falling from defendant's horse and alleged her cognitive and physical abilities were diminished significantly by her injuries. Plaintiff had posted pictures reflecting her lifestyle on her Facebook page, which was deactivated six months after the accident. Defendant sought plaintiff's entire "private" Facebook account, arguing that photographs and written postings (showing her cognitive abilities) were material and necessary to the defense (CPLR 3101(a)). "Supreme Court granted the motion to compel to the limited extent of directing plaintiff to produce all photographs of herself privately posted on Facebook prior to the accident that she intends to introduce at trial, all photographs of herself privately posted on Facebook after the accident that do not depict nudity or romantic encounters, and an authorization for Facebook records showing each time plaintiff posted a private message after the accident and the number of characters or words in the messages. ... [The appellate division] modified by limiting disclosure to photographs posted on Facebook that plaintiff intended to introduce at trial (whether pre- or post-accident) and eliminating the authorization permitting defendant to obtain data relating to post-accident messages ...". In reinstating Supreme Court's order, the Court of Appeals held that no special rules apply to Facebook accounts and courts should allow discovery based upon relevance, balanced against privacy concerns:

> ... [C]ourts should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the Facebook account. Second, balancing the potential utility of the information sought against any specific "privacy" or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of nonrelevant materials. In a personal injury case such as this it is appropriate to consider the nature of the underlying incident and the injuries claimed and to craft a rule for discovering information specific to each. ...
>
> With respect to the items Supreme Court ordered to be disclosed (the only portion of the discovery request we may consider), defendant more than met his threshold burden of showing that plaintiff's Facebook account was reasonably likely to yield relevant evidence. At her deposition, plaintiff indicated that, during the period prior to the accident, she posted "a lot" of

photographs showing her active lifestyle. Likewise, given plaintiff's acknowledged tendency to post photographs representative of her activities on Facebook, there was a basis to infer that photographs she posted after the accident might be reflective of her post-accident activities and/or limitations. ...

... [I]t was reasonably likely that the data revealing the timing and number of characters in posted messages would be relevant to plaintiffs' claim that she suffered cognitive injuries that caused her to have difficulty writing and using the computer, particularly her claim that she is painstakingly slow in crafting messages. **Forman v Henkin, 2018 NY Slip Op 01015, CtApp 2-13-18**

CIVIL PROCEDURE (COMPULSORY COUNTERCLAIM IN FEDERAL ACTION WAS NOT RAISED, FEDERAL CLAIM PRECLUSION RULES PROHIBITED A SUBSEQUENT STATE ACTION BASED UPON THE COUNTERCLAIM (CT APP))/RES JUDICATA (COMPULSORY COUNTERCLAIM IN FEDERAL ACTION WAS NOT RAISED, FEDERAL CLAIM PRECLUSION RULES PROHIBITED A SUBSEQUENT STATE ACTION BASED UPON THE COUNTERCLAIM (CT APP))/CLAIM PRECLUSION COMPULSORY COUNTERCLAIM IN FEDERAL ACTION WAS NOT RAISED, FEDERAL CLAIM PRECLUSION RULES PROHIBITED A SUBSEQUENT STATE ACTION BASED UPON THE COUNTERCLAIM (CT APP))/COMPULSORY COUNTERCLAIM (COMPULSORY COUNTERCLAIM IN FEDERAL ACTION WAS NOT RAISED, FEDERAL CLAIM PRECLUSION RULES PROHIBITED A SUBSEQUENT STATE ACTION BASED UPON THE COUNTERCLAIM (CT APP))

CIVIL PROCEDURE.

COMPULSORY COUNTERCLAIM IN FEDERAL ACTION WAS NOT RAISED, FEDERAL CLAIM PRECLUSION RULES PROHIBITED A SUBSEQUENT STATE ACTION BASED UPON THE COUNTERCLAIM (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a two-judge concurring opinion and a dissenting opinion, determined that the failure to raise a compulsory counterclaim in a federal action precluded a subsequent state action based upon the same counterclaim. In the federal action, investors sued Paramount pictures for securities fraud (federal question), common law fraud (state question) and unjust enrichment (state question). Paramount did not make any counterclaims, relying on a contractual waiver of liability (covenant not to sue). The federal district court found the waiver was binding and dismissed the investors' actions. Then Paramount sued in state court, seeking $8 million in attorney's fees. The opinions, dealing in depth with the underpinnings of claim preclusion and issue preclusion, as well as the applicability of federal law in this context, cannot be fairly summarized here:

Pursuant to federal principles of claim preclusion — the applicable rules of decision in this case (Semtek, 531 US at 507) — Paramount's covenant not to sue claim is transactionally related to the investors' claims in the federal case, amounting to the same "claim" for purposes of res judicata. As such, Paramount's claim should have been asserted in the parties' prior federal action. Because it was not, it is now barred. **Paramount Pictures Corp. v Allianz Risk Transfer AG, 2018 NY Slip Op 01150, CtApp 2-20-18**

CONTRACT LAW

CONTRACT LAW (CITY WAS NOT A THIRD PARTY BENEFICIARY OF A CONSTRUCTION CONTRACT BETWEEN THE DORMITORY AUTHORITY OF NYS AND DEFENDANT ARCHITECTS, MALPRACTICE ACTION AGAINST THE ARCHITECTS WAS DUPLICATIVE OF THE BREACH OF CONTRACT ACTION (CT APP))/THIRD PARTY BENEFICIARY (CONSTRUCTION CONTRACT, CITY WAS NOT A THIRD PARTY BENEFICIARY OF A CONSTRUCTION CONTRACT BETWEEN THE DORMITORY AUTHORITY OF NYS AND DEFENDANT ARCHITECTS, MALPRACTICE ACTION AGAINST THE ARCHITECTS WAS DUPLICATIVE OF THE BREACH OF CONTRACT ACTION (CT APP))/CONSTRUCTION CONTRACTS (THIRD PARTY BENEFICIARY, CITY WAS NOT A THIRD PARTY BENEFICIARY OF A CONSTRUCTION CONTRACT BETWEEN THE DORMITORY AUTHORITY OF NYS AND DEFENDANT ARCHITECTS, MALPRACTICE ACTION AGAINST THE ARCHITECTS WAS DUPLICATIVE OF THE BREACH OF CONTRACT ACTION (CT APP))/NEGLIGENCE (ARCHITECTURAL MALPRACTICE, CITY WAS NOT A THIRD PARTY BENEFICIARY OF A CONSTRUCTION CONTRACT BETWEEN THE DORMITORY AUTHORITY OF NYS AND DEFENDANT ARCHITECTS, MALPRACTICE ACTION AGAINST THE ARCHITECTS WAS DUPLICATIVE OF THE BREACH OF CONTRACT ACTION (CT APP))/ARCHITECTURAL MALPRACTICE (CITY WAS NOT A THIRD PARTY BENEFICIARY OF A CONSTRUCTION CONTRACT BETWEEN THE DORMITORY AUTHORITY OF NYS AND DEFENDANT ARCHITECTS, MALPRACTICE ACTION AGAINST THE ARCHITECTS WAS DUPLICATIVE OF THE BREACH OF CONTRACT ACTION (CT APP))

CONTRACT LAW, NEGLIGENCE, ARCHITECTURAL MALPRACTICE.

CITY WAS NOT A THIRD PARTY BENEFICIARY OF A CONSTRUCTION CONTRACT BETWEEN THE DORMITORY AUTHORITY OF NYS AND DEFENDANT ARCHITECTS, MALPRACTICE ACTION AGAINST THE ARCHITECTS WAS DUPLICATIVE OF THE BREACH OF CONTRACT ACTION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over two partial dissenting opinions, determined the city was not a third-party beneficiary of a contract between the Dormitory Authority of the State of New York (DASNY) and defendant architects (Perkins) and the negligence cause of action (professional malpractice) by DASNY against Perkins was duplicative of the the breach of contract cause of action. Perkins had contracted with DASNY to construct a building. During excavation a neighboring building, sidewalks, sewers, etc. settled. The building gradually settled about eight inches. The majority explained when a tort action, in addition to a breach of contract action, is viable in the context of architectural malpractice:

> With respect to construction contracts, we have generally required express contractual language stating that the contracting parties intended to benefit a third party by permitting that third party "to enforce [a promisee's] contract with another" ... . In the absence of express language, "[s]uch third parties are generally considered mere incidental beneficiaries" ... . This rule reflects the particular nature of construction contracts and the fact that — as is the case here — there are often several contracts between various entities, with performance ultimately benefitting all of the entities involved. * * *
>
> ... [T]here are circumstances where a professional architect may be subject to a tort claim for failure to exercise due care in the performance of contractual obligations. In seeking to "disentangl[e] tort and contract claims," we focused in Sommer both on potential catastrophic consequences of a failure to exercise due care and on the nature of the injury, the manner in which it occurred, and the resulting harm (79 NY2d at 552). We distinguished between the situation where the harm was an "abrupt, cataclysmic occurrence" not contemplated by the contracting parties and one where the plaintiff was essentially seeking enforcement of contract rights (79 NY2d at 552). Here, the ... building settled during the course of several months, damaging adjacent structures. However, even if any "abrupt" or "catastrophic" consequences either could have or did result from Perkins' alleged negligence, the fact remains that the only damages alleged appear to have been within the contemplation of the parties under the contract — and ... are identical for both claims. Put another way, there was no injury alleged here

that a separate negligence claim would include that is not already encompassed in DASNY's contract claim. **Dormitory Auth. of the State of N.Y. v Samson Constr. Co., 2018 NY Slip Op 01115, CtApp 2-15-18**

CRIMINAL LAW

CRIMINAL LAW (MISDEMEANOR COMPLAINTS ADEQUATELY CHARGED POSSESSION OF A DANGEROUS KNIFE (CT APP))/DANGEROUS KNIFE (CRIMINAL LAW, MISDEMEANOR COMPLAINTS ADEQUATELY CHARGED POSSESSION OF A DANGEROUS KNIFE (CT APP))/WEAPON, CRIMINAL POSSESSION OF (MISDEMEANOR COMPLAINTS ADEQUATELY CHARGED POSSESSION OF A DANGEROUS KNIFE (CT APP))/MISDEMEANOR COMPLAINTS (CRIMINAL POSSESSION OF A WEAPON, MISDEMEANOR COMPLAINTS ADEQUATELY CHARGED POSSESSION OF A DANGEROUS KNIFE (CT APP))

CRIMINAL LAW.

MISDEMEANOR COMPLAINTS ADEQUATELY CHARGED POSSESSION OF A DANGEROUS KNIFE (CT APP).

The Court of Appeals, over a concurrence and a concurrence/dissent, in a memorandum addressing two cases (McCain and Edward), determined the misdemeanor complaints were sufficient to support the charge of possessing a "dangerous knife:"

> The factual allegations of a misdemeanor complaint must establish "reasonable cause" to believe that a defendant committed the charged offense ... . Reasonable cause "exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it" ... .
>
> Here, the factual allegations of each misdemeanor complaint establish reasonable cause to believe that each defendant possessed a "dangerous knife" ... , triggering the statutory presumption of unlawful intent arising from such possession ... .
>
> **From the concurrence/dissent:** I concur in the result in People v McCain because the officer's sworn statement attached to the complaint specifies that the "knife was activated by deponent to an open and locked position through the force of gravity," which meets the statutory definition of "gravity knife" in Penal Law § 265.00 (5), and therefore a fortiori is a "dangerous knife" under Penal Law § 265.01, when subsections (1) and (2) thereof are read together.
>
> I dissent from the result in People v Edward for the reasons set out in Judge Simons' dissent in Matter of Jamie D.(59 NY2d 589 [1983]). **People v McCain, 2018 NY Slip Op 01018, CtApp 2-13-18**

CRIMINAL LAW (SPEEDY TRIAL, APPEALS, DEFENDANT WAS ENTITLED TO DISMISSAL OF THE MURDER INDICTMENT ON CONSTITUTIONAL SPEEDY TRIAL GROUNDS, SIX-YEARS BETWEEN ARREST AND GUILTY PLEA, SPEEDY TRIAL IS NOT A MIXED QUESTION OF LAW AND FACT (CT APP))/SPEEDY TRIAL (DEFENDANT WAS ENTITLED TO DISMISSAL OF THE MURDER INDICTMENT ON CONSTITUTIONAL SPEEDY TRIAL GROUNDS, SIX-YEARS BETWEEN ARREST AND GUILTY PLEA, SPEEDY TRIAL IS NOT A MIXED QUESTION OF LAW AND FACT (CT APP))/APPEALS (CRIMINAL LAW, SPEEDY TRIAL, EFENDANT WAS ENTITLED TO DISMISSAL OF THE MURDER INDICTMENT ON CONSTITUTIONAL SPEEDY TRIAL GROUNDS, SIX-YEARS BETWEEN ARREST AND GUILTY PLEA, SPEEDY TRIAL IS NOT A MIXED QUESTION OF LAW AND FACT (CT APP))/MIXED QUESTION OF LAW AND FACT (CRIMINAL LAW, APPEALS, SPEEDY TRIAL, DEFENDANT WAS ENTITLED TO DISMISSAL OF THE MURDER INDICTMENT ON CONSTITUTIONAL SPEEDY TRIAL GROUNDS, SIX-YEARS BETWEEN ARREST AND GUILTY PLEA, SPEEDY TRIAL IS NOT A MIXED QUESTION OF LAW AND FACT (CT APP))

CRIMINAL LAW, APPEALS.

DEFENDANT WAS ENTITLED TO DISMISSAL OF THE MURDER INDICTMENT ON CONSTITUTIONAL SPEEDY TRIAL GROUNDS, SIX-YEARS BETWEEN ARREST AND GUILTY PLEA, SPEEDY TRIAL IS NOT A MIXED QUESTION OF LAW AND FACT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a three-judge dissent, reversing the appellate division, determined that defendant was entitled to dismissal of the second degree murder indictment (to which he pled guilty) on constitutional speedy trial grounds. The opinion is fact-based, covers several significant legal issues (i.e. CPL 30.30 is not applicable, speedy trial is not a mixed question of law and fact, pre versus post-indictment delay, inter alia), and cannot be fairly summarized here. " ... [T]he People pursued a cooperation agreement with [codefendant] Armstead for approximately 2½ years. After that effort proved unsuccessful, they spent the next three years attempting to convict Armstead, trying him separately from defendant. After three mistrials, Armstead had been convicted of only criminal possession of a weapon in the second degree, he had been acquitted on the top count of second-degree murder, and the People were no closer to securing his testimony against defendant. The time between defendant's arrest on May 28, 2008 and defendant's plea on September 23, 2014 spanned six years, three months, and 25 days, from when defendant was 16 years old until he was 22. Defendant spent the entirety of that period incarcerated." The opinion goes through each of the *Taranovich* factors:

> We analyze constitutional speedy trial claims using the five factors set forth in People v Taranovich (37 NY2d 442 [1975]): "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay" (id. at 445). These factors are similar, but not identical, to the factors used in evaluating speedy trial claims under the federal constitution, which include the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant" ... . "[N]o one factor or combination of the factors . . . is necessarily decisive or determinative of the speedy trial claim, but rather the particular case must be considered in light of all the factors as they apply to it" ... . **People v Wiggins, 2018 NY Slip Op 01111, CtApp 2-15-18**

CRIMINAL LAW (DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR AGREEING TO ANNOTATIONS ON THE VERDICT SHEET WHICH SERVED TO DISTINGUISH COUNTS ALLEGING SIMILAR BEHAVIOR IN THIS AGGRAVATED HARASSMENT CASE, COUNTY COURT REVERSED (CT APP))/ATTORNEYS (CRIMINAL LAW, DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR AGREEING TO ANNOTATIONS ON THE VERDICT SHEET WHICH SERVED TO DISTINGUISH COUNTS ALLEGING SIMILAR BEHAVIOR IN THIS AGGRAVATED HARASSMENT CASE, COUNTY COURT REVERSED (CT APP))/INEFFECTIVE ASSISTANCE (DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR AGREEING TO ANNOTATIONS ON THE VERDICT SHEET WHICH SERVED TO DISTINGUISH COUNTS ALLEGING SIMILAR BEHAVIOR IN THIS AGGRAVATED HARASSMENT CASE, COUNTY COURT REVERSED (CT APP))

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR AGREEING TO ANNOTATIONS ON THE VERDICT SHEET WHICH SERVED TO DISTINGUISH COUNTS ALLEGING SIMILAR BEHAVIOR IN THIS AGGRAVATED HARASSMENT CASE, COUNTY COURT REVERSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, determined defense counsel was not ineffective for agreeing to annotations on the verdict sheet which served to distinguish the aggravated harassment counts from one another, many of which involved similar behavior. County Court's reversal of this City Court case on ineffective assistance grounds was reversed:

> The trial court provided the jury with a four-page verdict sheet. To help the jurors distinguish between the many similar allegations covering more than three hundred different acts committed over twelve distinct time periods, the court annotated each count on the verdict sheet with a date or date range and a short description of the alleged criminal conduct. For example, the fourth aggravated harassment charge included the annotation "Between June 26, 2011 and July 6, 2011 (emailing approximately 15 times)" and the fourth criminal contempt charge read "On July 12, 2012 (occurrence in small claims court)." ...
>
> CPL 310.20 permits trial courts to annotate verdict sheets containing two or more counts charging offenses set forth in the same article of the law with "the dates, names of complainants, or specific statutory language . . . by which the counts may be distinguished" (CPL 310.20 [2]). Those annotations are intended to "enhance the ability of deliberating juries to distinguish between seemingly identical or substantially similar counts". If the court believes different or further annotations would be instructive, it may "furnish an expanded or supplemental verdict sheet"... , although it may do so "only . . . with the consent of the parties" ... .
>
> Both common sense and defense counsel's summation demonstrate that trial counsel had a sound strategic reason for consenting to the annotations: they encouraged the jury to think about each count and the relevant evidence (restricted by date and type) independently, instead of concluding that Mr. O'Kane's egregious behavior warranted a conviction on every seemingly identical count. **People v O'Kane, 2018 NY Slip Op 00859, CtApp 2-8-18**

CRIMINAL LAW (CONSPIRACY, EVIDENCE OF CONSPIRACY NOT SUFFICIENT TO SUPPORT CONVICTION, PRESENCE WHEN CONSPIRACY DISCUSSED BY OTHER GANG MEMBERS NOT ENOUGH (CT APP))/EVIDENCE (CRIMINAL LAW, CONSPIRACY, EVIDENCE OF CONSPIRACY NOT SUFFICIENT TO SUPPORT CONVICTION, PRESENCE WHEN CONSPIRACY DISCUSSED BY OTHER GANG MEMBERS NOT ENOUGH (CT APP))/CONSPIRACY (CRIMINAL LAW, EVIDENCE OF CONSPIRACY NOT SUFFICIENT TO SUPPORT CONVICTION, PRESENCE WHEN CONSPIRACY DISCUSSED BY OTHER GANG MEMBERS NOT ENOUGH (CT APP))

CRIMINAL LAW, EVIDENCE.

EVIDENCE OF CONSPIRACY NOT SUFFICIENT TO SUPPORT CONVICTION, PRESENCE WHEN CONSPIRACY DISCUSSED BY OTHER GANG MEMBERS NOT ENOUGH (CT APP).

The Court of Appeals, over a two-judge dissent, affirming the appellate division, determined the evidence was insufficient to support the conviction of conspiracy in the second degree. The defendant's mere presence when the conspiracy was discussed by other gang members was not enough:

> ... [A]t the core of the People's case is evidence of defendant's presence at various gang meetings at which the crime intended was discussed by gang members other than defendant. Under the circumstances of this case, to conclude that defendant's presence at such gatherings alone was sufficient to establish agreement to join a plot would be to equate his passive act of "being present" with the affirmative act of "agreeing" to engage in a criminal conspiracy discussed at those assemblies. The law does not contain a presumption of agreement based on sheer presence at a meeting at which a conspiracy is discussed ... , and we share the view of the federal courts that mere "[k]nowledge of the existence and goals of a conspiracy does not itself make one a coconspirator" ... . **People v Reyes, 2018 NY Slip Op 01113, CtApp 2-15-18**

CRIMINAL LAW (SEX OFFENDER REGISTRATION ACT. YOUTHFUL OFFENDER ADJUDICATION PROPERLY CONSIDERED IN ASSESSING RISK LEVEL UNDER THE SEX OFFENDER REGISTRATION ACT (SORA) (CT APP))/SEX OFFENDER REGISTRATION ACT (SORA) (OUTHFUL OFFENDER ADJUDICATION PROPERLY CONSIDERED IN ASSESSING RISK LEVEL UNDER THE SEX OFFENDER REGISTRATION ACT (SORA) (CT APP))/YOUTHFUL OFFENDER (SEX OFFENDER REGISTRATION ACT. YOUTHFUL OFFENDER ADJUDICATION PROPERLY CONSIDERED IN ASSESSING RISK LEVEL UNDER THE SEX OFFENDER REGISTRATION ACT (SORA) (CT APP))

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

YOUTHFUL OFFENDER ADJUDICATION PROPERLY CONSIDERED IN ASSESSING RISK LEVEL UNDER THE SEX OFFENDER REGISTRATION ACT (SORA) (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined that a youthful offender (YO) adjudication can be considered in assessing the risk level of a sex offender under the Sex Offender Registration Act (SORA). Defendant contested the level three sex offender designation. The Court of Appeals held that consideration of the YO adjudication in this context did not violate the Criminal Procedure Law (CPL):

> CPL 720.35 (2) provides the Board with access to YO-related documents. Defendant's argument that access alone does not authorize use ignores that the CPL does not permit access for its own sake, but in furtherance of a

statutory purpose. Here, that purpose is found in SORA, which requires the Board establish guidelines and make risk level determinations based, in part, on an offender's past actions (Correction Law § 168-l [5]). * * *

Certainly, the youthful offender statute reflects the Legislature's recognition of the difference between a youth and an adult, and the Legislature clearly made a policy choice to give a class of young people a distinct benefit. Nevertheless, in concluding that an earlier YO adjudication may be used in assessing points against defendant, the Board has not acted in violation of the CPL ... . **People v Francis, 2018 NY Slip Op 01017, CtApp 2-13-18**

LANDLORD-TENANT

LANDLORD-TENANT (NYC HOUSING AUTHORITY'S RULES DO NOT ALLOW A SINGLE ADULT AND ADULT CHILD TO RESIDE PERMANENTLY IN A ONE BEDROOM APARTMENT, ADULT CHILD ALLOWED TEMPORARY RESIDENCY TO CARE FOR HIS MOTHER WAS NOT ENTITLED TO REMAINING FAMILY MEMBER STATUS UPON THE DEATH OF HIS MOTHER (CT APP))/MUNICIPAL LAW (NYC HOUSING AUTHORITY'S RULES DO NOT ALLOW A SINGLE ADULT AND ADULT CHILD TO RESIDE PERMANENTLY IN A ONE BEDROOM APARTMENT, ADULT CHILD ALLOWED TEMPORARY RESIDENCY TO CARE FOR HIS MOTHER WAS NOT ENTITLED TO REMAINING FAMILY MEMBER STATUS UPON THE DEATH OF HIS MOTHER (CT APP))/HOUSING AUTHORITY (NYC) (NYC HOUSING AUTHORITY'S RULES DO NOT ALLOW A SINGLE ADULT AND ADULT CHILD TO RESIDE PERMANENTLY IN A ONE BEDROOM APARTMENT, ADULT CHILD ALLOWED TEMPORARY RESIDENCY TO CARE FOR HIS MOTHER WAS NOT ENTITLED TO REMAINING FAMILY MEMBER STATUS UPON THE DEATH OF HIS MOTHER (CT APP))/REMAINING FAMILY MEMBER (RFM) (NYC HOUSING AUTHORITY'S RULES DO NOT ALLOW A SINGLE ADULT AND ADULT CHILD TO RESIDE PERMANENTLY IN A ONE BEDROOM APARTMENT, ADULT CHILD ALLOWED TEMPORARY RESIDENCY TO CARE FOR HIS MOTHER WAS NOT ENTITLED TO REMAINING FAMILY MEMBER STATUS UPON THE DEATH OF HIS MOTHER (CT APP))/NEW YORK CITY HOUSING AUTHORITY (NYCHA) (NYC HOUSING AUTHORITY'S RULES DO NOT ALLOW A SINGLE ADULT AND ADULT CHILD TO RESIDE PERMANENTLY IN A ONE BEDROOM APARTMENT, ADULT CHILD ALLOWED TEMPORARY RESIDENCY TO CARE FOR HIS MOTHER WAS NOT ENTITLED TO REMAINING FAMILY MEMBER STATUS UPON THE DEATH OF HIS MOTHER (CT APP))

LANDLORD-TENANT, MUNICIPAL LAW.

NYC HOUSING AUTHORITY'S RULES DO NOT ALLOW A SINGLE ADULT AND ADULT CHILD TO RESIDE PERMANENTLY IN A ONE BEDROOM APARTMENT, ADULT CHILD ALLOWED TEMPORARY RESIDENCY TO CARE FOR HIS MOTHER WAS NOT ENTITLED TO REMAINING FAMILY MEMBER STATUS UPON THE DEATH OF HIS MOTHER (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a concurring opinion, reversing the appellate division, determined the petitioner's application for remaining family member (RFM) status allowing him to reside in his late mother's one bedroom apartment was properly denied. The New York City Housing Authority's (NYCHA's) rules do not allow a single adult and and adult child to live together in a one bedroom apartment. Although petitioner could reside in the apartment temporarily to care for his mother, he was not entitled to permanent permission to live in the apartment and therefore he was not entitled to RFM status:

... NYCHA's rules contemplate that a tenant may require a live-in home-care attendant, either for the duration of a transient illness or the last stages of life, and its rules expressly allow for a live-in home-care attendant as a

temporary resident, even if the grant of permission would result in "overcrowding," without regard to whether the home-care attendant is related to the tenant. Mr. Aponte was, in effect, afforded temporary residency status. Essentially, Mr. Aponte is arguing that NYCHA's policy is arbitrary and capricious because it does not allow him to bypass the 250,000-household waiting line as a reward for enduring an "overcrowded" living situation while caring for his mother. NYCHA could adopt the policy Mr. Aponte advocates, to encourage people to care for elderly relatives by giving them a succession priority over others, but we cannot say on the record before us that its adoption of a different policy, prioritizing children in need and persons facing homelessness when allocating its insufficient stock of public housing, is arbitrary or capricious. **Matter of Aponte v Olatoye, 2018 NY Slip Op 01112, CtApp 2-15-18**

MUNICIPAL LAW

MUNICIPAL LAW (IMMUNITY, COMPLAINTS AGAINST LONG ISLAND ELECTRIC POWER PROVIDERS STATED CAUSES OF ACTION FOR NEGLIGENCE IN FAILING TO SHUT DOWN POWER BEFORE LANDFALL BY HURRICANE SANDY, DEFENDANTS DID NOT DEMONSTRATE THEY WERE ENTITLED TO GOVERNMENTAL IMMUNITY AT THIS PRE-ANSWER STAGE (CT APP))/IMMUNITY (GOVERNMENTAL, COMPLAINTS AGAINST LONG ISLAND ELECTRIC POWER PROVIDERS STATED CAUSES OF ACTION FOR NEGLIGENCE IN FAILING TO SHUT DOWN POWER BEFORE LANDFALL BY HURRICANE SANDY, DEFENDANTS DID NOT DEMONSTRATE THEY WERE ENTITLED TO GOVERNMENTAL IMMUNITY AT THIS PRE-ANSWER STAGE (CT APP))/NEGLIGENCE (GOVERNMENTAL IMMUNITY, COMPLAINTS AGAINST LONG ISLAND ELECTRIC POWER PROVIDERS STATED CAUSES OF ACTION FOR NEGLIGENCE IN FAILING TO SHUT DOWN POWER BEFORE LANDFALL BY HURRICANE SANDY, DEFENDANTS DID NOT DEMONSTRATE THEY WERE ENTITLED TO GOVERNMENTAL IMMUNITY AT THIS PRE-ANSWER STAGE (CT APP))/GOVERNMENTAL IMMUNITY (ELECTRIC POWER, COMPLAINTS AGAINST LONG ISLAND ELECTRIC POWER PROVIDERS STATED CAUSES OF ACTION FOR NEGLIGENCE IN FAILING TO SHUT DOWN POWER BEFORE LANDFALL BY HURRICANE SANDY, DEFENDANTS DID NOT DEMONSTRATE THEY WERE ENTITLED TO GOVERNMENTAL IMMUNITY AT THIS PRE-ANSWER STAGE (CT APP))/UTILITIES (GOVERNMENTAL IMMUNITY, COMPLAINTS AGAINST LONG ISLAND ELECTRIC POWER PROVIDERS STATED CAUSES OF ACTION FOR NEGLIGENCE IN FAILING TO SHUT DOWN POWER BEFORE LANDFALL BY HURRICANE SANDY, DEFENDANTS DID NOT DEMONSTRATE THEY WERE ENTITLED TO GOVERNMENTAL IMMUNITY AT THIS PRE-ANSWER STAGE (CT APP))/ELECTRIC POWER (GOVERNMENTAL IMMUNITY, COMPLAINTS AGAINST LONG ISLAND ELECTRIC POWER PROVIDERS STATED CAUSES OF ACTION FOR NEGLIGENCE IN FAILING TO SHUT DOWN POWER BEFORE LANDFALL BY HURRICANE SANDY, DEFENDANTS DID NOT DEMONSTRATE THEY WERE ENTITLED TO GOVERNMENTAL IMMUNITY AT THIS PRE-ANSWER STAGE (CT APP))

MUNICIPAL LAW, UTILITIES, IMMUNITY, NEGLIGENCE.

COMPLAINTS AGAINST LONG ISLAND ELECTRIC POWER PROVIDERS STATED CAUSES OF ACTION FOR NEGLIGENCE IN FAILING TO SHUT DOWN POWER BEFORE LANDFALL BY HURRICANE SANDY, DEFENDANTS DID NOT DEMONSTRATE THEY WERE ENTITLED TO GOVERNMENTAL IMMUNITY AT THIS PRE-ANSWER STAGE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a two-judge concurring opinion, determined that the complaints stated causes of action against the Long Island Power Authority (LIPA), Long Island Lighting Company (LILCO), and National Grid Electric Services LLC based upon defendants' failure to shut down the power in advance of landfall by Hurricane Sandy. Plaintiffs alleged the failure to shut down the power resulted in fires which destroyed their property. The complaints alleged the defendants acted in a proprietary, not governmental, capacity and therefore were not

entitled to governmental immunity. The Court of Appeals held that the defendants, at this pre-answer stage, had not met their burden of demonstrating their actions were governmental:

> Defendants moved to dismiss the amended complaints pursuant to CPLR 3211 (a) (7) insofar as asserted against them on the ground that LIPA was immune from liability based on the doctrine of governmental function immunity, and that LILCO and National Grid were entitled to the same defense. Specifically, LIPA argued, among other things, that the actions challenged were taken in the exercise of its governmental capacity and were discretionary, and, even if they were not discretionary, plaintiffs' failure to allege a special duty in the complaints amounted to a failure to state viable claims. Plaintiffs opposed the motions on the ground that defendants' actions were proprietary, not governmental, and that special duty rules did not apply. Supreme Court denied the motions to dismiss in three substantially similar orders. * * *
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> .. .[P]laintiffs' allegations concern the provision of electrical power by defendants, a service that traditionally has been provided by private entities in the State of New York. In fact, LIPA itself was created to replace LILCO which, at the time, was an "investor owned utility" (Public Authorities Law § 1020-a). This takeover was anomalous and, when the legislation creating LIPA was enacted, the New York State Public Service Commission — the agency charged with ensuring safe and reliable utility service throughout the State — observed that, "[i]n New York State we have generally adopted a system of private ownership subject to close regulation" ... .
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> ... [W]e cannot say, as a matter of law based only on the allegations in the amended complaints, as amplified, that LIPA was acting in a governmental, rather than a proprietary, capacity when engaged in the conduct claimed to have caused plaintiffs' injuries. **Connolly v Long Is. Power Auth., 2018 NY Slip Op 01148, CtApp 2-20-18**

NEGLIGENCE

NEGLIGENCE (MEDICAL MALPRACTICE, CONTINUOUS TREATMENT DOCTRINE, PLAINTIFF RAISED A QUESTION OF FACT ABOUT THE APPLICABILITY OF THE CONTINUOUS TREATMENT DOCTRINE IN THIS MEDICAL MALPRACTICE CASE, DESPITE A 30 MONTH PERIOD BETWEEN VISITS (CT APP))/MEDICAL MALPRACTICE (CONTINUOUS TREATMENT DOCTRINE, PLAINTIFF RAISED A QUESTION OF FACT ABOUT THE APPLICABILITY OF THE CONTINUOUS TREATMENT DOCTRINE IN THIS MEDICAL MALPRACTICE CASE, DESPITE A 30 MONTH PERIOD BETWEEN VISITS (CT APP))/CONTINUOUS TREATMENT DOCTRINE (MEDICAL MALPRACTICE, PLAINTIFF RAISED A QUESTION OF FACT ABOUT THE APPLICABILITY OF THE CONTINUOUS TREATMENT DOCTRINE IN THIS MEDICAL MALPRACTICE CASE, DESPITE A 30 MONTH PERIOD BETWEEN VISITS (CT APP))/CIVIL PROCEDURE (STATUTE OF LIMITATIONS, MEDICAL MALPRACTICE, CONTINUOUS TREATMENT DOCTRINE, PLAINTIFF RAISED A QUESTION OF FACT ABOUT THE APPLICABILITY OF THE CONTINUOUS TREATMENT DOCTRINE IN THIS MEDICAL MALPRACTICE CASE, DESPITE A 30 MONTH PERIOD BETWEEN VISITS (CT APP)) /STATUTE OF LIMITATIONS (MEDICAL MALPRACTICE, CONTINUOUS TREATMENT DOCTRINE, PLAINTIFF RAISED A QUESTION OF FACT ABOUT THE APPLICABILITY OF THE CONTINUOUS TREATMENT DOCTRINE IN THIS MEDICAL MALPRACTICE CASE, DESPITE A 30 MONTH PERIOD BETWEEN VISITS (CT APP))

NEGLIGENCE, MEDICAL MALPRACTICE, CIVIL PROCEDURE.

PLAINTIFF RAISED A QUESTION OF FACT ABOUT THE APPLICABILITY OF THE CONTINUOUS TREATMENT DOCTRINE IN THIS MEDICAL MALPRACTICE CASE, DESPITE A 30 MONTH PERIOD BETWEEN VISITS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a three-judge dissent, determined that plaintiff had raised a question of fact about whether the continuous treatment doctrine tolled the statute of limitations in this medical malpractice action, despite a 30-month period between visits. Decision holding that a gap in treatment longer than the statute of limitations precludes the application of the continuous treatment doctrine should not be followed:

> Plaintiff saw defendant over the course of four years, underwent two surgeries at his hand, and saw no other doctor for her shoulder during this time. She returned to him after the thirty-month gap, discussed yet a third surgery with him, and accepted his referral to his partner only because defendant was no longer performing such surgeries. Plaintiff's testimony regarding feeling discouraged with defendant's treatment does not demonstrate as a matter of law that she never intended to return to his care; in fact, her testimony reveals that she considered defendant her only doctor during this time. Nor does the fact that defendant repeatedly told plaintiff she should return "as needed" foreclose a finding that the parties anticipated further treatment. Notably, Plaintiff's injury was a chronic, long-term condition which both plaintiff and defendant understood to require continued care. Each of plaintiff's visits to defendant over the course of seven years were "for the same or related illnesses or injuries, continuing after the alleged acts of malpractice" ... . As to the 30-month period between visits, we have previously held that a gap in treatment longer than the statute of limitations "is not per se dispositive of defendant's claim that the statute has run" ... . To the extent that lower courts have held to the contrary ... , those cases should not be followed. **Lohnas v Luzi, 2018 NY Slip Op 01114, CtApp 2-15-18**

RETIREMENT AND SOCIAL SECURITY LAW

RETIREMENT AND SOCIAL SECURITY LAW (ACCIDENTAL DISABILITY RETIREMENT BENEFITS, POLICEMAN AND FIREFIGHTER WERE INJURED BY RISKS INHERENT IN THEIR JOBS AND THEREFORE WERE NOT ENTITLED TO ACCIDENTAL DISABILITY RETIREMENT BENEFITS (CT APP))/ACCIDENTAL DISABILITY RETIREMENT BENEFITS (POLICEMAN AND FIREFIGHTER WERE INJURED BY RISKS INHERENT IN THEIR JOBS AND THEREFORE WERE NOT ENTITLED TO ACCIDENTAL DISABILITY RETIREMENT BENEFITS (CT APP))/POLICE OFFICERS (ACCIDENTAL DISABILITY RETIREMENT BENEFITS, POLICEMAN AND FIREFIGHTER WERE INJURED BY RISKS INHERENT IN THEIR JOBS AND THEREFORE WERE NOT ENTITLED TO ACCIDENTAL DISABILITY RETIREMENT BENEFITS (CT APP))/FIREFIGHTERS (ACCIDENTAL DISABILITY RETIREMENT BENEFITS, POLICEMAN AND FIREFIGHTER WERE INJURED BY RISKS INHERENT IN THEIR JOBS AND THEREFORE WERE NOT ENTITLED TO ACCIDENTAL DISABILITY RETIREMENT BENEFITS (CT APP))

RETIREMENT AND SOCIAL SECURITY LAW.

POLICEMAN AND FIREFIGHTER WERE INJURED BY RISKS INHERENT IN THEIR JOBS AND THEREFORE WERE NOT ENTITLED TO ACCIDENTAL DISABILITY RETIREMENT BENEFITS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a two-judge concurrence/dissent, determined that the injuries suffered by a policemen (Kelly) , who was injured preventing a rafter from falling on another officer attempting to rescue residents of a house crushed by a tree during Hurricane Sandy, and a firefighter (Sica), who was injured by odorless toxic gases while performing cardiopulmonary resuscitation on two unconscious persons, did not suffer accidental injury within the meaning of the Retirement and Social Security Law. Therefore, neither petitioner was entitled to accidental disability retirement benefits:

> ... [T]here is substantial evidence in the record to support the determination that Kelly's actions in assisting the injured residents of the house during life-threatening conditions fell within his job duties, and that his injuries did not result from a sudden, unexpected event that was not a risk inherent in his duties as a police officer ... .
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> ... [E]xposure to toxic chemicals was a risk for which Sica had been trained, that he had responded to a gas leak in the past, and that his job duties specifically required "working with exposure to . . . fumes, explosives, toxic materials, chemicals and corrosives," the particular risk that caused Sica's injury. Inasmuch as it is not unexpected that a firefighter whose job duties required him to respond to emergency medical calls would be exposed to toxic fumes in responding to a call for difficulty breathing, ... Sica's injuries were the result of a risk inherent in his ordinary duties as a firefighter ... . **Matter of Kelly v DiNapoli, 2018 NY Slip Op 01016, CtApp 2-13-18**

SECURITIES

SECURITIES (INDENTURE TRUSTEE STATED CAUSES OF ACTION FOR FRAUDULENT CONVEYANCES UNDER A VEIL-PIERCING THEORY, COMPLAINT ALLEGED FRAUDULENT REDEMPTIONS SIPHONED OFF ASSETS LEAVING CORPORATE OBLIGORS UNABLE TO PAY NOTEHOLDERS (CT APP))/DEBTOR-CREDITOR (INDENTURE TRUSTEE STATED CAUSES OF ACTION FOR FRAUDULENT CONVEYANCES UNDER A VEIL-PIERCING THEORY, COMPLAINT ALLEGED FRAUDULENT REDEMPTIONS SIPHONED OFF ASSETS LEAVING CORPORATE OBLIGORS UNABLE TO PAY NOTEHOLDERS (CT APP))/CORPORATION LAW (INDENTURE TRUSTEE STATED CAUSES OF ACTION FOR FRAUDULENT CONVEYANCES UNDER A VEIL-PIERCING THEORY, COMPLAINT ALLEGED FRAUDULENT REDEMPTIONS SIPHONED OFF ASSETS LEAVING CORPORATE OBLIGORS UNABLE TO PAY NOTEHOLDERS (CT APP))/INDENTURE TRUSTEE (INDENTURE TRUSTEE STATED CAUSES OF ACTION FOR FRAUDULENT CONVEYANCES UNDER A VEIL-PIERCING THEORY, COMPLAINT ALLEGED FRAUDULENT REDEMPTIONS SIPHONED OFF ASSETS LEAVING CORPORATE OBLIGORS UNABLE TO PAY NOTEHOLDERS (CT APP))/FRAUD (INDENTURE TRUSTEE STATED CAUSES OF ACTION FOR FRAUDULENT CONVEYANCES UNDER A VEIL-PIERCING THEORY, COMPLAINT ALLEGED FRAUDULENT REDEMPTIONS SIPHONED OFF ASSETS LEAVING CORPORATE OBLIGORS UNABLE TO PAY NOTEHOLDERS (CT APP))/PIERCING THE CORPORATE VEIL (INDENTURE TRUSTEE STATED CAUSES OF ACTION FOR FRAUDULENT CONVEYANCES UNDER A VEIL-PIERCING THEORY, COMPLAINT ALLEGED FRAUDULENT REDEMPTIONS SIPHONED OFF ASSETS LEAVING CORPORATE OBLIGORS UNABLE TO PAY NOTEHOLDERS (CT APP))

SECURITIES, DEBTOR-CREDITOR, CORPORATION LAW.

INDENTURE TRUSTEE STATED CAUSES OF ACTION FOR FRAUDULENT CONVEYANCES UNDER A VEIL-PIERCING THEORY, COMPLAINT ALLEGED FRAUDULENT REDEMPTIONS SIPHONED OFF ASSETS LEAVING CORPORATE OBLIGORS UNABLE TO PAY NOTEHOLDERS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, affirmed the appellate division's ruling that the complaint by an indenture trustee stated causes of action on behalf of noteholders for fraudulent conveyances under a corporate veil-piercing theory. The court explained the issues before it as follows:

> On this appeal we must determine whether an indenture trustee may seek recovery on behalf of noteholders for defendants' alleged fraudulent redemptions intended to siphon off assets, leaving corporate obligors unable to pay the noteholders. The indenture at issue authorizes the trustee to "pursue any available remedy to collect . . . the payment of principal, premium, if any, and interest on the Notes," and thus empowers that trustee to proceed at law and in equity to recover losses incurred by all noteholders from the unpaid notes. As such, the trustee may assert causes of action to recover pro-rata losses caused by defendants' scheme to render the note debtor insolvent. The trustee may also seek to pierce the corporate veil and impose corporate obligations on defendants under an alter ego theory of liability based on properly pleaded factual allegations — here that defendants created, for unlawful purposes, a corporate structure over which they exercised complete control and domination, and which they used to incur corporate debt so they could distribute the loan proceeds to themselves through fraudulent transfers, leaving the corporation unable to pay its creditors. * * *
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> The [appellate division properly] concluded that the relevant language of the indenture "confers standing on the trustee to pursue . . . the fraudulent conveyance and other . . . claims, which seek recovery solely of the amounts due under the notes, for the benefit of all noteholders on a pro rata basis, as a remedy for an alleged injury suffered ratably by all noteholders by reason of their status as noteholders" ... . The court also [properly] found that the complaint sufficiently states a cause of action against these defendants under a veil-piercing theory ... . **Cortlandt St. Recovery Corp. v Bonderman, 2018 NY Slip Op 01149, CtApp 2-20-18**

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