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FEATURED DECISION

DOCTORS, WHO ALLEGEDLY FAILED TO WARN PATIENT OF DISORIENTING EFFECTS OF DRUGS, OWED A DUTY OF CARE TO PLAINTIFF, WHO WAS STRUCK BY A VEHICLE DRIVEN BY THE PATIENT.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over an extensive dissenting opinion by Judge Stein (in which Judge Abdus-Salaam concurred), determined a medical malpractice complaint alleging defendant hospital and doctors owed a duty of care to plaintiff, who was injured by a patient, should not have been dismissed. The patient was treated with drugs which could impair her ability to drive but allegedly was not warned of that effect by the treating doctors. Shortly after leaving the hospital, the patient crossed a double yellow line and struck plaintiff's vehicle. The Court of Appeals held that the injured plaintiff's complaint, which alleged the negligent failure to warn the patient of the impairment of the ability to drive, stated a cause of action, sounding in medical malpractice, against the defendant hospital and doctors:

FAHEY, J.:

This action arises from a motor vehicle accident that occurred after nonparty Lorraine A. Walsh was treated at defendant South Nassau Communities Hospital (Hospital) by [*2]defendants Regina E. Hammock, D.O. and Christine DeLuca, RPA-C, that is, medical professionals employed by defendant Island Medical Physicians, P.C. (collectively, Island Medical defendants). As a part of that treatment, defendants intravenously administered to Walsh an opioid narcotic painkiller and a benzodiazepine drug without warning her that such medication either impaired or could impair her ability to safely operate an automobile. Shortly thereafter, Walsh drove herself from the Hospital and, while allegedly impaired by the medication administered to her at that facility, she was involved in an accident. The automobile she operated crossed a double yellow line and struck a bus driven by Edwin Davis (plaintiff).

Here we are confronted with the question whether third party liability can attach when a hospital administered drugs to a patient and then released her,

FROM THE EDITOR

This is the 21st issue of the Digest---an indexed compilation of the summaries of New York State appellate decisions posted weekly in December, 2015, on the "Just Released" page of NewYorkAppellateDigest.com

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The Table of Contents facilitates finding the major categories of case summaries (p. 15).

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If you find the Digest useful, please let me know by signing up for the mailing list (envelope symbol on the bottom of the web site pages).

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in an impaired state, without any warning that the drugs affected or could have affected her ability to safely operate a motor vehicle. Stated differently, the main question is whether defendants owed a duty to plaintiff and his wife, Dianna,[FN1] to warn Walsh that the medication defendants gave to Walsh either impaired or could have impaired her ability to safely operate a motor vehicle following her departure from the Hospital.

We are mindful that in addressing the modification of a legal duty, its reach must be limited by what is foreseeable. Any expansion of duty is a power to be exercised cautiously, but it is a power that must be used if the changing needs of society are to be met. It was succinctly stated by Judge Cardozo that "[t]he principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be" (*MacPherson v Buick Motor Co.*, 217 NY 382, 391 [1916]). For the reasons that follow, we conclude that where a medical provider has administered to a patient medication that impairs or could impair the patient's ability to safely operate an automobile, the medical provider has a duty to third parties to warn the patient of that danger.

I.

On March 4, 2009, Walsh sought treatment at the Hospital's emergency room. According to plaintiffs, Walsh's medical records indicate that she drove herself to the Hospital, where she was intravenously administered Dilaudid, an opioid narcotic painkiller, and Ativan, a benzodiazepine drug, at 11:00 a.m.

The record reflects that "[c]ommon side effects [of Ativan] include sedation, dizziness, weakness, unsteadiness, and disorientation." Plaintiffs' expert averred that such drug has a "sedative/hypnotic" effect. Plaintiffs' expert also explained that "Dilaudid has two to eight [*3]times the painkilling effect of morphine," that the half-life of intravenously-administered Dilaudid is two to four hours, and that the Dilaudid package label and package insert contain various cautionary instructions pertinent to this matter. For example, plaintiffs' expert noted that "the package label for Dialudid states that it may impair mental and/or physical ability needed to perform potentially hazardous activities such as driving a car or operating machinery.' " The same expert further noted that the section of the package insert for Dilaudid "titled *Use in Ambulatory Patients*[] states that the drug may impair mental and/or physical ability required for the performance of potentially hazardous tasks (e.g., driving, operating machinery). Patients should be cautioned accordingly.' " In the words of that expert, the "insert also states that the most common adverse effects of [Dilaudid] are more prominent in[, inter alia,] ambulatory patients.' "

Walsh was discharged from the Hospital at 12:30 p.m. on the date in question. She drove herself away from that facility. Nineteen minutes after that discharge, Walsh was involved in a motor vehicle accident in which the vehicle she was driving crossed a double yellow line and struck an automobile operated by plaintiff. According to plaintiffs, the accident occurred while Walsh was in "a state of disorientation" and "under the influence of the aforementioned drugs."

Plaintiffs subsequently commenced this action against the Island Medical defendants and the Hospital. The complaint alleges, in relevant part, that Walsh sought the professional care of defendants on the date in question; that defendants rendered medical care to Walsh at that time; that, in the course of rendering such care to Walsh, defendants administered to Walsh the medication at issue; that defendants did not warn Walsh of the effects of such medication; and that the accident occurred while Walsh was affected by such medication. Based on those allegations, plaintiffs seek damages for injuries they sustained as the result of defendants' alleged medical malpractice in treating Walsh.

After issue was joined, the Island Medical defendants moved to dismiss the complaint for failure to state a cause of action (*see* CPLR 3211 [a] [7]), essentially contending that they did not owe plaintiffs a duty of care inasmuch as plaintiffs were third parties to the treatment rendered to Walsh. The Hospital cross-moved for the same relief, while plaintiffs cross-moved for an order both granting leave to serve an amended complaint asserting a cause of action for negligence and consolidating this action with two other actions arising from the subject accident. Supreme Court granted the motion of the Island Medical defendants and the cross motion of the Hospital seeking dismissal of the complaint while concomitantly denying plaintiffs' cross motion. On appeal, the Appellate Division affirmed, reasoning that because "only Walsh . . . had a physician-patient relationship with the defendants[,] . . . the allegations did not support a duty of care owed by the defendants to the injured plaintiff" (119 AD3d 512, 514 [2d Dept 2014]). We granted plaintiffs leave to appeal (24 NY3d 905 [2014]).

[*4]II.

Under these facts, defendants owed to plaintiffs a duty to warn Walsh that the medication administered to her either impaired or could have impaired her ability to safely operate an automobile. We begin our discussion of that issue with reference to the principles of law that inform our review.

In the context of a motion to dismiss pursuant to CPLR 3211, we "determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" (*id*. at 88 [internal quotation marks omitted]). We "may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint" (*id.*).

Similarly germane is our jurisprudence with respect to the recognition of a duty of care. "The threshold question in any negligence action is[] [whether the] defendant owe[s] a legally recognized duty of care to [the] plaintiff" (*Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 232 [2001]). "The question of whether a member or group of society owes a duty of care to reasonably avoid injury to another is [one] of law for the courts" (*Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1, 8 [1988], *rearg denied* 72 NY2d 953 [1988]). "Courts resolve legal duty questions by resort to common concepts of morality, logic and consideration of the social consequences of imposing the duty" (*Tenuto v Lederle Labs., Div. of Am. Cyanamid Co.*, 90 NY2d 606, 612 [1997]; *see Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 586 [1994]). A critical consideration in determining whether a duty exists is whether "the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm" (*Hamilton*, 96 NY2d at 233).

Said another way, our calculus is such that we assign the responsibility of care to the person or entity that can most effectively fulfill that obligation at the lowest cost. It is against that backdrop that we conclude that, under the facts alleged, defendants owed plaintiffs a duty to warn Walsh that the medication defendants administered to Walsh impaired her ability to safely operate a motor vehicle.

A.

In evaluating duty questions we have historically proceeded carefully and with reluctance to expand an existing duty of care. In a series of cases including *Eiseman v State of New York* (70 NY2d 175 [1987]), *Purdy* (72 NY2d 1), *Tenuto* (90 NY2d 606), and *McNulty v City of New York* (100 NY2d 227 [2003]), we declined to impose a broad duty of care extending from physicians past their patients "to members of the . . . community individually" (*Eiseman*, 70 NY2d at 188). That is, we declined to recognize a duty to an indeterminate, faceless, and ultimately prohibitively large class of plaintiffs, as opposed to "a known and identifiable group" (*Palka*, 83 NY2d at 589; *see McNulty*, 100 NY2d at 232; *Eiseman*, 70 NY2d at 187).

Specifically, in *Eiseman* we considered circumstances in which "an ex-felon with a history of drug abuse and criminal conduct" was released from incarceration and "accepted into a special State college program for the disadvantaged" (*id.* at 180). Following his acceptance into that program, the ex-felon raped and murdered a fellow student (*see id.*). The administrator of the decedent's estate sought recovery from the State on the ground that a prison physician negligently ignored the ex-felon's emotional instability and history of mental disorder in completing an examination report. The report was submitted in conjunction with that convict's admission into the college program (*see id.* at 182-183). Although we concluded that "the physician plainly owed a duty of care to his patient and to persons he knew or reasonably should have known were relying on him for this service to his patient," we maintained that "[t]he physician did not . . . undertake a duty to the community at large," and more specifically that the physician did not owe a duty of care to "members of the . . . community individually" (*id*. at 188). Consequently, we determined that the State, as the employer of the physician, had no duty to inform the victim of the convict's medical history (*see id.* at 188-189).

About a year after deciding *Eiseman*, we determined *Purdy* (72 NY2d 1). In that case the plaintiff was struck and injured by a speeding car while he patronized a gas station. The offending vehicle was operated by a resident of the defendant-nursing home, who had "a medical condition that left her susceptible to fainting spells and blackouts" (*id.* at 6). We considered the question whether the nursing home and the defendant-physician, who was merely the admitting physician at the nursing home, "owed to [the] plaintiff—an unidentified member of the public—a duty either to prevent [the resident] from driving or to warn her of the dangers of driving given her medical condition" (*id.*). In doing so, we acknowledged that "there exist special circumstances in which there is sufficient authority and ability to control the conduct of third persons that [have given rise to] a duty to do so" (*id.* at 8). More particularly, we indicated that those circumstances exist where there is a special relationship, which we described as, inter alia, "a relationship between [the]

defendant and a third person whose actions expose [the] plaintiff to harm such as would require the defendant to attempt to control the third person's conduct" (*id.*).

Nevertheless, on those facts we determined that there was no "special relationship between [the] defendants and [the resident] such as would require [the defendants] to control [the resident's] conduct for the benefit of [the] plaintiff" (*id.*). We specifically "conclude[d] . . . that neither [the nursing home] nor [the physician] had the necessary authority or ability to exercise such control over [the resident's] conduct so as to give rise to a duty on their part to protect [the] plaintiff—a member of the general public" (*id.* at 8-9).

After *Purdy* we heard *Tenuto* (90 NY2d 606), wherein we concluded that, under the circumstances of that case, a physician had a duty of reasonable care to the parents of a five-month-old to whom he administered an oral polio vaccine. The physician allegedly did not advise the parents of their risk of exposure to the polio virus following the administration of that [*5]vaccine, and the plaintiff-father was subsequently afflicted with that disease. Relying on both foreign authorities and *Eiseman* (70 NY2d at 188), we indicated that members of a patient's immediate family or household who may suffer harm as a result of the medical care a physician renders to that patient benefit from a duty of care running to them from the physician (*see Tenuto*, 90 NY2d at 610-614). In so concluding, we noted that there the "existence of a special relationship sufficient to supply the predicate for extending the duty to warn and advise [the] plaintiffs of their peril [was] especially pointed [inasmuch as] the physician [was] a pediatrician engaged by the parents to provide medical services to their infant, and whose services, by necessity, require[d] advising the patient's parents" (*id.* at 614).

Tenuto was arguably constrained by our decision in *McNulty* (100 NY2d 227)[FN2]. There we were called upon to decide whether the defendant-physicians owed a duty of care to the plaintiff, who was a friend of a woman they had treated for infectious meningitis and who subsequently contracted that disease herself. In that case the physicians allegedly answered in the negative the plaintiff's question whether she needed treatment after being in close contact with her infected friend (*id.* at 229). Significantly, we stated there was "no allegation that [the] plaintiff's injury arose from the [physicians'] treatment of [the patient]." We concluded that an extension of the duty physicians owe their patients so as to cover the plaintiff would have been unprecedented (*McNulty*, 100 NY2d at 234).[FN3]

[*6]B.

We left open the possibility of the recognition of a duty in a case such as this through *McNulty* and *Purdy*. In *McNulty*, we observed that, "[i]n the limited circumstances where we have expanded the duty [of care of a treating physician so as to include a third party], the third party's injury resulted from the physician's performance of the duty of care owed to the patient" (*McNulty*, 100 NY2d at 233). More importantly, in *Purdy*, in addition to determining that neither the defendant-nursing home nor the defendant-physician owed a duty to the public to warn the resident of the adverse effects of the medication that had been prescribed to her, we acknowledged the plaintiff's citations to foreign authorities imposing a duty on a treating physician in favor of unidentified members of the public to warn a patient of the adverse effects of prescribed medication on the safe operation of an automobile (*see Purdy*, 72 NY2d at 9-10). In concluding there that the defendant-physician bore no duty to the general public to warn the resident of the dangers of driving given her medical condition, we noted that such doctor

"was not [the resident's] treating physician, and therefore was under no legal obligation to warn [the resident] of possible dangers involved in activities in which she chose to engage off the premises of the facility. Nor[, we added,] ha[d] [the] plaintiff demonstrated that [the resident's] impaired driving ability was attributable to any medication prescribed to her by [the physician] without appropriate warnings" (*id.* at 10).

Our failure in *Purdy* to foreclose the prospect that a treating physician who does not warn a patient of the dangers of operating a motor vehicle in the face of a certain medical condition could be held accountable for that omission by a member of the general public logically left open the possibility that we could one day recognize such a duty.

This is an instance in which defendants' "relationship with . . . the tortfeasor . . . place[d] [them] in the best position to protect against the risk of harm" (*Hamilton*, 96 NY2d at 233), and the balancing of factors such as the expectations of the parties and society in general, the proliferation of claims, and public policies affecting the duty proposed herein (*see id.* at 232) tilts in favor of establishing a duty running from defendants to plaintiffs under the facts alleged in this case.

In formulating duty,

"[v]arious factors . . . have been given conscious or unconscious weight, including convenience of administration, capacity of the parties to bear the loss, a policy of preventing future injuries, [and] the moral blame attached to the wrongdoer. . . . Changing social conditions lead constantly to the recognition of new duties[, and] [n]o better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists" (Prosser and Keaton, Torts § 54 at 359 [5th ed 1984] [footnotes omitted]).

Here, put simply, to take the affirmative step of administering the medication at issue without warning Walsh about the disorienting effect of those drugs was to create a peril affecting every motorist in Walsh's vicinity. Defendants are the only ones who could have provided a proper warning of the effects of that medication. Consequently, on the facts alleged, we conclude that defendants had a duty to plaintiffs to warn Walsh that the drugs administered to her impaired her ability to safely operate an automobile.[FN4]

[*7]C.

Our conclusion with respect to the duty owed in this case is accompanied by three observations. First, the "cost" of the duty imposed upon physicians and hospitals should be a small one: where a medical provider administers to a patient medication that impairs or could impair the patient's ability to safely operate an automobile, the medical provider need do no more than simply warn that patient of those dangers. It is already the function of a physician to advise the patient of the risks and possible side effects of prescribed medication (*see Wolfgruber v Upjohn Co.*, 52 NY2d 768, 770 [1980], *affg*72 AD2d 59, 61 [4th Dept 1979] ["Since nonmedical consumers are legally precluded from self-prescribing' prescription drugs, the physician's function is to evaluate a patient's needs, assess the risks and benefits of available [*8]drugs and then prescribe a drug, advising the patient of its risks and possible side effects"]; *see also Martin v Hacker*, 83 NY2d 1, 9 [1993] [discussing the duty of a prescription drug manufacturer to caution against a drug's side effects by giving adequate warning to the prescribing physician, who "acts as an informed intermediary' . . . between the manufacturer and the patient"]). Our decision herein imposes no additional obligation on a physician who administers prescribed medication [FN5]. Rather, we merely extend the scope of persons to whom the physician may be responsible for failing to fulfill that responsibility.

Second, much as we are empowered to identify the duty articulated herein, it is within our authority to clarify how that obligation may be met. In that vein we reiterate that defendants and those similarly situated may comply with the duty recognized herein merely by advising one to whom such medication is administered of the dangers of that medication. Indeed, this case is not about *preventing Walsh from leaving the Hospital*, but ensuring that *when Walsh left the Hospital*, she was *properly warned about the effects of the medication administered to her*.

Third, our decision herein should not be construed as an erosion of the prevailing principle that courts should proceed cautiously and carefully in recognizing a duty of care. We have previously noted that, "[w]hile the temptation is always great to provide a form of relief to one who has suffered, . . . the law cannot provide a remedy for every injury incurred" (*Albala v City of New York*, 54 NY2d 269, 274 [1981]). In other words, we have said that "[n]ot all mistakes . . . result in liability" (*McNulty*, 100 NY2d at 232). This decision does not reflect a retreat from those principles.

III.

We now turn to the remaining issue on appeal, which pertains to the part of plaintiffs' cross motion seeking leave to serve an amended complaint. That request was based on plaintiffs' desire to add a cause of action for negligence against defendants based on plaintiffs' theory that defendants negligently caused Walsh to become "medically intoxicated and cognitively impaired," and that Walsh caused the accident because of that impairment.

As a general rule, "leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in [*9]merit . . . , and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court" (*Pink v Ricci*, 100 AD3d 1446, 1448 [4th Dept 2012] [internal quotation marks omitted]; *see* CPLR 3025 [b]; *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]). "A complaint sounds in medical malpractice rather than ordinary negligence where the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician to a particular patient" (1B NY PJI3d 2:150, at 46 [2015]; *see Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 788 [1996] ["(A) claim sounds in medical malpractice when the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician. By contrast, when the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the hospital's failure in fulfilling a different duty, the claim sounds in negligence"] [internal quotation marks and citation omitted]). Inasmuch as the "medical

intoxication" of which plaintiffs complain in the proposed new cause of action bears a substantial relationship to the medical treatment administered by defendants, we conclude that plaintiffs' claims against defendants sound in medical malpractice, rather than in negligence. Consequently, the part of the cross motion seeking leave to serve an amended complaint asserting a cause of action sounding in negligence was properly denied inasmuch as that proposed cause of action lacks merit.[FN6]

Accordingly, the order of the Appellate Division should be modified, without costs, by denying the motions of the Island Medical defendants and the Hospital to dismiss the complaint and, as so modified, affirmed.

STEIN, J. (dissenting):

The majority precipitously holds that medical professionals working in a hospital emergency room owe a duty of care to a non-patient member of the general public, requiring medical professionals who administer medication that may affect a patient's driving ability to warn the patient — for the benefit of a third-party motorist — that he or she should not operate a [*10]motor vehicle upon discharge. Because I vehemently disagree that a duty running from a physician to a non-patient should be recognized under the circumstances presented here, I would reaffirm our long-standing precedent holding that a physician's duty of care does not extend beyond the patient to the community at large, a result that is, I believe, mandated by any considered weighing of the societal interests involved. I, therefore, dissent.

I.

I will begin with a recitation of the facts giving rise to this action as recounted in the complaint — which must be accepted as true on this CPLR 3211 motion (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]) — and as supplemented by plaintiffs' documentary submissions to the trial court. One morning in March 2009, non-party Lorraine Walsh visited the emergency room of defendant South Nassau Communities Hospital (the Hospital), complaining of severe internal pain. During intake, Walsh informed emergency room staff that she had arrived at the Hospital by car, but she did not specify whether she was the driver of the vehicle. Thereafter, Walsh was examined by defendants Dr. Regina E. Hammock and Christine DeLuca (a physician's assistant), both of whom were employed by defendant Island Medical Physicians, P.C. Because Walsh informed the medical care providers that she was allergic to morphine, she was administered Dilaudid and Ativan, intravenously, a few minutes after 11:07 a.m. According to plaintiffs' expert, Dr. Alan Schechter, Dilaudid is an opioid narcotic painkiller and Ativan is a benzodiazepine drug used, among other things, as a muscle relaxant, a sedative, and to treat anxiety. In Dr. Schechter's opinion, any emergency room physician administering these narcotic medications should be aware that they can impair a patient's ability to drive, and the standard of care in the medical community requires that physicians warn their patients accordingly.

Walsh was discharged, and she left the Hospital at 12:30 p.m., over one hour after the administration of Dilaudid and Ativan. Shortly thereafter, Walsh crossed a double yellow line while operating her vehicle, striking an oncoming bus driven by plaintiff Edwin Davis. In a subsequent action commenced by Walsh against defendants Hammock, DeLuca, and the Hospital, Walsh claimed that the medications she was administered rendered her "unconscious for a period of time" and caused or contributed to the accident.

Thereafter, Davis — and his wife, derivatively — commenced the instant action to recover damages for Davis's personal injuries, asserting causes of action sounding in medical malpractice and negligent hiring and training of medical personnel against Hammock, DeLuca, and Island Medical Physicians, P.C. (collectively the Island Medical defendants), as well as the Hospital. Plaintiffs alleged that defendants committed medical malpractice by releasing Walsh from the Hospital "in severe pain, a state of disorientation, under the influence of the [administered drugs]" and without providing proper instructions or "arranging her a safe method of travel home."

After joinder of issue, the Hospital and the Island Medical defendants moved to [*11]dismiss the complaint, asserting that plaintiffs had failed to state a cause of action for medical malpractice because the complaint did not plead the existence of a cognizable duty of care inasmuch as there was no allegation of a physician-patient relationship between Davis and defendants. Plaintiffs opposed the motion to dismiss and cross-moved for, among other things, leave to amend the complaint to add a cause of action sounding in simple negligence, arguing that defendants owed Davis a duty of care based on their administration of medication to Walsh and their allegedly negligent discharge of her from the Hospital.

Supreme Court, as relevant here, granted defendants' motions to dismiss the complaint for failure to state a cause of action, and denied that branch of plaintiffs' cross motion that sought leave to amend the complaint to add a negligence

claim (2012 NY Slip Op 31969[U] [Sup Ct, Nassau County 2012]). The court concluded that there was no basis for the proposed amendment because there was no duty running from defendants to non-patient Davis. The Appellate Division affirmed (119 AD3d 512, 513 [2d Dept 2014]), and we subsequently granted plaintiffs leave to appeal (24 NY3d 905 [2014]).

II.

As the majority recognizes, the threshold issue in any negligence or malpractice action is whether the defendant owed the plaintiff a legally recognized duty of care (*see McNulty v City of New York*, 100 NY2d 227, 232 [2003]; *Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 232-233 [2001]). The question of whether and to whom a duty is owed "is a legal one for the courts to resolve, taking into account 'common concepts of morality, logic and consideration of the social consequences of imposing the duty'" (*McNulty*, 100 NY2d at 232, quoting *Tenuto v Lederle Labs., Div. of Am. Cyanamid Co.*, 90 NY2d 606, 612 [1997]). When conducting this analysis, "[d]espite often sympathetic facts in a particular case before them, courts must be mindful of the precedential, and consequential, future effects of their rulings, and 'limit the legal consequences of wrongs to a controllable degree'" (*Lauer v City of New York*, 95 NY2d 95, 100 [2000], quoting *Tobin v Grossman*, 24 NY2d 609, 619 [1969]).

We have repeatedly emphasized that the "foreseeability of harm does not define duty" (*532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 289 [2001]; *see Eiseman v State of New York*, 70 NY2d 175, 187 [1987]; *Pulka v Edelman*, 40 NY2d 781, 785 [1976]); rather it "merely determines the scope of the duty once it is determined to exist" (*Hamilton*, 96 NY2d at 232). Consequently, "[a]bsent a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm" (*532 Madison Ave. Gourmet Foods*, 96 NY2d at 289). "This restriction is necessary to avoid exposing defendants to unlimited liability to an indeterminate class of persons conceivably injured by any negligence in a defendant's act" (*id.*; *see Hamilton*, 96 NY2d at 232; *Eiseman*, 70 NY2d at 187). Thus, the foreseeability of Walsh experiencing side-effects from the medications administered to her by defendants and causing an accident with her motor vehicle does not [*12]resolve the question of whether defendants may be held liable to plaintiffs in this case.

III.

Plaintiffs assert, and the majority concludes, that recognition of a duty under the circumstances here is merely an extension of our existing precedent concerning the scope of a physician's duty. I disagree. To the contrary, our case law compels the conclusion that defendants owed Davis no duty of care to warn or prevent Walsh from driving because Davis was an unidentified and unknown stranger to defendants' physician-patient relationship with Walsh.

In *Eiseman v State of New York*, a prison physician completed a health form required for an inmate to be admitted into a college program upon his release from incarceration (70 NY2d at 187). The physician failed to note that the inmate had a history of addiction and mental illness and, after acceptance and enrollment at the college, the inmate committed heinous crimes against several of his peers (*see id.* at 180-183). In the subsequent negligence action, we acknowledged that, although the relevant form did not require the physician to disclose the inmate's history, in completing the form, the physician nevertheless "owed a duty of care to his patient and *to persons he knew or reasonably should have known were relying on him for this service to his patient*" — i.e., the college (*id.* at 188 [emphasis added]). Yet, in recognizing the possibility that a limited duty might be owed by a physician to a non-patient, we held that the physician did *not* "undertake a duty to the community at large," and we were careful to limit the object of such a potential duty to a specific *identified* individual or entity who the physician knew was relying on his or her services to the patient (*id.*).

The following year, in *Purdy v Public Adm'r of County of Westchester*, this Court was presented with the question of whether defendants, a health-related living facility and its admitting physician, owed a duty to a member of the public requiring them to prevent or warn a resident — 73-year-old Emily Shaw, who had a medical condition that made her susceptible to fainting and blackouts — from driving (72 NY2d 1, 6 [1988]). We recognized in *Purdy* that "there exist special circumstances in which there is sufficient authority and ability to control the conduct of third persons that we have identified a duty to do so," such as where there is a "relationship between [the] defendant and a third person whose actions expose [the] plaintiff to harm such as would require the defendant to attempt to control the third person's conduct; or a relationship between the defendant and plaintiff requiring [the] defendant to protect the plaintiff from the conduct of others" (*id.* at 8). However, we held that the defendants in *Purdy* had no duty to the plaintiff third party to prevent Shaw from driving because the facility lacked "the necessary authority or ability to exercise . . . control over Shaw's conduct so as to give rise to a duty on their part to protect [the] plaintiff — a member of the general public" (*id.* at 8-9). With respect to the plaintiff's duty to warn theory, we acknowledged that other jurisdictions have held that a treating physician's

relationship to a patient could be sufficient to impose a duty running to [*13]members of the public to warn the patient of the adverse effects of medication on the ability to drive. However, we noted that, in New York, "[a] physician's duty of care is ordinarily one owed to his or her patient" and not to the community at large (*id.* at 9-10). In any event, because the defendant physician was not Shaw's treating physician and there was no evidence that any medication prescribed by the physician contributed to the accident, we held that no duty was established.[FN1]

By contrast, in *Tenuto v Lederle Labs., Div. of Am. Cyanamid Co.*, we concluded that a special relationship existed between the non-patient parents of an infant and the infant's physician such that a duty was owed by the physician to the parents (90 NY2d at 611-612). There, the plaintiff parents presented their infant to her physician for the second dose of an oral poliomyelitis vaccine and, although it was known to the medical community that such vaccine presented a risk of transmittal to the parents, the physician did not warn the parents of that risk or explain how to avoid it (*see id.* at 610-611). The infant's father contracted the poliomyelitis virus and commenced an action against the physician. We held that the parents' complaint sufficiently alleged that the physician owed them a duty of care to warn of the risk, noting that

"[t]he relation of a physician *to his patient and the immediate family* is one of the highest trust. On account of his scientific knowledge and his peculiar relation, an attending physician is, in a certain sense, in custody of a patient afflicted with infectious or contagious disease. And he owes a duty to those who are ignorant of such disease, and *who by reason of family ties, or otherwise*, are liable to be brought in contact with the patient, to instruct and advise . . . them as to the character of the disease"

(*id.* at 613 [emphasis added] [internal quotation marks, emphasis, and citations omitted]). We [*14]also explained that a duty was cognizable under those circumstances because the physician's treatment "necessarily implicate[d] protection of household members or other *identified* persons foreseeably at risk because of a relationship with the patient, whom the doctor [knew] or should [have] know[n] may [have] suffer[ed] harm by relying on prudent performance of that medical service" (*id.* [emphasis added]). In other words, we recognized a duty in *Tenuto* only because the plaintiffs there were "within a *determinate* and *identified* class — immediate family members — whose relationships to the person acted upon have traditionally been recognized as a means of extending and yet limiting the scope of liability for injuries caused by a party's negligent acts or omissions" (*id.* at 614 [emphasis added]). Because there was a special relationship "triangulated" between the plaintiffs, the physician, and the patient in light of the fact that "the physician [was] a pediatrician *engaged by the parents* to provide medical services to their infant, and whose services, by necessity, require[d] advising the patient's parents," our extension of a physician's duty to a non-patient was careful and circumscribed (*id.* [emphasis added]).

To the extent, if any, that our decision in *Tenuto* could be read to permit the expansion of a physician's duty to a member of the general public, we clarified the limits of our holding a few years later, in *McNulty v City of New York* (100 NY2d at 227). In *McNulty*, the Court refused to extend a physician's duty to the friend of a patient being treated for contagious meningitis, even though the friend accompanied the patient to the hospital and directly inquired of two physicians whether she was at risk and should be treated in light of her close contact with the patient. In so holding, we clarified — again — that our holding in *Tenuto* was a very narrow one that relied on the special relationship between the parties and the physician's awareness of the parents' reliance on his services to the infant plaintiff, *combined* with the fact that the physician's treatment created the risk of harm (*see id.* at 233). We cautioned that, in the absence of such a convergence of factors, New York courts should be "reluctant to expand a doctor's duty of care to a patient to encompass nonpatients," in part due to the "critical concern . . . that a recognition of a duty would render doctors liable to a prohibitive number of possible plaintiffs" (*id.* at 232).

The rule of law that emerges from this line of cases is easily discerned. In New York, a physician's duty to a patient, and the corresponding liability, may be extended beyond the patient only to someone who is both a readily identifiable third party of a definable class, usually a family member, *and* who the physician knew or should have known could be injured by the physician's affirmative creation of a risk of harm through his or her treatment of the patient (*see McNulty*, 100 NY2d at 233-234; *Cohen v Cabrini Med. Ctr.*, 94 NY2d 639, 642-644 [2000]; *Eiseman*, 70 NY2d at 188). I am not aware of anything — and the majority makes no attempt to identify anything — indicating that this clear rule has become so unworkable that the significant redefinition of the scope of a physician's duty adopted by the majority is warranted. Under a reasoned application of our precedent to the facts of this case, it is evident that defendants owed [*15]no legal duty *to Davis* — or any other member of the public who may have come into contact with, and been harmed by, Walsh after her discharge — to warn Walsh against, or prevent her from, driving (*see McNulty*, 100 NY2d at 233-234; *Cohen*, 94 NY2d at 642-644; *Eiseman*, 70 NY2d at 188; *Rebollal v Payne*, 145 AD2d 617, 617-618 [2d Dept 1988]).

The majority's contrary conclusion and imposition of a duty to warn Walsh for the benefit of Davis and other motorists is inimical to the principles enunciated in *Purdy*, *Eiseman*, *Tenuto*, and*McNulty* because, while defendants

arguably created a risk of harm by affirmatively giving Walsh medications that impaired her ability to drive, Davis is not a member of an identifiable and readily limited class [FN2]. Inexplicably, the majority acknowledges that we have consistently "declined to recognize a duty to an indeterminate, faceless, and ultimately prohibitively large class of plaintiffs" (maj. op. at 8), but then proceeds to recognize just such a duty in this case without articulating any clearly defined class to which this new duty runs. Under the Court's decision in this case, the class of potential plaintiffs cannot be logically restricted or identified.

Ultimately, by imposing liability here, the majority eviscerates the precept that a physician generally owes a duty of care only to the patient, not to the community at large. The majority justifies its otherwise unsupportable position by pointing out that the harm to Davis here was foreseeable (which, as set forth above, is not dispositive) and by asserting that "our calculus [*16]is such that we assign the responsibility of care to the person or entity that can most effectively fulfill that obligation at the lowest cost" (maj. op. at 7). While it is true that we have stated in other contexts that a "'key' consideration critical to the existence of a duty . . . is 'that the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm,'" we have also recognized in the next breath that, even where the defendant is best positioned to prevent harm, a duty should be imposed only where "the specter of limitless liability is not present because the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship" (*Matter of New York City Asbestos Litig.*, 5 NY3d 486, 494 [2005], quoting *Hamilton*, 96 NY2d at 233). "The law demands that the equation be balanced; that the damaged plaintiff be able to point the finger of responsibility at a defendant owing, not a general duty to society, but a specific duty to [the plaintiff]" (*Johnson v Jamaica Hosp.*, 62 NY2d 523, 527 [1984]). The majority blatantly disregards this well-settled and crucial limitation on the recognition of a duty. Indeed, the duty it now adopts is not specific to Davis or based on any relationship he had with defendants or Walsh; rather, the duty imposed by the majority upon defendants here extends to any motorist, pedestrian, bicyclist, or other injured member of the public who comes into contact with any of defendants' innumerable patients. However, our jurisprudence, both in general and in the specific context of physician-owed duties, has repeatedly rejected the imposition of a duty that will have such far-reaching and unmanageable consequences (*see e.g. McNulty*, 100 NY2d at 232; *Hamilton*, 96 NY2d at 234; *Strauss v Belle Realty Co.*, 65 NY2d 399, 402 [1985] [it is the responsibility of the courts when fixing duty to "to protect against crushing exposure to liability"]). The majority's claim that it is not retreating from our heretofore cautious approach to recognizing new scopes of duties rings hollow in the face of its analysis and holding demonstrating otherwise.

IV.

Even if I were able to accept the premise that a logically defined duty could be extended to a non-patient third party under our prior decisions, this Court is obligated to balance certain relevant factors before making such a determination. These factors include "the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability" (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 586 [1994]; *see Hamilton*, 96 NY2d at 232-233). A thorough and careful consideration of these factors — an analysis that is conspicuously absent from the majority's decision — compels me to conclude that the societal costs of imposing upon physicians a duty to non-patient members of the general public greatly outweigh the potential benefits of permitting such individuals to recover against physicians for their injuries (*see Matter of New York City Asbestos Litig.*, 5 NY3d at 493 ["any extension of the scope of duty must be tailored to reflect accurately the extent that its social benefits outweigh [*17]its costs"]; *Hamilton*, 96 NY2d at 232).

(A)

First, the extension of a duty under the circumstances presented here does not conform with the expectations of the parties or of society in general. Until now, it was unlikely that physicians would have expected to be held accountable to members of the community at large for decisions arising out of their treatment of an individual patient. This is because the duty of care owed to a patient arises out of the personal, private, and individualized relationship between the two parties. By contrast, physicians have no relationship with unidentified members of the public and cannot foresee or predict with whom their patients will come into contact. In addition, while patients certainly expect their medical providers to properly advise them of the risks and side-effects associated with medications that are administered to them, patients have no reason to expect that their doctor's advice to them could give rise to a cause of action against the physician in favor of a person with whom neither the physician nor the patient had prior contact. Thus, this factor of the duty analysis militates against the finding of a duty.

(B)

Second, it is indisputable that a medical professional who administers medication that is likely to impair a patient's ability to drive owes a duty of care *to the patient* that may require the medical professional to warn the patient of potential risks and side-effects of the medication, including advice regarding whether it is safe for the patient to operate a motor vehicle (*see generally Nestorowich v Ricotta*, 97 NY2d 393, 398 [2002]; *Wolfgruber v Upjohn Co.*, 72 AD2d 59, 61 [4th Dept 1979], *affd* 52 NY2d 768 [1980]). It is precisely because the physician already has a duty to undertake the action that plaintiffs claim will prevent future harm — i.e., to warn the patient — that the majority's expansion of the scope of a physician's liability to every member of the public will not create any additional social benefit at all. Nor will the imposition of a duty in favor of third parties render it more or less likely that the *patient* — with whom the ultimate decision to drive rests — will heed a medical provider's warning not to operate a motor vehicle. That is, the extension of a duty under these circumstances will have little or no deterrent effect on the conduct which actually results in the harm — i.e., the operation of a motor vehicle by a person under the influence of medication — and there is little preventative benefit to be gained by the majority's expansion of liability (*see Matter of New York City Asbestos Litig.*, 5 NY3d at 495).

(C)

Third, while the majority's departure from our precedent yields no appreciable benefit, the extension of a physician's duty to warn a patient to a third party comes at a heavy cost, both financially and socially. As for the latter, in my view, it is readily foreseeable that the imposition of a duty and the corresponding expansion of liability to include non-patients will adversely interfere with the physician-patient relationship. It can hardly be disputed that, as this [*18]Court has previously stated, the relationship between a physician and patient "operates and flourishes in an atmosphere of transcendent trust and confidence and is infused with fiduciary obligations" (*Aufrichtig v Lowell*, 85 NY2d 540, 546 [1995]). As a fiduciary, a physician generally owes a duty of undivided loyalty to the patient, and the paramount consideration in a physician's course of treatment must, therefore, be the patient's health and well-being. Although a physician has a duty, generally, to warn patients of the potential for a medication to, among other things, interfere with driving ability, the physician's decision in specific situations regarding which side-effects to explain or warnings to give with particular medications is, undoubtedly, one that is made in the exercise of professional judgment, based on the physician's weighing of the likelihood of danger or quantum of risk and a determination of the individual patient's interests. Extending a physician's duty beyond the patient to a boundless pool of potential plaintiffs, creates a very real risk that a physician will be conflicted when deciding whether, and to what extent, medication should be administered and under what circumstances specific warnings should be issued. In my view,

"[t]he consequences of this conflict for decisions regarding patient care are not insignificant. A physician whose attention is diverted from the patient to the effects of his advice on unknown persons who could be harmed by the patient's future conduct 'may, understandably, become less concerned about the particular requirements of any given patient, and more concerned with protecting himself or herself from lawsuits by the potentially vast number of person[s] who will interact with and may fall victim to that patient's conduct outside of the treatment setting'"

(*Jarmie v Troncale*, 306 Conn 578, 611-612, 50 A3d 802, 821 [2012], quoting *Coombes v Florio*, 450 Mass 182, 211, 877 NE2d 567, 587 [2007] [Cordy, J., dissenting]).

For example, a physician may become overly cautious in prescribing necessary medications so as to avoid potential liability. Similarly, instead of giving only those warnings a physician truly believes to be warranted in a particular case, the physician may inundate a patient with excessive detail about potential, but unlikely, risks associated with a medication in order to insulate him- or herself from liability, thus distracting the patient from the most significant risks and side-effects. Worse yet, these warnings may devolve into a general practice of physicians handing out pro-forma lists of potential side-effects that patients will cursorily sign prior to the administration of medications, ultimately resulting in fewer educated patients and less informed consent. While a physician may be ethically bound to refrain from allowing considerations of liability to influence his or her treatment decisions, it is naive, at best, to assume that the immeasurable liability that will result from the imposition of a duty owing to countless non-[*19]patients will have no impact upon a physician's exercise of professional judgment.

The duty adopted by the majority also implicates concerns regarding physician-patient confidentiality (*see* CPLR 4504; Education Law § 6530) and, in my view, is unworkable on a practical level. For instance, where a patient who was administered medication without a warning against driving defaults in a legal action brought by an injured third party, or decides not to shift blame to the physician, the physician-patient privilege would bar disclosure to the injured party of the patient's medical records and communications with the physician (*see Arons v Jutkowitz*, 9 NY3d 393, 409

[2007];*Dillenbeck v Hess*, 73 NY2d 278, 287-88 [1989]). An injured third-party will, therefore, be unable to obtain the information necessary to establish or obtain a remedy for a breach of the physician's purported duty to that party. Conversely, where an injured third-party manages to state a claim despite a lack of cooperation from the patient, a physician's inability to disclose privileged information concerning the patient may hamstring the physician's ability to defend against the claim. Significantly, the majority does not address the rationality of imposing a duty upon a physician where a breach of that duty cannot be proven or disproved — absent a patient's cooperation — without encouraging violations of the physician-patient privilege or requiring courts to delve into whether intrusion into the privilege and a patient's privacy is warranted. In that regard, the likelihood of interference with the physician-patient relationship weighs heavily against extending a physician's duty to a non-patient in this context.

(D)

Fourth, the expansion of a physician's liability to include all members of the public injured by a patient's operation of a motor vehicle while under the influence of medication will likely have a substantial financial impact on the medical profession and the availability of competent medical care throughout the state. Where, as here, "recognition of a duty would render doctors liable to a prohibitive number of possible plaintiffs" (*McNulty*, 100 NY2d at 232), such a duty will assuredly affect the cost and availability of medical care, as physicians will face an influx of litigation and rising malpractice insurance premiums. Injured non-patients will have every incentive to pursue litigation against physicians due to the availability of insurance coverage and, even if the majority of physicians successfully defeat such claims by demonstrating compliance with their already-existing duty to warn a patient where such a warning is warranted, the added cost of entering into litigation of these claims, either through summary judgment motions or trial, will take its toll.

Moreover, scenarios implicating a physician's duty of care owed to members of the general public regarding their treatment of patients are endless, and the majority's finding of a duty here presents a slippery slope at the bottom of which a physician's ultimate liability could be staggering due to both the countless number of potential plaintiffs, as well as the myriad of ways in which liability may arise. Following the majority's holding to its logical conclusion, a [*20]physician can arguably now be held liable, not just where a medication impairs driving ability due to its impact on a patient's state of wakefulness, but also where a medication causes any other physical malady, for example, a severe stomach ache that distracts a driver or a rash of itchiness that causes a driver to release the steering wheel and lose control. The public as a whole gains little benefit from imposing upon physicians a scope of liability as vast as the one the majority now endorses. The societal cost, on the other hand, is significant.

(E)

Finally, plaintiffs lament that it is unfair to allow Walsh to recover against defendants for her own injuries if they failed to warn her not to drive, while concomitantly precluding Davis from obtaining the same recovery for his injuries. However, there is nothing inconsistent about allowing a patient, but not a stranger, to recover against a medical professional for a negligent failure to warn the patient. "Any conclusion regarding inconsistent outcomes must involve a comparison between two parties that stand in the same relationship to another party, and patients and injured third persons do not stand in the same relationship to health care providers" (*Jarmie*, 306 Conn. at 600-601). Moreover, in almost all instances in which courts are asked to establish a duty, the courts must draw the line somewhere. As former Chief Judge Kaye eloquently stated,

"[t]his sort of line-drawing — a policy-laden determination reflecting a balance of competing concerns — is invariably difficult not only because it looks in part to an unknowable future but also because it is in a sense arbitrary, hard to explain to the person just on the other side of the line, especially when grievous injury is alleged. Human compassion and rigorous logic resist the exercise. If this person can recover, why not the next? Yet line-drawing is necessary because, in determining responsibility for negligent acts, common-law courts also must look beyond the immediate facts and take into account the larger principles at stake"

(*McNulty*, 100 NY2d at 234-235 [Ch. J. Kaye, concurring]).

Although I am sympathetic to plaintiffs and "it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world" (*Tobin v Grossman*, 24 NY2d at 619; *see Albala v City of New York*, 54 NY2d 269, 274 [1981]). For, "[a] line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit" (*De Angelis v Lutheran Med. Ctr.*, 58 NY2d 1053, 1055 [1983]). To extend the duty here is to subject physicians to potentially crushing liability attenuated from the common expectations of all involved.

In addition, in many cases, motorists who are injured as a result of a physician's negligent failure to warn a patient of the possible side-effects from the administration of medication are not entirely without recompense because they may be covered by their own motor vehicle or health insurance, or can pursue recovery against the patient/driver who directly caused the injury. While an injured party may occasionally be deprived of compensation by the absence of a duty in scenarios like the one here, I cannot agree with the majority that the possible benefits to be gained by creating a liability owing from physicians to every person who might potentially be injured by a patient — benefits which are not identified by the majority — outweigh the costs.

V.

For all these reasons, I would decline to extend a physician's duty to warn a patient about the effects of medication on his or her driving ability, beyond the duty already owed to the patient, to the community at large. My conclusion is consistent with, and compelled by, our precedent cautioning against the expansion of a physician's scope of liability, which confines a physician's duty to patients and specifically-identified persons who the doctor knows or has reason to know are relying upon the patient's treatment and who are harmed by the physician's affirmative creation of a risk. Adherence to this rule and our prior case law is necessary to avoid the imposition of a duty in cases like this, where the absence of a definable class of potential plaintiffs opens the door to limitless liability that will unduly interfere with the physician-patient relationship and increase the costs of medical care throughout the state, all while producing minimal societal benefit. It is, therefore, my hope that the legislature — which has long expressed its concern regarding the impact of the costs of medical malpractice insurance and litigation on the affordability and availability of medical care — will carefully consider whether the majority's holding is consistent with New York's statutory medical malpractice schemes and the aims of tort recovery in New York.

* * * * * * * * * * * * * * * * *

Order modified, without costs, by denying the motions of the Island Medical Physicians, P.C. defendants and of defendant South Nassau Communities Hospital to dismiss the complaint and, as so modified, affirmed. Opinion by Judge Fahey. Chief Judge Lippman and Judges Pigott and Rivera concur. Judge Stein dissents and votes to affirm in an opinion in which Judge Abdus-Salaam concurs.

Decided December 16, 2015

Footnotes

Footnote 1: Dianna Davis was not involved in the accident, but she has asserted a derivative cause of action for loss of consortium.

Footnote 2: After deciding *Tenuto* but before hearing *McNulty* we determined *Cohen v Cabrini Med. Ctr.* (94 NY2d 639 [2000]), wherein we refused to recognize a duty of care running from the physician of the plaintiff's husband to the plaintiff to prevent the personal injuries complained of there, namely, the unwitting diminishment of the ability of the plaintiff's husband to impregnate the plaintiff. We reasoned that a contrary holding "would be an unwarranted extension of our narrowly drawn jurisprudence with respect to malpractice liability to a patient's family member" (*id.* at 643).

Footnote 3: Here we have specifically discussed the existence and scope of duty in the context of the administration of medical services. We note, however, that our caution in setting the parameters of duty in that context is also evident in other circumstances.
For example, in *D'Amico v Christie* (71 NY2d 76 [1987]) we reiterated the rule that landowners "have a duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control" (*id.* at 85). Through that opinion we decided two appeals—*D'Amico* and *Henry v Vann*—and the second of those appeals arose from circumstances in which an employer detected an intoxicated employee, fired the employee, and told the employee to leave the employer's premises, whereupon the dismissed employee drove approximately one-half mile away before colliding with an oncoming vehicle (*Henry*, 71 NY2d at 82). On those facts we concluded that the employer had no legal duty to control the terminated employee's conduct (*id.* at 89). Similarly, in *Martino v Stolzman* (18 NY3d 905 [2012]), we applied the foregoing principles of *D'Amico* to social hosts, ruling that such hosts owe no duty to protect third persons from a guest who becomes intoxicated on and then drives from a premises controlled by the hosts (*id*. at 908). Careful, too, was our approach in *Stiver v Good & Fair Carting & Moving, Inc.* (9 NY3d 253 [2007]), in which we concluded that the inspector of a motor vehicle involved in an accident attributable the mechanical failure of that vehicle has no duty to third parties to properly inspect that automobile (*see id.*at 255-257).

We were likewise circumspect in *Hamilton* (96 NY2d 222), wherein we concluded that the defendant-handgun manufacturers did not owe "a duty [to the plaintiffs, who were relatives of people killed by handguns,] to exercise reasonable care in the marketing and distribution of the handguns they manufacture"(*id*. at 230-231).

Footnote 4: There is support for our conclusion in other jurisdictions. In *Taylor v Smith* (892 So2d 887 [Ala 2004]), the Supreme Court of Alabama collected cases from seven jurisdictions imposing a duty on physicians for the benefit of nonpatient members of the driving public in support of its conclusion that "the duty of care owed by the director of a methadone-treatment center to his patients extends to third-party motorists who are injured in a foreseeable automobile accident with the patient that results from the director's administration of methadone" (*id.* at 897; *see id.* at 893-894, citing*McKenzie v Hawai'i Permanente Med. Group*, 98 Haw 296, 309, 47 P3d 1209, 1222 [2002] [ruling that a physician "owes a duty to non-patient third parties" to warn patients of possible adverse effects of prescribed medication on their ability to safely operate a motor vehicle, "where the circumstances are such that the reasonable patient could not have been expected to be aware of the risk without the physician's warning"]; *Joy v Eastern Maine Med. Ctr.*, 529 A2d 1364, 1365-1366 [Me 1987] [concluding that a physician who treated a patient by placing a patch over one of the patient's eyes owed a duty to motorists to warn the patient against driving while wearing the patch]; *Welke v Kuzilla*, 144 Mich App 245, 252, 375 NW2d 403, 406 [1985] [determining that a physician who injected a patient with an "unknown substance" owed a duty to a third-party motorist "within the scope of foreseeable risk, by virtue of (the physician's) special relationship with (the patient)"]; *Wilschinsky v Medina*, 108 NM 511, 514-515, 775 P2d 713, 716-717 [1989] [concluding that physicians who inject a patient "with drugs known to affect judgment and driving ability" have "a duty to the driving public"]; *Zavalas v State Dept. of Corr.*, 124 Or App 166, 171, 861 P2d 1026, 1028 [1993], *denying review* 319 Or 150, 877 P2d 86 [1994] [rejecting the contention "that a physician has no duty to third parties ... who claim that the physician's negligent treatment of a patient was the foreseeable cause of their harm"]; *Gooden v Tips*, 651 SW2d 364, 369 [Tex App 1983] ["under proper facts, a physician can owe a duty to use reasonable care to protect the driving public where the physician's negligence in diagnosis or treatment of his patient contributes to plaintiff's injuries"]; *Schuster v Altenberg*, 144 Wis2d 223, 239—240, 424 NW2d 159, 166 [1988] [rejecting the contention "that a psychotherapist (has no) duty to warn third parties . . . ."]).
The *Taylor* court also relied on a case from an eighth jurisdiction, which distinguished " a mere failure to warn' " from an affirmative act of failing to take proper precautions where the physician has " administer[ed] a drug which, when combined with other drugs or alcohol, may severely impair the patient' "(*id.* at 894, quoting *Cheeks v Dorsey*, 846 So2d 1169, 1173 [Fla 4th Dist Ct App 2003], *denying review* 859 So2d 513 [Fla 2003] [emphases removed]). Similarly, here, we have recognized a duty of care running from a physician to third parties where the physician fails to warn his or her patient of potential physical impairments caused by a drug the physician has*administered*, rather than *merely prescribed*, to the patient.
Moreover, our own canvas has revealed that at least eight other jurisdictions appear to have recognized a duty running from a physician past his or her patient to the general public to warn the patient of the possible adverse effects of medication administered or treatment rendered to the patient by the physician (*see Medina v Hochberg*, 465 Mass 102, 107-108, 987 NE2d 1206, 1211 [2013] [acknowledging that the Supreme Judicial Court of Massachusetts had previously "concluded that a physician may be liable to a third party for failing to warn his or her patient of the known side effects of medication prescribed by the physician that might affect the patient's ability to drive a motor vehicle"]; *Hardee v Bio-Medical Applications of South Carolina, Inc.*, 370 SC 511, 516, 636 SE2d 629, 631-632 [2006] ["a medical provider who provides treatment which it knows may have detrimental effects on a patient's capacities and abilities owes a duty to prevent harm to patients and to reasonably foreseeable third parties by warning the patient of the attendant risks and effects before administering the treatment"]; *Burroughs v Magee*, 118 SW3d 323, 333 [Tenn 2003] [holding, under the facts of that case, that the defendant-physician "owed a duty of care (to third-party motorists) to warn (a patient of the physician) of the possible adverse effect of . . . two prescribed drugs on (the patient's) ability to safely operate a motor vehicle"]; *Hoehn v United States*, 217 F Supp 2d 39, 41, 48-49 [DDC 2002] [deeming viable a claim that "a hospital or physician owe(s) a duty to the general public . . . to (warn) a heavily medicated patient . . . about the danger of driving"]; *Osborne v United States*, 211 W Va 667, 669, 567 SE2d 677, 679 [2002] [recognizing that West Virginia law permits a third party to bring a cause of action against a health care provider for foreseeable injuries that were proximately caused by the health care provider's negligent treatment of a tortfeasor patient]; *Cram v Howell*, 680 NE2d 1096, 1098 [Ind 1997] [concluding the defendant-physician had "a duty of care to take reasonable precautions in monitoring, releasing, and warning his patient for the protection of unknown third persons potentially jeopardized by the patient's driving upon leaving the physician's office" where the physician allegedly administered to the patient certain immunizations or vaccinations that caused the patient to experience "episodes of loss of consciousness"]; *Myers v Quesenberry*, 144 Cal App 3d 888, 890, 894, 193 Cal Rptr 733 [Ct App 4th Dist 1983] [observing, in the context of concluding that "liability may be imposed against two physicians for negligently failing to warn their patient of the foreseeable and dangerous consequences of engaging in certain conduct which proximately caused injuries to (the) plaintiff, a third person," that "(w)hen a physician furnishes medicine causing drowsiness, he should warn his patient not to drive or engage in other activities which are likely to cause injury"];*Kaiser v Suburban Transp. Sys.*, 65 Wash2d 461, 464, 398 P2d 14, 16 [1965], *mod on other grounds* 65 Wash2d 461, 401 P2d 350 [1965] [concluding that the question whether the defendant-doctor was negligent in failing to warn the patient-bus driver that a prescribed drug could cause drowsiness

was for a trier of fact]). We note, however, that our decision herein is not grounded in those foreign authorities inasmuch as our result is the product not of "vote counting" but of our independent balancing of factors including the expectations of the parties and of society, the proliferation of claims, and public policies affecting the duty we now recognize (*see Hamilton*, 96 NY2d at 232).

Footnote 5: With respect to the minimal "cost" arising from the duty imposed herein, we note that warnings that prescribed medication impairs or could impair the patient's ability to safely operate an automobile are commonly administered when filling a prescription at a pharmacy, and there is no reason why a medical provider cannot take a similar, simple prophylactic measure.

Footnote 6: We make a brief procedural point here. Plaintiffs appeal to this Court from an Appellate Division order that affirmed a Supreme Court judgment dismissing the complaint. This Court may review the propriety of the denial of plaintiffs' cross motion seeking leave to serve an amended complaint (*see Oakes v Patel*, 20 NY3d 633, 644-645 [2013]). However, we do not address the motion for consolidation, which was denied as academic below. This Court is reinstating the complaint, so the request for consolidation is no longer academic and may be raised again at Supreme Court.

Footnote 1: Although we noted the existence of pertinent out-of-state case law cited by plaintiff in support of a duty in *Purdy v Public Adm'r of County of Westchester*, we did not implicitly or explicitly approve of it (72 NY2d 1, 9-10 [1988]). Indeed, because we found that case law to be inapplicable to the facts as presented there, we had no occasion to determine whether it was consistent with governing principles of tort law in New York (*see id.*). Furthermore, as the majority concedes, out-of-state authority does not govern the disposition of this appeal or our determination of whether a duty exists under these circumstances (*see* maj. op. at 17 n 4).

Footnote 2: To the extent plaintiffs claim that defendants had a duty to actually prevent Walsh from leaving the hospital — as opposed to merely issuing a warning against driving — defendants did not have "sufficient authority and ability to control" Walsh's conduct to give rise to such a duty (*Purdy*, 72 NY2d at 8-9; *see Kowalski v St. Francis Hosp. & Health Ctrs.*, 21 NY3d 480, 486 [2013]; *D'Amico v Christie*, 71 NY2d 76, 88 [1987]; *Conboy v Mogeloff*, 172 AD2d 912, 913 [3d Dept 1991], *lv denied* 78 NY2d 862 [1991]; *Wagshall v Wagshall*, 148 AD2d 445, 447 [2d Dept 1989], *appeal dismissed and lv denied* 74 NY2d 781 [1989]; *Cartier v Long Is. Coll. Hosp.*, 111 AD2d 894, 895 [2d Dept 1985]). Moreover, there is clearly no relationship between defendants and Davis — who were completely unknown to one another prior to the accident — that required defendants to protect Davis from Walsh's conduct or to consider the effects of their treatment of Walsh on him (*compare Tenuto v Lederle Labs., Div. of Am. Cyanamid Co.*, 90 NY2d 90 NY2d 606, 614 [1997]). The majority recognizes the absence of sufficient control here by limiting their holding to a duty to warn.

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APPELLATE DIVISION

ADMINISTRATIVE LAW

ADMINISTRATIVE LAW (SERVICES FOR DEVELOPMENTALLY DISABLED CHILDREN, DOH EXECUTIVE COMPENSATION CAP AND CONFLICT OF INTEREST RULES DO NOT VIOLATE SEPARATION OF POWERS DOCTRINE)/DEVELOPMENTALLY DISABLED CHILDREN, SERVICES FOR (DOH EXECUTIVE COMPENSATION CAP AND CONFLICT OF INTEREST RULES DO NOT VIOLATE SEPARATION OF POWERS)/DEPARTMENT OF HEALTH (EXECUTIVE COMPENSATION CAP AND CONFLICT OF INETERST RULES DO NOT VIOLATE SEPARATION OF POWERS DOCTRINE)/SEPARATION OF POWERS DOCTRINE (SERVICES FOR DEVELOPMENTALLY DISABLED CHILDREN, DOH EXECUTIVE COMPENSATION CAP AND CONFLICT OF INTEREST RULES DO NOT VIOLATE SEPARATION OF POWERS DOCTRINE)

ADMINISTRATIVE LAW.

DEPARTMENT OF HEALTH EXECUTIVE-COMPENSATION-CAP AND CONFLICT-OF-INTEREST RULES FOR AGENCIES PROVIDING SERVICES TO DEVELOPMENTALLY DISABLED CHILDREN DO NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

The First Department, in a full-fledged opinion by Justice Dickerson, reversing Supreme Court, determined that two Department of Health (DOH) rules concerning services provided to developmentally disabled children did not violate the separation of powers doctrine. One rule placed a cap on executive compensation, and the other prohibited an agency which evaluates a child's need for services from itself providing those services ("conflict of interest" rule). The First Department explained the underlying general principles and then went through each of the *Boreali [71 NY2d 1]* "separation of powers" factors for each rule:

> "The cornerstone of administrative law is derived from the principle that the Legislature may declare its will, and after fixing a primary standard, endow administrative agencies with the power to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation" ... . "The constitutional principle of separation of powers . . . requires that the [L]egislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies" ... . "The branches of government cannot always be neatly divided, however, and common sense must be applied when reviewing a separation of powers challenge. As long as the [L]egislature makes the basic policy choices, the legislation need not be detailed or precise as to the agency's role" ... . Where an agency has been endowed with broad power to regulate in the public interest, courts generally will uphold reasonable acts that further the regulatory scheme ... .
>
> [The *Boreali*] factors are (1) "whether the agency did more than balanc[e] costs and benefits according to preexisting guidelines, but instead made value judgments entail[ing] difficult and complex choices between broad policy goals to resolve social problems"; (2) "whether the agency merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance"; (3) "whether the [L]egislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve"; and (4) "whether the agency used special expertise or competence in the field to develop the challenged regulations" ... . The "central theme" of a Boreali analysis is that "an administrative agency exceeds its authority when it makes difficult choices between public policy ends, rather than find[ing] means to an end chosen by the Legislature" ... . **Agencies for Children's Therapy Servs., Inc. v New York State Dept. of Health, 2015 NY Slip Op 09647, 2nd Dept 12-30-15**

ADMINISTRATIVE LAW (DRIVER'S LICENSES, COMMISSIONER HAS POWER TO DENY RELICENSING A DRIVER CONVICTED OF DWI BASED UPON TWO FIVE-POINT SPEEDING TICKETS)/DRIVER'S LICENSES (RELICENSING OF DRIVER CONVICTED OF DWI CAN BE DENIED BASED UPON TWO FIVE POINT SPEEDING TICKETS)/SPEEDING TICKETS (TWO FIVE POINT SPEEDS CONSTITUTE A SERIOUS DRIVING OFFENSE FOR WHICH RELICENSING CAN BE DENIED TO A DRIVER CONVICTED OF DWI)/RELICENSING OF DRIVERS CONVICTED OF DWI (CAN BE DENIED BASED UPON TWO FIVE POINT SPEEDING TICKETS)

ADMINISTRATIVE LAW, DRIVER'S LICENSES.

COMMISSIONER OF MOTOR VEHICLES HAS THE POWER TO DENY RELICENSING TO DRIVER CONVICTED OF DWI WHO HAD TWO SIX POINT SPEEDING TICKETS DURING THE LOOK-BACK PERIOD.

The Third Department, over a dissent, determined the Commissioner of Motor Vehicles, pursuant to the new DWI relicensing regulations, properly refused to relicense petitioner, who had been convicted of three alcohol-related offenses during ten years, based upon two six point speeding tickets during the look-back period. The question presented was whether two five point speeding tickets could properly constitute a "serious driving offense" justifying a denial of relicensing. The majority concluded the relevant regulation was a valid exercise of the Commissioner's powers. The court noted that the Commissioner has the discretion to grant a license under unusual, extenuating and compelling circumstances, but petitioner did not make an application under that provision:

> In the broadest sense, 15 NYCRR part 136 was promulgated to "establish[] criteria to identify individual problem drivers," that is, applicants for new licenses that "ha[ve] had a series of convictions, incidents and/or accidents . . . which in the judgment of the [C]ommissioner . . . upon review of the applicant's entire driving history, establishes that the person would be an unusual and immediate risk upon the highways" (15 NYCRR 136.1 [a], [b] [1]). In developing these regulations, the Commissioner considered empirical data, which indicated that drivers with three or more alcohol- or drug-related driving convictions are involved in a disproportionate number of motor vehicle accidents. Accordingly, the Commissioner rationally determined that such drivers "pose the highest risk to the general population" (NY Reg, Mar. 13, 2013 at 43) and, thus, should not be granted new, unrestricted licenses until after a waiting period of several years (see 15 NYCRR 136.5 [b] [3], [4]). With that in mind, we cannot consider the Commissioner's decision to subject such recidivist impaired or intoxicated drivers to a longer — or even a presumptively permanent — ban on relicensure to be arbitrary when, like petitioner, such drivers may independently qualify as "problem drivers" because of the presence of speeding or other violations on their driving records (see 15 NYCRR 136.1 [b] [1]; 136.5 [a] [2]; [b] [2]).
>
> As for petitioner's claim that her two six-point speeding violations during the 25-year look-back period are not serious enough to be expressly defined as a "serious driving offense" (see 15 NYCRR [a] [2] [iii]), we defer to the Commissioner's determination, as it was made pursuant to her discretionary authority (see Vehicle and Traffic Law § 510 [5], [6]), and it was within the area of expertise of the agency she heads ... . **Matter of Matsen v New York State Dept. of Motor Vehs., 2015 NY Slip Op 09159, 3rd Dept 12-10-15**

ADMINISTRATIVE LAW (RECONSIDERATION OF INCONSISTENT FINAL ORDERS BY NYS DIVISION OF HOUSING AND COMMUNITY RENEWAL)/DIVISION OF HOUSING AND COMMUNITY RENEWAL [DHCR] (RECONSIDERATION OF INCONSISTENT FINAL RENT-ADJUSTMENT ORDERS)

ADMINISTRATIVE LAW; LANDLORD-TENANT.

INCONSISTENCIES IN TWO FINAL RENT-ADJUSTMENT ORDERS ALLOWED RECONSIDERATION OF THE NATURE OF THE MAJOR CAPITAL IMPROVEMENTS [MCI'S] DESCRIBED IN THE ORDERS.

In a rent-increase matter which was before the NYS Division of Housing and Community Renewal (DHCR), the First Department, over an extensive two-justice dissent, determined a discrepancy between two prior rent-adjustment orders constituted "an irregularity in a vital matter" which allowed the DHRC, on remand, to reconsider the two (final) orders. The discrepancy related to the nature of the "major capital improvement [MCI]" (purportedly justifying a rent increase) to which each order referred. The dissent argued that the two orders were final orders and collateral estoppel prohibited further

reexamination of them. **Matter of 60 E. 12th St. Tenants' Assn. v New York State Div. of Hous. & Community Renewal, 2015 NY Slip Op 09599, 1st Dept 12-29-15**

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ANIMAL LAW

ANIMAL LAW (DOG BITE PROOF REQUIREMENTS EXPLAINED)/DOG BITE (PROOF REQUIREMENTS)

ANIMAL LAW.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED IN DOG-BITE CASE.

The Second Department determined defendants motion for summary judgment in a dog bite case was properly granted. The court explained the relevant law:

> Aside from a limited exception for straying farm animals ..., which has no application here, "New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a domestic animal" ... .
>
> To recover in strict liability for damages caused by a dog, the plaintiff must establish that the dog had vicious propensities and that the owner knew or should have known of the dog's vicious propensities ... . "Evidence tending to demonstrate a dog's vicious propensities includes evidence of a prior attack, the dog's tendency to growl, snap, or bare its teeth, the manner in which the dog was restrained, the fact that the dog was kept as a guard dog, and a proclivity to act in a way that puts others at risk of harm" ... .
>
> Here, the defendants established their prima facie entitlement to judgment as a matter of law by showing that they were not aware, and should not have been aware, of any vicious propensity ... . The defendants' submissions * * * established that, prior to the encounter with the plaintiff and her dog, there had never been any reported incident of aggression or viciousness ... . **Cosgrove v Trump Natl. Golf Club, 2015 NY Slip Op 09246, 2nd Dept 12-16-15**

ATTORNEYS

ATTORNEYS (MOTION TO DISQUALIFY ON CONFLICT OF INTEREST GROUNDS SHOULD HAVE BEEN GRANTED)/DISQUALIFICATION OF ATTORNEY (MOTION TO DISQUALIFY ON CONFLICT OF INTEREST GROUNDS SHOULD HAVE BEEN GRANTED)/CONFLICT OF INTEREST (MOTION TO DISQUALIFY ATTORNEY SHOULD HAVE BEEN GRANTED)

ATTORNEYS.

DEFENDANTS' MOTION TO DISQUALIFY PLAINTFF'S ATTORNEY ON CONFLICT OF INTEREST GROUNDS SHOULD HAVE BEEN GRANTED.

The Second Department determined defendants' motion to disqualify plaintiff's attorney on conflict of interest grounds should have been granted. Plaintiff's attorney had previously represented the defendant involving issues substantially related to those in the current action:

> "The disqualification of an attorney is a matter that rests within the sound discretion of the court" ... . "A party seeking disqualification of its adversary's counsel based on counsel's purported prior representation of that party must establish (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse'" ... . " A party's entitlement to be represented in ongoing litigation by counsel of [his or her] own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted'" ... . However, the right to be represented by counsel of one's own

choosing "will not supercede a clear showing that disqualification is warranted" ... . Any doubts as to the existence of a conflict of interest must be resolved in favor of disqualification so as to avoid even the appearance of impropriety ... . "Due to the significant competing interests in attorney disqualification cases,' however, the Court of Appeals has advised against mechanical application of blanket rules,' in favor of a careful appraisal of the interests involved'" ... . **Gjoni v Swan Club, Inc., 2015 NY Slip Op 09252, 2nd Dept 12-16-15**

ATTORNEYS (CHARGING LIEN IN MATRIMONIAL ACTIONS)/FAMILY LAW (ATTORNEY'S CHARGING LIEN IN MATRIMONIAL ACTIONS)/CHARGING LIEN (MATRIMONIAL ACTIONS)

ATTORNEYS, FAMILY LAW.

NO EQUITABLE DISTRIBUTION FUND TO WHICH ATTORNEY'S CHARGING LIEN COULD ATTACH.

The Second Department explained when an attorney's charging lien can be imposed in divorce proceedings:

"A charging lien is a security interest in the favorable result of litigation, giving the attorney equitable ownership interest in the client's cause of action and ensuring that the attorney can collect his fee from the fund he has created for that purpose on behalf of the client" (... see Judiciary Law § 475). In a matrimonial action, a charging lien will be available "to the extent that an equitable distribution award reflects the creation of a new fund by an attorney greater than the value of the interests already held by the client" ... . However, "[w]here the attorney's services do not create any proceeds, but consist solely of defending a title or interest already held by the client, there is no lien on that title or interest" ... .

In this case, the plaintiff and the defendant already owned the marital residence jointly as tenants by the entirety. Thus, the parties' settlement agreement merely permitted the plaintiff to retain her existing interest in the marital residence. "Although the nature of the property was converted from realty into dollars, her interest remained the same. Thus, no equitable distribution fund to which a charging lien can attach was created by the efforts of the [plaintiff's] attorney" ... . **Charnow v Charnow, 2015 NY Slip Op 09241, 2nd Dept 12-16-15**

ATTORNEYS (MALICIOUS PROSECUTION ACTION AGAINST LAW FIRMS WHICH REPRESENTED A CLIENT IN A FRAUDULENT SUIT DISMISSED)/MALICIOUS PROSECUTION (ACTION AGAINST LAW FIRMS WHICH REPRESENTED A CLIENT IN A FRAUDULENT SUIT DISMISSED)/JUDICIARY LAW 487 (ACTION AGAINST LAW FIRMS WHICH REPRESENTED A CLIENT IN A FRAUDULENT SUIT DISMISSED)

ATTORNEYS; JUDICIARY LAW; MALICIOUS PROSECUTION.

FACEBOOK'S SUIT AGAINST LAW FIRMS WHICH REPRESENTED A CLIENT IN A FRAUDULENT SUIT AGAINST FACEBOOK DISMISSED.

The First Department, reversing Supreme Court, dismissed a malicious prosecution and Judiciary Law 487 action brought by Facebook against law firms which represented a client who brought a fraudulent lawsuit against Facebook. The client apparently forged a contract with Mark Zuckerberg (the founder of Facebook) which would have given the client a 50% interest in Facebook. The client's suit against Facebook was dismissed and the client was indicted for wire fraud. The First Department held that the "conclusory" allegations in the complaint did not sufficiently plead the "no probable cause to bring the suit" element of a malicious prosecution cause of action or the "egregious conduct" element of a Judiciary Law 487 cause of action:

With respect to the element of probable cause [re: malicious prosecution], a plaintiff must allege that the underlying action was filed with "a purpose other than the adjudication of a claim" and that there was "an entire lack of probable cause in the prior proceeding" ... . Moreover, the lack of probable cause must be "patent" ... . In this context, the Court of Appeals has stated as follows: "Probable cause is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of. The want of probable cause does not mean the want of any cause, but the want of any reasonable cause, such as would persuade a man of ordinary care and prudence to believe in the truth of the

charge" ... . In a malicious prosecution action, the burden of proof to establish a want of probable cause is on the plaintiffs ... .

Here, the ... court's granting of a TRO at the inception of the [client's] action, prior to any of the defendants' representation of [the client], created a presumption that [the client] had probable cause to bring the case. This presumption must be overcome by specifically pleaded facts ... . Moreover, a plaintiff's factual allegations regarding lack of probable cause and malice may be disproved by the evidentiary material submitted by defendant in support of a motion to dismiss ... .

Applying these principles to this case, we find that the allegations in the instant complaint concerning defendants' lack of probable cause are entirely conclusory, and are thus inadequate to support the lack of probable cause element of the malicious prosecution claim ... . * * *
Relief under a cause of action based upon Judiciary Law § 487 "is not lightly given" ... and requires a showing of "egregious conduct or a chronic and extreme pattern of behavior" on the part of the defendant attorneys that caused damages ... . Allegations regarding an act of deceit or intent to deceive must be stated with particularity ... ; the claim will be dismissed if the allegations as to scienter are conclusory and factually insufficient ... . **Facebook, Inc. v DLA Piper LLP (US), 2015 NY Slip Op 09602, 1st Dept 12-29-15**

CIVIL PROCEDURE

CIVIL PROCEDURE (DEFAULT JUDGMENT HAS RES JUDICATA EFFECT)/RES JUDICATA (DEFAULT JUDGMENT HAS RES JUDICATA EFFECT)/DEFAULT JUDGMENT (GIVEN RES JUDICATA EFFECT)

CIVIL PROCEDURE.

DEFAULT JUDGMENT GIVEN RES JUDICATA EFFECT.

The Second Department, in affirming a cross-motion for summary judgment, explained that plaintiffs' action was precluded by the doctrine of res judicata based upon a default judgment taken against them. Plaintiffs did not move to vacate the default judgment. Therefore the judgment precluded plaintiffs' action as to any matters actually litigated and any matters that might have been litigated in the prior action:

"[R]es judicata, or claim preclusion, bars successive litigation based upon the same transaction or series of connected transactions if: (i) there is a judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was" ... . "The doctrine is applicable to an order or judgment taken by default which has not been vacated, as well as to issues which were or could have been raised in the prior proceeding" ... . Here, an order was issued in a declaratory judgment action granting the unopposed motion of the plaintiffs therein for leave to enter a default judgment against, inter alia, the appellants, who were named defendants in that action, upon their failure to appear or answer the complaint in that action. That order is conclusive for res judicata purposes as to any matters actually litigated or that might have been litigated in that action, and precludes the appellants from maintaining this action ... . **Albanez v Charles, 2015 NY Slip Op 08795, 2nd Dept 12-2-15**

CIVIL PROCEDURE (MOTION TO REARGUE, IMPROPER USE OF MOTION REQUIRED REVERSAL)/REARGUE, MOTION TO (IMPROPER USE OF MOTION TO REARGUE REQUIRED REVERSAL)/APPEALS (IMPROPER USE OF MOTION TO REARGUE REQUIRED REVERSAL DESPITE FAILURE TO RAISE THE ISSUE)

CIVIL PROCEDURE.

USE OF MOTION TO REARGUE TO RAISE NEW ISSUES REQUIRED REVERSAL.

The Third Department reversed based upon the improper use of a motion to reargue, despite the defendants' failure to raise the issue. The motion was improperly based upon a theory not raised in the original motion:

> "[A] motion to reargue is not available to advance a new theory of liability, or to present arguments different from those originally asserted" ... , but plaintiffs did just that in their motion for reargument, arguing that the installation of the original "[s]ewer [l]ine was no longer an issue" and that the alleged trespass caused by the new sewer line justified a grant of summary judgment. Supreme Court accordingly abused its discretion in granting reargument based upon the presence of the new sewer line, a claim that was not raised by plaintiffs in either their original motion for summary judgment or their complaint ... . **Wasson v Bond, 2015 NY Slip Op 08900, 3rd Dept 12-3-15**

CIVIL PROCEDURE (NOTICE TO ADMIT IMPROPERLY USED)/NOTICE TO ADMIT (IMPROPERLY USED)

CIVIL PROCEDURE.

NOTICE TO ADMIT IMPROPERLY SOUGHT CONCESSIONS THAT WENT TO HEART OF THE CONTROVERSY.

Reversing Supreme Court, the Second Department determined defendant's notice to admit sought concessions that went to the heart of the controversy which should not have been deemed admitted:

> CPLR 3123(a) authorizes the service of a notice to admit upon a party, and provides that if a timely response thereto is not served, the contents of the notice are deemed admitted ... . However, the purpose of a notice to admit is only to eliminate from contention those matters which are not in dispute in the litigation and which may be readily disposed of ... . A notice to admit is not to be employed to obtain information in lieu of other disclosure devices, or to compel admissions of fundamental and material issues or contested ultimate facts ... .
>
> Here, as the plaintiff correctly contends, ... the notice to admit improperly sought concessions that went to the essence of the controversy between the parties and involved matters that clearly were in contravention of the allegations of the complaint. Thus, the third-party defendant could not have reasonably believed that the admissions he sought were not in substantial dispute ... , and those items were palpably improper ... . Accordingly, the plaintiff was not obligated to respond to them ... . The Supreme Court therefore erred in deeming those items admitted by reason of the plaintiff's failure to respond to the notice. Since those items should not have been deemed admitted, the plaintiff's motion pursuant to CPLR 3123(b) to withdraw those deemed admissions was unnecessary. **32nd Ave. LLC v Angelo Holding Corp., 2015 NY Slip Op 08824, 2nd Dept 12-2-15**

CIVIL PROCEDURE (LONG-ARM JURISDICTION NOT DEMONSTRATED, SALE OF GOODS TO COMPANIES IN NEW JERSEY)/CIVIL PROCEDURE (JURISDICTION BASED UPON SITUS OF THE INJURY NOT DEMONSTRATED)/JURISDICTION (LONG-ARM JURISDICTION AND JURISDICTION BASED UPON SITUS OF THE INJURY NOT DEMONSTRATED)/LONG-ARM JURISDICTION (SALE OF GOODS TO OUT-OF-STATE BUYER NOT SUFFICIENT)/SITUS OF INJURY JURISDICTION (SITUS OF INJURY FROM ALLEGED FRAUDULENT CONVEYANCE WAS NOT NEW YORK)

CIVIL PROCEDURE.

PLAINTIFF, WHO SOLD GOODS TO NEW JERSEY COMPANIES FOR WHICH IT WAS NOT FULLY PAID, FAILED TO DEMONSTRATE NEW YORK JURISDICTION; FACTS PLED DID NOT DEMONSTRATE LONG-ARM JURISDICTION; SITUS OF THE INJURY WAS NEW JERSEY, NOT NEW YORK.

The First Department determined plaintiff did not demonstrate New York jurisdiction under the long arm statute (CPLR 302(a)(1) or under the statute imposing jurisdiction based on an out-of-state tort causing injury in New York (CPLR 302(a)(3)(ii)). Plaintiff allegedly sold goods to two New Jersey companies for which plaintiff was not fully paid. The assets of the two New Jersey companies were allegedly sold to a European company. Plaintiff alleged the transfer to the European company was a fraudulent conveyance. In finding both jurisdictional arguments lacking, the court wrote:

> ... [T]he purchase and sale transaction, whereby this in-state plaintiff shipped goods to the out-of-state defendants, who then failed to fully pay for the goods, is "[t]he classic instance in which personal jurisdiction is found not to exist" ... . Plaintiff has offered nothing but conclusory assertions to support long-arm jurisdiction under CPLR 302(a)(1). * * *
>
> The court also properly rejected plaintiff's assertion of jurisdiction under CPLR 302(a)(3)(ii), for an alleged tort committed without the state causing injury within the state. As to the tort committed without the state, plaintiff points to the alleged fraudulent conveyance .... This fails, however, because the "the situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are subsequently felt" ... . Thus, this alleged tortious act did not cause injury within New York, but in New Jersey. Plaintiff has also offered nothing but conclusory allegations that any defendant "derives substantial revenue from interstate or international commerce," as required for jurisdiction under CPLR 302(a)(3)(ii). **Cotia (USA) Ltd. v Lynn Steel Corp., 2015 NY Slip Op 09169, 1st Dept 12-10-15**

CIVIL PROCEDURE (EVIDENCE IN REPLY PAPERS PROPERLY CONSIDERED)/REPLY PAPERS (EVIDENCE SUBMITTED IN REPLY PAPERS PROPERLY CONSIDERED)

CIVIL PROCEDURE.

EVIDENCE SUBMITTED FOR THE FIRST TIME IN REPLY PAPERS PROPERLY CONSIDERED.

The Second Department determined Supreme Court had properly considered an affidavit submitted with the bank's reply papers in a mortgage foreclosure action. In the answering papers, appellant claimed that the bank did not properly serve notices of default. In the reply papers, the bank submitted an affidavit demonstrating proper service. The court explained when evidence submitted in reply papers can be considered:

> Although a party moving for summary judgement cannot meet its prima facie burden by submitting evidence for the first time in reply ... , and generally, evidence submitted for the first time in reply papers should be disregarded by the court ... , exceptions to the rule arise when the evidence submitted is in response to allegations raised for the first time in the opposition papers ... . **Citimortgage, Inc. v Espinal, 2015 NY Slip Op 09242,, 2nd Dept 12-16-15**

CIVIL PROCEDURE (DISCLOSURE OF FACEBOOK PHOTOGRAPHS AND INFORMATION ABOUT POST-ACCIDENT MESSAGES)/DISCLOSURE (FACEBOOK PHOTOGRAPHS AND INFORMATION ABOUT POST-ACCIDENT MESSAGES)/FACEBOOK (DISCLOSURE OF PHOTOGRAPHS AND INFORMATION ABOUT POST-ACCIDENT MESSAGES)

CIVIL PROCEDURE.

PLAINTIFF IN PERSONAL INJURY ACTION NOT REQUIRED TO DISCLOSE (1) FACEBOOK PHOTOGRAPHS SHE DID NOT INTEND TO INTRODUCE AT TRIAL AND (2) INFORMATION ABOUT POST-ACCIDENT MESSAGES.

The First Department, over an extensive dissenting memorandum by Justice Saxe, reversing Supreme Court, determined plaintiff in a personal injury action was not required to turn over to the defendant post-accident photographs of herself posted on Facebook which she does not intend to introduce at trial, and, further, plaintiff was not required to provide defendant with authorizations allowing Facebook to disclose when private messages were posted by the plaintiff after the accident and how long those messages were:

> CPLR 3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." In determining whether the information sought is subject to discovery, "[t]he test is one of usefulness and reason" ... . " It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims'" ... . Discovery demands are improper if they are based upon " hypothetical speculations calculated to justify a fishing expedition'" ... .
>
> This Court has consistently applied these settled principles in the context of discovery requests seeking a party's social media information. **Forman v Henkin, 2015 NY Slip Op 09350, 1st Dept 12-17-15**

CIVIL PROCEDURE (EQUITABLE ESTOPPEL DOCTRINE EXPLAINED)/EQUITABLE ESTOPPEL (CRITERIA EXPLAINED)

CIVIL PROCEDURE.

QUESTION OF FACT WHETHER DOCTRINE OF EQUITABLE ESTOPPEL PRECLUDED STATUTE OF LIMITATIONS DEFENSE, CRITERIA EXPLAINED.

The Second Department determined plaintiff raised a question of fact whether the doctrine of equitable estoppel precluded defendants' statute of limitations defense. The court explained the criteria:

> The doctrine of equitable estoppel will preclude a defendant from asserting the statute of limitations as a defense " where it is the defendant's affirmative wrongdoing . . . which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding'" ... . A plaintiff seeking to invoke the doctrine of equitable estoppel must "establish that subsequent and specific actions by defendants somehow kept [the plaintiff] from timely bringing suit" ... . "Equitable estoppel is appropriate where the plaintiff is prevented from filing an action within the applicable statute of limitations due to his or her reasonable reliance on deception, fraud or misrepresentations by the defendant" ... . Where the defendant has a fiduciary duty to the plaintiff, the doctrine of equitable estoppel may be invoked based on the defendant's failure to disclose facts underlying the claim ... . **North Coast Outfitters, Ltd. v Darling, 2015 NY Slip Op 09409, 2nd Dept 12-23-15**

CIVIL PROCEDURE (UNINCORPORATED ASSOCIATION PROPERLY JOINED BY NAMING PRESIDENT AS DEFENDANT)/ASSOCIATIONS (UNINCORPORATED ASSOCIATION PROPERLY JOINED BY NAMING PRESIDENT AS DEFENDANT)

CIVIL PROCEDURE; ASSOCIATIONS.

NAMING THE PRESIDENT OF AN UNINCORPORATED ASSOCIATION AS A DEFENDANT PROPERLY JOINED THE ASSOCIATION.

The Second Department determined an association was properly sued by naming the president as a defendant. An unincorporated association cannot sue or be sued solely in the association name:

> An unincorporated association such as the Condominium has "no legal existence separate and apart from its individual members" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C1025:2 at 341). "Unlike a partnership, an unincorporated association may not sue or be sued solely in the association name" ... . General Associations Law § 13 provides:
>
> > "An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally."
>
> Thus, by commencing the action against Fogarty, as president of the Condominium, the plaintiffs joined the Condominium ... . **Pascual v Rustic Woods Homeowners Assn., Inc., 2015 NY Slip Op 09415, 2nd Dept 12-23-15**

CIVIL PROCEDURE (CLASS ACTION PROPERLY CERTIFIED DESPITE DIFFERENCES IN DAMAGES)/CLASS ACTION (PROPERLY CERTIFIED DESPITE DIFFERENCES IN DAMAGES)/NEGLIGENCE (CLASS ACTION BASED ON DISCHARGE OF CHEMICALS INTO THE ATMOSPHERE)/ENVIRONMENTAL LAW (CLASS ACTION BASED ON DISCHARGE OF CHEMICALS INTO THE ATMOSPHERE)

CIVIL PROCEDURE; CLASS CERTIFICATION; NEGLIGENCE; ENVIRONMENTAL LAW.

CLASS ACTION PROPERLY CERTIFIED IN CASE ALLEGING NEGLIGENT DISCHARGE OF CHEMICALS INTO THE ATMOSPHERE.

In an action alleging defendants negligently discharged chemicals into the atmosphere, resulting in a reduction of property values and quality of life, the Fourth Department determined a class action was properly certified. The court explained the criteria:

> "[A] class action may be maintained in New York only after the five prerequisites set forth in CPLR 901 (a) have been met, i.e., the class is so numerous that joinder of all members is impracticable, common questions of law or fact predominate over questions affecting only individual members, the claims or defenses of the representative parties are typical of the class as a whole, the representative parties will fairly and adequately protect the interests of the class, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy" ... . A plaintiff seeking class certification has the "burden of establishing the prerequisites of CPLR 901 (a) and thus establish[ing] . . . entitlement to class certification" ... .
>
> Although the individual class members may have sustained differing amounts of damages, it is well settled that " the amount of damages suffered by each class member typically varies from individual to individual, but that fact will not prevent the suit from going forward as a class action if the important legal or factual issues involving liability are common to the class' " ... . * * *
>
> ... [B]ecause "the typicality requirement relates to the nature of the claims and the underlying transaction, not the amount or measure of damages, [the fact that the class representative's] damages may differ from those of other members of the class is not a proper basis to deny class certification" ... . **DeLuca v Tonawanda Coke Corp., 2015 NY Slip Op 09739, 4th Dept 12-31-15**

CIVIL PROCEDURE (MOTION TO SET ASIDE VERDICT SHOULD HAVE BEEN GRANTED BASED ON JUDGE'S IMPROPER COMMENTS)/MOTION TO SET ASIDE VERDICT (JUDGE'S IMPROPER COMMENTS)/JUDGES (IMPROPER COMMENTS WARRANTED SETTING ASIDE DAMAGES VERDICT)

CIVIL PROCEDURE; JUDGES.

JUDGE'S IMPROPER COMMENTS CONCERNING PLAINTIFF'S EXPERT WARRANTED A NEW TRIAL ON DAMAGES.

In finding a motion to set aside the verdict in a personal injury case should have been granted, the Second Department determined the plaintiff was entitled to a new trial on damages (in part) because of the improper comments made by the judge. The judge cast doubt on the plaintiff's expert's testimony:

> A motion pursuant to CPLR 4404(a) to set aside a verdict and for a new trial in the interest of justice may be granted where improper comments by the trial court deprive a party of a fair trial ... . "[L]itigants are entitled, as a matter of law, to a fair trial free from improper comments by counsel or the trial court" ... . A trial court "has broad authority to control the courtroom, rule on the admission of evidence, elicit and clarify testimony, expedite the proceedings and to admonish counsel and witnesses when necessary" ... . Nevertheless, "[a] trial judge should at all times maintain an impartial attitude and exercise a high degree of patience and forebearance. A trial judge may not so far inject himself [or herself] into the proceedings that the jury could not review the case in the calm and untrammeled spirit necessary to effect justice" ... .
>
> Here, at the trial on the issue of damages, the plaintiff presented the expert testimony of an orthopedic surgeon who examined the injured plaintiff. Before that examining physician testified, the trial court directed plaintiffs' counsel to ask questions in hypothetical form as to the physician's opinion regarding prognosis and the need for future medical care, and during the physician's direct testimony, defense counsel made a number of objections to those questions. In responding to those objections, the trial court gratuitously and repeatedly emphasized that the physician was an examining rather than treating physician and that he was only "assuming" that the injured plaintiff would need future medical care that was causally related to the accident. The record reflects that, with these repeated comments, "[t]he court conveyed an impression of incredulity" toward the physician's opinions ... . The cumulative effect of the court's comments deprived the plaintiffs of a fair trial on the issue of damages ... . **Ioffe v Seruya, 2015 NY Slip Op 09407, 2nd Dept 12-23-15**

CIVIL PROCEDURE (VENUE, PRINCIPAL OFFICE ON DEPARTMENT OF STATE APPLICATION IS THE CONTROLLING LOCATION OF A FOREIGN LIMITED LIABILITY COMPANY FOR VENUE PURPOSES)/VENUE (FOREIGN LIMITED LIABILITY COMPANY, LOCATION OF PRINCIPAL OFFICE AS LISTED ON DEPARTMENT OF STATE APPLICATION)/LIMITED LIABILITY COMPANY, FOREIGN (FOR VENUE PURPOSES, LOCATION OF PRINCIPAL OFFICE AS LISTED ON DEPARTMENT OF STATE APPLICATION IS CONTROLLING LOCATION)

CIVIL PROCEDURE; LIMITED LIABILITY COMPANY LAW.

PRINCIPAL OFFICE OF A FOREIGN LIMITED LIABILITY COMPANY, AS LISTED ON THE DEPARTMENT OF STATE APPLICATION FOR AUTHORITY TO CONDUCT BUSINESS, IS THE CONTROLLING LOCATION FOR VENUE PURPOSES.

The Second Department, reversing Supreme Court, determined that appellant's motion for a change of venue should have been granted. Appellants demonstrated that the foreign limited liability company's application for authority to conduct business in New York listed a principal office in New York County. Plaintiff brought the action in Queens County, alleging appellant's principal place of business is in Queens County. The principal office in New York County, pursuant to Limited Liability Company Law 102[s], was the controlling location for venue purposes:

> Pursuant to CPLR 503(a), the venue of an action is properly placed in the county in which any of the parties resided at the time of commencement ... . In support of their motion, the appellants established that QPS was a resident of New York County at the time of commencement by producing a certified copy of QPS's application for authority to conduct business filed with the New York State Department of State, which listed New York as the county in which its principal office was located ... . The plaintiff did not dispute the fact that the application for

authority designated New York County as the location of QPS's principal office, but claimed that QPS is a resident of Queens County because that is the location of its principal place of business. However, the sole residence of a foreign corporation or a foreign limited liability company for venue purposes is the county where its principal office is located as designated in its application for authority to conduct business filed with the New York State Department of State, regardless of where it transacts business or maintains its actual principal office or facility (see CPLR 503[c]...). Such office need not be a place where business activities are conducted by the limited liability company ... . **Carlton Group, Ltd. v Property Mkts. Group, Inc., 2015 NY Slip Op 09423, 2nd Dept 12-23-15**

CIVIL PROCEDURE (911 TAPES DISCOVERABLE IN WRONGFUL DEATH ACTION)/MUNICIPAL LAW (911 TAPES DISCOVERABLE IN WRONGFUL DEATH ACTION)/EVIDENCE (911 TAPES DISCOVERABLE IN WRONGFUL DEATH ACTION)/NEGLIGENCE (911 TAPES DISCOVERABLE IN WRONGFUL DEATH ACTION)/WRONGFUL DEATH (911 TAPES DISCOVERABLE)/911 TAPES (DISCOVERABLE IN WRONGFUL DEATH ACTION)

CIVIL PROCEDURE; MUNICIPAL LAW; EVIDENCE; NEGLIGENCE.

RECORDINGS OF 911 CALLS RE: PLAINTIFF'S DECEDENT'S CAR ACCIDENT DISCOVERABLE IN A WRONGFUL DEATH ACTION.

In a matter of first impression at the appellate level, the Second Department determined the recordings of 911 calls relating to plaintiff's decedent's (Reece's) car accident were discoverable. The wrongful death action was brought against the state alleging that a traffic counting device shattered when plaintiff's decedent's car drove over it, puncturing the gas tank and causing a fire which killed plaintiff's decedent and two children. The claimant served a subpoena upon non-party county for the recordings and the county moved to quash the subpoena. The Second Department held that the motion to quash was properly denied:

> The County moved to quash the subpoena on the ground that under County Law § 308(4), 911 recordings and documents are not discoverable by any entity or person other than certain designated public agencies and emergency medical providers. The claimant opposed the motion and thereafter moved to compel discovery of, inter alia, the 911 tapes, arguing that they were discoverable under CPLR 3101 as material and relevant matter. Specifically, the claimant argued that the material may be expected to reveal why Reece's vehicle left the roadway, the length of time the vehicle's occupants experienced conscious pain and suffering, and the amount of time it took for police to respond to the scene. * * *
>
> We view the language of County Law § 308(4) as generally prohibiting entities and private individuals from accessing 911 tapes and records ... . However, the statute is not intended to prohibit the disclosure of matter that is material and relevant in a civil litigation, accessible by a so-ordered subpoena or directed by a court to be disclosed in a discovery order ... . Indeed, in analogous criminal practice, 911 tapes and records are frequently made available to individual defendants as part of the People's disclosure obligations pursuant to People v Rosario (9 NY2d 286...) and are admitted at trials to describe events as present sense impressions of witnesses ... , to identify perpetrators as present sense impressions ... , or as excited utterances ... . Clearly, the general language of County Law § 308(4), which is part of the statute governing the establishment of an emergency 911 system in various counties, cannot be interpreted as prohibiting court-ordered discovery of 911 material in civil litigation. **Anderson v State of New York, 2015 NY Slip Op 09648, 2nd Dept 12-30-15**

CIVIL PROCEDURE; NEGLIGENCE; MUNICIPAL LAW; SHERIFF.

SHERIFF IS NOT VICARIOUSLY LIABLE FOR EMPLOYEES OF THE SHERIFF'S DEPARTMENT; SHERIFF, THEREFORE, IS NOT UNITED IN INTEREST WITH THE SHERIFF'S DEPARTMENT OR THE COUNTY; RELATION-BACK DOCTRINE DOES NOT APPLY; SHERIFF CANNOT BE ADDED TO THE COMPLAINT AFTER THE STATUTE OF LIMITATIONS HAS RUN.

Plaintiff sued the county alleging plaintiff's decedent was not properly screened and supervised when placed in the Erie County Holding Center where plaintiff's decedent committed suicide. After the statute of limitations had run, plaintiff was allowed to add the Erie County Sheriff as a defendant. The Fourth Department reversed, explaining that the Sheriff is not vicariously liable for the actions of the Sheriff's Department and is therefore not "united in interest" with the County/Sheriff's Department:

> In order for the relation back doctrine to apply, a plaintiff must establish that "(1) both claims arose out of [the] same conduct, transaction or occurrence, (2) the new party is united in interest with the original defendant[s], and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well" ... .
>
> .... [Plaintiff did not satisfy the second prong, i.e., unity of interest. "In [the] context [of this case], unity of interest means that the interest of the parties in the [subject matter] is such that they stand or fall together and that judgment against one will similarly affect the other . . . Although the parties might share a multitude of commonalities, . . . the unity of interest test will not be satisfied unless the parties share precisely the same jural relationship in the action at hand . . . Indeed, unless the original defendant[s] and new [defendant] are vicariously liable for the acts of the other[,] . . . there is no unity of interest between them" ... .
>
> Here, defendant County of Erie (County) is not united in interest with the Sheriff inasmuch as the County cannot be held vicariously liable for the alleged negligent acts of the Sheriff or his deputies ... . Nor is defendant Erie County Sheriff's Department (Sheriff's Department) united in interest with the Sheriff for purposes of the relation back doctrine. The Sheriff is not vicariously liable for the alleged negligent acts of the deputies employed at the Holding Center ... . In addition, the Sheriff's Department does not have a legal identity separate from the County ... , and thus an "action against the Sheriff's Department is, in effect, an action against the County itself" ... . Given that the Sheriff and the County are not united in interest, it follows that the Sheriff and the Sheriff's Department are not united in interest, and the court therefore erred in granting plaintiff's motion for leave to amend the complaint to add the Sheriff as a party. **Johanson v County of Erie, 2015 NY Slip Op 09736, 4th Dept 12-31-15**

CIVIL PROCEDURE (MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION, BURDEN NEVER SHIFTS TO PLAINTIFF EVEN IF DEFENDANT SUBMITS EVIDENCE)/MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION (BURDEN NEVER SHIFTS TO PLAINTIFF EVEN IF DEFENDANT SUBMITS EVIDENCE)

CIVIL PROCEDURE; REAL ESTATE.

ANALYTICAL CRITERIA FOR MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION, WHERE DEFENDANT SUBMITS EVIDENCE, CLEARLY EXPLAINED; PLAINTIFF IS NOT PENALIZED FOR NOT SUBMITTING EVIDENCE IN OPPOSITION; BURDEN NEVER SHIFTS TO PLAINTIFF.

The Second Department determined the complaint stated a cause of action for specific performance of a real estate contract. The court offered a clear explanation of the analytical criteria to be used when defendant submits evidence in support of a motion to dismiss for failure to state a cause of action. Here, the fact that plaintiff submitted no evidence in opposition was of no consequence. The evidence submitted by defendant was not sufficient to demonstrate, as a matter of law, the complaint did not state a cause of action:

> In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), "the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" ... . "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" ... .
>
> "A court is . . . permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7)" ... . However, "on a motion made pursuant to CPLR 3211(a)(7), the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party" ..., and a plaintiff "will not be penalized because he [or she] has not made an evidentiary showing in support of his [or her] complaint" ... . When evidentiary material is considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion has not been converted to one for summary judgment, "the criterion is whether the [plaintiff] has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the [plaintiff] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it . . . dismissal should not eventuate" ... .
>
> Contrary to the defendant's contention, the complaint adequately alleged a cause of action for specific performance of a contract for the sale of real property. **E & D Group, LLC v Vialet, 2015 NY Slip Op 09400, 2nd Dept 12-23-15**

CONTRACT LAW

CONTRACT LAW (BREACH OF WARRANTY, RESIDENTIAL MORTGAGE-BACKED SECURITIES)/WARRANTY, BREACH OF (RESIDENTIAL MORTGAGE-BACKED SECURITIES)/RESIDENTIAL MORTGAGE-BACKED SECURITIES (BREACH OF WARRANTY)

CONTRACT LAW.

MOTION TO DISMISS BREACH OF WARRANTY ACTION PROPERLY DENIED; THE WARRANTY CONCERNED THE QUALITY OF MORTGAGES POOLED INTO RESIDENTIAL MORTGAGE-BACKED SECURITIES.

The First Department, in a full-fledged opinion by Justice Moskowitz, determined the motion to dismiss the breach of warranty action against JP Morgan Mortgage Acquisition Corporation (JPMMAC) was properly denied. The warranty required JPMMAC to buy back any defective mortgages which were pooled into residential mortgage-backed securities. The lawsuit was commenced because JPMMAC refused to do so when notified of the problem mortgages. JPMMAC argued that the language of the warranty narrowly restricted the time to which it applied (constituting a so-called "gap" or "bring-down" warranty). Under standard principles of contract interpretation, however, the First Department held that the warranty applied no matter when the material misstatements occurred during the warranty period:

A contractual provision that is clear on its face "must be enforced according to the plain meaning of its terms" ... . This rule applies "with even greater force in commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople" ... . In addition, "courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" ... .

Plaintiff's claim ... states that "[w]ith respect to the period from [the] Whole Loan Sale Date to and including the Closing Date," JPMMAC warrants that the representations in the Mortgage Loan Schedule and loan tape are correct. There is simply no language in this warranty addressing when the defects in the loans must arise for JPMMAC to be held liable for a misrepresentation on the Mortgage Loan Schedule or loan tape. Rather, the language ... is straightforward: if false information — for example, information about a borrower's income or the loan-to-value ratio of a mortgage — was on the Mortgage Loan Schedule and loan tape before October 30, 2006, it constitutes a breach of JPMMAC's warranties as long as it remained on the Mortgage Loan Schedule or loan tape during the warranty period (that is, October 30, 2006 to December 20, 2006). Stated another way, JPMMAC warranted against the existence of any material misstatement during the warranty period, no matter when the misstatements first appeared on the Mortgage Loan Schedule or loan tape. **Bank of N.Y. Mellon v WMC Mtge., LLC, 2015 NY Slip Op 08794, 1st Dept 12-1-15**

CONTRACT LAW (BEST EVIDENCE RULE, FAILURE TO DEMONSTRATE AGREEMENT TO SHORTENED STATUTE OF LIMITATIONS)/EVIDENCE (BEST EVIDENCE RULE, FAILURE TO DEMONSTRATE AGREEMENT TO SHORTENED STATUTE OF LIMITATIONS)/BEST EVIDENCE RULE (FAILURE TO DEMONSTRATE AGREEMENT TO SHORTENED STATUTE OF LIMITATIONS)

CONTRACT LAW, EVIDENCE.

"BEST EVIDENCE RULE" CRITERIA EXPLAINED; NOT MET HERE.

The Second Department determined defendant did not meet the requirements of the best evidence rule and defendant's summary judgment motion should not have been granted. Defendant argued that plaintiff's breach of contract action was time-barred because a pricing offer/customer agreement included a shortened statute of limitations (one year). However, defendant produced only unsigned documents together with an employee's (Muscillo's) affidavit saying the original signed document was likely lost. The Second Department explained why that evidence was not sufficient under the best evidence rule:

"The best evidence rule requires the production of an original writing where its contents are in dispute and are sought to be proven" ... . "The rule serves mainly to protect against fraud, perjury and inaccuracies . . . which derive from faulty memory'" ... . Under an exception to the best evidence rule, "secondary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence and has not procured its loss or destruction in bad faith" ... . "Loss may be established upon a showing of a diligent search in the location where the document was last known to have been kept, and through the testimony of the person who last had custody of the original. Indeed, the more important the document to the resolution of the ultimate issue in the case, the stricter becomes the requirement of the evidentiary foundation establishing loss for the admission of secondary evidence" ... .

Here, given the significance of the lost original Pricing Offer to the issue of whether the action was time-barred, Muscillo's conclusory averments were insufficient to explain its unavailability ... . The defendant did not submit an affidavit from the person who last had custody of the original 2010 Pricing Offer, or from a person with personal knowledge of the search for it.

Even if the defendant's submissions were sufficient to establish the unavailability of the original Pricing Offer, Muscillo's affidavit was insufficient secondary evidence that an original signed agreement ever existed. **Amica Mut. Ins. Co. v Kingston Oil Supply Corp., 2015 NY Slip Op 09059, 2nd Dept 12-9-15**

CRIMINAL LAW

CRIMINAL LAW (INEFFECTIVE ASSISTANCE, FAILURE TO OBJECT TO REFERENCES TO STRICKEN TESTIMONY)/INEFFECTIVE ASSISTANCE (FAILURE TO OBJECT TO REFERENCES TO STRICKEN TESTIMONY)

CRIMINAL LAW.

DEFENSE COUNSEL'S FAILURE TO OBJECT TO PROSECUTOR'S REFERENCES TO STRICKEN TESTIMONY CONSTITUTED INEFFECTIVE ASSISTANCE REQUIRING REVERSAL.

The Third Department determined defense counsel's failure to object to the prosecutor's references to stricken testimony in summation amounted to ineffective assistance of counsel requiring reversal. The defendant was accused of running over his girlfriend with a pickup truck:

> Here, during direct examination by the People, the witness testified that he heard defendant yell, "I hope you f***ing die, bitch." Finding that this testimony went to defendant's state of mind, County Court overruled counsel's objection and permitted the statement into evidence. The witness then testified that he assumed defendant was directing such comment toward [the victim]. Upon defendant's further objection, County Court held that the witness could not speculate as to whom defendant had directed his comment, and the witness's testimony in that regard was stricken from the record. Despite this evidentiary ruling, during summation, the People twice made improper references to the stricken testimony and twice those references went without objection from defense counsel or curative instructions from the court. Specifically, at one point during closing argument the prosecutor stated, "If this was some sort of an accident, then why would the defendant scream at [the victim], I hope you f***ing die, bitch? Is that consistent with an accident or is that consistent with an intent to injure? If you accidentally just ran over your significant other, is that what you would say to them?" ... . **People v Ramsey, 2015 NY Slip Op 08874, 3rd Dept 12-3-15**

CRIMINAL LAW (JURY NOTES, O'RAMA ERROR NOT PRESERVED)/JURY NOTES (O'RAMA ERROR NOT PRESERVED)

CRIMINAL LAW.

O'RAMA-PROCEDURE ERRORS WERE NOT MODE OF PROCEEDINGS ERRORS AND WERE NOT PRESERVED FOR REVIEW BY OBJECTIONS.

The First Department determined that the O'Rama-procedure errors made by the trial judge did not rise to the level of "mode of proceedings" errors and were not preserved for appeal by objection. The note was read essentially verbatim in open court, but the judge did not give counsel advance notice of the contents of the note and did not give the parties the chance for input re: the response:

> The trial court's handling of the note sent out by the jury during deliberations did not constitute a mode of proceedings error ... . The note contained two questions and two requests for exhibits. While the court initially read only the first substantive question into the record in the presence of counsel before the jury was brought into the courtroom, once the jury was brought in, the court read the remainder of the note aloud, essentially verbatim, stopping at the end of each of the four parts to provide its response. Although the court did not inform counsel in advance about the entirety of the note or give the parties any opportunity for input into the court's proposed responses, by reading the full contents of the note in the presence of the parties and the jury, the court satisfied its core responsibility ... . **People v Ramirez, 2015 NY Slip Op 08772, 1st Dept 12-1-15**

CRIMINAL LAW (JURY NOTES, PARAPHRASING JURY NOTE WAS A MODE OF PROCEEDINGS ERROR)/JURY NOTES (PARAPHRASING NOTE WAS A MODE OF PROCEEDINGS ERROR)/MODE OF PROCEEDINGS ERROR (PARAPHRASING JURY NOTE)

CRIMINAL LAW.

MODE OF PROCEEDINGS ERROR TO PARAPHRASE SUBSTANTIVE JURY NOTE.

The First Department determined the trial judge's paraphrasing a substantive jury note, rather than reading it into the record verbatim, was a mode of proceedings error requiring reversal:

> By only paraphrasing some of the content of the third note, and failing to read the precise content of the that note into the record verbatim at any time, the court violated the procedures set forth in People v O'Rama (78 NY2d 270, 277-278 [1991]), more recently reiterated in People v Nealon (__ NY3d __ , 2015 NY Slip Op 07781 [2015]) ...). A court does not satisfy its responsibility to provide counsel with meaningful notice of a jury's substantive inquiry by summarizing the substance of the jurors' note ... . The ... note, which was a substantive jury inquiry, should not have been paraphrased, but read in its entirety so that counsel had meaningful notice of its contents and, therefore, an opportunity to formulate a proposed response. Although counsel did not object to how the court handled the ... note, the court's failure to read this substantive note into the record verbatim, is a "mode of proceedings error," and given this departure, counsel was not required to object to it in order to preserve any claim of error for appellate review ... . **People v Lane, 2015 NY Slip Op 08771, 1st Dept 12-1-15**

CRIMINAL LAW (SENTENCING, CATU ERROR PRECLUDES USE OF CONVICTION AS PREDICATE)/SENTENCING (CATU ERROR PRECLUDES USE OF CONVICTION AS PREDICATE)

CRIMINAL LAW.

CONVICTION IN VIOLATION OF CATU CAN NOT BE USED AS PREDICATE FOR SENTENCING.

The First Department determined the failure to mention the imposition of a period of postrelease supervision (PRS) in connection with a 2000 conviction precluded using that conviction as a predicate felony for sentencing purposes. The court noted that the 2005 Catu decision, which held defendants must be informed of PRS, applied retroactively:

> CPL 400.15(7)(b) provides: "A previous conviction . . . which was obtained in violation of the rights of the defendant under the applicable provisions of the constitution of the United States must not be counted in determining whether the defendant has been subjected to a predicate violent felony conviction." The People's argument that a Catu error does not violate the United States Constitution is improperly raised for the first time in their reply brief, and is without merit in any event.
>
> "[A] conviction obtained in violation of Catu implicates rights under the federal Constitution as well as the state constitution" ... . Furthermore, although the Catu error in this case occurred in 2000, prior to the 2005 Catu decision, Catu applies retroactively ... . **People v Fagan, 2015 NY Slip Op 08782, 1st Dept 12-1-15**

CRIMINAL LAW.

SEVEN-YEAR DELAY BETWEEN ARREST AND INDICTMENT DID NOT VIOLATE RIGHT TO SPEEDY TRIAL.

The Second Department determined Supreme Court properly found that the seven-year delay between defendant's arrest and indictment did not violate defendant's right to a speedy trial. The court explained the relevant law:

> A defendant's right to a speedy trial is guaranteed both by the United States Constitution ... . Moreover, an unjustified delay in prosecution will deprive a defendant of the State constitutional right to due process ... . However, "a determination made in good faith to delay prosecution for sufficient reasons will not deprive defendant of due process even though there may be some prejudice to defendant" ... . Where there has been extended delay, the People have the burden to establish good cause ... .
>
> In determining whether a defendant's constitutional right to a speedy trial has been violated, the Court of Appeals has articulated five factors to be considered: (1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charges; (4) any extended period of pretrial incarceration; and (5) any impairment of the defendant's defense ... . These factors apply as well to the due process guarantee ... . "In this State, we have never drawn a fine distinction between due process and speedy trial standards' when dealing with delays in prosecution" ... . **People v Allen, 2015 NY Slip Op 08850, 2nd Dept 12-2-15**

CRIMINAL LAW.

17-YEAR DELAY ADEQUATELY EXPLAINED, SPEEDY TRIAL RIGHT NOT VIOLATED.

The Third Department determined a 17-year delay between the act a defendant's indictment did not violate his right to a speedy trial. Several years of the delay were attributed to the ability to test DNA without destroying it (not available at the time of the offense, 1994). In addition, a witness came forward in 2011. The court explained the applicable law:

> "In determining whether there is an undue delay, the trial court must consider '(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'" ... . Where, as here, the delay is extraordinary, "close scrutiny of the other factors, especially the question of why the delay occurred," is required ... .
>
> The People introduced evidence indicating that DNA technology in 1994 would have required the destruction of the two samples of biological material that had been collected. Further evidence established that technology at the time that the samples were tested — in 2004 and 2011 — did not require such destruction. In addition to this physical evidence becoming probative, a witness came forward in May 2011 implicating defendant in the murder. Such evidence demonstrated a good faith basis for the delay in proceeding with the prosecution ... .
>
> Turning to the remaining factors, the charge of murder in the second degree is "inarguably a very serious offense" ... . Further, defendant was never incarcerated during the 17-year delay ... . In addition, defendant's generic claim that witnesses may have moved and that their recall of events is no longer as strong as it once was is too speculative to carry significant weight in the analysis ... . Although defendant faced a substantial delay, upon considering these factors, we find that his constitutional right to a speedy trial was not violated ... . **People v Chaplin, 2015 NY Slip Op 08869, 2nd Dept 12-2-15**

CRIMINAL LAW (POSTRELEASE SUPERVISION, FAILURE TO INFORM DEFENDANT OF)/SENTENCING (POSTRELEASE SUPERVISION, FAILURE TO INFORM DEFENDANT OF)/POSTRELEASE SUPERVISION (FAILURE TO INFORM DEFENDANT OF)/PLEA (GUILTY PLEA INVOLUNTARY IF DEFENDANT NOT INFORMED OF POSTRELEASE SUPERVISION)

CRIMINAL LAW.

FAILURE TO INFORM DEFENDANT OF THE PERIOD OF POSTRELEASE SUPERVISION AT THE TIME OF THE PLEA RENDERED THE PLEA INVALID.

The Third Department reversed defendant's conviction by guilty plea because the defendant was not informed of the period of postrelease supervision at the time of the plea. Defendant was told by the sentencing judge (at the time of the plea) if he violated interim probation (which was to lead to a felony probation) he would be sentenced to four years in prison. No mention was made of postrelease supervision. Defendant violated the terms of the interim probation and was sentenced to four years incarceration plus two years of postrelease supervision:

> ... [I]t is well settled that, for a defendant's plea to be knowingly, voluntarily and intelligently entered into, a court must advise him or her of the direct consequences of a plea prior to sentencing, including the existence and duration of any postrelease supervision requirement ... . Here, as the People concede, at the time of his plea, defendant was not properly made aware of the postrelease supervision component of his sentence. Accordingly, defendant's decision to plead guilty was not a knowing, voluntary and intelligent one and, therefore, the judgment of conviction must be reversed ... . **People v Binion, 2015 NY Slip Op 09142, 3rd Dept 12-10-15**

CRIMINAL LAW (FAILURE TO GIVE JUSTIFICATION DEFENSE JURY INSTRUCTION REQUIRED REVERSAL)/JUSTIFICATION DEFENSE (FAILURE TO CHARGE JURY REQUIRED REVERSAL)/JURY INSTRUCTIONS (FAILURE TO GIVE JUSTIFICATION DEFENSE JURY INSTRUCTION REQUIRED REVERSAL)

CRIMINAL LAW.

JUSTIFICATION DEFENSE JURY INSTRUCTION SHOULD HAVE BEEN GIVEN, CONVICTION REVERSED.

The Second Department determined the defense request for a jury instruction on the justification defense should have been granted. There was evidence of a struggle for a knife and defendant feared for his life:

> A person is justified in using deadly physical force against another if he or she reasonably believes such to be necessary to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of deadly physical force by such other person ... . "A trial court must charge the jury with respect to the defense of justification whenever, viewing the record in the light most favorable to the defendant, there is any reasonable view of the evidence which would permit the jury to conclude that the defendant's conduct was justified" ... . A failure to give a justification charge under such circumstances constitutes reversible error ... .
>
> Here, the defendant requested a justification charge to the jury based, inter alia, upon his trial testimony that during his altercation with the decedent, there was a struggle for the Swiss Army-style knife attached to his key chain that he then used to inflict the fatal wounds. The defendant also testified that he feared for his life during the altercation. Under these circumstances, considering the record in the light most favorable to the defendant, the Supreme Court erred in failing to provide the jury with the requested justification charge ... . **People v Austin, 2015 NY Slip Op 09112, 2nd Dept 12-9-15**

CRIMINAL LAW (BURGLARY, UNLOCKED VESTIBULE DID CONSTITUTE VICTIM'S DWELLING)/BURGLARY (UNLOCKED VESTIBULE DID NOT CONSTITUTE VICTIM'S DWELLING)

CRIMINAL LAW.

INSUFFICIENT EVIDENCE DEFENDANT COMMITTED BURGLARY; DEFENDANT, THROUGH AN UNLOCKED DOOR, ENTERED A VESTIBULE THAT WAS NOT RESTRICTED TO USE BY TENANTS.

The Second Department reversed defendant's burglary conviction because of insufficient evidence defendant entered the victim's dwelling. Defendant entered a vestibule through an unlocked door and there was no indication the area was restricted to use by tenants only:

> To be guilty of burglary in the first degree, a person must, among other things, knowingly enter or remain unlawfully in a dwelling (see Penal Law § 140.30). Here, while the evidence at trial showed that the defendant entered the vestibule of the victim's apartment building through an outer door that did not lock, there was no indicia that access to the building or vestibule was restricted to tenants. Thus, the weight of the evidence does not warrant a finding that the defendant knowingly entered the victim's dwelling ... . **People v Huggins, 2015 NY Slip Op 09119, 2nd Dept 12-9-15**

CRIMINAL LAW (53-MONTH PRE-INDICTMENT DELAY DID NOT DENY DEFENDANT DUE PROCESS)/SPEEDY TRIAL (53-MONTH PRE-INDICTMENT DELAY DID NOT DENY DEFENDANT DUE PROCESS)/PRE-INDICTMENT DELAY (53-MONTH DELAY DID NOT DENY DEFENDANT DUE PROCESS)

CRIMINAL LAW.

53-MONTH PRE-INDICTMENT DELAY DID NOT DENY DEFENDANT DUE PROCESS.

The Fourth Department determined a 53-month delay between the incident and indictment did not constitute a denial of due process. Defendant was charged with burglary, robbery and criminal possession of a weapon. He was convicted of criminal possession of a weapon. The court explained the analytical criteria re: speedy trial/due process and went through the facts in support of each of the criteria:

> "A defendant's right to a speedy trial is guaranteed by both the Constitution ... and by statute ... . A defendant may also challenge, on due process grounds, preindictment delay ..., and "the factors utilized to determine if a defendant's rights have been abridged are the same whether the right asserted is a speedy trial right or the due process right to prompt prosecution" ... . The inquiry involves weighing the factors enunciated in Taranovich: "(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" (Taranovich, 37 NY2d at 445...). "Generally when there has been a protracted delay, certainly over a period of years, the burden is on the prosecution to establish good cause" ... . **People v Johnson, 2015 NY Slip Op 09449, 4th Dept 12-23-15**

CRIMINAL LAW (FAILURE TO APPRISE COUNSEL OF JURY NOTE CONTENTS REQUIRED REVERSAL)/JURY NOTES (FAILURE TO APPRISE COUNSEL OF CONTENTS REQUIRED REVERSAL)/ORAMA ERROR (FAILURE TO APPRISE COUNSEL OF CONTENTS OF JURY NOTE REQUIRED REVERSAL IN THE ABSENCE OF PRESERVATION)

CRIMINAL LAW.

FAILURE TO APPRISE COUNSEL OF THE CONTENTS OF A NOTE FROM THE JURY REQUIRED REVERSAL.

The Fourth Department determined the trial judge's failure to apprise counsel of the specific, substantive contents of a jury note requesting a readback of testimony required reversal (in the absence of preservation):

As the court brought the jury into the courtroom to respond to the first two notes, the jury gave a third note to the court. The court told the jury that it would respond to the first two notes at that time, and would then discuss the issue raised in the third note with counsel after sending the jury back to the jury room. The court stated that the "third note [had] not yet [been] shown to counsel nor have we had an opportunity to discuss it." The record further reflects that the jury resumed its deliberations after the court provided requested testimony and instruction in response to the first two notes, and then rendered a verdict of guilty. The third note, which is included in the record, indicates that the jury was seeking the testimony of a particular witness on a specific topic, but there is nothing in the record indicating that the note was shown to counsel, or that it was read into the record before the jury rendered its verdict. Where, as here, "the record fails to show that defense counsel was apprised of the specific, substantive contents of the note . . . [,] preservation is not required" ... , and we conclude that the "[c]ourt committed reversible error by violating the core requirements of CPL 310.30 in failing to advise counsel on the record of the contents of a substantive jury note before accepting a verdict" ... . **People v Brink, 2015 NY Slip Op 09450, 4th Dept 12-23-15**

CRIMINAL LAW (DEFENDANT NOT INFORMED OF DEPORTATION CONSEQUENCES OF GUILTY PLEA ENTITLED TO WITHDRAW PLEA)/DEPORTATION (DEFENDANT NOT INFORMED OF DEPORTATION CONSEQUENCES OF GUILTY PLEA, ENTITLED TO WITHDRAW PLEA)

CRIMINAL LAW.

FAILURE TO INFORM DEFENDANT OF THE DEPORTATION CONSEQUENCES OF HIS PLEA REQUIRED THAT HE BE GIVEN THE OPPORTUNITY TO WITHDRAW HIS PLEA, DESPITE THE FACT THAT THE COURT OF APPEALS CASE MANDATING AN EXPLANATION OF DEPORTATION CONSEQUENCES CAME DOWN AFTER DEFENDANT'S PLEA.

The Second Department determined defendant should be afforded the opportunity to withdraw his plea because he was not informed of the deportation consequences of the plea. Although the Court of Appeals case requiring that the deportation consequences be explained came down after defendant's plea, the issue was properly raised on defendant's direct appeal:

Relying upon People v Peque (22 NY3d 168) the defendant contends that his plea of guilty was not knowing and voluntary because the plea record demonstrates that the court never advised him of the possibility that he would be deported as a consequence of his plea. In Peque, the Court of Appeals held that, as a matter of "fundamental fairness," due process requires that a court apprise a noncitizen pleading guilty to a felony of the possibility of deportation as a consequence of the plea of guilty (id. at 193). A defendant seeking to vacate a plea based on this defect must establish that there is a "reasonable probability" that he or she would not have pleaded guilty and would instead have gone to trial had the court warned of the possibility of deportation (id. at 176, 198).

As a threshold matter, we disagree with the People's contention that Peque should only apply prospectively. Inasmuch as Peque, decided after the defendant's plea, involved federal constitutional principles, it must be applied to this direct appeal ... . Contrary to the People's contention, the record does not demonstrate either that the Supreme Court mentioned, or that the defendant was otherwise aware of, the possibility of deportation. Therefore, the defendant's claim is not subject to the requirement of preservation ... . **People v Odle, 2015 NY Slip Op 09699, 2nd Dept 12-30-15**

CRIMINAL LAW (PEOPLE'S FAILURE TO OBJECT TO JURY CHARGE WHICH INCREASED THEIR BURDEN OF PROOF REQUIRED THEM TO MEET THAT BURDEN)/JURY INSTRUCTIONS (PEOPLE'S FAILURE TO OBJECT TO JURY CHARGE WHICH INCREASED THEIR BURDEN OF PROOF REQUIRED THEM TO MEET THAT BURDEN)/BURDEN OF PROOF, CRIMINAL (PEOPLE'S FAILURE TO OBJECT TO JURY CHARGE WHICH INCREASED THEIR BURDEN OF PROOF REQUIRED THEM TO MEET THAT BURDEN)

CRIMINAL LAW.

PEOPLE'S FAILURE TO OBJECT TO JURY INSTRUCTION WHICH (UNNECESSARILY) INCREASED THEIR BURDEN OF PROOF REQUIRED THE PEOPLE TO MEET THAT BURDEN.

The Second Department determined that People's failure to object to the judge's instruction to the jury, which increased the People's burden of proof, required that the People meet that burden (which the People failed to do). The defendant was charged with first degree robbery. Two victims, Brandt and Bishop, were ordered to lie on the ground at gunpoint. Brandt was shot when he didn't lie down and later died. Property was taken from Bishop, but not from Brandt. In the charge to the jury, the judge stated that, in order to convict the defendant of first degree robbery, the jury must find property was forcibly taken from Brandt. The People did not object:

> As the People correctly concede, the evidence was legally insufficient to establish the defendant's guilt of robbery in the first degree under Penal Law § 160.15(1), as that crime was charged to the jury. As relevant here, "[a] person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime . . . [c]auses serious physical injury to any person who is not a participant in the crime" (Penal Law § 160.15[1]). In this case, the Supreme Court instructed the jurors, without objection, that to find the defendant guilty of robbery in the first degree, they had to find, inter alia, that the defendant, acting in concert with at least one other individual, forcibly stole property from Brandt. Where, as here, "the trial court's instructions to the jury increase the People's burden, and the People fail to object, they must satisfy the heavier burden" ... . Inasmuch as the evidence demonstrated that property was only taken from Bishop, the People failed to satisfy their burden as to the count of robbery in the first degree. Although the defendant's legal sufficiency claim as to this count is unpreserved for appellate review, we reach it in the exercise of our interest of justice jurisdiction ... . **People v Rose, 2015 NY Slip Op 09702, 2nd Dept 12-30-15**

CRIMINAL LAW (FAILURE TO CONSIDER YOUTHFUL OFFENDER STATUS REQUIRED VACATION OF SENTENCE)/YOUTHFUL OFFENDER (FAILURE TO CONSIDER YOUTHFUL OFFENDER ADJUDICATION REQUIRED VACATION OF SENTENCE)/SENTENCING (FAILURE TO CONSIDER YOUTHFUL OFFENDER ADJUDICATION REQUIRED VACATION OF SENTENCE)

CRIMINAL LAW.

SENTENCING COURT'S FAILURE TO CONSIDER YOUTHFUL OFFENDER STATUS REQUIRED VACATION OF SENTENCE.

The Second Department determined Supreme Court's failure to consider whether defendant should be adjudicated a youthful offender required vacation of the sentence, despite the fact defendant did not request youthful offender status:

> In People v Rudolph (21 NY3d 497, 499), the Court of Appeals held that compliance with CPL 720.20(1), which provides that the sentencing court "must" determine whether an eligible defendant is to be treated as a youthful offender, "cannot be dispensed with, even where defendant has failed to ask to be treated as a youthful offender, or has purported to waive his or her right to make such a request." 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 ... . Here, the Supreme Court did not place on the record any reason for not adjudicating the defendant a youthful offender on his conviction of attempted robbery in the second degree under Indictment No. 9960/10, and there is nothing in the record to indicate that it considered and made an actual determination as to whether the defendant should be granted youthful offender treatment for his conviction under that indictment ... . Under these circumstances, we vacate the defendant's sentence and remit the matter to the Supreme Court, Kings County, for a determination of whether the defendant should be afforded youthful offender treatment. **People v Worrell, 2015 NY Slip Op 09706, 2nd Dept 12-30-15**

CRIMINAL LAW (VICTIM'S DEATH FIVE MONTHS AFTER ASSAULT SUFFICIENTLY LINKED TO DEFENDANT'S ACTIONS)/MURDER (VICTIM'S DEATH FIVE MONTHS AFTER ASSAULT SUFFICIENTLY LINKED TO DEFENDANT'S ACTIONS)

CRIMINAL LAW.

VICTIM'S DEATH FIVE MONTHS AFTER THE ASSAULT WAS SUFFICIENTLY LINKED TO DEFENDANT'S ACTIONS.

In affirming defendant's murder conviction, the Fourth Department concluded the victim's death five months after the assault was sufficiently linked to defendant's actions:

> ... [I]t has long been the rule in New York that " [i]f a person inflicts a wound . . . in such manner as to put life in jeopardy, and death follows as a consequence of this felonious and wicked act, it does not alter its nature or diminish its criminality to prove that other causes cooperated in producing the fatal result. Indeed, it may be said that neglect of the wound or its unskillful and improper treatment, which were of themselves consequences of the criminal act, which might naturally follow in any case, must in law be deemed to have been among those which were in contemplation of the guilty party, and for which he is to be held responsible' " ... . Thus, "[f]or criminal liability to attach, a defendant's actions must have been an actual contributory cause of death, in the sense that they forged a link in the chain of causes which actually brought about the death' " ... . Additionally, the "defendant's acts need not be the sole cause of death; where the necessary causative link is established, other causes, such as a victim's preexisting condition, will not relieve the defendant of responsibility for homicide . . . By the same token, death need not follow on the heels of injury" ... . **People v Pratcher, 2015 NY Slip Op 09730, 4th Dept 12-31-15**

CRIMINAL LAW (REQUEST TO PROCEED PRO SE MADE ON EVE OF TRIAL NOT UNTIMELY, NEW TRIAL ORDERED)/PRO SE (CRIMINAL LAW, REQUEST TO PROCEED PRO SE MADE ON EVE OF TRIAL NOT UNTIMELY, NEW TRIAL ORDERED)

CRIMINAL LAW.

DEFENDANT'S REQUEST TO PROCEED PRO SE, MADE ON THE EVE OF TRIAL, WAS NOT UNTIMELY AND SHOULD NOT HAVE BEEN SUMMARILY DENIED ON THAT GROUND, NEW TRIAL ORDERED.

The Fourth Department determined defendant's request to proceed pro se, made prior to the prosecution's opening statement, was not untimely and should not have been summarily denied on that ground. A new trial was ordered:

> ... [T]he judgment of conviction should be reversed and a new trial granted because the court erred in summarily denying, as untimely, his request to proceed pro se ... . "Although requests [to proceed pro se] on the eve of trial are discouraged, the Court of Appeals has found that a request may be considered timely when it is interposed prior to the prosecution's opening statement,' as here"... . **People v Smith. 2015 NY Slip Op 09757, 4th Dept 12-31-15**

CRIMINAL LAW (WAIVER OF APPEAL INVALID)/APPEALS (CRIMINAL LAW, WAIVER INVALID)/WAIVER OF APPEAL INVALID)

CRIMINAL LAW; APPEALS.

WAIVER OF APPEAL INVALID; DESCRIPTION OF THE EXTENT OF THE WAIVER WAS ERRONEOUS; NO ASSURANCE DEFENDANT WAS AWARE OF THE DIFFERENCE BETWEEN RIGHTS WAIVED BY GUILTY PLEA AND APPELLATE RIGHTS.

The First Department sent the matter back for resentencing because the record suggested the sentencing judge erroneously thought he did not have the power to impose a reduced sentence. The First Department determined the

defendant's waiver of appeal was invalid because the sentencing judge erroneously stated the relevant law and did not make sure the defendant understood the difference between the rights waived by entering a guilty plea and his appellate rights:

> Defendant's waiver of his right to appeal was invalid, where the court failed to adequately ensure defendant's understanding that the right to appeal is separate and distinct from the rights automatically forfeited by pleading guilty ... . The court's statement that defendant was "waiving [his] right to appeal any legal issues connected with the case, including the sentence" (emphasis added) was incorrect, insofar as a defendant cannot waive certain rights, such as the right to challenge the legality of a sentence or raise a speedy trial claim ... . The court's further statement that the "right of appeal is waived by [defendant], the rights I just mentioned are automatically waived by a plea" was insufficient to explain that the right to appeal is not included with those automatically waived by a guilty plea, since the court had "just mentioned" that right. Moreover, defendant's execution of a written waiver "does not, standing alone, provide sufficient assurance that the defendant is knowingly, intelligently and voluntarily giving up his or her right to appeal" ... . **People v Flores, 2015 NY Slip Op 08905, 1st Dept 12-3-15**

CRIMINAL LAW (WAIVER OF APPEAL INVALID)/APPEALS (WAIVER OF APPEAL INVALID)/CRIMINAL LAW (SENTENCE HARSH AND EXCESSIVE)/SENTENCING (HARSH AND EXCESSIVE)

CRIMINAL LAW; APPEALS.

FAILURE TO CLARIFY WHETHER APPEAL WAIVER WAS PART OF THE PLEA AGREEMENT RENDERED THE WAIVER INVALID.

The Third Department determined defendant's waiver of appeal was invalid because it was not made clear whether the waiver was part of the plea agreement. The court further determined that the sentence for non-violent offenses committed by the 18-year-old defendant was harsh and excessive. With respect to the invalid waiver of appeal, the court wrote:

> Defendant was free to waive his right to appeal as an adjunct to the plea agreement, so long as he made a voluntary, knowing and intelligent decision to do so ... . It was accordingly incumbent upon County Court to verify, among other things, that defendant understood he was "intentionally relinquish[ing] or abandon[ing] a known right that would otherwise survive a guilty plea" as a component of the plea agreement ... . Defendant expressed his willingness to waive his right to appeal during the plea colloquy, but the record is devoid of any indication that an appeal waiver was actually a component of the plea agreement. An appeal waiver was not mentioned when the terms of the plea agreement were recited and, indeed, the People stated that they did not know if defendant was executing an appeal waiver given the absence of any sentencing commitment. Defense counsel then gratuitously offered to have defendant waive his right to appeal in the spirit of "mak[ing] it as easy on everyone as possible." As a result of these statements, County Court was obliged to determine whether an appeal waiver was required as a "detail[] of the plea bargain" and, if not, whether defendant understood that he did not have to execute one .... . County Court did neither and, given the absence of proof that defendant waived his right to appeal in return for any consideration, we find that waiver to be invalid ... . **People v Justiniano, 2015 NY Slip Op 08875, 3rd Dept 12-3-15**

CRIMINAL LAW (TESTIMONIAL HEARSAY STATEMENTS PROPERLY ADMITTED, DEFENDANT OPENED THE DOOR)/EVIDENCE (TESTIMONIAL HEARSAY STATEMENTS PROPERLY ADMITTED, DEFENDANT OPENED THE DOOR)/TESTIMONIAL HEARSAY STATEMENTS (PROPERLY ADMITTED, DEFENDANT OPENED THE DOOR)

CRIMINAL LAW; EVIDENCE.

DEFENSE OPENED THE DOOR TO ALLOW EVIDENCE OF OTHERWISE INADMISSIBLE TESTIMONIAL HEARSAY STATEMENTS MADE TO A POLICE INVESTIGATOR.

The Third Department determined testimonial statements made by a co-defendant, Denno, to a police investigator were properly allowed in evidence because the defense "opened the door" by questioning the investigator about one of the statements:

> Although testimonial statements by a nontestifying witness are inadmissible as violative of the Confrontation Clause, "a defendant can open the door to the admission of evidence otherwise barred by the Confrontation Clause" ... . Denno, a witness to and participant in the crimes, gave three statements to the investigator, and Denno invoked his Fifth Amendment right not to testify at defendant's trial. Defendant called the investigator as a witness to elicit information about Denno's second statement, which was favorable to defendant. This opened the door for the People to cross-examine the investigator about the content of the two other Denno statements, which provided context and were less favorable to defendant. **People v Taylor, 2015 NY Slip Op 08873, 3rd Dept 12-3-15**

CRIMINAL LAW (MARITAL PRIVILEGE)/EVIDENCE (MARITAL PRIVILEGE, CRIMINAL TRIAL)

CRIMINAL LAW;EVIDENCE.

MARITAL PRIVILEGE DID NOT APPLY TO DEFENDANT'S STATEMENT THAT HE WAS GOING TO BURN THE HOUSE DOWN.

In an arson case, the Third Department determined County Court properly allowed defendant's wife to testify defendant said he was going to burn the house down. The court explained the limits of marital privilege:

> The privilege that precludes a spouse from disclosing a confidential communication made during marriage by the other spouse (see CPLR 4502 [b]; CPL 60.10) does not protect every remark between spouses during a marriage. Instead, "the privilege attaches only to those statements made in confidence and 'that are induced by the marital relation and prompted by the affection, confidence and loyalty engendered by such relationship'" ... . The wife testified that her marriage to defendant began to deteriorate during the months before the fire, in part because defendant wanted to relocate to Colorado while the wife wanted to remain in New York and continue living in the marital home with her children. She stated that, as the relationship worsened, defendant told her "many" times that he would burn the house down to prevent her from taking possession of it when they separated.
>
> The privilege "was never designed to forbid inquiry into the personal wrongs committed by one spouse against the other" and, thus, does not apply here, as defendant's statements were not prompted by trust or confidence in the marital relationship, but, instead, constituted threats of criminal activity directed at the wife ... . Further, the privilege does not apply "when the substance of a communication . . . is revealed to third parties" ... . Here, the wife testified that several of defendant's threats were made in the presence of other people, including mutual friends and the couple's children, and these statements were not privileged ... . **People v Howard, 2015 NY Slip Op 08870, 3rd Dept 12-3-15**

CRIMINAL LAW (TESTIMONIAL HEARSAY IMPROPERLY ADMITTED)/CRIMINAL LAW (PROSECUTORIAL MISCONDUCT, REFERENCE TO STRICKEN TESTIMONY)/CRIMINAL LAW (COERCED VERDICT, MISTRIAL SHOULD HAVE BEEN GRANTED)/EVIDENCE (TESTIMONIAL HEARSAY IMPROPERLY ADMITTED)/HEARSAY (TESTIMONIAL HEARSAY IMPROPERLY ADMITTED)/PROSECUTORIAL MISCONDUCT (REFERENCE TO STRICKEN TESTIMONY)/COERCED VERDICT (JURY IMPROPERLY PRESSURED TO REACH VERDICT BY JUDGE)/VERDICT (COERCED, JURY IMPROPERLY PRESSURED TO REACH VERDICT BY JUDGE)/MISTRIAL (JUDGE IMPROPERLY COERCED JURY TO REACH A VERDICT, MOTION FOR A MISTRIAL SHOULD HAVE BEEN GRANTED)

CRIMINAL LAW, EVIDENCE.

INADMISSIBLE TESTIMONIAL HEARSAY, PROSECUTORIAL MISCONDUCT, AND JUDGE'S ACTIONS TO COERCE THE JURY TO REACH A VERDICT DEPRIVED DEFENDANT OF A FAIR TRIAL.

The First Department reversed defendant's conviction, finding several distinct flaws which deprived defendant of a fair trial. Testimonial hearsay which served to bolster the complainant's identification of the defendant was improperly admitted. The prosecutor improperly referred to stricken testimony in summation. And the judge effectively coerced the jury into reaching a verdict. With respect to the coerced verdict, the court wrote:

> During jury deliberations, the court should have granted defendant's mistrial motion, made on the ground that any verdict would be reached under coercive circumstances. The court's statements during jury deliberation were also prejudicial to defendant's right to a fair trial. The jury returned two notes, on the second and fourth day of deliberations, announcing that the jury was deadlocked; the second note emphatically listed different types of evidence the jury had considered. The court's Allen charges in response to both notes were mostly appropriate but presented the prospect of protracted deliberations by improperly stating that the jury had only deliberated for a very short time when it had actually deliberated for days ... . The court initially informed the jury that its hours on one day would be extended to 7:00 p.m., before reversing that decision and merely extending the hours to 5:00 p.m., and then it extended the hours to 6:00 p.m. on the next day, a Friday. The court improperly described those changes as a "tremendous accommodation" that was "loathed" by the system ... .
>
> The court further indicated that the jury would likely continue deliberating into the next week although jurors had been told during jury selection that the case would be over by the aforementioned Friday, raising concerns for one juror who was going to start a new job the following Monday and another juror who was solely responsible for his child's care in the first three days of the next week ... . After the court informed the latter juror that he would be required to show up the next week despite the juror's purportedly fruitless efforts to obtain alternative childcare, and then brought the juror back into the courtroom solely to reiterate that point more firmly, the jury apparently returned its verdict within less than nine minutes, at about 3:29 p.m. on the Friday ... . The totality of the circumstances supports an inference that the jury was improperly coerced into returning a compromise verdict. **People v DeJesus, 2015 NY Slip Op 08959, 1st Dept 12-8-15**

CRIMINAL LAW (PERJURIOUS DEFENDANT TESTIFYING IN NARRATIVE FORM)/EVIDENCE (CRIMINAL LAW, PERJURIOUS DEFENDANT TESTIFYING IN NARRATIVE FORM)/NARRATIVE FORM (TESTIMONY OF PERJURIOUS DEFENDANT)

CRIMINAL LAW, EVIDENCE.

DEFENSE COUNSEL'S OBLIGATIONS RE: HAVING A PERJURIOUS DEFENDANT TESTIFY IN NARRATIVE FORM.

The Second Department explained the rules associated with defense counsel's decision to have a perjurious defendant testify in narrative form:

> ... [W]here defense counsel indicates an intention to present the defendant's testimony in narrative form, due process does not require that a record be made of either defense counsel's reasons for believing the defendant will commit perjury or of defense counsel's advice to the defendant regarding the intention to commit perjury or the consequences of that course of action. "A lawyer with a perjurious client must contend with competing considerations—duties of zealous advocacy, confidentiality and loyalty to the client on the one hand, and a responsibility to the courts and our truth-seeking system of justice on the other" ... . Requiring counsel to put on the

record his or her reasons for anticipating perjured testimony and the advice proffered to the defendant related to his or her testimony would not strike the appropriate balance between these competing considerations but rather, would present too great a risk that defense counsel would be forced to reveal client confidences ... . A defendant who seeks to challenge counsel's judgment to elicit testimony in narrative form or counsel's advice in that regard may raise those issues in a motion pursuant to CPL 440.10. **People v Wesley, 2015 NY Slip Op 09310, 2nd Dept 12-16-15**

CRIMINAL LAW (DESTRUCTION OF EVIDENCE CAUSED BY HURRICANE SANDY, ADVERSE INFERENCE CHARGE NOT WARRANTED)/JURY INSTRUCTIONS (ADVERSE INFERENCE CHARGE NOT WARRANTED, EVIDENCE DESTROYED BY HURRICANE SANDY)/EVIDENCE (DESTRUCTION BY HURRICANE SANDY, ADVERSE INFERENCE CHARGE NOT WARRANTED)/ADVERSE INFERENCE JURY INSTRUCTION (NOT WARRANTED WHERE EVIDENCE DESTROYED BY HURRICANE SANDY)

CRIMINAL LAW; EVIDENCE.

DESTRUCTION OF BLOOD EVIDENCE IN FLOODING CAUSED BY HURRICANE SANDY DID NOT WARRANT AN ADVERSE INFERENCE JURY INSTRUCTION.

The First Department, over an extensive dissent, determined that the destruction of blood evidence by Hurricane Sandy did not warrant an adverse inference jury instruction, despite the People's failure to timely respond to the defense request for the evidence. The court determined that the adverse inference jury instruction is not triggered by a loss of evidence for which the People are blameless:

> ... [T]he *Handy* [20 NY3d 663] adverse inference charge is a penalty for destruction of evidence, not for mere tardiness in producing it. ... While we do not condone the People's slowness in fulfilling their disclosure obligations in this case, the evidence in question was not lost as a foreseeable result of the passage of time, but as a consequence of a natural catastrophe that happened to occur just before this case went to trial. Moreover, the delay in production of the evidence here appears to be as much the fault of the defense as of the People. Even though the defense always knew that the case would rely on DNA evidence, defense counsel, after making a pro forma request to which the physical blood evidence would have been responsive, never took any steps before the hurricane, over a period of approximately two years, to enforce defendant's right to production of that evidence. As previously noted, the physical evidence did not become a focus of the discussion among the court and counsel until after the hurricane had passed. ...
>
> We see no support in the record for the dissent's position that the physical blood evidence from the crime scene was somehow material to the defense. As previously discussed, while the dissent correctly notes that the match of defendant's DNA with the DNA in the crime scene evidence was "the lynchpin of the People's case against defendant," placing before the jury the physical blood evidence from the crime scene would not have told them anything about the accuracy of the DNA match. Indeed, this appears to have been the original conclusion of defense counsel, who, without ever having had an opportunity to examine the physical evidence, announced that he was "ready to go" to trial before he learned that such evidence was no longer [*4]available. Nothing but speculation supports the dissent's unlikely supposition that the appearance of the physical blood evidence at trial might have told the jury anything about "the manner of its collection, storage or handling" at the time the State analyzed its DNA, three years before trial. The condition of the physical evidence after the State conducted its analysis is irrelevant, since defendant has never expressed any interest in conducting an independent DNA analysis. **People v Austin, 2015 NY Slip Op 09372, 1st Dept 12-22-15**

CRIMINAL LAW (EVIDENCE OF MURDER VICTIM'S STATE OF MIND AND STRIFE BETWEEN DEFENDANT AND VICTIM ADMISSIBLE TO SHOW MOTIVE AND IDENTITY)/EVIDENCE (MURDER VICTIM'S STATE OF MIND AND STRIFE BETWEEN DEFENDANT AND VICTIM ADMISSIBLE TO SHOW MOTIVE AND IDENTITY)/PRIOR BAD ACTS (STRIFE IN RELATIONSHIP BETWEEN DEFENDANT AND MURDER VICTIM ADMISSIBLE TO SHOW DEFENDANT'S MOTIVE AND IDENTITY)

CRIMINAL LAW; EVIDENCE.

EVIDENCE OF HOW THE MURDER VICTIM FELT ABOUT DEFENDANT AND EVIDENCE OF STRIFE IN THE COUPLE'S RELATIONSHIP ADMISSIBLE TO SHOW MOTIVE AND IDENTITY.

The First Department determined evidence of how the murder victim felt toward the defendant and evidence of the couple's "strife and unhappiness" was properly admitted to show the defendant's motive and was inextricably interwoven with the issue of the identity of the killer:

> The court properly admitted testimony from friends of the victim reflecting the victim's unfavorable perception of defendant's character, in order to show the victim's beliefs as part of a showing that the couple had been arguing and that the victim had been attempting to break up with defendant. Proof of the "murder victim's espoused intention to terminate her relationship with, and stay away from, defendant" was admissible to show the "victim's state of mind" and was "relevant to the issue of the motive of defendant, who was aware of the victim's attitude, to kill the victim" ... . Hence, the background information about the couple's "strife and unhappiness" was admissible as "highly probative of the defendant's motive and [was] either directly related to or inextricably interwoven with the issue of his identity as the killer" ... . The friends' testimony about disputes between defendant and the victim was similarly admissible ... . **People v Brooks, 2015 NY Slip Op 09379, 1st Dept 12-22-15**

CRIMINAL LAW (SEARCH OF JACKET POCKET NOT SUPPORTED BY PROBABLE CAUSE)/EVIDENCE (SEARCH OF JACKET POCKET NOT SUPPORTED BY PROBABLE CAUSE)/SUPPRESSION (SEARCH OF JACKET POCKET NOT SUPPORTED BY PROBABLE CAUSE)/SEARCH AND SEIZURE (SEARCH OF JACKET POCKET NOT SUPPORTED BY PROBABLE CAUSE)

CRIMINAL LAW; EVIDENCE.

SEARCH OF JACKET POCKET NOT PRECEDED BY PAT DOWN SEARCH; SEIZURE OF WEAPON FROM JACKET POCKET NOT SUPPORTED BY PROBABLE CAUSE.

The Second Department, reversing Supreme Court, determined defendant's motion to suppress evidence taken during a search of his jacket should have been granted. The searching officer had the right to pat the defendant down for weapons but did not do so. The search of the pockets, which turned up a weapon, was not, therefore, supported by probable cause:

> The search of the defendant's right jacket pocket, from which the police recovered a gun, cannot be upheld as justifiably premised on probable cause, since the defendant had not been placed under arrest prior to the search ... . "[A]n officer who reasonably suspects that a detainee is armed may conduct a frisk or take other protective measures even in the absence of probable cause to arrest" ... . However, "[a] police officer acting on reasonable suspicion that criminal activity is afoot and on an articulable basis to fear for his own safety may intrude upon the person or personal effects of the suspect only to the extent that is actually necessary to protect himself from harm while he conducts the inquiry" ... . "The key question in all cases remains whether the protective measures taken by the officer were reasonable under the circumstances" ... .
>
> Here, the police officer searched the defendant's jacket pocket without any prior visual observations of a weapon and without first conducting a pat down of the outside of the pocket. Thus, even assuming that the officer acted on reasonable suspicion that criminal activity was afoot and an articulable basis to fear for his safety, he failed to confine the scope of his search to an intrusion reasonably necessary to protect himself from harm. Accordingly, the weapon recovered as a result of the unlawful search should have been suppressed. In addition, the drugs and other items thereafter recovered must also be suppressed as fruits of the initial, unlawful search ... . **People v Graham, 2015 NY Slip Op 09442, 2nd Dept 12-23-15**

CRIMINAL LAW; EVIDENCE.

EMERGENCY EXCEPTION TO WARRANT REQUIREMENT IMPROPERLY APPLIED; JUDGE FAILED TO ELICIT UNEQUIVOCAL ASSURANCES OF IMPARTIALITY FROM FIVE PROSPECTIVE JURORS; NOTHING CAN BE INFERRED FROM THE PROSPECTIVE JURORS' COLLECTIVE SILENCE IN RESPONSE TO THE JUDGE'S QUESTION WHETHER THEY COULD BE FAIR.

The Fourth Department ordered a new trial after finding that defendant's motion to suppress statements and evidence should have been granted. The police entered defendant's apartment without permission. The People argued that the entry was proper under the so-called emergency exception to the warrant requirement. However, the facts indicated the police entered the apartment solely because of defendant's refusal to open the door. The Fourth Department further noted that five prospective jurors should have been excused for cause because they all indicated not hearing from the defendant would be problematic for them. The judge explained that the defendant had no responsibility to put on any proof, but failed to elicit an unequivocal assurance from each of the jurors that they could render an impartial verdict. The judge simply asked all the jurors collectively whether they had a problem sitting as fair and impartial jurors and the jurors remained silent:

> ... [B]ased on our review of the record, we conclude that "the evidence at the suppression hearing [did] not establish that the police had reasonable grounds to believe that there [was] an emergency at hand and an immediate need for their assistance for the protection of life or property' " ... . Indeed, the People did not present any evidence that the police observed anything unusual once they arrived at defendant's apartment. Although the record indicates that defendant and the victim may have been previously involved in domestic disputes, both police officers testified at the suppression hearing that they did not have direct, personal knowledge of any previous domestic violence or any indication that defendant and the victim were engaged in a domestic dispute at the time they arrived at the apartment. The police officers testified only that they knew that defendant was inside the apartment but would not answer the door. In our view, such testimony is insufficient to support a determination that the "emergency exception" applied to justify the warrantless entry.
>
> ... Here, the record establishes that five out of the six prospective jurors clearly expressed concerns that not hearing from defendant or someone on behalf of defendant would affect, inter alia, their ability to be fair and impartial. In response, the court instructed the jury panel that defendant has no responsibility to put on any proof, that he may or may not call witnesses, that he may or may not take the witness stand, and that it is the prosecution's burden to prove the elements of the crimes of which defendant is accused. The court then asked the jury panel whether anyone had "a problem sitting as a fair and impartial juror in this case?" The five prospective jurors at issue remained silent.
>
> In our view, the statements of the five prospective jurors cast serious doubt on their ability to render an impartial verdict ... . The court erred in not obtaining thereafter an "unequivocal assurance . . . from each of those potential jurors" to the effect that he or she could render an impartial verdict ... . Furthermore, "we can infer nothing from the [collective] silence of the challenged jurors" ... . **People v Casillas, 2015 NY Slip Op 09454, 4th Dept 12-23-15**

CRIMINAL LAW (SEARCH OF DEFENDANT'S JACKET VIOLATED STATE CONSTITUTION)/EVIDENCE (SEARCH OF DEFENDANT'S JACKET VIOLATED THE STATE CONSTITUTION)/SEARCH AND SEIZURE (SEARCH OF DEFENDANT'S JACKET VIOLATED STATE CONSTITUTION)/SUPPRESSION (SEARCH OF DEFENDANT'S JACKET VIOLATED STATE CONSTITUTION)

CRIMINAL LAW; EVIDENCE.

SEARCH OF DEFENDANT'S JACKET, WHICH WAS NOT ON HIS PERSON, AFTER DEFENDANT WAS HANDCUFFED AND IN CUSTODY VIOLATED THE STATE CONSTITUTION.

The Fourth Department determined the search of the pockets of defendant's jacket (which was not on his person) after defendant was handcuffed and in custody was illegal under the State Constitution and the drugs found in the pockets should have been suppressed. The court further found that the illegally-seized drugs presented as evidence at trial may have influenced the jury to find an "intent to sell" with respect to the remaining drug count. A new trial was ordered on the remaining count:

> After securing the jacket, the officers replaced the handcuffs on defendant and escorted him to the rear seat of their patrol car. One of the officers placed the jacket on the floor of the front seat of the patrol car, where it remained while defendant was transported to the Public Safety Building. Defendant was taken to an interview room, and the jacket was searched in another room at the Public Safety Building. A variety of drugs was discovered in the jacket pockets. * * *
>
> "Under the State Constitution, to justify a warrantless search incident to an arrest, the People must satisfy two separate requirements. The first imposes spatial and temporal limitations to ensure that the search is not significantly divorced in time or place from the arrest . . . The second, and equally important, predicate requires the People to demonstrate the presence of exigent circumstances" ... . We conclude that, here, neither requirement is satisfied. At the time the jacket was searched, defendant was handcuffed in an interview room at the Public Safety Building. "[T]he jacket had been reduced to the exclusive control of the police[,] and there was no reasonable possibility that defendant could have reached it" ... . Nor was there any exigency that would justify the warrantless search of the jacket in these circumstances ... . **People v Wilcox, 2015 NY Slip Op 09457, 4th Dept 12-23-15**

CRIMINAL LAW (SEARCH OF DEFENDANT'S UNDERWEAR AT TRAFFIC STOP ILLEGAL)/SEARCH AND SEIZURE (SEARCH OF DEFENDANT'S UNDERWEAR AT TRAFFIC STOP ILLEGAL)/EVIDENCE (SEARCH OF DEFENDANT'S UNDERWEAR AT TRAFFIC STOP ILLEGAL)/SUPPRESSION (SEARCH OF DEFENDANT'S UNDERWEAR AT TRAFFIC STOP ILLEGAL)

CRIMINAL LAW; EVIDENCE.

SEARCH INSIDE DEFENDANT'S UNDERWEAR WAS AN ILLEGAL STRIP SEARCH.

The Fourth Department, reversing County Court, determined what amounted to a strip search at a traffic stop was illegal. The officer searched defendant's underwear and seized drugs which were inside defendant's underwear:

> ... [B]ecause the officer intended to transport defendant to the police station to charge him with the traffic infractions, he was justified in conducting a pat search for weapons before placing defendant in the patrol vehicle ... . We note that a person's underwear, "unlike a waistband or even a jacket pocket, is not a common sanctuary for weapons' " ... and, in any event, the officer did not pat the outside of defendant's clothing to determine whether defendant had secreted a weapon in his underwear after defendant leaned forward. Instead, he conducted a strip search by engaging in a visual inspection of the private area of defendant's body ... . We conclude that a visual inspection of the private area of defendant's body on a city street was not based upon reasonable suspicion that defendant was concealing a weapon or evidence underneath his clothing... . **People v Smith, 2015 NY Slip Op 09517, 4th Dept 12-23-15**

CRIMINAL LAW (JURY ALLOWED TO CONSIDER EVIDENCE OF ACTIONS NOT CHARGED IN INDICTMENT, CONVICTION REVERSED, INDICTMENT DISMISSED)/EVIDENCE (JURY ALLOWED TO CONSIDER EVIDENCE OF ACTIONS NOT CHARGED IN INDICTMENT, CONVICTION REVERSED, INDICTMENT DISMISSED)

CRIMINAL LAW; EVIDENCE.

JUDGE'S RESPONSE TO JURY NOTE ALLOWED JURY TO CONSIDER EVIDENCE OF ACTIONS NOT CHARGED IN THE INDICTMENT, CONVICTION REVERSED AND INDICTMENT DISMISSED.

The Fourth Department determined the trial judge's response to a jury note allowed the jury to consider evidence of actions not charged in the indictment. Defendant's conviction for endangering the welfare of a child was therefore reversed and the indictment was dismissed:

> As set forth in the indictment and bill of particulars, as well as pursuant to the People's theory at trial, the endangerment charge was based on the conduct alleged in the preceding six counts of rape in the second degree and incest in the second degree, of which defendant was acquitted. After receiving a jury note during deliberations, the court instructed the jurors that they were not precluded from considering conduct other than the alleged rape and incest when considering the endangerment charge. That instruction allowed the jury to consider conduct not charged in the indictment. " Because the jury may have convicted defendant of . . . act[s] . . . for which he was not indicted, defendant's right to have charges preferred by the [g]rand [j]ury rather than the prosecutor at trial was violated' " ... . Additionally, based on the vague nature of the court's instruction, "[i]t is impossible to ascertain what alleged act of [endangerment] was found by the jury to have occurred, whether it was one . . . for which he was indicted, or indeed whether different jurors convicted defendant based on different acts" ... . **People v Utley, 2015 NY Slip Op 09749, 4th Dept 12-31-15**

CRIMINAL LAW (VIOLATION OF CIVIL CONTEMPT ORDER RELEVANT TO INTENT IN GRAND LARCENY TRIAL)/EVIDENCE (VIOLATION OF CIVIL CONTEMPT ORDER RELEVANT TO INTENT IN GRAND LARCENY TRIAL)/PRIOR CRIMES AND BAD ACTS (VIOLATION OF CIVIL CONTEMPT ORDER RELEVANT TO INTENT IN GRAND LARCENY TRIAL)/MOLINEUX EVIDENCE (VIOLATION OF CIVIL CONTEMPT ORDER RELEVANT TO INTENT IN GRAND LARCENY TRIAL)

CRIMINAL LAW; EVIDENCE.

VIOLATION OF CIVIL CONTEMPT ORDER PROPERLY ADMITTED IN GRAND LARCENY TRIAL TO SHOW LARCENOUS INTENT.

The Fourth Department, over a two-justice dissent, determined defendant's violation of a civil contempt order was properly admitted in defendant's grand larceny trial to show larcenous intent:

> The ... order directed defendant's businesses to turn over all monies they had received as a result of defendant diverting credit card proceeds from Webster Hospitality Development LLC (WHD), a company in which defendant held majority ownership and which was in receivership, to undisclosed bank accounts maintained for defendant's businesses. Contrary to defendant's contention, the contempt order does not constitute a finding that defendant stole the money; rather, it demonstrates that defendant's businesses failed to abide by the earlier order to return money to WHD and to provide certain documentation to the receiver. We thus conclude that the contempt order was properly admitted as relevant evidence of defendant's intent to deprive WHD of the money by "withhold[ing] it or caus[ing] it to be withheld from [WHD] permanently" (§ 155.00 [3]; see People v Molineux, 168 NY 264, 293). Moreover, we note that "[l]arcenous intent . . . is rarely susceptible of proof by direct evidence, and must usually be inferred from the circumstances surrounding the defendant's actions' " ... . Here, the contempt order had significant probative value inasmuch as it showed that defendant's conduct did not merely constitute poor financial management but, rather, that defendant, through his businesses, intended to deprive WHD of the diverted money permanently. The court therefore properly concluded that "the probative value of the evidence outweighed its prejudicial effect" ... . **People v Frumusa, 2015 NY Slip Op 09718, 4th Dept 12-31-15**

CRIMINAL LAW (STATEMENT MADE AFTER REQUEST FOR COUNSEL SHOULD HAVE BEEN SUPPRESSED)/EVIDENCE (STATEMENT MADE AFTER REQUEST FOR COUNSEL SHOULD HAVE BEEN SUPPRESSED)/SUPPRESSION (STATEMENT MADE AFTER REQUEST FOR COUNSEL SHOULD HAVE BEEN SUPPRESSED)

CRIMINAL LAW; EVIDENCE.

STATEMENT MADE AFTER UNEQUIVOCAL REQUEST FOR COUNSEL SHOULD HAVE BEEN SUPPRESSED, NEW TRIAL ORDERED.

The Fourth Department reversed defendant's conviction and ordered a new trial after concluding defendant's statements to police should have been suppressed. After defendant told police she needed to talk to a lawyer, the police questioned her further during a "smoke break:"

> After answering questions for approximately an hour and ten minutes, defendant said, "I think I need to talk to an attorney." In response, the first investigator stated, "Would you like to talk to one? If you think that, that's fine. That's up to you." Defendant replied, "I need to," before going on to state that she would never have bad feelings toward the boy and genuinely cared about him. The questioning then ceased, and the first investigator allowed defendant to go outside with the second investigator and a female Child Protective Services worker to smoke a cigarette.
>
> While defendant was smoking in the parking garage, the second investigator engaged her in a lengthy conversation. Unbeknownst to defendant, the conversation was being digitally recorded by the second investigator. During the conversation, defendant made numerous admissions, all but confessing that she had engaged in sexual activity with the boy. * * *
>
> ... [W]e conclude that, although defendant's statement "I think I need to talk to an attorney" may not, standing alone, constitute an unequivocal invocation of the right to counsel ... , her subsequent statement "I need to"—made in reply to the first investigator stating "Would you like to talk to one? If you think that, that's fine. That's up to you"—removed any ambiguity and made clear that defendant was requesting the assistance of counsel ... . **People v Kennard, 2015 NY Slip Op 09729, 4th Dept 12-31-15**

CRIMINAL LAW (UNEQUIVOCAL REQUEST FOR COUNSEL)/SUPPRESSION (STATEMENTS, UNEQUIVOCAL REQUEST FOR COUNSEL)/COUNSEL (UNEQUIVOCAL REQUEST FOR)

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S UNEQUIVOCAL REQUEST FOR COUNSEL NOT HONORED; CONVICTION REVERSED.

The Second Department determined defendant's statements, made after an unequivocal request for counsel, should have been suppressed. Defendant's conviction was reversed and a new trial ordered:

> The issue is whether " a reasonable police officer in the circumstances would understand the statement to be a request for an attorney'" ... . Any indication by a police officer that he understood a defendant's statement to be a request for counsel is a factor to be considered in evaluating whether there was an unequivocal request for counsel ... .
>
> Once a suspect in police custody unequivocally requests the assistance of counsel, the suspect may not be asked any more questions in the absence of counsel ... . "A defendant's unequivocal invocation of counsel while in custody results in the attachment of the right to counsel, indelibly so, meaning that, as a matter of state constitutional law, a defendant cannot subsequently waive the right to counsel unless the defendant is in the presence of an attorney representing that defendant" ... . * * *

... [T]he defendant's second statement, made approximately 25 minutes after his first mention of an attorney, stating that he "need[ed] to see private counsel" and that he "need[ed] an attorney," was an unequivocal invocation of his right to counsel ... . Shortly thereafter, the investigator evidenced his understanding that the defendant had requested counsel by querying the defendant about "the attorney thing." **People v Carrino, 2015 NY Slip Op 09295, 2nd Dept 12-16-15**

CRIMINAL LAW (PROSECUTOR ADMONISHED FOR IMPROPER REMARKS IN SUMMATION)/CRIMINAL LAW (ASSAULT 3RD CONVICTION NOT SUPPORTED BY SUFFICIENT EVIDENCE OF PHYSICAL INJURY)/PROSECUTORIAL MISCONDUCT (IMPROPER REMARKS IN SUMMATION)/EVIDENCE (INSUFFICIENT EVIDENCE OF PHYSICAL INJURY RE: ASSAULT 3RD CONVICTION)/ASSAULT 3RD (INSUFFICIENT EVIDENCE OF PHYSICAL INJURY)

CRIMINAL LAW; EVIDENCE; PROSECUTORIAL MISCONDUCT.

PROSECUTOR ADMONISHED FOR IMPROPER REMARKS IN SUMMATION (CONVICTION NOT REVERSED HOWEVER); INSUFFICIENT EVIDENCE OF PHYSICAL INJURY TO SUPPORT ASSAULT 3RD CONVICTION.

The Fourth Department admonished the prosecutor for improper remarks in summation, but did not reverse the conviction. The court found the evidence of "physical injury" insufficient to support the Assault 3rd conviction and reversed that unpreserved error under a "weight of the evidence" analysis:

Despite this Court's repeated admonitions to prosecutors not to engage in misconduct during summation, the prosecutor improperly referred to facts not in evidence when he insinuated that the victim regretted that she did not get out of defendant's vehicle ... . The prosecutor also improperly appealed to the jury's sympathy and bolstered the victim's credibility, and did so repeatedly, by commenting on how difficult it was for her to recount her ordeal, first to the police, then before the grand jury, and finally in her trial testimony ... . In addition, the prosecutor improperly suggested that the jury experiment on themselves to see how quickly bite marks fade ... . Nevertheless, "[a]lthough we do not condone the prosecutor's conduct, it cannot be said here that it caused such substantial prejudice to the defendant that he has been denied due process of law' " ... . We admonish the prosecutor, however, "and remind him that prosecutors have special responsibilities . . . to safeguard the integrity of criminal proceedings and fairness in the criminal process' " ... . * * *

We conclude, upon our independent review of the evidence, that the People failed to prove beyond a reasonable doubt that the victim sustained a physical injury ... . The indictment alleged that defendant caused physical injury to the victim "by striking her in the face." Although the victim testified that defendant struck her in the face, and photographs of the victim showed swelling and discoloration of the left side of her face, the victim did not testify that she suffered substantial pain from that injury or that she sought medical attention for it ... . **People v Gibson, 2015 NY Slip Op 09722, 4th Dept 12-31-15**

CRIMINAL LAW (PROSECUTOR'S REMARKS IN SUMMATION REQUIRED REVERSAL)/PROSECUTORIAL MISCONDUCT (REMARKS IN SUMMATION REQUIRED REVERSAL)

CRIMINAL LAW; PROSECUTORIAL MISCONDUCT.

PROSECUTOR'S REMARKS IN SUMMATION REQUIRED REVERSAL.

The Fourth Department, in the interest of justice, reversed defendant's conviction based upon prosecutorial misconduct in summation:

On summation, the prosecutor repeatedly invoked a "safe streets" argument ... , even after Supreme Court sustained defense counsel's objection to the prosecutor's use of that argument; denigrated the defense by calling defense counsel's arguments "garbage," "smoke and mirrors," and "nonsense" intended to distract the juror's focus

from the "atrocious acts" that defendant committed against the victim ... ; improperly characterized the defense as being based on a "big conspiracy" against defendant by the prosecutor and the People's witnesses ... ; and denigrated the fact that defendant had elected to invoke his constitutional right to a trial ... . Perhaps most egregiously, given that "the potential danger posed to defendant when DNA evidence is presented as dispositive of guilt is by now obvious," the prosecutor engaged in misconduct when she mischaracterized and overstated the probative value of the DNA evidence in this case ... .

We recognize, of course, that "[r]eversal is an ill-suited remedy for prosecutorial misconduct" ... . It is nevertheless mandated when the conduct of the prosecutor "has caused such substantial prejudice to the defendant that he [or she] has been denied due process of law. In measuring whether substantial prejudice has occurred, one must look at the severity and frequency of the conduct, whether the court took appropriate action to dilute the effect of that conduct, and whether review of the evidence indicates that without the conduct the same result would undoubtedly have been reached" ... . In view of the substantial prejudice caused by the prosecutor's misconduct in this case, including the fact that the evidence of guilt is less than overwhelming ... , we agree with defendant that reversal is required. **People v Jones, 2015 NY Slip Op 09773, 4th Dept 12-31-15**

EMPLOYMENT LAW

EMPLOYMENT LAW (NYC HUMAN RIGHTS LAW RACIAL DISCRIMINATION ACTION DISMISSED)/HUMAN RIGHTS LAW, NEW YORK CITY (PROOF REQUIREMENTS EXPLAINED)/DISCRIMINATION (NYC HUMAN RIGHTS LAW ACTION DISMISSED)/ MUNICIPAL LAW (DISCRIMINATION ACTION UNDER THE NEW YORK CITY HUMAN RIGHTS LAW)

EMPLOYMENT LAW, MUNICIPAL LAW.

PROOF REQUIREMENTS FOR RACIAL DISCRIMINATION UNDER THE NEW YORK CITY HUMAN RIGHTS LAW EXPLAINED; PLAINTIFF'S ACTION SHOULD HAVE BEEN DISMISSED.

The First Department, in a full-fledged opinion by Justice Acosta, determined plaintiff, who had brought a racial-discrimination action under the New York City Human Rights Law, was unable to show that the employer's reasons for terminating her were pretextual. The court held that the phrase "a leopard does not change its spots" and the term "tirade," used in reference to plaintiff's behavior, did not have discriminatory meanings. With respect to the proof requirements under the NYC Human Rights Law ("City HRL"), the court explained:

How the City HRL's distinctive substantive definitions, standards, and frameworks interact with existing standards for summary judgment has been the subject of some confusion ... . As with any other civil case, a discrimination plaintiff must produce enough evidence to preclude the moving defendant from being able to prove that (1) no issues of material fact have been placed in dispute by competent evidence, and (2) a reasonable jury (resolving all inferences that can reasonably be drawn in favor of the non-moving party) could not find for the plaintiff on any set of facts under any theory of the case. But recognizing that the general evidentiary standard remains the same in discrimination cases does not permit a court to apply the standard in a manner that ignores the distinctiveness of City HRL causes of action. All the general standard does, in other words, is provide the template that says, "Defendant must prove that no reasonable jury can conclude X." The "X" depends on the cause of action.

Thus, the only substantive requirement in a City HRL case where the plaintiff goes the "pretext" route is for the plaintiff to produce some evidence to suggest that at least one reason is "false, misleading, or incomplete." A plaintiff who satisfies this requirement may well have produced less evidence than would be required under the state and federal laws. But he or she will have produced enough evidence to preclude the defendant from proving that no reasonable jury could conclude that any of the defendant's reasons was pretextual. In other words, the general evidentiary standard comfortably co-exists with the distinctive substantive framework that must be applied to City HRL claims. **Cadet-Legros v New York Univ. Hosp. Ctr., 2015 NY Slip Op 08984, 1st Dept 12-6-15**

ENVIRONMENTAL LAW

ENVIRONMENTAL LAW (NO JUSTICIABLE CONTROVERSY, POTENTIAL ISSUANCE OF GAS DRILLING PERMIT)/CIVIL PROCEDURE (NO JUSTICIABLE CONTROVERSY, POTENTIAL ISSUANCE OF GAS DRILLING PERMIT)/HYDROFRACKING BAN (NO JUSTICIABLE CONTROVERSY, POTENTIAL ISSUANCE OF GAS DRILLING PERMIT)/NATURAL GAS (NO JUSTICIABLE CONTROVERSY, POTENTIAL ISSUANCE OF GAS DRILLING PERMIT)

ENVIRONMENTAL LAW; CIVIL PROCEDURE.

BECAUSE THE GAS WELL TO WHICH PLAINTIFFS OBJECTED MAY NEVER BE CONSTRUCTED, THE DECLARATORY JUDGMENT ACTION DID NOT PRESENT A JUSTICIABLE CONTROVERSY.

The Third Department determined plaintiff coalition's declaratory judgment action against the New York Department of Environmental Conservation (DEC) was properly dismissed. The action contended that the DEC's response to a comment submitted by plaintiff coalition (re; a gas-well permit under State Environmental Quality Review Act [SEQRA] review) constituted an unlawful extension of the common law rule of capture and effectuated a trespass on the land owned by a coalition member. The Third Department determined, because the comment period for the relevant rule-making had passed and the relevant rules had not been adopted, and because whether or not the gas-well permit will be issued has not been determined, the declaratory judgment action did not raise a justiciable controversy:

> Assuming, without deciding, that the statewide ban on hydrofracking does not render all of plaintiffs' claims moot and, further, that plaintiffs each have standing to maintain this declaratory judgment action, Supreme Court nonetheless properly granted defendant's motion to dismiss the complaint. As this Court recently reiterated, "[i]n order to warrant a determination of the merits of a cause of action, the party requesting relief must state a justiciable claim — one that is capable of review and redress by the courts at the time it is brought for review. A claim is justiciable, in turn, when two requirements are met: first, that the plaintiff has an interest sufficient to constitute standing to maintain the action and, second, that the underlying controversy involves present, rather than hypothetical, contingent or remote, prejudice to the plaintiff" ... . Again, even assuming that plaintiffs have satisfied the standing element of this equation, the fact remains that their entire complaint is predicated upon either (1) defendant's allegedly improper response to a comment made by the Coalition regarding proposed draft regulations that ultimately were not adopted, or (2) the theoretical consequences of a well bore or fluid fracture penetrating the subsurface of [a plaintiff's] property. **Community Watersheds Clear Water Coalition, Inc. v New York State Dept. of Envtl. Conservation, 2015 NY Slip Op 08890, 3rd Dept 12-3-15**

ENVIRONMENTAL LAW (SALE OF WATER BY VILLAGE REQUIRED SEQRA REVIEW)/STATE ENVIRONMENTAL QUALITY REVIEW ACT [SEQRA] (SALE OF WATER BY VILLAGE REQUIRED SEQRA REVIEW)/WATER (SALE OF WATER BY VILLAGE REQUIRED SEQRA REVIEW)/MUNICIPAL LAW (SALE OF WATER BY VILLAGE REQUIRED SEQRA REVIEW)

ENVIRONMENTAL LAW; MUNICIPAL LAW.

VILLAGE'S AGREEMENT TO SELL ONE MILLION GALLONS OF WATER PER DAY FOR TRANSPORT TO PENNSYLVANIA WAS A TYPE I ACTION REQUIRING SEQRA REVIEW.

Upon remittitur after reversal by the Court of Appeals, the Fourth Department affirmed Supreme Court's rulings re: the Water Agreement and Lease Agreement entered into by the Village of Painted Post. The Lease Agreement concerned the construction of a railroad transloading facility and the Water Agreement concerned the sale of one million gallons of water per day (gpd) to be transported (by rail) to Pennsylvania. The Fourth Department determined the Water Agreement was a Type I, not Type II, action which required review under the State Environmental Quality Review Act (SEQRA). Because the Village of Painted Post did not conduct a SEQRA review of the Water Agreement, the relevant village resolutions were annulled and a consolidated SEQRA review of both the Water Agreement and Lease Agreement was ordered:

> Although the Water Agreement does not call for the use of "ground or surface water in excess of [two million gpd]" (6 NYCRR 617.4 [b] [6] [ii]) and thus is not a Type I action under that subsection, Type I actions also include "any

Unlisted action[] that exceeds 25 percent of any threshold in this section, occurring wholly or partially within or substantially contiguous to any publicly owned or operated parkland, recreation area or designated open space" (6 NYCRR 617.4 [b] [10]). Where, as here, the Department of Environmental Conservation (DEC) has set a threshold clarifying that the use of a certain amount of a natural resource, e.g., land or water, constitutes a Type I action, it is reasonable to assume that the DEC has "implicitly determined that an annexation of less than [that threshold] is an [U]nlisted action' " ... . We thus conclude therefrom that the Water Agreement is implicitly an Unlisted action. Inasmuch as there is also evidence in the record that the transloading facility may be substantially contiguous to a publicly owned park and the Water Agreement calls for the use of surface water in the amount of one million gpd, i.e., 50% of the threshold in section 617.4 (b) (6) (ii), the Water Agreement could also be deemed a Type I action under 6 NYCRR 617.4 (b) (10).

Consequently, SEQRA review was required for the Water Agreement. Although the Village conducted a SEQRA review of the Lease Agreement, segmentation, i.e., the division of environmental review for different sections or stages of a project (see 6 NYCRR 617.2 [ag]), is generally disfavored ... . We thus conclude that the court properly determined, on the merits of the first cause of action, that all of respondent Village's resolutions should be annulled and that a consolidated SEQRA review of both agreements was required. **Matter of Sierra Club v Village of Painted Post, 2015 NY Slip Op 09707, 4th Dept 12-31-15**

EVIDENCE

EVIDENCE (MISSING WITNESS CHARGE SHOULD NOT HAVE BEEN GIVEN, NO SHOWING REQUEST WAS TIMELY)/MISSING WITNESS CHARGE (SHOULD NOT HAVE BEEN GIVEN, NO SHOWING REQUEST WAS TIMELY)/EVIDENCE (ADVERSE INFERENCE CHARGE SHOULD HABE BEEN GIVEN, EXPERT DID NOT BRING SUBPOENAED NOTES)/ADVERSE INFERENCE CHARGE (SHOULD HAVE BEEN GIVEN, EXPERT DID NOT BRING SUBPOENAED NOTES)/JURY INSTRUCTIONS (MISSING WITNESS CHARGE SHOULD NOT HAVE BEEN GIVEN, NO SHOWING OF TIMELY REQUEST)/JURY INSTRUCTIONS (ADVERSE INFERENCE CHARGE SHOULD HAVE BEEN GIVEN, EXPERT DID NOT BRING SUBPOENAED NOTES)

EVIDENCE.

MISSING WITNESS CHARGE SHOULD NOT HAVE BEEN GIVEN, NO SHOWING REQUEST FOR THE CHARGE WAS TIMELY; ADVERSE INFERENCE CHARGE RE: EXPERT WHO DID NOT BRING SUBPOENAED NOTES SHOULD HAVE BEEN GIVEN.

The First Department, in ordering a new trial, determined the trial judge should not have given a missing witness charge with respect to one of plaintiff's doctors and should have given an adverse inference charge based upon a defense expert's failure to bring her notes, which were subpoenaed:

The party seeking a missing witness charge has the burden of promptly notifying the court when the need for such a charge arises ... . The purpose of imposing such a burden is, in part, to permit the parties "to tailor their trial strategy to avoid substantial possibilities of surprise" ... . Once the party requesting the charge meets its initial burden, the party opposing the request can defeat it by demonstrating that, among other things, the witness was not available, was outside of its control, or the issue about which the witness would have been called to testify is immaterial ... .

Here, the record does not reflect when defendants asked for a missing witness charge for Dr. Rose. This presents the possibility that they did not do so until after plaintiff presented her case. Had that been so, plaintiff would have lost any opportunity to account for Dr. Rose's absence, argue that plaintiff did not have the requisite control over him, or attempt to procure his appearance. Accordingly, since there is no indication that defendants met their burden, we find that the missing witness charge was improperly given. * * *

...[W]hile Dr. Elkin [a defense expert] did not, as plaintiff suggests, testify that she "destroyed" her notes, she did concede that she did not comply with the subpoena, which required her to bring with her to court the notes that she used in generating her report on behalf of defendants. The failure to produce those notes affected plaintiff's ability to cross-examine defendants' expert and was fundamentally unfair to plaintiff. At the least, it would have been appropriate for the court to issue an adverse inference charge ... . That Dr. Elkin testified that the notes were

subsumed in the report is of no moment. Plaintiff was entitled to independently investigate that claim without having to rely on Dr. Elkin's own assurances that the notes were themselves of no probative value. **Herman v Moore, 2015 NY Slip Op 09352, 1st Dept 12-17-15**

FAMILY LAW

FAMILY LAW (JURISDICTION OVER CUSTODY, NEW YORK'S JURISDICTION DESPITE FLORIDA DIVORCE)/JURISDICTION (CUSTODY, NEW YORK'S JURISDICTION DESPITE FLORIDA DIVORCE)/UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (UCCJEA) (JURISDICTION OF NEW YORK DESPITE FLORIDA DIVORCE)/PARENTAL KIDNAPPING PREVENTION ACT (PKPA) (NO CONFLICT WITH UCCJEA)

FAMILY LAW.

DESPITE FLORIDA DIVORCE, NEW YORK HAD JURISDICTION OVER THE CUSTODY/VISITATION MATTERS BASED UPON THE PARTIES' PRESENCE IN NEW YORK.

Reversing Family Court, the Third Department determined New York had jurisdiction over the custody/visitation matters, despite the Florida divorce. The parties had subsequently moved from Florida to New York and there was no indication the relocation was temporary. The criteria for New York's jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) has nothing to do with the legal residence of the parties. The court further determined that the relevant provisions of the UCCJEA did not conflict with the Parental Kidnapping Prevention Act (PKPA) and was therefore not preempted by the PKPA. With respect to New York's jurisdiction, the court wrote:

> Consistent with the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act (hereinafter UCCJEA), which is codified in Domestic Relations Law article 5-A, "a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial custody determination under [Domestic Relations Law § 76 (1) (a) or (b)]" and, insofar as is relevant here, "[a] court of this state . . . determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state" (Domestic Relations Law § 76-b [2]). As to the first criteria, jurisdiction to render an initial custody determination may be predicated upon, among other things, a finding that "this state is the home state of the child on the date of the commencement of the proceeding" (Domestic Relations Law § 76 [1] [a]). A child's home state, in turn, is defined as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding" (Domestic Relations Law § 75-a [7]...). A child custody proceeding includes a proceeding in which visitation with the child is at issue (see Domestic Relations Law § 75-a [4]), and the commencement of a proceeding "means the filing of the first pleading in a proceeding" (Domestic Relations Law § 75-a [5] ...). **Matter of Lewis v Martin, 2015 NY Slip Op 08879, 3rd Dept 12-3-15**

FAMILY LAW (JURISDICTION OVER CUSTODY, PARENT PREVENTS CHILDREN FROM RETURNING TO NEW YORK)/CUSTODY (JURISDICTION OVER CUSTODY MATTER, PARENT PREVENTS CHILDREN FROM RETURNING TO NEW YORK)/JURISDICTION (FAMILY COURT, JURISDICTION OVER CUSTODY MATTER WHERE PARENT PREVENTS RETURN OF CHILDREN TO NEW YORK)

FAMILY LAW.

NEW YORK WOULD REMAIN "HOME STATE" FOR A CUSTODY MATTER IF FATHER WRONGFULLY PREVENTED CHILDREN FROM RETURNING TO NEW YORK FROM BANGLADESH IN THE SIX MONTHS BEFORE THE FILING OF THE PETITION.

The Second Department determined Family Court should not have concluded it did not have subject matter jurisdiction over a custody matter without conducting a hearing. It was alleged father was wrongfully preventing the children from returning to New York from Bangladesh. If father prevented the children from returning to New York in the six month period before the petition was filed, New York, pursuant to the controlling statutes, would be the "home state:"

Under the Domestic Relations Law, a state may have jurisdiction over a child custody proceeding if the "state is the home state of the child" (Domestic Relations Law § 76[1][a]...). A "[h]ome [s]tate" is defined as "the state in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child custody proceeding" (Domestic Relations Law § 75-a[7]). The definition of a "[h]ome [s]tate" also permits a period of temporary absence during the six-month time frame necessary to establish home-state residency (Domestic Relations Law § 75-a[7]...). In addition, it is established that a parent "may not wrongfully remove or withhold a child from the other parent for the purpose of establishing a home state' for that child" ... .

Here, there are disputed allegations as to the circumstances of the continued presence of the children in Bangladesh. Thus, under the circumstances of this case, the Family Court erred in dismissing the petition based on lack of subject matter jurisdiction without conducting a hearing as to whether the children were wrongfully prevented from returning to New York during the six-month period preceding the petition. If that is the case, New York remained the "home state" of the children in light of such wrongdoing ... . **Matter of Padmo v Kayef, 2015 NY Slip Op 09289, 2nd Dept 12-16-15**

FAMILY LAW (STIPULATION DID NOT CALL FOR REDUCTION OF CHILD SUPPORT UPON EMANCIPATION OF OLDER CHILD)/CONTRACT LAW (STIPULATION DID NOT CALL FOR REDUCTION OF CHILD SUPPORT UPON EMANCIPATION OF OLDER CHILD)/STIPULATION, DIVORCE (STIPULATION DID NOT CALL FOR REDUCTION OF CHILD SUPPORT UPON EMANCIPATION OF OLDER CHILD)/CHILD SUPPORT (STIPULATION DID NOT CALL FOR REDUCTION OF CHILD SUPPORT UPON EMANCIPATION OF OLDER CHILD)

FAMILY LAW; CONTRACT LAW.

STIPULATION WHICH DID NOT SPECIFICALLY CALL FOR A REDUCTION OF CHILD SUPPORT UPON THE EMANCIPATION OF THE OLDEST CHILD WOULD NOT BE INTERPRETED OTHERWISE.

The First Department, over a two-justice dissent, determined that a stipulation which was incorporated but not merged into the divorce did not call for the reduction of child support upon emancipation of the older child. The dissent argued that, applying standard principles of contract interpretation, it was clear the parties intended emancipation of the older child would result in the reduction of child support, despite the absence of a formula for the reduction in the stipulation:

There is no evidence, other than plaintiff's testimony, that the parties had agreed to a reduction in child support on account of any purported emancipation of the older child. Indeed, their agreement, freely entered into, does not allocate plaintiff's child support obligation as between the children or provide a formula for a reduction in the event of one child's emancipation ... . "When child support has been ordered for more than one child, the emancipation of the oldest child does not automatically reduce the amount of support owed under an order of support for multiple children" ... . **Schulman v Miller, 2015 NY Slip Op 09603, 1st Dept, 12-29-15**

FAMILY LAW (NEGLECT NOT ESTABLISHED, PETITIONER'S CASE REBUTTED)/NEGLECT (PETITIONER'S PRIMA FACIE CASE REBUTTED BY EXPERT TESTIMONY)/EXPERT TESTIMONY (SUFFICIENT TO REBUT PRIMA FACIE CASE OF NEGLECT)

FAMILY LAW; EVIDENCE.

PRIMA FACIE CASE OF NEGLECT REBUTTED BY MOTHER'S EXPERT.

Reversing Family Court, the Second Department determined expert testimony on behalf of the mother rebutted the petitioner's prima facie case of neglect. The court noted the nature of petitioner's prima facie proof is akin to the doctrine of res ipsa loquitur in negligence. Proof of an injury to a child which would not occur if the child had been in the care of a responsible caregiver is enough to make out a prima facie case. Expert testimony demonstrating the injuries may have occurred when the child was not in the mother's care and further demonstrating alternate causes of the injuries was sufficient to rebut the prima facie case of neglect/abuse:

Section 1046(a)(ii) of the Family Court Act permits a finding of abuse based upon evidence of an injury to a child which would ordinarily not occur absent acts or omissions of the responsible caretaker, and "authorizes a method

of proof which is closely analogous to the negligence rule of res ipsa loquitur" ... . "If the petitioner establishes a prima facie case of abuse, the burden of going forward shifts to respondents to rebut the evidence of parental culpability,' although the burden of proof always remains with the petitioner" ... .

The petitioner established a prima facie case of abuse ... . Contrary to the petitioner's contention, however, the mother presented sufficient evidence to rebut the petitioner's case, through the testimony of her expert witness. The mother's expert witness testified that the injuries ... occurred during a period of time when the petitioner had not established that [the child] was in the exclusive care of the mother. Additionally, the expert opined that the injuries could have resulted from alternate mechanisms. Thus, the petitioner failed to establish, by a preponderance of the evidence, that the mother abused [the child] ... . **Matter of Miguel G. (Navil G.). 2015 NY Slip Op 08834, 2nd Dept 12-2-15**

FAMILY LAW (CHILD'S OUT-OF-COURT STATEMENTS NOT SUFFICIENTLY CORROBORATED)/EVIDENCE (IN VISITATION-MODIFICATION PROCEEDING, CHILD'S OUT-OF-COURT STATEMENTS NOT SUFFICIENTLY CORROBORATED)/HEARSAY (IN VISITATION-MODIFICATION PROCEEDING, CHILD'S OUT-OF-COURT STATEMENTS NOT SUFFICIENTLY CORROBORATED)

FAMILY LAW; EVIDENCE.

IN THIS VISITATION-MODIFICATION PROCEEDING, DAUGHTER'S OUT-OF-COURT STATEMENTS WERE NOT SUFFICIENTLY CORROBORATED.

The Fourth Department determined Family Court, in a visitation-modification proceeding, properly found that the daughter's out-of-court statements about alleged sex abuse were not reliably corroborated:

"It is well settled that there is an exception to the hearsay rule in custody [and visitation] cases involving allegations of abuse and neglect of a child, based on the Legislature's intent to protect children from abuse and neglect as evidenced in Family Ct Act § 1046 (a) (vi)' . . . , where . . . the statements are corroborated" ... . "Although the degree of corroboration [required] is low, a threshold of reliability' must be met" ... . "The repetition of an accusation does not corroborate a child's prior statement' . . . , although the reliability threshold may be satisfied by the testimony of an expert" ... . "Family Court has considerable discretion in deciding whether a child's out-of-court statements alleging incidents of abuse have been reliably corroborated . . . , and its findings must be accorded deference on appeal where . . . the . . . [c]ourt is primarily confronted with issues of credibility" ... .

Here, there is no direct or physical evidence of abuse, and thus "the case turns almost entirely on issues of credibility" ... . Although the mother correctly notes that some corroboration may be provided through the consistency of a child's statements and that a child's out-of-court statements may be corroborated by testimony regarding the child's increased sexualized behavior ... , the court determined here that the mother's witnesses—who provided the corroborative testimony regarding the daughter's purportedly consistent statements and sexualized behavior—were not credible. **Matter of East v Giles, 2015 NY Slip Op 09466, 4th Dept 12-23-15**

SPECIAL IMMIGRANT JUVENILE STATUS (MOTHER'S MOTION FOR FINDINGS SHOULD HAVE BEEN GRANTED)/IMMIGRATION LAW (MOTHER'S MOTION FOR FINDINGS ALLOWING HER CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS SHOULD HAVE BEEN GRANTED)

FAMILY LAW, IMMIGRATION LAW.

MOTHER'S MOTION FOR FINDINGS ALLOWING HER CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS SHOULD HAVE BEEN GRANTED.

Reversing Family Court, the Second Department determined mother's motion for findings allowing her child to petition for special immigrant juvenile status (SIJS) should have been granted:

... [W]e declare that the child has been legally committed to, or placed under the custody of, an individual appointed by a state or juvenile court, and we find that the child is unmarried and under 21 years of age, that reunification with

one of his parents is not viable due to parental abandonment, and that it would not be in his best interests to return to El Salvador ... . **Matter of Tommy E. H. (Anonymous) v Silvia C. (Anonymous), 2015 NY Slip Op 09104, 2nd Dept 12-9-15**

FAMILY LAW (JUVENILE DELINQUENCY, AGE-ALLEGATION FOR AN OFFENSE CHARGED IN A JUVENILE DELINQUENCY PETITION CAN ONLY BE MADE BY A CLOSE RELATIVE)/JUVENILE DELINQUENCY (AGE-ALLEGATION FOR AN OFFENSE CHARGED IN A JUVENILE DELINQUENCY PETITION CAN ONLY BE MADE BY A CLOSE RELATIVE)/EVIDENCE (AGE-ALLEGATION FOR AN OFFENSE CHARGED IN A JUVENILE DELINQUENCY PETITION CAN ONLY BE MADE BY A CLOSE RELATIVE)

FAMILY LAW; JUVENILE DELINQUENCY; EVIDENCE.

ONLY A CLOSE RELATIVE COULD SUFFICIENTLY ALLEGE THAT THE APPELLANT WAS UNDER SIXTEEN TO SUPPORT THE AGE-ELEMENT OF THE CHARGED OFFENSE; HERE APPELLANT'S COUSIN'S ALLEGATION APPELLANT WAS FOURTEEN WAS INSUFFICIENT.

The Second Department determined that the allegation of appellant's age in a juvenile delinquency petition was insufficient. The adjudication based upon "unlawful possession of weapons by persons under sixteen" was therefore deleted. Although an allegation of age by a close relative will be sufficient to support an age-element of an offense, here the age allegation was made by appellant's cousin:

> Here, the petition failed to provide an adequate nonhearsay allegation of an essential element of Penal Law § 265.05, namely, that the appellant was under the age of sixteen at the time of the incident. The complainant's supporting deposition alleged that the appellant was his "14-year-old cousin," but it did not state the source of the complainant's knowledge of the appellant's age. The presentment agency contends that the allegation is sufficient, and it relies on the proposition that "it is generally recognized that the age of a family member is common knowledge within a family" (Matter of Brandon P., 106 AD3d 653, 653). That proposition, however, applies to close family relationships. Notably, in Matter of Brandon P., the allegation as to the appellant's age was made by the appellant's sister (see id. at 653). The relationship of "cousin," by contrast, is too distant and too broad in degree of consanguinity (see Black's Law Dictionary 442-443 [10th ed 2014]) to meet the requirements of Family Court Act § 311.2 in this case. Specifically, the complainant's statement regarding the appellant's age was not a sufficient nonhearsay allegation based on personal knowledge establishing reasonable cause to believe that the age element of the offense was met. Since count four of the petition was jurisdictionally defective, that count must be dismissed, and the order of disposition and the order of fact-finding modified accordingly ... . **Matter of Diamond J. (Anonymous), 2015 NY Slip Op 09689, 2nd Dept 12-30-15**

FAMILY LAW (JUVENILE DELINQUENCY, STATEMENT MADE BY INCAPACITATED JUVENILE ADMISSIBLE IN PROBABLE CAUSE HEARING)/JUVENILE DELINQUENCY (STATEMENT MADE BY INCAPACITATED JUVENILE ADMISSIBLE IN PROBABLE CAUSE HEARING)/EVIDENCE (JUVENILE DELINQUENCY, STATEMENT MADE BY INCAPACITATED JUVENILE ADMISSIBLE IN PROBABLE CAUSE HEARING)

FAMILY LAW; JUVENILE DELINQUENCY; EVIDENCE.

STATEMENT TO LAW ENFORCEMENT PERSONNEL BY AN INCAPACITATED JUVENILE ADMISSIBLE IN PROBABLE CAUSE HEARING WHICH LED TO A MENTAL HEALTH COMMITMENT OF THE JUVENILE.

The Second Department determined a statement made to law enforcement personnel by a juvenile respondent who was deemed incapacitated was admissible in the probable cause hearing which led to the juvenile's commitment to the custody of the commissioner of mental health/mental retardation and developmental disabilities. The juvenile allegedly started a fire in his father's house. Family Court found the juvenile to be incapacitated and therefore no fact-finding hearing was held. At the probable cause hearing (re: commitment of the juvenile) the juvenile's statement, made after waiving his Miranda rights, was admitted in evidence:

... Family Court did not violate [the juvenile's] due process rights by ordering his commitment based on a probable cause finding that depended, in part, on a written statement he made to law enforcement officials. The court's finding that the appellant lacked the capacity to proceed to a fact-finding hearing did not equate to a finding that the appellant could not comprehend the Miranda warnings ... that were administered by a police officer before the appellant made his statement. To be competent to proceed to a fact-finding hearing, a juvenile respondent must have the capacity to understand the proceedings and to assist in his or her own defense (see Family Ct Act § 301.2[13]). In contrast, "[a]n individual may validly waive Miranda rights so long as the immediate import of those warnings is comprehended, regardless of his or her ignorance of the mechanics by which the fruits of that waiver may be used later in the criminal process" ... . Thus, the court's incapacity finding did not undermine the reliability of the appellant's statement with respect to whether there was probable cause to believe that the appellant committed an offense. Further, the statement was, prima facie, competent for that purpose, even if it might later be rendered inadmissible by extrinsic proof ... . **Matter of Jaime E. S. (Anonymous), 2015 NY Slip Op 09694, 2nd Dept 12-30-15**

FRAUD

FRAUD (FRAUD AND FRAUDULENT CONCEALMENT CAUSES OF ACTION AGAINST MORGAN STANLEY, STEMMING FROM RESIDENTIAL MORTGAGE-BACKED SECURITIES)/RESIDENTIAL MORTGAGE-BACKED SECURITIES (FRAUD AND FRAUDULENT CONCEALMENT CAUSES OF ACTION AGAINST MORGAN STANLEY)/MORGAN STANLEY (FRAUD AND FRAUDULENT CONCEALMENT CAUSES OF ACTION AGAINST)

FRAUD.

FRAUD AND FRAUDULENT CONCEALMENT CAUSES OF ACTION AGAINST MORGAN STANLEY, STEMMING FROM RESIDENTIAL MORTGAGE-BACKED SECURITIES, PROPERLY SURVIVED A MOTION TO DISMISS.

The First Department, in a full-fledged opinion by Justice Friedman, determined Morgan Stanley's motion to dismiss fraud and fraudulent concealment causes of action was properly denied. The action stemmed from residential mortgage backed securities (RMBS) and the collapse of subprime mortgages. In essence, Morgan Stanley argued the plaintiff, Basis Yield, a mutual fund, did not allege justifiable reliance on the ratings of the investments and did not allege it exercised due diligence in researching the quality of the investments. With respect to the "failure to allege the exercise of due diligence" argument, the court wrote:

... Morgan Stanley ... argues that the fraud claims are legally insufficient because Basis Yield does not allege that it conducted, or sought to conduct, a due diligence investigation into the allegedly misrepresented matters. This argument relies on the well-established principle that a plaintiff suing for fraud (and particularly a sophisticated plaintiff, such as Basis Yield) must establish that it "has taken reasonable steps to protect itself against deception" ... . * * *

If accepted, Morgan Stanley's position would require the prospective purchaser of a credit instrument to assume that the instrument's credit rating is fraudulent until the rating has been verified through a detailed retracing of the steps of the underwriter and credit rating agency. This would largely negate the utility of the credit ratings of negotiable bonds and notes that are published by accredited rating agencies. Morgan Stanley does not draw our attention to any New York decision holding that the due diligence obligation of even a sophisticated investor extends so far as to require it to seek to verify the accuracy of an accredited agency's credit rating of a note or bond through an investigation of nonpublic information. **Basis Yield Alpha Fund Master v Stanley, 2015 NY Slip Op 09645, 1st Dept 12-29-15**

FREEDOM OF INFORMATION LAW (FOIL)

FREEDOM OF INFORMATION LAW [FOIL] (STATEMENTS OF NON-TESTIFYING WITNESSES ARE CONFIDENTIAL)/FREEDOM OF INFORMATION LAW [FOIL] (GRAND JURY MINUTES, NO FACTUAL SHOWING OF PARTICULARIZED NEED FOR DISCLOSURE)/GRAND JURY MINUTES (FOIL REQUEST, NO FACTUAL SHOWING OF A PARTICULARIZED NEED FOR DISCLOSURE)

FREEDOM OF INFORMATION LAW (FOIL).

REQUEST FOR STATEMENTS MADE BY WITNESSES WHO DID NOT TESTIFY AT TRIAL (BECAUSE PETITIONER PLED GUILTY) SHOULD HAVE BEEN DENIED; NON-TESTIFYING WITNESS STATEMENTS ARE CONFIDENTIAL; REQUEST FOR GRAND JURY MINUTES SHOULD HAVE BEEN DENIED; ALTHOUGH THE PUBLIC INTEREST IS INVOLVED, PETITIONER DID NOT MAKE THE REQUISITE FACTUAL SHOWING OF A PARTICULARIZED NEED FOR DISCLOSURE.

The Second Department, over an extensive dissent, reversing Supreme Court, determined that petitioner's request for disclosure of statements made by non-testifying witnesses and the grand jury minutes should not have been granted. In 1988 petitioner pled guilty to several sex offenses. Therefore, none of the witnesses who gave statements in connection the petitioner's criminal case testified. The Second Department held the statements remained confidential. With respect to the grand jury minutes, the court noted that the public interest was involved, but was not enough to justify disclosure because petitioner did not make a factual showing of a particularized need for disclosure:

> " [T]he statements of nontestifying witnesses are confidential and not disclosable under FOIL'" ... . Thus, the documents sought by the petitioner, which contain statements of nontestifying witnesses, are not disclosable under FOIL.
>
> Contrary to the petitioner's contention, the fact that he pleaded guilty and forfeited his right to a trial does not warrant a different conclusion. Under this Court's jurisprudence, the statements of nontestifying witnesses are confidential, and that "cloak of confidentiality" is removed "once the statements have been used in open court" ... . The entry of the petitioner's plea of guilty did not remove the "cloak of confidentiality" from the statements of the nontestifying witnesses. Thus, those statements remain confidential and are not disclosable under FOIL. * * *
>
> [A] "... party seeking disclosure [of grand jury minutes] will not satisfy the compelling and particularized need threshold simply by asserting, or even showing, that a public interest is involved." Rather, "[t]he party must, by a factual presentation, demonstrate why, and to what extent, the party requires the minutes of a particular grand jury proceeding to advance the actions or measures taken, or proposed (e.g., legal action, administrative inquiry or legislative investigation), to insure that the public interest has been, or will be, served'" ... .
>
> Despite the public interest involved in this case, the petitioner's submissions did not establish a compelling and particularized need for disclosure of the grand jury materials ... . The petitioner failed to demonstrate, by factual presentation, why, and to what extent, the grand jury materials are necessary to insure that the public interest will be served. In particular, the petitioner failed to sufficiently demonstrate how examination of the grand jury minutes and records will support his claim of actual innocence. **Matter of Friedman v Rice, 2015 NY Slip Op 09103, 2nd Dept 12-9-15**

INSURANCE LAW

INSURANCE LAW (DAMAGE TO MASSIVE CONSTRUCTION CRANE NOT COVERED BY TEMPORARY WORKS CLAUSE)/CONTRACT LAW (DAMAGE TO MASSIVE CONSTRUCTION CRANE NOT COVERED BY TEMPORARY WORKS CLAUSE IN POLICY)

INSURANCE LAW; CONTRACT LAW.

MASSIVE 750-FOOT TOWER CRANE DESTROYED BY HURRICANE SANDY NOT COVERED UNDER "TEMPORARY WORKS" CLAUSE IN INSURANCE POLICY.

The First Department, in a full-fledged opinion by Justice Andrias, over a two-justice dissent (opinion by Justice Mazzarelli), determined that a massive 750-foot tower crane destroyed during Hurricane Sandy was not included in the policy-definition of "Temporary Works" and was included in a policy-exclusion for "contractor's tools, machinery, plant and equipment." Damage to the crane, therefore, was not covered:

> The policy defines a temporary structure as something that is "incidental to the project." Although the term incidental is not defined, "it is common practice for the courts of this State to refer to the dictionary to determine the plain and ordinary meaning of words to a contract" ... .
>
> Black's Law Dictionary defines the term "incidental" as"[s]ubordinate to something of greater importance; having a minor role" (10th ed 2014]). The American Heritage Dictionary, defines incidental as "[o]f a minor, casual, or subordinate nature" (5th ed 2011]). The Merriam-Webster Online Dictionary defines the term "incidental" as "being likely to ensue as a chance or minor consequence" (11th ed 2003).
>
> Applying these definitions, the 750-foot tower crane is not a structure that is "incidental" to the project. Indeed, rather than ensuing by chance or minor consequence ... the "[b]uilding was specifically designed to incorporate the Tower Crane during construction" and the crane's design and erection involved an "in-depth process" that had to be approved by a structural engineer. Moreover, once it was integrated into the structure of the building, the custom designed tower crane, rather than serving a minor or subordinate role, was used to lift items such as concrete slabs, structural steel and equipment, was integral and indispensable, not incidental, to the construction of the 74-story high-rise, which could not have been built without it. Accordingly, the tower crane does not fall within the policy's definition of Temporary Works. **Lend Lease (US) Constr. LMB Inc. v Zurich Am. Ins. Co., 2015 NY Slip Op 09389, 1st Dept 12-22-15**

LABOR LAW

LABOR LAW (INJURY WHILE DOING ROUTINE MAINTENANCE NOT COVERED)/ROUTINE MAINTENANCE (INJURY NOT COVERED BY LABOR LAW)

LABOR LAW.

INJURY WHILE DOING ROUTINE MAINTENANCE DID NOT GIVE RISE TO LABOR LAW CAUSES OF ACTION.

The Second Department determined plaintiff was doing routine maintenance (checking light fixtures) when he was injured by a loose electric cable and his Labor Law causes of action were properly dismissed:

> The defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 240(1) by offering proof that the plaintiff was involved in routine maintenance rather than repair and, therefore, the plaintiff's activity did not fall within the protection of that provision of the Labor Law ... .

The defendants also demonstrated their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 241(6). The plaintiff was not involved in the activity of construction, excavation, or demolition, and the statute does not protect workers involved in maintenance or replacement of parts ... .

The defendants also demonstrated their prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging a violation of Labor Law § 200 and common-law negligence. The defendants demonstrated, prima facie, that they neither created nor had notice of the loose cable that allegedly caused the plaintiff's electric shock ... . **Guevera v Simon Prop. Group, Inc., 2015 NY Slip Op 09254, 2nd Dept 12-16-15**

LABOR LAW (INDUSTRIAL CODE PROVISION REQUIRING SAFETY DEVICES BE KEPT SOUND AND OPERABLE WAS A CONCRETE PREDICATE FOR A LABOR LAW 241 (6) CAUSE OF ACTION)/INDUSTRIAL CODE (PROVISION REQUIRING SAFETY DEVICES BE KEPT SOUND AND OPERABLE WAS A CONCRETE PREDICATE FOR A LABOR LAW 241 (6) CAUSE OF ACTION)

LABOR LAW.

INDUSTRIAL CODE PROVISION REQUIRING THAT SAFETY DEVICES BE KEPT SOUND AND OPERABLE CONSTITUTED A CONCRETE PREDICATE FOR A LABOR LAW 241 (6) CAUSE OF ACTION WHICH ALLEGED INJURY DUE TO THE ABSENCE OF A "PROTECTOR" ON A GRINDER.

The Second Department determined a provision in the Industrial Code, 12 NYCRR 23-9.2(a), was sufficiently concrete to serve as a predicate for a Labor Law 241 (6) cause of action. The plaintiff was using a grinder cut sheet metal when a piece of sheet metal and a piece of the grinder "shot out" and injured him. Plaintiff alleged a "protector" had been removed from the grinder:

Labor Law § 241(6) imposes on owners and contractors a nondelegable duty to "provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" ... . As a predicate to a section 241(6) cause of action, a plaintiff must allege a violation of a concrete specification promulgated by the Commissioner of the Department of Labor in the Industrial Code ... . * * *

...[P]laintiff's Labor Law § 241(6) claim is predicated on an alleged violation of 12 NYCRR 23-1.5(c)(3), which provides that "[a]ll safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged." Sections 23-9.2(a) and 23-1.5(c)(3) each set forth an action to be taken ("corrected by necessary repairs or replacement"; "repaired or restored . . . or removed") and set forth the trigger or time frame for taking such action ("upon discovery"; "immediately . . . if damaged"). Therefore ... we hold that 12 NYCRR 23-1.5(c)(3) is sufficiently concrete and specific to support the plaintiff's Labor Law § 241(6) cause of action ... . **Perez v 286 Scholes St. Corp., 2015 NY Slip Op 09664, 2nd Dept 12-30-15**

LABOR LAW (WORKER STRUCK BY FALLING DEBRIS ENTITLED TO SUMMARY JUDGMENT ON LABOR LAW 240 (1) CAUSE OF ACTION)

LABOR LAW.

WORKER STRUCK BY DEBRIS WHICH FELL THROUGH A GAP IN PROTECTIVE NETTING ENTITLED TO SUMMARY JUDGMENT ON LABOR LAW 240 (1) CAUSE OF ACTION.

The Second Department, reversing Supreme Court, granted summary judgment on plaintiff's Labor Law 240 (1) cause of action. Workers were using jackhammers to chip away concrete on an elevated structure. Netting had been installed to catch falling pieces of concrete. Plaintiff was struck and severely injured by a four-foot piece of concrete which fell through a gap in the netting. The netting was deemed to be an inadequate safety device:

The plaintiffs' submissions demonstrated that the injured plaintiff suffered harm that "flow[ed] directly from the application of the force of gravity" to the piece of concrete that struck him ... , and that given the nature and purpose of the work that was being performed at the time of his injury, the falling debris presented a significant risk of injury such that the ... defendants were obligated under Labor Law § 240(1) to use appropriate safety devices to safeguard the injured plaintiff from the harm it posed ... . The plaintiffs' submissions also demonstrated that the injured plaintiff's injury was "the direct consequence of a failure to provide adequate protection against [the] risk" of harm posed by the falling debris ... . Indeed, the plaintiffs established that the vertical netting that was installed around the controlled access zone to protect workers from the falling debris had pulled loose from the plywood barricade, creating an opening through which the concrete that struck the injured plaintiff traveled. Under these circumstances, the vertical netting constituted a safety device within the meaning of Labor Law § 240(1) ... , and the plaintiffs demonstrated that it was not "so constructed, placed and operated as to give proper protection" (Labor Law § 240[1]). **Sarata v Metropolitan Transp. Auth., 2015 NY Slip Op 09667, 2nd Dept 12-30-15**

LABOR LAW (241 (6) CAUSE OF ACTION STEMMING FROM USE OF NAIL GUN)/NAIL GUN (LABOR LAW 241 (6) CAUSE OF ACTION BASED UPON EYE INJURY)

LABOR LAW.

LABOR LAW 241 (6) CAUSE OF ACTION STEMMING FROM EYE INJURY ASSOCIATED WITH USE OF A NAIL GUN PROPERLY SURVIVED SUMMARY JUDGMENT.

Plaintiff was injured when using a nail gun. A nail ricocheted and struck his eye. The Fourth Department determined defendant was not entitled to summary judgment dismissing the Labor Law 241 (6) cause of action because eye protection was required by the Industrial Code, and plaintiff was not entitled to summary judgment because there were questions of fact whether eye protection was available to the plaintiff. The court noted that the risk of eye injury from use of a nail gun is more apparent than any such risk associated with manual hammering:

We reject defendant's contention that it was entitled to summary judgment pursuant to this Court's holding in Herman v Lancaster Homes (145 AD2d 926, 926, lv denied 74 NY2d 601). Unlike the circumstances in Herman, plaintiff herein was not manually hammering nails but, rather, was operating a pneumatic nail gun when a nail ricocheted and penetrated his right eye. In our view, "the dangers a nail gun present[s] to the eyes are more apparent tha[n] the dangers of manual hammering" ... and the plaintiff's use of the nail gun clearly falls within the regulatory definition of engaging "in any other operation which may endanger the eyes" (12 NYCRR 23-1.8 [a]). Contrary to defendant's further contention, based upon the record before us, we conclude that plaintiff established as a matter of law that the regulation applies, and that defendant failed to raise a triable issue of fact on that point ... .

We agree with defendant, however, that the court erred in granting plaintiff's motion inasmuch as defendant raised triable issues of fact whether it had violated 12 NYCRR 23-1.8 (a) and whether plaintiff was comparatively negligent ... . Specifically, there is a triable issue of fact whether defendant provided eye protection, or made such available, to plaintiff on the day of the accident and, if so, whether plaintiff was comparatively negligent in refusing to use the eye protection. Summary judgment to plaintiff is therefore inappropriate ... . We note, in any event, that "[e]ven assuming, arguendo, that plaintiff[] established that defendant violated [12 NYCRR 23-1.8 (a)], any such violation does not establish negligence as a matter of law but is merely some evidence to be considered on the question of a defendant's negligence' " ... . **Quiros v Five Star Improvements, Inc., 2015 NY Slip Op 09713, 4th Dept 12-31-15**

LABOR LAW (PLAINTIFF STRUCK BY BEAM LOWERED BY TWO WORKERS)/EVIDENCE (EXPERT OPINION NO SAFEY EQUIPMENT NECESSARY DID NOT DEFEAT PLAINTIFF'S SUMMARY JUDGMENT MOTION IN A LABOR LAW 240 (1) ACTION)/EXPERT OPINION (OPINION THAT NO SAFETY EQUIPMENT WAS NECESSARY WAS INSUFFICIENT TO DEFEAT SUMMARY JUDGMENT IN LABOR LAW 240 (1) ACTION)

LABOR LAW; EVIDENCE.

PLAINTIFF STRUCK WHEN TWO WORKERS LOST CONTROL OF A HEAVY BEAM THEY WERE LOWERING TO THE GROUND ENTITLED TO SUMMARY JUDGMENT ON LABOR LAW 240 (1) CAUSE OF ACTION; EXPERT OPINION THAT NO SAFETY DEVICES WERE NECESSARY INSUFFICIENT TO DEFEAT SUMMARY JUDGMENT MOTION.

The First Department affirmed Supreme Court's grant of summary judgment to the plaintiff in a Labor Law 240 (1) cause of action. Plaintiff was injured when a heavy beam being lowered by two other workers struck him in the chest and leg when the workers lost control of it. The court noted an expert opinion that no safety devices were needed was insufficient to establish the absence of a Labor Law 240 (1) violation:

> The court properly found a "causal connection between the object's inadequately regulated descent and plaintiff's injury" ... . By submitting an expert affidavit, plaintiff met his initial burden of showing that the beam "required securing for the purposes of the undertaking" ... , and that statutorily enumerated safety devices could have prevented the accident ... . It is undisputed that no enumerated safety devices were provided, and the testimony and expert opinion that such devices were neither necessary nor customary is insufficient to establish the absence of a Labor Law § 240(1) violation '" . The "height differential cannot be described as de minimis given the amount of force [the beam was] able to generate over [its] descent" ... . Plaintiff was not the sole proximate cause of his injuries, which were caused at least in part by the lack of safety devices to check the beam's descent as well as the manner in which the other two workers lowered the beam; comparative negligence is no defense to the Labor Law § 240(1) claim ... . **Bonaerge v Leighton House Condominium, 2015 NY Slip Op 09632, 1st Dept 12-29-15**

LANDLORD-TENANT

LANDLORD-TENANT (SECURITY DEPOSIT CANNOT BE USED AS OFFSET AGAINST UNPAID RENT)/LANDLORD-TENANT (SECURITY DEPOSIT CAN BE USED TO REDUCE AMOUNT TENANT OWES LANDLORD)/SECURITY DEPOSIT (LANDLORD CANNOT USE AS OFFSET AGAINST UNPAID RENT)/SECURITY DEPOSIT (CAN BE USED TO REDUCE AMOUNT OWED LANDLORD BY TENANT)

LANDLORD-TENANT.

SECURITY DEPOSIT CANNOT BE USED BY THE LANDLORD AS AN OFFSET AGAINST UNPAID RENT, BUT CAN BE USED BY THE TENANT TO REDUCE AMOUNT OWED TO THE LANDLORD.

In finding the special referee exceeded the scope of the reference from Supreme Court, the First Department explained the consequences of a landlord's failure to place a security deposit in a separate account pursuant to General Obligations Law 7-103:

> Section 7-103 prohibits landlords from commingling security deposits with their own funds. Violation of the statute gives rise to an action in conversion and the right to immediate return of the funds ... . A landlord who violates Section 7-103 of the General Obligations Law cannot use the security as an offset against unpaid rents. This is so because a landlord is considered to be a trustee with respect to those funds deposited as security. To allow the landlord to set off the rent against the deposit would be to treat the deposit as a debt and the landlord as a debtor, the situation the statute was enacted to change ... .The same logic does not pertain where a tenant seeks to apply the security deposit to reduce amounts found owing to the landlord. **23 E. 39th St. Mgt. Corp. v 23 E. 39th St. Dev., LLC, 2015 NY Slip Op 09605, 1st Dept 12-29-15**

MENTAL HYGIENE LAW

MENTAL HYGIENE LAW (TRIABLE QUESTION OF FACT WHETHER PETITIONER HAD SERIOUS DIFFICULTY CONTROLLING SEXUAL CONDUCT)/SEX OFFENDERS (MENTAL HYGIENE LAW, TRIABLE QUESTION OF FACT WHETHER PETITIONER HAD SERIOUS DIFFICULTY CONTROLLING SEXUAL CONDUCT)

MENTAL HYGIENE LAW.

PETITIONER'S MOTION FOR A DIRECTED VERDICT IN AN ARTICLE 10 TRIAL SHOULD NOT HAVE BEEN GRANTED; A TRIABLE ISSUE HAD BEEN RAISED CONCERNING PETITIONER'S ABILITY TO CONTROL HIS SEXUAL CONDUCT.

The Fourth Department, over a two-justice dissent, reversing Supreme Court, determined that petitioner-sex-offender's motion for a directed verdict in an Article 10 trial should not have been granted. Petitioner had been deemed a dangerous sex offender and was committed to a secure facility. In the instant proceeding, petitioner sought release under a regimen of strict and intensive supervision and treatment. The state presented evidence petitioner had been diagnosed with antisocial personality disorder, paraphila otherwise specified, and cannabis dependence. The majority concluded that the state's expert, Dr. Prince, had presented sufficient additional evidence, including a history of defendant's sexual behavior, his response to treatment, and the results of psychological tests, to raise a triable issue of fact whether defendant had serious difficulty in controlling difficulty controlling his sexual conduct:

> When coupled with the evidence of petitioner's clear, well-defined cycle of offending that begins with becoming frustrated, the deficits in his recent treatment plan on that specific area, and his stagnating course of treatment, we conclude that Dr. Prince's opinion and the supporting evidence, " when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, [establish that petitioner is a] . . . dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment[, rather than a] dangerous but typical recidivist convicted in an ordinary criminal case' " ... . Thus, respondents submitted sufficient evidence that, if it is credited by the factfinder, would establish that petitioner has a condition, disease or disorder "that predisposes him . . . to the commission of conduct constituting a sex offense and that results in [petitioner] having serious difficulty in controlling such conduct" (§ 10.03 [i] ...). Consequently, we conclude that, if the factfinder accepts that evidence, there is a "rational process by which the [factfinder] could find for [respondents] as against" petitioner ... . **Matter of Wright v State of New York, 2015 NY Slip Op 09711, 4th Dept 12-31-15**

MUNICIPAL LAW

MUNICIPAL LAW (TOWN ASSESSOR'S TERM, EFFECT OF WITHDRAWAL FROM COORDINATED ASSESSMENT PROGRAM [CAP])/TOWN LAW (TOWN ASSESSOR'S TERM, EFFECT OF WITHDRAWAL FROM COORDINATED ASSESSMENT PROGRAM [CAP])/REAL PROPERTY TAX LAW (TOWN ASSESSOR'S TERM, EFFECT OF WITHDRAWAL FROM COORDINATED ASSESSMENT PROGRAM [CAP])/COORDINATED ASSESSMENT PROGRAM (TOWN ASSESSOR'S TERM, EFFECT OF WITHDRAWAL FROM)

MUNICIPAL LAW.

TOWN'S WITHDRAWAL FROM A COORDINATED ASSESSMENT PROGRAM (CAP) DOES NOT TERMINATE TOWN ASSESSOR'S TERM.

The Third Department, in a matter of first impression, determined petitioner, a town assessor who was removed when the town withdrew from the coordinated assessment program (CAP), was entitled to finish out his six-year term. Under the CAP, the petitioner served three towns. When one of those towns withdrew from the CAP, that town appointed its own town assessor. The Third Department held that petitioner was entitled to finish out his term as assessor for that town:

> ... [W]e find it telling that RPTL 579 was amended in 2009 to, among other things, clarify that an assessor appointed in a CAP receives a six-year term and to shorten the notice period for a member to withdraw (see L

2009, ch 46, §§ 1-3 [eff May 29, 2009]). The adoption of these companion provisions leads us to conclude that the Legislature intended an assessor's six-year term to remain intact, even where a CAP member opts to withdraw. Insofar as the assessor is concerned, the effect of withdrawal is merely delayed until the assessor's term expires, at which time the assessing unit is free to choose a new assessor, without approval from any other assessing unit. **Matter of Rubeor v Town of Wright, 2015 NY Slip Op 08895, 3rd Dept 12-3-15**

MUNCIPAL LAW (AGREEMENT IMPLEMENTING CASINO GAMBLING ON ONEIDA NATION LAND DID NOT VIOLATE TOWNS' HOME RULE RIGHTS)/HOME RULE (AGREEMENT IMPLEMENTING CASINO GAMBLING ON ONEIDA NATION LAND DID NOT VIOLATE TOWNS' HOME RULE RIGHTS)/GAMBLING (AGREEMENT IMPLEMENTING CASINO GAMBLING ON ONEIDA NATION LAND DID NOT VIOLATE TOWNS' HOME RULE RIGHTS)/ONEIDA NATION (AGREEMENT IMPLEMENTING CASINO GAMBLING ON ONEIDA NATION LAND DID NOT VIOLATE TOWNS' HOME RULE RIGHTS)

MUNICIPAL LAW.

AGREEMENT ALLOWING CASINO GAMBLING ON ONEIDA NATION LAND DID NOT VIOLATE TOWNS' "HOME RULE" RIGHTS.

The Third Department, in a full-fledged opinion by Justice Garry, determined the petitioners, the Town of Vernon and the Town of Verona, did not have standing to attack an agreement (ratified by the New York Gaming Economic Development Act of 2013 [UNYGEDA]) allowing the Oneida Nation to implement legalized casino gambling. The towns argued that the agreement violated the towns' "home rule" rights by removing land from their zoning and environmental authority, as well as preventing the collection of property taxes. The Third Department held that it was the placing of Oneida Nation land in trust (by the federal Department of the Interior) which caused these negative consequences and the trust was created before the agreement at issue:

> These negative consequences ... did not result from the agreement or from the UNYGEDA, but, instead, from the decision by the Department to place the lands in trust. That decision had already been made when the agreement was executed, and it was unaffected by any State action other than the agreement's provision that the State and the Counties would discontinue then-pending federal litigation that challenged the Department's decision. In 2014, the State and Counties did so ... . The State has no constitutional obligation to pursue litigation, nor have petitioners established that the litigation would have resulted in the reversal of the Department's decision to place the lands in trust if it had not been settled. Further, the discontinuance of the State's claims did not foreclose the Towns from pursuing separate federal litigation that challenged the Department's action, which they did until the action was dismissed on the merits in 2015 ... . Thus, the State's actions did not cause the harm that forms the basis of the Towns' claims. Accordingly, the Towns failed to establish that the agreement and the UNYGEDA impinged upon their home rule powers, and Supreme Court properly ruled that they lacked the capacity to bring this action/proceeding. **Matter of Town of Verona v Cuomo, 2015 NY Slip Op 09338, 3rd Dept 12-17-15**

MUNICIPAL LAW (NOTICE OF CLAIM, FAILURE TO NAME POLICE OFFICERS OR JOHN DOE OFFICERS PRECLUDED SUIT AGAINST OFFICERS SUBSEQUENTLY NAMED)/NOTICE OF CLAIM (FAILURE TO NAME POLICE OFFICERS OR JOHN DOE OFFICERS PRECLUDED SUIT AGAINST OFFICERS SUBSEQUENTLY NAMED)/POLICE OFFICERS (NOTICE OF CLAIM, FAILURE TO NAME POLICE OFFICERS OR JOHN DOE OFFICERS PRECLUDED SUIT AGAINST OFFICERS SUBSEQUENTLY NAMED)

MUNICIPAL LAW.

FAILURE TO NAME INDIVIDUAL POLICE OFFICERS, OR JOHN DOE OFFICERS, IN A NOTICE OF CLAIM PRECLUDED SUIT AGAINST THE POLICE OFFICERS SUBSEQUENTLY NAMED IN THE COMPLAINTS.

The First Department affirmed the lower court's dismissal of an action against the police department and several named individual police officers because the notice of claim named only the New York City Police Department as a defendant and did not name any individual officers or any "john doe" officers. Justice Sweeney explained his reasoning for affirming in a concurring memorandum. Two justices dissented in a memorandum by Justice Manzanet-Daniels. Justice Sweeney argued that the underlying purpose of a notice of claim is to allow the municipality to make a timely investigation

into the allegations. By failing to name individual officers, the municipality was not given sufficient notice. The dissent argued that the General Municipal Law does not require the naming (in a notice of claim) of individual employees of a municipality to state a valid claim against employees of a municipality:

> Plaintiffs here did not put the City on notice that it would seek to impose liability upon specific employees of the NYPD. Indeed, as the action progressed, more and more police officers were added as individual defendants, the last of which over three years removed from the incident in question, thus rendering a timely investigation into and assessment of the claims impossible. To permit such a result raises questions of fundamental fairness for the individual defendants, since they were not put on notice, even in a generic way by way of "Police Officer John Doe" or similar language, that they were going to become defendants. Moreover, the prejudice accruing to both the municipal and individual defendants from such a delay is obvious, since memories fade over time, records that could have easily been obtained early on may have been archived, lost or discarded, and witnesses may have relocated, just to name a few of the potential obstacles. Delay in investigating and evaluating a claim defeats the purpose of GML § 50-e. **Alvarez v City of New York, 2015 NY Slip Op 09601, 1st Dept 12-29-15**

NEGLIGENCE

NEGLIGENCE (CREATION OF HAZARDOUS CONDITION, SNOW REMOVAL)/SLIP AND FALL (CREATION OF HAZARDOUS CONDITION, SNOW REMOVAL)/HAZARDOUS CONDITION, CREATION OF (SNOW REMOVAL)/SNOW REMOVAL (CREATION OF HAZARDOUS CONDITION)

NEGLIGENCE.

BECAUSE PROPERTY-OWNER-DEFENDANTS UNDERTOOK SNOW REMOVAL EFFORTS, THEIR FAILURE TO AFFIRMATIVELY DEMONSTRATE THOSE EFFORTS DID NOT CREATE THE HAZARDOUS CONDITION REQUIRED DENIAL OF THEIR MOTION FOR SUMMARY JUDGMENT.

The Second Department noted that, although a property owner is under no duty to remove snow and ice during a storm, if snow removal efforts are made, in moving for summary judgment, the property owner (here Chestnut Oaks) must affirmatively demonstrate the snow removal efforts did not create a hazardous condition. Chestnut Oaks' failure to so demonstrate required denial of the motion:

> As the proponents of a motion for summary judgment, the Chestnut Oaks defendants had the burden of establishing, prima facie, that they neither created the ice condition nor had actual or constructive notice of the condition ... . "Under the so-called storm in progress' rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm" ... . A person responsible for maintaining property is not under a duty to remove ice and snow until a reasonable time after the cessation of the storm ... . However, if a storm is ongoing, and a property owner elects to remove snow, it must do so with reasonable care or it could be held liable for creating or exacerbating a natural hazard created by the storm ... . In such an instance, a property owner moving for summary judgment in a slip and fall case must demonstrate in support of its motion that the snow removal efforts it undertook neither created nor exacerbated the allegedly hazardous condition which caused the injured plaintiff to fall ... . **DeMonte v Chestnut Oaks at Chappaqua, 2015 NY Slip Op 08800, 2nd Dept 12-3-15**

NEGLIGENCE (DUTY OF CARE RE: THIRD PARTY)/DUTY OF CARE (OWED TO THIRD PARTY)/THIRD PARTY (DUTY OF CARE OWED TO)

NEGLIGENCE.

A QUESTION OF FACT EXISTS WHETHER DEFENDANT DRUG TREATMENT FACILITY OWED A DUTY OF CARE TO PLAINTIFF WHO WAS STABBED BY A PATIENT OF THE FACILITY SHORTLY AFTER DISCHARGE.

The First Department, in a full-fledged opinion by Justice Sweeny, over a full-fledged dissenting opinion by Justice Saxe, determined defendant drug treatment facility (Queens Village) did not demonstrate that it owed no duty of care to plaintiff who was stabbed by a patient who had just been discharged by the facility. Queens Village is an alternative to incarceration. The patient was there because he had robbed a cab driver at gunpoint. The patient was discharged because he had pushed another patient to the ground and admitted drinking alcohol. The director of Queens Village indicated that the plan was to transfer the patient to an interim facility until he could be returned to the TASC program [Treatment Alternatives for Safer Communities]. However, the patient apparently became enraged when told he was being discharged and was "escorted" from Queens Village by the police. There was no evidence the police took the patient into custody, or that the police were told by Queens Village to take the patient to the interim facility. The majority concluded that the evidence demonstrated Queens Village exercised sufficient control over the patient (he was to be transferred to an interim facility, not released) to give rise to a duty of care owed to plaintiff. Because Queens Village moved for summary judgment, the court deemed that Queens Village did not demonstrate, as a matter of law, that it did not owe plaintiff a duty of care:

> Generally, the common law does not impose a duty to control the conduct of third persons to prevent them from causing injury to others; rather, liability for the negligent acts of third persons "arises when the defendant has authority to control the actions of such third persons" ... . * * *
>
> The key factor in determining whether a defendant will be liable for the negligent acts of third persons is whether the defendant has sufficient authority to control the actions of such third persons ... . Such authority, at a minimum, requires "an existing relationship between the defendant and the third person over whom charge' is asserted" ... .There is no question that Queens Village had "an existing relationship" and sufficient authority to control [the patient's] actions. **Oddo v Queens Vil. Comm. for Mental Health for Jamaica Community Adolescent Program, Inc., 2015 NY Slip Op 08943, 1st Dept 12-3-15**

NEGLIGENCE (LACK OF NOTICE OF SLIP AND FALL HAZARD, FAILURE TO DEMONSTRATE)/SLIP AND FALL (FAILURE TO DEMONSTRATE LACK OF NOTICE)/NOTICE OF SLIP AND FALL HAZARD (FAILURE TO DEMONSTRATE LACK OF)

NEGLIGENCE.

DEFENDANT'S FAILURE TO DEMONSTRATE WHEN THE AREA WAS LAST INSPECTED AND CLEANED REQUIRED DENIAL OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

Reversing Supreme Court, the Second Department determined defendant transit authority did not demonstrate a lack of constructive notice of a slip and fall hazard because it did not present evidence of when the area was last cleaned and inspected or what the area looked like prior to the slip and fall:

> A defendant property owner who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence ... . " To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell'" ... .
>
> Here, viewing the evidence in the light most favorable to the plaintiff, as the nonmoving party, the defendant failed to establish its prima facie entitlement to judgment as a matter of law ... . The defendant failed to set forth when the subject platform was last inspected or what it looked like prior to the accident, and it failed to establish, prima facie,

that it did not have constructive notice of the alleged hazardous condition ... . **Roman v New York City Tr. Auth., 2015 NY Slip Op 08820, 2nd Dept 12-2-15**

NEGLIGENCE (REAR-END COLLISION, UNEXPLAINED STOP)/REAR-END COLLISION (UNEXPLAINED STOP)

NEGLIGENCE.

ALLEGATION THAT PLAINTIFF'S LEAD VEHICLE STOPPED FOR NO APPARENT REASON RAISED A QUESTION OF FACT ABOUT WHETHER PLAINTIFF'S NEGLIGENCE CAUSED OR CONTRIBUTED TO THE REAR-END COLLISION.

The Second Department determined that defendant's (Balenescu's) allegation that plaintiff (Galuten, who was in the lead vehicle) suddenly stopped for no apparent reason raised a question of fact about whether plaintiff's negligence caused or contributed to the accident:

> Mere evidence of a sudden stop, without more, is not enough to raise a triable issue of fact as to whether the operator of the stopped vehicle was partly at fault, so as to defeat summary judgment ... . However, while vehicle stops under prevailing traffic conditions are forseeable and must be anticipated by the following driver, where the sudden stop is unexplained by the existing circumstances and conditions, an issue of fact as to liability is raised ... .
>
> Here, Balenescu averred, inter alia, that when he was "25 yards from the Galuten vehicle, still traveling at 15 miles per hour, the light turned green, and the Galuten vehicle . . . accelerated safely through the intersection into the next block." Then about 10 yards past the intersection of West 23rd Street and 12th Avenue, the Galuten vehicle suddenly stopped short "for no apparent reason," as there was no traffic "for fifty yards in front of the Galuten vehicle," and the Galuten vehicle showed no signs, nor made any signals, to signify that it was stopping. This evidence was sufficient to raise a triable issue of fact as to whether Galuten's alleged negligence caused or contributed to the accident ... . **Etingof v Metropolitan Laundry Mach. Sales, Inc., 2015 NY Slip Op 08803, 2nd Dept 12-2-15**

NEGLIGENCE (CAUSE OF FALL, PLAINTIFF'S KNOWLEGE OF)/NEGLIGENCE (CONSTRUCTIVE NOTICE OF DANGEROUS CONDITION, FAILURE TO DEMONSTRATE LACK OF)/SLIP AND FALL (CAUSE OF FALL, PLAINTIFF'S KNOWLEDGE OF; CONSTRUCTIVE NOTICE, LACK OF KNOWLEDGE OF DANGEROUS CONDITION, FAILURE TO DEMONSTRATE)

NEGLIGENCE.

DEFENDANT DID NOT DEMONSTRATE PLAINTIFF DID NOT KNOW THE CAUSE OF HER FALL AND DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE DANGEROUS CONDITION; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department determined defendant's motion for summary judgment in a slip and fall case should not have been granted. Plaintiff's testimony she "felt" liquid on the floor was sufficient evidence plaintiff was aware of the cause of her fall. And defendant failed to demonstrate a lack of constructive notice of the dangerous condition:

> Although the defendant presented evidence that it neither created, nor had actual notice of, the alleged condition, it failed to demonstrate that it did not have constructive notice of the alleged condition, as the defendant failed to tender any evidence establishing when the subject area was last inspected and cleaned prior to the accident ... . **Korn v Parkside Harbors Apts., 2015 NY Slip Op 09071, 2nd Dept 12-9-15**

NEGLIGENCE (PROPERTY OWNER DEMONSTRATED SNOW REMOVAL EFFORTS DID NOT CREATE DANGEROUS CONDITION)/SNOW REMOVAL EFFORTS (DEFENDANT DEMONSTRATED IT DID NOT CREATE DANGEROUS CONDITION)/SLIP AND FALL (SNOW REMOVAL DID NOT CREATE DANGEROUS CONDITION)

NEGLIGENCE.

RARE CASE WHERE DEFENDANT SUBMITTED SUFFICIENT EVIDENCE TO DEMONSTRATE SNOW REMOVAL EFFORTS DID NOT CREATE OR EXACERBATE A DANGEROUS CONDITION; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendant (Sailsman) was entitled to summary judgment in a slip and fall case. Defendant demonstrated that his snow removal efforts did not create or exacerbate a dangerous condition. [This case is noteworthy because the vast majority of defendants' motions for summary judgment in similar cases are denied for failure to present the necessary evidence.]:

> Sailsman made a prima facie showing that his property is a two-family home in which he resides, not subject to liability pursuant to Administrative Code of City of NY § 7-210 (b), and that his voluntary snow removal efforts did not create or exacerbate the alleged hazardous condition on the sidewalk ... . Sailsman testified that the day before the accident, he removed the snow and ice from the sidewalk and applied enough salt to completely melt the ice, and provided a neighbor's affidavit confirming that the sidewalk was clear and safe to walk on, as well as photographs taken shortly after the accident. **Montiel v Sailsman, 2015 NY Slip Op 08968, 1st Dept 12-8-15**

NEGLIGENCE (CHAIN ACROSS DRIVEWAY NOT OPEN AND OBVIOUS AS MATTER OF LAW)/OPEN AND OBVIOUS CONDITION (CHAIN ACROSS DRIVEWAY NOT OPEN AND OBVIOUS AS A MATTER OF LAW)

NEGLIGENCE.

CHAIN ACROSS DRIVEWAY WAS NOT "OPEN AND OBVIOUS" AS A MATTER OF LAW; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined a chain hanging across a driveway from two yellow posts was not "open and obvious" as a matter of law. Plaintiff allegedly tripped over the chain on a dark and rainy night. Defendant's motion for summary judgment, therefore, should not have been granted:

> While a possessor of real property has a duty to maintain that property in a reasonably safe condition ... , there is no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous ... . The issue of whether a dangerous condition is open and obvious is fact-specific, and usually a question of fact for a jury ... . "Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances" ... . "A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" ... .
>
> Here, contrary to the Supreme Court's determination, the defendant failed to establish, prima facie, that the chain was open and obvious, i.e., readily observable by those employing the reasonable use of their senses, given the conditions at the time of the accident ... . **Lazic v Trump Vil. Section 3, Inc., 2015 NY Slip Op 09075, 2nd Dept 12-9-15**

NEGLIGENCE.

FACT THAT PLAINTIFF, A PASSENGER IN THE LEAD VEHICLE, WAS NOT AT FAULT IN THE REAR-END COLLISION DOES NOT LEAD TO THE AUTOMATIC CONCLUSION THE DRIVER OF THE REAR VEHICLE WAS AT FAULT; HERE THE DRIVER OF THE REAR VEHICLE RAISED A QUESTION OF FACT WHETHER THE ACCIDENT WAS CAUSED BY OIL ON THE ROADWAY; SUMMARY JUDGMENT FINDING THE REAR DRIVER AT FAULT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, in a full-fledged opinion by Justice Dillon, reversing Supreme Court, determined the driver of a vehicle which struck the rear of a stopped vehicle (in which plaintiff was a passenger) raised a question of fact about whether the accident was unavoidable because of oil on the roadway. The Second Department took the time to explain, in detail, what the proof burdens are in the context of a rear-end collision. Here, the fact that the plaintiff-passenger was not at fault should not have given rise to the automatic conclusion the driver of the rear vehicle was at fault. In addition to the allegation oil on the road made it impossible to stop, there was a question whether the driver of the lead vehicle was comparatively at fault for stopping in the roadway to let off passengers:

> We take this opportunity to caution that trial courts must be careful to avoid concluding, in rear-end accident cases, that just because a plaintiff is a passenger in the lead vehicle, the liability of the rear vehicle is automatically established. It is not. A plaintiff moving for summary judgment on the issue of liability must meet the twofold burden of establishing that he or she was free from comparative fault and was, instead, an innocent passenger, and, separately, that the operator of the rear vehicle was at fault. If the plaintiff fails to demonstrate, prima facie, that the operator of the offending vehicle was at fault, or if triable issues of fact are raised by the defendants in opposition, as here, summary judgment on the issue of liability must be denied, even if the moving plaintiff was an innocent passenger ... .
>
> We further note that [the driver of the rear vehicle] aised the issue of the [lead vehicle driver's] comparative fault by asserting that the van was partially stopped in the moving lane of traffic. A plaintiff's right as an innocent passenger to summary judgment on the issue of liability is not barred or restricted by any potential issue of comparative fault as between the owners and operators of the two vehicles involved in the accident ... . Thus, had the only triable issue of fact raised [by the rear driver] been the [lead driver's] comparative fault, the plaintiff would have been entitled to summary judgment on the issue of liability against [the rear driver]. However, since [the rear driver] raised a triable issue of fact as to whether [he was] completely free from fault, "[t]his matter involves more than simply a trier of fact's apportionment of fault between both defendants" ... . Accordingly, the plaintiff is not entitled to summary judgment on the issue of liability against [the rear driver]. **Phillip v D&D Carting Co., Inc., 2015 NY Slip Op 09084, 2nd Dept 12-9-15**

NEGLIGENCE (QUESTION OF FACT WHETHER WHEEL STOP WAS OPEN AND OBVIOUS)/SLIP AND FALL (QUESTION OF FACT WHETHER WHEEL STOP WAS OPEN AND OBVIOUS)/OPEN AND OBVIOUS CONDITION (WHEEL STOP NOT OPEN AND OBVIOUS AS A MATTER OF LAW)/WHEEL STOP (QUESTION OF FACT WHETHER WHEEL STOP WAS OPEN AND OBVIOUS)

NEGLIGENCE.

QUESTION OF FACT WHETHER WHEEL STOP IN PARKING LOT WAS AN OPEN AND OBVIOUS CONDITION.

The Second Department determined a question of fact had been raised whether a wheel stop in a parking area was an open and obvious condition. A photograph demonstrated the wheel stop was partially obstructing a walkway:

> Here, the defendants submitted the expert affidavit of a forensic engineer who determined that "the parking lot was a safe walking surface and adequately illuminated at night," and that the wheel stop on which the injured plaintiff tripped "was an open and obvious condition" located "within a designated parking space" and not a pedestrian walkway. However, the photographs upon which the defendants' expert partially relies depict the wheel stop as extending directly in front of, and thus partially obstructing, a designated pedestrian walkway. Thus, the defendants failed to satisfy their initial burden of showing that they neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it ... . **Rivera v Queens Ballpark Co., LLC, 2015 NY Slip Op 09087, 2nd Dept 12-9-15**

NEGLIGENCE (ASSUMPTION OF RISK, PLAYER WARMING UP STRUCK BY LACROSSE BALL)/ASSUMPTION OF RISK (LACROSSE PLAYER STRUCK BY LACROSSE BALL WHILE WARMING UP)

NEGLIGENCE.

LACROSSE PLAYER JOGGING AROUND LACROSSE FIELD ASSUMED THE RISK OF BEING STRUCK BY A LACROSSE BALL.

The Second Department, noting that even bystanders assume the risk of being struck by a ball, determined a lacrosse player who was jogging around the lacrosse field while other players were throwing balls assumed the risk of being struck by a ball:

> Pursuant to the doctrine of primary assumption of risk, a participant in a sport or recreational activity consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation ... . This doctrine also applies to spectators or bystanders who place themselves in close proximity to a playing field ... .
>
> Here, the defendants established, prima facie, that by entering the fenced-off field where players were warming up for lacrosse practice, and jogging around the perimeter of the field where lacrosse balls were being thrown between the players and into the net, the injured plaintiff assumed the risk of being struck by a lacrosse ball ... . **Spiteri v Bisson, 2015 NY Slip Op 09089, 2nd Dept 12-9-15**

NEGLIGENCE (DEFENDANT DID NOT DEMONSTRATE PLAINTIFF DID NOT KNOW CAUSE OF HIS FALL)/SLIP AND FALL (DEFENDANT DID NOT DEMONSTRATE PLAINTIFF DID NOT KNOW THE CAUSE OF HIS FALL)

NEGLIGENCE

DEFENDANT UNABLE TO DEMONSTRATE PLAINTIFF DID NOT KNOW THE CAUSE OF HIS FALL; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The First Department, over a dissent, determined defendant did not demonstrate, as a matter of law, that plaintiff did not know the cause of his slip and fall. Therefore, defendant's motion for summary judgment should not have been granted:

... [P]laintiff, who testified at his depositions through a Spanish interpreter, testified at his first deposition that upon exiting the convenience store he "stepped like on a hole," and that he "stepped on something" on the defective ramp which caused his ankle to twist and him to fall to the ground. He further testified at that deposition that "[w]hen [he] stepped, it was that [he] felt like something — - that something was not right underneath," "[l]ike [he] stepped on something not solid." That plaintiff could not initially identify the location of his accident, based upon photographs he was shown at his first deposition that depicted only the bottom portion of a door with no other identifying features, is hardly surprising and not dispositive. Upon being shown, at his second deposition, additional photographs depicting the full entrance area and front of the convenience store, plaintiff was able to definitively identify and mark with an "X" the area on the ramp which was "not leveled" and caused him to fall ... . **Taveras v 1149 Webster Realty Corp., 2015 NY Slip Op 09192, 1st Dept 12-15-15**

NEGLIGENCE (SLIP AND FALL, FAILURE TO DEMONSTRATE WHEN AREA LAST CLEANED OR INSPECTED)/SLIP AND FALL (FAILURE TO DEMONSTRATE WHEN AREA LAST CLEANED OR INSPECTED)

NEGLIGENCE.

FAILURE TO DEMONSTRATE WHEN AREA WAS LAST CLEANED OR INSPECTED REQUIRED DENIAL OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN SLIP AND FALL CASE.

The Second Department, reversing Supreme Court, determined summary judgment should not have been granted to defendants in a slip and fall case. The plaintiff alleged she slipped on a patch of oil in a parking lot. The defendants failed to demonstrate when the area had last been inspected or cleaned:

To meet its burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the accident ... . "Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice" ... .

In support of their motion, the defendants failed to demonstrate, prima facie, a lack of constructive notice of the allegedly hazardous condition that caused the subject accident, as they failed to submit any evidence as to when, prior to the accident, the area of the parking lot where the alleged slip and fall occurred, was last inspected or cleaned relative to the accident ... . **Bruni v Macy's Corporate Servs., Inc., 2015 NY Slip Op 09238, 2nd Dept 12-16-15**

NEGLIGENCE (ASSUMPTION OF RISK, UNREASONABLE INCREASE OF RISK)/ASSUMPTION OF RISK (UNREASONABLE INCREASE)

NEGLIGENCE.

DEFENDANTS' FAILURE TO DEMONSTRATE THE NORMAL RISKS ASSOCIATED WITH HORSEBACK RIDING WERE NOT UNREASONABLY INCREASED BY THE RIDING INSTRUCTOR REQUIRED DENIAL OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

The Second Department determined defendants' motion for summary judgment should not have been granted. Plaintiff was injured when she fell off a horse during riding instruction. The instructor had plaintiff execute a maneuver with her feet outside the stirrups. The plaintiff had told the instructor she could not do the maneuver and she fell when attempting it:

Pursuant to the doctrine of primary assumption of risk, a voluntary participant in a sporting or recreational activity " consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation'" ... . The doctrine operates to limit the scope of the defendant's duty, and "it has been described [as] a principle of no duty' rather than an absolute defense based upon a plaintiff's culpable conduct" ... . "If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty" ... . "The risks of falling from a horse or a horse acting in an unintended manner are inherent in the sport of horseback riding" ... .

The primary assumption of risk doctrine does not serve as a bar to liability if the risk is unassumed, concealed, or unreasonably increased ... . "[A]wareness of risk is not to be determined in a vacuum. It is, rather, to be assessed against the background of the skill and experience of the particular plaintiff" ... . Furthermore, "in assessing whether a defendant has violated a duty of care within the genre of tort-sports activities and their inherent risks, the applicable standard should include whether 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 sport'" ... .

Here, the defendants failed to establish [their] prima facie entitlement to judgment as a matter of law. The defendants failed to establish, prima facie, that the conduct of [the instructor] did not unreasonably increase [plaintiff's] exposure to the risk of falling. **Georgiades v Nassau Equestrian Ctr. at Old Mill, Inc., 2015 NY Slip Op 09249, 2nd Dept 12-16-15**

NEGLIGENCE (NO LEGAL DUTY TO AID UNCONSCIOUS PERSON IN SUPERMARKET PARKING LOT)/DUTY OF CARE (NO LEGAL DUTY TO AID UNCONSCIOUS PERSON IN SUPERMARKET PARKING LOT)

NEGLIGENCE.

SUPERMARKET EMPLOYEES HAD NO LEGAL DUTY TO AID AN UNCONSCIOUS PERSON IN A CAR IN THE SUPERMARKET PARKING LOT.

The Third Department determined employees of Tops supermarket did not have a duty to come to the aid of decedent, who died in his parked car in the Tops parking lot. Decedent and companions were drinking and doing drugs. When decedent was unconscious, his companions placed him in his own car and allegedly told Tops employees decedent was in need of emergency aid. The court held that the Tops employees did not have a legal duty to aid decedent:

"In any negligence action, the threshold issue before the court is whether the defendant owed a legally recognized duty to the plaintiff" ... . This is frequently a "difficult task [and,] [d]espite often sympathetic facts in a particular case before them, courts must be mindful of the precedential, and consequential, future effects of their rulings, and limit the legal consequences of wrongs to a controllable degree" ... . Consonant with the premise that a moral duty does not equate with a legal duty ... , it is the general rule that "one does not owe a duty to come to the aid of a person in peril" ... . Exceptions to the general rule exist, such as, for example, a common carrier's duty to take reasonable action to protect a passenger who is being assaulted ... .

Here, although Tops was open to shoppers, this did not necessarily create an affirmative duty to come to the aid of anyone who was anywhere on its property no matter how unrelated such person's presence was to Tops' function as a grocery store. Decedent was not a customer of Tops, neither he nor his companions were on the premises for any activity related in any manner to Tops' business, Tops' employees did not participate in any fashion in the conduct of decedent's companions, it is not alleged that Tops' employees saw or had any contact with decedent on the premises, and Tops' employees did not take any actions that put decedent in a worse position than the one in which his companions left him. **Daily v Tops Mkts., LLC, 2015 NY Slip Op 09336, 3rd Dept 12-17-15**

NEGLIGENCE (DESPITE STORM IN PROGRESS, QUESTION OF FACT RAISED WHETHER PREEXISTING ICE AND SNOW WAS THE CAUSE OF THE FALL)/SLIP AND FALL (DESPITE STORM IN PROGRESS, QUESTION OF FACT RAISED WHETHER PREEXISTING ICE AND SNOW WAS THE CAUSE OF THE FALL)/STORM IN PROGRESS (QUESTION OF FACT WHETHER PREEXISTING ICE AND SNOW WAS CAUSE OF FALL)

NEGLIGENCE.

ALTHOUGH THERE WAS A STORM IN PROGRESS WHEN PLAINTIFF FELL, PLAINTIFFS RAISED A QUESTION OF FACT WHETHER PREEXISTING SNOW AND ICE WAS THE CAUSE OF THE FALL.

The Second Department determined the defendant met his burden of demonstrating a storm was in progress when plaintiff slipped and fell, but plaintiff then raised a question of fact whether snow and ice which was there prior to the storm was the cause of the fall:

> The evidence submitted by the defendant in support of its motion for summary judgment, including certified climatological data, a report from the plaintiffs' own expert meteorologist, and the transcripts of the deposition testimony of the parties, demonstrated, prima facie, that a storm was in progress at the time of the subject accident ... . The plaintiffs do not contend otherwise.
>
> Accordingly, the burden shifted to the plaintiffs to raise a triable issue of fact as to whether the injured plaintiff's fall was caused by something other than precipitation from the storm in progress ... . In order to do so, the plaintiffs were "required to raise a triable issue of fact as to whether the accident was caused by a slippery condition at the location where the [injured] plaintiff fell that existed prior to the storm, as opposed to precipitation from the storm in progress, and that the defendant had actual or constructive notice of the preexisting condition" ... . The plaintiffs raised a triable issue of fact in this regard. The evidence relied upon by the plaintiffs in opposition to the defendant's motion, which included the report of their expert meteorologist, certified climatological data, and the affidavits of the injured plaintiff and two nonparty witnesses, raised a triable issue of fact as to whether the injured plaintiff slipped and fell on old snow and ice that was the product of a prior storm, as opposed to precipitation from the storm in progress, and as to whether the defendant had constructive notice of the preexisting condition... . **Burniston v Ranric Enters. Corp., 2015 NY Slip Op 09395, 2nd Dept 12-23-15**

NEGLIGENCE (DRIVER WITH RIGHT OF WAY MAY BE COMPARATIVELY NEGLIGENT IN STRIKING CAR WHICH FAILED TO YIELD)/RIGHT OF WAY (DRIVER WITH RIGHT OF WAY MAY BE COMPARATIVELY NEGLIGENT IN STRIKING CAR WHICH FAILED TO YIELD)

NEGLIGENCE.

QUESTION OF FACT WHETHER DRIVER WITH THE RIGHT OF WAY WAS COMPARATIVELY NEGLIGENT IN COLLISION WITH DRIVER WHO FAILED TO YIELD THE RIGHT OF WAY.

The Fourth Department determined there was question of fact whether the driver of a car with the right of way (defendant) was comparatively negligent in striking a car (driven by Deering) which failed to yield the right of way at an intersection:

> There is no dispute that Deering was negligent in failing to yield the right-of-way or that defendant was entitled to anticipate that she would obey the traffic laws that required her to yield the right-of-way to him ... . Nevertheless, in moving for summary judgment, defendant had the burden of establishing not only that Deering was negligent, but also that he was free of comparative fault ... . Defendant failed to meet that burden, inasmuch as his own submissions raised triable issues of fact whether he was negligent ... . At his deposition, defendant testified that he saw the Deering vehicle at the intersection after he traveled over an elevated overpass on Route 5 that is approximately 300 yards from the intersection, but he looked away and did not see the Deering vehicle before or at the moment of impact. "[I]t is well settled that drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident,' " and defendant's admitted failure to see the Deering vehicle immediately prior to the accident raises an issue of fact whether he violated that duty ... . Thus, even though defendant had the right-of-way as he approached Bayview Road, he "may nevertheless be found negligent if he . . . fail[ed] to use reasonable care when proceeding into the intersection' . . . A driver cannot blindly and wantonly enter an intersection' " ... . **Deering v Deering, 2015 NY Slip Op 09715, 4th Dept 12-31-15**

NEGLIGENCE (NEGLIGENT SUPERVISION OF STUDENTS)/NEGLIGENCE (ASSUMPTION OF RISK, SCHOOL SPORTS, HORSEPLAY)/NEGLIGENT SUPERVISION (STUDENTS)/ASSUMPTION OF RISK (SCHOOL SPORTS, HORSEPLAY)/EDUCATION-SCHOOL LAW (NEGLIGENT SUPERVISION, HORSEPLAY)

NEGLIGENCE, EDUCATION-SCHOOL LAW.

ASSUMPTION OF RISK DEFENSE DID NOT APPLY TO STUDENT-ATHLETE'S PARTICIPATION IN UNSUPERVISED "HORSEPLAY;" SCHOOL'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant school district's motion for summary judgment should not have been granted. Plaintiff student was injured when, during an unsupervised period of time prior to the beginning of football practice, a blocking sled was being misused to catapult players into the air. Plaintiff fractured both wrists. The Second Department held there was a question of fact re: the negligent supervision cause of action, and further held that the assumption of risk defense did not apply to the "horseplay" which resulted in plaintiff's injury. With regard to assumption of the risk, the court wrote:

> The doctrine of primary assumption of risk is most persuasively justified for its utility in facilitating " free and vigorous participation in athletic activities'" ... . By placing the risk of participation on the participants themselves, rather than on the sponsor, the doctrine encourages sponsorship, which leads to more opportunities to participate in sports or other recreational activities ... . The doctrine of primary assumption of risk is not applicable to the conduct at issue in this case. ...[T]he use of the blocking sled to catapult each other into the air is not the sort of "socially valuable voluntary activity" that the doctrine seeks to encourage ... . Furthermore, the defendants did not establish that the commonly appreciated risks which are inherent in and arise out of the nature of football generally and flow from such participation on the football team included the risk of sustaining injury after being catapulted through the air by a blocking sled ... . **Duffy v Long Beach City Sch. Dist.. 2015 NY Slip Op 09065. 2nd Dept 12-9-15**

NEGLIGENCE (STUDENT ATHLETE ASSUMED THE RISK OF INJURY DURING LACROSSE PRACTICE)/EDUCATION-SCHOOL LAW (STUDENT ATHLETE ASSUMED THE RISK OF INJURY DURING LACROSSE PRACTICE)/ASSUMPTION OF RISK (STUDENT ATHLETE ASSUMED RISK OF INJURY DURING LACROSSE PRACTICE)

NEGLIGENCE; EDUCATION-SCHOOL LAW.

STUDENT ASSUMED THE RISK OF INJURY DURING LACROSSE PRACTICE.

The Second Department, reversing Supreme Court, determined plaintiff, a high school varsity lacrosse player, assumed the risk of injury during lacrosse practice. Plaintiff alleged the goal was not properly covered by the net and his foot hit the base of the goal, causing him to twist his ankle and fall:

> The assumption of risk doctrine applies where a consenting participant in sporting and amusement activities "is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks" ... . "An educational institution organizing a team sporting activity must exercise ordinary reasonable care to protect student athletes voluntarily participating in organized athletics from unassumed, concealed, or enhanced risks" ... . "If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty" ... . This includes the construction of the playing surface and any open and obvious condition on it ... . * * *
>
> ... Supreme Court should have granted the defendant's motion for summary judgment dismissing the complaint. The defendant established, prima facie, that the plaintiff assumed the risk by voluntarily participating in lacrosse practice where the condition of the goal was not concealed and clearly visible ... . **Safon v Bellmore-Merrick Cent. High Sch. Dist., 2015 NY Slip Op 09418, 2nd Dept 12-23-15**

NEGLIGENCE (ADMISSIBILITY OF STATEMENTS IN HOSPITAL RECORDS)/EVIDENCE (ADMISSIBILITY OF STATEMENTS IN HOSPITAL RECORDS)/HOSPITAL RECORDS (ADMISSIBILITY OF STATEMENTS INCLUDED IN)/EXPERT TESTIMONY (LATE NOTICE, PROPERLY PRECLUDED)/EVIDENCE (PRECLUSION OF EXPERT TESTIMONY PROPER, LATE DISCLOSURE)

NEGLIGENCE; EVIDENCE.

STATEMENTS ATTRIBUTED TO PLAINTIFF PROPERLY REDACTED FROM HOSPITAL RECORDS; EXPERT TESTIMONY DISCLOSED DAYS BEFORE TRIAL PROPERLY PRECLUDED.

In a case with a substantial plaintiff's verdict, the First Department noted the statement that the driver "made an illegal left turn," which was attributed to the plaintiff, was properly redacted from the hospital records. It was not clear the plaintiff made the statement. Even if she did, plaintiff was not the driver so it was not a statement against plaintiff's interest. The statement was not made for the purpose of diagnosis and treatment. And the statement does not relate to a matter of fact ("illegal" is a conclusion of law). The First Department further noted that the trial court's preclusion of testimony by defendants' experts was not an abuse of discretion. The defendants served their disclosures only days before the trial:

> The trial court providently exercised its discretion in precluding testimony from defendants' biomechanical and accident reconstruction experts because defendants served their disclosures only days before the scheduled trial date. We see no reason to disturb the trial court's exercise of discretion in precluding this testimony ... , whether applying a "good cause" standard ... or a "willful or prejudicial" standard ... . We also see no reason to disturb the trial court's exercise of discretion in precluding testimony regarding a seatbelt defense ... . **Coleman v New York City Tr. Auth., 2015 NY Slip Op 08906, 1st Dept 12-3-15**

NEGLIGENCE (EFFECT OF STATUTORY AND REGULATORY VIOLATIONS)/EVIDENCE (EFFECT OF STATUTORY AND REGULATORY VIOLATIONS IN NEGLIGENCE CASE)/STATUTORY VIOLATION (NEGLIGENCE PER SE)/REGULATORY VIOLATIONS (SOME EVIDENCE OF NEGLIGENCE)

NEGLIGENCE, EVIDENCE.

FAILURE TO INSTRUCT JURY ON EFFECT OF STATUTORY AND REGULATORY VIOLATIONS REQUIRED REVERSAL AND A NEW TRIAL IN THIS SLIP AND FALL CASE.

The Second Department determined the trial judge's failure to instruct the jury on the effect of the defendant's violation of a statute and/or a regulation required reversal of the defense verdict in this slip and fall case. The New York State Building Code and the Americans with Disabilities Act require eight-foot wide aisles for access to handicapped parking spots. Plaintiff, who had a handicapped parking permit, slipped on a grassy slope after getting out of his car. The plaintiff's expert testified the parking spot where plaintiff fell did not comply with the statutory/regulatory requirements for handicapped parking. The plaintiff requested the jury be instructed on the effect of a statutory violation (negligence per se) and the defendant requested the jury be instructed on the effect of a regulatory violation (some evidence of negligence). The judge denied both requests. The Second Department ordered a new trial:

> Jury instructions should adequately convey "the sum and substance of the applicable law to be charged" ... . A new trial is warranted when an error is "so significant that the jury was prevented from fairly considering the issues at trial" ... .
>
> "The general rule is that the violation of a statute that establishes a specific safety duty constitutes negligence per se" ... . When evidence is presented that a defendant violated such a statute, the jury's role is to determine whether the violation of that statute proximately caused the plaintiff's injury (... PJI 2:25). Moreover, if proven, a violation of the Building Code of New York State can be considered by a jury as some evidence of negligence (... PJI 2:29...). * * *
>
> Based on the evidence, the trial court should have charged the jury as to the language of the applicable sections of the Americans with Disabilities Act along with PJI 2:25 and the applicable sections of the Building Code of New

York State and the Property Maintenance Code of New York State, in conjunction with PJI 2:29. The failure to do so cannot be considered harmless error since these provisions are applicable to the subject parking lot ... . **DiLallo v Katsan LP, 2015 NY Slip Op 09248, 2nd Dept 12-16-15**

NEGLIGENCE (CEMENT PATCH WAS NOT TRIVIAL DEFECT AS A MATTER OF LAW)/TRIVIAL DEFECT (SLIP AND FALL, CEMENT PATCH WAS NOT A TRIVIAL DEFENCE AS A MATTER OF LAW)/SLIP AND FALL (CEMENT PATCH WAS NOT TRIVIAL DEFECT AS A MATTER OF LAW)/EVIDENCE (CEMENT PATCH WAS NOT SHOWN TO BE TRIVIAL DEFECT AS A MATTER OF LAW, NO EVIDENCE OF DIMENSIONS OF DEFECT)

NEGLIGENCE; EVIDENCE.

DEFENDANTS DID NOT DEMONSTRATE CEMENT PATCH WAS A TRIVIAL DEFECT AS A MATTER OF LAW; NO EVIDENCE OF DIMENSIONS OF DEFECT SUBMITTED.

The Second Department determined defendants did not demonstrate, as a matter of law, that the cement patch over which plaintiff allegedly tripped was a trivial defect. The defendants did not submit evidence of the dimensions of the defect:

> "[T]here is no minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" ... . Photographs that fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable ... .
>
> Here, in support of their motion, the defendants submitted, inter alia, the deposition testimony of the plaintiff and photographs which the plaintiff claimed accurately depicted the condition that allegedly caused her to fall. Viewed in the light most favorable to the plaintiff, as the nonmovant ... , the evidence submitted by the defendants failed to establish their prima facie entitlement to judgment as a matter of law. No evidence was elicited as to the dimensions of the defect at the time of the accident. In light of the photographs, which depict the irregular nature of the sidewalk, as well as the time, place, and circumstance of the plaintiff's fall, it cannot be said as a matter of law that the condition at issue was trivial as a matter of law and therefore not actionable ... . **Mazza v Our Lady of Perpetual Help R.C. Church, 2015 NY Slip Op 09657, 2nd Dept 12-30-15**

NEGLIGENCE (DEFENDANT NOT AN OUT-OF-POSSESSION LANDLORD, PROPERLY HELD LIABLE FOR PLAINTIFF'S INJURIES)/LANDLORD-TENANT (DEFENDANT NOT AN OUT-OF-POSSESSION LANDLORD, PROPERLY HELD LIABLE FOR PLAINTIFF'S INJURIES)/OUT-OF-POSSESSION LANDLORD (DEFENDANT NOT AN OUT-OF POSSESSION LANDLORD, PROPERLY HELD LIABLE FOR PLAINTIFF'S INJURIES)

NEGLIGENCE, LANDLORD-TENANT.

DEFENDANT DID NOT ESTABLISH IT WAS AN OUT-OF-POSSESSION LANDLORD; MANAGEMENT AGREEMENT INCLUDED THE RIGHT TO INSPECT THE PROPERTY AND AN AGREEMENT TO INDEMNIFY TENANT FOR CLAIMS ARISING FROM TENANT'S NEGLIGENCE.

The First Department determined defendant did not demonstrate it was an out-of-possession landlord and defendant was therefore properly held liable for plaintiff's slip and fall. Plaintiff worked for nonparty tenant Sunrise Senior Living Management, Inc. (SSLM) with which defendant had a property management agreement. Although the agreement required SSLM to maintain the facility, defendant had access to the facility for inspection and agreed to indemnify SSLM for claims arising from SSLM's negligence:

> Defendant failed to establish that it was an out-of-possession landowner with limited liability to third persons injured on the property ... . Its management agreement with SSLM gave SSLM "complete and full control and discretion in the operation ... of the Facility" and required SSLM to "maintain the Facility ... in conformity with applicable Legal Requirements." However, defendant had "access to the Facility at any and all reasonable times for the purpose of inspection," had access to SSLM's books and records, and was required to fund operating shortfalls, and SSLM was required to report to defendant regularly and to maintain bank accounts in approved financial institutions "as agent for [defendant]."

Significantly, the management agreement requires defendant to indemnify SSLM for claims arising out of SSLM's own negligence in the performance of its duties. This agreement to indemnify is analogous to the procurement of insurance, which constitutes evidence of ownership and control ... . It evidences defendant's intent to be responsible for any accidents on the property. But for the fortuity of plaintiff's being an employee who was barred from suing his employer, defendant would be responsible, through the indemnification provision, for his injuries. **Waring v Sunrise Yonkers SL, LLC, 2015 NY Slip Op 09174, 1st Dept 12-10-15**

NEGLIGENCE (WRONGFUL BIRTH CAUSE OF ACTION ACCRUES UPON BIRTH OF CHILD)/MEDICAL MALPRACTICE (WRONGFUL BIRTH CAUSE OF ACTION ACCRUES UPON BIRTH OF CHILD)/WRONGFUL BIRTH (CAUSE OF ACTION ACCRUES UPON BIRTH OF CHILD)

NEGLIGENCE, MEDICAL MALPRACTICE.

WRONGFUL BIRTH CAUSE OF ACTION ACCRUES UPON BIRTH OF THE CHILD, NOT UPON THE TERMINATION OF TREATMENT CULMINATING IN THE IMPLANTATION OF A FERTILIZED DONOR EGG.

The First Department, in a full-fledged opinion by Justice Friedman, over a partial dissent, determined that plaintiffs' action for wrongful birth accrued upon the birth of the child, not when the procedure implanting a fertilized donated egg was complete. The plaintiffs alleged that a donor egg was not adequately screened for genetic defects and that, in fact, a genetic defect in the egg was passed on to plaintiffs' child:

> This is a medical malpractice action for "wrongful birth" ... , in which it is alleged that defendants' failure to perform adequate genetic screening of an egg donor for an in vitro fertilization resulted in the conception and birth of plaintiffs' impaired child. The primary question raised on this appeal is whether plaintiffs' wrongful birth cause of action accrued upon the termination of defendants' treatment of the plaintiff mother, less than two months after the implantation of the embryo, or upon the birth of the infant several months later. We hold that the wrongful birth claim accrued upon the birth of the infant and, therefore, was not barred by the applicable statute of limitations (CPLR 214-a) when this action was commenced within 2½ years after the birth. * * *
>
> In the case of a claim for wrongful birth, "the parents' legally cognizable injury is the increased financial obligation" of raising an impaired child ... , ... Whether this legally cognizable injury will befall potential parents as the result of the gestation of an impaired fetus cannot be known until the pregnancy ends. Only if there is a live birth will the injury be suffered. Thus, until there is a live birth, the existence of a cognizable legal injury that will support a wrongful birth cause of action cannot even be alleged . Without legally cognizable damages, there is no legal right to relief, and "the Statute of Limitations cannot run until there is a legal right to relief" ... . Accordingly, the statute of limitations begins to run on a wrongful birth claim upon the live birth of an impaired child, whose care and support will occasion the pecuniary damages the parents may seek to recover. **B.F. v Reproductive Medicine Assoc. of N.Y., LLP, 2015 NY Slip Op 09370, 1st Dept 12-17-15**

NEGLIGENCE (CITY [NYC], NOT ABUTTING LANDOWNERS, RESPONSIBLE FOR MAINTENANCE OF SIDEWALK HYDRANT VALVE COVER)/SLIP AND FALL (CITY [NYC], NOT ABUTTING LANDOWNERS, RESPONSIBLE FOR MAINTENANCE OF SIDEWALK HYDRANT VALVE COVER)/MUNICIPAL LAW (CITY [NYC]], NOT ABUTTING LANDOWNERS, RESPONSIBLE FOR MAINTENANCE OF SIDEWALK HYDRANT VALVE COVER)/TRANSPORTATION, NYC DEPARTMENT OF (RESPONSIBLE FOR MAINTENANCE OF SIDEWALK HYDRANT VALVE COVER)

NEGLIGENCE, MUNICIPAL LAW.

CITY (NYC), NOT ABUTTING LANDOWNERS, RESPONSIBLE FOR MISSING SIDEWALK HYDRANT VALVE COVER PURSUANT TO RULES OF CITY OF NEW YORK DEPARTMENT OF TRANSPORTATION.

The Second Department determined that the city (NYC) was responsible for maintenance of grates or covers on sidewalks pursuant to the Rules of the City of New York Department of Transportation. Therefore plaintiff, who allegedly fell because a sidewalk hydrant valve cover was missing, could not sue the abutting landowners:

> Section 7-210 of the Administrative Code of the City of New York imposes liability for injuries resulting from negligent sidewalk maintenance on the abutting property owners. However, Rules of City of New York Department of Transportation (34 RCNY) § 2-07(b) provides that owners of covers or gratings on a street are responsible for monitoring the condition of those covers and gratings and the area extending 12 inches outward from the perimeter of the hardware, and for ensuring that the hardware is flush with the surrounding street surface. "34 RCNY 2-01 includes a sidewalk' within the definition of street'" ... . Accordingly, the City, and not the defendants, was responsible for maintaining the condition of the area where the plaintiff fell ... . "[T]here is nothing in section 7-210 of the Administrative Code of the City of New York indicating that the City Council intended to supplant the provisions of 34 RCNY 2-07(b) and to allow a plaintiff to shift the statutory obligation of the owner of the cover or grating to the abutting property owner" ... . **Torres v Sander's Furniture, Inc., 2015 NY Slip Op 09091 2nd Dept 12-9-15**

NEGLIGENCE (GOVERNMENT IMMUNITY, GOVERNMENTAL FUNCTION, NO SPECIAL RELATIONSHIP)/GOVERNMENTAL IMMUNITY (GOVERNMENTAL FUNCTION, NO SPECIAL RELATIONSHIP)/MUNICIPAL LAW (GOVERNMENTAL IMMUNITY, GOVERNMENTAL FUNCTION, NO SPECIAL RELATIONSHIP)/SPECIAL RELATIONSHIP (GOVERNMENTAL IMMUNITY, GOVERNMENTAL FUNCTION)

NEGLIGENCE, MUNICIPAL LAW.

NO SPECIAL RELATIONSHIP BETWEEN CITY AND PLAINTIFF; CITY WAS THEREFORE IMMUNE FROM SUIT.

The Second Department determined no special relationship existed between plaintiff, a city sanitation worker, and the city (NYC). Therefore, the city was protected from plaintiff's suit by the doctrine of governmental immunity. Plaintiff was attacked by a participant in a community service program with whom plaintiff was working. The gravaman of plaintiff's complaint was the city's failure to provide security. The provision of security is a governmental, not proprietary, function. Therefore, absent a special relationship between the plaintiff and the city, the city was immune from suit. **Giordanella v City of New York, 2015 NY Slip Op 09251, 2nd Dept 12-16-15**

NEGLIGENCE (MUNICIPAL LIABILITY, FAILURE INSTALL STOP SIGN)/MUNICIPAL LAW (LIABILITY FOR FAILURE TO INSTALL STOP SIGN)/TRAFFIC PLAN (MUNICIPAL LIABILITY FOR FAILURE TO INSTALL STOP SIGN)

NEGLIGENCE, MUNICIPAL LAW.

QUESTION OF FACT WHETHER CITY LIABLE FOR FAILURE TO INSTALL A STOP SIGN AT AN ACCIDENT-PRONE INTERSECTION.

The Second Department determined there was a question of fact whether the municipality should have installed an all-way stop at an intersection where plaintiff was injured. A study of the intersection by the municipality, prompted by the number of accidents, was deemed inadequate:

A municipality owes a nondelegable duty to keep its streets in a reasonably safe condition ... . However, it is accorded a qualified immunity from liability arising out of a highway safety planning decision ... . A municipality may be held liable only "when its study of a traffic condition is plainly inadequate or there is no reasonable basis for its traffic plan" ... . * * *

"Once [a municipality] is made aware of a dangerous traffic condition it must undertake reasonable study thereof with an eye toward alleviating the danger" ... . "Moreover, after the [municipality] implements a traffic plan it is under a continuing duty to review its plan in the light of its actual operation'" ... . Under these circumstances, the City's submissions revealed triable issues of fact regarding the adequacy of the ... 2008 re-evaluation of its prior study which it undertook to complete, and the reasonableness of the City's failure to install a stop sign ... at the intersection under all of the attendant circumstances ... . **Langer v Xenias, 2015 NY Slip Op 09258. 2nd Dept 12-16-15**

NEGLIGENCE (POLICE OFFICER TRIPPED OVER ELECTRIC CORD AT WORK)/MUNICIPAL LAW ([POLICE OFFICER TRIPPED OVER ELECTRIC CORD AT WORK, FIREFIGHTER RULE)/FIREFIGHTER RULE (POLICE OFFICER TRIPPED OVER ELECTRIC CORD AT WORK)/GENERAL MUNICIPAL LAW 205-e (POLICE OFFICER TRIPPED OVER ELECTRIC CORD AT WORK)/LABOR LAW 27-a(3)(a)(1) (VIOLATION AS PREDICATE FOR GENERAL MUNICIPAL LAW 205-e ACTION)

NEGLIGENCE; MUNICIPAL LAW; LABOR LAW.

FIREFIGHTER RULE DID NOT PRECLUDE ACTION BY POLICE OFFICER STEMMING FROM A FALL AT THE OFFICE; GENERAL MUNICIPAL LAW 205-e ACTION PROPERLY BASED ON ALLEGED VIOLATION OF LABOR LAW 27-a.

The Second Department determined a police officer's common law negligence and General Municipal Law 205-e actions should not have been dismissed. The officer tripped over an electric cord at the office. The firefighter rule did not bar the suit because the injury was not the result of the heightened risk associated with police work. The General Municipal Law 205-e cause of action was correctly based upon an alleged violation of Labor Law 27-a:

Here, the defendants failed to establish, prima facie, that the firefighter rule barred the plaintiffs' cause of action alleging common-law negligence. The injured plaintiff's injury did not occur during an act in furtherance of a police function which exposed her to a heightened risk of sustaining that injury. The performance of her duties merely furnished the occasion for the injury. Furthermore, the defendants failed to establish, prima facie, that they did not have constructive notice of the condition complained of ... . Therefore, the Supreme Court erred in directing dismissal of the plaintiffs' common-law negligence cause of action.

The Supreme Court also erred in dismissing the plaintiffs' cause of action pursuant to General Municipal Law § 205-e. General Municipal Law § 205-e permits a police officer to assert a tort claim against a fellow officer or an employer. To establish a cause of action under General Municipal Law § 205-e, a police officer plaintiff must (1) identify the statute or ordinance with which the defendant failed to comply, (2) describe the manner in which the police officer was injured, and (3) set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm ... . As a prerequisite to recovery pursuant to a General Municipal Law § 205-e cause of action, "a police officer must demonstrate injury resulting from negligent noncompliance with a requirement found in a well-developed body of law and regulation that imposes clear duties" ... .

Here, the plaintiffs predicate their General Municipal Law § 205-e cause of action on Labor Law § 27-a(3)(a)(1). The Supreme Court correctly determined that Labor Law § 27-a(3)(a)(1) may appropriately serve as a statutory predicate for a section 205-e cause of action, and does so here ... . **Kelly v City of New York, 2015 NY Slip Op 08808, 2nd Dept 12-2-15**

NEGLIGENCE (PLAINTIFF FELL WHILE CLIMBING ON OUTSIDE OF TUBE SLIDE)/PRODUCTS LIABILITY (PLAINTIFF FELL WHILE CLIMBING ON THE OUTSIDE OF A TUBE SLIDE)

NEGLIGENCE, PRODUCTS LIABILITY.

MANUFACTURER OF A TUBE SLIDE AND THE PROPERTY OWNER WHERE THE TUBE SLIDE WAS LOCATED ENTITLED TO SUMMARY JUDGMENT; INFANT PLAINTIFF FELL WHEN CLIMBING ON THE OUTSIDE OF THE TUBE SLIDE.

The Second Department determined both the manufacturer (Slip N Slide) of a tube slide (an enclosed plastic spiral tube) and the property owner (Philip Howard) where the tube slide was located were entitled to summary judgment. Infant plaintiff (ten years old) was injured when she fell while climbing on the outside of the tube slide. The Second Department determined the dangers of climbing on the outside of the tube were obvious and the tube slide was not inherently dangerous or defectively designed. In addition, the property owner demonstrated it did not create the hazardous condition or have constructive notice of it:

> Contrary to the plaintiffs' contention, Swing N Slide established its prima facie entitlement to judgment as a matter of law by demonstrating that the tube slide was not inherently dangerous or otherwise defectively designed ... . In addition, as here, "there is no liability for failure to warn where [the] risks and dangers are so obvious that they can ordinarily be appreciated by any consumer to the same extent that a formal warning would provide . . . or where they can be recognized simply as a matter of common sense" ... . In opposition, the plaintiffs failed to raise a triable issue of fact. Accordingly, the Supreme Court properly granted that branch of Swing N Slide's motion which was for summary judgment dismissing the complaint insofar as asserted against ... .
>
> Philip Howard also was entitled to judgment as a matter of law. "A landowner has a duty to exercise reasonable care to maintain its premises in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk'" ... . "A defendant in a premises liability case may establish its prima facie entitlement to judgment as a matter of law, inter alia, by establishing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient time to remedy it, or that the accident was not foreseeable" ... .
>
> Here, Philip Howard demonstrated its prima facie entitlement to judgment as a matter of law by submitting proof that the tube slide, which was neither inherently dangerous nor defectively designed, was installed and maintained in a reasonably safe condition. Moreover, there is no duty imposed upon a landlord to supervise children who are properly upon its premises ... . **Moseley v Philip Howard Apts. Tenants Corp., 2015 NY Slip Op 09080, 2nd Dept 12-9-15**

NEGLIGENCE (PRODUCTS LIABILITY, EVIDENDE OF RECALL AND CUSTOMER COMPLAINTS RE: DEFENDANT'S MOTORCYCLE RELEVANT TO DEFENDANTS' DUTY TO WARN)/PRODUCTS LIABILITY (EVIDENCE OF RECALL AND CUSTOMER COMPLAINTS RE: DEFENDANT'S MOTORCYCLE RELEVANT TO DEFENDANTS' DUTY TO WARN)/DUTY TO WARN (PRODUCTS LIABILITY, EVIDENCE OF RECALL AND CUSTOMER COMPLAINTS RE: DEFENDANT'S MOTORCYCLE RELEVANT TO DEFENDANTS' DUTY TO WARN)

NEGLIGENCE; PRODUCTS LIABILITY.

EXPERT EVIDENCE OF A RECALL AND EVIDENCE OF CUSTOMER COMPLAINTS ABOUT DEFENDANTS' MOTORCYCLE RELEVANT TO DEFENDANTS' DUTY TO WARN.

The Fourth Department, eliminating restrictions on the evidence imposed by Supreme Court, determined evidence from plaintiffs' electrical expert and evidence of customer complaints were relevant to defendants' duty to warn. Plaintiffs alleged an electrical defect in their motorcycle (manufactured by defendants) caused the accident. Plaintiffs sought to introduce evidence of a recall made prior to the accident and evidence of customer complaints:

> ... [W]e conclude that the court erred in granting that part of defendants' motion seeking to preclude the testimony of plaintiffs' electrical engineer expert and the customer complaints to the extent that such evidence is relevant to defendants' continuing duty to warn. We therefore modify the order accordingly. "A manufacturer or retailer may . . . incur liability for failing to warn concerning dangers in the use of a product which come to his attention after

manufacture or sale . . . through being made aware of later accidents involving dangers in the product of which warning should be given to users . . . Although a product [may] be reasonably safe when manufactured and sold and involve no then known risks of which warning need be given, risks thereafter revealed by user operation and brought to the attention of the manufacturer or vendor may impose upon one or both a duty to warn" ... . "What notice . . . will trigger [this] postdelivery duty to warn appears to be a function of the degree of danger which the problem involves and the number of instances reported . . . [Whether] a prima facie case on that issue has been made will, of course, depend on the facts of each case" ... .

Defendant's recall was first issued in March 2004, prior to plaintiffs' accident on April 30, 2004. A determination that plaintiffs' motorcycle should have been included in the recall would be relevant to defendants' duty to warn plaintiffs of the defect that, plaintiffs allege, caused a "quit while riding" event in their motorcycle and thereby caused or contributed to their accident. Plaintiffs' expert, an electrical engineer, expects to testify in part that plaintiffs' motorcycle does not differ in any material respect from those included in the 2004 recall, despite the fact that plaintiffs' motorcycle did not have the same stator as the motorcycles affected by the recall. In our view, the expert's qualifications as an electrical engineer qualify him to opine whether the motorcycles "were the same in all significant respects" ... , and the fact that the expert has done no testing goes to the weight to be given to his testimony, not its admissibility ... . **Smalley v Harley-Davidson Motor Co. Group LLC, 2015 NY Slip Op 09712, 4th Dept 12-31-15**

REAL PROPERTY

REAL PROPERTY (PARTIAL PERFORMANCE OF ORAL AGREEMENT, STATUTE OF FRAUDS)/CONTRACT LAW (PARTIAL PERFORMANCE OF ORAL AGREEMENT, STATUTE OF FRAUDS)/STATUTE OF FRAUDS (PARTIAL PERFORMANCE OF ORAL AGREEMENT)

REAL PROPERTY; CONTRACT LAW.

QUESTION OF FACT WHETHER PARTIAL PERFORMANCE TOOK ORAL AGREEMENT OUT OF THE STATUTE OF FRAUDS.

The Third Department determined a question of fact had been raised about whether an oral agreement to extend a mining lease was enforceable because partial performance took the contract out of the statute of frauds. An amendment to extend the mining lease for 20 years was never executed. However, the agreement was mentioned in a 20-year sublease which was subsequently entered:

Defendants' statute of frauds argument is governed by General Obligations Law § 5-703, which, as relevant here, provides that an interest in real property can be created or conveyed only by a signed writing. While plaintiff concedes that a signed copy of the amendment does not exist, he contends that the statute of frauds is inapplicable, as the parties' course of conduct constitutes partial performance of an oral contract to extend the term of the lease (see General Obligations Law § 5-703 [4]...). "[P]artial performance of an alleged oral contract will be deemed sufficient to take such contract out of the [s]tatute of [f]rauds only if it can be demonstrated that the acts constituting partial performance are 'unequivocally referable' to said contract" ... .

Here, plaintiff raised triable issues of fact as to whether the partial-performance exception to the statute of frauds applies. Evidence of such performance can be found in the parties' mutual decision to execute the 20-year sublease agreement, which explicitly referred to the amendment and acknowledged that plaintiff and [defendant] were parties to it. Indeed, if the parties did not have an understanding that the mining lease was to be extended to 20 years, then [defendant sublessee's] willingness to enter into a 20-year sublease with plaintiff — despite the fact that plaintiff had only a five-year lease with [defendant] and [defendant's] express consent to the creation of these incongruous interests in his property — would appear to be "'unintelligible or at least extraordinary,' explainable only with reference to the oral agreement" .... . **Bowers v Hurley, 2015 NY Slip Op 08884, 3rd Dept 12-3-15**

TRUSTS AND ESTATES

TRUSTS AND ESTATES (WILL CONSTRUCTION, EFFECT OF POWER OF APPOINTMENT ON REMAINDER INTERESTS)/POWER OF APPOINTMENT (WILL CONSTRUCTION, EFFECT OF POWER OF APPOINTMENT ON REMAINDER INTERESTS)/WILL CONSTRUCTION (EFFECT OF POWER OF APPOINTMENT ON REMAINDER INTERESTS)/REMAINDER INTERESTS (WILL CONSTRUCTION, EFFECT OF POWER OF APPOINTMENT ON REMAINDER INTERESTS)

TRUSTS AND ESTATES.

REMAINDER INTERESTS WHICH CAN ONLY BE DIVESTED BY A POWER OF APPOINTMENT ARE VESTED REMAINDER INTERESTS.

The Second Department determined the five individuals who were to take remainder interests in the event a power of appointment was not exercised had vested remainder interests:

> In Article Third of the will, the testator created a trust for the benefit of Sydelle [his wife] during her lifetime. Upon the death of Sydelle, the remainder was to be distributed to or for the benefit of such one or more persons within a class composed of the testator's then living issue or Sydelle's living issue, "in such estates, interests and proportions as [Sydelle] may appoint by specific reference to this power of appointment in her last will and testament, admitted to probate." The will provided that if Sydelle failed to exercise or did not fully or effectually exercise her power of appointment, all property not effectually appointed, was to be paid and distributed to five other named individuals. * * *
>
> "It is a well-established rule, both of the common law and by statute, in this State that estates in remainder which are limited to take effect upon default in the exercise of a power of appointment are not prevented from vesting by the existence of the power, but take effect in the same manner as if no power existed, subject, however, to be divested by an exercise of the power" ... . Where the power of appointment has not been exercised and cannot be until the death of the person with the power of appointment, it may be eliminated from consideration and the next limitation considered ... . Thus, the five individuals named in Article Third ... have a vested remainder interest which can be divested if Sydelle exercises her power of appointment by will ... . **Matter of Levitan, 2015 NY Slip Op 08838, 2nd Dept 12-2-15**

UNEMPLOYMENT INSURANCE

UNEMPLOYMENT INSURANCE (IT CONSULTANT)

UNEMPLOYMENT INSURANCE.

IT CONSULTANT WAS EMPLOYEE.

The Third Department determined claimant, who had her own IT consultant business, was an employee of Geneva, despite the contractual "independent contractor" designation. The court, however, sent the matter back for a determination whether claimant was totally unemployed. With respect to the employee status, the court wrote:

> The evidence at the hearing demonstrated that claimant, who runs her own consulting business, Jessica Consultant LLC, responded to an advertisement placed by Geneva that listed the job requirements and necessary IT background for a position with its client; Geneva screened her and forwarded her credentials to its client, which interviewed and approved of claimant. Geneva required that claimant sign a contract that designated her as the consultant assigned to perform the IT services for the client, and labeled her as an independent contractor. Geneva employed approximately 35 people as consultants who received benefits and designated another 15 consultants as independent contractors who were required to be in business for themselves and to obtain, among other things, their own liability insurance, but Geneva's chief financial officer conceded that both groups provided the "same services" and had the "same skills." Geneva contracted with its client to provide claimant's services and charged the client for those services, and Geneva paid claimant a negotiated daily rate. Claimant worked a full-time

schedule set by the client and performed services in the client's office where she was provided a desk, computer, supplies and support staff. Claimant reported regularly to the client's manager, who instructed her on the client's needs and expectations, trained her on the client's systems, gave her assignments, set her deadlines and approved her time sheets, which were submitted to Geneva for payment. Claimant could not provide substitutes or refuse assigned work and needed the client's approval to take time off from work. **Matter of Thomas (Geneva Consulting Group--Commissioner of Labor), 2015 NY Slip Op 08889, 3rd Dept 12-3-15**

UNEMPLOYMENT INSURANCE (MEDICAL COURIERS)

UNEMPLOYMENT INSURANCE.

MEDICAL COURIERS WERE EMPLOYEES.

The Third Department determined couriers were employees of Dynamex entitled to unemployment insurance benefits:

... [T]he record contains evidence that claimants were required to wear uniforms identifying themselves as being contracted through Dynamex. Claimants were also issued Dynamex identification cards. Further, claimants were bound by a one-year noncompetition restriction following their termination with Dynamex. Claimants would advise Dynamex when they were available to work and Dynamex would then assign pickups and deliveries to them within their general geographic location. Claimants were required to complete their assignments the same day and provide Dynamex with proof of delivery. Dynamex handled customer complaints and would bill its customers and pay claimants weekly, based upon commissions for the services performed, even if the customer did not pay Dynamex. **Matter of Voisin (Dynamex Operations E., Inc.--Commissioner of Labor), 2015 NY Slip Op 08881, 3rd Dept 12-3-15**

UNEMPLOYMENT INSURANCE (SPECIAL EDUCATION PROVIDER)

UNEMPLOYMENT INSURANCE.

SPECIAL EDUCATION PROVIDER NOT AN EMPLOYEE.

The Third Department determined claimant, a provider of special education services, was not an employee of Mid Island, which was under contract with the New York City Department of Education (NYCDOE) to provide such services:

Although Mid Island would contact claimant to let her know whether a student in her geographic area needed special education services, Mid Island did not assign students to claimant; she was free to accept or reject a referral from Mid Island ... . Mid Island also did not control the scheduling of services, which would be arranged between the student's parents and claimant ... , and did not dictate the type, location or manner of delivery of the services that were to be provided, which would be specified in the student's individualized education program ... . Once services were provided, any parental complaints were handled by NYCDOE, not Mid Island, and if a teacher needed to be replaced, NYCDOE would direct Mid Island to do so. Mid Island never performed any type of performance evaluation of claimant ... . The reporting requirements governing submission of session and progress notes also came from NYCDOE, and such notes were neither required nor reviewed by Mid Island ... .

Claimant was required under the parties' agreement to maintain her own malpractice insurance and cover her own expenses, and she was not provided with any supplies or benefits ... . The rate of payment was established by NYCDOE, and, if Mid Island did not receive payment from NYCDOE, it was not obliged to remit payment to claimant for services provided to a student... . **Matter of Wright (Mid Is. Therapy Assoc. LLC--Commissioner of Labor), 2015 NY Slip Op 08897, 3rd Dept 12-3-15**

UNEMPLOYMENT INSURANCE.

INTERPRETERS ARE EMPLOYEES.

The Third Department determined interpreters were employees of CP Language Institute, Inc (CPLI):

> The record establishes that CPLI advertises for language service interpreters, like claimant, to provide translation services for its clients. An interpreter is required to submit a resume and, after being interviewed by CPLI and receiving a sufficient score on a written language proficiency test, CPLI adds the interpreter to its roster. CPLI maintains a file of each interpreter's qualifications that includes a resume, reference letters, proficiency exam and availability. CPLI notifies an interpreter of assignments, which can be accepted or declined by the interpreter. Once an assignment is accepted, however, the interpreter is required to notify CPLI if he or she becomes unavailable and CPLI, not the interpreter, provides a substitute if needed.
>
> Furthermore, claimant signed an agreement with CPLI that included guidelines regarding punctuality, attire, performance and conduct when providing services to CPLI clients. Although claimant could work for other agencies that provided translation services, she was subject to a 12-month noncompete clause following termination of her relationship with CPLI. In addition, claimant was provided with a picture identification badge with CPLI's name. Claimant was paid by CPLI following the submission of time sheets, regardless of whether CPLI was paid by the client. Any complaints from a client were handled by CPLI. **Matter of Karapetyan (Commissioner of Labor), 2015 NY Slip Op 09324, 3rd Dept 12-17-15**

UNEMPLOYMENT INSURANCE.

PHARMACEUTICALS COURIERS WERE EMPLOYEES.

The Third Department determined couriers for a pharmaceuticals warehouse (SDS) were employees entitled to unemployment insurance benefits:

> Here, SDS advertised for couriers and screened interested parties. Couriers are assigned routes by SDS, set up geographically by SDS's clients, worked an agreed upon set weekly schedule at a pay rate negotiated between the couriers and SDS and were required to either pick the pharmaceuticals up at an SDS warehouse or at the SDS client's location. SDS would have an on-site coordinator present when pickups were made at the client's location. Couriers were provided a daily manifest bearing SDS's name that identifies the stops for their routes. Couriers were required to obtain proof of delivery signatures on the manifests and return a copy of them to SDS. Couriers also provided invoices to SDS in order to get paid and SDS would bill its clients, and couriers were paid whether or not SDS was paid by its clients ... . Couriers were required to wear SDS uniforms and were provided badges identifying themselves as being contracted through SDS. SDS also provided scanners to couriers to be used in order to electronically track their pickups and deliveries. **Matter of Gill (Strategic Delivery Solutions LLC--Commissioner of Labor), 2015 NY Slip Op 09576, 3rd Dept 12-24-15**

USURY

USURY (EFFECTIVE ANNUAL INTEREST ON NOTE WAS 36%)

USURY.

NOTE WITH 12% INTEREST RATE FOR LESS THAN A YEAR WAS USURIOUS.

The First Department determined a note was void as usurious. Although the face of the note indicated the interest rate was 12%, the duration of the note was less than a year. The actual interest was a usurious 36%:

> It is true that the stated rate on the four-month note is 12%. However, it does not say 12% per annum. Where, as here, the loan is for less than a year, the interest rate is annualized ... , and thus, the annual rate on the note is 36%, well above the criminal usury rate of 25%. It is also true that the note says, "in no event shall the rate of interest payable hereunder exceed the maximum interest permitted to be charged by applicable law and any interest paid in excess of the permitted rate shall be credited to principal and any balance refunded to" defendant. However, that does not make the subject note nonusurious ... . Furthermore, even if defendant drafted the note, that "does not relieve the lender from a defense of usury" ... . **Bakhash v Winston, 2015 NY Slip Op 08966, 1st Dept 12-8-15**

WORKERS' COMPENSATION LAW

WORKER'S COMPENSATION (FEDERAL LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT)/FEDERAL LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

WORKERS' COMPENSATION LAW (FEDERAL LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT).

PLAINTIFF'S ACTION AGAINST ALTER EGO OF HIS EMPLOYER BARRED BY FEDERAL LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT.

Plaintiff was injured while working on a vessel owned by a defendant when an employee of the New York Container Terminal, LLC (NYCT) lowered a container on him. NYCT's motion for summary judgment should have been granted. NYCT provided insurance coverage for payment of Federal Longshore and Harbor Workers' Compensation Act (LHWHA) benefits to plaintiff. And NYCT demonstrated it was the alter ego of plaintiff's employer:

> The evidence demonstrated that any action against NYCT in relation to the plaintiff's accident was barred by the Federal Longshore and Harbor Workers' Compensation Act (hereinafter the LHWCA) because NYCT provided insurance coverage for the payment of LHWCA benefits to the plaintiff ... . Moreover, NYCT provided sufficient evidence that it was the alter ego of the plaintiff's employer ... . In opposition, the plaintiff failed to raise a triable issue of fact.
>
> "[O]nce an employer fulfills its obligations under the [LHWCA] by paying out benefits to the injured LHWCA employee, further tort-based contribution from the employer is foreclosed" ... . Therefore, [plaintiff's employer] cannot maintain contribution or contractual indemnification claims against NYCT ... and [plaintiff's employer's] proposed cross claims against NYCT would be palpably insufficient or patently devoid of merit ... . **Morales v Hapag-Lloyd AG. (America), 2015 NY Slip Op 09079, 2nd Dept 12-9-15**

COURT OF APPEALS

ARBITRATION (COA)

ARBITRATION (DISPUTES RE: COMMERCIAL REAL ESTATE FELL UNDER JURISDICTION OF FEDERAL ARBITRATION ACT)/FEDERAL ARBITRATION ACT (DISPUTES INVOLVING COMMERCIAL REAL ESTATE)/ARBITRATION (WAIVER BY INVOLVEMENT IN LITIGATION AND PREJUDICE TO OPPOSING PARTY)/WAIVER OF ARBITRATION (INVOLVEMENT IN LITIGATION AND PREJUDICE TO OPPOSING PARTY)

ARBITRATION.

DISPUTES INVOLVING COMMERCIAL REAL ESTATE WERE SUFFICIENTLY RELATED TO INTERSTATE COMMERCE TO FALL UNDER THE JURISDICTION OF THE FEDERAL ARBITRATION ACT; PLAINTIFFS' RESORT TO LITIGATION AND THE RESULTING PREJUDICE TO DEFENDANTS CONSTITUTED A WAIVER OF ARBITRATION.

The Court of Appeals, in a full-fledged opinion by Judge Lippman, determined that the intrafamilial contractual disputes involving commercial real estate fell under the jurisdiction of the Federal Arbitration Act (FAA), but that the plaintiffs, by litigating the disputes in the courts and thereby prejudicing the rights of the defendants, had waived arbitration:

> ... [T]he Supreme Court has made it abundantly clear that the FAA's reach is expansive. The idea that the intrafamilial nature of the agreements has some bearing on whether the FAA is applicable finds no support in the caselaw. Nor does the fact that these agreements do not themselves evidence the commercial transactions appear to be significant. The ultimate purpose of the agreements was to authorize participation in the business of commercial real estate and that is, in fact, what the entities did. In determining whether the FAA applies, the emphasis is meant to be on whether the particular economic activity at issue affects interstate commerce — and, here, it does.
>
> Nonetheless, plaintiffs have waived their right to arbitrate this dispute. '"[L]ike contract rights generally, a right to arbitration may be modified, waived or abandoned.' Accordingly, a litigant may not compel arbitration when its use of the courts is 'clearly inconsistent with [its] later claim that the parties were obligated to settle their differences by arbitration'" ... . While it is true that "[n]ot every foray into the courthouse effects a waiver of the right to arbitrate," we are satisfied that the totality of plaintiffs' conduct here establishes waiver... .
>
> Generally, when addressing waiver, courts should consider the amount of litigation that has occurred, the length of time between the start of the litigation and the arbitration request, and whether prejudice has been established ... . The majority of federal courts have taken the position that waiver cannot be established in the absence of prejudice ... . * * *
>
> Here, ... prejudice ... [has] been established. After vigorously pursuing their litigation strategy for approximately one year, plaintiffs moved to compel arbitration. Even more telling, the desire for arbitration only arose after Supreme Court made plain its view that plaintiffs' claims were vexatious and largely time-barred. Indeed, plaintiffs had expressly represented to Supreme Court that they did not want to go to arbitration. Plaintiffs' behavior is indicative of blatant forum-shopping and, under these circumstances, prejudice has clearly been established. Therefore, plaintiffs have waived the right to arbitration and the issue of timeliness should be determined by the court ... . **Cusimano v Schnurr, 2015 NY Slip Op 09232, CtApp 12-16-15**

CIVIL PROCEDURE (COA)

CIVIL PROCEDURE (CONTRACTUAL CHOICE OF LAW PROVISION OVERRIDES STATUTORY CHOICE OF LAW PROVISION)/CONTRACT LAW (CONTRACTUAL CHOICE OF LAW PROVISION OVERRIDES STATUTORY CHOICE OF LAW PROVISON)/CHOICE OF LAW (CONTRACTUAL PROVISION OVERRIDES STATUTORY PROVISION)/CONFLICT OF LAWS (CONTRACTUAL CHOICE OF LAW PROVISION OVERRIDES STATUTORY CHOICE OF LAW PROVISION)

CIVIL PROCEDURE, CONTRACT LAW.

A CONTRACTUAL NEW YORK CHOICE OF LAW PROVISION OVERRIDES AN OTHERWISE APPLICABLE NEW YORK STATUTORY CHOICE OF LAW PROVISION WHICH WOULD REQUIRE THE APPLICATION OF ANOTHER STATE'S LAW.

In a full-fledged opinion by Judge Stein, over an extensive dissenting opinion by Judge Abdus-Salaam (in which Judge Rivera concurred), the Court of Appeals determined the New York choice of law provision in decedent's retirement and death benefit plans required the application of New York law, even though, under the facts, an otherwise applicable New York statutory choice of law provision required the application of Colorado law. Decedent was enrolled in both retirement and death benefit plans. He made his wife the beneficiary of the plans and his wife's father the contingent beneficiary. Decedent and his wife divorced and decedent died in Colorado. If the otherwise applicable New York statutory choice of law provision applied, the effect of the divorce would be determined by Colorado law (where decedent died). Under Colorado law, the divorce removed both decedent's wife and her father as beneficiaries of the plans. Under New York law only the wife was removed and her father remained. The choice of law provision in the retirement and death benefit plans was deemed to supersede the otherwise applicable New York statutory choice of law provision (which would have required analysis under Colorado law):

> ... [W]e should apply the most reasonable interpretation of the contract language that effectuates the parties' intended and expressed choice of law ... . To do otherwise — by applying New York's statutory conflict-of-laws principles, even if doing so results in the application of the substantive law of another state — would contravene the primary purpose of including a choice-of-law provision in a contract — namely, to avoid a conflict-of-laws analysis and its associated time and expense. Such an interpretation would also interfere with, and ignore, the parties' intent, contrary to the basic tenets of contract interpretation. **Ministers & Missionaries Benefit Bd. v Snow, 2015 NY Slip Op 09186, CtApp 12-15-15**

CIVIL PROCEDURE (NEGLIGENT SPOLIATION OF EVIDENCE, RELEVANCE MUST BE DEMONSTRATED)/EVIDENCE (NEGLIGENT SPOLIATION OF EVIDENCE, RELEVANCE MUST BE DEMONSTRATED)/SPOLIATION OF EVIDENCE (NEGLIGENT SPOLIATION, RELEVANCE MUST BE DEMONSTRATED)/SPOLIATION OF EVIDENCE (ADVERSE INFERENCE JURY INSTRUCTION)/ADVERSE INFERENCE JURY INSTRUCTION (NEGLIGENT SPOLIATION OF EVIDENCE)/JURY INSTRUCTIONS (ADVERSE INFERENCE, NEGLIGENT SPOLIATION OF EVIDENCE)

CIVIL PROCEDURE, EVIDENCE.

SANCTIONS FOR NEGLIGENT SPOLIATION OF EVIDENCE REQUIRE A SHOWING OF THE RELEVANCE OF THE LOST EVIDENCE; AN ADVERSE INFERENCE JURY INSTRUCTION MAY BE APPROPRIATE FOR NEGLIGENT SPOLIATION.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, over an extensive dissenting opinion by Judge Stein (in which Judge Rivera concurred), determined the record supported a finding that defendant was negligent in failing to preserve electronic evidence and remitted the matter to Supreme Court for a determination of the relevance of the lost evidence and a sanction, if deemed appropriate. The court noted that, even where spoliation is the result of simple negligence, an adverse inference jury instruction may be appropriate. The court explained the applicable law as follows:

> A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a "culpable state of mind," and "that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" ... . Where the evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed documents is presumed

... . On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense ... .

On this appeal, we are asked to decide whether the Appellate Division erred in reversing an order of Supreme Court that imposed a spoliation sanction on the defendants. We hold that it did, and remand the matter to the trial court for a determination as to whether the evidence, which the Appellate Division found to be negligently destroyed, was relevant to the claims asserted against defendants and for the imposition of an appropriate sanction, should the trial court deem, in its discretion, that a sanction is warranted. * * *

... [A]dverse inference charges have been found to be appropriate even in situations where the evidence has been found to have been negligently destroyed ... . **Pegasus Aviation I, Inc. v Varig Logistica S.A., 2015 NY Slip Op 09187, CtApp 12-15-15**

CRIMINAL LAW (COA)

CRIMINAL LAW (SUFFICIENCY OF MISDEMEANOR INFORMATION, POSSESSION OF CONTROLLED SUBSTANCE)/MISDEMEANOR INFORMATION (SUFFICIENT ALLEGATION OF POSSESSION OF A CONTROLLED SUBSTANCE)/POSSESSION OF A CONTROLLED SUBSTANCE (SUFFICIENCY OF MISDEMEANOR INFORMATION)

CRIMINAL LAW.

INFORMATION ADEQUATELY ALLEGED CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE; THE APPEARANCE OF BURNT RESIDUE IN A GLASS PIPE, TOGETHER WITH ALLEGATIONS THE OFFICER HAD THE REQUISITE TRAINING AND EXPERIENCE SUFFICIENT.

The Court of Appeals determined the heightened requirements for a misdemeanor information were met by the information charging defendant with criminal possession of a controlled substance seventh degree:

Here, ... the information was facially sufficient because it contained adequate allegations that the officer had the requisite training and experience to recognize the substance in defendant's possession as a controlled substance and that the officer reached his conclusion about the nature of the substance based on its appearance and placement within a favored apparatus of drug users, a glass pipe.

That the substance at issue here was a burnt residue does not dictate a different result. ...[A]n information's description of the characteristics of a substance combined with its account of an officer's training in identifying such substances, the packaging of such substance and the presence of drug paraphernalia, can support the inference that the officer properly recognized the substance as a controlled substance. **People v Smalls, 2015 NY Slip Op 09188, CtApp 12-15-15**

CRIMINAL LAW (NO CORAM NOBIS RELIEF WHERE DEFENDANT DID NOT REQUEST COUNSEL TO FILE A NOTICE OF APPEAL)/CORAM NOBIS (NO RELIEF WHERE DEFENDANT DID NOT REQUEST ATTORNEY TO FILE A NOTICE OF APPEAL)/APPEALS (NO CORAM NOBIS RELIEF WHERE DEFENDANT DID NOT REQUEST COUNSEL TO FILE A NOTICE OF APPEAL)

CRIMINAL LAW.

RE: FAILURE TO TIMELY FILE A NOTICE OF APPEAL: A PREREQUISITE FOR CORAM NOBIS RELIEF IS INEFFECTIVE ASSISTANCE OF COUNSEL.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, over a partial dissent, determined that the applications for a writ of coram nobis in the two cases before the court were properly denied. The court found that the defendants were aware of their right to appeal but had not requested that their attorneys file a notice of appeal. The cases, therefore, were

factually distinct from cases where the defendants requested that their attorneys file a notice of appeal but the attorneys failed to do so:

> In People v Syville (15 NY3d 391), this Court considered whether defendants may be afforded an opportunity to file a notice of appeal, even beyond the one year and 30 days permitted under the CPL. In Syville, the defendants had made timely requests to their attorneys to file a notice of appeal on their behalf but their attorneys failed to comply. We held that when an attorney has failed to comply with a timely request for the filing of a notice of appeal and the defendant demonstrates that the omission could not reasonably have been discovered within the one-year period, the time limit imposed in CPL 460.30 should not categorically bar an appellate court from considering a coram nobis application to pursue an untimely appeal. Thus, coram nobis relief is not just another stop on a continuum of opportunities for a defendant to seek appellate relief. Rather, it is extraordinary relief only to be provided in "rare cases" "when a right to appeal was extinguished 'due solely to the unconstitutionally deficient performance of counsel'" ... . * * *
>
> ... [N]either defendant claims that he requested that his attorney file a notice of appeal and that his attorney failed to comply with that request. Rather, they claim that counsel did not advise them of the right to appeal and had defendants known about their right to appeal, they would have requested one. However, in both appeals, the only evidence proffered in support of the contention that defendants were not apprised of their appellate rights are self-serving affidavits. The records as a whole reveal that defendants knew about their right to appeal. Thus, to grant defendants relief here would be to broaden the Syville rule to apply to any case where a notice of appeal had not been filed within one year and 30 days of conviction. Such a rule would abrogate CPL 460.30. Simply put, defendants here failed to show that their attorneys were unconstitutionally ineffective and therefore they are not entitled to the relief they seek. **People v Rosario, 2015 NY Slip Op 09230, CtApp 12-16-15**

CRIMINAL LAW (TRIAL PREPARATION EXCEPTION TO WADE HEARING REJECTED)/IDENTIFICATION (TRIAL PREPARATION EXCEPTION TO WADE HEARING REJECTED)/HERNER HEARING (TRIAL PREPARATION EXCEPTION TO WADE HEARING REJECTED)/WADE HEARING (TRIAL PREPARATION EXCEPTION TO WADE HEARING REJECTED)

CRIMINAL LAW.

"TRIAL PREPARATION" EXCEPTION TO A DETERMINATION WHETHER A PHOTOGRAPHIC DISPLAY IS UNDULY SUGGESTIVE, IN THE FORM OF A *HERNER* HEARING, SHOULD NO LONGER BE EMPLOYED.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a dissenting opinion by Judge Lippman, held that the "trial preparation" exception to a determination whether a photographic display is unduly suggestive, in the form of a *Herner* hearing, should no longer be employed. The complainant was shown a photograph of the defendant shortly before trial, ostensibly as part of "trial preparation." Defense counsel asked for a full-fledged *Wade* hearing to determine whether the single-photograph-showing was unduly suggestive. Instead only a *Herner* hearing was held to determine if a judicial determination of suggestiveness was needed. The trial court determined no judicial determination of suggestiveness was necessary. Although the Court of Appeals found the trial court erred in not conducting a full *Wade* hearing, it further found the complainant's identification of defendant was otherwise validated by an "independent source." The dissent disagreed and argued the conviction should be reversed:

> Defendant claims that the trial preparation exception recognized in Herner is inconsistent with New York's approach to suggestive pre-trial identifications. We agree. By employing this truncated hearing protocol, the court failed to reach the essential question whether the photograph display was unduly suggestive, and, if so, whether it tainted complainant's identification of defendant. When a defendant challenges the suggestiveness of an out-of-court viewing of defendant's likeness, the central issue presented for judicial consideration is whether the pre-trial display is conducted under circumstances bearing the earmarks of improper influence and unreliability, which create the risk of mistaken identification and thus infect the truth-seeking process. **People v Marshall, 2015 NY Slip Op 09313, CtApp 12-17-15**

CRIMINAL LAW (WHERE NO NOTICE OF APPEAL IS FILED, A JUDGMENT OF CONVICTION AND SENTENCE BECOMES FINAL WHEN THE 30-DAY PERIOD FOR FILING A NOTICE OF APPEAL EXPIRES)/JUDGMENT OF CONVICTION AND SENTENCE (BECOMES FINAL UPON EXPIRATION OF 30-DAY PERIOD FOR FILING A NOTICE OF APPEAL)

CRIMINAL LAW.

WHERE NO NOTICE OF APPEAL IS FILED, A CONVICTION AND SENTENCE BECOMES FINAL WHEN THE 30-DAY PERIOD FOR FILING A NOTICE OF APPEAL EXPIRES.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a dissenting opinion by Judge Rivera, determined a judgment of conviction and sentence becomes final when the 30-day period for filing a notice of appeal expires (where no notice is filed). Here the issue was whether the defendant could move to vacate his conviction by guilty plea because he was not informed of the deportation consequences of the plea. Because the motion to vacate would not be available if defendant's conviction and sentence became final before Padilla v Kentucky (559 US 356) was decided (requiring that a defendant be informed of deportation consequence of a plea), the date of finality was determinative. If the finality date is 30 days after conviction and sentence, defendant's conviction and sentence would have been final before Padilla was decided. If, as defendant argued, the conviction and sentence became final one year and 30 days after the conviction and sentence, when the time for moving to file a late notice of appeal expired, defendant's conviction and sentence would not have been final before Padilla was decided. Because the Court of Appeals decided the conviction and sentence became final when no notice of appeal was filed within 30 days, defendant could not move to vacate his conviction:

> Adopting defendant's reasoning would result in uncertainty in the finality of judgments in many procedural situations. For example, a defendant who takes a direct appeal to the Appellate Division but does not seek leave to appeal to this Court in a timely fashion could argue that the judgment was not final until one year and 30 days after the Appellate Division affirmance, inasmuch as the defendant could have sought leave from this Court to file a belated application for discretionary review pursuant to CPL 460.30 (1). Or, a defendant who has filed a notice of appeal with the Appellate Division but has had the appeal dismissed due to failure to perfect could argue that the judgment is not yet final, inasmuch as the defendant could ask the Appellate Division to vacate the dismissal of the appeal.
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> Indeed, if we adopt defendant's logic, other defendants who did not take a direct appeal conceivably could argue that their judgments were never final, inasmuch as they could seek to file a late notice of appeal even after the one-year grace period of CPL 460.30 has expired by moving for a writ of error coram nobis ... . **People v Varenga, 2015 NY Slip Op 09312, CtApp 12-17-15**

CRIMINAL LAW (PHOTO ARRAY, PRESUMPTION OF SUGGESTIVENESS IF NOT PRESERVED)/IDENTIFICATION (PHOTO ARRAY, PRESUMPTION OF SUGGESTIVENESS IF NOT PRESERVED)/PHOTO ARRAY (PRESUMPTION OF SUGGESTIVENESS IF NOT PRESERVED)

CRIMINAL LAW.

FAILURE TO PRESERVE PHOTO ARRAY GIVES RISE TO A REBUTTABLE PRESUMPTION THE PHOTO ARRAY WAS SUGGESTIVE; THE PRESUMPTION CAN BE REBUTTED BY DETAILING THE PROCEDURES USED TO SAFEGUARD AGAINST SUGGESTIVENESS.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, with a concurring opinion by Judge Abdus-Salaam, adopted an analytical framework for determining whether a photo array which has not been preserved is unduly suggestive. When a photo array is not preserved, a presumption arises that the array was suggestive. That presumption can be rebutted. If the presumption is rebutted, the burden of demonstrating undue suggestiveness passes to the defendant. Here, the victim was shown over 100 computer generated images after the police entered criteria based upon eyewitness-descriptions of the perpetrator. Because those images were not preserved, a presumption of suggestiveness arose. Evidence that the victim picked out the defendant, and only the defendant, from the 100 images rebutted that presumption. Defendant thereafter did not meet his burden of showing undue suggestiveness:

Under Appellate Division case law, "the failure of the police to preserve a photographic array [shown to an identifying witness] gives rise to a rebuttable presumption that the array was suggestive" ... . The rebuttable presumption fits within the burden-shifting mechanism in the following manner. Failure to preserve a photo array creates a rebuttable presumption that the People have failed "to meet their burden of going forward to establish the lack of suggestiveness" ... . To the extent the People are silent about the nature of the photo array, they have not met their burden of production. On the other hand, the People may rebut the presumption by means of testimony "detailing the procedures used to safeguard against suggestiveness" ..., in which case they have met their burden, and the burden shifts to the defendant. Although we have not expressly adopted this presumption of suggestiveness before, we endorse it now. **People v Holley, 2015 NY Slip Op 09314, CtApp 12-17-15**

CRIMINAL LAW (APPEAL OF UNPRESERVED SENTENCING ISSUE LIES FROM DENIAL OF A MOTION TO VACATE THE SENTENCE)/CRIMINAL LAW (FOREIGN STATUTE WHICH CAN BE VIOLATED BY AN ACT WHICH IS NOT A FELONY IN NEW YORK CAN NOT BE THE BASIS OF A PREDICATE FELONY)/APPEALS (CRIMINAL LAW, APPEAL OF UNPRESERVED SENTENCING ISSUE LIES FROM DENIAL OF A MOTION TO VACATE THE SENTENCE)/PREDICATE FELONY (A FOREIGN STATUTE WHICH CAN BE VIOLATED BY AN ACT WHICH IS NOT A FELONY IN NEW YORK CAN NOT BE THE BASIS FOR A PREDICATE FELONY)/FOREIGN FELONY (A FOREIGN STATUTE WHICH CAN BE VIOLATED BY AN ACT WHICH IS NOT A FELONY IN NEW YORK CAN NOT BE THE BASIS FOR A PREDICATE FELONY)

CRIMINAL LAW, APPEALS.

THE COURT OF APPEALS CAN HEAR THE APPEAL OF AN UNPRESERVED SENTENCING ISSUE RAISED FOR THE FIRST TIME IN A MOTION TO VACATE THE SENTENCE; A FOREIGN STATUTE WHICH CAN BE VIOLATED BY AN ACT WHICH IS NOT A FELONY IN NEW YORK CAN NOT SERVE AS A PREDICATE FELONY, IRRESPECTIVE OF THE ACTUAL FACTS UNDERLYING THE FOREIGN CONVICTION.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a full-fledged dissenting opinion by Judge Pigott, determined the Court of Appeals could hear the appeal of an unpreserved sentencing issue first raised in a motion to vacate the sentence (Criminal Procedure Law 440.20) and further determined that a Washington DC robbery conviction should not have been deemed a predicate felony. Because the DC statute could be violated by "snatching" property from someone, an act which would not be felony robbery in New York, the Court of Appeals held it could not be the basis for defendant's conviction as a second felony offender, irrespective of whether the actual facts underlying the DC conviction would constitute a felony in New York:

A CPL 440.20 motion is the proper vehicle for raising a challenge to a sentence as "unauthorized, illegally imposed or otherwise invalid as a matter of law" (CPL 440.20 [1]), and a determination of second felony offender status is an aspect of the sentence (see CPL 70.06 [included in CPL article 70, addressing sentences of imprisonment]). One of the legal defects that can be challenged in a CPL 440.20 motion is an alleged error in sentencing a defendant as a second or third felony offender, including the decision to consider certain prior convictions as predicates. Raising the predicate felony sentencing issue in a CPL 440.20 motion serves the goals and purposes of the preservation rule by permitting the parties to present their arguments on the issue in the trial court, creating a record for appellate review, and allowing the trial court the first opportunity to correct any error [FN3]. Thus, we may address defendant's current challenge — that the sentence was illegal because the D.C. conviction did not render him a second felony offender — on the appeal of the denial of his CPL 440.20 motion to set aside the sentence. * * *

... [U]nder the D.C. statute the taking can occur (1) by force or violence, or (2) by putting in fear. The force or violence element can be accomplished (1) against resistance, or (2) by sudden or stealthy seizure, or (3) by snatching ... . Stated another way, "the statute must be interpreted to include 'stealthy seizure' as a form of 'force or violence'" ... . The statutory language means that the crime can be committed in different ways, and the phrase "sudden or stealthy seizure or snatching" does not describe separate criminal acts required by the statute in addition to the use of "force or violence" ... . Consequently, we do not look at the underlying accusatory instrument to determine if the crime is equivalent to a New York felony ... . Because the statute, itself, indicates that a person can be convicted of the D.C. crime without committing an act that would qualify as a felony in New York (i.e., by pickpocketing), defendant's D.C. conviction for attempt to commit robbery was not a proper basis for a predicate felony offender adjudication ... . **People v Jurgins, 2015 NY Slip Op 09311, CtApp 12-17-15**

CRIMINAL LAW (COLLATERAL ESTOPPEL DOCTRINE NOT APPLIED)/COLLATERAL ESTOPPEL (UNDER THE FACTS, DOCTRINE INAPPLICABLE IN CRIMINAL CASE)/ATTORNEYS (ADVOCATE-WITNESS RULE REQUIRED THAT DEFENSE COUNSEL'S MOTION TO WITHDRAW OR HER MOTION FOR A MISTRIAL BE GRANTED)/ADVOCATE-WITNESS RULE (DEFENSE COUNSEL'S MOTION TO WITHDRAW OR HER MOTION FOR A MISTRIAL SHOULD HAVE BEEN GRANTED)

CRIMINAL LAW, ATTORNEYS.

COLLATERAL ESTOPPEL DOCTRINE DID NOT PRECLUDE TESTIMONY ABOUT DEFENDANT'S USE OF A RAZOR BLADE, DESPITE DEFENDANT'S ACQUITTAL ON THE RELATED "DANGEROUS INSTRUMENT" CHARGES IN THE FIRST TRIAL; ADVOCATE-WITNESS RULE REQUIRED THAT DEFENSE COUNSEL'S MOTION TO WITHDRAW OR HER MOTION FOR A MISTRIAL BE GRANTED.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, determined the doctrine of collateral estoppel did not prohibit testimony in defendant's second trial that the defendant threatened to cut a victim's throat with a razor blade, despite the fact defendant was acquitted of charges involving the use of a dangerous instrument in the first trial. The court concluded that the witness-victims could not give truthful testimony about the defendant's actions without reference to the razor blade. Therefore, the collateral estoppel doctrine, under the facts of this case, was properly not applied. The court went on to find that defense counsel's request to withdraw or her motion for a mistrial should have been granted. Defense counsel's statements at arraignment were used to impeach the defendant's version of events. After defense counsel reviewed her notes, she informed the court that her statements at arraignment were incorrect and that defendant's testimony at trial matched what he had told her before arraignment. Under these circumstances, the witness-advocate rule required that defense counsel withdraw or that a mistrial be declared. Defendant's conviction was therefore reversed:

> ... [T]he rigid application of collateral estoppel sometimes gives way to society's interest in ensuring the correctness of criminal prosecutions ... . Thus, ... if it becomes apparent ... that collateral estoppel "cannot practicably be followed if a necessary witness is to give truthful testimony, then [the doctrine] should not be applied" .... . * * *
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> [Re: the use of defense counsel's erroneous statement to impeach defendant:] The situation went from bad to worse when it became clear that the only way for defense counsel to rehabilitate her client's credibility was to impugn her own, moments before she would argue for her client's innocence in summation. Any way you look at it, defense counsel had no choice but to withdraw. In these unusual circumstances, we hold that the trial court should have granted counsel's request to withdraw or declared a mistrial. **People v Ortiz, 2015 NY Slip Op 09233, CtApp 12-16-15**

CRIMINAL LAW (PRESENTING EVIDENCE OF DEFENDANT'S POST-ARREST SILENCE VIOLATED DEFENDANT'S DUE PROCESS RIGHTS UNDER THE STATE CONSTITUTION)/EVIDENCE (PRESENTING EVIDENCE OF DEFENDANT'S POST-ARREST SILENCE VIOLATED DEFENDANT'S DUE PROCESS RIGHTS UNDER THE STATE CONSTITUTION)/SILENCE (PRESENTING EVIDENCE OF DEFENDANT'S POST-ARREST SILENCE VIOLATED DEFENDANT'S DUE PROCESS RIGHTS UNDER THE STATE CONSTITUTION)

CRIMINAL LAW, EVIDENCE.

PROSECUTION'S USE OF EVIDENCE OF DEFENDANT'S POST-ARREST SILENCE VIOLATED DEFENDANT'S DUE PROCESS RIGHTS UNDER THE STATE CONSTITUTION; THE ERROR WAS DEEMED HARMLESS HOWEVER.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a dissenting opinion by Judge Pigott (who adopted the dissent by Justice Garry in the Appellate Division), determined that the prosecution's proof of defendant's post-Miranda silence as he was being transported by the police violated defendant's due process rights under the state constitution. The error, however, was deemed harmless because the court found there was no reasonable possibility the error contributed to defendant's conviction. The defendant's conviction was therefore upheld. The defendant acknowledged commission of the crimes (two murders) but raised the extreme emotional disturbance (EED) defense. The

Court of Appeals held that evidence of defendant's silence upon arrest, which apparently was aimed at disproving or calling into question the EED defense, did not contribute to the jury's rejection of the EED defense. The opinion includes extensive discussions of the use of evidence of a defendant's silence and the related violation of state constitutional rights, the EED proof requirements, and ineffective assistance of counsel. **People v Pavone, 2015 NY Slip Op 09315, CtApp 12-17-15**

CRIMINAL LAW (STATEMENT AGAINST PENAL INTEREST SHOULD HAVE BEEN ADMITTED)/EVIDENCE (STATEMENT AGAINST PENAL INTEREST SHOULD HAVE BEEN ADMITTED)/HEARSAY (STATEMENT AGAINST PENAL INTEREST SHOULD HAVE BEEN ADMITTED)/STATEMENT AGAINST PENAL INTEREST (REVERSIBLE ERROR TO EXCLUDE)

CRIMINAL LAW, EVIDENCE.

HEARSAY STATEMENT BY AN UNAVAILABLE WITNESS SHOULD HAVE BEEN ADMITTED AS A STATEMENT AGAINST PENAL INTEREST.

The Court of Appeals, in a full-fledged opinion by Judge Lippman, over a dissenting opinion by Judge Pigott, determined that a statement made by an unavailable witness should have been admitted as a statement against penal interest. The defendant was convicted of driving while intoxicated. The out-of-court statement made by the unavailable witness indicated that she, not the defendant, was driving. The Court of Appeals affirmed the Appellate Division, reversed defendant's conviction and ordered a new trial. The court held that all of the following elements of the declaration-against-penal-interest exception to the hearsay rule were supported by sufficient evidence at trial:

> The declaration-against-interest exception to the hearsay rule "flows from the fact that a person ordinarily does not reveal facts that are contrary to his own interest" unless those facts are true ... . A statement qualifies as a declaration against interest if four elements are met: (1) the declarant is unavailable to testify as a witness; (2) when the statement was made, the declarant was aware that it was adverse to his or her penal interest; (3) the declarant has competent knowledge of the facts underlying the statement; and (4) supporting circumstances independent of the statement itself attest to its trustworthiness and reliability ... . **People v Soto, 2015 NY Slip Op 09316, CtApp 12-17-15**

FAMILY LAW (COA)

FAMILY LAW (GRANDPARENTS HAD STANDING TO SEEK CUSTODY, NO REQUIREMENT OF A COMPLETE ABSENCE OF PARENTAL CONTACT)/CUSTODY (GRANDPARENTS HAD STANDING TO SEEK CUSTODY, NO REQUIREMENT OF A COMPLETE ABSENCE OF PARENTAL CONTACT)/GRANDPARENT CUSTODY (NO REQUIREMENT OF A COMPLETE ABSENCE OF PARENTAL CONTACT)

FAMILY LAW.

GRANDPARENTS, WITH WHOM THE CHILD HAD RESIDED FOR TEN YEARS, HAD STANDING TO SEEK CUSTODY OF THE CHILD; THERE IS NO REQUIREMENT THAT THE 24-MONTH SEPARATION OF PARENT AND CHILD REQUIRED BY THE "GRANDPARENT STANDING" STATUTE BE CHARACTERIZED BY A COMPLETE LACK OF CONTACT BETWEEN PARENT AND CHILD.

The Court of Appeals, in a full-fledged opinion by Judge Stein, reversing the Appellate Division, determined the grandparents had demonstrated standing to seek custody of the child, who had lived with the grandparents from infancy for ten years. Mother argued that, in order to meet the standing requirement of a 24-month separation of parent and child, the child must have had no contact with her during at least a 24-month period. The Court of Appeals disagreed, finding no "absence of parental contact" requirement. The case was remanded to the Appellate Division for an application of the "best interests of the child" analysis in the custody proceedings:

Domestic Relations Law § 72 (2) sets forth three "elements" required to demonstrate the extraordinary circumstance of an "extended disruption of custody," specifically: (1) a 24-month separation of the parent and child, which is identified as "prolonged," (2) the parent's voluntary relinquishment of care and control of the child during such period, and (3) the residence of the child in the grandparents' household. * * *

Contrary to the mother's contention, a lack of contact is not a separate element under the statute. Indeed, there is no explicit statutory reference to contact or the lack thereof. Rather, the quality and quantity of contact between the parent and child are simply factors to be considered in the context of the totality of the circumstances when determining whether the parent voluntarily relinquished care and control of the child, and whether the child actually resided with the grandparents for the required "prolonged" period of time. **Matter of Suarez v Williams, 2015 NY Slip Op 09231, CtApp 12-16-15**

NEGLIGENCE (COA)

NEGLIGENCE (DOCTORS OWED DUTY OF CARE TO PERSON INJURED BY DRUGGED PATIENT)/MEDICAL MALPRACTICE (DOCTORS OWED DUTY OF CARE TO PERSON INJURED BY DRUGGED PATIENT)/MEDICAL MALPRACTICE (FAILURE TO WARN PATIENT OF DISORIENTING EFFECT OF ADMINISTERED DRUGS)

NEGLIGENCE, MEDICAL MALPRACTICE.

DOCTORS, WHO ALLEGEDLY FAILED TO WARN PATIENT OF DISORIENTING EFFECTS OF DRUGS, OWED A DUTY OF CARE TO PLAINTIFF, WHO WAS STRUCK BY A VEHICLE DRIVEN BY THE PATIENT.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over an extensive dissenting opinion by Judge Stein (in which Judge Abdus-Salaam concurred), determined a medical malpractice complaint alleging defendant hospital and doctors owed a duty of care to plaintiff, who was injured by a patient, should not have been dismissed. The patient was treated with drugs which could impair her ability to drive but allegedly was not warned of that effect by the treating doctors. Shortly after leaving the hospital, the patient crossed a double yellow line and struck plaintiff's vehicle. The Court of Appeals held that the injured plaintiff's complaint, which alleged the negligent failure to warn the patient of the impairment of the ability to drive, stated a cause of action, sounding in medical malpractice, against the defendant hospital and doctors:

Here, put simply, to take the affirmative step of administering the medication at issue without warning [the patient] about the disorienting effect of those drugs was to create a peril affecting every motorist in [the patient's] vicinity. Defendants are the only ones who could have provided a proper warning of the effects of that medication. Consequently, on the facts alleged, we conclude that defendants had a duty to plaintiffs to warn [the patient] that the drugs administered to her impaired her ability to safely operate an automobile ... . **Davis v South Nassau Communities Hosp., 2015 NY Slip Op 09229, CtApp 12-16-15**

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