NEW YORK APPELLATE DIGEST, LLC

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

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Major Categories Addressed In The Digest This Month:

Appellate Division:

Account Stated, Administrative Law, Animal Law, Arbitration, Appeals, Attorneys, Civil Procedure, Civil Rights Law, Contract Law, Corporation Law, Court Of Claims, Criminal Law, Defamation, Disciplinary Hearings, Education-School Law, Employment Law, Environmental Law, Evidence, Family Law, Foreclosure, Fraud, Insurance Law, Labor Law-Construction Law, Medicaid, Medical Malpractice, Municipal Law, Negligence, Partnership Law, Real Estate, Real Property Law, Retirement And Social Security Law, Social Services Law, Tax Law, Unemployment Insurance, Workers' Compensation Law, Zoning.

Court Of Appeals:

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ACCOUNT STATED, ATTORNEYS.

ATTORNEY ENTITLED TO THE REMAINDER OF HER FEE UNDER AN ACCOUNT STATED THEORY (SECOND DEPT).

The Second Department determined plaintiff attorney was entitled to her fees from the defendant client under an account stated theory and the defendant's counterclaim for legal malpractice was properly dismissed:

> The plaintiff represented the defendant from January 2009 through June 2011, and periodically sent invoices to the defendant for legal services rendered in accordance with a retainer agreement executed by the defendant. The defendant received the invoices and made payments with respect thereto through October 22, 2010. Thereafter, he made no further payments to the plaintiff. ...
>
> " An account stated is an agreement between parties, based upon their prior transactions, with respect to the correctness of the account items and the specific balance due'" ... . "Although an account stated may be based on an express agreement between the parties as to the amount due, an agreement may be implied where a defendant retains bills without objecting to them within a reasonable period of time, or makes partial payment on the account" ... . The "agreement" at the core of an account stated is independent of the underlying obligation between the parties ... . **Holtzman v Griffith, 2018 NY Slip Op 04540, Second Dept 6-20-18**

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ADMINISTRATIVE LAW

ADMINISTRATIVE LAW.

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The Third Department determined the Commissioner of Health's denial of petitioner's application to the NYS Medical Indemnity Fund for about $12,000 for a lift which would allow a disabled child to use a pool was arbitrary and capricious:

> ... [T]he Commissioner determined that the pool lift did not qualify, reasoning that "[a] pool is not deemed an exterior modification of a residence because it is typically outside the confines of the [home]." This reasoning mischaracterizes the proposal. By definition, Emods [environmental home modifications] include exterior physical adaptations to a residence, including ramps. As demonstrated in the home evaluation, the backyard deck is attached to and directly accessed from the house through two back doors ... . We readily recognize the attached deck as part of the residence, and the proposed modification here is to install two deck sockets that extend below the deck, i.e., the physical modification would be to the deck, not the pool. The pool lift is not directly attached to either the deck or the pool, but positioned in either socket depending on the intended use of either the pool or hot tub. As such, we find that the pool lift qualifies as an Emod and that the Commissioner's contrary finding was arbitrary and capricious. **Matter of Anson v Zucker, 2018 NY Slip Op 04063, Third Dept 6-7-18**

ADMINISTRATIVE LAW (COMMISSIONER OF HEALTH'S DENIAL OF AN APPLICATION TO THE NYS MEDICAL INDEMNITY FUND FOR $12,000 TO PAY FOR A LIFT FOR A DISABLED CHILD WAS ARBITRARY AND CAPRICIOUS (THIRD DEPT))/NYS MEDICAL INDEMNITY FUND (COMMISSIONER OF HEALTH'S DENIAL OF AN APPLICATION TO THE NYS MEDICAL INDEMNITY FUND FOR $12,000 TO PAY FOR A LIFT FOR A DISABLED CHILD WAS ARBITRARY AND CAPRICIOUS (THIRD DEPT))/ENVIRONMENTAL HOME MODIFICATIONS (COMMISSIONER OF HEALTH'S DENIAL OF AN APPLICATION TO THE NYS MEDICAL INDEMNITY FUND FOR $12,000 TO PAY FOR A LIFT FOR A DISABLED CHILD WAS ARBITRARY AND CAPRICIOUS (THIRD DEPT))/DISABLED PERSONS (ENVIRONMENTAL HOME MODIFICATIONS, COMMISSIONER OF HEALTH'S DENIAL OF AN APPLICATION TO THE NYS MEDICAL INDEMNITY FUND FOR $12,000 TO PAY FOR A LIFT FOR A DISABLED CHILD WAS ARBITRARY AND CAPRICIOUS (THIRD DEPT))

ANIMAL LAW

ANIMAL LAW.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS DOG BITE CASE SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment in this dog bite case should have been granted:

> It is well established that "an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities—albeit only when such proclivity results in the injury giving rise to the lawsuit" ... . "A known tendency to attack others, even in playfulness, as in the case of the overly friendly large dog with a propensity for enthusiastic jumping up on visitors, will be enough to make the defendant[] liable for damages resulting from such an act" ... . "In contrast, normal canine behavior' such as barking and running around' does not amount to vicious propensities" ... .
>
> The evidence establishes that, on the day of the incident, plaintiff sent a text message to a group of people that included defendant, as she had on previous occasions, to inform them that she would be at the dog park with her dog, who often played with Kane [defendant's dog]. Immediately prior to the incident, plaintiff threw a ball for her dog, plaintiff's dog retrieved the ball and, as he had frequently done in the past, Kane ran alongside plaintiff's dog back toward plaintiff. Both dogs were running fast in plaintiff's direction and, when it appeared that Kane was not going to veer off to the side, plaintiff turned away, whereupon Kane allegedly struck her leg. Despite evidence that Kane may have clumsily run around the dog park and similarly made contact with another visitor on a prior occasion, we conclude that, unlike situations in which a dog purposefully jumps onto or charges at a person ... , "[Kane's alleged] act of running into plaintiff in the course of . . . playfully [running alongside another dog at a dog park] merely consisted of normal canine behavior that does not amount to a vicious propensity" ... . **Long v Hess, 2018 NY Slip Op 04475, Fourth Dept 6-15-18**

ANIMAL LAW (DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS DOG BITE CASE SHOULD HAVE BEEN GRANTED (FOURTH DEPT))/DOG BITE (DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS DOG BITE CASE SHOULD HAVE BEEN GRANTED (FOURTH DEPT))

ARBITRATION

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ELIMINATION OF A POSITION WAS ALLEGED TO CONSTITUTE AN IMPROPER DISMISSAL UNDER THE GUISE OF RETRENCHMENT, ALTHOUGH RETRENCHMENT IS NOT ARBITRABLE UNDER THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT, THE CLAIM THAT THE EMPLOYEE WAS IMPROPERLY DISMISSED UNDER THE GUISE OF RETRENCHMENT WAS DEEMED ARBITRABLE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the petition seeking a permanent stay of arbitration of an employment dispute should not have been granted. The Fourth Department found that the dispute concerned whether an employee of a community college was improperly dismissed (by eliminating the position). The matter was deemed arbitrable based upon the language of the collective bargaining agreement (CBA) and the grievance. Under the CBA, if a position is "retrenched" the action is not arbitrable. Although the term "retrenched" was used in eliminating the position, the grievance alleged the employee was improperly dismissed under the guise of "retrenchment:"

> We ... agree with respondent that the grievance, as properly construed, should be submitted to arbitration. The CBA defines "grievance," in relevant part, as "a claimed violation, misinterpretation or inequitable application of this agreement, except as excluded herein." Pursuant to the CBA, a grievance may be submitted to arbitration if it remains unresolved after the second stage of the grievance procedure. Although the CBA specifies several exclusions from the definition of a "grievance" that are therefore not subject to arbitration, including a decision by petitioner to retrench a position, all other grievances remain subject to arbitration. Contrary to the court's determination, we conclude that the arbitration clause at issue here is broad, despite the existence of such exclusions ... .
>
> Where, as here, "there is a broad arbitration clause and a reasonable relationship between the subject matter of the dispute and the general subject matter of the parties' [CBA], the court should rule the matter arbitrable, and the arbitrator will then make a more exacting interpretation of the precise scope of the substantive provisions of the [CBA], and whether the subject matter of the dispute fits within them"... . The grievance at issue concerns whether the member was improperly dismissed without just cause under the guise of retrenchment, and a reasonable relationship exists between the subject matter of the grievance and the general subject matter of the CBA ... . Thus, " it is for the arbitrator to determine whether the subject matter of the dispute falls within the scope of the arbitration provisions of the [CBA]' " ... . **Matter of Onondaga Community Coll. (Professional Adm'rs of Onondaga Community Coll. Fedn. of Teachers & Adm'rs), 2018 NY Slip Op 04878, Fourth Dept 6-29-18**

ARBITRATION (EMPLOYMENT LAW, ELIMINATION OF A POSITION WAS ALLEGED TO CONSTITUTE AN IMPROPER DISMISSAL UNDER THE GUISE OF RETRENCHMENT, ALTHOUGH RETRENCHMENT IS NOT ARBITRABLE UNDER THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT, THE CLAIM THAT THE EMPLOYEE WAS IMPROPERLY DISMISSED UNDER THE GUISE OF RETRENCHMENT WAS DEEMED ARBITRABLE (FOURTH DEPT))/CONTRACT LAW (COLLECTIVE BARGAINING AGREEMENT, ELIMINATION OF A POSITION WAS ALLEGED TO CONSTITUTE AN IMPROPER DISMISSAL UNDER THE GUISE OF RETRENCHMENT, ALTHOUGH RETRENCHMENT IS NOT ARBITRABLE UNDER THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT, THE CLAIM THAT THE EMPLOYEE WAS IMPROPERLY DISMISSED UNDER THE GUISE OF RETRENCHMENT WAS DEEMED ARBITRABLE (FOURTH DEPT))/COLLECTIVE BARGAINING AGREEMENT (ARBITRATION, ELIMINATION OF A POSITION WAS ALLEGED TO CONSTITUTE AN IMPROPER DISMISSAL UNDER THE GUISE OF RETRENCHMENT, ALTHOUGH RETRENCHMENT IS NOT ARBITRABLE UNDER THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT, THE CLAIM THAT THE EMPLOYEE WAS IMPROPERLY DISMISSED UNDER THE GUISE OF RETRENCHMENT WAS DEEMED ARBITRABLE (FOURTH DEPT))/EMPLOYMENT LAW (ARBITRATION, COLLECTIVE BARGAINING AGREEMENT, ELIMINATION OF A POSITION WAS ALLEGED TO CONSTITUTE AN IMPROPER DISMISSAL UNDER THE GUISE OF RETRENCHMENT, ALTHOUGH RETRENCHMENT IS NOT ARBITRABLE UNDER THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT, THE CLAIM THAT THE EMPLOYEE WAS IMPROPERLY DISMISSED UNDER THE GUISE OF RETRENCHMENT WAS DEEMED ARBITRABLE (FOURTH DEPT)

ARBITRATION, CONTRACT LAW, FRAUD.

PLAINTIFFS' CONCLUSORY ALLEGATION OF FRAUD DID NOT DEFEAT THE AGREEMENT TO ARBITRATE (SECOND DEPT).

The Second Department determined the arbitration clause of the contract between plaintiffs and defendant was enforceable, despite the plaintiffs' allegation of fraud in connection with the contract:

> A party may not be compelled to arbitrate a dispute unless there is evidence which affirmatively establishes that the parties clearly, explicitly, and unequivocally agreed to arbitrate the dispute… . Under both federal and New York law, unless it can be established that there was a grand scheme to defraud which permeated the entire agreement, including the arbitration provision, a broadly worded arbitration provision will be deemed separate from the substantive contractual provisions, and the agreement to arbitrate may be valid despite the underlying allegation of fraud … .
>
> The broad arbitration clause in the 2014 agreement, together with the other provisions of the 2014 agreement, demonstrate that the plaintiffs explicitly and unequivocally agreed to arbitrate the matters that are the subject of this action. In addition, the plaintiffs' bare conclusory assertions of fraud failed to establish that any alleged fraud was part of a grand scheme that permeated the entire agreement, including the arbitration clause … . **Zafar v Fast Track Leasing, LLC, 2018 NY Slip Op 04774, Second Dept 6-27-18**

ARBITRATION (CONTRACT LAW, FRAUD, PLAINTIFFS' CONCLUSORY ALLEGATION OF FRAUD DID NOT DEFEAT THE AGREEMENT TO ARBITRATE (SECOND DEPT))/CONTRACT LAW (ARBITRATION, PLAINTIFFS' CONCLUSORY ALLEGATION OF FRAUD DID NOT DEFEAT THE AGREEMENT TO ARBITRATE (SECOND DEPT))/FRAUD (ARBITRATION, CONTRACT LAW, PLAINTIFFS' CONCLUSORY ALLEGATION OF FRAUD DID NOT DEFEAT THE AGREEMENT TO ARBITRATE (SECOND DEPT))

ARBITRATION, EMPLOYMENT LAW, EDUCATION-SCHOOL LAW.

ARBITRATION AWARD WAS INDEFINITE AND NONFINAL (FOURTH DEPT).

The Fourth Department determined the arbitrator's award concerning the transfer of employees was indefinite and nonfinal:

> The arbitration proceeding arose from respondent's plan to transfer certain employees previously assigned to work at a single location to new positions requiring them to alternate between two different work locations. The arbitrator's opinion and award, among other things, found that respondent involuntarily transferred the grievants in violation of the collective bargaining agreement between the parties, and directed respondent to compensate the grievants "for work performed at more than one location from November 30, 2013 until the end of the 2016 Budget Year."
>
> We agree with respondent that Supreme Court erred in granting the petition and in denying the cross petition. An arbitration award "shall be vacated" where the arbitrator "so imperfectly executed [the award] that a final and definite award upon the subject matter submitted was not made"... . "An award is indefinite or nonfinal within the meaning of the statute only if it leaves the parties unable to determine their rights and obligations, if it does not resolve the controversy submitted or if it creates a new controversy' " ... . Vacatur is appropriate where the award failed to set forth the manner of computing monetary damages... .
>
> ... The award does not explain the basis for the compensation allegedly owed to the grievants, nor does it detail how that compensation should be calculated. **Matter of The Professional, Clerical, Tech. Empls. Assn. (Board of Educ. for Buffalo City Sch. Dist.), 2018 NY Slip Op 04128, Fourth Dept 6-8-18**

ARBITRATION (ARBITRATION AWARD WAS INDEFINITE AND NONFINAL (FOURTH DEPT))/EMPLOYMENT LAW (ARBITRATION AWARD WAS INDEFINITE AND NONFINAL (FOURTH DEPT))/EDUCATION-SCHOOL LAW (EMPLOYMENT LAW, ARBITRATION AWARD WAS INDEFINITE AND NONFINAL (FOURTH DEPT))

APPEALS

APPEALS.

SUPREME COURT PROPERLY CONSIDERED A RELEASE WHICH DID NOT EXIST AT THE TIME THE CASE WAS REVERSED ON APPEAL AND SENT BACK (FIRST DEPT).

The First Department determined Supreme Court properly considered a release that defendant had signed after the matter had been reversed on appeal and before the case was heard on remittal:

> While Supreme Court is powerless to change a remittitur from this Court, "nevertheless, in order to avoid an obviously unjust result it may mold its procedure and adapt its relief to the exigencies of any new facts or conditions which were not before the [appellate court] when it made its original determination and entered its remittitur"... . Here, the release is a "new fact" that was not considered by this Court, and Supreme Court properly determined that it would be unjust to ignore its existence and proceed with the litigation. **Gramercy Park Residence Corp. v Ellman, 2018 NY Slip Op 04424, First Dept 6-14-18**

APPEALS SUPREME (COURT PROPERLY CONSIDERED A RELEASE WHICH DID NOT EXIST AT THE TIME THE CASE WAS REVERSED ON APPEAL AND SENT BACK (FIRST DEPT))/REMITTITUR (APPEALS, COURT PROPERLY CONSIDERED A RELEASE WHICH DID NOT EXIST AT THE TIME THE CASE WAS REVERSED ON APPEAL AND SENT BACK (FIRST DEPT))

ATTORNEYS

ATTORNEYS.

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The First Department determined plaintiff attorney's contingency fee retainer violated 22 USC 1623 (f) (which prohibits contingency fees in excess of 10% in actions governed by the federal statute) and was therefore unlawful and void under federal law. The unjust enrichment theory was not available to the plaintiff on equitable and evidentiary grounds:

> Plaintiff is not entitled to any compensation for services rendered under the subject contingency fee retainer. It is undisputed that the terms of the retainer violated 22 USC § 1623(f), and, thus, the retainer was "unlawful and void" under federal law. Under these circumstances, plaintiff's argument that the void retainer allowed him to pursue a quasi-contract theory of recovery is unavailing. In light of the illegality of the retainer, the court properly found that plaintiff had "unclean hands" to foreclose any claim of unjust enrichment ... . Furthermore, plaintiff failed to plead a relationship with defendant that could have caused reliance or inducement on plaintiff's part sufficient to sustain an unjust enrichment claim ... . **Sorenson v Winston & Strawn, LLP, 2018 NY Slip Op 04828, First Dept 6-28-18**

ATTORNEYS (FEES, CONTINGENCY FEE RETAINER VIOLATED FEDERAL LAW AND WAS VOID, UNJUST ENRICHMENT THEORY NOT AVAILABLE ON EQUITABLE AND EVIDENTIARY GROUNDS (FIRST DEPT))/ATTORNEY'S FEES (CONTINGENCY FEE RETAINER VIOLATED FEDERAL LAW AND WAS VOID, UNJUST ENRICHMENT THEORY NOT AVAILABLE ON EQUITABLE AND EVIDENTIARY GROUNDS (FIRST DEPT))/CONTINGENCY FEES (ATTORNEYS, CONTINGENCY FEE RETAINER VIOLATED FEDERAL LAW AND WAS VOID, UNJUST ENRICHMENT THEORY NOT AVAILABLE ON EQUITABLE AND EVIDENTIARY GROUNDS (FIRST DEPT))/UNJUST ENRICHMENT (ATTORNEY'S FEES, CONTINGENCY FEE RETAINER VIOLATED FEDERAL LAW AND WAS VOID, UNJUST ENRICHMENT THEORY NOT AVAILABLE ON EQUITABLE AND EVIDENTIARY GROUNDS (FIRST DEPT))/UNCLEAN HANDS (UNJUST ENRICHMENT, CONTINGENCY FEE RETAINER VIOLATED FEDERAL LAW AND WAS VOID, UNJUST ENRICHMENT THEORY NOT AVAILABLE ON EQUITABLE AND EVIDENTIARY GROUNDS (FIRST DEPT))/RETAINER (ATTORNEY'S FEES, CONTINGENCY FEE RETAINER VIOLATED FEDERAL LAW AND WAS VOID, UNJUST ENRICHMENT THEORY NOT AVAILABLE ON EQUITABLE AND EVIDENTIARY GROUNDS (FIRST DEPT))

ATTORNEYS, LEGAL MALPRACTICE, NEGLIGENCE, EDUCATION-SCHOOL LAW.

MOTIONS TO DISMISS LEGAL MALPRACTICE CAUSES OF ACTION AGAINST ORIGINAL COUNSEL FOR FAILING TO FILE A NOTICE OF CLAIM AND AGAINST SUCCESSOR COUNSEL FOR FAILURE TO SEEK LEAVE TO FILE A LATE NOTICE OF CLAIM PROPERLY DENIED (FIRST DEPT).

The First Department determined the motions to dismiss the legal malpractice causes of action against original (Neimark defendants) and successor counsel (Budin defendants) were properly denied. Original counsel did not file a notice of claim and successor counsel did not seek leave to file a late notice of claim:

> The Budin defendants, as successor counsel, had an opportunity to protect plaintiff's rights by seeking discretionary leave, pursuant to General Municipal Law § 50-e(5), to serve a late notice of claim. Whether the Budin defendants would have prevailed on such motion will have to be determined by the trier of fact ... . We do not find this determination to be speculative given that Supreme Court will weigh established factors in exercising its General Municipal Law § 50-e(5) discretion ... .
>
> We agree with plaintiff's argument that the Neimark defendants' failure to serve a timely notice of claim, as of right, on the New York City Department of Education in the underlying personal injury action remains a potential proximate cause of his alleged damages. Plaintiff has a viable claim against the Neimark defendants despite the fact that the Budin defendants were substituted as counsel before the expiration of time to move to serve a late notice of claim. Thus, the Budin defendants' substitution can only be deemed a superseding and intervening act that severed any potential liability for legal malpractice on the part of the Neimark defendants if a determination is made that a motion for leave to serve a late notice of claim would have been successful in the underlying personal injury action ... . **Liporace v Neimark & Neimark, LLP, 2018 NY Slip Op 04668, First Dept 6-26-18**

ATTORNEYS (MALPRACTICE, MOTIONS TO DISMISS LEGAL MALPRACTICE CAUSES OF ACTION AGAINST ORIGINAL COUNSEL FOR FAILING TO FILE A NOTICE OF CLAIM AND AGAINST SUCCESSOR COUNSEL FOR FAILURE TO SEEK LEAVE TO FILE A LATE NOTICE OF CLAIM PROPERLY DENIED (FIRST DEPT))/LEGAL MALPRACTICE (MOTIONS TO DISMISS LEGAL MALPRACTICE CAUSES OF ACTION AGAINST ORIGINAL COUNSEL FOR FAILING TO FILE A NOTICE OF CLAIM AND AGAINST SUCCESSOR COUNSEL FOR FAILURE TO SEEK LEAVE TO FILE A LATE NOTICE OF CLAIM PROPERLY DENIED (FIRST DEPT))/NEGLIGENCE (LEGAL MALPRACTICE, MOTIONS TO DISMISS LEGAL MALPRACTICE CAUSES OF ACTION AGAINST ORIGINAL COUNSEL FOR FAILING TO FILE A NOTICE OF CLAIM AND AGAINST SUCCESSOR COUNSEL FOR FAILURE TO SEEK LEAVE TO FILE A LATE NOTICE OF CLAIM PROPERLY DENIED (FIRST DEPT))/EDUCATION-SCHOOL LAW (NOTICE OF CLAIM, LEGAL MALPRACTICE, MOTIONS TO DISMISS LEGAL MALPRACTICE CAUSES OF ACTION AGAINST ORIGINAL COUNSEL FOR FAILING TO FILE A NOTICE OF CLAIM AND AGAINST SUCCESSOR COUNSEL FOR FAILURE TO SEEK LEAVE TO FILE A LATE NOTICE OF CLAIM PROPERLY DENIED (FIRST DEPT))/NOTICE OF CLAIM (EDUCATION-SCHOOL LAW, LEGAL MALPRACTICE, MOTIONS TO DISMISS LEGAL MALPRACTICE CAUSES OF ACTION AGAINST ORIGINAL COUNSEL FOR FAILING TO FILE A NOTICE OF CLAIM AND AGAINST SUCCESSOR COUNSEL FOR FAILURE TO SEEK LEAVE TO FILE A LATE NOTICE OF CLAIM PROPERLY DENIED (FIRST DEPT))

CIVIL PROCEDURE

CIVIL PROCEDURE.

PLAINTIFF JUDICIALLY ESTOPPED FROM IMPOSING A CONSTRUCTIVE TRUST ON REAL PROPERTY, PLAINTIFF STATED HE HAD NO INTEREST IN THE PROPERTY IN PRIOR BANKRUPTCY PROCEEDINGS (SECOND DEPT).

The Second Department determined plaintiff was judicially estopped from imposing a constructive trust on real property because he stated he had no interest in the property in prior bankruptcy proceedings:

> Under the doctrine of judicial estoppel, also known as estoppel against inconsistent positions, a party may not take a position in a legal proceeding that is contrary to a position he or she took in a prior proceeding, simply because his or her interests have changed ... . The doctrine applies only where the party secured a judgment in his or her favor in the prior proceeding ... . This doctrine "rests upon the principle that a litigant should not be permitted . . . to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise'" ... . "The doctrine is invoked to estop parties from adopting such contrary positions because the judicial system cannot tolerate this playing fast and loose with the courts"... .
>
> Here, the plaintiff's contention that he had an interest in the ... property based on promises that [defendant] made to the plaintiff ... is contrary to his representation to the United States Bankruptcy Court ... that he had no interest in real property. Based upon the plaintiff's representations to the Bankruptcy Court, his debts were discharged. Therefore, we agree with the Supreme Court that this action is barred by the doctrine of judicial estoppel ... . **Bihn v Connelly, 2018 NY Slip Op 03956, Second Dept 6-6-18**

CIVIL PROCEDURE (JUDICIAL ESTOPPEL, PLAINTIFF JUDICIALLY ESTOPPED FROM IMPOSING A CONSTRUCTIVE TRUST ON REAL PROPERTY, PLAINTIFF STATED HE HAD NO INTEREST IN THE PROPERTY IN PRIOR BANKRUPTCY PROCEEDINGS (SECOND DEPT))/JUDICIAL ESTOPPEL (PLAINTIFF JUDICIALLY ESTOPPED FROM IMPOSING A CONSTRUCTIVE TRUST ON REAL PROPERTY, PLAINTIFF STATED HE HAD NO INTEREST IN THE PROPERTY IN PRIOR BANKRUPTCY PROCEEDINGS (SECOND DEPT))

CIVIL PROCEDURE.

STRIKING THE ANSWER WAS TOO SEVERE A SANCTION FOR A DISCOVERY VIOLATION, THERE WAS NO SPOLIATION OF EVIDENCE, RATHER THERE WAS A DELAY IN PRODUCING THE EVIDENCE (FOURTH DEPT).

The Fourth Department determined a discovery violation had occurred, but it did not involve spoliation of evidence and striking defendant's (the Clinic's) answer was too severe a sanction. This is a medical malpractice action alleging a failure to diagnose breast cancer. The plaintiff sought reports generated by software (CAD) used to detect breast cancer:

> ... [J]ust prior to the scheduled date for trial, plaintiff issued a subpoena duces tecum on defendants requesting CAD structured reports. Defendants objected to the subpoena and ... plaintiff moved to strike defendants' answers or for other sanctions for defendants' discovery violation. In response, defendants were eventually able to generate the CAD structured reports and provided them to plaintiff. ...
>
> ... [A]lthough we agree with the court that plaintiff established that a discovery violation occurred, we conclude that the sanction of striking the answer of the Clinic was too severe under the circumstances of this case ... . This case is not similar to a spoliation case because the CAD structured reports were never destroyed but, rather, were not generated and produced in a timely manner . We conclude that the Clinic should be sanctioned by imposing costs upon it for any additional expenses plaintiff incurred as a result of the delay in disclosure ... . **Woloszuk v Logan-Young, 2018 NY Slip Op 04176, Fourth Dept 6-8-18**

CIVIL PROCEDURE (STRIKING THE ANSWER WAS TOO SEVERE A SANCTION FOR A DISCOVERY VIOLATION, THERE WAS NO SPOLIATION OF EVIDENCE, RATHER THERE WAS A DELAY IN PRODUCING THE EVIDENCE (FOURTH DEPT))/DISCOVERY (STRIKING THE ANSWER WAS TOO SEVERE A SANCTION FOR A DISCOVERY VIOLATION, THERE WAS NO SPOLIATION OF EVIDENCE, RATHER THERE WAS A DELAY IN PRODUCING THE EVIDENCE (FOURTH DEPT))/SANCTIONS (DISCOVERY VIOLATION, STRIKING THE ANSWER WAS TOO SEVERE A SANCTION FOR A DISCOVERY VIOLATION, THERE WAS NO SPOLIATION OF EVIDENCE, RATHER THERE WAS A DELAY IN PRODUCING THE EVIDENCE (FOURTH DEPT))

CIVIL PROCEDURE.

MOTION TO EXTEND THE TIME TO SERVE THE SUMMONS AND COMPLAINT PROPERLY GRANTED, DIFFERENCE BETWEEN 'GOOD CAUSE' AND 'INTEREST OF JUSTICE' CRITERIA EXPLAINED (SECOND DEPT).

The Second Department determined plaintiff's cross motion to extend the time to serve the summons and complaint was properly granted. Defendant doctor had retired and was no longer working at the place of business where the medical malpractice summons and complaint was served:

> ... [A]n attempt at service that later proves defective cannot be the basis for a "good cause" extension of time to serve process pursuant to CPLR 306-b... . However, the more flexible "interest of justice" standard accommodates late service that might be due to mistake, confusion, or oversight, so long as there is no prejudice to the defendant ... . Indeed, the court may consider diligence or lack thereof, along with any other relevant factor, in making its determination, including expiration of the statute of limitations, the potentially meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant ... .
>
> Here, several factors weighed in favor of granting the plaintiff's cross motion. The action was timely commenced, and the statute of limitations with respect to one of the two causes of action had expired when the plaintiff cross-moved for relief ... . The appellant also had actual notice of this action within 120 days after its commencement ... . Furthermore, an extension of time to serve the summons and complaint under CPLR 306-b in the interest of justice is available where, as here, "service is timely made within the 120-day period but is subsequently found to have been defective" ... .Finally, we note that whether a plaintiff has demonstrated that he or she has a potentially meritorious cause of action is but one factor to be considered by a court in determining a CPLR 306-b motion ... . **Estate of Fernandez v Wyckoff Hgts. Med. Ctr., 2018 NY Slip Op 04306, Second Dept 6-13-18**

CIVIL PROCEDURE (MOTION TO EXTEND THE TIME TO SERVE THE SUMMONS AND COMPLAINT PROPERLY GRANTED, DIFFERENCE BETWEEN 'GOOD CAUSE' AND 'INTEREST OF JUSTICE' CRITERIA EXPLAINED (SECOND DEPT))/CPLR 306-b (MOTION TO EXTEND THE TIME TO SERVE THE SUMMONS AND COMPLAINT PROPERLY GRANTED, DIFFERENCE BETWEEN 'GOOD CAUSE' AND 'INTEREST OF JUSTICE' CRITERIA EXPLAINED (SECOND DEPT))/SERVICE OF PROCESS (MOTION TO EXTEND THE TIME TO SERVE THE SUMMONS AND COMPLAINT PROPERLY GRANTED, DIFFERENCE BETWEEN 'GOOD CAUSE' AND 'INTEREST OF JUSTICE' CRITERIA EXPLAINED (SECOND DEPT))/EXTEND TIME, MOTION TO (SERVICE OF PROCESS, MOTION TO EXTEND THE TIME TO SERVE THE SUMMONS AND COMPLAINT PROPERLY GRANTED, DIFFERENCE BETWEEN 'GOOD CAUSE' AND 'INTEREST OF JUSTICE' CRITERIA EXPLAINED (SECOND DEPT))

CIVIL PROCEDURE.

PLAINTIFF DID NOT DEMONSTRATE DILIGENT EFFORTS TO SERVE DEFENDANT BEFORE USING THE AFFIX AND MAIL PROCEDURE, DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to dismiss the complaint for failure to obtain personal jurisdiction should have been granted. Plaintiff used the affix and mail procedure and did not demonstrate that diligent efforts were made to serve by other means:

> Affix and mail service pursuant to CPLR 308(4) is only valid where service under CPLR 308(1) by personal delivery or CPLR 308(2) by delivery to a person of suitable age and discretion "cannot be made with due diligence" ... . This requirement must be " strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received'"... . Whether due diligence has been satisfied must be "determined on a case-by-case basis, focusing not on the quantity of the attempts at personal delivery, but on their quality" ... . Specifically, "it must be shown that the process server made genuine inquiries about the defendant's whereabouts and place of employment" ... .
>
> Here, the submissions in support of the plaintiff's motion contained numerous inconsistent dates regarding when service was attempted and made upon the defendant. Even accepting the dates of attempted service claimed by the plaintiff, those attempts were "made on weekdays during hours when it reasonably could have been expected that [the defendant] was either working or in transit to work"... . Moreover, there is no indication that the process server made any attempt to locate the defendant's place of employment so he could attempt to effectuate service there ... . Under these circumstances, the plaintiff failed to establish that he exercised due diligence in attempting to effectuate service pursuant to CPLR 308(1) or (2) before resorting to service pursuant to CPLR 308(4) ... . **Faruk v Dawn, 2018 NY Slip Op 04307, Second Dept 6-13-18**

CIVIL PROCEDURE (SERVICE OF PROCESS, PLAINTIFF DID NOT DEMONSTRATE DILIGENT EFFORTS TO SERVE DEFENDANT BEFORE USING THE AFFIX AND MAIL PROCEDURE, DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION SHOULD HAVE BEEN GRANTED (SECOND DEPT))/SERVICE OF PROCESS (PLAINTIFF DID NOT DEMONSTRATE DILIGENT EFFORTS TO SERVE DEFENDANT BEFORE USING THE AFFIX AND MAIL PROCEDURE, DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION SHOULD HAVE BEEN GRANTED (SECOND DEPT))/CPLR 308 (SERVICE OF PROCESS, PLAINTIFF DID NOT DEMONSTRATE DILIGENT EFFORTS TO SERVE DEFENDANT BEFORE USING THE AFFIX AND MAIL PROCEDURE, DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION SHOULD HAVE BEEN GRANTED (SECOND DEPT))/AFFIX AND MAIL (SERVICE OF PROCESS, PLAINTIFF DID NOT DEMONSTRATE DILIGENT EFFORTS TO SERVE DEFENDANT BEFORE USING THE AFFIX AND MAIL PROCEDURE, DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION SHOULD HAVE BEEN GRANTED (SECOND DEPT))/JURISDICTION (SERVICE OF PROCESS, PLAINTIFF DID NOT DEMONSTRATE DILIGENT EFFORTS TO SERVE DEFENDANT BEFORE USING THE AFFIX AND MAIL PROCEDURE, DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION SHOULD HAVE BEEN GRANTED (SECOND DEPT))

CIVIL PROCEDURE.

ABSENCE OF A TRANSLATOR'S AFFIDAVIT CONTRIBUTED TO DEFENDANT'S FAILURE TO MAKE OUT A PRIMA FACIE CASE FOR SUMMARY JUDGMENT (SECOND DEPT).

The Second Department determined the defendant's motion for summary judgment was properly denied because the errata sheets attached to the deposition were not accompanied by a translator's affidavit. The defendant testified through a Spanish language interpreter:

> ... [T]he defendant testified at her deposition through a Spanish language interpreter. However, the errata sheets annexed to the transcript of the defendant's deposition testimony and the defendant's affidavit, which were both written in English, were not accompanied by a translator's affidavit executed in compliance with CPLR 2101(b). Therefore, those evidentiary submissions were facially defective and inadmissible ... . While the defendant submitted a translator's affidavit with her reply papers, that affidavit was unnotarized, and thus was not in admissible form ... . The defendant's remaining evidentiary submissions were insufficient to establish her prima facie entitlement to judgment as a matter of law on the applicability of the homeowner's exemption under the Labor Law ... . **Gonzalez v Abreu, 2018 NY Slip Op 04309, Second Dept 6-13-18**
>
> .

CIVIL PROCEDURE (ABSENCE OF A TRANSLATOR'S AFFIDAVIT CONTRIBUTED TO DEFENDANT'S FAILURE TO MAKE OUT A PRIMA FACIE CASE FOR SUMMARY JUDGMENT (SECOND DEPT))/CPLR 2101 (ABSENCE OF A TRANSLATOR'S AFFIDAVIT CONTRIBUTED TO DEFENDANT'S FAILURE TO MAKE OUT A PRIMA FACIE CASE FOR SUMMARY JUDGMENT (SECOND DEPT))/TRANSLATOR'S AFFIDAVIT (ABSENCE OF A TRANSLATOR'S AFFIDAVIT CONTRIBUTED TO DEFENDANT'S FAILURE TO MAKE OUT A PRIMA FACIE CASE FOR SUMMARY JUDGMENT (SECOND DEPT))

CIVIL PROCEDURE.

DEFENDANT'S MOTION TO VACATE A DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED, DEFENDANT WAS NOT SERVED WITH THE SUMMONS BY PERSONAL DELIVERY AND MOVED TO VACATE WITHIN ONE YEAR OF LEARNING OF THE SUIT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to vacate a default judgment should have been granted. Defendant had not changed the address for service on file with the Secretary of State and did not receive the summons and complaint. Plaintiff knew where defendant's place of business was and had communicated with defendant at that address:

> A defendant who has been served with a summons other than by personal delivery may be allowed to defend the action within one year after he or she obtains knowledge of entry of the judgment upon a finding of the court that the defendant did not personally receive notice of the summons in time to defend and has a potentially meritorious defense (see CPLR 317 ...). ...
>
> There is no evidence in the record that the defendant or its agent received actual notice of the summons, which was delivered to the Secretary of State, in time to defend this action ... . Although the defendant did not explain why it failed to update its address with the Secretary of State, "there is no necessity for a defendant moving pursuant to CPLR 317 to show a reasonable excuse' for its delay" ... .
>
> ... [T]hrough the affidavit of the defendant's principal averring that the plaintiff failed to comply with the terms of the parties' oral lease, the defendant met its burden of demonstrating the existence of a potentially meritorious defense ... . **Benchmark Farm, Inc. v Red Horse Farm, LLC, 2018 NY Slip Op 04522, Second Dept 6-20-18**

CIVIL PROCEDURE (DEFENDANT'S MOTION TO VACATE A DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED, DEFENDANT WAS NOT SERVED WITH THE SUMMONS BY PERSONAL DELIVERY AND MOVED TO VACATE WITHIN ONE YEAR OF LEARNING OF THE SUIT (SECOND DEPT))/CPLR 317 (DEFENDANT'S MOTION TO VACATE A DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED, DEFENDANT WAS NOT SERVED WITH THE SUMMONS BY PERSONAL DELIVERY AND MOVED TO VACATE WITHIN ONE YEAR OF LEARNING OF THE SUIT (SECOND DEPT))/DEFAULT JUDGMENT, MOTION TO VACATE (DEFENDANT'S MOTION TO VACATE A DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED, DEFENDANT WAS NOT SERVED WITH THE SUMMONS BY PERSONAL DELIVERY AND MOVED TO VACATE WITHIN ONE YEAR OF LEARNING OF THE SUIT (SECOND DEPT))

CIVIL PROCEDURE.

PARTY MOVING TO PRECLUDE THE OTHER PARTY FROM PRESENTING EVIDENCE BASED UPON VIOLATIONS OF DISCOVERY ORDERS HAS THE BURDEN OF PROVING WILLFUL OR CONTUMACIOUS CONDUCT, BURDEN NOT MET HERE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to preclude the plaintiff from presenting evidence at trial should not have been granted. Plaintiff had failed to provide discovery and failed to appear for her court ordered deposition three times. A so-ordered stipulation was entered requiring plaintiff to be deposed on or before March 16, 2015, at a time and place to be agreed upon. Defendant moved to preclude when plaintiff did not appear on March 16, 2015. The court noted that no date for the deposition had been agreed to and therefore preclusion was not warranted:

> When a litigant fails to comply with the terms of a conditional order of preclusion, the terms of that order become absolute ... . However, the burden of establishing noncompliance rests with the party seeking preclusion ... . Because the remedy of preclusion is the functional equivalent of striking a party's pleading... , it may not be granted where the party can demonstrate a justifiable excuse and a potentially meritorious cause of action or defense ... .
>
> Here, the so-ordered stipulation did not set a time, date, or place for the plaintiff's deposition, instead stating merely that the plaintiff's deposition was to be held "on or before" March 16, 2015, "at a time and location to be agreed upon." In light of this, the defendants' minimal assertion that the plaintiff failed to appear, which relied on the hearsay assertion of an unnamed employee of defense counsel, was insufficient to demonstrate that the plaintiff willfully and contumaciously violated the so-ordered stipulation ... . Similarly, the defendants did not allege in their motion that the plaintiff had failed to provide the outstanding written discovery that was included in the so-ordered stipulation. Therefore, since the defendants failed to demonstrate that the plaintiff knew when and where to appear for her deposition, there was no evidence of ongoing willful or contumacious conduct ... . **Cannon v 111 Fulton St. Condominium, Inc., 2018 NY Slip Op 04523, Second Dept 6-20-18**

CIVIL PROCEDURE (PRECLUDE, MOTION TO, PARTY MOVING TO PRECLUDE THE OTHER PARTY FROM PRESENTING EVIDENCE BASED UPON VIOLATIONS OF DISCOVERY ORDERS HAS THE BURDEN OF PROVING WILLFUL OR CONTUMACIOUS CONDUCT, BURDEN NOT MET HERE (SECOND DEPT))/DISCOVERY (PRECLUDE, MOTION TO, PARTY MOVING TO PRECLUDE THE OTHER PARTY FROM PRESENTING EVIDENCE BASED UPON VIOLATIONS OF DISCOVERY ORDERS HAS THE BURDEN OF PROVING WILLFUL OR CONTUMACIOUS CONDUCT, BURDEN NOT MET HERE (SECOND DEPT))/PRECLUDE, MOTION TO (PARTY MOVING TO PRECLUDE THE OTHER PARTY FROM PRESENTING EVIDENCE BASED UPON VIOLATIONS OF DISCOVERY ORDERS HAS THE BURDEN OF PROVING WILLFUL OR CONTUMACIOUS CONDUCT, BURDEN NOT MET HERE (SECOND DEPT))/CPLR 3126 (PRECLUDE, MOTION TO, PARTY MOVING TO PRECLUDE THE OTHER PARTY FROM PRESENTING EVIDENCE BASED UPON VIOLATIONS OF DISCOVERY ORDERS HAS THE BURDEN OF PROVING WILLFUL OR CONTUMACIOUS CONDUCT, BURDEN NOT MET HERE (SECOND DEPT))/WILLFUL OR CONTUMACIOUS CONDUCT (PRECLUDE, MOTION TO, PARTY MOVING TO PRECLUDE THE OTHER PARTY FROM PRESENTING EVIDENCE BASED UPON VIOLATIONS OF DISCOVERY ORDERS HAS THE BURDEN OF PROVING WILLFUL OR CONTUMACIOUS CONDUCT, BURDEN NOT MET HERE (SECOND DEPT))

CIVIL PROCEDURE.

ALTHOUGH SUPREME COURT PROPERLY PRECLUDED DEFENDANT FROM PRESENTING EVIDENCE AT TRIAL BECAUSE OF DISCOVERY ORDER VIOLATIONS, SUPREME COURT ABUSED ITS DISCRETION BY STRIKING DEFENDANT'S ANSWER (SECOND DEPT).

The Second Department determined defendant (Koonin), the owner/operator of a car involved in an accident with plaintiff, had violated discovery orders and was guilty of willful or contumacious conduct warranting sanction. Supreme Court both struck Konnin's answer and precluded Koonin from submitting any evidence at trial. The Second Department held that striking the answer was an abuse of discretion:

> "The nature and degree of a penalty to be imposed under CPLR 3126 for discovery violations is addressed to the court's discretion" ... . "The general rule is that the court will impose a sanction commensurate with the particular disobedience it is designed to punish and go no further than that" ... . This Court is vested with corresponding power to substitute its own discretion for that of the motion court, even in the absence of abuse... .
>
> In light of Koonin's failure to comply with multiple court orders and so-ordered stipulations directing him to appear for the EBT, the Supreme Court properly concluded that Koonin engaged in willful and contumacious conduct... . However, under the circumstances, it was an improvident exercise of discretion to grant those branches of the motion and cross motion which were to strike Koonin's answer in light of the fact that the court also granted those branches of the motion and cross motion which were to preclude Koonin from offering any evidence at the time of trial ... . **Chowdhury v Hudson Val. Limousine Serv., LLC, 2018 NY Slip Op 04526, Second Dept 6-20-18**

CIVIL PROCEDURE (DISCOVERY VIOLATIONS, ALTHOUGH SUPREME COURT PROPERLY PRECLUDED DEFENDANT FROM PRESENTING EVIDENCE AT TRIAL BECAUSE OF DISCOVERY ORDER VIOLATIONS, SUPREME COURT ABUSED ITS DISCRETION BY STRIKING DEFENDANT'S ANSWER (SECOND DEPT))/CPLR 3126 (DISCOVERY VIOLATIONS, ALTHOUGH SUPREME COURT PROPERLY PRECLUDED DEFENDANT FROM PRESENTING EVIDENCE AT TRIAL BECAUSE OF DISCOVERY ORDER VIOLATIONS, SUPREME COURT ABUSED ITS DISCRETION BY STRIKING DEFENDANT'S ANSWER (SECOND DEPT))/DISCOVERY (DISCOVERY VIOLATIONS, ALTHOUGH SUPREME COURT PROPERLY PRECLUDED DEFENDANT FROM PRESENTING EVIDENCE AT TRIAL BECAUSE OF DISCOVERY ORDER VIOLATIONS, SUPREME COURT ABUSED ITS DISCRETION BY STRIKING DEFENDANT'S ANSWER (SECOND DEPT))/WILLFUL OR CONTUMACIOUS CONDUCT (DISCOVERY VIOLATIONS, ALTHOUGH SUPREME COURT PROPERLY PRECLUDED DEFENDANT FROM PRESENTING EVIDENCE AT TRIAL BECAUSE OF DISCOVERY ORDER VIOLATIONS, SUPREME COURT ABUSED ITS DISCRETION BY STRIKING DEFENDANT'S ANSWER (SECOND DEPT))/PRECLUDE, MOTION TO (DISCOVERY VIOLATIONS, ALTHOUGH SUPREME COURT PROPERLY PRECLUDED DEFENDANT FROM PRESENTING EVIDENCE AT TRIAL BECAUSE OF DISCOVERY ORDER VIOLATIONS, SUPREME COURT ABUSED ITS DISCRETION BY STRIKING DEFENDANT'S ANSWER (SECOND DEPT))/ANSWER, MOTION TO STRIKE (DISCOVERY VIOLATIONS, ALTHOUGH SUPREME COURT PROPERLY PRECLUDED DEFENDANT FROM PRESENTING EVIDENCE AT TRIAL BECAUSE OF DISCOVERY ORDER VIOLATIONS, SUPREME COURT ABUSED ITS DISCRETION BY STRIKING DEFENDANT'S ANSWER (SECOND DEPT))

CIVIL PROCEDURE.

STATUTORY CRITERIA OF CPLR 3216 NOT MET, COURT SHOULD NOT HAVE DISMISSED ACTION FOR NEGLECT TO PROSECUTE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the statutory criteria in CPLR 3216 were not met and the court should not have dismissed the action for neglect to prosecute:

> The Supreme Court issued a compliance conference order dated December 3, 2014, directing the plaintiff to serve and file a note of issue on or before May 15, 2015, and warning that the failure to do so "shall result in dismissal of the action for unreasonably neglecting to proceed, without further notice." ...
>
> "A court may not dismiss an action based on neglect to prosecute unless the statutory preconditions to dismissal, as articulated in CPLR 3216, are met" ... . "Effective January 1, 2015, the Legislature amended, in several significant respects, the statutory preconditions to dismissal under CPLR 3216" ... . One such precondition is that where a written demand to resume prosecution of the action is made by the court, as here, "the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation" ... . Here, the compliance conference order did not set forth any specific conduct constituting neglect by the plaintiff. Accordingly, since one of the statutory preconditions to dismissal was not met, the court should not have directed dismissal of the complaint pursuant to CPLR 3216 ... . **Goetz v Public Serv. Truck Renting, Inc., 2018 NY Slip Op 04534, Second Dept 6-20-18**

CIVIL PROCEDURE (STATUTORY CRITERIA OF CPLR 3216 NOT MET, COURT SHOULD NOT HAVE DISMISSED ACTION FOR NEGLECT TO PROSECUTE (SECOND DEPT))/CPLR 3216 (STATUTORY CRITERIA OF CPLR 3216 NOT MET, COURT SHOULD NOT HAVE DISMISSED ACTION FOR NEGLECT TO PROSECUTE (SECOND DEPT))/NEGLECT TO PROSECUTE (STATUTORY CRITERIA OF CPLR 3216 NOT MET, COURT SHOULD NOT HAVE DISMISSED ACTION FOR NEGLECT TO PROSECUTE (SECOND DEPT))

CIVIL PROCEDURE.

WHERE THERE IS NO PREJUDICE TO A DEFENDANT, PLAINTIFF'S MOTION FOR A VOLUNTARY DISCONTINUANCE WITHOUT PREJUDICE SHOULD BE GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff's motion for a voluntary discontinuance without prejudice should have been granted:

> CPLR 3217(b) permits a voluntary discontinuance of a claim by court order "upon terms and conditions, as the court deems proper" (CPLR 3217[b]...). In general, absent a showing of special circumstances, including prejudice to a substantial right of the defendant or other improper consequences, a motion for a voluntary discontinuance should be granted without prejudice ... .
>
> Here, there was no evidence that the defendant would be prejudiced by a discontinuance without prejudice ... . **Kondaur Capital Corp. v Reilly, 2018 NY Slip Op 04707, Second Dept 6-27-18**

CIVIL PROCEDURE (DISCONTINUANCE, WHERE THERE IS NO PREJUDICE TO A DEFENDANT, PLAINTIFF'S MOTION FOR A VOLUNTARY DISCONTINUANCE WITHOUT PREJUDICE SHOULD BE GRANTED (SECOND DEPT))/DISCONTINUANCE (WHERE THERE IS NO PREJUDICE TO A DEFENDANT, PLAINTIFF'S MOTION FOR A VOLUNTARY DISCONTINUANCE WITHOUT PREJUDICE SHOULD BE GRANTED (SECOND DEPT))/VOLUNTARY DISCONTINUANCE (WHERE THERE IS NO PREJUDICE TO A DEFENDANT, PLAINTIFF'S MOTION FOR A VOLUNTARY DISCONTINUANCE WITHOUT PREJUDICE SHOULD BE GRANTED (SECOND DEPT))/CPLR 3217 (DISCONTINUANCE, WHERE THERE IS NO PREJUDICE TO A DEFENDANT, PLAINTIFF'S MOTION FOR A VOLUNTARY DISCONTINUANCE WITHOUT PREJUDICE SHOULD BE GRANTED (SECOND DEPT))

CIVIL PROCEDURE, APPEALS.

MOTION FOR A CHANGE OF VENUE ON DISCRETIONARY GROUNDS WAS MADE IN THE WRONG COUNTY, ISSUE PROPERLY HEARD ON APPEAL ALTHOUGH NOT RAISED BELOW (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion for a change of venue on discretionary grounds was not brought in the correct county and should not have been granted. The issue was properly before the appellate court despite not having been raised below:

> It is undisputed that, pursuant to CPLR 503(a), venue of the Ulster County Action is properly in Ulster County, where Bacci, one of the Ulster plaintiffs, resided at the time the action was commenced ... . A motion to change venue on discretionary grounds, unlike motions made as of right, must be made in the county in which the action is pending, or in any county in that judicial district, or in any adjoining county (see CPLR 2212[a]...). The Fenstermen parties, therefore, were required to make a motion pursuant to CPLR 510(3) either in Ulster County, where the Ulster County Action was pending, in another county in the 3rd Judicial District, or in a county contiguous to Ulster County (see CPLR 2212[a] ...). Since Ulster County and Nassau County are not contiguous, and Nassau County is not in the 3rd Judicial District, the Fensterman parties' motion to change venue pursuant to CPLR 510(3) based on discretionary grounds was improperly made in the Supreme Court, Nassau County ... . Although not argued by the parties in the Supreme Court, Nassau County, but argued on appeal, we reach this issue in the exercise of our discretion because it appears on the face of the record and could not have been avoided or explained if raised in the Supreme Court ... . **Fensterman v Joseph, 2018 NY Slip Op 04532, Second Dept 6-20-18**

CIVIL PROCEDURE (MOTION FOR A CHANGE OF VENUE ON DISCRETIONARY GROUNDS WAS MADE IN THE WRONG COUNTY, ISSUE PROPERLY HEARD ON APPEAL ALTHOUGH NOT RAISED BELOW (SECOND DEPT))/CPLR 503 (MOTION FOR A CHANGE OF VENUE ON DISCRETIONARY GROUNDS WAS MADE IN THE WRONG COUNTY, ISSUE PROPERLY HEARD ON APPEAL ALTHOUGH NOT RAISED BELOW (SECOND DEPT))/CPLR 2212 (MOTION FOR A CHANGE OF VENUE ON DISCRETIONARY GROUNDS WAS MADE IN THE WRONG COUNTY, ISSUE PROPERLY HEARD ON APPEAL ALTHOUGH NOT RAISED BELOW (SECOND DEPT))/VENUE (MOTION FOR A CHANGE OF VENUE ON DISCRETIONARY GROUNDS WAS MADE IN THE WRONG COUNTY, ISSUE PROPERLY HEARD ON APPEAL ALTHOUGH NOT RAISED BELOW (SECOND DEPT))/APPEALS (CIVIL PROCEDURE, VENUE, MOTION FOR A CHANGE OF VENUE ON DISCRETIONARY GROUNDS WAS MADE IN THE WRONG COUNTY, ISSUE PROPERLY HEARD ON APPEAL ALTHOUGH NOT RAISED BELOW (SECOND DEPT))

CIVIL PROCEDURE, EMPLOYMENT LAW.

CLASS ACTION CERTIFICATION FOR EMPLOYEES ALLEGING DEFENDANT'S FAILURE TO PAY THE PREVAILING WAGE SHOULD NOT HAVE BEEN DENIED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined class certification under CPLR 901 for employees alleging defendant did not pay prevailing wages required by article I, § 17 of the New York Constitution and section 220 (3) of the Labor Law:

> ... [T]he court erred in determining that plaintiffs failed to establish the first and second CPLR 901 prerequisites, numerosity and commonality. Plaintiffs established the numerosity prerequisite by submitting evidence of approximately 350 class members at a minimum ... . Plaintiffs established the commonality prerequisite because one common legal issue dominates the claims of all putative class members, i.e., whether similarly situated employees who worked on public projects were deprived of the prevailing wages to which they were entitled... . Contrary to defendant's contention, the fact that the amount of damages will vary among the putative class members does not prevent this lawsuit from going forward as a class action ... . **Vandee v Suit-Kote Corp., 2018 NY Slip Op 04456, Fourth Dept 6-15-18**

CIVIL PROCEDURE (CLASS ACTIONS, CLASS ACTION CERTIFICATION FOR EMPLOYEES ALLEGING DEFENDANT'S FAILURE TO PAY THE PREVAILING WAGE SHOULD NOT HAVE BEEN DENIED (FOURTH DEPT))/CPLR 901 (CLASS ACTIONS, CLASS ACTION CERTIFICATION FOR EMPLOYEES ALLEGING DEFENDANT'S FAILURE TO PAY THE PREVAILING WAGE SHOULD NOT HAVE BEEN DENIED (FOURTH DEPT))/CLASS ACTION (CLASS ACTION CERTIFICATION FOR EMPLOYEES ALLEGING DEFENDANT'S FAILURE TO PAY THE PREVAILING WAGE SHOULD NOT HAVE BEEN DENIED (FOURTH DEPT))/EMPLOYMENT LAW (CLASS ACTIONS, CLASS ACTION CERTIFICATION FOR EMPLOYEES ALLEGING DEFENDANT'S FAILURE TO PAY THE PREVAILING WAGE SHOULD NOT HAVE BEEN DENIED (FOURTH DEPT))/LABOR LAW (CLASS ACTIONS, CLASS ACTION CERTIFICATION FOR EMPLOYEES ALLEGING DEFENDANT'S FAILURE TO PAY THE PREVAILING WAGE SHOULD NOT HAVE BEEN DENIED (FOURTH DEPT))

CIVIL PROCEDURE, EVIDENCE.

PLAINTIFFS' MOTION FOR A CONTINUANCE TO ALLOW THEIR EXPERT TO COMPLETE HIS TESTIMONY IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined plaintiffs' motion for a continuance to allow their expert to testify in this medical malpractice action should have been granted.

> When the expert ... arrived in the late morning of December 1, 2016, he did not have his original file with him. According to the expert, he left the original file in his hotel and it was his belief that it was not necessary for him to have it in order to testify. Defendant objected to having the expert testify until the original file was with him. Supreme Court directed the expert to have his office make arrangements to immediately bring the original file to the courthouse with the hope that it would arrive in the afternoon. According to the court, the expert could then testify that afternoon and finish the next day, on Friday, December 2, 2016. Plaintiffs' counsel, however, advised the court that the expert had scheduled appointments with patients on December 2, 2016 and was unavailable to testify that day or on December 5, 2016. The next available day for the expert was Tuesday, December 6, 2016. The court, however, instructed the expert to reschedule his appointments. The expert testified in the afternoon of December 1, 2016, but by the completion of direct examination by plaintiffs' counsel, the original file had not arrived. ...
>
> On December 2, 2016, plaintiffs' expert did not appear. ...
>
> We conclude that plaintiffs' motion for a continuance should have been granted ... . The record does not support Supreme Court's finding that the failure of plaintiffs' expert to appear and complete his testimony on December 2, 2016 stemmed from a lack of due diligence by plaintiffs ... . **Normandin v Bell, 2018 NY Slip Op 04053, Third Dept 6-7-18**

CIVIL PROCEDURE (CONTINUANCE, PLAINTIFFS' MOTION FOR A CONTINUANCE TO ALLOW THEIR EXPERT TO COMPLETE HIS TESTIMONY IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN GRANTED (THIRD DEPT))/EVIDENCE (MEDICAL MALPRACTICE, PLAINTIFFS' MOTION FOR A CONTINUANCE TO ALLOW THEIR EXPERT TO COMPLETE HIS TESTIMONY IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN GRANTED (THIRD DEPT))/MEDICAL MALPRACTICE (EXPERT WITNESS, PLAINTIFFS' MOTION FOR A CONTINUANCE TO ALLOW THEIR EXPERT TO COMPLETE HIS TESTIMONY IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN GRANTED (THIRD DEPT))/EXPERT OPINION (MEDICAL MALPRACTICE, PLAINTIFFS' MOTION FOR A CONTINUANCE TO ALLOW THEIR EXPERT TO COMPLETE HIS TESTIMONY IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN GRANTED (THIRD DEPT))/CONTINUANCE (PLAINTIFFS' MOTION FOR A CONTINUANCE TO ALLOW THEIR EXPERT TO COMPLETE HIS TESTIMONY IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN GRANTED (THIRD DEPT))

CIVIL PROCEDURE, EVIDENCE, TRUSTS AND ESTATES.

EVIDENCE INCLUDED IN A SETTLEMENT LETTER PROPERLY ADMITTED AT TRIAL, MISSING WITNESS JURY INSTRUCTION RE A WITNESS LIVING IN FLORIDA WAS ERROR, EXPERT TESTIMONY WHICH RELIED IN PART ON INADMISSIBLE HEARSAY WAS PROPERLY ADMITTED (FIRST DEPT).

The First Department, affirming the denial of summary judgment and the denial of the motion to set aside the verdict in this probate action, determined evidence included in a settlement letter and hearsay relied upon an expert witness were properly admitted. The court further found that the missing witness jury instruction for the decedent's treating doctors was proper, but the missing witness jury instruction for the attorney who drafted the will, who lives in Florida, was (harmless) error. The jury revoked preliminary letters:

> Although CPLR 4547 precludes presentation of evidence of settlement negotiations, it expressly exempts exclusion of evidence, which is otherwise discoverable, solely because such evidence was presented during the course of settlement negotiations.
>
> The list of paintings that was signed by proponent as part of the settlement conference in Shanghai was admitted into evidence because it included a factual admission that proponent possessed a painting that he accused objectant of stealing. Thus, its use at trial was permissible, notwithstanding that the factual statement was contained in a settlement document ... .
>
> The court's missing witness charge with respect to the attorney, Jerome Kamerman, was in error. Mr. Kamerman was living in Florida at the time of trial and was unavailable to proponents ... .
>
> A psychiatrist's opinion may be received in evidence even though some of the information on which it is based is inadmissible hearsay, if the hearsay is "of a kind accepted in the profession as reliable in forming a professional opinion, or if it comes from a witness subject to full cross-examination on [] trial" ... . The court properly permitted the expert to testify, despite his conversations with objectant, since she was subject to full cross-examination at trial. **Matter of Chi-ChuanFile Wang, 2018 NY Slip Op 04090, First Dept 6-7-18**

CIVIL PROCEDURE (EVIDENCE INCLUDED IN A SETTLEMENT LETTER PROPERLY ADMITTED AT TRIAL, MISSING WITNESS JURY INSTRUCTION RE A WITNESS LIVING IN FLORIDA WAS ERROR, EXPERT TESTIMONY WHICH RELIED IN PART ON INADMISSIBLE HEARSAY WAS PROPERLY ADMITTED (FIRST DEPT))/EVIDENCE (EVIDENCE INCLUDED IN A SETTLEMENT LETTER PROPERLY ADMITTED AT TRIAL, MISSING WITNESS JURY INSTRUCTION RE A WITNESS LIVING IN FLORIDA WAS ERROR, EXPERT TESTIMONY WHICH RELIED IN PART ON INADMISSIBLE HEARSAY WAS PROPERLY ADMITTED (FIRST DEPT))/TRUSTS AND ESTATES (EVIDENCE INCLUDED IN A SETTLEMENT LETTER PROPERLY ADMITTED AT TRIAL, MISSING WITNESS JURY INSTRUCTION RE A WITNESS LIVING IN FLORIDA WAS ERROR, EXPERT TESTIMONY WHICH RELIED IN PART ON INADMISSIBLE HEARSAY WAS PROPERLY ADMITTED (FIRST DEPT))/SETTLEMENT NEGOTIATIONS (EVIDENCE INCLUDED IN A SETTLEMENT LETTER PROPERLY ADMITTED AT TRIAL, MISSING WITNESS JURY INSTRUCTION RE A WITNESS LIVING IN FLORIDA WAS ERROR, EXPERT TESTIMONY WHICH RELIED IN PART ON INADMISSIBLE HEARSAY WAS PROPERLY ADMITTED (FIRST DEPT))/CPLR 4547 (EVIDENCE INCLUDED IN A SETTLEMENT LETTER PROPERLY ADMITTED AT TRIAL, MISSING WITNESS JURY INSTRUCTION RE A WITNESS LIVING IN FLORIDA WAS ERROR, EXPERT TESTIMONY WHICH RELIED IN PART ON INADMISSIBLE HEARSAY WAS PROPERLY ADMITTED (FIRST DEPT))/JURY INSTRUCTIONS (MISSING WITNESSES, EVIDENCE INCLUDED IN A SETTLEMENT LETTER PROPERLY ADMITTED AT TRIAL, MISSING WITNESS JURY INSTRUCTION RE A WITNESS LIVING IN FLORIDA WAS ERROR, EXPERT TESTIMONY WHICH RELIED IN PART ON INADMISSIBLE HEARSAY WAS PROPERLY ADMITTED (FIRST DEPT))/MISSING WITNESS INSTRUCTION (EVIDENCE INCLUDED IN A SETTLEMENT LETTER PROPERLY ADMITTED AT TRIAL, MISSING WITNESS JURY INSTRUCTION RE A WITNESS LIVING IN FLORIDA WAS ERROR, EXPERT TESTIMONY WHICH RELIED IN PART ON INADMISSIBLE HEARSAY WAS PROPERLY ADMITTED (FIRST DEPT))/EXPERT OPINION (EVIDENCE INCLUDED IN A SETTLEMENT LETTER PROPERLY ADMITTED AT TRIAL, MISSING WITNESS JURY INSTRUCTION RE A WITNESS LIVING IN FLORIDA WAS ERROR, EXPERT TESTIMONY WHICH RELIED IN PART ON INADMISSIBLE HEARSAY WAS PROPERLY ADMITTED (FIRST DEPT))/HEARSAY (EXPERT OPINION, EVIDENCE INCLUDED IN A SETTLEMENT LETTER PROPERLY ADMITTED AT TRIAL, MISSING WITNESS JURY INSTRUCTION RE A WITNESS LIVING IN FLORIDA WAS ERROR, EXPERT TESTIMONY WHICH RELIED IN PART ON INADMISSIBLE HEARSAY WAS PROPERLY ADMITTED (FIRST DEPT))

CIVIL PROCEDURE, MEDICAL MALPRACTICE.

ANNOUNCING A NEW RULE GOVERNING THE DISCLOSURE OF PROSPECTIVE EXPERT WITNESS'S QUALIFICATIONS IN MEDICAL MALPRACTICE ACTIONS, THE THIRD DEPARTMENT REQUIRES COMPLETE DISCLOSURE OF THE QUALIFICATIONS, EVEN IF SUCH DISCLOSURE FACILITATES THE IDENTIFICATION OF THE WITNESS (THIRD DEPT).

The Third Department, announcing a new Third-Department rule governing expert witness disclosure in medical malpractice actions, in a full-fledged opinion by Justice McCarthy, determined plaintiffs are obligated to provide full disclosure of a prospective expert witness's qualifications, even if the disclosure will identify the witness. Defendants may be entitled to a protective order prohibiting the intimidation or harassment of a witness whose identity has effectively been revealed by his or her qualifications:

> Inasmuch as this state's expert disclosure statute is already the most restrictive in the nation, there is no reason for this Court to continue to interpret the statute in a way that permits parties to severely limit the amount of information they provide regarding their expert witnesses.
>
> Like the Second Department held in Thomas v Alleyne [302 AD2d 36], we conclude that our current standard is not only impractical, but contrary to the statutory language and "the salutary policy of encouraging full pretrial disclosure so as to advance the fundamental purpose of litigation, which is to ascertain the truth" ... . Accordingly, we adopt that Court's rule that parties in medical malpractice cases "will ordinarily be entitled to full disclosure of the qualifications of [an opponent's] expert, [except for the expert's name,] notwithstanding that such disclosure may permit such expert's identification," but a party may obtain a protective order under CPLR 3103 (a) by making a factual showing that there exists a reasonable probability, "under the special circumstances of a particular case, that a prospective expert medical witness would be subjected to intimidation or threats if his or her name were revealed before trial" ... . **Kanaly v DeMartino, 2018 NY Slip Op 04060, Third Dept 6-7-18**

CIVIL PROCEDURE (DISCLOSURE, MEDICAL MALPRACTICE, ANNOUNCING A NEW RULE GOVERNING THE DISCLOSURE OF PROSPECTIVE EXPERT WITNESS'S QUALIFICATIONS IN MEDICAL MALPRACTICE ACTIONS, THE THIRD DEPARTMENT REQUIRES COMPLETE DISCLOSURE OF THE QUALIFICATIONS, EVEN IF SUCH DISCLOSURE FACILITATES THE IDENTIFICATION OF THE WITNESS (THIRD DEPT))/MEDICAL MALPRACTICE (EXPERT WITNESSES, DISCLOSURE, ANNOUNCING A NEW RULE GOVERNING THE DISCLOSURE OF PROSPECTIVE EXPERT WITNESS'S QUALIFICATIONS IN MEDICAL MALPRACTICE ACTIONS, THE THIRD DEPARTMENT REQUIRES COMPLETE DISCLOSURE OF THE QUALIFICATIONS, EVEN IF SUCH DISCLOSURE FACILITATES THE IDENTIFICATION OF THE WITNESS (THIRD DEPT))/DISCLOSURE (MEDICAL MALPRACTICE, EXPERT WITNESSES, ANNOUNCING A NEW RULE GOVERNING THE DISCLOSURE OF PROSPECTIVE EXPERT WITNESS'S QUALIFICATIONS IN MEDICAL MALPRACTICE ACTIONS, THE THIRD DEPARTMENT REQUIRES COMPLETE DISCLOSURE OF THE QUALIFICATIONS, EVEN IF SUCH DISCLOSURE FACILITATES THE IDENTIFICATION OF THE WITNESS (THIRD DEPT))/EXPERT WITNESSES (MEDICAL MALPRACTICE, ANNOUNCING A NEW RULE GOVERNING THE DISCLOSURE OF PROSPECTIVE EXPERT WITNESS'S QUALIFICATIONS IN MEDICAL MALPRACTICE ACTIONS, THE THIRD DEPARTMENT REQUIRES COMPLETE DISCLOSURE OF THE QUALIFICATIONS, EVEN IF SUCH DISCLOSURE FACILITATES THE IDENTIFICATION OF THE WITNESS (THIRD DEPT))/QUALIFICATIONS (EXPERT WITNESSES, ANNOUNCING A NEW RULE GOVERNING THE DISCLOSURE OF PROSPECTIVE EXPERT WITNESS'S QUALIFICATIONS IN MEDICAL MALPRACTICE ACTIONS, THE THIRD DEPARTMENT REQUIRES COMPLETE DISCLOSURE OF THE QUALIFICATIONS, EVEN IF SUCH DISCLOSURE FACILITATES THE IDENTIFICATION OF THE WITNESS (THIRD DEPT))

CIVIL PROCEDURE, MUNICIPAL LAW.

DECLARATORY JUDGMENT ACTION ATTACKING THE PROCEDURE USED TO ENACT LEGISLATION IS SUBJECT TO THE FOUR-MONTH ARTICLE 78 STATUTE OF LIMITATIONS, DECLARATORY JUDGMENT ACTION CHALLENGING THE LEGISLATION ITSELF IS SUBJECT TO THE SIX-YEAR STATUTE OF LIMITATIONS (SECOND DEPT).

The Second Department, in a lawsuit brought by plaintiff village alleging the county did not have the power to issue parking tickets in the village, explained how to determine the appropriate statute of limitations in actions seeking a declaratory judgment:

> While no period of limitation is specifically prescribed for a declaratory judgment action, the six-year catch-all limitation period of CPLR 213(1) does not necessarily apply to all such actions. Rather, in order to determine the statute of limitations applicable to an action for a declaratory judgment, a court must examine the substance of the action. Where it is determined that the parties' dispute can be, or could have been, resolved in an action or proceeding for which a specific limitation period is statutorily required, that limitation period governs ... .
>
> A proceeding pursuant to CPLR article 78 is unavailable to challenge the validity of a legislative act ... . However, when a challenge is directed to the procedure followed in enacting, rather than the substance of, legislation, a proceeding pursuant to CPLR article 78 may be maintained ... .
>
> .. .[T]he plaintiff's third cause of action alleged that the actions taken by the defendants in the formation of the agency were void, invalid, and illegal due to the failure of the defendants to comply with the requirements of the State Environmental Quality Review Act ... . "SEQRA challenges must be commenced within four months after the determination becomes final and binding upon the petitioner ... .
>
> ... [T]he plaintiff's ... causes of action ... for declaratory relief ... challenging the substantive validity of the defendants' formation of the [county parking ticket] agency and the defendants' continuing actions with respect to the adjudication of tickets issued for violations occurring in the Village, either could not have been maintained in a proceeding pursuant to CPLR article 78 ... , or related to ongoing actions of the defendants, and, thus, were not barred by the four-month limitation period under CPLR 217(1). Accordingly, since the six-year statute of limitations of CPLR 213(1) applies ... . **Village of Islandia v County of Suffolk, 2018 NY Slip Op 04025, Second Dept 6-6-18**

CIVIL PROCEDURE (DECLARATORY JUDGMENT, DECLARATORY JUDGMENT ACTION ATTACKING THE PROCEDURE USED TO ENACT LEGISLATION IS SUBJECT TO THE FOUR-MONTH ARTICLE 78 STATUTE OF LIMITATIONS, DECLARATORY JUDGMENT ACTION CHALLENGING THE LEGISLATION ITSELF IS SUBJECT TO THE SIX-YEAR STATUTE OF LIMITATIONS (SECOND DEPT))/STATUTE OF LIMITATIONS (DECLARATORY JUDGMENT ACTION ATTACKING THE PROCEDURE USED TO ENACT LEGISLATION IS SUBJECT TO THE FOUR-MONTH ARTICLE 78 STATUTE OF LIMITATIONS, DECLARATORY JUDGMENT ACTION CHALLENGING THE LEGISLATION ITSELF IS SUBJECT TO THE SIX-YEAR STATUTE OF LIMITATIONS (SECOND DEPT))/DECLARATORY JUDGMENT (STATUTE OF LIMITATIONS, DECLARATORY JUDGMENT ACTION ATTACKING THE PROCEDURE USED TO ENACT LEGISLATION IS SUBJECT TO THE FOUR-MONTH ARTICLE 78 STATUTE OF LIMITATIONS, DECLARATORY JUDGMENT ACTION CHALLENGING THE LEGISLATION ITSELF IS SUBJECT TO THE SIX-YEAR STATUTE OF LIMITATIONS (SECOND DEPT))/MUNICIPAL LAW (DECLARATORY JUDGMENT, DECLARATORY JUDGMENT ACTION ATTACKING THE PROCEDURE USED TO ENACT LEGISLATION IS SUBJECT TO THE FOUR-MONTH ARTICLE 78 STATUTE OF LIMITATIONS, DECLARATORY JUDGMENT ACTION CHALLENGING THE LEGISLATION ITSELF IS SUBJECT TO THE SIX-YEAR STATUTE OF LIMITATIONS (SECOND DEPT))

CONTRACT LAW

CONTRACT LAW.

PLAINTIFF'S FAILURE TO SATISFY A NON-MATERIAL CONDITION PRECEDENT DID NOT JUSTIFY THE AWARD OF SUMMARY JUDGMENT TO DEFENDANT (FIRST DEPT).

The First Department, reversing Supreme Court, determined the failure to satisfy a non-material condition precedent, which did not prejudice the defendant, did not justify summary judgment in favor of defendant:

> It is undisputed that plaintiff failed to satisfy a condition precedent to recovering disputed costs for extra work on which defendant forced price reductions. Although plaintiff gave detailed written statements contesting defendant's determinations of the fair and reasonable value of the extra work pursuant to section 8.01(B), it failed to give verified statements pursuant to section 11.03(A) of the contractual General Conditions.
>
> Nevertheless, we conclude that plaintiff should be excused from the non-occurrence of that condition, because otherwise it would suffer a disproportionate forfeiture, and the occurrence of the condition was not a material part of the agreed exchange ... . Defendant does not argue that plaintiff failed to document the costs of the claimed extra work, to provide timely notice of its claims for extra work, or to provide timely notice of its objections to defendant's rejections of and price reductions on the claimed extra work. Nor does it contend other than in conclusory terms that plaintiff's failure to submit verified written statements was prejudicial to it. Moreover, the cases on which defendant relies did not consider whether the failure to strictly comply with a condition precedent should be excused to avoid a disproportionate forfeiture under the circumstances of a case such as this, where the noncompliance is de minimis and defendant has shown no prejudice whatsoever ... . **Danco Elec. Contrs., Inc. v Dormitory Auth. of the State of N.Y., 2018 NY Slip Op 03935, First Dept 6-5-18**

CONTRACT LAW (PLAINTIFF'S FAILURE TO SATISFY A NON-MATERIAL CONDITION PRECEDENT DID NOT JUSTIFY THE AWARD OF SUMMARY JUDGMENT TO DEFENDANT (FIRST DEPT))/CONDITION PRECEDENT (CONTRACT LAW, PLAINTIFF'S FAILURE TO SATISFY A NON-MATERIAL CONDITION PRECEDENT DID NOT JUSTIFY THE AWARD OF SUMMARY JUDGMENT TO DEFENDANT (FIRST DEPT))

CONTRACT LAW.

QUESTION OF FACT WHETHER AN ORAL CONTRACT WAS FORMED (THIRD DEPT).

The Third Department, modifying Supreme Court, determined plaintiff had raised a question of fact whether there was an oral contract for dock space for and storage of plaintiff's boat at defendant marina:

> ... [P]laintiff submitted a copy of an invoice from defendant that itemized the charges for winter storage and spring launch and showed that no balance was due in April 2008. The invoice also acknowledged receipt of a $500 payment from plaintiff on April 14, 2008 for a monthly slip charge. Plaintiff also submitted an affidavit in which he averred that the $500 payment accepted by defendant is evidence that the parties entered into an oral agreement for rental of dock space for the 2008 boating season. The facts alleged in plaintiff's affidavit are consistent with his deposition testimony, which was submitted by defendant, in which he claimed that he made an oral agreement with defendant's employee. Plaintiff's argument that the oral agreement was consistent with the parties' prior dealings because he had entered into a written agreement for only one season during his long period of occupancy is corroborated by [defendant's] allegation that "[o]ver the years[, plaintiff] refused to sign any license agreement." When viewed in the light most favorable to plaintiff, as the nonmoving party ... , plaintiff's submissions are sufficient to establish the existence of a triable issue of fact regarding formation of an oral contract. **Carroll v Rondout Yacht Basin, Inc., 2018 NY Slip Op 04051, Third Dept 6-7-18**

CONTRACT LAW (QUESTION OF FACT WHETHER AN ORAL CONTRACT WAS FORMED (THIRD DEPT))/ORAL CONTRACTS (QUESTION OF FACT WHETHER AN ORAL CONTRACT WAS FORMED (THIRD DEPT))

CONTRACT LAW, UNIFORM COMMERCIAL CODE.

PURPORTED ORAL AGREEMENT TO PURCHASE ART WORKS BY PLAINTIFF PETER BEARD BARRED BY THE STATUTE OF FRAUDS, PAYMENTS ALLEGEDLY MADE TO PLAINTIFF WERE NOT UNEQUIVOCALLY REFERABLE TO THE ALLEGED CONTRACT (FIRST DEPT).

The First Department, over a detailed, comprehensive two-justice dissent, determined that a purported oral agreement to sell works of art by Peter Beard was barred by the statute of frauds. Plaintiffs' motion for summary judgment on the causes of action for declaration, conversion and replevin was properly granted. Plaintiff Peter Beard was properly declared to be the sole owner of the art works. The dissent includes a detailed rendition of the facts which is not summarized here:

> The motion court correctly found that the works of art at issue were goods, and thus that the purported oral agreement to sell them was barred by the statute of frauds (see UCC 2-201...). Defendants' wire transfers to a third party, who then purportedly remitted the funds to plaintiffs, were not unequivocally referable to the agreement alleged, such as to deem the agreement partially completed and outside the statute of frauds ... . Alternative explanations, including that the funds were for financing other projects involving the third party, defeat such claims ... . **Beard v Chase, 2018 NY Slip Op 04636, First Dept 6-21-18**

CONTRACT LAW (STATUTE OF FRAUDS, PURPORTED ORAL AGREEMENT TO PURCHASE ART WORKS BY PLAINTIFF PETER BEARD BARRED BY THE STATUTE OF FRAUDS, PAYMENTS ALLEGEDLY MADE TO PLAINTIFF WERE NOT UNEQUIVOCALLY REFERABLE TO THE ALLEGED CONTRACT (FIRST DEPT))/ORAL CONTRACTS (STATUTE OF FRAUDS, PURPORTED ORAL AGREEMENT TO PURCHASE ART WORKS BY PLAINTIFF PETER BEARD BARRED BY THE STATUTE OF FRAUDS, PAYMENTS ALLEGEDLY MADE TO PLAINTIFF WERE NOT UNEQUIVOCALLY REFERABLE TO THE ALLEGED CONTRACT (FIRST DEPT))/STATUTE OF FRAUDS (ORAL CONTRACT, PURPORTED ORAL AGREEMENT TO PURCHASE ART WORKS BY PLAINTIFF PETER BEARD BARRED BY THE STATUTE OF FRAUDS, PAYMENTS ALLEGEDLY MADE TO PLAINTIFF WERE NOT UNEQUIVOCALLY REFERABLE TO THE ALLEGED CONTRACT (FIRST DEPT))/ART WORKS (STATUTE OF FRAUDS, PURPORTED ORAL AGREEMENT TO PURCHASE ART WORKS BY PLAINTIFF PETER BEARD BARRED BY THE STATUTE OF FRAUDS, PAYMENTS ALLEGEDLY MADE TO PLAINTIFF WERE NOT UNEQUIVOCALLY REFERABLE TO THE ALLEGED CONTRACT (FIRST DEPT))/UNIFORM COMMERCIAL CODE (STATUTE OF FRAUDS, PURPORTED ORAL AGREEMENT TO PURCHASE ART WORKS BY PLAINTIFF PETER BEARD BARRED BY THE STATUTE OF FRAUDS, PAYMENTS ALLEGEDLY MADE TO PLAINTIFF WERE NOT UNEQUIVOCALLY REFERABLE TO THE ALLEGED CONTRACT (FIRST DEPT))/UCC (STATUTE OF FRAUDS, PURPORTED ORAL AGREEMENT TO PURCHASE ART WORKS BY PLAINTIFF PETER BEARD BARRED BY THE STATUTE OF FRAUDS, PAYMENTS ALLEGEDLY MADE TO PLAINTIFF WERE NOT UNEQUIVOCALLY REFERABLE TO THE ALLEGED CONTRACT (FIRST DEPT))

CONTRACT LAW, CIVIL PROCEDURE, COOPERATIVES.

CONTINUING WRONG DOCTRINE TOLLED THE STATUTE OF LIMITATIONS IN THIS BREACH OF CONTRACT AND BREACH OF WARRANTY OF HABITABILITY ACTION BASED UPON THE ALLEGED FAILURE TO REPAIR DAMAGE TO A COOPERATIVE APARTMENT (SECOND DEPT).

The Second Department, modifying Supreme Court, determined the continuing wrong doctrine operated to toll the statute of limitations in this breach of contract/breach of warranty of habitability action involving damage to plaintiff's cooperative apartment during a 2004 renovation. Plaintiff alleged the damage had never been repaired and brought his action in 2016. The Second Department held that the continuing wrong doctrine tolled the statute of limitations but damages were recoverable for only the six years preceding the commencement of the action:

> The continuing wrong doctrine "is usually employed where there is a series of continuing wrongs and serves to toll the running of a period of limitations to the date of the commission of the last wrongful act" ... . "In contract actions, the doctrine is applied to extend the statute of limitations when the contract imposes a continuing duty on the breaching party" ... . Here, the plaintiff alleged that the damage to his unit persisted and had not been repaired, and that such breach constituted a continuing breach of the defendants' contractual duty to keep the building in good repair and to provide habitable premises ... . However, where, as here, the sole remedy sought for the alleged continuing contractual breaches is monetary damages, the plaintiff's recovery must be limited to damages incurred within the six years prior to commencement of the action ... . **Garron v Bristol House, Inc., 2018 NY Slip Op 04533, Second Dept 6-20-18**

CONTRACT LAW (CONTINUING WRONG DOCTRINE TOLLED THE STATUTE OF LIMITATIONS IN THIS BREACH OF CONTRACT AND BREACH OF WARRANTY OF HABITABILITY ACTION BASED UPON THE ALLEGED FAILURE TO REPAIR DAMAGE TO A COOPERATIVE APARTMENT (SECOND DEPT))/CIVIL PROCEDURE (STATUTE OF LIMITATIONS, CONTINUING WRONG DOCTRINE TOLLED THE STATUTE OF LIMITATIONS IN THIS BREACH OF CONTRACT AND BREACH OF WARRANTY OF HABITABILITY ACTION BASED UPON THE ALLEGED FAILURE TO REPAIR DAMAGE TO A COOPERATIVE APARTMENT (SECOND DEPT))/STATUTE OF LIMITATIONS (CONTINUING WRONG DOCTRINE TOLLED THE STATUTE OF LIMITATIONS IN THIS BREACH OF CONTRACT AND BREACH OF WARRANTY OF HABITABILITY ACTION BASED UPON THE ALLEGED FAILURE TO REPAIR DAMAGE TO A COOPERATIVE APARTMENT (SECOND DEPT))/COOPERATIVES (CONTINUING WRONG DOCTRINE TOLLED THE STATUTE OF LIMITATIONS IN THIS BREACH OF CONTRACT AND BREACH OF WARRANTY OF HABITABILITY ACTION BASED UPON THE ALLEGED FAILURE TO REPAIR DAMAGE TO A COOPERATIVE APARTMENT (SECOND DEPT))/HABITABILITY, WARRANTY OF (CONTINUING WRONG DOCTRINE TOLLED THE STATUTE OF LIMITATIONS IN THIS BREACH OF CONTRACT AND BREACH OF WARRANTY OF HABITABILITY ACTION BASED UPON THE ALLEGED FAILURE TO REPAIR DAMAGE TO A COOPERATIVE APARTMENT (SECOND DEPT))

CONTRACT LAW, UNJUST ENRICHMENT.

THE RELATIONSHIP BETWEEN PLAINTIFF AND DEFENDANT WAS NOT CLOSE ENOUGH TO ALLOW AN UNJUST ENRICHMENT ACTION, DEFENDANT'S ACTIONS COULD NOT HAVE CAUSED PLAINTIFF'S RELIANCE OR INDUCEMENT (SECOND DEPT).

The Second Department determined the relationship between plaintiff and defendant (Trovato) was not close enough to allow an unjust enrichment suit. Plaintiff had paid for shares in a corporation which were later sold to defendant. Plaintiff alleged the price paid by defendant was reduced by the amount plaintiff had already paid:

> To recover for unjust enrichment, a plaintiff must show that (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered... . "Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated" ... . The relationship must be one that could have caused reliance or inducement ... . Here, the defendant established her prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff and Trovato did not have a relationship that could have caused reliance or inducement on the plaintiff's part. **Crescimanni v Trovato, 2018 NY Slip Op 04529, Second Dept 6-20-28**

UNJUST ENRICHMENT (THE RELATIONSHIP BETWEEN PLAINTIFF AND DEFENDANT WAS NOT CLOSE ENOUGH TO ALLOW AN UNJUST ENRICHMENT ACTION, DEFENDANT'S ACTIONS COULD NOT HAVE CAUSED PLAINTIFF'S RELIANCE OR INDUCEMENT (SECOND DEPT))/PRIVITY (UNJUST ENRICHMENT, THE RELATIONSHIP BETWEEN PLAINTIFF AND DEFENDANT WAS NOT CLOSE ENOUGH TO ALLOW AN UNJUST ENRICHMENT ACTION, DEFENDANT'S ACTIONS COULD NOT HAVE CAUSED PLAINTIFF'S RELIANCE OR INDUCEMENT (SECOND DEPT))

CORPORATION LAW

CORPORATION LAW, DEBTOR-CREDITOR LAW.

PLAINTIFF DID NOT DEMONSTRATE THE CONTINUITY OF OWNERSHIP ELEMENT OF THE DE FACTO MERGER DOCTRINE SUCH THAT THE ASSETS OF ONE DEFENDANT SHOULD BE USED TO SATISFY THE DEBT OF ANOTHER (FOURTH DEPT).

The Fourth Department, modifying Supreme Court, determined plaintiff did not show that there was a continuity of ownership such that, pursuant to the de facto merger doctrine, the assets of defendant NYP Ag should be used to satisfy a judgment against NYP Management:

> "Traditionally, courts have considered several factors in determining whether a de facto merger has occurred: (1) continuity of ownership; (2) a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible; (3) assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor; and (4) a continuity of management, personnel, physical location, assets, and general business operation" ... .
>
> ... [C]ourts have flexibility in determining whether a transaction constitutes a de facto merger. While factors such as shareholder and management continuity will be evidence that a de facto merger has occurred . . . , those factors alone should not be determinative" ... . "[I]n non-tort actions, continuity of ownership is the essence of a merger' " ... , and is a necessary predicate to finding a de facto merger... Here, inasmuch as [plaintiff] failed to establish continuity of ownership, it failed to establish that there was a de facto merger between the two corporations ... . **R&D Electronics, Inc. v NYP Mgt., Co., Inc., 2018 NY Slip Op 04151, Fourth Dept 6-8-18**

CORPORATION LAW (PLAINTIFF DID NOT DEMONSTRATE THE CONTINUITY OF OWNERSHIP ELEMENT OF THE DE FACTO MERGER DOCTRINE SUCH THAT THE ASSETS OF ONE DEFENDANT SHOULD BE USED TO SATISFY THE DEBT OF ANOTHER (FOURTH DEPT))/DEBTOR-CREDITOR (CORPORATION LAW, PLAINTIFF DID NOT DEMONSTRATE THE CONTINUITY OF OWNERSHIP ELEMENT OF THE DE FACTO MERGER DOCTRINE SUCH THAT THE ASSETS OF ONE DEFENDANT SHOULD BE USED TO SATISFY THE DEBT OF ANOTHER (FOURTH DEPT))/DE FACTOR MERGER (CORPORATION LAW, DEBTOR-CREDITOR, PLAINTIFF DID NOT DEMONSTRATE THE CONTINUITY OF OWNERSHIP ELEMENT OF THE DE FACTO MERGER DOCTRINE SUCH THAT THE ASSETS OF ONE DEFENDANT SHOULD BE USED TO SATISFY THE DEBT OF ANOTHER (FOURTH DEPT))

COURT OF CLAIMS

COURT OF CLAIMS, MEDICAL MALPRACTICE, NEGLIGENCE, EVIDENCE.

FAILURE TO PLEAD A JURISDICTIONAL DEFECT AS A DEFENSE WAIVED THE DEFECT; WITHOUT EXPERT OPINION EVIDENCE, THE MEDICAL MALPRACTICE CAUSE OF ACTION WAS NOT PROVED (SECOND DEPT).

The Second Department noted that the defendant's (NYS's) failure to plead a jurisdictional defect as a defense (defendant had not timely filed and served notice of claim) waived the defect. The claimant did not present expert evidence to support the medical malpractice claim and therefore did not demonstrate that any alleged deviation from the accepted standard of care was the proximate case of his injury. The claimant alleged a negligent failure to diagnose a urinary tract infection (UTI):

> "To establish a prima facie case of medical malpractice, a plaintiff must set forth (1) the standard of care in the locality where the treatment occurred, (2) that the defendant breached that standard of care, and (3) that the breach was the proximate cause of his or her injuries"… . Further, where, as here, the subject matter (UTIs) and treatment thereof are "not within the ordinary experience and knowledge of laypersons"… , the claimant must establish a prima facie case of medical malpractice through expert medical opinion … . **Whitfield v State of New York, 2018 NY Slip Op 04773, Second Dept 6-27-18**

COURT OF CLAIMS (FAILURE TO PLEAD A JURISDICTIONAL DEFECT AS A DEFENSE WAIVED THE DEFECT; WITHOUT EXPERT OPINION EVIDENCE, THE MEDICAL MALPRACTICE CAUSE OF ACTION WAS NOT PROVED (SECOND DEPT))/NOTICE OF CLAIM (COUIRT OF CLAIMS, FAILURE TO PLEAD A JURISDICTIONAL DEFECT AS A DEFENSE WAIVED THE DEFECT; WITHOUT EXPERT OPINION EVIDENCE, THE MEDICAL MALPRACTICE CAUSE OF ACTION WAS NOT PROVED (SECOND DEPT))/NEGLIGENCE (MEDICAL MALPRACTICE, WITHOUT EXPERT OPINION THE MEDICAL MALPRACTICE CAUSE OF ACTION WAS NOT PROVED (SECOND DEPT))/MEDICAL MALPRACTICE (EXPERT OPINION, WITHOUT EXPERT OPINION EVIDENCE, THE MEDICAL MALPRACTICE CAUSE OF ACTION WAS NOT PROVED (SECOND DEPT))/EVIDENCE (MEDICAL MALPRACTICE, WITHOUT EXPERT OPINION THE MEDICAL MALPRACTICE CAUSE OF ACTION WAS NOT PROVED (SECOND DEPT))/EXPERT OPINION (MEDICAL MALPRACTICE, WITHOUT EXPERT OPINION EVIDENCE, THE MEDICAL MALPRACTICE CAUSE OF ACTION WAS NOT PROVED (SECOND DEPT))

CRIMINAL LAW

CRIMINAL LAW.

BECAUSE A MATERIAL INDUCEMENT TO DEFENDANT'S GUILTY PLEA WAS NULLIFIED THE PLEA MUST BE VACATED (THIRD DEPT).

The Third Department, reversing defendant's conviction by guilty plea, determined the complicated facts of this case nullified a benefit that was expressly promised as inducement to a guilty plea. Defendant had pled guilty to burglaries in two counties (Schenectady and Albany) as a persistent felony offender. Both persistent felony offender guilty pleas were overturned. His subsequent plea was reversed in this case:

> Defendant pleaded guilty here upon the understanding that the imposed sentence would run concurrently to the aggregate prison sentence of 16½ years to life imposed in Albany County. He was also aware that a higher aggregate sentence would be imposed in Albany County if he successfully challenged his status as a persistent violent felony offender, and Supreme Court promised that any resentence in this case would run concurrently to that increased sentence.
>
> During the pendency of this appeal, this Court reversed the judgment of conviction in Albany County, vacated defendant's guilty plea and remitted for further proceedings ... . The sentencing exposure that prompted defendant's concern about concurrent sentencing here accordingly dissolved and, indeed, he entered into a new plea arrangement in Albany County where he received, among other things, a much shorter prison term of six years. In short, the "reduction of the preexisting sentence [in Albany County] nullified a benefit that was expressly promised and was a material inducement to the guilty plea" here ... . Inasmuch as "we cannot say that defendant would have foregone pretrial and trial rights and pleaded guilty" had he known that his guilty plea in Albany County would be vacated, his plea must also be vacated here ... . **People v Brewington, 2018 NY Slip Op 04035, Third Dept 6-7-18**

CRIMINAL LAW (PLEA AGREEMENTS, BECAUSE A MATERIAL INDUCEMENT TO DEFENDANT'S GUILTY PLEA WAS NULLIFIED THE PLEA MUST BE VACATED (THIRD DEPT))/PLEA AGREEMENTS (BECAUSE A MATERIAL INDUCEMENT TO DEFENDANT'S GUILTY PLEA WAS NULLIFIED THE PLEA MUST BE VACATED (THIRD DEPT))/GUILTY PLEAS (PLEA AGREEMENTS, BECAUSE A MATERIAL INDUCEMENT TO DEFENDANT'S GUILTY PLEA WAS NULLIFIED THE PLEA MUST BE VACATED (THIRD DEPT))

CRIMINAL LAW.

COUNTY COURT SHOULD HAVE INQUIRED INTO THE REASON FOR DEFENDANT'S FAILURE TO APPEAR AT SENTENCING, SENTENCE VACATED (THIRD DEPT).

The Third Department determined the court should have inquired into the reasons for defendant's failure to appear at sentencing before sentencing him in absentia:

> When defendant did not appear for sentencing on April 2, 2015, the court noted that defendant had been present for "each and every other occasion," before issuing a bench warrant and adjourning sentencing to April 9, 2015. When defendant again failed to appear, his counsel represented that the only contact he had had with defendant was a conversation on April 1, 2015, when defendant informed counsel that he had additional doctors' appointments to attend, and counsel advised him to appear in court for sentencing on April 2, 2015. There is no indication in the record that defendant was advised that sentencing was adjourned to April 9, 2015. The court was aware of defendant's medical condition, which had required hospitalization in October 2014 and was the reason that sentencing was first adjourned from January 2015 to April 2, 2015. The court specifically observed that no explanation for defendant's absence had been provided by defendant or his counsel but, nonetheless, made no inquiry on the record into the status of any efforts to locate defendant since April 2, when it had issued the bench warrant, before it proceeded to sentence him in absentia. In light of its failure to make any inquiry whatsoever into the reason for defendant's absence, County Court erred when it sentenced defendant in absentia ... . **People v Sassenscheid, 2018 NY Slip Op 04037, Third Dept 6-7-18**

CRIMINAL LAW (SENTENCING, COUNTY COURT SHOULD HAVE INQUIRED INTO THE REASON FOR DEFENDANT'S FAILURE TO APPEAR AT SENTENCING, SENTENCE VACATED (THIRD DEPT))/SENTENCING (COUNTY COURT SHOULD HAVE INQUIRED INTO THE REASON FOR DEFENDANT'S FAILURE TO APPEAR AT SENTENCING, SENTENCE VACATED (THIRD DEPT))

CRIMINAL LAW.

COURT DID NOT MAKE SURE DEFENDANT WAS AWARE OF THE RIGHTS HE WAS GIVING UP BY PLEADING GUILTY, PLEA VACATED (THIRD DEPT).

The Third Department, vacating defendant's guilty plea, determined the court did not adequately explain the rights defendant was giving up by pleading guilty:

> During the plea proceedings, County Court engaged in an abbreviated colloquy during which it made only a passing reference to the rights that defendant was giving up by pleading guilty. Notably, the court did not mention the privilege against self-incrimination or advise defendant of his right to a jury trial. Nor did the court ascertain whether defendant had conferred with counsel regarding the trial-related rights that he was waiving or the constitutional consequences of his guilty plea. With no affirmative showing on the record that defendant understood and voluntarily waived his constitutional rights when he entered his guilty plea, the plea was invalid and must be vacated ... . **People v Holmes, 2018 NY Slip Op 04039, Third Dept 6-7-18**

CRIMINAL LAW (GUILTY PLEA, COURT DID NOT MAKE SURE DEFENDANT WAS AWARE OF THE RIGHTS HE WAS GIVING UP BY PLEADING GUILTY, PLEA VACATED (THIRD DEPT))/GUILTY PLEA (COURT DID NOT MAKE SURE DEFENDANT WAS AWARE OF THE RIGHTS HE WAS GIVING UP BY PLEADING GUILTY, PLEA VACATED (THIRD DEPT))

CRIMINAL LAW.

FAILURE TO EXPLAIN TO THE JURY THAT ACQUITTAL OF ATTEMPTED MURDER BASED ON THE JUSTIFICATION DEFENSE REQUIRED ACQUITTAL OF ASSAULT FIRST WAS REVERSIBLE ERROR, NEW TRIAL ON ASSAULT FIRST ORDERED (FIRST DEPT).

The First Department, reversing defendant's assault first conviction, over an extensive dissent, determined it was reversible error to fail to instruct the jury that acquittal of the top count (attempted murder) based on the justification defense would require acquittal on the assault first count:

> "While the jury may have acquitted on the top charge without relying on defendant's justification defense . . . it is nevertheless impossible to discern whether acquittal of the top count . . . was based on the jurors' finding of justification so as to mandate acquittal on the two lesser counts" ... . **People v Breckenridge, 2018 NY Slip Op 04074, First Dept 6-7-18**

CRIMINAL LAW (FAILURE TO EXPLAIN TO THE JURY THAT ACQUITTAL OF ATTEMPTED MURDER BASED ON THE JUSTIFICATION DEFENSE REQUIRED ACQUITTAL OF ASSAULT FIRST WAS REVERSIBLE ERROR, NEW TRIAL ON ASSAULT FIRST ORDERED (FIRST DEPT))/JUSTIFICATION DEFENSE (CRIMINAL LAW, FAILURE TO EXPLAIN TO THE JURY THAT ACQUITTAL OF ATTEMPTED MURDER BASED ON THE JUSTIFICATION DEFENSE REQUIRED ACQUITTAL OF ASSAULT FIRST WAS REVERSIBLE ERROR, NEW TRIAL ON ASSAULT FIRST ORDERED (FIRST DEPT))/JURY INSTRUCTIONS (CRIMINAL LAW, JUSTIFICATION DEFENSE, FAILURE TO EXPLAIN TO THE JURY THAT ACQUITTAL OF ATTEMPTED MURDER BASED ON THE JUSTIFICATION DEFENSE REQUIRED ACQUITTAL OF ASSAULT FIRST WAS REVERSIBLE ERROR, NEW TRIAL ON ASSAULT FIRST ORDERED (FIRST DEPT))

CRIMINAL LAW.

PETTY SLAPS DO NOT CONSTITUTE SUBSTANTIAL PAIN, ROBBERY SECOND REDUCED TO ROBBERY THIRD (FIRST DEPT).

The First Dept, reducing the robbery second conviction to robbery third, determined the proof of substantial pain was insufficient:

> ... [W]e agree with the defendant that the evidence was insufficient to establish "substantial pain" beyond a reasonable doubt to sustain his conviction of robbery in the second degree Penal Law § 160.10 [2] [a]). The People's evidence, presented through photographs and police testimony, was insufficient to establish that plaintiff suffered more than "petty slaps" and, therefore, failed to establish "substantial pain" beyond a reasonable doubt ... . **People v Ramos, 2018 NY Slip Op 04097, First Dept 6-7-18**

CRIMINAL LAW (ROBBERY, PETTY SLAPS DO NOT CONSTITUTE SUBSTANTIAL PAIN, ROBBERY SECOND REDUCED TO ROBBERY THIRD (FIRST DEPT))/ROBBERY (SUBSTANTIAL PAIN, PETTY SLAPS DO NOT CONSTITUTE SUBSTANTIAL PAIN, ROBBERY SECOND REDUCED TO ROBBERY THIRD (FIRST DEPT))/SUBSTANTIAL PAIN (ROBBERY, PETTY SLAPS DO NOT CONSTITUTE SUBSTANTIAL PAIN, ROBBERY SECOND REDUCED TO ROBBERY THIRD (FIRST DEPT))

CRIMINAL LAW.

DEFENSE COUNSEL'S FOR CAUSE CHALLENGE TO A JUROR SHOULD HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined defense counsel's for cause challenge to a juror should have been granted:

> Turning first to defendant's contention regarding prospective juror No. 4 from round three, she indicated that she knew Ruth Crepet, a physician that the People intended to call as a witness, as Crepet was her primary care physician of 15 years. Although the juror stated that she had a preconceived notion that Crepet would be truthful, she indicated that she could be impartial and fair at trial in that regard. This juror also stated that her husband was the victim of a robbery and, because the person "got off," she was "a little cynical" about the criminal justice system, but "would try" to be impartial and thought "that [she] could be." When asked if she could find defendant guilty, this juror stated "yes, you bet." ...
>
> While it is not necessarily an issue that Crepet was the prospective juror's doctor ... , her general equivocality is problematic. "Equivocal, uncertain responses, including statements that a prospective juror will 'try' or 'hope' to be impartial, are insufficient in the absence of [other] 'express and unequivocal' declarations that the juror will put any preconceptions aside and render an impartial verdict based solely on the evidence" ... . Here, while some of the prospective juror's responses were unequivocal, many were not, and, as such, her responses as a whole do not demonstrate that her opinion would not influence her verdict ... . Therefore, further inquiry was needed and, in the absence of said inquiry, it was error for Supreme Court to deny defendant's challenge for cause ... . **People v Horton, 2018 NY Slip Op 04040, Third Dept 6-7-18**

CRIMINAL LAW (JURORS, DEFENSE COUNSEL'S FOR CAUSE CHALLENGE TO A JUROR SHOULD HAVE BEEN GRANTED (THIRD DEPT))/JURORS (CRIMINAL LAW, DEFENSE COUNSEL'S FOR CAUSE CHALLENGE TO A JUROR SHOULD HAVE BEEN GRANTED (THIRD DEPT))/FOR CAUSE CHALLENGE (CRIMINAL LAW, JURORS, DEFENSE COUNSEL'S FOR CAUSE CHALLENGE TO A JUROR SHOULD HAVE BEEN GRANTED (THIRD DEPT)

CRIMINAL LAW.

DEFENDANT WAS NOT IN CUSTODY WHEN HIS STATEMENTS WERE MADE, SUPPRESSION MOTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant's motion to suppress his statements should not have been granted. The People demonstrated defendant was not in custody when the statements were made:

> "In determining whether a defendant was in custody for Miranda purposes, [t]he test is not what the defendant thought, but rather what a reasonable [person], innocent of any crime, would have thought had he [or she] been in the defendant's position' " ... . We reject defendant's contention that the People failed to meet their "burden of showing that [he] voluntarily went to the [detectives' office] where he allegedly made the inculpatory statements"... . Indeed, the People "properly demonstrated by unchallenged hearsay testimony" that defendant voluntarily accompanied the officers to the detectives' office for questioning and, inasmuch as defendant did not dispute that fact in either his motion papers or his arguments on the motion, that testimony was sufficient to sustain the People's burden ... . We further conclude that defendant was not in custody when he made the statements because he was informed that he was not under arrest and that he would be going home that day, he was not handcuffed, he was permitted to leave the interview room several times, he never asked to leave the office nor was he told that he could not leave, and he was not arrested that day ... . **People v Bell-Scott, 2018 NY Slip Op 04192, Fourth Dept 6-8-18**

CRIMINAL LAW (SUPPRESS STATEMENTS, DEFENDANT WAS NOT IN CUSTODY WHEN HIS STATEMENTS WERE MADE, SUPPRESSION MOTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/SUPPRESS, MOTION TO (CRIMINAL LAW, STATEMENTS, DEFENDANT WAS NOT IN CUSTODY WHEN HIS STATEMENTS WERE MADE, SUPPRESSION MOTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/CUSTODY (CRIMINAL LAW, STATEMENTS, DEFENDANT WAS NOT IN CUSTODY WHEN HIS STATEMENTS WERE MADE, SUPPRESSION MOTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))

CRIMINAL LAW.

ACQUITTAL ON SOME COUNTS DID NOT RENDER PROOF OF OTHER COUNTS LEGALLY INSUFFICIENT, SERVICE ELEMENT OF CRIMINAL CONTEMPT PROVEN BY DEFENDANT'S RECEIPT OF THE ORDER IN COURT (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice NeMoyer, rejected defendant's arguments that (1) the People failed to prove the "service of the order" element of criminal contempt, and (2) his acquittal on some counts of the indictment rendered the evidence legally insufficient for the counts on which he was convicted.

> ... [D]efendant argues only that the convictions on counts two and five are legally insufficient due to the jury's acquittals on the remaining counts. According to defendant, "when the conduct that was plainly rejected by the jury is removed from consideration, there is nothing left to support the physical menace conviction [count two] or the conviction for engaging in conduct that created a substantial risk of serious physical injury [count five]." Put differently, "the only conduct upon which defendant could be found guilty of the crimes for which he was convicted was smashing [his wife's] car windows with a metal pipe while she was inside it. Because the jury was unwilling to find that defendant engaged in that conduct," defendant continues, "the convictions must be reversed as unsupported by legally sufficient evidence."
>
> ... [T]he mixed verdicts provide no basis to question the legal sufficiency of the convictions... . In fact, defendant's argument is a classic "masked repugnancy" argument ... , and it suffers from the same premise error that dooms all "masked repugnancy" arguments: it assumes that a jury's verdict on one count can be weaponized to attack the legal or factual sufficiency of its verdict on another count. But that is not the law. To the contrary, the Court of Appeals has repeatedly held that "[f]actual inconsistency [in a verdict]— which can be attributed to mistake, confusion, compromise or mercy—does not provide a reviewing court with the power to overturn a verdict' " on legal sufficiency grounds ... . * * *
>
> ... [D]efendant says that the People failed to prove the so-called "service element" of that crime, i.e., that the underlying protective order was "duly served" upon him or that he had "actual knowledge [thereof] because he . . . was present in court when [it] was issued" ... . Because the service element is phrased disjunctively — i.e., it is satisfied if the defendant violates either a "duly served" protective order or a protective order of which he or she has "actual knowledge" because of his or her presence in court ...) — the People need prove only one of the statutory alternatives beyond reasonable doubt ... . **People v Nichols, 2018 NY Slip Op 04502, Fourth Dept 6-15-18**

CRIMINAL LAW (ACQUITTAL ON SOME COUNTS DID NOT RENDER PROOF OF OTHER COUNTS LEGALLY INSUFFICIENT, SERVICE ELEMENT OF CRIMINAL CONTEMPT PROVEN BY DEFENDANT'S RECEIPT OF THE ORDER IN COURT (FOURTH DEPT))/VERDICTS (CRIMINAL LAW, ACQUITTAL ON SOME COUNTS DID NOT RENDER PROOF OF OTHER COUNTS LEGALLY INSUFFICIENT, SERVICE ELEMENT OF CRIMINAL CONTEMPT PROVEN BY DEFENDANT'S RECEIPT OF THE ORDER IN COURT (FOURTH DEPT))/INCONSISTENT VERDICTS (CRIMINAL LAW, ACQUITTAL ON SOME COUNTS DID NOT RENDER PROOF OF OTHER COUNTS LEGALLY INSUFFICIENT, SERVICE ELEMENT OF CRIMINAL CONTEMPT PROVEN BY DEFENDANT'S RECEIPT OF THE ORDER IN COURT (FOURTH DEPT))/CONTEMPT, CRIMINAL (SERVICE ELEMENT OF CRIMINAL CONTEMPT PROVEN BY DEFENDANT'S RECEIPT OF THE ORDER IN COURT (FOURTH DEPT))

CRIMINAL LAW.

DEFENDANT WAS NOT PRESENT IN THE COURTROOM WHEN HIS SENTENCE OF INCARCERATION WAS CHANGED, MATTER REMITTED FOR RESENTENCING (FOURTH DEPT).

The Fourth Department, remitting the DWI case for resentencing, determined defendant's sentence should not have been changed after defendant left the courtroom. The court further found that the five-year conditional discharge to monitor the ignition interlock device exceeded the maximum allowed term (three years):

> "[D]efendants have a fundamental right to be present at sentencing' in the absence of a waiver" of that right ... , and here defendant did not waive his right to be present at sentencing. Thus, as the People correctly concede, the court erred in changing the sentence of incarceration after defendant left the courtroom inasmuch as a resentencing to correct an error in a sentence "must be done in the defendant's presence" ... . **People v Perkins, 2018 NY Slip Op 04472, Fourth Dept 6-15-18**

CRIMINAL LAW (SENTENCING, DEFENDANT WAS NOT PRESENT IN THE COURTROOM WHEN HIS SENTENCE OF INCARCERATION WAS CHANGED, MATTER REMITTED FOR RESENTENCING (FOURTH DEPT))/SENTENCING (DEFENDANT WAS NOT PRESENT IN THE COURTROOM WHEN HIS SENTENCE OF INCARCERATION WAS CHANGED, MATTER REMITTED FOR RESENTENCING (FOURTH DEPT))

CRIMINAL LAW.

CRIME OF ATTEMPTED ASSAULT IN THE SECOND DEGREE IS A LEGAL IMPOSSIBILITY (SECOND DEPT).

The Second Department vacated defendant's conviction of attempted assault in the second degree, noting that the crime is a legal impossibility:

> The crime of attempted assault in the second degree is a legal impossibility (see Penal Law § 120.05[3]; People v Campbell, 72 NY2d 602, 605...). As correctly conceded by the People, the inclusion of that nonexistent crime in the superior court information constituted a nonwaivable jurisdictional defect, necessitating vacatur of the defendant's conviction of attempted assault in the second degree, vacatur of the sentence imposed thereon, and dismissal of that count of the superior court information ... . **People v Jones, 2018 NY Slip Op 04565, Second Dept 6-20-18**

CRIMINAL LAW (CRIME OF ATTEMPTED ASSAULT IN THE SECOND DEGREE IS A LEGAL IMPOSSIBILITY (SECOND DEPT))/ASSAULT (CRIME OF ATTEMPTED ASSAULT IN THE SECOND DEGREE IS A LEGAL IMPOSSIBILITY (SECOND DEPT))/ATTEMPTED ASSAULT (CRIME OF ATTEMPTED ASSAULT IN THE SECOND DEGREE IS A LEGAL IMPOSSIBILITY (SECOND DEPT))

CRIMINAL LAW.

THERE WAS GOOD CAUSE FOR THE 31 YEAR DELAY IN INDICTING DEFENDANT FOR MURDER (SECOND DEPT).

The Second Department determined there was good cause for a 31 year delay in indicting the defendant for murder:

> Cecil Schiff (hereinafter the decedent) was murdered in September 1980 during a robbery of his apartment. With no eyewitnesses and no match to latent fingerprints that were recovered from the crime scene, the investigation stalled. In 2008, a detective with the New York City Police Department's Latent Print Unit randomly selected the case for fingerprint analysis, and determined that the defendant's fingerprints matched three fingerprints recovered from a jewelry box and two other boxes found in the decedent's bedroom. Further investigation revealed that the defendant, who was a 17-year-old high school student at the time of the murder, was absent from school on the day of the murder. The defendant was arrested and indicted in 2012, more than 31 years after the crime was committed. * * *
>
> ... [A] significant amount of the delay was due to a lack of evidence identifying a viable suspect. After the defendant's fingerprints were matched to the fingerprints recovered from the three boxes in the decedent's bedroom, further investigation was conducted. The People had a good-faith basis to wait until they had sufficient evidence to arrest the defendant. Accordingly, we agree with the Supreme Court's determination that the People met their burden of demonstrating good cause for the delay ... . The reasons for the delay establishing the People's good cause, the nature of the crime, and the fact that there was no period of pre-indictment incarceration in connection with this matter outweigh the extent of the delay. The court appropriately balanced the requisite factors in denying the defendant's motion to dismiss the indictment ... . **People v Mattison, 2018 NY Slip Op 04569, Second Dept 6-20-18**

CRIMINAL LAW (PRE-INDICTMENT DELAY, THERE WAS GOOD CAUSE FOR THE 31 YEAR DELAY IN INDICTING DEFENDANT FOR MURDER (SECOND DEPT))/PRE-INDICTMENT DELAY (THERE WAS GOOD CAUSE FOR THE 31 YEAR DELAY IN INDICTING DEFENDANT FOR MURDER (SECOND DEPT))/DELAY, PRE-INDICTMENT (THERE WAS GOOD CAUSE FOR THE 31 YEAR DELAY IN INDICTING DEFENDANT FOR MURDER (SECOND DEPT))

CRIMINAL LAW.

JUROR MISCONDUCT, INCLUDING COMMUNICATIONS WITH THIRD PARTIES AND WEB BROWSING IN VIOLATION OF THE JUDGE'S ADMONITIONS, WARRANTED A NEW TRIAL IN THIS MURDER CASE (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined that juror misconduct warranted a new trial in this murder case:

> We begin by noting that, at the hearing on the CPL 330.30 motion, defendant established that during the trial juror number 12 engaged in text messaging with third parties about the trial. Indeed, after being selected to serve on the jury, juror number 12 received a text message from her father that stated: "Make sure he's guilty!" During the trial, juror number 12 received a text message from a friend asking if she had seen the "scary person" yet. Juror number 12 responded: "I've seen him since day 1." ... * * *
>
> Forensic examination of her cell phone revealed that juror number 12 had selectively deleted scores of messages or parts thereof and that she had deleted her entire web browsing history. At the hearing, juror number 12 was unable to provide any explanation for why she had done that. * * *
>
> We observe that, had this juror's misconduct been discovered during voir dire or during the trial, rather than after the verdict, the weight of authority under CPL 270.35 would have compelled her discharge on the ground that she was grossly unqualified and/or had engaged in misconduct of a substantial nature ... . Here, due to juror number 12's flagrant failure to follow the court's instructions and her concealment of that substantial misconduct, defendant, through no fault of his own, was denied the opportunity to seek her discharge during trial on the ground that she was grossly unqualified and/or had engaged in substantial misconduct. **People v Neulander, 2018 NY Slip Op 04925, Fourth Dept 6-29-18**

CRIMINAL LAW (JUROR MISCONDUCT, INCLUDING COMMUNICATIONS WITH THIRD PARTIES AND WEB BROWSING IN VIOLATION OF THE JUDGE'S ADMONITIONS, WARRANTED A NEW TRIAL IN THIS MURDER CASE (FOURTH DEPT))/JURORS (CRIMINAL LAW, (JUROR MISCONDUCT, INCLUDING COMMUNICATIONS WITH THIRD PARTIES AND WEB BROWSING IN VIOLATION OF THE JUDGE'S ADMONITIONS, WARRANTED A NEW TRIAL IN THIS MURDER CASE (FOURTH DEPT))

CRIMINAL LAW.

NUMEROUS FAILURES BY THE JUDGE TO FOLLOW THE PROTOCOL FOR BATSON CHALLENGES TO THE PROSECUTION'S ELIMINATION OF JURORS REQUIRED A NEW TRIAL, THE FOURTH DEPARTMENT NOTED THAT BATSON CHALLENGES MAY BE BASED UPON COLOR AS OPPOSED TO ETHNICITY, AND THE ETHNICITY OF THE DEFENDANT IS NOT A RELEVANT FACTOR IN A BATSON CHALLENGE (FOURTH DEPT).

The Fourth Department, reversing County Court, determined that the County Court judge did not follow the required steps and procedures for addressing defendant's Batson challenges to the prosecution's exercise of peremptory challenges. In one instance the judge indicated the prospective juror was "Carribean," not "African American." The Fourth Department noted that a Batson challenge may be based on color alone, as opposed to ethnicity. The County Court judge questioned another Batson challenge to an African-American prospective juror on the ground that the defendant was Caucasion. The Fourth Department pointed out that the race or ethnicity of a defendant is not relevant. Among the many problems cited by the Fourth Department:

> When the prosecutor struck prospective juror number 13, defense counsel raised a Batson claim, asserting that the prospective juror had never been involved in the criminal justice system in any way and that she unequivocally stated that she could be fair and impartial. In response, the prosecutor explained that he struck prospective juror number 13 because she was in nursing school and stated on her juror questionnaire that she was going to school because she wanted to help people, which in the prosecutor's view indicated that she may be sympathetic to defendant.
>
> Instead of determining whether the race-neutral explanation offered by the prosecutor was pretextual, the court engaged defense counsel in an extended colloquy during which the court asked how defendant, as a Caucasian, could assert a Batson claim with respect to an African-American prospective juror. Defense counsel answered, correctly, that a defendant need not be the same race as the stricken prospective juror ....
>
> We ... conclude that, based on the court's wholesale failure to comply with the Batson protocol with respect to multiple African-American prospective jurors who were the subject of peremptory challenges by the People, defendant is entitled to a new trial ... . **People v Pescara, 2018 NY Slip Op 04927, Fourth Dept 6-29-18**

CRIMINAL LAW (JURORS, BATSON CHALLENGE, NUMEROUS FAILURES BY THE JUDGE TO FOLLOW THE PROTOCOL FOR BATSON CHALLENGES TO THE PROSECUTION'S ELIMINATION OF JURORS REQUIRED A NEW TRIAL, THE FOURTH DEPARTMENT NOTED THAT BATSON CHALLENGES MAY BE BASED UPON COLOR AS OPPOSED TO ETHNICITY, AND THE ETHNICITY OF THE DEFENDANT IS NOT A RELEVANT FACTOR IN A BATSON CHALLENGE (FOURTH DEPT))/JURORS (CRIMINAL LAW, BATSON CHALLENGES, NUMEROUS FAILURES BY THE JUDGE TO FOLLOW THE PROTOCOL FOR BATSON CHALLENGES TO THE PROSECUTION'S ELIMINATION OF JURORS REQUIRED A NEW TRIAL, THE FOURTH DEPARTMENT NOTED THAT BATSON CHALLENGES MAY BE BASED UPON COLOR AS OPPOSED TO ETHNICITY, AND THE ETHNICITY OF THE DEFENDANT IS NOT A RELEVANT FACTOR IN A BATSON CHALLENGE (FOURTH DEPT))/BATSON CHALLENGES (CRIMINAL LAW, JURORS, NUMEROUS FAILURES BY THE JUDGE TO FOLLOW THE PROTOCOL FOR BATSON CHALLENGES TO THE PROSECUTION'S ELIMINATION OF JURORS REQUIRED A NEW TRIAL, THE FOURTH DEPARTMENT NOTED THAT BATSON CHALLENGES MAY BE BASED UPON COLOR AS OPPOSED TO ETHNICITY, AND THE ETHNICITY OF THE DEFENDANT IS NOT A RELEVANT FACTOR IN A BATSON CHALLENGE (FOURTH DEPT))

CRIMINAL LAW.

FAILURE TO PROVIDE NOTICE TO COUNSEL OF THE CONTENTS OF JURY NOTES AND FAILURE TO MAKE A RECORD DEMONSTRATING MEANINGFUL NOTICE REQUIRED REVERSAL AND A NEW TRIAL (SECOND DEPT).

The Second Department reversed defendant's convictions and ordered a new trial because the trial judge failed to comply with the strict requirements surrounding providing notice to counsel of the contents of notes sent out by the jury:

> Here, on the morning of the first day of deliberations, the Supreme Court received three notes from the jury requesting, among other things, "Judge's reading of charges of 1st degree & the 4 things we must prove to reach a guilty [verdict] . . . Same thing for 2nd Degree . . . Definition of unreasonable doubt." The jury also requested the transcript of the testifying accomplice's testimony. The court did not read the contents of these notes into the record, and there is no indication in the record that the entire contents of the notes otherwise were shared with counsel. Rather, after receiving the notes, the court explained its intended responses to defense counsel and the prosecutor, and then, in the presence of the jury, provided a readback of the requested charges. * * *
>
> Meaningful notice of the content of a jury note "means notice of the actual specific content of the jurors' request" (People v O'Rama, 78 NY2d at 277...). Where the record fails to establish that the trial court provided counsel with "meaningful notice of the precise content of a substantive juror inquiry, a mode of proceedings error occurs, and reversal is therefore required even in the absence of an objection" ... . Because the record here fails to establish that the Supreme Court provided counsel with meaningful notice of the precise content of the subject jury notes, we must reverse the defendant's convictions and order a new trial. **People v Gedeon, 2018 NY Slip Op 04751, Second Dept 6-27-18**

CRIMINAL LAW (JURY NOTES, FAILURE TO PROVIDE NOTICE TO COUNSEL OF THE CONTENTS OF JURY NOTES AND FAILURE TO MAKE A RECORD DEMONSTRATING MEANINGFUL NOTICE REQUIRED REVERSAL AND A NEW TRIAL (SECOND DEPT))/JURY NOTES (CRIMINAL LAW, FAILURE TO PROVIDE NOTICE TO COUNSEL OF THE CONTENTS OF JURY NOTES AND FAILURE TO MAKE A RECORD DEMONSTRATING MEANINGFUL NOTICE REQUIRED REVERSAL AND A NEW TRIAL (SECOND DEPT))/O'RAMA (JURY NOTES, FAILURE TO PROVIDE NOTICE TO COUNSEL OF THE CONTENTS OF JURY NOTES AND FAILURE TO MAKE A RECORD DEMONSTRATING MEANINGFUL NOTICE REQUIRED REVERSAL AND A NEW TRIAL (SECOND DEPT))/CPL 310.30 (JURY NOTES, FAILURE TO PROVIDE NOTICE TO COUNSEL OF THE CONTENTS OF JURY NOTES AND FAILURE TO MAKE A RECORD DEMONSTRATING MEANINGFUL NOTICE REQUIRED REVERSAL AND A NEW TRIAL (SECOND DEPT))

CRIMINAL LAW.

THE PROPONENT OF A MISSING WITNESS CHARGE MUST FIRST DEMONSTRATE THE TESTIMONY OF THE MISSING WITNESS WOULD NOT MERELY BE CUMULATIVE (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined that the proponent of a missing witness jury instruction must first demonstrate the testimony of the witness would not have been cumulative:

> In the First, Second, and Third Departments, it is well established that the proponent of such a charge has the " initial burden of proving,' " inter alia, that the missing witness has " noncumulative' " testimony to offer on behalf of the opposing party ... . That rule has been explicitly and consistently reiterated by our sister appellate courts ... .
>
> We have never held otherwise. * * *
>
> Here, defendant—as the proponent of the missing witness charge—failed to meet his initial burden of proving, prima facie, that the missing witness had noncumulative testimony to offer on the People's behalf... . Neither defendant nor the dissent claim otherwise; instead, they argue only that defendant had no such initial burden and, as discussed above, we reject that view of the law. Further, although our holding does not rest on this point, we note our disagreement with the dissent that defendant met his initial burden of demonstrating that the uncalled witness would have testified favorably to the People. **People v Smith, 2018 NY Slip Op 04863, Fourth Dept 6-29-18**

CRIMINAL LAW (MISSING WITNESS CHARGE, THE PROPONENT OF A MISSING WITNESS CHARGE MUST FIRST DEMONSTRATE THE TESTIMONY OF THE MISSING WITNESS WOULD NOT MERELY BE CUMULATIVE (FOURTH DEPT))/MISSING WITNESS CHARGE (CRIMINAL LAW, THE PROPONENT OF A MISSING WITNESS CHARGE MUST FIRST DEMONSTRATE THE TESTIMONY OF THE MISSING WITNESS WOULD NOT MERELY BE CUMULATIVE (FOURTH DEPT))/JURY INSTRUCTIONS (CRIMINAL LAW, THE PROPONENT OF A MISSING WITNESS CHARGE MUST FIRST DEMONSTRATE THE TESTIMONY OF THE MISSING WITNESS WOULD NOT MERELY BE CUMULATIVE (FOURTH DEPT))

CRIMINAL LAW, APPEALS.

TAXI LICENSES ARE NOT PROPERTY WITHIN THE MEANING OF THE GRAND LARCENY STATUTE, ALTHOUGH THE LEGAL INSUFFICIENCY ARGUMENT WAS NOT PRESERVED, DEFENDANT'S GRAND LARCENY CONVICTION WAS VACATED IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department vacated defendant's grand larceny conviction in the interest of justice because the licenses from the NYC Taxi and Limousine Commission (TLC) do not constitute "property" within the meaning of the grand larceny statute:

> The defendant's conviction of grand larceny in the third degree (Penal Law § 155.35[1]) was based on the alleged theft of licenses from the TLC. "A person is guilty of grand larceny in the third degree when he or she steals property and . . . when the value of the property exceeds three thousand dollars" ... .. The licenses from the TLC are not considered "property" within the meaning of the statute ... . Accordingly, although the defendant's legal insufficiency claim is unpreserved for appellate review, we vacate his conviction of grand larceny in the third degree and the sentence imposed thereon, and dismiss that count of the indictment as a matter of discretion in the interest of justice ... . **People v Ishtiaq, 2018 NY Slip Op 04752,, Second Dept 6-27-18**

CRIMINAL LAW (GRAND LARCENY, TAXI LICENSES ARE NOT PROPERTY WITHIN THE MEANING OF THE GRAND LARCENY STATUTE, ALTHOUGH THE LEGAL INSUFFICIENCY ARGUMENT WAS NOT PRESERVED, DEFENDANT'S GRAND LARCENY CONVICTION WAS VACATED IN THE INTEREST OF JUSTICE (SECOND DEPT))/APPEALS (CRIMINAL LAW, TAXI LICENSES ARE NOT PROPERTY WITHIN THE MEANING OF THE GRAND LARCENY STATUTE, ALTHOUGH THE LEGAL INSUFFICIENCY ARGUMENT WAS NOT PRESERVED, DEFENDANT'S GRAND LARCENY CONVICTION WAS VACATED IN THE INTEREST OF JUSTICE (SECOND DEPT))/GRAND LARCENY (TAXI LICENSES ARE NOT PROPERTY WITHIN THE MEANING OF THE GRAND LARCENY STATUTE, ALTHOUGH THE LEGAL INSUFFICIENCY ARGUMENT WAS NOT PRESERVED, DEFENDANT'S GRAND LARCENY CONVICTION WAS VACATED IN THE INTEREST OF JUSTICE (SECOND DEPT))/TAXI LICENSES (CRIMINAL LAW, GRAND LARCENY, TAXI LICENSES ARE NOT PROPERTY WITHIN THE MEANING OF THE GRAND LARCENY STATUTE, ALTHOUGH THE LEGAL INSUFFICIENCY ARGUMENT WAS NOT PRESERVED, DEFENDANT'S GRAND LARCENY CONVICTION WAS VACATED IN THE INTEREST OF JUSTICE (SECOND DEPT))

CRIMINAL LAW, APPEALS.

DEFENDANT ABSCONDED DURING TRIAL, WAS INVOLUNTARILY RETURNED ON A WARRANT 20 YEARS LATER, AND FILED HIS APPELLATE BRIEF 30 YEARS AFTER CONVICTION, APPEAL DISMISSED FOR FAILURE TO PROSECUTE (FIRST DEPT).

The First Department dismissed the appeal of the defendant who had absconded during trial, was subsequently returned on a warrant 20 years later, and filed his brief 30 years after conviction:

> The People seek to dismiss defendant's appeal based on the "failure of timely prosecution or perfection thereof," pursuant to CPL 470.60(1). Where a defendant's appeal remained pending for a long time while he or she was a fugitive, whether the appeal should be permitted to proceed once the defendant is returned to custody is "subject to the broad discretion of the Appellate Division"... . In exercising its discretion, the Appellate Division may consider factors including whether defendant's flight caused "a significant interference with the operation of [the] appellate process"; whether defendant's absence "so delayed the administration of justice that the People would be prejudiced in locating witnesses and presenting evidence at any retrial should the defendant be successful on appeal"; the length of the defendant's absence; whether the defendant "voluntarily surrendered"; and the merits of the appeal ... .
>
> Applying these standards, we exercise our discretion to dismiss the appeal. There was an extensive delay — more than 27 years — from June 12, 1987, when counsel, on defendant's behalf, filed a notice of appeal, until September 2014, when defendant sought poor person relief and assignment of counsel, and defendant finally filed his appellate brief in June 2017, 30 years after his conviction. The delay was caused entirely by defendant's own conduct in absconding from trial, and remaining a fugitive for close to 20 years. Defendant did not surrender voluntarily; rather, he was returned involuntarily on the warrant after being arrested and convicted under another name in Massachusetts. An important transcript and the court file, each of which has a bearing on issues defendant seeks to raise on appeal, have been lost, and it is unreasonable to expect a court to preserve such materials forever. The delay of over 30 years would severely prejudice the People if required to retry the case after appeal. Thus, these factors demonstrate that dismissal is appropriate ... . We also note that this Court has fully complied with the requirement ... that this determination be made after appellate counsel has been assigned and permitted to review the record. **People v Perez, 2018 NY Slip Op 04669, First Dept 6-25-18**

CRIMINAL LAW (APPEALS, DEFENDANT ABSCONDED DURING TRIAL, WAS INVOLUNTARILY RETURNED ON A WARRANT 20 YEARS LATER, AND FILED HIS APPELLATE BRIEF 30 YEARS AFTER CONVICTION, APPEAL DISMISSED FOR FAILURE TO PROSECUTE (FIRST DEPT))/APPEALS (CRIMINAL LAW, DEFENDANT ABSCONDED DURING TRIAL, WAS INVOLUNTARILY RETURNED ON A WARRANT 20 YEARS LATER, AND FILED HIS APPELLATE BRIEF 30 YEARS AFTER CONVICTION, APPEAL DISMISSED FOR FAILURE TO PROSECUTE (FIRST DEPT))/FUGITIVES (CRIMINAL LAW, APPEALS, DEFENDANT ABSCONDED DURING TRIAL, WAS INVOLUNTARILY RETURNED ON A WARRANT 20 YEARS LATER, AND FILED HIS APPELLATE BRIEF 30 YEARS AFTER CONVICTION, APPEAL DISMISSED FOR FAILURE TO PROSECUTE (FIRST DEPT))

CRIMINAL LAW, APPEALS.

DEFENDANT'S WAIVER OF HIS RIGHT TO APPEAL DEEMED INVALID, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department determined defendant's waiver of his right to appeal was invalid:

> The Supreme Court did not provide the defendant with an explanation of the nature of the right to appeal or explain the consequences of waiving that right. In addition, nothing in the record shows that the defendant understood the distinction between the right to appeal and other trial rights forfeited incident to his plea of guilty... . While the defendant was represented by counsel during the plea proceedings, counsel did not participate during the proceedings other than to acknowledge to the court that he was the defendant's attorney, and counsel did not sign the defendant's written appeal waiver form. Furthermore, although the record on appeal reflects that the defendant signed the written appeal waiver form, a written waiver "is not a complete substitute for an on-the-record explanation of the nature of the right to appeal" ... . The court's colloquy amounted to nothing more than a simple confirmation that the defendant signed the waiver and a conclusory statement that the defendant understood the waiver or was executing it knowingly and voluntarily ... . Under the circumstances here, we conclude that the defendant did not knowingly, voluntarily, and intelligently waive his right to appeal ... . **People v Latham, 2018 NY Slip Op 04753, Second Dept 6-27-18**

CRIMINAL LAW (WAIVER OF APPEAL, DEFENDANT'S WAIVER OF HIS RIGHT TO APPEAL DEEMED INVALID, CRITERIA EXPLAINED (SECOND DEPT))/APPEALS (CRIMINAL LAW, WAIVER, DEFENDANT'S WAIVER OF HIS RIGHT TO APPEAL DEEMED INVALID, CRITERIA EXPLAINED (SECOND DEPT))/WAIVER OF APPEAL (CRIMINAL LAW, DEFENDANT'S WAIVER OF HIS RIGHT TO APPEAL DEEMED INVALID, CRITERIA EXPLAINED (SECOND DEPT))

CRIMINAL LAW, APPEALS.

DEFENDANT DID NOT HAVE STATUTORY AUTHORITY TO APPEAL COUNTY COURT'S RULING GIVING THE DISTRICT ATTORNEY ACCESS TO A PRE-SENTENCE INVESTIGATION REPORT (PSI) RELATING TO DEFENDANT'S PRIOR CONVICTION (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Devine, determined that the defendant did not have statutory authorization to appeal from a ruling by County Court which allowed the prosecutor access to a pre-sentence investigation report (PSI) prepared in connection with defendant's prior conviction:

> Defendant pleaded guilty to attempted criminal possession of a weapon in the third degree in Saratoga County, and a presentence investigation report (hereinafter PSI) was prepared for County Court prior to his 2006 sentencing. Several years later, an indictment was handed up in Schenectady County charging defendant with various offenses. The Schenectady County District Attorney believed that the PSI contained information relevant to the new criminal action and, as a result, applied to County Court for the limited disclosure and use of the PSI. County Court granted that request, prompting this appeal by defendant. * * *
>
> ... [T]he Schenectady County District Attorney's Office applied for disclosure of the PSI with the aim of using it in a pending criminal action against defendant. The application therefore "relate[s] to a prospective, pending or completed criminal action" so as to constitute a criminal matter, and statutory authorization is required to appeal from any order emanating from it (CPL 1.20 [18] [b]). No such authorization can be found in CPL 450.10 or 450.15 and, thus, the present appeal must be dismissed ... . **People v Young, 2018 NY Slip Op 04596, Third Dept 6-21-18**

CRIMINAL LAW (DEFENDANT DID NOT HAVE STATUTORY AUTHORITY TO APPEAL COUNTY COURT'S RULING GIVING THE DISTRICT ATTORNEY ACCESS TO A PRE-SENTENCE INVESTIGATION REPORT (PSI) RELATING TO DEFENDANT'S PRIOR CONVICTION (THIRD DEPT))/APPEALS (CRIMINAL LAW, DEFENDANT DID NOT HAVE STATUTORY AUTHORITY TO APPEAL COUNTY COURT'S RULING GIVING THE DISTRICT ATTORNEY ACCESS TO A PRE-SENTENCE INVESTIGATION REPORT (PSI) RELATING TO DEFENDANT'S PRIOR CONVICTION (THIRD DEPT)).PRE-SENTENCE INVESTIGATION REPORT (PSI) (DEFENDANT DID NOT HAVE STATUTORY AUTHORITY TO APPEAL COUNTY COURT'S RULING GIVING THE DISTRICT ATTORNEY ACCESS TO A PRE-SENTENCE INVESTIGATION REPORT (PSI) RELATING TO DEFENDANT'S PRIOR CONVICTION (THIRD DEPT))

CRIMINAL LAW, APPEALS, EVIDENCE.

CHILD PORNOGRAPHY CONVICTIONS REVERSED AS AGAINST THE WEIGHT OF THE EVIDENCE, DEFENDANT DID NOT WAIVE HIS RIGHT TO CHALLENGE THE VOLUNTARINESS OF THE STATEMENT AT TRIAL BY WAIVING A PRE-TRIAL HUNTLEY HEARING (SECOND DEPT).

The Second Department, reversing defendant's child pornography convictions and dismissing the indictment, determined the convictions were against the weight of the evidence. The defendant, who speaks Spanish, gave a written statement in English acknowledging he had downloaded child pornography. However, it was revealed at trial that the police provided information that was in the statement and made changes to the statement without defendant's permission. The defendant had waived a pre-trial Huntley hearing on the voluntariness of the statement, informing the judge he intended to challenge the voluntariness of the statement at trial. The judge, in this bench trial, erroneously ruled defendant had waived his right to challenge the statement a trial. The defendant testified that he did not download the child pornography and that he gave the statement to protect a family member. A family member testified and admitted "unintentionally" downloading the files. Defendant produced evidence he was at work when at least two of the files were downloaded:

> The convictions were based on the defendant's alleged acts of downloading and/or sharing 15 video files and 2 still images, on multiple dates. The People introduced into evidence, inter alia, a written statement in English that the defendant made to law enforcement officials. In that statement, the defendant acknowledged having downloaded approximately 5 videos containing child pornography; he did not specify the names or descriptions of the materials, or the dates of the actions. The defendant's written statement included the name of the program used to download contraband materials to this computer, as well as a term allegedly used in titles of child pornography files, but a police investigator acknowledged that he had supplied those terms. Apart from the defendant's statement to the police, the prosecution adduced no other evidence showing that it was the defendant who had downloaded and/or shared the subject materials, consisting of 15 video files and 2 still photographs, on specific dates and times. …
>
> Although we ordinarily accord great deference to the factfinder's opportunity to view the witnesses, hear the testimony, and observe demeanor…, under the circumstances of this case, we give no deference to the County Court's assessment of the defendant's credibility on the issue of the voluntariness of his statements to law enforcement officials, as the court erroneously precluded the defendant from contesting the voluntariness of the written statement during the trial, contrary to his statutory and constitutional right to do so … . **People v Vasquez, 2018 NY Slip Op 04761, Second Dept 6-27-18**

CRIMINAL LAW (CHILD PORNOGRAPHY CONVICTIONS REVERSED AS AGAINST THE WEIGHT OF THE EVIDENCE, DEFENDANT DID NOT WAIVE HIS RIGHT TO CHALLENGE THE VOLUNTARINESS OF THE STATEMENT AT TRIAL BY WAIVING A PRE-TRIAL HUNTLEY HEARING (SECOND DEPT))/APPEALS (CRIMINAL LAW, WEIGHT OF THE EVIDENCE, CHILD PORNOGRAPHY CONVICTIONS REVERSED AS AGAINST THE WEIGHT OF THE EVIDENCE, DEFENDANT DID NOT WAIVE HIS RIGHT TO CHALLENGE THE VOLUNTARINESS OF THE STATEMENT AT TRIAL BY WAIVING A PRE-TRIAL HUNTLEY HEARING (SECOND DEPT))/WEIGHT OF THE EVIDENCE (CRIMINAL LAW, CHILD PORNOGRAPHY CONVICTIONS REVERSED AS AGAINST THE WEIGHT OF THE EVIDENCE, DEFENDANT DID NOT WAIVE HIS RIGHT TO CHALLENGE THE VOLUNTARINESS OF THE STATEMENT AT TRIAL BY WAIVING A PRE-TRIAL HUNTLEY HEARING (SECOND DEPT))/CHILD PORNOGRAPHY (CRIMINAL LAW, CHILD PORNOGRAPHY CONVICTIONS REVERSED AS AGAINST THE WEIGHT OF THE EVIDENCE, DEFENDANT DID NOT WAIVE HIS RIGHT TO CHALLENGE THE VOLUNTARINESS OF THE STATEMENT AT TRIAL BY WAIVING A PRE-TRIAL HUNTLEY HEARING (SECOND DEPT))/VOLUNTARINESS OF STATEMENT (CRIMINAL LAW, CHILD PORNOGRAPHY CONVICTIONS REVERSED AS AGAINST THE WEIGHT OF THE EVIDENCE, DEFENDANT DID NOT WAIVE HIS RIGHT TO CHALLENGE THE VOLUNTARINESS OF THE STATEMENT AT TRIAL BY WAIVING A PRE-TRIAL HUNTLEY HEARING (SECOND DEPT))/HUNTLEY HEARING LAW (CHILD PORNOGRAPHY CONVICTIONS REVERSED AS AGAINST THE WEIGHT OF THE EVIDENCE, DEFENDANT DID NOT WAIVE HIS RIGHT TO CHALLENGE THE VOLUNTARINESS OF THE STATEMENT AT TRIAL BY WAIVING A PRE-TRIAL HUNTLEY HEARING (SECOND DEPT))/EVIDENCE (CRIMINAL LAW, (CHILD PORNOGRAPHY CONVICTIONS REVERSED AS AGAINST THE WEIGHT OF THE EVIDENCE, DEFENDANT DID NOT WAIVE HIS RIGHT TO CHALLENGE THE VOLUNTARINESS OF THE STATEMENT AT TRIAL BY WAIVING A PRE-TRIAL HUNTLEY HEARING (SECOND DEPT))

CRIMINAL LAW, APPEALS, EVIDENCE.

INSUFFICIENT EVIDENCE DEFENDANT INTENDED TO DESTROY A MOTORCYCLE WHEN SHE STARTED A FIRE IN A GARAGE, CRIMINAL MISCHIEF CONVICTION REVERSED UNDER A WEIGHT OF THE EVIDENCE ANALYSIS (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction under a weight of the evidence analysis, determined there was insufficient proof that defendant intended to destroy a motorcycle that was in the garage in which she started a fire. She testified she started the fire because she was angry with her husband and she expected he would put the fire out. The fire was started in an area of the garage which was not near the motorcycle:

> We agree with defendant, however, that the verdict finding her guilty of criminal mischief in the third degree is against the weight of the evidence. County Court instructed the jurors that defendant was guilty of that crime if they found that she intentionally "damage[d] property of another person in an amount exceeding $250," specifically "a Suzuki motorcycle." The People presented evidence that a motorcycle belonging to defendant's husband was completely destroyed by the fire that defendant allegedly set, a loss valued at over $4,000. No evidence was offered of the value of any damage caused by defendant prior to the fire, and the only evidence of how and why the fire started came from defendant's statements to law enforcement, wherein she stated that she did not know why she started the fire, but that she was angry at her husband with whom she had been fighting and thought that he would return to the garage to put out the fire. Moreover, defendant told law enforcement that she started the fire by igniting a fleece blanket in a part of the garage different from where the motorcycle was located. Defendant's statements are consistent with the testimony of the fire protection inspector regarding the origin of the fire and are not contradicted by any other evidence in the record. Thus, viewing the evidence in light of the elements of the crime of criminal mischief in the third degree as charged to the jury ..., we conclude that the jury's determination that defendant set the fire with the intention of damaging her husband's motorcycle is against the weight of the evidence ... . **People v Colbert, 2018 NY Slip Op 04879, Fourth Dept 6-29-18**

CRIMINAL LAW (INSUFFICIENT EVIDENCE DEFENDANT INTENDED TO DESTROY A MOTORCYCLE WHEN SHE STARTED A FIRE IN A GARAGE, CRIMINAL MISCHIEF CONVICTION REVERSED UNDER A WEIGHT OF THE EVIDENCE ANALYSIS (FOURTH DEPT))/APPEALS (INSUFFICIENT EVIDENCE DEFENDANT INTENDED TO DESTROY A MOTORCYCLE WHEN SHE STARTED A FIRE IN A GARAGE, CRIMINAL MISCHIEF CONVICTION REVERSED UNDER A WEIGHT OF THE EVIDENCE ANALYSIS (FOURTH DEPT))/EVIDENCE (INSUFFICIENT EVIDENCE DEFENDANT INTENDED TO DESTROY A MOTORCYCLE WHEN SHE STARTED A FIRE IN A GARAGE, CRIMINAL MISCHIEF CONVICTION REVERSED UNDER A WEIGHT OF THE EVIDENCE ANALYSIS (FOURTH DEPT))/WEIGHT OF THE EVIDENCE (INSUFFICIENT EVIDENCE DEFENDANT INTENDED TO DESTROY A MOTORCYCLE WHEN SHE STARTED A FIRE IN A GARAGE, CRIMINAL MISCHIEF CONVICTION REVERSED UNDER A WEIGHT OF THE EVIDENCE ANALYSIS (FOURTH DEPT))/CRIMINAL MISCHIEF (INSUFFICIENT EVIDENCE DEFENDANT INTENDED TO DESTROY A MOTORCYCLE WHEN SHE STARTED A FIRE IN A GARAGE, CRIMINAL MISCHIEF CONVICTION REVERSED UNDER A WEIGHT OF THE EVIDENCE ANALYSIS (FOURTH DEPT))/INTENT (CRIMINAL LAW, CRIMINAL MISCHIEF, (INSUFFICIENT EVIDENCE DEFENDANT INTENDED TO DESTROY A MOTORCYCLE WHEN SHE STARTED A FIRE IN A GARAGE, CRIMINAL MISCHIEF CONVICTION REVERSED UNDER A WEIGHT OF THE EVIDENCE ANALYSIS (FOURTH DEPT))

CRIMINAL LAW, ATTORNEYS.

WHETHER TO PRESENT PSYCHIATRIC EVIDENCE IS A STRATEGIC DECISION FOR DEFENSE COUNSEL, NOT DEFENDANT, DEFENSE COUNSEL DID NOT RELINQUISH HIS AUTHORITY TO DECIDE WHETHER TO REQUEST A MISTRIAL MERELY BY CONFERRING WITH THE DEFENDANT AND AGREEING WITH THE DEFENDANT'S REQUEST TO PROCEED, IT WAS NOT ERROR TO HANDCUFF DEFENDANT AND TO HAVE LAW ENFORCEMENT OFFICERS SEATED NEAR THE DEFENDANT DURING THE TRIAL (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Clark, determined: (1) whether to introduce psychiatric evidence that defendant suffered from Secure Housing Unit Syndrome (Grassian Syndrome) was a strategic decision for defense counsel, not defendant; (2) defense counsel did not relinquish his authority to decide whether to request a mistrial merely by conferring with the defendant and agreeing with the defendant's wish for the trial to proceed; (3) it was not error to handcuff the defendant during the trial and to have law enforcement officers seated near the defendant and in the gallery during the trial (defendant was on trial for allegedly attacking and stabbing a prison guard with an ice pick):

> ... [T]he decision of whether to present psychiatric evidence in furtherance of the affirmative defense of not criminally responsible by reason of mental disease or defect is a strategic decision involving the exercise of professional judgment, over which defense counsel retains ultimate decision-making authority ... . Additionally, the record reflects that defense counsel "fully" investigated a possible psychiatric defense and, having done so, "made 'a calculated trial strategy' to fashion a different defense" ... .
>
> Defense counsel's statements on the record do not demonstrate, as defendant argues, that he ceded his decision-making authority to defendant. Rather, the record reflects that defense counsel consulted with defendant and received his input on the matter before withdrawing his motion for a mistrial ... .
>
> County Court stated on the record that defendant had a "clear record of violence both within and outside the prison" and that it was therefore not "comfortable" with the security risks posed by allowing defendant to sit throughout the trial without restraints. Considering defendant's violent criminal history, as well as the fact that the present charges arose out of allegations that defendant attacked the victim in the hopes that he would incite retaliatory actions from correction officers that would result in his death, we find that County Court's stated security concerns provided a reasonable basis to require that defendant be restrained during the trial... . Nor do we find that defendant was deprived of a fair trial by County Court's determination to allow, as a security measure, two correction officers to sit near defendant throughout the trial and other law enforcement personnel to sit in the court's gallery ... . **People v Diaz, 2018 NY Slip Op 04389, Third Dept 6-14-18**

CRIMINAL LAW (WHETHER TO PRESENT PSYCHIATRIC EVIDENCE IS A STRATEGIC DECISION FOR DEFENSE COUNSEL, NOT DEFENDANT, DEFENSE COUNSEL DID NOT RELINQUISH HIS AUTHORITY TO DECIDE WHETHER TO REQUEST A MISTRIAL MERELY BY CONFERRING WITH THE DEFENDANT AND AGREEING WITH THE DEFENDANT'S REQUEST TO PROCEED, IT WAS NOT ERROR TO HANDCUFF DEFENDANT AND TO HAVE LAW ENFORCEMENT OFFICERS SEATED NEAR THE DEFENDANT DURING THE TRIAL (THIRD DEPT))/ATTORNEYS (CRIMINAL LAW, WHETHER TO PRESENT PSYCHIATRIC EVIDENCE IS A STRATEGIC DECISION FOR DEFENSE COUNSEL, NOT DEFENDANT, DEFENSE COUNSEL DID NOT RELINQUISH HIS AUTHORITY TO DECIDE WHETHER TO REQUEST A MISTRIAL MERELY BY CONFERRING WITH THE DEFENDANT AND AGREEING WITH THE DEFENDANT'S REQUEST TO PROCEED, IT WAS NOT ERROR TO HANDCUFF DEFENDANT AND TO HAVE LAW ENFORCEMENT OFFICERS SEATED NEAR THE DEFENDANT DURING THE TRIAL (THIRD DEPT))/PSYCHIATRIC EVIDENCE (CRIMINAL LAW, DEFENSE, WHETHER TO PRESENT PSYCHIATRIC EVIDENCE IS A STRATEGIC DECISION FOR DEFENSE COUNSEL, NOT DEFENDANT, DEFENSE COUNSEL DID NOT RELINQUISH HIS AUTHORITY TO DECIDE WHETHER TO REQUEST A MISTRIAL MERELY BY CONFERRING WITH THE DEFENDANT AND AGREEING WITH THE DEFENDANT'S REQUEST TO PROCEED, IT WAS NOT ERROR TO HANDCUFF DEFENDANT AND TO HAVE LAW ENFORCEMENT OFFICERS SEATED NEAR THE DEFENDANT DURING THE TRIAL (THIRD DEPT))/MISTRIAL (CRIMINAL LAW, DEFENSE COUNSEL, WHETHER TO PRESENT PSYCHIATRIC EVIDENCE IS A STRATEGIC DECISION FOR DEFENSE COUNSEL, NOT DEFENDANT, DEFENSE COUNSEL DID NOT RELINQUISH HIS AUTHORITY TO DECIDE WHETHER TO REQUEST A MISTRIAL MERELY BY CONFERRING WITH THE DEFENDANT AND AGREEING WITH THE DEFENDANT'S REQUEST TO

PROCEED, IT WAS NOT ERROR TO HANDCUFF DEFENDANT AND TO HAVE LAW ENFORCEMENT OFFICERS SEATED NEAR THE DEFENDANT DURING THE TRIAL (THIRD DEPT))/RESTRAINTS (CRIMINAL LAW, TRIAL, WHETHER TO PRESENT PSYCHIATRIC EVIDENCE IS A STRATEGIC DECISION FOR DEFENSE COUNSEL, NOT DEFENDANT, DEFENSE COUNSEL DID NOT RELINQUISH HIS AUTHORITY TO DECIDE WHETHER TO REQUEST A MISTRIAL MERELY BY CONFERRING WITH THE DEFENDANT AND AGREEING WITH THE DEFENDANT'S REQUEST TO PROCEED, IT WAS NOT ERROR TO HANDCUFF DEFENDANT AND TO HAVE LAW ENFORCEMENT OFFICERS SEATED NEAR THE DEFENDANT DURING THE TRIAL (THIRD DEPT))/TRIALS (CRIMINAL LAW, RESTRAINTS, EXTRA LAW ENFORCEMENT PERSONNEL, WHETHER TO PRESENT PSYCHIATRIC EVIDENCE IS A STRATEGIC DECISION FOR DEFENSE COUNSEL, NOT DEFENDANT, DEFENSE COUNSEL DID NOT RELINQUISH HIS AUTHORITY TO DECIDE WHETHER TO REQUEST A MISTRIAL MERELY BY CONFERRING WITH THE DEFENDANT AND AGREEING WITH THE DEFENDANT'S REQUEST TO PROCEED, IT WAS NOT ERROR TO HANDCUFF DEFENDANT AND TO HAVE LAW ENFORCEMENT OFFICERS SEATED NEAR THE DEFENDANT DURING THE TRIAL (THIRD DEPT))

CRIMINAL LAW, ATTORNEYS.

WHEN DEFENDANT TOLD THE COURT AT HIS FIRST TWO APPEARANCES THAT HE WISHED TO TESTIFY AT THE GRAND JURY, THE COURT SHOULD HAVE RECOGNIZED THAT DEFENDANT WAS ATTEMPTING TO REPRESENT HIMSELF AND CONDUCTED A SEARCHING INQUIRY TO MAKE SURE DEFENDANT UNDERSTOOD THE RISKS (THIRD DEPT).

The Third Department, reversing defendant's conviction by guilty plea and dismissing the indictment, determined the court should have conducted a searching inquiry into defendant's representing himself when he indicated he wished to testify at the grand jury at his first and second appearances in court:

> ... [D]efendant appeared in City Court for arraignment on a felony complaint and a misdemeanor information charging him with the offenses for which he was later indicted. Defendant, as is relevant here, stated that he wished to represent himself and testify before the grand jury. He remained unrepresented at a second appearance three days later and reiterated his desire to appear before the grand jury. The indictment was handed up shortly thereafter, and it appears that the People disregarded defendant's desire to testify before the grand jury because he failed to make a written demand as required ... .
>
> "[D]efendant's indelible right to counsel . . . attached when the felony complaint against him was first filed" ... and, while he could waive that right and proceed pro se, the waiver would be invalid absent a "searching inquiry" by City Court to discern whether defendant understood and "appreciated the 'dangers and disadvantages' of" self-representation... . There was no inquiry conducted here, leaving the record silent as to whether "defendant 'acted with full knowledge and appreciation of the panoply of constitutional protections that would be adversely affected by counsel's inability to participate'" so as to constitute a valid waiver ... . Defendant should therefore not have been permitted to proceed pro se ... . It follows that defendant was deprived of an opportunity to consult with counsel — who could have assisted defendant in deciding whether to appear before the grand jury and made an effective demand to appear in the event he chose to do so — and this "deprivation of defendant's constitutional right to counsel requires the dismissal of the indictment" ... . **People v Trapani, 2018 NY Slip Op 04041, Third Dept 6-7-18**

CRIMINAL LAW (ATTORNEYS, WHEN DEFENDANT TOLD THE COURT AT HIS FIRST TWO APPEARANCES THAT HE WISHED TO TESTIFY AT THE GRAND JURY, THE COURT SHOULD HAVE RECOGNIZED THAT DEFENDANT WAS ATTEMPTING TO REPRESENT HIMSELF AND CONDUCTED A SEARCHING INQUIRY TO MAKE SURE DEFENDANT UNDERSTOOD THE RISKS (THIRD DEPT))/ATTORNEYS (CRIMINAL LAW, WHEN DEFENDANT TOLD THE COURT AT HIS FIRST TWO APPEARANCES THAT HE WISHED TO TESTIFY AT THE GRAND JURY, THE COURT SHOULD HAVE RECOGNIZED THAT DEFENDANT WAS ATTEMPTING TO REPRESENT HIMSELF AND CONDUCTED A SEARCHING INQUIRY TO MAKE SURE DEFENDANT UNDERSTOOD THE RISKS (THIRD DEPT))/RIGHT TO COUNSEL (WHEN DEFENDANT TOLD THE COURT AT HIS FIRST TWO APPEARANCES THAT HE WISHED TO TESTIFY AT THE GRAND JURY, THE COURT SHOULD HAVE RECOGNIZED THAT DEFENDANT WAS ATTEMPTING TO REPRESENT HIMSELF AND CONDUCTED A SEARCHING INQUIRY TO MAKE SURE DEFENDANT UNDERSTOOD THE RISKS (THIRD DEPT))/GRAND JURY (WHEN DEFENDANT TOLD THE COURT AT HIS FIRST TWO APPEARANCES THAT HE WISHED TO TESTIFY AT THE GRAND JURY, THE COURT SHOULD HAVE RECOGNIZED THAT DEFENDANT WAS ATTEMPTING TO REPRESENT HIMSELF AND CONDUCTED A SEARCHING INQUIRY TO MAKE SURE DEFENDANT UNDERSTOOD THE RISKS (THIRD DEPT))

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL DID NOT OBJECT TO THE COURT'S FAILURE TO INSTRUCT THE JURY DEFENDANT'S PRIOR CONVICTIONS COULD NOT BE CONSIDERED AS EVIDENCE OF GUILT OF THE OFFENSE ON TRIAL, DEFENSE COUNSEL TOLD THE JURY THEIR JOB WAS TO SEARCH FOR THE TRUTH THEREBY DIMINISHING THE PEOPLE'S BURDEN OF PROOF, AND DEFENSE COUNSEL INDICATED TO THE JURY DEFENDANT HAD TEN PRIOR CONVICTIONS, DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined the defendant did not receive effective assistance of counsel:

> Defense counsel repeatedly stated to the jury during voir dire that the trial was to be "a search for the truth." It is settled that a "prosecutor's characterization of [a] trial as a search for the truth' [is] indeed improper" ... , inasmuch as it is a way of "proposing that the jury might convict even in the absence of proof beyond a reasonable doubt so long as the jury concluded that its verdict represented the truth" ... . Here, by making that statement to the jury during voir dire then repeating it at least three times during summation, defense counsel improperly diminished the People's burden of proof.
>
> Furthermore, it is also well settled that, when a defendant testifies and is cross-examined regarding his prior convictions, he or she is entitled to have the court "charge the jury that such prior convictions could only be used in evaluating defendant's credibility, and that they could not be used as evidence of defendant's guilt"... . Here, counsel requested such a charge, the prosecutor conceded that the charge should be given, and the court agreed to give it. Nevertheless, the court's instructions indicated that the jury may rely upon evidence of a previous conviction in evaluating the credibility of the witnesses, including defendant, but the court did not instruct the jury that they may not consider the prior conviction as evidence of defendant's guilt. Defense counsel did not object or otherwise bring the omission to the court's attention. ...
>
> Furthermore, defense counsel exacerbated the harmful impact of defendant's prior convictions during the cross-examination of the People's fingerprint expert by eliciting evidence that gave the impression that defendant had 10 or more prior arrests and/or convictions. **People v Mccallum, 2018 NY Slip Op 04898, Fourth Dept 6-29-18**

CRIMINAL LAW (ATTORNEYS, INEFFECTIVE ASSISTANCE, DEFENSE COUNSEL DID NOT OBJECT TO THE COURT'S FAILURE TO INSTRUCT THE JURY DEFENDANT'S PRIOR CONVICTIONS COULD NOT BE CONSIDERED AS EVIDENCE OF GUILT OF THE OFFENSE ON TRIAL, DEFENSE COUNSEL TOLD THE JURY THEIR JOB WAS TO SEARCH FOR THE TRUTH THEREBY DIMINISHING THE PEOPLE'S BURDEN OF PROOF, AND DEFENSE COUNSEL INDICATED TO THE JURY DEFENDANT HAD TEN PRIOR CONVICTIONS, DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE (FOURTH DEPT))/ATTORNEYS (CRIMINAL LAW, INEFFECTIVE ASSISTANCE, DEFENSE COUNSEL DID NOT OBJECT TO THE COURT'S FAILURE TO INSTRUCT THE JURY DEFENDANT'S PRIOR CONVICTIONS COULD NOT BE CONSIDERED AS EVIDENCE OF GUILT OF THE OFFENSE ON TRIAL, DEFENSE COUNSEL TOLD THE JURY THEIR JOB WAS TO SEARCH FOR THE TRUTH THEREBY DIMINISHING THE PEOPLE'S BURDEN OF PROOF, AND DEFENSE COUNSEL INDICATED TO THE JURY DEFENDANT HAD TEN PRIOR CONVICTIONS, DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE (FOURTH DEPT))/INEFFECTIVE ASSISTANCE OF COUNSEL (CRIMINAL LAW, DEFENSE COUNSEL DID NOT OBJECT TO THE COURT'S FAILURE TO INSTRUCT THE JURY DEFENDANT'S PRIOR CONVICTIONS COULD NOT BE CONSIDERED AS EVIDENCE OF GUILT OF THE OFFENSE ON TRIAL, DEFENSE COUNSEL TOLD THE JURY THEIR JOB WAS TO SEARCH FOR THE TRUTH THEREBY DIMINISHING THE PEOPLE'S BURDEN OF PROOF, AND DEFENSE COUNSEL INDICATED TO THE JURY DEFENDANT HAD TEN PRIOR CONVICTIONS, DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE (FOURTH DEPT))

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL PROVIDED DEFENDANT WITH ERRONEOUS INFORMATION ABOUT THE LENGTH OF HIS SENTENCE SHOULD HE BE CONVICTED AFTER TRIAL AND ERRONEOUSLY TOLD THE DEFENDANT HIS PLEA TO SEX TRAFFICKING WOULD NOT MAKE HIM SUBJECT TO THE SEX OFFENDER REGISTRATION ACT (SORA), DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL. CONVICTION BY GUILTY PLEA REVERSED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction by guilty plea, determined defendant did not receive effective assistance of counsel. Defense counsel told the defendant he could receive a 75-year sentence if convicted on the charged offenses, when the most the defendant could receive was 15 to 30 years. Defense counsel also erroneously told the defendant the sex trafficking offense to which he pled guilty would not make him subject to the Sex Offender Registration Act (SORA):

> The evidence, including a letter from defense counsel to the prosecutor during plea negotiations and the testimony of defendant and defense counsel at the hearing on defendant's motion to vacate the judgment, established that defendant and defense counsel perceived a viable defense to the sex trafficking charges and were leaning toward going to trial, but defendant—under the misapprehension that he risked the possibility of an aggregate maximum term of imprisonment that would be the equivalent of a life sentence for him—relied upon defense counsel's erroneous advice in accepting a plea that addressed his primary concerns by providing the ostensible benefit of greatly reducing his sentencing exposure while also avoiding any SORA implications. We thus conclude on this record that defendant was denied meaningful representation inasmuch as defense counsel's erroneous advice compromised the fairness of the process as a whole by depriving defendant of the ability to make an intelligent choice between pleading guilty or proceeding to trial ... . **People v Oliver, 2018 NY Slip Op 04885, Fourth Dept 6-29-18**

CRIMINAL LAW (DEFENSE COUNSEL PROVIDED DEFENDANT WITH ERRONEOUS INFORMATION ABOUT THE LENGTH OF HIS SENTENCE SHOULD HE BE CONVICTED AFTER TRIAL AND ERRONEOUSLY TOLD THE DEFENDANT HIS PLEA TO SEX TRAFFICKING WOULD NOT MAKE HIM SUBJECT TO THE SEX OFFENDER REGISTRATION ACT (SORA), DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL. CONVICTION BY GUILTY PLEA REVERSED (FOURTH DEPT))/ATTORNEYS (CRIMINAL LAW, INEFFECTIVE ASSISTANCE, DEFENSE COUNSEL PROVIDED DEFENDANT WITH ERRONEOUS INFORMATION ABOUT THE LENGTH OF HIS SENTENCE SHOULD HE BE CONVICTED AFTER TRIAL AND ERRONEOUSLY TOLD THE DEFENDANT HIS PLEA TO SEX TRAFFICKING WOULD NOT MAKE HIM SUBJECT TO THE SEX OFFENDER REGISTRATION ACT (SORA), DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL. CONVICTION BY GUILTY PLEA REVERSED (FOURTH DEPT))/INEFFECTIVE ASSISTANCE (CRIMINAL LAW, DEFENSE COUNSEL PROVIDED DEFENDANT WITH ERRONEOUS INFORMATION ABOUT THE LENGTH OF HIS SENTENCE SHOULD HE BE CONVICTED AFTER TRIAL AND ERRONEOUSLY TOLD THE DEFENDANT HIS PLEA TO SEX TRAFFICKING WOULD NOT MAKE HIM SUBJECT TO THE SEX OFFENDER REGISTRATION ACT (SORA), DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL. CONVICTION BY GUILTY PLEA REVERSED (FOURTH DEPT))

CRIMINAL LAW, ATTORNEYS, APPEALS.

DEFENDANT ENTITLED TO A HEARING ON HIS INEFFECTIVE ASSISTANCE ALLEGATIONS IN HIS MOTIONS TO VACATE HIS CONVICTIONS, EVEN THOSE ALLEGATIONS THAT COULD HAVE BEEN RAISED ON APPEAL (FOURTH DEPT).

The Fourth Department, reversing County Court, determined defendant was entitled to a hearing on his motions to vacate his convictions on ineffective assistance grounds. The Fourth Department noted that, where some of the allegations of ineffective assistance are outside the record, a hearing on a motion to vacate can encompass all allegations of ineffective assistance, even those which could have been raised on appeal:

> Where, as here, "an ineffective assistance of counsel claim involves . . . mixed claims' relating to both record-based and nonrecord-based issues . . . [, such] claim may be brought in a collateral proceeding, whether or not the [defendant] could have raised the claim on direct appeal" ... . In such situations, i.e., where the "claim of ineffective assistance of counsel cannot be resolved without reference to matter outside of the record, a CPL 440.10 proceeding is the appropriate forum for reviewing the claim in its entirety" ... . That is because "each alleged shortcoming or failure by defense counsel should not be viewed as a separate ground or issue raised upon the motion' . . . Rather, a defendant's claim of ineffective assistance of counsel constitutes a single ground or issue upon which relief is requested' ".. . In other words, "such a claim constitutes a single, unified claim that must be assessed in totality" ... .
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> ... "[D]efendant established that there were sufficient questions of fact . . . whether [trial counsel] had an adequate explanation' for [her] failure to pursue certain lines of defense on cross-examination or for [her] failure to call an expert on defendant's behalf, and defendant is therefore entitled to an opportunity to establish that [he] was deprived of meaningful legal representation' " ... . For example, defense counsel failed to address at trial evidence in the medical records that tended to disprove allegations of penetration. We also note that defendant presented sworn allegations supporting his contention that DNA buccal swabs were taken from him by the use of excessive force. Such an allegation, if true, would support suppression of the damaging DNA evidence had such a motion been made ... . No such motion was made, and "[s]uch a failure, in the absence of a reasonable explanation for it, is hard to reconcile with a defendant's constitutional right to . . . effective assistance of counsel" ... . **People v Wilson, 2018 NY Slip Op 04233, Fourth Dept 6-8-18**

CRIMINAL LAW (VACATE CONVICTION, MOTION TO, INEFFECTIVE ASSISTANCE, DEFENDANT ENTITLED TO A HEARING ON HIS INEFFECTIVE ASSISTANCE ALLEGATIONS IN HIS MOTIONS TO VACATE HIS CONVICTIONS, EVEN THOSE ALLEGATIONS THAT COULD HAVE BEEN RAISED ON APPEAL (FOURTH DEPT))/ATTORNEYS (CRIMINAL LAW, INEFFECTIVE ASSISTANCE, DEFENDANT ENTITLED TO A HEARING ON HIS INEFFECTIVE ASSISTANCE ALLEGATIONS IN HIS MOTIONS TO VACATE HIS CONVICTIONS, EVEN THOSE ALLEGATIONS THAT COULD HAVE BEEN RAISED ON APPEAL (FOURTH DEPT))/APPEALS (CRIMINAL LAW, MOTION TO VACATE CONVICTION, INEFFECTIVE ASSISTANCE, DEFENDANT ENTITLED TO A HEARING ON HIS INEFFECTIVE ASSISTANCE ALLEGATIONS IN HIS MOTIONS TO VACATE HIS CONVICTIONS, EVEN THOSE ALLEGATIONS THAT COULD HAVE BEEN RAISED ON APPEAL (FOURTH DEPT))/INEFFECTIVE ASSISTANCE (VACATE CONVICTION, MOTION TO, DEFENDANT ENTITLED TO A HEARING ON HIS INEFFECTIVE ASSISTANCE ALLEGATIONS IN HIS MOTIONS TO VACATE HIS CONVICTIONS, EVEN THOSE ALLEGATIONS THAT COULD HAVE BEEN RAISED ON APPEAL (FOURTH DEPT))/VACATE CONVICTION, MOTION TO (INEFFECTIVE ASSISTANCE, DEFENDANT ENTITLED TO A HEARING ON HIS INEFFECTIVE ASSISTANCE ALLEGATIONS IN HIS MOTIONS TO VACATE HIS CONVICTIONS, EVEN THOSE ALLEGATIONS THAT COULD HAVE BEEN RAISED ON APPEAL (FOURTH DEPT))

CRIMINAL LAW, ATTORNEYS, IMMIGRATION LAW.

DEFENDANT WAS ERRONEOUSLY TOLD BY HIS ATTORNEY A CERTIFICATE OF RELIEF FROM CIVIL DISABILITIES WOULD PROTECT DEFENDANT FROM DEPORTATION, MOTION TO VACATE DEFENDANT'S CONVICTION BY GUILTY PLEA SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion to vacate his conviction by guilty plea should have been granted. Defendant's attorney erroneously told defendant a certificate of relief from civil liabilities would protect defendant from deportation:

> Defendant pleaded guilty to a felony relating to the sale of drugs in return for a promised sentence of five years' probation with a certificate of relief from civil disabilities. The record establishes that defense counsel advised defendant that even though this type of conviction would be likely to result in deportation, the certificate of relief would protect him from that consequence. Counsel's advice about the effect of the certificate was clearly erroneous because defendant's conviction was a deportable offense, from which a certificate of relief provides no shield. The plea and sentencing minutes, including statements made by counsel, corroborate defendant's claim that he was misadvised about the certificate.
>
> Defendant has demonstrated a reasonable probability that he would not have pleaded guilty and would have gone to trial had he known that the plea would have rendered him deportable despite the certificate... . Statements he made during the plea proceeding and the hearing support his claims that he pled guilty because the plea offer involved no jail time and because he was misled as to the immigration consequences. **People v Rosario, 2018 NY Slip Op 04114, First Dept 6-7-18**

CRIMINAL LAW (DEFENDANT WAS ERRONEOUSLY TOLD BY HIS ATTORNEY A CERTIFICATE OF RELIEF FROM CIVIL DISABILITIES WOULD PROTECT DEFENDANT FROM DEPORTATION, MOTION TO VACATE DEFENDANT'S CONVICTION BY GUILTY PLEA SHOULD HAVE BEEN GRANTED (FIRST DEPT))/ATTORNEYS (CRIMINAL LAW, DEFENDANT WAS ERRONEOUSLY TOLD BY HIS ATTORNEY A CERTIFICATE OF RELIEF FROM CIVIL DISABILITIES WOULD PROTECT DEFENDANT FROM DEPORTATION, MOTION TO VACATE DEFENDANT'S CONVICTION BY GUILTY PLEA SHOULD HAVE BEEN GRANTED (FIRST DEPT))/INEFFECTIVE ASSISTANCE (DEFENDANT WAS ERRONEOUSLY TOLD BY HIS ATTORNEY A CERTIFICATE OF RELIEF FROM CIVIL DISABILITIES WOULD PROTECT DEFENDANT FROM DEPORTATION, MOTION TO VACATE DEFENDANT'S CONVICTION BY GUILTY PLEA SHOULD HAVE BEEN GRANTED (FIRST DEPT))/VACATE CONVICTION, MOTION TO (DEFENDANT WAS ERRONEOUSLY TOLD BY HIS ATTORNEY A CERTIFICATE OF RELIEF FROM CIVIL DISABILITIES WOULD PROTECT DEFENDANT FROM DEPORTATION, MOTION TO VACATE DEFENDANT'S CONVICTION BY GUILTY PLEA SHOULD HAVE BEEN GRANTED (FIRST DEPT))/GUILT PLEA (VACATE, MOTION TO, DEFENDANT WAS ERRONEOUSLY TOLD BY HIS ATTORNEY A CERTIFICATE OF RELIEF FROM CIVIL DISABILITIES WOULD PROTECT DEFENDANT FROM DEPORTATION, MOTION TO VACATE DEFENDANT'S CONVICTION BY GUILTY PLEA SHOULD HAVE BEEN GRANTED (FIRST DEPT)) /IMMIGRATION LAW (CRIMINAL LAW, DEPORTATION, DEFENDANT WAS ERRONEOUSLY TOLD BY HIS ATTORNEY A CERTIFICATE OF RELIEF FROM CIVIL DISABILITIES WOULD PROTECT DEFENDANT FROM DEPORTATION, MOTION TO VACATE DEFENDANT'S CONVICTION BY GUILTY PLEA SHOULD HAVE BEEN GRANTED (FIRST DEPT))/DEPORTATION (CRIMINAL LAW, DEFENDANT WAS ERRONEOUSLY TOLD BY HIS ATTORNEY A CERTIFICATE OF RELIEF FROM CIVIL DISABILITIES WOULD PROTECT DEFENDANT FROM DEPORTATION, MOTION TO VACATE DEFENDANT'S CONVICTION BY GUILTY PLEA SHOULD HAVE BEEN GRANTED (FIRST DEPT)) /CERTIFICATE OF RELIEF FROM CIVIL DISABILITIES (DEFENDANT WAS ERRONEOUSLY TOLD BY HIS ATTORNEY A CERTIFICATE OF RELIEF FROM CIVIL DISABILITIES WOULD PROTECT DEFENDANT FROM DEPORTATION, MOTION TO VACATE DEFENDANT'S CONVICTION BY GUILTY PLEA SHOULD HAVE BEEN GRANTED (FIRST DEPT))

CRIMINAL LAW, CIVIL PROCEDURE.

PETITIONER ENTITLED TO RENEWED STATUTE OF LIMITATIONS UNDER THE SON OF SAM LAW TO SEEK FUNDS IN THE CONVICTED MURDERER'S INMATE ACCOUNT, THE INMATE'S EARNED AND UNEARNED INCOME ARE AVAILABLE FOR RECOVERY (THIRD DEPT).

The Third Department determined petitioner was entitled to the renewed statute of limitations under the Son of Sam Law to seek earned and unearned income in the account of an inmate convicted of murder in 1986:

> Generally, a crime victim of a violent felony offense has 10 years from the date of the crime to bring a civil action against the individual convicted of said crime to recover money damages for any injury or loss resulting therefrom (see CPLR 213-b [2]; Executive Law § 632-a [1] [d], [e] [i] [A]; Penal Law § 70.02 [1] [a]). The Son of Sam Law, however, creates a renewed limitations period whereby a crime victim may bring an action within three years of the discovery of "funds of a convicted person" (Executive Law § 632-a [3]). Here, the subject crimes occurred in 1986 ... , thus, the statute of limitations has long since passed. Contrary to respondent's assertion, however, the applicability of the extended statute of limitations provided for in Executive Law § 632-a (3) is not tethered to the $10,000 requirement that triggers the notice provisions of the statute... . Moreover, although Executive Law § 632-a does not statutorily mandate the type of notice that was provided for here, it does not prohibit it either. Thus, having received notice of newly discovered "funds of a convicted person" ... , respondent's victims are entitled to the benefit of the extended limitations period, without regard to the amount of funds in respondent's inmate account.
>
> Next, to the extent that respondent argues that his earned income should be excluded from any future recovery, and, thus, excluded from the purview of the subject preliminary injunction, this Court has previously held that "[t]he distinction between earned and unearned income is relevant only to determine whether petitioner must be notified, and has no effect on the ability of a crime victim or a victim's representative to recover such income in a civil action" ... . **Matter of New York State Off. of Victim Servs. v Vigo, 2018 NY Slip Op 04608, Third Dept 6-21-18**

CRIMINAL LAW (SON OF SAM LAW, PETITIONER ENTITLED TO RENEWED STATUTE OF LIMITATIONS UNDER THE SON OF SAM LAW TO SEEK FUNDS IN THE CONVICTED MURDERER'S INMATE ACCOUNT, THE INMATE'S EARNED AND UNEARNED INCOME ARE AVAILABLE FOR RECOVERY (THIRD DEPT))/SON OF SAM LAW (PETITIONER ENTITLED TO RENEWED STATUTE OF LIMITATIONS UNDER THE SON OF SAM LAW TO SEEK FUNDS IN THE CONVICTED MURDERER'S INMATE ACCOUNT, THE INMATE'S EARNED AND UNEARNED INCOME ARE AVAILABLE FOR RECOVERY (THIRD DEPT))/CIVIL PROCEDURE (SON OF SAM LAW, PETITIONER ENTITLED TO RENEWED STATUTE OF LIMITATIONS UNDER THE SON OF SAM LAW TO SEEK FUNDS IN THE CONVICTED MURDERER'S INMATE ACCOUNT, THE INMATE'S EARNED AND UNEARNED INCOME ARE AVAILABLE FOR RECOVERY (THIRD DEPT))

CRIMINAL LAW, EVIDENCE.

UNDER A WEIGHT OF THE EVIDENCE ANALYSIS, THE MAJORITY DETERMINED THE EVIDENCE OF SERIOUS PHYSICAL INJURY IN THIS ASSAULT FIRST PROSECUTION WAS INSUFFICIENT (THIRD DEPT).

The Third Department, over a partial two-justice dissent, determined the evidence did not support the serious physical injury element of assault first and reduced the conviction to attempted assault first. The victim was shot in the leg. The dissenters argued the serious physical injury element had been proven. The majority focused on weaknesses of the evidence of serious physical injury and found it deficient under a weight of the evidence analysis:

> ... [T]he weight of the evidence does not support a finding that the victim sustained a serious physical injury. Serious physical injury is defined as a "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" ... . As to whether the victim sustained a physical injury that created a substantial risk of death, the victim testified that, following the shooting, he was in "miraculous pain," he underwent two surgeries, his tibia bone was "shattered" and pins were inserted to hold the bones in place. The pins, however, were removed four months after their insertion, at which point the pain subsided. The victim then wore a cast on his leg for 1½ months. Although the victim's injuries are by no means trivial, they fall short of constituting injuries that create a substantial risk of death. There was no evidence that the victim lost consciousness after being shot or that a vital organ was damaged. Nor was there any proof, lay or medical, indicating that the victim's injuries caused a substantial risk of death or were life threatening ... .
>
> * * * ... [A]lthough the victim's testimony and the photographs show a significant injury immediately following the shooting, there was no corresponding proof regarding its long-term effects ... .
>
> As to whether the victim sustained a serious and protracted disfigurement, we note that the victim showed his scar to the jury. There was, however, no contemporaneous description of what the jury saw to demonstrate the extent of such scarring, nor can such extent be discerned from the photographs entered into evidence ... . **People v Marshall, 2018 NY Slip Op 04038, Third Dept 6-7-18**

CRIMINAL LAW (ASSAULT, SERIOUS PHYSICAL INJURY, UNDER A WEIGHT OF THE EVIDENCE ANALYSIS, THE MAJORITY DETERMINED THE EVIDENCE OF SERIOUS PHYSICAL INJURY IN THIS ASSAULT FIRST PROSECUTION WAS INSUFFICIENT (THIRD DEPT))/ASSAULT (SERIOUS PHYSICAL INJURY, UNDER A WEIGHT OF THE EVIDENCE ANALYSIS, THE MAJORITY DETERMINED THE EVIDENCE OF SERIOUS PHYSICAL INJURY IN THIS ASSAULT FIRST PROSECUTION WAS INSUFFICIENT (THIRD DEPT))/SERIOUS PHYSICAL INJURY (ASSAULT, UNDER A WEIGHT OF THE EVIDENCE ANALYSIS, THE MAJORITY DETERMINED THE EVIDENCE OF SERIOUS PHYSICAL INJURY IN THIS ASSAULT FIRST PROSECUTION WAS INSUFFICIENT (THIRD DEPT))/WEIGHT OF THE EVIDENCE (UNDER A WEIGHT OF THE EVIDENCE ANALYSIS, THE MAJORITY DETERMINED THE EVIDENCE OF SERIOUS PHYSICAL INJURY IN THIS ASSAULT FIRST PROSECUTION WAS INSUFFICIENT (THIRD DEPT))

CRIMINAL LAW, EVIDENCE.

DEFENDANT FIRED INTO THE CAR AHEAD DURING A HIGH SPEED CHASE, DEPRAVED INDIFFERENCE MURDER AND ASSAULT CONVICTIONS AFFIRMED, TESTIMONY FROM THE FIRST TRIAL BY A WITNESS WHO HAD SINCE BEEN DEPORTED PROPERLY ADMITTED (SECOND DEPT).

The Second Department affirmed defendant's conviction of depraved indifference murder and assault. During a high speed chase defendant fired a bullet into the car he was following. The driver, Singh, lost control and struck a trestle. One person, Arena, was killed, and Singh and another person, Weiner, were seriously injured. Defendant fled the scene. Defendant had been convicted of these crimes in 2003 and they were affirmed on appeal. But he obtained federal habeas corpus relief in 2013 and was retried in 2015.The sentencing court properly imposed a consecutive sentence for criminal possession of a weapon, which was not an inclusory concurrent count. One of the witnesses in the first trial had been deported and the court properly admitted his testimony at the second trial:

> [T]he evidence proved beyond a reasonable doubt that the defendant recklessly engaged in conduct which created a grave risk of death to another person. The defendant engaged in a high-speed chase, in the course of which he fired a gun at the fleeing car, causing Singh, the driver, to lose control of that car. Following the crash, the defendant exhibited no signs of remorse for the results of his recklessness, and even went so far as to express his disappointment that Weiner had survived the crash. The direct and circumstantial evidence proved that the defendant deliberately engaged in a high-speed chase and shot at Singh's car with an utter disregard for the value of human life, and thus, was legally sufficient to support the jury's determination that the defendant acted with depraved indifference with respect to the death of Arena and the serious injuries sustained by Singh and Weiner ... .
>
> The defendant's contention that the County Court erred in admitting the testimony of Jose Vanderlinde from the first trial is without merit. Vanderlinde had testified at the defendant's first trial but was deported before the second trial commenced, and was barred from re-entering the United States. Under these circumstances, the court properly admitted Vanderlinde's testimony from the defendant's first trial, as the prosecutor's failure to produce the witness "was not due to indifference or a strategic preference for presenting [the witness's] testimony in the more sheltered form of [trial] minutes rather than in the confrontational setting of a personal appearance on the stand ... . **People v Williams, 2018 NY Slip Op 04015, Second Dept 6-6-18**

CRIMINAL LAW (DEFENDANT FIRED INTO THE CAR AHEAD DURING A HIGH SPEED CHASE, DEPRAVED INDIFFERENCE MURDER AND ASSAULT CONVICTIONS AFFIRMED, TESTIMONY FROM THE FIRST TRIAL BY A WITNESS WHO HAD SINCE BEEN DEPORTED PROPERLY ADMITTED (SECOND DEPT))/EVIDENCE (CRIMINAL LAW, DEFENDANT FIRED INTO THE CAR AHEAD DURING A HIGH SPEED CHASE, DEPRAVED INDIFFERENCE MURDER AND ASSAULT CONVICTIONS AFFIRMED, TESTIMONY FROM THE FIRST TRIAL BY A WITNESS WHO HAD SINCE BEEN DEPORTED PROPERLY ADMITTED (SECOND DEPT))/DEPRAVED INDIFFERENCE (CRIMINAL LAW, DEFENDANT FIRED INTO THE CAR AHEAD DURING A HIGH SPEED CHASE, DEPRAVED INDIFFERENCE MURDER AND ASSAULT CONVICTIONS AFFIRMED, TESTIMONY FROM THE FIRST TRIAL BY A WITNESS WHO HAD SINCE BEEN DEPORTED PROPERLY ADMITTED (SECOND DEPT))/PRIOR TESTIMONY (CRIMINAL LAW, TESTIMONY FROM THE FIRST TRIAL BY A WITNESS WHO HAD SINCE BEEN DEPORTED PROPERLY ADMITTED (SECOND DEPT))

CRIMINAL LAW, EVIDENCE.

EVIDENCE OF CONSTRUCTIVE POSSESSION OF DRUGS IN AN APARTMENT LEGALLY INSUFFICIENT, CONVICTION REVERSED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction for possession of a controlled substance, determined the circumstantial evidence of constructive possession of the drugs found in an apartment was legally insufficient:

> Although defendant was present in the apartment at the time when the police executed the search warrant, "no evidence was presented to establish that defendant was an occupant of the apartment or that [she] regularly frequented it"... . The People relied primarily on the trial testimony of a police investigator, who testified that defendant was listed in the records management system of the Utica Police Department (UPD) as living at the apartment. The investigator acknowledged on cross-examination, however, that he did not know how the UPD obtained that information and that the information in the records management system is not always current or even accurate. The investigator also testified that he surveilled the building in which the apartment was located "hundreds" of times over the course of a three-week investigation, and that he observed defendant "at that location" only twice. Although the investigator testified that "typical women's clothing" was found in the apartment, he failed to offer specifics except for three pairs of footwear, which he believed might fit defendant. By contrast, he testified in detail about men's underwear and men's deodorant found in a dresser drawer, men's work boots piled near the dresser, and men's sweatshirts hanging over a couch. Photographs of the clothing were received in evidence, and those photographs did not depict any "typical women's clothing," with the possible exception of one or two pairs of footwear. **People v Williams, 2018 NY Slip Op 04173, Fourth Dept 6-8-18**

CRIMINAL LAW (EVIDENCE OF CONSTRUCTIVE POSSESSION OF DRUGS IN AN APARTMENT LEGALLY INSUFFICIENT, CONVICTION REVERSED (FOURTH DEPT))/EVIDENCE (CRIMINAL LAW, (EVIDENCE OF CONSTRUCTIVE POSSESSION OF DRUGS IN AN APARTMENT LEGALLY INSUFFICIENT, CONVICTION REVERSED (FOURTH DEPT))/CONSTRUCTIVE POSSESSION (CRIMINAL LAW, (EVIDENCE OF CONSTRUCTIVE POSSESSION OF DRUGS IN AN APARTMENT LEGALLY INSUFFICIENT, CONVICTION REVERSED (FOURTH DEPT))

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S PRE-MIRANDA STATEMENT SHOULD HAVE BEEN SUPPRESSED, DEFENDANT DEMONSTRATED HE WAS NOT COMPETENT TO TESTIFY AT THE GRAND JURY, HIS GRAND JURY TESTIMONY SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction and ordering a new trial, determined the portion of defendant's videotaped statement that was allowed in evidence should have been suppressed, and the jury should not have heard defendant's grand jury testimony because he was not competent to testify at the time:

> ... [T]he court erred in suppressing only a portion of his videotaped statement to police investigators inasmuch as the portion of the statement that the court refused to suppress was also obtained prior to the administration of Miranda warnings. Although the court properly determined that defendant was in custody from the outset of the interview, we conclude that the court erred in determining that Miranda warnings were not required before defendant admitted to having a foot fetish inasmuch as "the facts indicated that an interrogational environment existed" from the outset of the interview ... .
>
> Although a defendant is presumed to be competent to testify before the grand jury ... , here, we conclude that defendant rebutted that presumption. Indeed, defendant's grand jury testimony, a rambling, delusional and bizarre narrative of government conspiracy, prompted one grand juror to inquire of defendant whether he had any psychiatric diagnoses. Within days of his testimony at the grand jury, the arraigning court referred defendant for a CPL article 730 psychiatric examination based upon what the court described as "confused, or bizarre behavior" and the inability "to understand charges or court processes." Shortly thereafter, two psychiatric examiners found that defendant lacked capacity to understand the proceedings against him or to assist in his defense based upon a diagnosis of Delusional Disorder, Paranoid Type. As a result, defendant was involuntarily committed to a psychiatric facility under the auspices of the Office of Mental Health. We thus conclude that defendant rebutted the presumption of competence, and that the court abused its discretion in denying the motion to preclude the grand jury testimony ... . **People v Perri, 2018 NY Slip Op 04134, Fourth Dept 6-8-18**

CRIMINAL LAW (DEFENDANT'S PRE-MIRANDA STATEMENT SHOULD HAVE BEEN SUPPRESSED, DEFENDANT DEMONSTRATED HE WAS NOT COMPETENT TO TESTIFY AT THE GRAND JURY, HIS GRAND JURY TESTIMONY SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE (FOURTH DEPT))/EVIDENCE (CRIMINAL LAW, DEFENDANT'S PRE-MIRANDA STATEMENT SHOULD HAVE BEEN SUPPRESSED, DEFENDANT DEMONSTRATED HE WAS NOT COMPETENT TO TESTIFY AT THE GRAND JURY, HIS GRAND JURY TESTIMONY SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE (FOURTH DEPT))/SUPPRESS, MOTION TO (DEFENDANT'S PRE-MIRANDA STATEMENT SHOULD HAVE BEEN SUPPRESSED, DEFENDANT DEMONSTRATED HE WAS NOT COMPETENT TO TESTIFY AT THE GRAND JURY, HIS GRAND JURY TESTIMONY SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE (FOURTH DEPT))/STATEMENTS (CRIMINAL LAW, PRE-MIRANDA, DEFENDANT'S PRE-MIRANDA STATEMENT SHOULD HAVE BEEN SUPPRESSED, DEFENDANT DEMONSTRATED HE WAS NOT COMPETENT TO TESTIFY AT THE GRAND JURY, HIS GRAND JURY TESTIMONY SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE (FOURTH DEPT))/MIRANDA (CRIMINAL LAW, PRE-MIRANDA, DEFENDANT'S PRE-MIRANDA STATEMENT SHOULD HAVE BEEN SUPPRESSED, DEFENDANT DEMONSTRATED HE WAS NOT COMPETENT TO TESTIFY AT THE GRAND JURY, HIS GRAND JURY TESTIMONY SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE (FOURTH DEPT))/GRAND JURY (DEFENDANT DEMONSTRATED HE WAS NOT COMPETENT TO TESTIFY AT THE GRAND JURY, HIS GRAND JURY TESTIMONY SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE (FOURTH DEPT))/COMPETENCE (CRIMINAL LAW, GRAND JURY TESTIMONY, DEFENDANT DEMONSTRATED HE WAS NOT COMPETENT TO TESTIFY AT THE GRAND JURY, HIS GRAND JURY TESTIMONY SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE (FOURTH DEPT))

CRIMINAL LAW, EVIDENCE.

PEOPLE SHOULD HAVE PROVIDED NOTICE OF BURGLARY VICTIM'S IDENTIFICATION OF DEFENDANT ON THE POLICE DEPARTMENT'S FACEBOOK PAGE AFTER THE VICTIM HAD BEEN GIVEN THE DEFENDANT'S NAME BY THE POLICE, ERROR HARMLESS HOWEVER (THIRD DEPT).

The Third Department determined it was error to fail to provide notice to the defendant of an identification procedure involving the victim of the burglary, Febus. The error was deemed harmless, however:

> Febus testified that approximately one week prior to the burglary, she answered a ringing doorbell to find a stranger who asked for a person who was unknown to her. The individual left before she could respond to his inquiry. She described the individual as an older black man with long hair who was carrying a satchel. Approximately 10 days after the burglary, Febus went to the police station and identified various objects that had been taken from her residence. While she was at the police station, she asked a police officer about the identity of the individual who had broken into her residence, and the officer provided defendant's name. She then asked the officer if she could see a picture of the individual, and the officer responded that it "was online on the Albany Police Department's [Facebook page]." Febus testified that she returned home and accessed the Facebook page. Over defendant's objection, County Court permitted Febus to continue her testimony regarding her prior identification of defendant. In that regard, she testified that when she accessed the police department's Facebook page, she saw a number of mugshots and immediately identified defendant as the person who had knocked on her door approximately one week prior to the burglary.
>
> We are not presented with the issue of whether maintenance by a police department of a Facebook page or website with mugshot photos of arrested individuals — or referral of individuals to such a website — are, without more, police-initiated identification procedures because, in this case, the police officer also provided Febus with defendant's name when he told her that she could view a picture of the person who had been arrested for burglarizing her home on the police department's Facebook page. The fact that she had been provided with defendant's name could have influenced her identification of defendant when she subsequently viewed the Facebook page. This, in our view, was sufficient police involvement to invoke the notice requirement of CPL 710.30 (1) ... . Inasmuch as notice was not provided, County Court erred in permitting Febus to identify defendant as the person who came to her home prior to the burglary. **People v Cole, 2018 NY Slip Op 04391, Third Dept 6-14-18**

CRIMINAL LAW (IDENTIFICATION, PEOPLE SHOULD HAVE PROVIDED NOTICE OF BURGLARY VICTIM'S IDENTIFICATION OF DEFENDANT ON THE POLICE DEPARTMENT'S FACEBOOK PAGE AFTER THE VICTIM HAD BEEN GIVEN THE DEFENDANT'S NAME BY THE POLICE, ERROR HARMLESS HOWEVER (THIRD DEPT))/EVIDENCE (CRIMINAL LAW, IDENTIFICATION, PEOPLE SHOULD HAVE PROVIDED NOTICE OF BURGLARY VICTIM'S IDENTIFICATION OF DEFENDANT ON THE POLICE DEPARTMENT'S FACEBOOK PAGE AFTER THE VICTIM HAD BEEN GIVEN THE DEFENDANT'S NAME BY THE POLICE, ERROR HARMLESS HOWEVER (THIRD DEPT))/IDENTIFICATION (CRIMINAL LAW, NOTICE, PEOPLE SHOULD HAVE PROVIDED NOTICE OF BURGLARY VICTIM'S IDENTIFICATION OF DEFENDANT ON THE POLICE DEPARTMENT'S FACEBOOK PAGE AFTER THE VICTIM HAD BEEN GIVEN THE DEFENDANT'S NAME BY THE POLICE, ERROR HARMLESS HOWEVER (THIRD DEPT))/FACEBOOK (CRIMINAL LAW, MUG SHOTS, IDENTIFICATION, PEOPLE SHOULD HAVE PROVIDED NOTICE OF BURGLARY VICTIM'S IDENTIFICATION OF DEFENDANT ON THE POLICE DEPARTMENT'S FACEBOOK PAGE AFTER THE VICTIM HAD BEEN GIVEN THE DEFENDANT'S NAME BY THE POLICE, ERROR HARMLESS HOWEVER (THIRD DEPT))

CRIMINAL LAW, EVIDENCE.

AT THE SUPPRESSION HEARING THE PEOPLE DID NOT PROVE THE VALIDITY OF THE COMMUNICATIONS WITH THE ARRESTING OFFICERS ABOUT THE EXISTENCE OF AN ACTIVE WARRANT FOR DEFENDANT'S ARREST, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing the conviction by guilty plea and dismissing the indictment, determined the People did not present sufficient proof at the suppression hearing to allow the suppression court to find there was probable cause for defendant's arrest. After a traffic stop, defendant was arrested based upon information from the 911 Center and the Cortland Police Department about an active warrant for defendant's arrest in Cortland. Cocaine seized in a search incident to arrest was the basis for the instant charges against the defendant. The defendant specifically challenged the validity of the communications with the arresting officers concerning the warrant. At the suppression hearing, the People did not present the warrant or any witness with first-hand knowledge about the warrant. The cocaine should have been suppressed:

> Despite defendant's explicit challenge to the reliability of the information justifying his arrest ... , the People did not produce the arrest warrant itself prior to the conclusion of the hearing ... . Instead, the People relied upon the officer's testimony concerning his communications with an unidentified person or persons at the 911 Center and his assumptions about how the 911 Center confirmed the existence of an active and valid warrant. That testimony, however, rested "on a pyramid of hearsay, the information having been passed from" the arresting officer to unidentified persons at the 911 Center and the Cortland Police Department and back to the officer... . "In making an arrest, a police officer may rely upon information communicated to him by another police officer that an individual is the subject named in a warrant and should be taken into custody in the execution of the warrant . . . However, if the warrant turns out to be invalid or vacated . . . [,] or nonexistent . . . , any evidence seized as a result of the arrest will be suppressed notwithstanding the reasonableness of the arresting officer's reliance upon the communication" ... . Here, without producing the arrest warrant itself or reliable evidence that the warrant was active and valid, the People did not meet their burden of establishing that defendant's arrest was based on probable cause ... . **People v Searight, 2018 NY Slip Op 04466, Fourth Dept 6-15-18**

CRIMINAL LAW (AT THE SUPPRESSION HEARING THE PEOPLE DID NOT PROVE THE VALIDITY OF THE COMMUNICATIONS WITH THE ARRESTING OFFICERS ABOUT THE EXISTENCE OF AN ACTIVE WARRANT FOR DEFENDANT'S ARREST, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED (FOURTH DEPT))/EVIDENCE (CRIMINAL LAW, AT THE SUPPRESSION HEARING THE PEOPLE DID NOT PROVE THE VALIDITY OF THE COMMUNICATIONS WITH THE ARRESTING OFFICERS ABOUT THE EXISTENCE OF AN ACTIVE WARRANT FOR DEFENDANT'S ARREST, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED (FOURTH DEPT))/SUPPRESS, MOTION TO (AT THE SUPPRESSION HEARING THE PEOPLE DID NOT PROVE THE VALIDITY OF THE COMMUNICATIONS WITH THE ARRESTING OFFICERS ABOUT THE EXISTENCE OF AN ACTIVE WARRANT FOR DEFENDANT'S ARREST, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED (FOURTH DEPT))

CRIMINAL LAW, EVIDENCE.

FAILURE TO INSTRUCT THE JURY ON TWO REMOTE LESSER INCLUDED OFFENSES WAS HARMLESS ERROR, JURY WAS INSTRUCTED ON THE HIGHEST LESSER INCLUDED OFFENSE AND CONVICTED DEFENDANT OF THE TOP COUNT OF THE INDICTMENT (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined that the trial court's error in refusing the instruct the jury on manslaughter second and criminally negligent homicide was harmless error. The defendant was charged with murder and the trial court instructed the jury on manslaughter first degree as a lesser included offense. The jury convicted the defendant of both murder and manslaughter first. Because the jury convicted on the top count, and the jury was instructed on the top lesser included offense, the failure to instruct on the more remote lesser included offenses was deemed harmless error. The manslaughter first conviction was reversed as a lesser concurrent count:

> As set forth by the Court of Appeals, "where a court charges the next lesser included offense of the crime alleged in the indictment, but refuses to charge lesser degrees than that, . . . the defendant's conviction of the crime alleged in the indictment forecloses a challenge to the court's refusal to charge the remote lesser included offenses" (People v Boettcher, 69 NY2d 174, 180 [1987]). The premise underlying a determination of harmless error is that, when a jury convicts the defendant of the top (i.e., highest) charged offense and thereby excludes from the case the next lesser (i.e., intermediate) included offense, the verdict dispels any significant probability that the jury, had it been given the option, would have acquitted the defendant of both the highest and intermediate charged offenses and instead convicted the defendant of the even lesser (i.e., remote) included offense that was erroneously not charged ... . Thus, cases applying the analysis set forth in Boettcher hold that where the trial court charges the jury with the highest offense of murder in the second degree and the intermediate offense of manslaughter in the first degree, and the jury convicts the defendant of murder in the second degree, the defendant's challenge on appeal to the court's denial of a request to charge the remote offenses of manslaughter in the second degree and/or criminally negligent homicide is foreclosed, i.e., any error is harmless ... . **People v Mcintosh, 2018 NY Slip Op 04455, Fourth Dept 6-15-18**

CRIMINAL LAW (FAILURE TO INSTRUCT THE JURY ON TWO REMOTE LESSER INCLUDED OFFENSES WAS HARMLESS ERROR, JURY WAS INSTRUCTED ON THE FIRST LESSER INCLUDED OFFENSE AND CONVICTED DEFENDANT OF THE TOP COUNT OF THE INDICTMENT (FOURTH DEPT))/LESSER INCLUDED OFFENSES (FAILURE TO INSTRUCT THE JURY ON TWO REMOTE LESSER INCLUDED OFFENSES WAS HARMLESS ERROR, JURY WAS INSTRUCTED ON THE FIRST LESSER INCLUDED OFFENSE AND CONVICTED DEFENDANT OF THE TOP COUNT OF THE INDICTMENT (FOURTH DEPT))/JURY INSTRUCTIONS (CRIMINAL LAW, LESSER INCLUDED OFFENSES, FAILURE TO INSTRUCT THE JURY ON TWO REMOTE LESSER INCLUDED OFFENSES WAS HARMLESS ERROR, JURY WAS INSTRUCTED ON THE FIRST LESSER INCLUDED OFFENSE AND CONVICTED DEFENDANT OF THE TOP COUNT OF THE INDICTMENT (FOURTH DEPT))

CRIMINAL LAW, EVIDENCE.

SEIZURE OF CREDIT CARDS FROM UNDER THE HOOD OF DEFENDANT'S CAR WAS NOT THE RESULT OF AN ILLEGAL SEARCH, POLICE WERE FOLLOWING A PROCEDURE TO SAFEGUARD THE CAR FROM THEFT (FIRST DEPT).

The First Department determined the seizure of credit cards from under the hood of defendant's car was not the result of an illegal search. The police had validly impounded the car and were following a procedure which required that the car be disabled to thwart theft:

> Police entry into the car and under its hood was reasonable because it was done in compliance with the Police Department Patrol Guide's safeguarding procedure, requiring police to disable all vehicles being safeguarded, in order to prevent theft. The limited entry into the car was done to protect the owner's property, and was not an attempt to search for incriminating evidence, as shown by the fact that, upon discovering the credit cards in the hood, the police did not search any other part of the vehicle ... . The officers' failure to perform this safeguarding procedure within the 48-hour period allowed by the Patrol Guide, after which a vehicle is to be moved from the precinct to the Property Clerk's storage facility, was a minor deviation from procedure, and did not undermine the reasonableness of the limited search, where the remainder of the procedure was followed and, as noted, there was no indication that the police were using the procedure as a pretext to search for incriminating evidence ... . **People v Keita, 2018 NY Slip Op 04847, First Dept 6-28-18**

CRIMINAL LAW (SEIZURE OF CREDIT CARDS FROM UNDER THE HOOD OF DEFENDANT'S CAR WAS NOT THE RESULT OF AN ILLEGAL SEARCH, POLICE WERE FOLLOWING A PROCEDURE TO SAFEGUARD THE CAR FROM THEFT (FIRST DEPT))/SEARCH AND SEIZURE (SEIZURE OF CREDIT CARDS FROM UNDER THE HOOD OF DEFENDANT'S CAR WAS NOT THE RESULT OF AN ILLEGAL SEARCH, POLICE WERE FOLLOWING A PROCEDURE TO SAFEGUARD THE CAR FROM THEFT (FIRST DEPT))/EVIDENCE (CRIMINAL LAW, SEARCH AND SEIZURE, SEIZURE OF CREDIT CARDS FROM UNDER THE HOOD OF DEFENDANT'S CAR WAS NOT THE RESULT OF AN ILLEGAL SEARCH, POLICE WERE FOLLOWING A PROCEDURE TO SAFEGUARD THE CAR FROM THEFT (FIRST DEPT))/SUPPRESSION (CRIMINAL LAW, SEARCH AND SEIZURE, SEIZURE OF CREDIT CARDS FROM UNDER THE HOOD OF DEFENDANT'S CAR WAS NOT THE RESULT OF AN ILLEGAL SEARCH, POLICE WERE FOLLOWING A PROCEDURE TO SAFEGUARD THE CAR FROM THEFT (FIRST DEPT))

CRIMINAL LAW, EVIDENCE, APPEALS.

DEFENDANT DID NOT MOVE TO SUPPRESS INFORMATION OBTAINED FROM HIS CELL PHONE, COUNTY COURT ERRED IN SUPPRESSING THAT EVIDENCE, SUPPRESSION MOTION SHOULD HAVE BEEN DENIED (THIRD DEPT).

The Third Department, in an appeal by the People of a suppression ruling, determined the suppression motion should have been denied in its entirety. Defendant never made a motion to suppress information taken from his cell phone. Yet County Court apparently speculated that the police must have searched defendant's cell phone before the Miranda warnings were given:

> ... [T]he detectives approached defendant outside his place of employment and asked him to accompany them to the police station. Defendant voluntarily agreed and they drove him to the station without placing him in handcuffs. The videotaped statement indicates that, during the ride and before entering the interview room, they engaged in general conversation regarding defendant's background, education, employment and family life, but did not discuss the criminal investigation. Inside the interview room, defendant was initially not restrained. The detectives asked if he would like water and provided him a drink. Later, they obtained a cigarette and allowed him to smoke it, and permitted him to make a phone call. At the beginning of the conversation in the interview room, a detective administered Miranda warnings and defendant stated that he was willing to talk to them and answer questions. Defendant was not threatened or coerced during the interview.
>
> County Court did not rely on these facts, but instead focused on what it deemed "the troubling and unavoidable issue that, prior to entering the interview room and prior to Miranda warnings, . . . defendant's phone had already been seized by the police." The court highlighted the People's failure at the hearing to address this seizure of the phone even though, as discussed above, the People were not on notice that anything related to the phone was being challenged by defendant. The court chastised the People for failing to acknowledge or explain "the circumstances under which . . . defendant's phone was seized and potentially searched, pre-Miranda." The record contains no factual support for, and actually belies, the court's speculative assertion that the phone was searched before Miranda warnings were administered, because the video shows that, when the detective eventually brought the phone into the interview room and obtained defendant's consent to look at some of its features, defendant had to unlock the phone with either a password or swiping pattern. **People v Moore, 2018 NY Slip Op 04042, Third Dept 6-7-18**

CRIMINAL LAW (SUPPRESSION, DEFENDANT DID NOT MOVE TO SUPPRESS INFORMATION OBTAINED FROM HIS CELL PHONE, COUNTY COURT ERRED IN SUPPRESSING THAT EVIDENCE, SUPPRESSION MOTION SHOULD HAVE BEEN DENIED (THIRD DEPT))/EVIDENCE (CRIMINAL LAW, SUPPRESSION, DEFENDANT DID NOT MOVE TO SUPPRESS INFORMATION OBTAINED FROM HIS CELL PHONE, COUNTY COURT ERRED IN SUPPRESSING THAT EVIDENCE, SUPPRESSION MOTION SHOULD HAVE BEEN DENIED (THIRD DEPT))/APPEALS (CRIMINAL LAW, SUPPRESSION, PEOPLE'S APPEAL, DEFENDANT DID NOT MOVE TO SUPPRESS INFORMATION OBTAINED FROM HIS CELL PHONE, COUNTY COURT ERRED IN SUPPRESSING THAT EVIDENCE, SUPPRESSION MOTION SHOULD HAVE BEEN DENIED (THIRD DEPT))/SUPPRESSION (CRIMINAL LAW, DEFENDANT DID NOT MOVE TO SUPPRESS INFORMATION OBTAINED FROM HIS CELL PHONE, COUNTY COURT ERRED IN SUPPRESSING THAT EVIDENCE, SUPPRESSION MOTION SHOULD HAVE BEEN DENIED (THIRD DEPT))/SEARCH AND SEIZURE (SUPPRESSION, DEFENDANT DID NOT MOVE TO SUPPRESS INFORMATION OBTAINED FROM HIS CELL PHONE, COUNTY COURT ERRED IN SUPPRESSING THAT EVIDENCE, SUPPRESSION MOTION SHOULD HAVE BEEN DENIED (THIRD DEPT))

CRIMINAL LAW, EVIDENCE, APPEALS.

DECISION WITHHELD AND PEOPLE DIRECTED TO PROVIDE DEFENSE APPELLATE COUNSEL WITH TRIAL EXHIBITS COUNSEL WAS UNABLE TO ACCESS (THIRD DEPT).

The Third Department withheld decision and directed the People to provide defense counsel with certain trial exhibits counsel was unable to access prior to perfecting the appeal:

> Defendant contends, among other things, that the People deprived him of an opportunity to develop an effective argument on appeal by failing to provide him with certain video and photographic exhibits that were introduced into evidence at trial in a format that he could readily view ... . Specifically, defendant avers that, although the People provided him with copies of 14 DVDs introduced as exhibits at trial, he was unable to view the contents of exhibit Nos. 9, 10, 11, 12, 13, 14, 18 and 108.
>
> Defendant has a "fundamental right to appellate review of a criminal conviction" ... and, to that end, it is well-settled that the People "'must provide a record of trial sufficient to enable a defendant to present reviewable issues on appeal'" ... . Here, there is no dispute that the subject exhibits were admitted into evidence, were viewed by the juries at both of defendant's trials and are now a part of the record from which defendant may prepare his appellate arguments and this Court may conduct meaningful appellate review. Based upon our own efforts to view these exhibits, we find defendant's observation to have merit. **People v Haggray, 2018 NY Slip Op 04036, Third Dept 6-7-18**

CRIMINAL LAW DECISION WITHHELD AND PEOPLE DIRECTED TO PROVIDE DEFENSE APPELLATE COUNSEL WITH TRIAL EXHIBITS COUNSEL WAS UNABLE TO ACCESS (THIRD DEPT))/APPEALS (CRIMINAL LAW, DECISION WITHHELD AND PEOPLE DIRECTED TO PROVIDE DEFENSE APPELLATE COUNSEL WITH TRIAL EXHIBITS COUNSEL WAS UNABLE TO ACCESS (THIRD DEPT))/EVIDENCE (CRIMINAL LAW, APPEALS, DECISION WITHHELD AND PEOPLE DIRECTED TO PROVIDE DEFENSE APPELLATE COUNSEL WITH TRIAL EXHIBITS COUNSEL WAS UNABLE TO ACCESS (THIRD DEPT))

CRIMINAL LAW, EVIDENCE, APPEALS.

DEFENDANT'S EVIDENTIARY ARGUMENTS ARE VIEWED ON APPEAL THROUGH THE LENS OF THE JURY INSTRUCTIONS TO WHICH NO OBJECTIONS WERE MADE, NO NEED TO PRESENT SPECIFIC PROOF THE CAR DEALERSHIP WHICH WAS VANDALIZED WAS A PERSON (A CORPORATION IN THIS CONTEXT) WITHIN THE MEANING OF THE CRIMINAL MISCHIEF STATUTE, NO NEED TO PROVE THE PRECISE AMOUNT OF DAMAGE CAUSED BY THE DEFENDANT AS OPPOSED TO THE DAMAGE CAUSED BY ALL PARTICIPANTS, ORDERING RESTITUTION IN THE FULL AMOUNT OF THE DAMAGES, AS OPPOSED TO APPORTIONING THE DAMAGES AMONG ALL THE PARTICIPANTS, WAS NOT ERROR (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice NeMoyer, affirming defendant's criminal mischief conviction and the restitution order, looked at the evidentiary issues raised on appeal through the lens of the relevant jury instructions. Where there is no objection to the jury instructions, the proof required of the People is that which is laid out in the jury instructions. The indictment alleged that the defendant and several others vandalized cars at a dealership by scratching the cars with keys causing total damage in the amount of $40,000. On appeal defendant argued (1) the charged offense requires damage to property owned by a "person" and the People did not demonstrate that the car dealership was a "person" within the meaning of the statute, (2) the precise amount of damage attributable to the defendant was not proven, and (3) ordering defendant to pay restitution in the full amount of the damages was error. All of defendant's arguments were rejected:

> The court told the jury that defendant must have damaged the property of "another person" — not "another human being" — and it is common knowledge that personhood can and sometimes does attach to nonhuman entities like corporations or animals .... Indeed, the Court of Appeals has written that personhood is "not a question of biological or natural' correspondence"..., and we can "presume[]" that the jurors had " sufficient intelligence' to make [the] elementary logical inferences presupposed by the language of [the court's] charge" ... . In short, defendant's personhood argument effectively transforms an undefined but commonly understood term into an incorrectly defined term, and we decline to follow him down that path. ...
>
> ... [T]he jury was instructed — without objection — that "[i]f it is proven . . . that the defendant acted in concert with others, he is thus criminally liable for their conduct. The extent or degree of the defendant's participation in the crime does not matter" ... . Perhaps this instruction was inconsistent with section 20.15 ... but it still forecloses defendant's claim of factual insufficiency as to value. ...
>
> ... [T]he Court of Appeals previously upheld a restitution award that imposed the full value of the victim's loss on a single perpetrator, instead of apportioning the loss among the defendant and his accomplices ...— as defendant appears to seek here. **People v Graves, 2018 NY Slip Op 04503, Fourth Dept 6-15-18**

CRIMINAL LAW (DEFENDANT'S EVIDENTIARY ARGUMENTS ARE VIEWED ON APPEAL THROUGH THE LENS OF THE JURY INSTRUCTIONS TO WHICH NO OBJECTIONS WERE MADE, NO NEED TO PRESENT SPECIFIC PROOF THE CAR DEALERSHIP WHICH WAS VANDALIZED WAS A PERSON (A CORPORATION IN THIS CONTEXT) WITHIN THE MEANING OF THE CRIMINAL MISCHIEF STATUTE, NO NEED TO PROVE THE PRECISE AMOUNT OF DAMAGE CAUSED BY THE DEFENDANT AS OPPOSED TO THE DAMAGE CAUSED BY ALL THE PARTICIPANTS, ORDERING RESTITUTION IN THE FULL AMOUNT OF THE DAMAGES, AS OPPOSED TO APPORTIONING THE DAMAGES AMONG ALL THE PARTICIPANTS, WAS NOT ERROR (FOURTH DEPT))/EVIDENCE (CRIMINAL LAW, (DEFENDANT'S EVIDENTIARY ARGUMENTS ARE VIEWED ON APPEAL THROUGH THE LENS OF THE JURY INSTRUCTIONS TO WHICH NO OBJECTIONS WERE MADE, NO NEED TO PRESENT SPECIFIC PROOF THE CAR DEALERSHIP WHICH WAS VANDALIZED WAS A PERSON (A CORPORATION IN THIS CONTEXT) WITHIN THE MEANING OF THE CRIMINAL MISCHIEF STATUTE, NO NEED TO PROVE THE PRECISE AMOUNT OF DAMAGE CAUSED BY THE DEFENDANT AS OPPOSED TO THE DAMAGE CAUSED BY ALL THE PARTICIPANTS, ORDERING RESTITUTION IN THE FULL AMOUNT OF THE DAMAGES, AS OPPOSED TO APPORTIONING THE DAMAGES AMONG ALL THE PARTICIPANTS, WAS NOT ERROR (FOURTH DEPT))/APPEALS (CRIMINAL LAW, DEFENDANT'S EVIDENTIARY ARGUMENTS ARE VIEWED ON APPEAL THROUGH THE LENS OF THE JURY INSTRUCTIONS TO WHICH NO OBJECTIONS WERE MADE, NO NEED TO

PRESENT SPECIFIC PROOF THE CAR DEALERSHIP WHICH WAS VANDALIZED WAS A PERSON (A CORPORATION IN THIS CONTEXT) WITHIN THE MEANING OF THE CRIMINAL MISCHIEF STATUTE, NO NEED TO PROVE THE PRECISE AMOUNT OF DAMAGE CAUSED BY THE DEFENDANT AS OPPOSED TO THE DAMAGE CAUSED BY ALL THE PARTICIPANTS, ORDERING RESTITUTION IN THE FULL AMOUNT OF THE DAMAGES, AS OPPOSED TO APPORTIONING THE DAMAGES AMONG ALL THE PARTICIPANTS, WAS NOT ERROR (FOURTH DEPT))/RESTITUTION (CRIMINAL LAW, (DEFENDANT'S EVIDENTIARY ARGUMENTS ARE VIEWED ON APPEAL THROUGH THE LENS OF THE JURY INSTRUCTIONS TO WHICH NO OBJECTIONS WERE MADE, NO NEED TO PRESENT SPECIFIC PROOF THE CAR DEALERSHIP WHICH WAS VANDALIZED WAS A PERSON (A CORPORATION IN THIS CONTEXT) WITHIN THE MEANING OF THE CRIMINAL MISCHIEF STATUTE, NO NEED TO PROVE THE PRECISE AMOUNT OF DAMAGE CAUSED BY THE DEFENDANT AS OPPOSED TO THE DAMAGE CAUSED BY ALL THE PARTICIPANTS, ORDERING RESTITUTION IN THE FULL AMOUNT OF THE DAMAGES, AS OPPOSED TO APPORTIONING THE DAMAGES AMONG ALL THE PARTICIPANTS, WAS NOT ERROR (FOURTH DEPT))

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT DID NOT HAVE NOTICE OF OR A CHANCE TO OBJECT TO A 20 POINT ASSESSMENT MADE BY THE JUDGE SUA SPONTE, NEW HEARING ORDERED (THIRD DEPT).

The Third Department, ordering a new SORA hearing, determined defendant did not have notice of or an opportunity to object to a 20 point assessment made by the judge sua sponte:

> "A defendant has both a statutory and constitutional right to notice of points sought to be assigned to him or her so as to be afforded a meaningful opportunity to respond to that assessment" … . To that end, SORA requires the People to provide defendant with written notice, at least 10 days prior to the hearing, if they intend to seek a presumptive risk level classification that differs from the Board's recommendation along with their reasons for doing so… . Similarly, "a court's sua sponte departure from the Board's recommendation at the hearing, without prior notice, deprives the defendant of a meaningful opportunity to be respond" … . **People v Maus, 2018 NY Slip Op 04796, Third Dept 6-28-18**

CRIMINAL LAW (SEX OFFENDER REGISTRATION ACT (SORA), DEFENDANT DID NOT HAVE NOTICE OF OR A CHANCE TO OBJECT TO A 20 POINT ASSESSMENT MADE BY THE JUDGE SUA SPONTE, NEW HEARING ORDERED (THIRD DEPT))/SEX OFFENDER REGISTRATION ACT (SORA) (DEFENDANT DID NOT HAVE NOTICE OF OR A CHANCE TO OBJECT TO A 20 POINT ASSESSMENT MADE BY THE JUDGE SUA SPONTE, NEW HEARING ORDERED (THIRD DEPT))

DEFAMATION

DEFAMATION, MALICIOUS PROSECUTION.

DEFAMATION AND MALICIOUS PROSECUTION CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED, ELEMENTS EXPLAINED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined plaintiff had stated causes of action for malicious prosecution and defamation Defendant, Goyer, was the town deputy clerk and plaintiff was the town supervisor. Goyer had filed a harassment complaint against plaintiff alleging he physically prevented her from entering a conference room at the town hall. Plaintiff was acquitted and then brought this lawsuit:

> Accepting plaintiff's allegations as true, as we must, the complaint adequately alleges that Goyer "knowingly provided false information to the police" and such allegations are "sufficient to state that the complainant initiated the proceeding by playing an active role in the other party's arrest and prosecution" ... .
>
> The incident report — which was attached to and incorporated into the complaint — indicates that, on the evening in question, Goyer attempted to enter a conference room at the Town Hall when plaintiff stepped to the side and blocked her from entering. Goyer indicated that, when she attempted to then go around him, plaintiff "put his arm up in front of [her] to block [her]" and "reached in front of [her,] grabbed [certain office supplies and] tried to pull them out of [her] hand" while screaming "[g]et out" and "[y]ou can't come in here." The statements contained in the information, supporting deposition and incident report were thereafter "published and/or republished to the press." Inasmuch as these statements provide allegations of fact indicating that plaintiff subjected Goyer to unwanted physical contact while at the Town Hall, on the night of a Town Board meeting, at a time when plaintiff was acting in his official capacity as Town Supervisor, they provide "more than a general reflection upon [plaintiff]'s character or qualities" ... . **Higgins v Goyer, 2018 NY Slip Op 04067, Third Dept 6-7-18**

DEFAMATION (DEFAMATION AND MALICIOUS PROSECUTION CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED, ELEMENTS EXPLAINED (THIRD DEPT))/MALICIOUS PROSECUTION (DEFAMATION AND MALICIOUS PROSECUTION CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED, ELEMENTS EXPLAINED (THIRD DEPT))

DISCIPLINARY HEARINGS

DISCIPLINARY HEARINGS (INMATES).

PETITIONER WAS NEVER INFORMED OF HIS RIGHT TO CALL WITNESSES, DETERMINATION ANNULLED AND RECORD EXPUNGED (THIRD DEPT).

The Third Department annulled the determination and expunged the inmate's record because he was never informed of his right to call witnesses:

> While petitioner did not, at the hearing, request that the inmate be called to testify or demand that there be a further inquiry into his refusal... , the record does not reflect that petitioner was ever advised of his constitutional or regulatory right to call witnesses at the hearing ... . The constitutional right to call witnesses at a prison disciplinary proceeding "is not waivable in the absence of [an inmate] being informed of its existence"... . As such, the determination must be annulled. Given that petitioner's due process rights were violated and that this situation is comparable to the outright denial of the constitutional right to call witnesses, expungement is the proper remedy ... . **Matter of Ballard v Annucci, 2018 NY Slip Op 04625, Third Dept 6-21-18**

DISCIPLINARY HEARINGS (INMATES) (PETITIONER WAS NEVER INFORMED OF HIS RIGHT TO CALL WITNESSES, DETERMINATION ANNULLED AND RECORD EXPUNGED (THIRD DEPT))/EXPUNGEMENT (DISCIPLINARY HEARINGS (INMATES), PETITIONER WAS NEVER INFORMED OF HIS RIGHT TO CALL WITNESSES, DETERMINATION ANNULLED AND RECORD EXPUNGED (THIRD DEPT

DISCIPLINARY HEARINGS (INMATES).

PRISON'S FAILURE TO COMPLY WITH DEPARTMENT OF CORRECTIONS DIRECTIVE RE OPENING INMATES' MAIL REQUIRED ANNULMENT OF THE MISBEHAVIOR DETERMINATION (THIRD DEPT).

The Third Department annulled the misbehavior determination because there was no proof the superintendent provided written permission to open petitioner's mail as required by a Department of Corrections directive. All the disciplinary rule violations stemmed from the contents of the mail:

> Petitioner's sole claim is that the Superintendent did not provide written authorization pursuant to Department of Corrections and Community Supervision Directive No. 4422 (III) (B) (9) (see 7 NYCRR 720.3 [e]) for opening the outgoing correspondence that led to the investigation implicating him as the sender. Significantly, such correspondence provided the basis for all of the disciplinary rule violations of which petitioner was found guilty. The directive at issue specifically provides that "[o]utgoing correspondence . . . shall not be opened, inspected, or read without express written authorization from the facility superintendent" ... . It further states that "[s]uch written authorization shall set forth the specific facts forming the basis for the action" ... . Here, there was no proof presented that the Superintendent issued a written authorization supported by specific facts permitting the correction official to open the correspondence. Rather, the record suggests that the authorization was verbal, as no written instrument was ever produced and the Superintendent did not testify at the hearing. Under these circumstances, the determination of guilt must be annulled ... . **Matter of Sudler v Annucci, 2018 NY Slip Op 04629, Third Dept 6-21-18**

DISCIPLINARY HEARINGS (INMATES) (PRISON'S FAILURE TO COMPLY WITH DEPARTMENT OF CORRECTIONS DIRECTIVE RE OPENING INMATES' MAIL REQUIRED ANNULMENT OF THE MISBEHAVIOR DETERMINATION (THIRD DEPT))/MAIL (DISCIPLINARY HEARINGS (INMATES), PRISON'S FAILURE TO COMPLY WITH DEPARTMENT OF CORRECTIONS DIRECTIVE RE OPENING INMATES' MAIL REQUIRED ANNULMENT OF THE MISBEHAVIOR DETERMINATION (THIRD DEPT))

EDUCATION-SCHOOL LAW

EDUCATION-SCHOOL LAW, CONTRACT LAW, CONSTITUTIONAL LAW.

PROVISION OF THE EDUCATION LAW WHICH ALLOWS THE APPOINTMENT OF A RECEIVER TO TAKE OVER ALLEGEDLY FAILING SCHOOLS DOES NOT VIOLATE THE CONTRACT CLAUSE OF THE US CONSTITUTION (THIRD DEPT).

The Third Department, in a complex decision not fully summarized here, determined the provision of the Education Law which allows the appointment of a receiver to take over allegedly failing schools does not violate the Contract Clause of the US Constitution:

> ... [W]here a statute or regulation impairs a private contract, courts will defer to a legislature's rationale with regard to its necessity ... . Less deference is warranted where the statute or regulation "is self-serving and impairs the obligations of [the state's] own contracts" because "a [s]tate is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives" ... . Less deference may be warranted even where, as here, the state is not a party to an impaired public contract ... . "[F]or an impairment to be reasonable and necessary under less deference scrutiny, it must be shown that the state did not (1) consider impairing the contracts on par with other policy alternatives or (2) impose a drastic impairment when an evident and more moderate course would serve its purpose equally well nor (3) act unreasonably in light of the surrounding circumstances" ... .
>
> Assuming without deciding that the less deferential standard applies, we find that Education Law § 211-f (8) is reasonable and necessary both on its face and as applied. In context, the receivership agreement was necessary in order to implement available methods to address the immediate issues that were facing the struggling or persistent struggling schools. The statute provides that the Superintendent must act in accordance with the existing CBA [collective bargaining agreement], and, where, as here, a receivership agreement is requested, the statute limits the scope of the agreement — and impairment. No modification or impairment can be unilaterally imposed but instead must be negotiated. As applied, although an agreement was not reached with regard to all issues, the modifications imposed were applicable to the affected schools only for the time limited by the statute. In sum, because the statute and the agreements apply prospectively and limit the scope, application and duration of any modifications to existing agreements, while prohibiting any adverse financial impact, we find that it was reasonably designed and necessary to further the goal of helping students to succeed ... . **Matter of Buffalo Teachers Fedn., Inc. v Elia, 2018 NY Slip Op 04061, Third Dept 6-7-18**

EDUCATION-SCHOOL LAW (PROVISION OF THE EDUCATION LAW WHICH ALLOWS THE APPOINTMENT OF A RECEIVER TO TAKE OVER ALLEGEDLY FAILING SCHOOLS DOES NOT VIOLATE THE CONTRACT CLAUSE OF THE US CONSTITUTION (THIRD DEPT))/CONTRACT LAW (EDUCATION-SCHOOL LAW, CONSTITUTIONAL LAW, PROVISION OF THE EDUCATION LAW WHICH ALLOWS THE APPOINTMENT OF A RECEIVER TO TAKE OVER ALLEGEDLY FAILING SCHOOLS DOES NOT VIOLATE THE CONTRACT CLAUSE OF THE US CONSTITUTION (THIRD DEPT))/CONSTITUTIONAL LAW (EDUCATION-SCHOOL LAW, CONTRACT LAW, PROVISION OF THE EDUCATION LAW WHICH ALLOWS THE APPOINTMENT OF A RECEIVER TO TAKE OVER ALLEGEDLY FAILING SCHOOLS DOES NOT VIOLATE THE CONTRACT CLAUSE OF THE US CONSTITUTION (THIRD DEPT))/FAILING SCHOOLS (PROVISION OF THE EDUCATION LAW WHICH ALLOWS THE APPOINTMENT OF A RECEIVER TO TAKE OVER ALLEGEDLY FAILING SCHOOLS DOES NOT VIOLATE THE CONTRACT CLAUSE OF THE US CONSTITUTION (THIRD DEPT))/RECEIVERS (FAILING SCHOOLS, (PROVISION OF THE EDUCATION LAW WHICH ALLOWS THE APPOINTMENT OF A RECEIVER TO TAKE OVER ALLEGEDLY FAILING SCHOOLS DOES NOT VIOLATE THE CONTRACT CLAUSE OF THE US CONSTITUTION (THIRD DEPT))

EDUCATION-SCHOOL LAW, NEGLIGENCE.

DEFENDANTS SCHOOL BUS COMPANY AND BOARD OF EDUCATION DID NOT HAVE NOTICE CHILDREN WHO INJURED INFANT PLAINTIFF ON THE SCHOOL BUS WERE CAPABLE OF DANGEROUS CONDUCT, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant school bus company and board of education did not have notice that two children who allegedly injured infant plaintiff on the bus were capable of dangerous conduct:

> Schools are under a duty to adequately supervise children in their charge, and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision ... . Schools are not, however, "insurers of [the] safety [of students] . . . for they cannot reasonably be expected to continuously supervise and control all movements and activities of students"... . A school bus operator owes the "very same duty to the students entrusted to its care and custody"... . In cases involving injury caused by the acts of fellow students, to establish a breach of the duty to provide adequate supervision, plaintiffs must show that school authorities had "sufficiently specific knowledge or notice of the [alleged] dangerous conduct" ... .
>
> Here, the defendants established their prima facie entitlement to judgment as a matter of law by producing evidence that they had no knowledge or notice of the infant perpetrators' dangerous conduct, as there was no record of any inappropriate conduct by them, sexual or otherwise, prior to the incident ... . **Champagne v Lonero Tr., Inc., 2018 NY Slip Op 03959, Second Dept 6-6-18**

EDUCATION-SCHOOL LAW (NEGLIGENT SUPERVISION, DEFENDANTS SCHOOL BUS COMPANY AND BOARD OF EDUCATION DID NOT HAVE NOTICE CHILDREN WHO INJURED INFANT PLAINTIFF ON THE SCHOOL BUS WERE CAPABLE OF DANGEROUS CONDUCT, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/SCHOOL BUSES (NEGLIGENT SUPERVISION, DEFENDANTS SCHOOL BUS COMPANY AND BOARD OF EDUCATION DID NOT HAVE NOTICE CHILDREN WHO INJURED INFANT PLAINTIFF ON THE SCHOOL BUS WERE CAPABLE OF DANGEROUS CONDUCT, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/NEGLIGENCE (EDUCATION-SCHOOL LAW, NEGLIGENT SUPERVISION, DEFENDANTS SCHOOL BUS COMPANY AND BOARD OF EDUCATION DID NOT HAVE NOTICE CHILDREN WHO INJURED INFANT PLAINTIFF ON THE SCHOOL BUS WERE CAPABLE OF DANGEROUS CONDUCT, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/NEGLIGENT SUPERVISION (EDUCATION-SCHOOL LAW, DEFENDANTS SCHOOL BUS COMPANY AND BOARD OF EDUCATION DID NOT HAVE NOTICE CHILDREN WHO INJURED INFANT PLAINTIFF ON THE SCHOOL BUS WERE CAPABLE OF DANGEROUS CONDUCT, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))/ASSAULT (EDUCATION-SCHOOL LAW, NEGLIGENT SUPERVISION, DEFENDANTS SCHOOL BUS COMPANY AND BOARD OF EDUCATION DID NOT HAVE NOTICE CHILDREN WHO INJURED INFANT PLAINTIFF ON THE SCHOOL BUS WERE CAPABLE OF DANGEROUS CONDUCT, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT))

EDUCATION-SCHOOL LAW, NEGLIGENCE, EVIDENCE.

SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENT SUPERVISION PLAYGROUND ACCIDENT CASE PROPERLY DENIED, PLAINTIFFS' MOTION FOR A NEGATIVE INFERENCE JURY CHARGE BASED UPON THE SCHOOL DISTRICT'S DESTRUCTION OF VIDEO SURVEILLANCE EVIDENCE PROPERLY GRANTED (SECOND DEPT).

The Second Department determined the defendant-school district's motion for summary judgment in this negligent supervision case was properly denied. And plaintiffs' motion for an adverse or negative inference jury instruction based on the school district's destruction of video surveillance evidence was properly granted. Infant plaintiff, a fifth grader, fell from the top of a set of monkey bars while attempting a dangerous cartwheel to a handstand. Apparently he successfully did the stunt just before and fell on his second attempt. The school was aware that infant plaintiff needed some extra supervision because of his past actions. The school preserved only the video of the failed second attempt of the stunt and nothing prior:

> ... [T]here are triable issues of fact as to whether the infant plaintiff's alleged prior conduct and his reputation warranted more appropriate supervision, or heightened supervision, and, if so, whether such supervision would have prevented the accident ... . The evidence submitted in support of the defendant's motion for summary judgment did not establish, prima facie, that the accident occurred in so short a span of time that even the most intense supervision could not have prevented it... . Additionally, the doctrine of primary assumption of risk is not an applicable defense to the facts herein ... .
>
> ... [T]he plaintiffs demonstrated that the defendant had an obligation to preserve surveillance footage of the moments leading up to the infant plaintiff's accident at the time of its destruction, but negligently failed to do so. Given the nature of the infant plaintiff's injuries and the immediate documentation and investigation into the cause of the accident by the defendant's employees, the defendant was clearly on notice of possible litigation and, thus, under an obligation to preserve any evidence that might be needed for future litigation ... . The defendant failed to meet this obligation. The defendant acted negligently in unilaterally deciding to preserve only 24 seconds of footage and passively permitting the destruction of the remaining footage, portions of which were undisputedly relevant to the plaintiffs' case. **SM v Plainedge Union Free Sch. Dist., 2018 NY Slip Op 04370, Second Dept 6-13-18**

EDUCATION-SCHOOL LAW (NEGLIGENT SUPERVISION, SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENT SUPERVISION PLAYGROUND ACCIDENT CASE PROPERLY DENIED, PLAINTIFFS' MOTION FOR A NEGATIVE INFERENCE JURY CHARGE BASED UPON THE SCHOOL DISTRICT'S DESTRUCTION OF VIDEO SURVEILLANCE EVIDENCE PROPERLY GRANTED (SECOND DEPT))/NEGLIGENCE (EDUCATION-SCHOOL LAW, SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENT SUPERVISION PLAYGROUND ACCIDENT CASE PROPERLY DENIED, PLAINTIFFS' MOTION FOR A NEGATIVE INFERENCE JURY CHARGE BASED UPON THE SCHOOL DISTRICT'S DESTRUCTION OF VIDEO SURVEILLANCE EVIDENCE PROPERLY GRANTED (SECOND DEPT))/NEGLIGENT SUPERVISION (EDUCATION-SCHOOL LAW, SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENT SUPERVISION PLAYGROUND ACCIDENT CASE PROPERLY DENIED, PLAINTIFFS' MOTION FOR A NEGATIVE INFERENCE JURY CHARGE BASED UPON THE SCHOOL DISTRICT'S DESTRUCTION OF VIDEO SURVEILLANCE EVIDENCE PROPERLY GRANTED (SECOND DEPT))/EVIDENCE (SPOLIATION, NEGLIGENT SUPERVISION, SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENT SUPERVISION PLAYGROUND ACCIDENT CASE PROPERLY DENIED, PLAINTIFFS' MOTION FOR A NEGATIVE INFERENCE JURY CHARGE BASED UPON THE SCHOOL DISTRICT'S DESTRUCTION OF VIDEO SURVEILLANCE EVIDENCE PROPERLY GRANTED (SECOND DEPT))/SPOLIATION (NEGLIGENT SUPERVISION, SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENT SUPERVISION PLAYGROUND ACCIDENT CASE PROPERLY DENIED, PLAINTIFFS' MOTION FOR A NEGATIVE INFERENCE JURY CHARGE BASED UPON THE SCHOOL DISTRICT'S DESTRUCTION OF VIDEO SURVEILLANCE EVIDENCE PROPERLY GRANTED (SECOND DEPT))

EMPLOYMENT LAW

TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE. EMPLOYMENT LAW, CIVIL PROCEDURE.

THE PATTERN JURY INSTRUCTIONS FOR TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE ARE WRONG, THE INDEPENDENT CRIME OR TORT ELEMENT IS A FACTUAL QUESTION FOR THE JURY AND SHOULD NOT BE DECIDED AS A MATTER OF LAW BY THE COURT, MOTION TO SET ASIDE THE $5 MILLION VERDICT SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined defendant's motion to set aside the verdict based upon flawed jury instructions should have been granted. Plaintiff was awarded a $5 million verdict based upon complaints made by the defendant, who taught at the school, which led to plaintiff's firing from her position as superintendent of the NYS School for the Deaf. The Fourth Department determined the pattern jury instructions, which the trial court followed, do not state the correct way to instruct a jury on the elements of tortious interference with prospective economic advantage. One of the elements is the commission of an independent crime or tort. The pattern jury instructions indicate that whether an independent crime or tort has been committed should be determined by the court as a matter of law. The Fourth Department disagreed and held that whether defendant committed an independent crime or tort is a factual question for the jury:

> To state a cause of action for tortious interference with prospective economic advantage, "a plaintiff must plead that the defendant directly interfered with a third party and that the defendant either employed wrongful means or acted for the sole purpose of inflicting intentional harm on plaintiff[]" ... . The term "[w]rongful means" has been defined by the Court of Appeals as conduct amounting "to a crime or an independent tort" ... . This definition was a refinement to the ... previous description of the standard, which required "more culpable conduct on the part of the defendant" for the interference when there is no breach of an existing contract. ..." [M]ore culpable' conduct" [haw been defined] as including the "wrongful means" ... . Wrongful means include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract ... .
>
> ... [T]he determination whether particular facts constitute the independent tort is almost always a factual determination best left to the jury. Thus, while the court should evaluate the evidence to decide which independent tort(s) fits the fact pattern presented, the disputed underlying elements of the independent tort should still be charged to the jury. **Ray v Stockton, 2018 NY Slip Op 04861, Fourth Dept 6-29-18**

TORTIOUS INTERFERENCE WITH A PROSPECTIVE ECONOMIC ADVANTAGE (THE PATTERN JURY INSTRUCTIONS FOR TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE ARE WRONG, THE INDEPENDENT CRIME OR TORT ELEMENT IS A FACTUAL QUESTION FOR THE JURY AND SHOULD NOT BE DECIDED AS A MATTER OF LAW BY THE COURT, MOTION TO SET ASIDE THE $5 MILLION VERDICT SHOULD HAVE BEEN GRANTED (FOURTH DEPT))/EMPLOYMENT LAW (THE PATTERN JURY INSTRUCTIONS FOR TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE ARE WRONG, THE INDEPENDENT CRIME OR TORT ELEMENT IS A FACTUAL QUESTION FOR THE JURY AND SHOULD NOT BE DECIDED AS A MATTER OF LAW BY THE COURT, MOTION TO SET ASIDE THE $5 MILLION VERDICT SHOULD HAVE BEEN GRANTED (FOURTH DEPT))/CIVIL PROCEDURE (THE PATTERN JURY INSTRUCTIONS FOR TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE ARE WRONG, THE INDEPENDENT CRIME OR TORT ELEMENT IS A FACTUAL QUESTION FOR THE JURY AND SHOULD NOT BE DECIDED AS A MATTER OF LAW BY THE COURT, MOTION TO SET ASIDE THE $5 MILLION VERDICT SHOULD HAVE BEEN GRANTED (FOURTH DEPT))/JURY INSTRUCTIONS (THE PATTERN JURY INSTRUCTIONS FOR TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE ARE WRONG, THE INDEPENDENT CRIME OR TORT ELEMENT IS A FACTUAL QUESTION FOR THE JURY AND SHOULD NOT BE DECIDED AS A MATTER OF LAW BY THE COURT, MOTION TO SET ASIDE THE $5 MILLION VERDICT SHOULD HAVE BEEN GRANTED (FOURTH DEPT))

EMPLOYMENT LAW, LABOR LAW, ATTORNEYS.

ALTHOUGH PLAINTIFF LOST HER LABOR LAW 740 WRONGFUL TERMINATION TRIAL, SUPREME COURT SHOULD NOT HAVE AWARDED ATTORNEY'S FEES TO DEFENDANT, PLAINTIFF'S CLAIM WAS NOT BASELESS (SECOND DEPT).

The Second Department, modifying Supreme Court, determined the court should not have awarded attorney's fees to the defendant in this Labor Law 740 action. Plaintiff had alleged ongoing sterility problems in defendant's operating room. Plaintiff lost the trial, in which she claimed she had been wrongfully terminated because of her complaints. The Second Department found that her claims were not without basis and, therefore, the award of attorney's fees to defendant was an abuse of discretion:

> Labor Law § 740(6) provides that a court, in its discretion, may award an employer attorneys' fees and costs if it determines that the employee's action is " without basis in law or in fact'" ... . Here, the trial record included testimonial and documentary evidence of the plaintiff's numerous complaints about ongoing sterility problems in the operating room, which problems arguably constituted a violation of applicable regulations and posed a present, substantial, and specific danger to patient health. The plaintiff and other witnesses testified that these issues arose hundreds of times over the relevant time period and were not seriously addressed until after the plaintiff finally complained to her supervisor's supervisor. The plaintiff's annual performance evaluations demonstrate that she met or exceeded expectations throughout her tenure as a nurse manager and, despite identifying areas for improvement, did not indicate a risk of dismissal until after she complained to upper management. While ultimately unpersuasive in light of the defendant's evidence, the plaintiff's action "cannot reasonably be characterized as being without basis in law or in fact'" ... . The Supreme Court therefore improvidently exercised its discretion in awarding the defendant attorneys' fees and costs pursuant to Labor Law § 740(6). **Berde v North Shore- Long Is. Jewish Health Sys., Inc., 2018 NY Slip Op 03955, Second Dept 6-6-18**

EMPLOYMENT LAW (WRONGFUL TERMINATION, ALTHOUGH PLAINTIFF LOST HER LABOR LAW 740 WRONGFUL TERMINATION TRIAL, SUPREME COURT SHOULD NOT HAVE AWARDED ATTORNEY'S FEES TO DEFENDANT, PLAINTIFF'S CLAIM WAS NOT BASELESS (SECOND DEPT))/LABOR LAW (WRONGFUL TERMINATION, ALTHOUGH PLAINTIFF LOST HER LABOR LAW 740 WRONGFUL TERMINATION TRIAL, SUPREME COURT SHOULD NOT HAVE AWARDED ATTORNEY'S FEES TO DEFENDANT, PLAINTIFF'S CLAIM WAS NOT BASELESS (SECOND DEPT))/ATTORNEYS (FEES, WRONGFUL TERMINATION, ALTHOUGH PLAINTIFF LOST HER LABOR LAW 740 WRONGFUL TERMINATION TRIAL, SUPREME COURT SHOULD NOT HAVE AWARDED ATTORNEY'S FEES TO DEFENDANT, PLAINTIFF'S CLAIM WAS NOT BASELESS (SECOND DEPT))/ATTORNEY'S FEES (WRONGFUL TERMINATION, ALTHOUGH PLAINTIFF LOST HER LABOR LAW 740 WRONGFUL TERMINATION TRIAL, SUPREME COURT SHOULD NOT HAVE AWARDED ATTORNEY'S FEES TO DEFENDANT, PLAINTIFF'S CLAIM WAS NOT BASELESS (SECOND DEPT))/WRONGFUL TERMINATION (LABOR LAW 740, ALTHOUGH PLAINTIFF LOST HER LABOR LAW 740 WRONGFUL TERMINATION TRIAL, SUPREME COURT SHOULD NOT HAVE AWARDED ATTORNEY'S FEES TO DEFENDANT, PLAINTIFF'S CLAIM WAS NOT BASELESS (SECOND DEPT))

ENVIRONMENTAL LAW

ENVIRONMENTAL LAW, MUNICIPAL LAW.

LOCAL LAW REQUIRING A PERMIT FOR THE TRANSPORT OF WASTE WITHIN THE COUNTY WAS NOT PREEMPTED BY STATE LAW (WHICH ALSO REQUIRED A PERMIT) AND DID NOT VIOLATE THE COMMERCE CLAUSE, PETITIONER PROPERLY FINED FOR FAILURE TO OBTAIN A COUNTY PERMIT (SECOND DEPT).

The Second Department determined that the Westchester County Solid Waste Commission properly found that petitioner had not obtained a permit to allow the transport of waste within Westchester County and imposed a $15,000 fine. Petitioner had obtained a permit from the state Department of Environmental Conservation (DEC) and argued that the Westchester County law was preempted by the state law and violated the Commerce Clause. The Second Department rejected those arguments:

> "The constitutional home rule provision confers broad police power upon local government relating to the welfare of its citizens"... . In instances where the State has demonstrated its intent to preempt an entire field and preclude any further local regulation, a local law that regulates the same subject matter is considered inconsistent and will not be given effect. "It is . . . well settled that, if a town or other local government is otherwise authorized to legislate, it is not forbidden to do so unless the State, expressly or impliedly, has evinced an unmistakable desire to avoid the possibility that the local legislation will not be on all fours with that of the State" ... . The legislature's intent to preempt a particular area can be inferred from a declaration of policy or from a comprehensive and detailed scheme in a particular area ... . However, the fact that State and local laws touch upon the same area is insufficient to support a determination that the State law has preempted the entire field of regulation in a given area ... .
>
> In Monroe-Livingston Sanitary Landfill v Town of Caledonia (51 NY2d 679, 683-684), the Court of Appeals held that the State had not preempted the field of waste management through the solid waste disposal provisions that then existed in the Environmental Conservation Law. Eight years after the decision in Monroe-Livingston, the Legislature added the Solid Waste Management Act of 1988 (hereinafter the Act) to the Environmental Conservation Law. Had the Legislature intended to preempt the local regulation of solid waste management, it could have expressly said so in the Act. **Matter of MVM Constr., LLC v Westchester County Solid Waste Commn., 2018 NY Slip Op 04731, Second Dept 6-27-18**

ENVIRONMENTAL LAW (LOCAL LAW REQUIRING A PERMIT FOR THE TRANSPORT OF WASTE WITHIN THE COUNTY WAS NOT PREEMPTED BY STATE LAW (WHICH ALSO REQUIRED A PERMIT) AND DID NOT VIOLATE THE COMMERCE CLAUSE, PETITIONER PROPERLY FINED FOR FAILURE TO OBTAIN A COUNTY PERMIT (SECOND DEPT))/MUNICIPAL LAW (ENVIRONMENTAL LAW, LOCAL LAW REQUIRING A PERMIT FOR THE TRANSPORT OF WASTE WITHIN THE COUNTY WAS NOT PREEMPTED BY STATE LAW (WHICH ALSO REQUIRED A PERMIT) AND DID NOT VIOLATE THE COMMERCE CLAUSE, PETITIONER PROPERLY FINED FOR FAILURE TO OBTAIN A COUNTY PERMIT (SECOND DEPT))/WASTE (ENVIRONMENTAL LAW, MUNICIPAL LAW, LOCAL LAW REQUIRING A PERMIT FOR THE TRANSPORT OF WASTE WITHIN THE COUNTY WAS NOT PREEMPTED BY STATE LAW (WHICH ALSO REQUIRED A PERMIT) AND DID NOT VIOLATE THE COMMERCE CLAUSE, PETITIONER PROPERLY FINED FOR FAILURE TO OBTAIN A COUNTY PERMIT (SECOND DEPT))

EVIDENCE

EVIDENCE.

SURVEILLANCE VIDEO PROPERLY EXCLUDED, IT WAS NOT AUTHENTICATED (SECOND DEPT).

The Second Department determined Supreme Court properly refuse to admit a surveillance video because it was not properly authenticated:

> "Testimony from [a] videographer that he [or she] took the video, that it correctly reflects what he [or she] saw, and that it has not been altered or edited is normally sufficient to authenticate a videotape" ... . Where the videographer is not called as a witness, the video can still be authenticated with testimony that the video "truly and accurately represents what was before the camera"... . Furthermore, "[e]vidence establishing the chain of custody of the videotape may additionally buttress its authenticity and integrity, and even allow for acceptable inferences of reasonable accuracy and freedom from tampering" ... . Here, given the inability of the witness to testify regarding the editing of the master recording and the accuracy of the video excerpt, and his lack of personal knowledge as to the creation of the proffered disc and how it came into the possession of the plaintiff's attorneys, we agree with the court's determination that the plaintiff failed to properly authenticate the video excerpt ... . **Torres v Hickman, 2018 NY Slip Op 04372, Second Dept 6-13-18**

EVIDENCE (VIDEO, SURVEILLANCE VIDEO PROPERLY EXCLUDED, IT WAS NOT PROPERLY AUTHENTICATED (SECOND DEPT))/AUTHENTICATION (EVIDENCE, SURVEILLANCE VIDEO PROPERLY EXCLUDED, IT WAS NOT PROPERLY AUTHENTICATED (SECOND DEPT))/VIDEO (EVIDENCE, AUTHENTICATION, SURVEILLANCE VIDEO PROPERLY EXCLUDED, IT WAS NOT PROPERLY AUTHENTICATED (SECOND DEPT))/AUTHENTICATION (EVIDENCE, SURVEILLANCE VIDEO PROPERLY EXCLUDED, IT WAS NOT PROPERLY AUTHENTICATED (SECOND DEPT))

FAMILY LAW

FAMILY LAW.

DURATION OF ORDERS OF PROTECTION FOR A BIOLOGICAL GRANDFATHER AND A STEPGRANDFATHER EXPLAINED (THIRD DEPT).

The Third Department discussed the allowed duration of orders of protection for a biological grandfather and a stepgrandfather:

> Family Ct Act § 1056 (4) provides that "[t]he court may enter an order of protection[,] independently of any other order made under this part, against a person who was a member of the child's household or a person legally responsible . . . and who is no longer a member of such household at the time of the disposition and who is not related by blood or marriage to the child or a member of the child's household. [Such] order of protection . . . may be for any period of time up to the child's eighteenth birthday." Because Harold J. is the biological grandfather of Annabella and Caleb J., the orders of protection as to these children must be modified to reflect an expiration date ... one year from disposition of the matter ... .
>
> The familial relationship between Makayla and Harold J. warrants slightly more analysis as Harold J. is not Makayla's biological grandfather, but rather is related to her through his son's marriage to Makayla's mother. This raises the issue of whether a stepgrandparent is related to a stepgrandchild by marriage for the purposes of Family Ct Act § 1056 (4). We conclude that they are not. This conclusion is supported by the specific language in the statute, "related by . . . marriage" ... , rather than the broader and more inclusive concept of "affinity," which is used elsewhere in the Family Ct Act ... . Further, a stepgrandparent has no enforceable legal right to have contact with a stepgrandchild as a stepgrandparent lacks standing to pursue visitation ... . Thus, although Family Ct Act § 1056 (4) limits the duration of orders of protection against a stepparent who is related to a child by and through his or her own marriage to the child's mother or father, these limitations do not apply to a stepgrandparent, whose relationship to the child is attenuated. Therefore, because Harold J.'s relationship to Makayla is not established by his own marriage, but rather through his son's marriage, it was statutorily permissible, in this regard, for Family Court to issue an order of protection until Makayla's eighteenth birthday. Our analysis does not end here, however, as Family Ct Act § 1056 (4) prohibits orders of protection until a child's eighteenth birthday if the order is against someone who is related by blood or marriage to a member of the child's household. Therefore, if, at the time of disposition, Makayla resided in the same household as Annabella and Caleb J., the order of protection as to Makayla could not exceed one year ... . Inasmuch as we cannot discern from the record whether this is the case, the matter must be remitted for the purpose of making this determination. **Matter of Makayla I. (Caleb K.), 2018 NY Slip Op 04047, Third Dept 6-7-18**

FAMILY LAW (ORDERS OF PROTECTION, DURATION OF ORDERS OF PROTECTION FOR A BIOLOGICAL GRANDFATHER AND A STEPGRANDFATHER EXPLAINED (THIRD DEPT))/ORDERS OF PROTECTION (FAMILY LAW, DURATION OF ORDERS OF PROTECTION FOR A BIOLOGICAL GRANDFATHER AND A STEPGRANDFATHER EXPLAINED (THIRD DEPT))

FAMILY LAW.

SUSPENDED JUDGMENT COMMITTING RESPONDENT TO JAIL FOR FAILURE TO MAKE CHILD SUPPORT PAYMENTS SHOULD NOT HAVE BEEN REVOKED WITHOUT A HEARING (THIRD DEPT).

The Third Department, reversing Family Court, determined a suspended judgment should not have been revoked without a hearing:

> ... [R]espondent consented to an order confirming the Support Magistrate's finding that he willfully violated his child support obligation. Family Court suspended judgment on the condition that respondent make certain minimum payments. After respondent failed to make the requisite payments, petitioner, in November 2015, filed a violation petition against him. Following an appearance in April 2016, it was revealed that respondent had been recently employed and the child support payments had been made. As a consequence, Family Court continued to suspend judgment and the matter was adjourned. At a November 2016 appearance, petitioner advised Family Court that, although it had been receiving payments directly from respondent's employer, such payments had ceased in early October 2016. Inasmuch as respondent failed to personally appear in November 2016, a warrant was issued for his arrest. At an appearance on January 4, 2017, respondent's counsel requested a hearing to call respondent's employer as a witness to determine why payments were not being made to petitioner. Respondent's counsel inquired whether he should subpoena the employer and, although Family Court did not explicitly respond to this inquiry, the court noted that a hearing "could at least start." At the January 17, 2017 appearance, Family Court refused to let respondent call the subpoenaed witness. Family Court noted that a hearing was unnecessary because respondent did not dispute that payments had not been made and, therefore, good cause existed to revoke the suspended judgment. Family Court sentenced respondent to a 90-day jail term and imposed a purge amount of $3,507.50. ...
>
> Family Court erred in revoking the suspended judgment without first conducting an evidentiary hearing ... . Given respondent's liberty interest at stake ... , he was entitled to present witnesses on the issue of whether good cause existed to revoke the suspended judgment ... . **Matter of Madison County Support Collection Unit v Campbell, 2018 NY Slip Op 04049, Third Dept 6-7-18**

FAMILY LAW (SUSPENDED JUDGMENT COMMITTING RESPONDENT TO JAIL FOR FAILURE TO MAKE CHILD SUPPORT PAYMENTS SHOULD NOT HAVE BEEN REVOKED WITHOUT A HEARING (THIRD DEPT))/CHILD SUPPORT (SUSPENDED JUDGMENT COMMITTING RESPONDENT TO JAIL FOR FAILURE TO MAKE CHILD SUPPORT PAYMENTS SHOULD NOT HAVE BEEN REVOKED WITHOUT A HEARING (THIRD DEPT))/SUSPENDED JUDGMENT (FAMILY LAW, CHILD SUPPORT, SUSPENDED JUDGMENT COMMITTING RESPONDENT TO JAIL FOR FAILURE TO MAKE CHILD SUPPORT PAYMENTS SHOULD NOT HAVE BEEN REVOKED WITHOUT A HEARING (THIRD DEPT))

FAMILY LAW.

FAMILY COURT SHOULD HAVE SET A SPECIFIC AND DEFINITIVE VISITATION SCHEDULE, MATTER REMITTED (FOURTH DEPT).

The Fourth Department, modifying Family Court, determined Family Court should have set a specific and definitive visitation schedule:

> Respondent mother appeals from an amended order that, inter alia, granted petitioner father's petition to modify a prior custody order by awarding him primary physical custody of their daughter. We agree with the mother that Family Court erred in failing to set a specific and definitive visitation schedule ... . We therefore modify the amended order by striking from the first ordering paragraph the words "and subject to periods of visitation with the Mother and the Father shall encourage [the child] to visit with her Mother," and we remit the matter to Family Court to fashion a specific and definitive schedule for visitation between the mother and daughter. **Matter of Montes v Johnson, 2018 NY Slip Op 04194, Fourth Dept 6-8-18**

FAMILY LAW (VISITATION, FAMILY COURT SHOULD HAVE SET A SPECIFIC AND DEFINITIVE VISITATION SCHEDULE, MATTER REMITTED (FOURTH DEPT))/VISITATION (FAMILY LAW, FAMILY COURT SHOULD HAVE SET A SPECIFIC AND DEFINITIVE VISITATION SCHEDULE, MATTER REMITTED (FOURTH DEPT))

FAMILY LAW.

AN ADOPTIVE PARENT MAY BE EQUITABLY ESTOPPED FROM DENYING THAT HER FORMER SAME-SEX PARTNER, WITH WHOM SHE HAD AN AGREEMENT TO ADOPT A CHILD, HAS STANDING TO SEEK JOINT CUSTODY, MATTER REMITTED FOR PRESENTING EVIDENCE ON AND CONSIDERATION OF THAT ISSUE (FIRST DEPT).

The First Department, in a full-fledged, comprehensive opinion by Justice Gische, determined the issue of whether KG, on equitable estoppel grounds, had standing to seek custody of a child adopted by her former same-sex partner, CH, required remittal because the issue was not considered by Supreme Court. The couple had an agreement to raise an adopted child. The First Department found ample support in the record for Supreme Court's factual finding that the agreement was terminated when the couple's relationship dissolved before the child was adopted. The fact that the agreement was deemed terminated did not, however, prohibit the court from considering whether CH was equitably estopped from denying that KG had standing to seek custody:

> Although prior to Brooke [28 NY3d 1] the doctrine of equitable estoppel was not available to establish standing on behalf of nonbiological, nonadoptive parents, it has been relied upon by New York courts in resolving many family disputes involving children. For instance, the legal doctrine has been applied to prevent an adult from denying paternity where a child has justifiably relied upon the representations of a man that he is the father and a parent-child relationship has developed ... ,It has also been applied to prevent a biological father from asserting paternity when he has acquiesced in the establishment of a strong parent-child bond between the child and another man ... . Recently, it was successfully invoked to prevent a sperm donor from asserting paternity to a child born in an intact marriage ... . A unifying characteristic of these cases is the protection of " the status interests of a child in an already recognized and operative parent-child relationship'" ... . Equitable estoppel requires careful scrutiny of the child's relationship with the relevant adult and is ultimately based upon the best interest of the child ... . Likewise, in the context of standing under Domestic Relations Law § 70, equitable estoppel concerns whether a child has a bonded and de facto parental relationship with a nonbiological, nonadoptive adult. The focus is and must be on the child ... . It is for this reason that the child's point of view is crucial whenever equitable estoppel is raised. * * *
>
> We recognize that not every loving relationship that a child has with an adult will confer standing under Domestic Relations Law § 70, no matter how close or committed. It requires a relationship that demonstrates the relevant adult's permanent, unequivocal, committed and responsible parental role in the child's life. The underpinning of an equitable estoppel inquiry is whether the actual relationship between the child and relevant adult rises to the level of parenthood. Anything less would interfere with the biological or adoptive parent's right to decide with whom his or her child may associate ... . Consent, whether express or implied, is an important consideration that bears upon the issue. It may be that in this case the issue of CH's consent becomes a predominant consideration in the ultimate determination of whether equitable estoppel can be established. We only hold that the record developed at trial does not permit us to make the full consideration necessary to finally determine the issue of equitable estoppel at this point.
>
> Because the record on equitable estoppel is incomplete, we remand this matter for further proceedings consistent with this decision. **Matter of K.G. v C.H., 2018 NY Slip Op 04683, First Dept 6-26-18**

FAMILY LAW (AN ADOPTIVE PARENT MAY BE EQUITABLY ESTOPPED FROM DENYING THAT HER FORMER SAME-SEX PARTNER, WITH WHOM SHE HAD AN AGREEMENT TO ADOPT A CHILD, HAS STANDING TO SEEK JOINT CUSTODY, MATTER REMITTED FOR PRESENTING EVIDENCE ON AND CONSIDERATION OF THAT ISSUE (FIRST DEPT))/EQUITABLE ESTOPPEL (FAMILY LAW, AN ADOPTIVE PARENT MAY BE EQUITABLY ESTOPPED FROM DENYING THAT HER FORMER SAME-SEX PARTNER, WITH WHOM SHE HAD AN AGREEMENT TO ADOPT A CHILD, HAS STANDING TO SEEK JOINT CUSTODY, MATTER REMITTED FOR PRESENTING EVIDENCE ON AND CONSIDERATION OF THAT ISSUE (FIRST DEPT))/CUSTODY (ADOPTIVE PARENT MAY BE EQUITABLY ESTOPPED FROM DENYING THAT HER FORMER SAME-SEX PARTNER, WITH WHOM SHE HAD AN AGREEMENT TO ADOPT A CHILD, HAS STANDING TO SEEK JOINT CUSTODY, MATTER REMITTED FOR PRESENTING EVIDENCE ON AND CONSIDERATION OF THAT ISSUE (FIRST DEPT))/STANDING (FAMILY LAW, CUSTODY, PARENT, AN ADOPTIVE PARENT MAY BE EQUITABLY ESTOPPED FROM DENYING THAT HER FORMER SAME-SEX

PARTNER, WITH WHOM SHE HAD AN AGREEMENT TO ADOPT A CHILD, HAS STANDING TO SEEK JOINT CUSTODY, MATTER REMITTED FOR PRESENTING EVIDENCE ON AND CONSIDERATION OF THAT ISSUE (FIRST DEPT))/PARENT (CUSTODY, AN ADOPTIVE PARENT MAY BE EQUITABLY ESTOPPED FROM DENYING THAT HER FORMER SAME-SEX PARTNER, WITH WHOM SHE HAD AN AGREEMENT TO ADOPT A CHILD, HAS STANDING TO SEEK JOINT CUSTODY, MATTER REMITTED FOR PRESENTING EVIDENCE ON AND CONSIDERATION OF THAT ISSUE (FIRST DEPT))/SAME-SEX PARTNERS (FAMILY LAW, PARENT, CUSTODY, AN ADOPTIVE PARENT MAY BE EQUITABLY ESTOPPED FROM DENYING THAT HER FORMER SAME-SEX PARTNER, WITH WHOM SHE HAD AN AGREEMENT TO ADOPT A CHILD, HAS STANDING TO SEEK JOINT CUSTODY, MATTER REMITTED FOR PRESENTING EVIDENCE ON AND CONSIDERATION OF THAT ISSUE (FIRST DEPT))/ADOPTION (PARENT, SAME-SEX PARTNERS, CUSTODY, STANDING, AN ADOPTIVE PARENT MAY BE EQUITABLY ESTOPPED FROM DENYING THAT HER FORMER SAME-SEX PARTNER, WITH WHOM SHE HAD AN AGREEMENT TO ADOPT A CHILD, HAS STANDING TO SEEK JOINT CUSTODY, MATTER REMITTED FOR PRESENTING EVIDENCE ON AND CONSIDERATION OF THAT ISSUE (FIRST DEPT))/DOMESTIC RELATIONS LAW (PARENT, SAME-SEX PARTNERS, CUSTODY, STANDING, AN ADOPTIVE PARENT MAY BE EQUITABLY ESTOPPED FROM DENYING THAT HER FORMER SAME-SEX PARTNER, WITH WHOM SHE HAD AN AGREEMENT TO ADOPT A CHILD, HAS STANDING TO SEEK JOINT CUSTODY, MATTER REMITTED FOR PRESENTING EVIDENCE ON AND CONSIDERATION OF THAT ISSUE (FIRST DEPT))

FAMILY LAW, APPEALS.

FOURTEEN YEAR OLD CHILD HAD THE STATUTORY RIGHT TO WAIVE HIS PRESENCE AT THE PERMANENCY HEARING AND SHOULD NOT HAVE BEEN ORDERED TO APPEAR, APPEAL HEARD AS AN EXCEPTION TO THE MOOTNESS DOCTRINE (FOURTH DEPT).

The Fourth Department, reversing Family Court, in a full-fledged opinion by Justice Troutman, determined the 14-year-old child had the statutory right to waive his presence at the permanency hearing and the judge should not have ordered his presence. Although the hearing had been held, the appeal was heard under as an exception to the mootness doctrine because the issue was likely to recur:

> The child was freed for adoption in 2014. A permanency hearing was scheduled for March 30, 2017, and notice of the hearing was provided to the child, who was then 14 years old. One week before the scheduled hearing date, the Attorney for the Child (AFC) filed a form indicating that the child, after consultation with the AFC, waived his right to participate in the hearing. The AFC appeared at the hearing on the child's behalf and reiterated that the child had waived his right to participate in the hearing. The court stated, however, that it was "required by law to have some communication" with the child, and that the child would therefore be required to appear at the next scheduled hearing date. ...
>
> Here, the statutory language is clear and unambiguous. Although the permanency hearing must include "an age appropriate consultation with the child" (Family Ct Act § 1090-a [a] [1]), that requirement may not "be construed to compel a child who does not wish to participate in his or her permanency hearing to do so" ... . The choice belongs to the child. Indeed, "[a] child age fourteen and older shall be permitted to participate in person in all or any portion of his or her permanency hearing in which he or she chooses to participate" ... . Moreover, "a child who has chosen to participate in his or her permanency hearing shall choose the manner in which he or she shall participate, which may include participation in person, by telephone or available electronic means, or the issuance of a written statement to the court" ... . Although the court may limit the participation of a child under the age of 14 based on the best interests of the child... , the court lacks the authority to compel the participation of a child who has waived his or her right to participate in a permanency hearing after consultation with his or her attorney ... . **Matter of Shawn S., 2018 NY Slip Op 04208, Fourth Dept 6-8-18**

FAMILY LAW (PERMANENCY HEARING, FOURTEEN YEAR OLD CHILD HAD THE STATUTORY RIGHT TO WAIVE HIS PRESENCE AT THE PERMANENCY HEARING AND SHOULD NOT HAVE BEEN ORDERED TO APPEAR, APPEAL HEARD AS AN EXCEPTION TO THE MOOTNESS DOCTRINE (FOURTH DEPT))/APPEALS (FAMILY LAW, MOOTNESS, FOURTEEN YEAR OLD CHILD HAD THE STATUTORY RIGHT TO WAIVE HIS PRESENCE AT THE PERMANENCY HEARING AND SHOULD NOT HAVE BEEN ORDERED TO APPEAR, APPEAL HEARD AS AN EXCEPTION TO THE MOOTNESS DOCTRINE (FOURTH DEPT))/PERMANENCY HEARINGS (FAMILY LAW, FOURTEEN YEAR OLD CHILD HAD THE STATUTORY RIGHT TO WAIVE HIS PRESENCE AT THE PERMANENCY HEARING AND SHOULD NOT HAVE BEEN ORDERED TO APPEAR, APPEAL HEARD AS AN EXCEPTION TO THE MOOTNESS DOCTRINE (FOURTH DEPT))/MOOTNESS DOCTRINE (APPEALS, FAMILY LAW, FOURTEEN YEAR OLD CHILD HAD THE STATUTORY RIGHT TO WAIVE HIS PRESENCE AT THE PERMANENCY HEARING AND SHOULD NOT HAVE BEEN ORDERED TO APPEAR, APPEAL HEARD AS AN EXCEPTION TO THE MOOTNESS DOCTRINE (FOURTH DEPT))

FAMILY LAW, ATTORNEYS.

MOTHER DEMONSTRATED FATHER WILLFULLY VIOLATED THE SEPARATION AGREEMENT AND WAS THEREFORE ENTITLED TO ATTORNEY'S FEES (THIRD DEPT).

The Third Department, reversing Family Court, determined mother had demonstrated that father's violation of the separation agreement was willful, entitling mother to attorney's fees:

> Family Court's determination that the mother failed to prove a willful violation is not supported by the record or the law. The mother's testimonial and documentary submissions were amply sufficient to make a prima facie showing that the father's delays and failures to satisfy his obligations were willful violations, thus shifting the burden to him to demonstrate his inability to pay ... . In response, the father made no effort to show that he could not meet his obligations; indeed, he admitted that he did not make the orthodontic payment or turn over the tax information until he was ordered to do so. Accordingly, he failed to satisfy his burden... . Family Court thus erred in dismissing the mother's objections. Contrary to the court's determination, the fact that the father had paid his obligations by the time of the hearing — at least in part, because he was ordered to do so — does not negate the evidence that he repeatedly delayed in fulfilling some of his responsibilities and completely avoided others, forcing the mother to make repeated efforts to obtain his compliance and, finally, to commence this proceeding. **Matter of Shkaf v Shkaf, 2018 NY Slip Op 04052, Third Dept 6-7-18**

FAMILY LAW (SEPARATION AGREEMENTS, MOTHER DEMONSTRATED FATHER WILLFULLY VIOLATED THE SEPARATION AGREEMENT AND WAS THEREFORE ENTITLED TO ATTORNEY'S FEES (THIRD DEPT))/ATTORNEYS (FAMILY LAW, (SEPARATION AGREEMENTS, MOTHER DEMONSTRATED FATHER WILLFULLY VIOLATED THE SEPARATION AGREEMENT AND WAS THEREFORE ENTITLED TO ATTORNEY'S FEES (THIRD DEPT))/ATTORNEY'S FEES (FAMILY LAW, MOTHER DEMONSTRATED FATHER WILLFULLY VIOLATED THE SEPARATION AGREEMENT AND WAS THEREFORE ENTITLED TO ATTORNEY'S FEES (THIRD DEPT))/SEPARATION AGREEMENTS (VIOLATION, ATTORNEY'S FEES, MOTHER DEMONSTRATED FATHER WILLFULLY VIOLATED THE SEPARATION AGREEMENT AND WAS THEREFORE ENTITLED TO ATTORNEY'S FEES (THIRD DEPT))/CONTRACT LAW (FAMILY LAW, SEPARATION AGREEMENTS, MOTHER DEMONSTRATED FATHER WILLFULLY VIOLATED THE SEPARATION AGREEMENT AND WAS THEREFORE ENTITLED TO ATTORNEY'S FEES (THIRD DEPT))

FAMILY LAW, ATTORNEYS, APPEALS.

FAMILY COURT SHOULD NOT HAVE RELIEVED MOTHER'S COUNSEL WITHOUT NOTICE TO MOTHER, THEREFORE FAMILY COURT SHOULD NOT HAVE ENTERED A DEFAULT JUDGMENT UPON MOTHER'S FAILURE TO APPEAR, BECAUSE THE DEFAULT JUDGMENT SHOULD NOT HAVE BEEN ENTERED, APPEAL WAS THE PROPER REMEDY (SECOND DEPT).

The Second Department, reversing Family Court, determined Family Court should not have relieved mother's attorney as counsel and entered a default judgment on mother's failure to appear. Mother was not notified of her attorney's intent to withdraw and, therefore, Family Court should not have entered an order on mother's default. Because the order should not have been entered, an appeal, rather than a motion to vacate the default, was the proper remedy:

> Generally, no appeal lies from an order made upon the default of the appealing party (see CPLR 5511...). Rather, the proper procedure is to move to vacate the default and, if necessary, appeal from any denial of that motion (see CPLR 5015[a][1]...). Here, however, there was no proper order entered upon default. An attorney of record may withdraw as counsel only upon sufficient cause and upon notice to the client (see CPLR 321[b][2]...). Indeed, a purported withdrawal without proof of proper notice to the client is ineffective ..., and a court may not enter a default order in the absence of a proper withdrawal ... . There is no indication on the record that the mother's attorney informed her that he was seeking to withdraw as counsel. Accordingly, the Family Court should not have relieved the mother's attorney as counsel or entered an order on the mother's default... . Inasmuch as no order was properly entered upon default, the mother's appeal is not precluded ... . **Matter of Menghi v Trotta-Menghi, 2018 NY Slip Op 04324, Second Dept 6-13-18**

FAMILY LAW (ATTORNEYS, DEFAULT, FAMILY COURT SHOULD NOT HAVE RELIEVED MOTHER'S COUNSEL WITHOUT NOTICE TO MOTHER, THEREFORE FAMILY COURT SHOULD NOT HAVE ENTERED A DEFAULT JUDGMENT UPON MOTHER'S FAILURE TO APPEAR, BECAUSE THE DEFAULT JUDGMENT SHOULD NOT HAVE BEEN ENTERED, APPEAL WAS THE PROPER REMEDY (SECOND DEPT))/ATTORNEYS (FAMILY LAW, DEFAULT, FAMILY COURT SHOULD NOT HAVE RELIEVED MOTHER'S COUNSEL WITHOUT NOTICE TO MOTHER, THEREFORE FAMILY COURT SHOULD NOT HAVE ENTERED A DEFAULT JUDGMENT UPON MOTHER'S FAILURE TO APPEAR, BECAUSE THE DEFAULT JUDGMENT SHOULD NOT HAVE BEEN ENTERED, APPEAL WAS THE PROPER REMEDY (SECOND DEPT))/APPEALS (ATTORNEYS, DEFAULT, FAMILY COURT SHOULD NOT HAVE RELIEVED MOTHER'S COUNSEL WITHOUT NOTICE TO MOTHER, THEREFORE FAMILY COURT SHOULD NOT HAVE ENTERED A DEFAULT JUDGMENT UPON MOTHER'S FAILURE TO APPEAR, BECAUSE THE DEFAULT JUDGMENT SHOULD NOT HAVE BEEN ENTERED, APPEAL WAS THE PROPER REMEDY (SECOND DEPT))/DEFAULT (ATTORNEYS, FAMILY COURT SHOULD NOT HAVE RELIEVED MOTHER'S COUNSEL WITHOUT NOTICE TO MOTHER, THEREFORE FAMILY COURT SHOULD NOT HAVE ENTERED A DEFAULT JUDGMENT UPON MOTHER'S FAILURE TO APPEAR, BECAUSE THE DEFAULT JUDGMENT SHOULD NOT HAVE BEEN ENTERED, APPEAL WAS THE PROPER REMEDY (SECOND DEPT))/CIVIL PROCEDURE (APPEALS, FAMILY COURT SHOULD NOT HAVE RELIEVED MOTHER'S COUNSEL WITHOUT NOTICE TO MOTHER, THEREFORE FAMILY COURT SHOULD NOT HAVE ENTERED A DEFAULT JUDGMENT UPON MOTHER'S FAILURE TO APPEAR, BECAUSE THE DEFAULT JUDGMENT SHOULD NOT HAVE BEEN ENTERED, APPEAL WAS THE PROPER REMEDY (SECOND DEPT))/CPLR 5511 FAMILY COURT SHOULD NOT HAVE RELIEVED MOTHER'S COUNSEL WITHOUT NOTICE TO MOTHER, THEREFORE FAMILY COURT SHOULD NOT HAVE ENTERED A DEFAULT JUDGMENT UPON MOTHER'S FAILURE TO APPEAR, BECAUSE THE DEFAULT JUDGMENT SHOULD NOT HAVE BEEN ENTERED, APPEAL WAS THE PROPER REMEDY (SECOND DEPT))/CPLR 5015 FAMILY COURT SHOULD NOT HAVE RELIEVED MOTHER'S COUNSEL WITHOUT NOTICE TO MOTHER, THEREFORE FAMILY COURT SHOULD NOT HAVE ENTERED A DEFAULT JUDGMENT UPON MOTHER'S FAILURE TO APPEAR, BECAUSE THE DEFAULT JUDGMENT SHOULD NOT HAVE BEEN ENTERED, APPEAL WAS THE PROPER REMEDY (SECOND DEPT))/CPLR 321 (FAMILY COURT SHOULD NOT HAVE RELIEVED MOTHER'S COUNSEL WITHOUT NOTICE TO MOTHER, THEREFORE FAMILY COURT SHOULD NOT HAVE ENTERED A DEFAULT JUDGMENT UPON MOTHER'S FAILURE TO APPEAR, BECAUSE THE DEFAULT JUDGMENT SHOULD NOT HAVE BEEN ENTERED, APPEAL WAS THE PROPER REMEDY (SECOND DEPT))

FAMILY LAW, CIVIL PROCEDURE.

COURT ATTORNEY REFEREE WAS NOT AUTHORIZED TO DETERMINE A CONTESTED FAMILY OFFENSE PETITION OR CUSTODY AND VISITATION ISSUES (SECOND DEPT).

The Second Department determined the court attorney referee was not authorized to determine a contested family offense petition or custody and visitation issues:

> A referee derives authority from an order of reference by the court (see CPLR 4311, 4317...). Here, as correctly asserted by the mother, the order of reference did not authorize the Court Attorney Referee to hear and report or to hear and determine a contested family offense petition. The Court Attorney Referee therefore lacked jurisdiction to dismiss the mother's family offense petition in this instance... . Accordingly, the family offense matter must be remitted to a judge of the Family Court for a new determination.
>
> With respect to the determination of custody, the order of reference recited that, upon the parties' stipulation, a court attorney referee is authorized to hear and determine the parties' rights to custody of and visitation with the child, including the determination of motions and temporary orders of custody. Upon our review of the record, however, we find no indication that the parties stipulated to the reference in the manner prescribed by CPLR 2104, and, absent such stipulation, the Court Attorney Referee had the power only to hear and report her findings ... . We further find that the mother did not consent to the reference merely by participating in the proceeding without expressing her desire to have the matter tried before a judge ... . The order of reference must therefore be deemed an order to hear and report. Thus, the Court Attorney Referee had no jurisdiction to determine, but only to hear and report, with respect to the parties' respective rights of custody and visitation ... . **Matter of Rose v Simon, 2018 NY Slip Op 04736, Second Dept 6-27-18**

FAMILY LAW (COURT ATTORNEY REFEREE WAS NOT AUTHORIZED TO DETERMINE A CONTESTED FAMILY OFFENSE PETITION OR CUSTODY AND VISITATION ISSUES (SECOND DEPT))/CIVIL PROCEDURE (FAMILY LAW, COURT ATTORNEY REFEREE WAS NOT AUTHORIZED TO DETERMINE A CONTESTED FAMILY OFFENSE PETITION OR CUSTODY AND VISITATION ISSUES (SECOND DEPT))/CPLR 4311, 4317, 2104 (FAMILY LAW, COURT ATTORNEY REFEREE WAS NOT AUTHORIZED TO DETERMINE A CONTESTED FAMILY OFFENSE PETITION OR CUSTODY AND VISITATION ISSUES (SECOND DEPT))/COURT ATTORNEY REFEREE (FAMILY LAW, COURT ATTORNEY REFEREE WAS NOT AUTHORIZED TO DETERMINE A CONTESTED FAMILY OFFENSE PETITION OR CUSTODY AND VISITATION ISSUES (SECOND DEPT))/REFEREES (FAMILY LAW, COURT ATTORNEY REFEREE WAS NOT AUTHORIZED TO DETERMINE A CONTESTED FAMILY OFFENSE PETITION OR CUSTODY AND VISITATION ISSUES (SECOND DEPT))

FAMILY LAW, EVIDENCE.

CHILD'S OUT OF COURT STATEMENTS ABOUT ABUSE BY STEPFATHER SUFFICIENTLY CORROBORATED (THIRD DEPT).

The Third Department, in a custody proceeding, determined out of court statements by a child about abuse by the stepfather were properly deemed admissible because they were sufficiently corroborated:

> ... [T]he older child's out-of-court statements concerning the sexual abuse perpetrated upon her by the stepfather did not constitute impermissible hearsay. Where, as here, a child's out-of-court statements relate to abuse or neglect, such statements are admissible in a Family Ct Act article 6 proceeding so long as they are sufficiently corroborated ... . "The relatively low degree of required corroboration may be provided by '[a]ny other evidence tending to support the reliability of the [child's] statements'"... . While the mere repetition of an accusation does not, by itself, provide sufficient corroboration ... , "some degree of corroboration can be found in the consistency of the out-of-court repetitions" ... . Proof of the abuse of another child can also provide the requisite corroboration ... . The sufficiency and "reliability of the corroboration, as well as issues of credibility, are matters entrusted to the sound discretion of Family Court and will not be disturbed unless clearly unsupported by the record" ... .
>
> The maternal aunt testified that, while babysitting the children ... , the older child disclosed that the stepfather comes into her room in the middle of the night and "touches in [her] butt." The child also revealed the sexual abuse to the father, specifically stating that, while she was locked in her room, the stepfather would pull back the covers and reach into her underwear. The maternal aunt described changes in the older child's behavior that coincided with the time frame in which the alleged sexual abuse occurred, explaining that the child, who used to be happy and playful, became "unsociable" and "scared," as if something was bothering her. A therapist whom the older child began seeing following the disclosures testified that the child was "very distant," "detached" and "withdrawn" during their interactions and opined that the child exhibited behavior that was consistent with that of a four-year-old who may have experienced trauma. Further, a woman whose father had previously lived with the stepfather provided detailed and graphic testimony of her own sexual abuse at the hands of the stepfather when she was a young girl. During interviews with the State Police, both this woman as well as her sister confirmed that they had been sexually abused by the stepfather when they were younger. In view of this proof, and according due deference to Family Court's factual findings and credibility assessments, we conclude that the older child's statements were adequately corroborated ... . **Matter of Cory O. v Katie P., 2018 NY Slip Op 04046, Third Dept 6-7-18**

FAMILY LAW (EVIDENCE, HEARSAY, CHILD'S OUT OF COURT STATEMENTS ABOUT ABUSE BY STEPFATHER SUFFICIENTLY CORROBORATED (THIRD DEPT))/EVIDENCE (FAMILY LAW, ABUSE, HEARSAY, CHILD'S OUT OF COURT STATEMENTS ABOUT ABUSE BY STEPFATHER SUFFICIENTLY CORROBORATED (THIRD DEPT))/HEARSAY (FAMILY LAW, ABUSE, CHILD'S OUT OF COURT STATEMENTS ABOUT ABUSE BY STEPFATHER SUFFICIENTLY CORROBORATED (THIRD DEPT))/EVIDENCE (FAMILY LAW, ABUSE, HEARSAY, CHILD'S OUT OF COURT STATEMENTS ABOUT ABUSE BY STEPFATHER SUFFICIENTLY CORROBORATED (THIRD DEPT))/CORROBORATION (FAMILY LAW, ABUSE, HEARSAY, CHILD'S OUT OF COURT STATEMENTS ABOUT ABUSE BY STEPFATHER SUFFICIENTLY CORROBORATED (THIRD DEPT))/EVIDENCE (FAMILY LAW, ABUSE, HEARSAY, CHILD'S OUT OF COURT STATEMENTS ABOUT ABUSE BY STEPFATHER SUFFICIENTLY CORROBORATED (THIRD DEPT))

FAMILY LAW, CONTRACT LAW.

HUSBAND ENTITLED TO REVOKE HIS CONSENT TO USE OF A FROZEN EMBRYO, EMBRYO AWARDED TO HUSBAND FOR SOLE PURPOSE OF DISPOSAL IN THIS DIVORCE ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff husband, in this divorce action, was entitled to the frozen embryo for the sole purpose of disposal:

> ... [Husband and wife] engaged the services of [New Hope Fertility Center, NHF] in the hope of conceiving a child via implantation of cryopreserved embryos in the wife's uterus. ... [T]hey signed an agreement with NHF entitled "Consent for the Cryopreservation of Human Embryo(s)" (the Consent Agreement). ...
>
> Paragraph 7 of the Consent Agreement is entitled "Voluntary Participation" and provides "I/We may withdraw my/our consent and discontinue participation at any time . . . ." Paragraph 16, entitled "Authorization," provides, "This consent will remain in effect until such time as I notify NHF in writing of my/our wish to revoke such consent." ...
>
> In Kass v Kass (91 NY2d 554 [1998]), the Court of Appeals determined that agreements between donors participating in IVF [in vitro fertilization] should be enforced pursuant to general rules of contract interpretation. ... The Consent Agreement specifies that participation in the procedures involving cryopreservation of embryos is voluntary and that either party may withdraw consent at any time. ... The provisions permitting either party to revoke consent are not limited to cryopreservation, but permit either party to withdraw consent to participation in the entire IVF process. ... [T]he Consent Agreement does not indicate that the court has plenary authority to determine ownership of the embryo in the event of divorce ... . **Finkelstein v Finkelstein, 2018 NY Slip Op 03926, First Dept 6-5-18**

FAMILY LAW (IN VITRO FERTILIZATION, FROZEN EMBRYO, HUSBAND ENTITLED TO REVOKE HIS CONSENT TO USE OF A FROZEN EMBRYO, EMBRYO AWARDED TO HUSBAND FOR SOLE PURPOSE OF DISPOSAL IN THIS DIVORCE ACTION (FIRST DEPT))/CONTRACT LAW (FAMILY LAW, IN VITRO FERTILIZATION, FROZEN EMBRYO, HUSBAND ENTITLED TO REVOKE HIS CONSENT TO USE OF A FROZEN EMBRYO, EMBRYO AWARDED TO HUSBAND FOR SOLE PURPOSE OF DISPOSAL IN THIS DIVORCE ACTION (FIRST DEPT))/IN VITRO FERTILIZATION (FAMILY LAW. FROZEN EMBRYO, HUSBAND ENTITLED TO REVOKE HIS CONSENT TO USE OF A FROZEN EMBRYO, EMBRYO AWARDED TO HUSBAND FOR SOLE PURPOSE OF DISPOSAL IN THIS DIVORCE ACTION (FIRST DEPT))/EMBRYO, FROZEN (FAMILY LAW, IN VITRO FERTILIZATION, HUSBAND ENTITLED TO REVOKE HIS CONSENT TO USE OF A FROZEN EMBRYO, EMBRYO AWARDED TO HUSBAND FOR SOLE PURPOSE OF DISPOSAL IN THIS DIVORCE ACTION (FIRST DEPT))

FAMILY LAW, IMMIGRATION LAW.

FAMILY COURT SHOULD NOT HAVE DENIED THE PETITION RE THE CHILD'S SPECIAL IMMIGRANT JUVENILE STATUS WITHOUT HOLDING A HEARING TO DETERMINE WHETHER REUNITING THE CHILD WITH MOTHER WAS NOT VIABLE DUE TO NEGLECT OR ABANDONMENT (SECOND DEPT).

The Second Department ruled that Family Court should have held a hearing to determine whether the child could be reunited with his mother in order to further determine whether to make the findings necessary for the child to apply for special immigrant juvenile status (SIJS):

> ... [B]ased upon our independent factual review ... , we find that the record establishes that the child meets the age and marital status requirements for special immigrant status, and the dependency requirement has been satisfied by the granting of the father's guardianship petition ... . Further, we determine that it would not be in the best interests of the child to be returned to El Salvador, where gang members had threatened to kill him and his sister ... . However, the record is insufficient to determine whether reunification with the mother is not viable due to parental neglect or abandonment ... .
>
> Accordingly, we reverse the order, and remit the matter to the Family Court, Nassau County, for a hearing on the issue of whether reunification with the mother is not viable due to parental neglect or abandonment, and a new determination thereafter of the father's motion for the issuance of an order, inter alia, making specific findings so as to enable the child to petition for SIJS ... . **Matter of A.M.G. v Gladis A.G., 2018 NY Slip Op 04321, Second Dept 6-13-18**

FAMILY LAW (SPECIAL IMMIGRANT JUVENILE STATUS, FAMILY COURT SHOULD NOT HAVE DENIED THE PETITION RE THE CHILD'S SPECIAL IMMIGRANT JUVENILE STATUS WITHOUT HOLDING A HEARING TO DETERMINE WHETHER REUNITING THE CHILD WITH MOTHER WAS NOT VIABLE DUE TO NEGLECT OR ABANDONMENT (SECOND DEPT))/SPECIAL IMMIGRANT JUVENILE STATUS (FAMILY COURT SHOULD NOT HAVE DENIED TKE PETITION RE THE CHILD'S SPECIAL IMMIGRANT JUVENILE STATUS WITHOUT HOLDING A HEARING TO DETERMINE WHETHER REUNITING THE CHILD WITH MOTHER WAS NOT VIABLE DUE TO NEGLECT OR ABANDONMENT (SECOND DEPT))/IMMIGRATION LAW (FAMILY LAW, SPECIAL IMMIGRANT JUVENILE STATUS, FAMILY COURT SHOULD NOT HAVE DENIED THE PETITION RE THE CHILD'S SPECIAL IMMIGRANT JUVENILE STATUS WITHOUT HOLDING A HEARING TO DETERMINE WHETHER REUNITING THE CHILD WITH MOTHER WAS NOT VIABLE DUE TO NEGLECT OR ABANDONMENT (SECOND DEPT))

FORECLOSURE

FORECLOSURE, CIVIL PROCEDURE, APPEALS.

BANK WAS REQUIRED TO GIVE DEFENDANT NOTICE OF ITS MOTIONS FOR AN ORDER OF REFERENCE AND JUDGMENT OF FORECLOSURE BECAUSE DEFENDANT'S DEFAULT OCCURRED MORE THAN A YEAR BEFORE, DEFENDANT'S MOTION TO VACATE SHOULD HAVE BEEN GRANTED, FAILURE OF NOTICE PROPERLY RAISED FOR THE FIRST TIME ON APPEAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff bank was required to provide notice of its motions for an order of reference and a judgment of foreclosure which were made more than a year after defendant's default. Therefore defendant's motion to vacate the order of reference and judgment of foreclosure should have been granted. The court noted that the failure of notice was properly raised for the first time on appeal:

> The defendant was entitled to notice of the plaintiff's motions for an order of reference and for a judgment of foreclosure and sale pursuant to CPLR 3215(g)(1), which provides, in relevant part, that such notice to a defendant who has not appeared is required "if more than one year has elapsed since the default." Here, the defendant defaulted in November 2009, and the plaintiff moved for an order of reference in March 2013, more than three years later. Contrary to the plaintiff's contention, the issue of its failure to comply with CPLR 3215(g)(1) may be raised for the first time on appeal ... . The failure to give a party proper notice of a motion deprives the court of jurisdiction to entertain the motion and renders the resulting order void ... . **Citimortgage, Inc. v Reese, 2018 NY Slip Op 04527, Second Dept 6-20-18**

FORECLOSURE (BANK WAS REQUIRED TO GIVE DEFENDANT NOTICE OF ITS MOTIONS FOR AN ORDER OF REFERENCE AND JUDGMENT OF FORECLOSURE BECAUSE DEFENDANT'S DEFAULT OCCURRED MORE THAN A YEAR BEFORE, DEFENDANT'S MOTION TO VACATE SHOULD HAVE BEEN GRANTED, FAILURE OF NOTICE PROPERLY RAISED FOR THE FIRST TIME ON APPEAL (SECOND DEPT))/CIVIL PROCEDURE (FORECLOSURE, BANK WAS REQUIRED TO GIVE DEFENDANT NOTICE OF ITS MOTIONS FOR AN ORDER OF REFERENCE AND JUDGMENT OF FORECLOSURE BECAUSE DEFENDANT'S DEFAULT OCCURRED MORE THAN A YEAR BEFORE, DEFENDANT'S MOTION TO VACATE SHOULD HAVE BEEN GRANTED, FAILURE OF NOTICE PROPERLY RAISED FOR THE FIRST TIME ON APPEAL (SECOND DEPT))/CPLR 3215 (FORECLOSURE, BANK WAS REQUIRED TO GIVE DEFENDANT NOTICE OF ITS MOTIONS FOR AN ORDER OF REFERENCE AND JUDGMENT OF FORECLOSURE BECAUSE DEFENDANT'S DEFAULT OCCURRED MORE THAN A YEAR BEFORE, DEFENDANT'S MOTION TO VACATE SHOULD HAVE BEEN GRANTED, FAILURE OF NOTICE PROPERLY RAISED FOR THE FIRST TIME ON APPEAL (SECOND DEPT))

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW, EVIDENCE.

PROOF OF MAILING OF THE REQUIRED NOTICE DEFICIENT, BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank was not entitled to summary judgment in this foreclosure action because the proof of mailing of the required notice did not meet the requirements of Real Property Actions and Proceedings Law (RPAPL) 1304:

> ... [T]he plaintiff failed to establish, prima facie, that it strictly complied with RPAPL 1304. "[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition" ... . Here, contrary to the plaintiff's contention, the "affidavit of mailing" of a vice president for loan documentation of its loan servicer was insufficient to establish that the notice was sent to the defendant in the manner required by RPAPL 1304, as the loan servicer did not provide proof of a standard office mailing procedure and provided no independent proof of the actual mailing ... . **US Bank N.A. v Sims, 2018 NY Slip Op 04374, Second Dept 6-13-18**

FORECLOSURE (NOTICE, PROOF OF MAILING OF THE REQUIRED NOTICE DEFICIENT, BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (FORECLOSURE, PROOF OF MAILING OF THE REQUIRED NOTICE DEFICIENT, BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/EVIDENCE (FORECLOSURE, MAILING, NOTICE, PROOF OF MAILING OF THE REQUIRED NOTICE DEFICIENT, BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/MAILING (FORECLOSURE, PROOF OF MAILING OF THE REQUIRED NOTICE DEFICIENT, BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))

FRAUD

CONSUMER LAW, FRAUD.

CIVIL ENFORCEMENT COMPLAINT BROUGHT BY THE ATTORNEY GENERAL STATED CAUSES OF ACTION AGAINST DEFENDANT INTERNET SERVICE PROVIDER ALLEGING FRAUDULENT AND DECEPTIVE PRACTICES CONCERNING THE ADVERTISING OF BROADBAND SPEEDS AND ACCESS TO ONLINE CONTENT (FIRST DEPT).

The First Department determined the civil enforcement complaint stated causes of action under the Executive Law and the General Business Law for fraudulent practices in advertising Internet speeds and reliable access to online content:

> Defendants make official disclosures about broadband speeds (actual speeds measured according to a testing protocol on the modems of consumers deemed representative) in accordance with the federal rule [Transparency Rule, 47 CFR 8.3]. The complaint alleges that defendants' use of their official disclosures in consumer advertisements is misleading, because other statements in the advertisements give consumers the false impression that the disclosed speeds represent speeds that consumers can expect to experience on their devices, including wireless devices, consistently ... . The Transparency Rule does not preempt state laws "that prevent fraud, deception and false advertising" ... .
>
> The court correctly determined that the complaint's allegations about the advertisements' representations of speeds "up to" a certain level state a cause of action ... . Issues of fact exist as to whether defendants delivered the advertised speed levels consistently.
>
> The court correctly declined to dismiss claims based on allegations about network quality and reliability on the ground that some of the language in the advertisements is mere puffery, because other statements in the advertisements are not mere puffery and are actionable ... . **People v Charter Communications, Inc., 2018 NY Slip Op 04644, First Dept 6-21-18**

CONSUMER LAW (INTERNET, CIVIL ENFORCEMENT COMPLAINT BROUGHT BY THE ATTORNEY GENERAL STATED CAUSES OF ACTION AGAINST DEFENDANT INTERNET SERVICE PROVIDER ALLEGING FRAUDULENT AND DECEPTIVE PRACTICES CONCERNING THE ADVERTISING OF BROADBAND SPEEDS AND ACCESS TO ONLINE CONTENT (FIRST DEPT))/FRAUD (INTERNET, CIVIL ENFORCEMENT COMPLAINT BROUGHT BY THE ATTORNEY GENERAL STATED CAUSES OF ACTION AGAINST DEFENDANT INTERNET SERVICE PROVIDER ALLEGING FRAUDULENT AND DECEPTIVE PRACTICES CONCERNING THE ADVERTISING OF BROADBAND SPEEDS AND ACCESS TO ONLINE CONTENT (FIRST DEPT))/ADVERTISING (CONSUMER LAW, INTERNET, CIVIL ENFORCEMENT COMPLAINT BROUGHT BY THE ATTORNEY GENERAL STATED CAUSES OF ACTION AGAINST DEFENDANT INTERNET SERVICE PROVIDER ALLEGING FRAUDULENT AND DECEPTIVE PRACTICES CONCERNING THE ADVERTISING OF BROADBAND SPEEDS AND ACCESS TO ONLINE CONTENT (FIRST DEPT))/INTERNET (CONSUMER LAW, CIVIL ENFORCEMENT COMPLAINT BROUGHT BY THE ATTORNEY GENERAL STATED CAUSES OF ACTION AGAINST DEFENDANT INTERNET SERVICE PROVIDER ALLEGING FRAUDULENT AND DECEPTIVE PRACTICES CONCERNING THE ADVERTISING OF BROADBAND SPEEDS AND ACCESS TO ONLINE CONTENT (FIRST DEPT))/CIVIL ENFORCEMENT ACTION (INTERNET, CIVIL ENFORCEMENT COMPLAINT BROUGHT BY THE ATTORNEY GENERAL STATED CAUSES OF ACTION AGAINST DEFENDANT INTERNET SERVICE PROVIDER ALLEGING FRAUDULENT AND DECEPTIVE PRACTICES CONCERNING THE ADVERTISING OF BROADBAND SPEEDS AND ACCESS TO ONLINE CONTENT (FIRST DEPT))

FRAUD. CIVIL PROCEDURE.

SIX YEAR STATUTE OF LIMITATIONS FOR FRAUD APPLIES TO A CONVERSION ACTION, ALTHOUGH THE FRAUD BEGAN IN 1998 PLAINTIFF COULD NOT HAVE BECOME AWARE OF IT UNTIL 2013, PLAINTIFF'S ACTION IS TIMELY (SECOND DEPT).

The Second Department determined plaintiff's action for conversion and breach of a fiduciary duty was timely. Plaintiff was the beneficiary of a structured settlement with payments which were to begin in 1998 and continue for the rest of his life. Defendant, who was the custodian of the structured settlement while plaintiff was minor, did not inform the plaintiff of the settlement and used the funds for her own purposes. The Second Department held that conversion sounds in fraud. Therefore the six-year statute of limitations applied and the statute did not begin to run until plaintiff became aware of fraud in 2013:

> Contrary to the defendant's contentions, since the cause of action for conversion is based upon fraud, it is governed by the statute of limitations period for fraud set forth in CPLR 213(8) ... . The limitations period for fraud under CPLR 213(8) also applies to the breach of fiduciary duty causes of action inasmuch as the allegations of fraud are essential to those claims ... .
>
> Pursuant to CPLR 213(8), "the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it." "A cause of action based upon fraud accrues, for statute of limitations purposes, at the time the plaintiff possesses knowledge of facts from which the fraud could have been discovered with reasonable diligence'" ... .
>
> Here, the plaintiff established that he could not, with reasonable diligence, have discovered the fraud until 2013, when he learned for the first time that he was the beneficiary of a structured settlement from which he was entitled to receive millions of dollars in monthly and periodic lump-sum payments. **Monteleone v Monteleone, 2018 NY Slip Op 04317, Second Dept 6-13-18**

FRAUD (STATUTE OF LIMITATIONS, SIX YEAR STATUTE OF LIMITATIONS FOR FRAUD APPLIES TO A CONVERSION ACTION, ALTHOUGH THE FRAUD BEGAN IN 1998 PLAINTIFF COULD NOT HAVE BECOME AWARE OF IT UNTIL 2013, PLAINTIFF'S ACTION IS TIMELY (SECOND DEPT))/CONVERSION (STATUTE OF LIMITATIONS, SIX YEAR STATUTE OF LIMITATIONS FOR FRAUD APPLIES TO A CONVERSION ACTION, ALTHOUGH THE FRAUD BEGAN IN 1998 PLAINTIFF COULD NOT HAVE BECOME AWARE OF IT UNTIL 2013, PLAINTIFF'S ACTION IS TIMELY (SECOND DEPT))/CIVIL PROCEDURE (STATUTE OF LIMITATIONS, FRAUD, CONVERSION, SIX YEAR STATUTE OF LIMITATIONS FOR FRAUD APPLIES TO A CONVERSION ACTION, ALTHOUGH THE FRAUD BEGAN IN 1998 PLAINTIFF COULD NOT HAVE BECOME AWARE OF IT UNTIL 2013, PLAINTIFF'S ACTION IS TIMELY (SECOND DEPT))/STATUTE OF LIMITATIONS (FRAUD, CONVERSION, SIX YEAR STATUTE OF LIMITATIONS FOR FRAUD APPLIES TO A CONVERSION ACTION, ALTHOUGH THE FRAUD BEGAN IN 1998 PLAINTIFF COULD NOT HAVE BECOME AWARE OF IT UNTIL 2013, PLAINTIFF'S ACTION IS TIMELY (SECOND DEPT))/FRAUD (STATUTE OF LIMITATIONS, CONVERSION, SIX YEAR STATUTE OF LIMITATIONS FOR FRAUD APPLIES TO A CONVERSION ACTION, ALTHOUGH THE FRAUD BEGAN IN 1998 PLAINTIFF COULD NOT HAVE BECOME AWARE OF IT UNTIL 2013, PLAINTIFF'S ACTION IS TIMELY (SECOND DEPT))/CONVERSION (STATUTE OF LIMITATIONS, FRAUD, SIX YEAR STATUTE OF LIMITATIONS FOR FRAUD APPLIES TO A CONVERSION ACTION, ALTHOUGH THE FRAUD BEGAN IN 1998 PLAINTIFF COULD NOT HAVE BECOME AWARE OF IT UNTIL 2013, PLAINTIFF'S ACTION IS TIMELY (SECOND DEPT))/CPLR 213 (STATUTE OF LIMITATIONS, FRAUD, CONVERSION, SIX YEAR STATUTE OF LIMITATIONS FOR FRAUD APPLIES TO A CONVERSION ACTION, ALTHOUGH THE FRAUD BEGAN IN 1998 PLAINTIFF COULD NOT HAVE BECOME AWARE OF IT UNTIL 2013, PLAINTIFF'S ACTION IS TIMELY (SECOND DEPT))

FRAUD, CONTRACT LAW, LANDLORD-TENANT.

FRAUDULENT INDUCEMENT CAUSE OF ACTION MUST BE BASED UPON MATTERS COLLATERAL TO THE CONTRACT, NOT THE BREACH OF PROVISIONS OF THE CONTRACT ITSELF (FIRST DEPT).

The First Department noted that contract provisions cannot be the bases for a fraudulent inducement cause of action. Only matters collateral to the contract will support fraudulent inducement:

> Plaintiffs alleged six different bases for the fraudulent inducement claim. The alleged misrepresentations regarding assistance operating the preschool, the working fire alarm, and use of the stroller area, area near the kitchen, and upstairs gym, are all " directly related to a specific provision of the contract,'" not collateral to the lease, and cannot be used to sustain a fraudulent inducement claim ... . Plaintiffs properly pled a fraudulent inducement claim with respect to defendants materially misrepresenting that a 2004 letter of no objection was all plaintiffs would need, failing to disclose to plaintiffs that defendant intended to remove oversight over homeless individuals on the property, and fraudulently misrepresenting that homeless individuals were living on the property legally, when they were doing so illegally ... . Plaintiffs properly pled that, as a result of these statements, which plaintiffs allege were made with the intention to deceive them, they signed the lease and developed the property ... . **Iken v Bohemian Brethren Presbyt. Church, 2018 NY Slip Op 04830, First Dept 6-28-18**

FRAUD (FRAUDULENT INDUCEMENT CAUSE OF ACTION MUST BE BASED UPON MATTERS COLLATERAL TO THE CONTRACT, NOT THE BREACH OF PROVISIONS OF THE CONTRACT ITSELF (FIRST DEPT))/CONTRACT LAW (FRAUDULENT INDUCEMENT CAUSE OF ACTION MUST BE BASED UPON MATTERS COLLATERAL TO THE CONTRACT, NOT THE BREACH OF PROVISIONS OF THE CONTRACT ITSELF (FIRST DEPT))/LANDLORD-TENANT (LEASE, CONTRACT LAW, FRAUDULENT INDUCEMENT CAUSE OF ACTION MUST BE BASED UPON MATTERS COLLATERAL TO THE CONTRACT, NOT THE BREACH OF PROVISIONS OF THE CONTRACT ITSELF (FIRST DEPT))

INSURANCE LAW

INSURANCE LAW, CIVIL PROCEDURE.

BAD FAITH DISCLAIMER ACTION BROUGHT AFTER INJURED PLAINTIFFS WERE ASSIGNED THE INSURED'S RIGHTS UNDER THE POLICY NOT BARRED BY RES JUDICATA, PLAINTIFFS DID NOT HAVE STANDING TO BRING THE BAD FAITH ACTION UNTIL THE RIGHTS WERE ASSIGNED (FOURTH DEPT).

The Fourth Department determined plaintiffs' bad faith action against the insurer was not barred by res judicata. Plaintiffs successfully sued the insured in this accidental shooting case and recovered the policy limits. Plaintiffs then were assigned the insured's rights against the insurer and sued for the insurer for disclaiming coverage in bad faith. Because plaintiffs could not have brought the bad faith action until the assignment of rights, plaintiffs had standing to bring the current action. The Fourth Department noted that the First Department had come to the opposite conclusion under similar facts:

> ... [U]nder Insurance Law § 3420 (a) (2) and (b) (1), an injured party's standing to bring an action against an insurer is limited to recovering only the policy limits of the insured's insurance policy. ... [I]f an injured party/judgment creditor seeks to recover from the insurer an amount above the insured's policy limits on a theory of liability beyond that created by Insurance Law § 3420 (a) (2), the statute does not confer standing to do so. However, if the insured assigns his or her rights under the insurance contract to the injured party/judgment creditor, then the injured party/judgment creditor may simultaneously bring a direct action against the insurer pursuant to Insurance Law § 3420 (a) (2) along with any other appropriate claim, including a bad faith claim, seeking a judgment in a total amount beyond the insured's policy limits.
>
> Here, when [plaintiffs] commenced the prior action pursuant to Insurance Law § 3420 (a) (2) ... , the [insured] had not yet assigned their rights under the insurance contract ... . As a result, [plaintiffs] did not have standing to bring a bad faith claim against defendant ... . Thus, because [plaintiffs] lacked standing to bring a bad faith claim against defendant at the time [they] brought the Insurance Law § 3420 (a) (2) action, we conclude that the doctrine of res judicata does not bar this action ... . **Corle v Allstate Ins. Co., 2018 NY Slip Op 04135, Fourth Dept 6-8-18**

INSURANCE LAW (BAD FAITH DISCLAIMER ACTION BROUGHT AFTER INJURED PLAINTIFFS WERE ASSIGNED THE INSURED'S RIGHTS UNDER THE POLICY NOT BARRED BY RES JUDICATA, PLAINTIFFS DID NOT HAVE STANDING TO BRING THE BAD FAITH ACTION UNTIL THE RIGHTS WERE ASSIGNED (FOURTH DEPT))/CIVIL PROCEDURE (RES JUDICATA, INSURANCE LAW, BAD FAITH DISCLAIMER ACTION BROUGHT AFTER INJURED PLAINTIFFS WERE ASSIGNED THE INSURED'S RIGHTS UNDER THE POLICY NOT BARRED BY RES JUDICATA, PLAINTIFFS DID NOT HAVE STANDING TO BRING THE BAD FAITH ACTION UNTIL THE RIGHTS WERE ASSIGNED (FOURTH DEPT))/BAD FAITH (INSURANCE LAW, (BAD FAITH DISCLAIMER ACTION BROUGHT AFTER INJURED PLAINTIFFS WERE ASSIGNED THE INSURED'S RIGHTS UNDER THE POLICY NOT BARRED BY RES JUDICATA, PLAINTIFFS DID NOT HAVE STANDING TO BRING THE BAD FAITH ACTION UNTIL THE RIGHTS WERE ASSIGNED (FOURTH DEPT))/DISCLAIMER (INSURANCE LAW, BAD FAITH DISCLAIMER ACTION BROUGHT AFTER INJURED PLAINTIFFS WERE ASSIGNED THE INSURED'S RIGHTS UNDER THE POLICY NOT BARRED BY RES JUDICATA, PLAINTIFFS DID NOT HAVE STANDING TO BRING THE BAD FAITH ACTION UNTIL THE RIGHTS WERE ASSIGNED (FOURTH DEPT))/RES JUDICATA (INSURANCE LAW, BAD FAITH DISCLAIMER ACTION BROUGHT AFTER INJURED PLAINTIFFS WERE ASSIGNED THE INSURED'S RIGHTS UNDER THE POLICY NOT BARRED BY RES JUDICATA, PLAINTIFFS DID NOT HAVE STANDING TO BRING THE BAD FAITH ACTION UNTIL THE RIGHTS WERE ASSIGNED (FOURTH DEPT))

INSURANCE LAW, CIVIL PROCEDURE, CRIMINAL LAW, NEGLIGENCE.

ALTHOUGH THE INSURER COULD DISCLAIM COVERAGE FOR ANY INJURIES CAUSED BY THE INSURED ASSAILANT'S INTENTIONAL CRIMINAL ACTS UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL, THE INSURER COULD NOT DISCLAIM COVERAGE FOR ANY SUBSEQUENT INJURIES THAT MAY HAVE BEEN CAUSED BY THE ASSAILANT'S NEGLIGENCE (THIRD DEPT).

The Third Department determined plaintiff insurer could not completely disclaim coverage of injuries suffered by the defendant at the insured home (owned by the McCabe's). McCabe was convicted of assaulting and strangling the defendant. Defendant alleges that after McCabe assaulted her she fell over a tripping hazard in the McCabe home and was injured in the fall. Although the insurer can properly disclaim coverage for any injuries inflicted by McCabe's intentional criminal conduct under the collateral estoppel doctrine, the insurer could not, at this early stage, disclaim coverage for any injuries that might have been caused by McCabe's negligence (tripping hazard, failure to seek medical care, etc.):

> Plaintiff asserts that, to convict McCabe, the criminal jury must have disbelieved his version of events. It is possible, however, that the jury disbelieved only some portions of his testimony ... . The jury may have found it incredible that all of defendant's facial and head injuries were caused when she tried to walk on her own, fell over a raised threshold in the doorway and hit her head on a cinder block wall during that fall. It is also possible that the jury believed that McCabe slammed defendant's head into the ground or a wall, thereby causing some of her injuries, but the jury did not render any findings regarding what happened after the choking and slamming, such as whether defendant then got up, tried to walk and fell. To establish the convictions, it was unnecessary for the jury to have made findings regarding whether McCabe created a tripping hazard, allowed defendant to walk on her own after he had rendered her partially incapacitated or failed to seek medical help for her after the criminal assault. Hence, the issues as to insurance coverage and exclusions are not identical to the issues decided in McCabe's criminal trial, and defendants here did not have a full and fair opportunity in the criminal trial to address some of the issues regarding McCabe's negligence allegedly committed before and after the criminal assault. Plaintiff failed to demonstrate that there was no possible factual or legal basis to support a finding that some of defendant's injuries were unintended by McCabe, so as to bar coverage under the policy exclusion ... . Accordingly, collateral estoppel does not apply here, except as to the more narrow issues necessarily decided in the criminal trial, and plaintiff was not entitled to summary judgment or a declaratory judgment at this early stage of this coverage action ... . **State Farm Fire & Cas. Co. v Chauncey McCabe, 2018 NY Slip Op 04416, Third Dept 6-14-18**

INSURANCE LAW (ALTHOUGH THE INSURER COULD DISCLAIM COVERAGE FOR ANY INJURIES CAUSED BY THE INSURED ASSAILANT'S INTENTIONAL CRIMINAL ACTS UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL, THE INSURER COULD NOT DISCLAIM COVERAGE FOR ANY SUBSEQUENT INJURIES THAT MAY HAVE BEEN CAUSED BY THE ASSAILANT'S NEGLIGENCE (THIRD DEPT))/CIVIL PROCEDURE (INSURANCE LAW, COLLATERAL ESTOPPEL, ALTHOUGH THE INSURER COULD DISCLAIM COVERAGE FOR ANY INJURIES CAUSED BY THE INSURED ASSAILANT'S INTENTIONAL CRIMINAL ACTS UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL, THE INSURER COULD NOT DISCLAIM COVERAGE FOR ANY SUBSEQUENT INJURIES THAT MAY HAVE BEEN CAUSED BY THE ASSAILANT'S NEGLIGENCE (THIRD DEPT))/COLLATERAL ESTOPPEL (INSURANCE LAW, ALTHOUGH THE INSURER COULD DISCLAIM COVERAGE FOR ANY INJURIES CAUSED BY THE INSURED ASSAILANT'S INTENTIONAL CRIMINAL ACTS UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL, THE INSURER COULD NOT DISCLAIM COVERAGE FOR ANY SUBSEQUENT INJURIES THAT MAY HAVE BEEN CAUSED BY THE ASSAILANT'S NEGLIGENCE (THIRD DEPT))/CRIMINAL LAW (INSURANCE LAW, COLLATERAL ESTOPPEL, ALTHOUGH THE INSURER COULD DISCLAIM COVERAGE FOR ANY INJURIES CAUSED BY THE INSURED ASSAILANT'S INTENTIONAL CRIMINAL ACTS UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL, THE INSURER COULD NOT DISCLAIM COVERAGE FOR ANY SUBSEQUENT INJURIES THAT MAY HAVE BEEN CAUSED BY THE ASSAILANT'S NEGLIGENCE (THIRD DEPT))/NEGLIGENCE (INSURANCE LAW, CRIMINAL LAW, COLLATERAL ESTOPPEL, ALTHOUGH THE INSURER COULD DISCLAIM COVERAGE FOR ANY INJURIES CAUSED BY THE INSURED ASSAILANT'S INTENTIONAL CRIMINAL ACTS UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL, THE INSURER COULD NOT DISCLAIM COVERAGE FOR ANY SUBSEQUENT INJURIES THAT MAY HAVE BEEN CAUSED BY THE ASSAILANT'S NEGLIGENCE (THIRD DEPT))

INSURANCE LAW, CONTRACT LAW.

DATE OF LOSS DEEMED TO BE DATE THE CLAIM FOR A STOLEN CAR WAS DENIED, NOT THE DATE THE CAR WAS STOLEN (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that the term "date of loss" in the policy referred to the date the insurer disclaimed coverage, not the date the car was stolen. Therefore plaintiff's action for breach of contract was timely. The contract properly shortened the applicable statute of limitations to one year:

> In our view, the generic "date of loss" language employed here, in the context of the policy as a whole, does not evince an unmistakable intention that the one-year limitations period be measured from the occurrence of the underlying event ... . Significantly, in shortening the limitations period, the insurance policy did not use the term of art "inception of loss" or other similarly specific language indicating that the limitations period was to be measured from the event giving rise to the claim ... . Moreover, although "date of loss" could be reasonably interpreted to mean the date of theft, as defendant contends, ambiguities in an insurance policy must be construed against the insurer ... . In view of the foregoing, we hold that the one-year limitations period set forth in the insurance policy began to run on the date that defendant denied the claim for coverage ... . **Mercedes-Benz Fin. Servs. USA, LLC v Allstate Ins. Co., 2018 NY Slip Op 04064, Third Dept 6-7-18**

INSURANCE LAW (DATE OF LOSS DEEMED TO BE DATE THE CLAIM FOR A STOLEN CAR WAS DENIED, NOT THE DATE THE CAR WAS STOLEN (THIRD DEPT))/CONTRACT LAW (INSURANCE LAW, DATE OF LOSS DEEMED TO BE DATE THE CLAIM FOR A STOLEN CAR WAS DENIED, NOT THE DATE THE CAR WAS STOLEN (THIRD DEPT))

LABOR LAW-CONSTRUCTION LAW

LABOR LAW-CONSTRUCTION LAW.

INJURY FROM SIX INCH FALL OF 500 POUND BEAM COVERED BY LABOR LAW 240 (1), POWER TO STOP WORK FOR SAFETY REASONS INSUFFICIENT BASIS FOR LIABILITY UNDER LABOR LAW 200 (FIRST DEPT).

The First Department, modifying Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action and the construction manager (Structure Tone), although it had the power to stop work for safety reasons, was entitled to summary judgment on the Labor Law 200 cause of action:

> Plaintiff was injured ... when he and three other workers were attempting to load a 500-pound steel I-beam into an internal freight elevator at a construction site in order to transport it from the 18th floor to the ground floor. The elevator was four feet wide and five feet deep, with an eight foot ceiling, while the beam was 12 feet long. The workers opened a hatch on top of the elevator, and were attempting to stand the beam on its end, with the high end extending through the open hatch, when the beam fell down half a foot onto plaintiff's shoulder. ...
>
> Plaintiff submitted evidence showing that he was engaged in an activity covered by the statute, that defendants failed to provide an adequate safety device to protect him, and that such violation was a proximate cause of the accident ... . The half foot that the steel I-beam dropped onto plaintiff's shoulder is not de minimis, given the I-beam's weight and since the hazard was one directly flowing from the application of the force of gravity to a person ... . * * *
>
> Although Structure Tone had the authority to stop work at the construction site for safety reasons, this is "insufficient to raise a triable issue of fact with respect to whether [Structure Tone] exercised the requisite degree of supervision and control over the work being performed to sustain a claim under Labor Law § 200 or for common-law negligence" ... . **Villanueva v 114 Fifth Ave. Assoc. LLC, 2018 NY Slip Op 03928, First Dept 6-5-18**

LABOR LAW-CONSTRUCTION LAW (INJURY FROM SIX INCH FALL OF 500 POUND BEAM COVERED BY LABOR LAW 240 (1), POWER TO STOP WORK FOR SAFETY REASONS INSUFFICIENT BASIS FOR LIABILITY UNDER LABOR LAW 200 (FIRST DEPT))

LABOR LAW-CONSTRUCTION LAW.

TWO TO THREE FOOT FALL OF HEAVY STEEL PLATE WHICH WAS BEING HOISTED IS COVERED UNDER LABOR LAW 240 (1), HEIGHT DIFFERENTIAL NOT DE MINIMUS (FIRST DEPT).

The First Department determined the two to three foot fall of a heavy steel plate that was being hoisted was covered by Labor Law 240 (1):

> Plaintiff was injured when the nylon sling attaching a one-to-two ton steel plate to an excavator snapped, causing the heavy plate to fall to the ground, bounce, and sever the pole of a nearby street sign. The impact caused the sign to be propelled toward plaintiff, hitting his right forearm and causing him serious personal injuries. ...
>
> ... [T]he photographs taken immediately before the accident show that the steel plate was about two or three feet above the ground. This elevation differential cannot be viewed as de minimis, given the weight of the steel plate and the amount of force it generated over the course of its relatively short descent ... . **Makkieh v Judlau Contr. Inc., 2018 NY Slip Op 04112, First Dept 6-7-18**

LABOR LAW-CONSTRUCTION LAW (TWO TO THREE FOOT FALL OF HEAVY STEEL PLATE WHICH WAS BEING HOISTED IS COVERED UNDER LABOR LAW 240 (1), HEIGHT DIFFERENTIAL NOT DE MINIMUS (FIRST DEPT))

LABOR LAW-CONSTRUCTION LAW.

QUESTION OF FACT WHETHER SAFETY DEVICES FOR LIFTING HEAVY MOTOR WERE AVAILABLE, PLAINTIFFS' MOTION OF SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department determined there was a question of fact whether safety devices were available precluded granting plaintiffs' motion for summary judgment on the Labor Law 240 (1) cause of action. Plaintiff was injured lifting a heavy motor onto a scissor lift. Defendant's foreman testified he had never manually lifted a motor onto a scissors lift and safety devices for lifting the motor must have been available:

> In support of the motion, plaintiffs submitted the deposition testimony of plaintiff set forth above, as well as that of his coworker and a foreman. Plaintiff's coworker testified that he had performed work on 30 or 40 such doors and had manually lifted the motor onto a scissor lift every time. Conversely, the foreman, who was not on location on the date of the injury, testified that he had performed work on "over a thousand" such doors and had "never lifted a motor manually onto a scissor lift." The foreman found it "hard to believe" that hoists, blocks, pulleys, ropes, or other safety devices were not available on site.
>
> We conclude that plaintiffs failed to meet their initial burden on their motion inasmuch as their evidentiary submissions created issues of fact whether plaintiff's "injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" ... . **Smiley v Allgaier Constr. Corp., 2018 NY Slip Op 04130, Fourth Dept 6-8-18**

LABOR LAW-CONSTRUCTION LAW (QUESTION OF FACT WHETHER SAFETY DEVICES FOR LIFTING HEAVY MOTOR WERE AVAILABLE, PLAINTIFFS' MOTION OF SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))

LABOR LAW-CONSTRUCTION LAW.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 241 (6) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED, DEFENDANT DEMONSTRATED IT WAS NOT AN AGENT OF THE OWNER OR GENERAL CONTRACTOR (FOURTH DEPT).

The Fourth Department determined defendant's (Pumpcrete's) motion for summary judgment on the Labor Law 241 (6) cause of action should have been granted, but a question of fact precluded summary judgment in favor of Pumpcrete on the Labor Law 200 cause of action:

> Plaintiff was injured while guiding a concrete pump hose that was attached to a truck owned and operated by defendant Pumpcrete Corporation (Pumpcrete). An obstruction formed in the pump hose, causing wet concrete to suddenly be ejected from the hose and knocking plaintiff off of the scaffolding upon which he was standing. At the time of the accident, plaintiff was working for the general contractor, which had hired Pumpcrete to supply the concrete pumping equipment. ...
>
> With respect to the Labor Law § 241 (6) cause of action ... , we note that, "while under that statute owners and general contractors are generally absolutely liable for statutory violations . . . , other parties may be liable under th[at] statute[ ] only if they are acting as the agents of the owner or general contractor by virtue of the fact that they had been given the authority to supervise and control the work being performed at the time of the injury" ... . Pumpcrete satisfied its initial burden of establishing as a matter of law that it was not an agent of the owner or general contractor by submitting deposition testimony from plaintiff and the Pumpcrete pump operator that Pumpcrete lacked authority to supervise or control plaintiff's work, and plaintiff failed to raise a triable issue of fact in response ... . **Rohr v Dewald, 2018 NY Slip Op 04160, Fourth Dept 6-8-18**

LABOR LAW-CONSTRUCTION LAW (DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 241 (6) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED, DEFENDANT DEMONSTRATED IT WAS NOT AN AGENT OF THE OWNER OR GENERAL CONTRACTOR (FOURTH DEPT))

LABOR LAW-CONSTRUCTION LAW.

QUESTION OF FACT WHETHER GENERAL CONTRACTOR LIABLE UNDER LABOR LAW 240 (1) FOR PLAINTIFF'S FALL FROM A LADDER BASED ON CONTRACTUAL SAFETY RESPONSIBILITIES, AND QUESTION OF FACT WHETHER A SUBCONTRACTOR IS LIABLE AS A STATUTORY AGENT OF THE OWNER (FIRST DEPT).

The First Department, modifying Supreme Court, determined there was a question of fact (1) whether one defendant, the general contractor Russco, could be liable under Labor Law 240 (1) for plaintiff's fall from a ladder based upon contractual safety responsibilities, and (2) whether another defendant, Ruggles, could be liable under Labor Law 240 (1) as a statutory agent of the owner exercising supervision and control over the work:

> ... [T]he contract ... provides that Russco [the general contractor] is responsible for "taking all reasonable safety precautions to prevent injury or death to persons or damage to property" and that such responsibility extends "to the protection of all employees on the Project and all other persons who may be affected by the Work in any way" ... . The project is defined in the contract as "construction of all Tenant Improvements for a retail store." Reading these contractual provisions together creates ambiguity as to whether Russco's site safety obligations extended to the signage and awning work that plaintiff was performing when his accident occurred. * * *
>
> The Labor Law § 240(1) claim should not be dismissed as against Ruggles. "Labor Law § 240(1) imposes a nondelegable duty upon owners, general contractors, and their agents to provide proper protection to persons working upon elevated structures" ... . "To be treated as a statutory agent, the subcontractor must have been delegated the supervision and control either over the specific work area involved or the work which [gave] rise to the injury'" ... . "[O]nce a subcontractor qualifies as a statutory agent, it may not escape liability by the simple expedient of delegating that work to another entity" ... .
>
> Ruggles is a proper Labor Law § 240(1) defendant because it was a statutory agent of Express, the owner of the project. **White v 31-01 Steinway, LLC, 2018 NY Slip Op 04279. First Dept 6-12-18**

LABOR LAW-CONSTRUCTION LAW (QUESTION OF FACT WHETHER GENERAL CONTRACTOR LIABLE UNDER LABOR LAW 240 (1) FOR PLAINTIFF'S FALL FROM A LADDER BASED ON CONTRACTUAL SAFETY RESPONSIBILITIES, AND QUESTION OF FACT WHETHER A SUBCONTRACTOR IS LIABLE AS A STATUTORY AGENT OF THE OWNER (FIRST DEPT))/SAFETY RESPONSIBILITIES (LABOR LAW-CONSTRUCTION LAW, (QUESTION OF FACT WHETHER GENERAL CONTRACTOR LIABLE UNDER LABOR LAW 240 (1) FOR PLAINTIFF'S FALL FROM A LADDER BASED ON CONTRACTUAL SAFETY RESPONSIBILITIES, AND QUESTION OF FACT WHETHER A SUBCONTRACTOR IS LIABLE AS A STATUTORY AGENT OF THE OWNER (FIRST DEPT))/STATUTORY AGENT (LABOR LAW-CONSTRUCTION LAW, QUESTION OF FACT WHETHER GENERAL CONTRACTOR LIABLE UNDER LABOR LAW 240 (1) FOR PLAINTIFF'S FALL FROM A LADDER BASED ON CONTRACTUAL SAFETY RESPONSIBILITIES, AND QUESTION OF FACT WHETHER A SUBCONTRACTOR IS LIABLE AS A STATUTORY AGENT OF THE OWNER (FIRST DEPT))/LADDERS (LABOR LAW-CONSTRUCTION LAW, (QUESTION OF FACT WHETHER GENERAL CONTRACTOR LIABLE UNDER LABOR LAW 240 (1) FOR PLAINTIFF'S FALL FROM A LADDER BASED ON CONTRACTUAL SAFETY RESPONSIBILITIES, AND QUESTION OF FACT WHETHER A SUBCONTRACTOR IS LIABLE AS A STATUTORY AGENT OF THE OWNER (FIRST DEPT))

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION, MAKESHIFT LADDER SLID OUT FROM UNDER HIM (FIRST DEPT).

The First Department determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action. Plaintiff alleged a makeshift ladder slid out from under him. A co-worker's statement that plaintiff may have missed the last step did not refute plaintiff's statement that the ladder slid out from under him:

> Plaintiff made a prima facie showing of entitlement to partial summary judgment on the issue of liability on his Labor Law § 240(1) claim with his testimony that the makeshift ladder on which he was descending after detaching a crane cable from the top of an eight-foot C-box slid out from under him ... .
>
> In opposition, defendants failed to raise a triable issue of fact. The affidavit of plaintiff's coworker, who stated that "[he] observed [plaintiff] fall from the ladder after he appeared to have missed' the last step," does not raise a triable issue as to whether plaintiff was the sole proximate cause of the accident, as it does not refute plaintiff's assertion that the ladder slid out from beneath him ... . **Nolan v Port Auth. of N.Y. & N.J., 2018 NY Slip Op 04293, First Dept 6-12-18**

LABOR LAW-CONSTRUCTION LAW (PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION, MAKESHIFT LADDER SLID OUT FROM UNDER HIM (FIRST DEPT))/LADDERS (LABOR LAW-CONSTRUCTION LAW, PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION, MAKESHIFT LADDER SLID OUT FROM UNDER HIM (FIRST DEPT))

LABOR LAW-CONSTRUCTION LAW.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED, PLAINTIFF FELL FROM A SCAFFOLD AND HAD NOT TIED OFF HIS LANYARD (FOURTH DEPT).

The Fourth Department, modifying Supreme Court, over a two-justice dissent, determined that defendant's motion for summary judgment on the Labor Law 240 (1) should not have been granted. There were questions of fact whether plaintiff's fall could have been prevented by an available safety device. Plainitiff was not tied off, but there was testimony he couldn't have accomplished the work if he were tied off with a six foot lanyard. Although a 25 foot lanyard was available, plaintiff fell 25 to 30 feet and the retractable lanyard may not have prevented the injury:

> "A violation occurs where a scaffold or elevated platform is inadequate in and of itself to protect workers against the elevation-related hazards encountered while assembling or dismantling that device, and it is the only safety device supplied or any additional safety device is also inadequate" ... .
>
> We conclude that defendants' own submissions raised triable issues of fact with respect to the Labor Law § 240 (1) claim. In support of their contentions that plaintiff's conduct was the sole proximate cause of his injuries, defendants submitted plaintiff's deposition testimony in which he testified that he chose to unhook his safety lanyard and detach the bridge scaffolding sheet without the benefit of the lanyard or other safety device. The six-foot lanyard given to him was not an adequate safety device, however, because plaintiff also testified that it was too short to permit plaintiff to reach the final clip anchoring the bridge scaffolding sheet, even if he had moved the fall arrest system cable to a location closer to that clip. Furthermore, although defendants submitted evidence that other safety devices were generally available on the work site, they failed to establish as a matter of law that an adequate safety device was present that would have prevented plaintiff "from harm directly flowing from the application of the force of gravity to . . . [his] person" ... . For example, defendants failed to establish as a matter of law that a 20- or 25-foot lanyard, which appears to have been the next length available on the work site, would have prevented plaintiff's fall by virtue of the fact that it was retractable. It therefore cannot be concluded on this record that plaintiff's use of that alternative lanyard would have made any substantial difference in plaintiff's injuries ... . **Martin v Niagara Falls Bridge Commn., 2018 NY Slip Op 04452, Fourth Dept 6-15-18**

LABOR LAW-CONSTRUCTION LAW (DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED, PLAINTIFF FELL FROM A SCAFFOLD AND HAD NOT TIED OFF HIS LANYARD (FOURTH DEPT))/SCAFFOLDS (LABOR LAW-CONSTRUCTION LAW, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED, PLAINTIFF FELL FROM A SCAFFOLD AND HAD NOT TIED OFF HIS LANYARD (FOURTH DEPT))

LABOR LAW-CONSTRUCTION LAW.

QUESTION OF FACT WHETHER LADDERS WERE AVAILABLE, PLAINTIFF FELL WHEN AN INVERTED BUCKET HE WAS STANDING ON TIPPED, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS LABOR LAW 240 (1) ACTION PROPERLY DENIED (SECOND DEPT).

The Second Department determined there was a question of fact whether ladders were available at the work site such that plaintiff did not need to stand on an inverted bucket to install sheetrock. Plaintiff was injured when the bucket tipped and he fell:

> "Under Labor Law § 240(1), owners and general contractors, and their agents, have a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites" ... . "To prevail on a Labor Law § 240(1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries" ... . "Liability under section 240(1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident. In such cases, plaintiff's own negligence is the sole proximate cause of his injury"... .
>
> Here, the plaintiff failed to establish his prima facie entitlement to judgment as a matter of law on the issue of liability on the Labor Law § 240(1) cause of action. In support of his motion, the plaintiff submitted transcripts of his deposition, in which he testified that there were ladders and Bakers scaffolds kept on the job site. **Lorde v Margaret Tietz Nursing & Rehabilitation Ctr., 2018 NY Slip Op 04542, Second Dept 6-20-18**

LABOR LAW-CONSTRUCTION LAW (QUESTION OF FACT WHETHER LADDERS WERE AVAILABLE, PLAINTIFF FELL WHEN AN INVERTED BUCKET HE WAS STANDING ON TIPPED, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS LABOR LAW 240 (1) ACTION PROPERLY DENIED (SECOND DEPT))/LADDERS (LABOR LAW-CONSTRUCTION LAW, QUESTION OF FACT WHETHER LADDERS WERE AVAILABLE, PLAINTIFF FELL WHEN AN INVERTED BUCKET HE WAS STANDING ON TIPPED, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS LABOR LAW 240 (1) ACTION PROPERLY DENIED (SECOND DEPT))

LABOR LAW-CONSTRUCTION LAW.

KNEE INJURY CAUSED BY CARRYING A HEAVY STEEL BEAM DOWN STAIRS IS NOT A COVERED ACCIDENT UNDER LABOR LAW 240 (1) (SECOND DEPT).

The Second Department, modifying Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law 240 (1) cause of action was properly granted and defendant's (Premier's) motion for summary judgment dismissing the Labor Law 240 (1) cause of action should have been granted. Plaintiff injured his knee carrying a heavy steel beam down some stairs. The court held that the incident was not encompassed by Labor Law 240 (1):

> ... [T]he plaintiff did not establish his prima facie entitlement to judgment as a matter of law, since he failed to demonstrate that his injury was caused by an elevation-related hazard encompassed by Labor Law § 240(1). The plaintiff's evidence demonstrated that the cause of his injury was the weight of the beam he was carrying. The mere fact that the plaintiff was injured by the weight of a heavy object being lifted or carried does not give rise to liability pursuant to Labor Law § 240(1) ... . The Court of Appeals has "repeatedly held, implicitly and explicitly, that it is not enough that a plaintiff's injury flowed directly from the application of the force of gravity to an object or person, even where a device specified by the statute might have prevented the accident" ... . Accordingly, the Supreme Court properly denied the plaintiff's cross motion for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1).
>
> Premier established its prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 240(1) cause of action through evidence that the plaintiff was injured by the weight of the beam as opposed to an elevation-related risk ... . **Sullivan v New York Athletic Club of City of N.Y., 2018 NY Slip Op 04590, Second Dept 6-20-18**

LABOR LAW-CONSTRUCTION LAW (KNEE INJURY CAUSED BY CARRYING A HEAVY STEEL BEAM DOWN STAIRS IS NOT A COVERED ACCIDENT UNDER LABOR LAW 240 (1) (SECOND DEPT))

LABOR LAW-CONSTRUCTION LAW.

GENERAL CONTRACTOR DID NOT EXERCISE SUFFICIENT SUPERVISORY CONTROL OVER PLAINTIFF'S WORK TO BE LIABLE UNDER LABOR LAW 200 OR COMMON LAW NEGLIGENCE (SECOND DEPT).

The Second Department determined plaintiff's knee injury stemming from carrying a heavy beam down stairs was not covered under Labor Law 240 (1). The court further found that defendant general contractor (Talisen) did not exercise sufficient supervisory control over plaintiff's work to be liable under Labor Law 200 or common law negligence:

> Labor Law § 200 codifies the common-law duty imposed on an owner or a general contractor to provide construction site workers with a safe place to work ... . Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work. General supervisory authority to oversee the progress of the work is insufficient to impose liability... . " A defendant has the authority to control the work for the purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed"' ... . If the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercises no supervisory control over the work, no liability attaches under Labor Law § 200 or the common law ... .
>
> In this case, Talisen met its prima facie burden of demonstrating a lack of sufficient supervisory control over the plaintiff's work to subject it to liability under either Labor Law § 200 or common-law negligence. In support of its motion, Talisen presented the deposition testimony of its project superintendent as well as the owner of Premier showing that decisions regarding the means and methods for carrying the beam were the responsibility of Premier. In opposition, the plaintiff failed to raise a triable issue of fact. **Sullivan v New York Athletic Club of City of N.Y., 2018 NY Slip Op 04591, Second Dept 6-20-18**

LABOR LAW-CONSTRUCTION LAW (GENERAL CONTRACTOR DID NOT EXERCISE SUFFICIENT SUPERVISORY CONTROL OVER PLAINTIFF'S WORK TO BE LIABLE UNDER LABOR LAW 200 OR COMMON LAW NEGLIGENCE (SECOND DEPT))/GENERAL CONTRACTOR (LABOR LAW-CONSTRUCTION LAW, GENERAL CONTRACTOR DID NOT EXERCISE SUFFICIENT SUPERVISORY CONTROL OVER PLAINTIFF'S WORK TO BE LIABLE UNDER LABOR LAW 200 OR COMMON LAW NEGLIGENCE (SECOND DEPT))

LABOR LAW-CONSTRUCTION LAW.

ALTHOUGH THE DEFENDANT HOMEOWNERS ACTED AS A GENERAL CONTRACTOR, THEY DID NOT SUPERVISE OR CONTROL ANY OF THE WORK, HOMEOWNERS' MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240 (1), 241 (6) AND 200 CAUSES OF ACTION SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the homeowners' motion for summary judgment dismissing the Labor Law 240 (1), 241 (6) and 200 causes of action should have been granted. Although the homeowners acted as a general contractor, they did not supervise or control any of the work:

> As the owners of a one-family dwelling who contracted for but did not direct or control the work, defendants are exempt from liability under Labor Law §§ 240 and 241 ... . "Whether an owner's conduct amounts to directing or controlling the work depends upon the degree of supervision exercised over the method and manner in which the work is performed" ... . Here, although defendants acted as general contractors on the construction of their home by obtaining the necessary permits, purchasing roofing materials, and hiring contractors to perform the construction work, defendants met their initial burden of demonstrating that they did not supervise or control the method or manner of plaintiff's work ... .
>
> "Where[, as here,] the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200" ... . **Bund v Higgins, 2018 NY Slip Op 04897, Fourth Dept 6-29-18**

LABOR LAW-CONSTRUCTION LAW (ALTHOUGH THE DEFENDANT HOMEOWNERS ACTED AS A GENERAL CONTRACTOR, THEY DID NOT SUPERVISE OR CONTROL ANY OF THE WORK, HOMEOWNERS' MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240 (1), 241 (6) AND 200 CAUSES OF ACTION SHOULD HAVE BEEN GRANTED (FOURTH DEPT))/HOMEOWNERS (LABOR LAW-CONSTRUCTION LAW, ALTHOUGH THE DEFENDANT HOMEOWNERS ACTED AS A GENERAL CONTRACTOR, THEY DID NOT SUPERVISE OR CONTROL ANY OF THE WORK, HOMEOWNERS' MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240 (1), 241 (6) AND 200 CAUSES OF ACTION SHOULD HAVE BEEN GRANTED (FOURTH DEPT))

LABOR LAW-CONSTRUCTION LAW.

THE PLACEMENT OF THE LADDER WAS DEEMED THE CAUSE OF PLAINTIFF'S FALL AND PLAINTIFF HAD PLACED THE LADDER, THEREFORE PLAINTIFF'S ACTIONS WERE DEEMED THE SOLE PROXIMATE CAUSE OF HIS INJURY PRECLUDING RECOVERY IN THIS LABOR LAW 240 (1) CASE (FOURTH DEPT).

The Fourth Department, over a dissent, determined that plaintiff's actions were the sole proximate cause of his fall from a ladder in this Labor Law 240 (1) case. The court determined it was the placement of the ladder which was the cause of the accident and defendant had placed the ladder:

> Plaintiff alleged in his second amended complaint that he fell due to the placement of the ladder, and he admitted in his deposition testimony that he had placed the ladder himself. Plaintiff's theory of liability is that the ladder was not an adequate safety device because it could not be placed directly below his work site. Defendants, however, submitted photographs and a video recording from their safety expert that depicted the expert placing the ladder directly under the work site and standing on it. Furthermore, plaintiff conceded in his deposition testimony that other safety devices were available at the site, and that he asked if they were available before using the ladder. Thus, we conclude that defendants established as a matter of law that the ladder was an adequate safety device and that plaintiff's own conduct was the sole proximate cause of his injuries. **Kipp v Marinus Homes, Inc., 2018 NY Slip Op 04859, Fourth Dept 6-29-18**

LABOR LAW-CONSTRUCTION LAW (THE PLACEMENT OF THE LADDER WAS DEEMED THE CAUSE OF PLAINTIFF'S FALL AND PLAINTIFF HAD PLACED THE LADDER, THEREFORE PLAINTIFF'S ACTIONS WERE DEEMED THE SOLE PROXIMATE CAUSE OF HIS INJURY PRECLUDING RECOVERY IN THIS LABOR LAW 240 (1) CASE (FOURTH DEPT))/LADDERS (LABOR LAW-CONSTRUCTION LAW, THE PLACEMENT OF THE LADDER WAS DEEMED THE CAUSE OF PLAINTIFF'S FALL AND PLAINTIFF HAD PLACED THE LADDER, THEREFORE PLAINTIFF'S ACTIONS WERE DEEMED THE SOLE PROXIMATE CAUSE OF HIS INJURY PRECLUDING RECOVERY IN THIS LABOR LAW 240 (1) CASE (FOURTH DEPT))/SOLE PROXIMATE CAUSE (LABOR LAW-CONSTRUCTION LAW, HE PLACEMENT OF THE LADDER WAS DEEMED THE CAUSE OF PLAINTIFF'S FALL AND PLAINTIFF HAD PLACED THE LADDER, THEREFORE PLAINTIFF'S ACTIONS WERE DEEMED THE SOLE PROXIMATE CAUSE OF HIS INJURY PRECLUDING RECOVERY IN THIS LABOR LAW 240 (1) CASE (FOURTH DEPT))

LABOR LAW-CONSTRUCTION LAW.

QUESTION OF FACT WHETHER STAIRWAY WHICH COLLAPSED WAS TEMPORARY OR PERMANENT, ONLY TEMPORARY STAIRWAYS ARE COVERED UNDER LABOR LAW 240 (1), QUESTIONS OF FACT WHETHER PROJECT MANAGER HAD SUFFICIENT SUPERVISORY CONTROL TO BE LIABLE UNDER LABOR LAW 240 (1), 241 (6) AND 200 (FOURTH DEPT).

The Fourth Department determined there was a question of fact whether the stairs which collapsed were temporary or permanent. If the stairs were temporary they would be considered the functional equivalent of a ladder and would be covered under Labor Law 240 (1). There was also a question of fact whether a project manager could be deemed a general contractor or agent of the owner with supervisory control and therefore potentially liable under Labor Law 240 (1) and 241 (6). There were also questions of fact whether the project manage was liable under Labor Law 200, depending on whether it had control over the work site or whether it had actual or constructive notice of the dangerous condition:

> "A temporary staircase that is used for access to and from the upper levels of a house under construction is the functional equivalent of a ladder' and falls within the designation of other devices' within the meaning of Labor Law § 240 (1)" ... . "[I]t has repeatedly been held that a stairway which is, or is intended to be, permanent—even one that has not yet been anchored or secured in its designated location . . . , or completely constructed . . . —cannot be considered the functional equivalent of a ladder or other device as contemplated by section 240 (1)" ... .
>
> " An entity is a contractor within the meaning of Labor Law § 240 (1) and § 241 (6) if it had the power to enforce safety standards and choose responsible subcontractors . . . , and an entity is a general contractor if, in addition thereto, it was responsible for coordinating and supervising the . . . project' " ... . While a construction manager "is generally not considered a contractor' or owner' within the meaning of section 240 (1) or section 241" ... , a construction manager may nevertheless be "vicariously liable as an agent of the property owner . . . where the manager had the ability to control the activity which brought about the injury" ... . "The label given a defendant, whether construction manager' or general contractor,' is not determinative . . . [inasmuch as] the core inquiry is whether the defendant had the authority to supervise or control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition' " ... . **Stiegman v Barden & Robeson Corp., 2018 NY Slip Op 04865, Fourth Dept 6-29-18**

LABOR LAW-CONSTRUCTION LAW (QUESTION OF FACT WHETHER STAIRWAY WHICH COLLAPSED WAS TEMPORARY OR PERMANENT, ONLY TEMPORARY STAIRWAYS ARE COVERED UNDER LABOR LAW 240 (1), QUESTIONS OF FACT WHETHER PROJECT MANAGER HAD SUFFICIENT SUPERVISORY CONTROL TO BE LIABLE UNDER LABOR LAW 240 (1), 241 (6) AND 200 (FOURTH DEPT))/STAIRWAYS (LABOR LAW-CONSTRUCTION LAW (QUESTION OF FACT WHETHER STAIRWAY WHICH COLLAPSED WAS TEMPORARY OR PERMANENT, ONLY TEMPORARY STAIRWAYS ARE COVERED UNDER LABOR LAW 240 (1), QUESTIONS OF FACT WHETHER PROJECT MANAGER HAD SUFFICIENT SUPERVISORY CONTROL TO BE LIABLE UNDER LABOR LAW 240 (1), 241 (6) AND 200 (FOURTH DEPT))/PROJECT MANAGER (LABOR LAW-CONSTRUCTION LAW, QUESTION OF FACT WHETHER STAIRWAY WHICH COLLAPSED WAS TEMPORARY OR PERMANENT, ONLY TEMPORARY STAIRWAYS ARE COVERED UNDER LABOR LAW 240 (1), QUESTIONS OF FACT WHETHER PROJECT MANAGER HAD SUFFICIENT SUPERVISORY CONTROL TO BE LIABLE UNDER LABOR LAW 240 (1), 241 (6) AND 200 (FOURTH DEPT))

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

PLAINTIFF WAS ENGAGED IN ALTERATION WHEN HE FELL FROM AN A FRAME LADDER AND WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION, RECOVERY NOT PRECLUDED ON THE GROUND THAT PLAINTIFF WAS THE ONLY WITNESS OR ON THE GROUND OF COMPARATIVE NEGLIGENCE (FIRST DEPT).

The First Department determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) action stemming from a fall from an A frame ladder. Plaintiff was engaged in "alteration" within the meaning of the statute. The fact that plaintiff was the sole witness to the action did not preclude summary judgment. The fact that plaintiff may have been comparatively negligent did not preclude summary judgment:

> Partial summary judgment on the issue of liability was properly granted in favor of plaintiff in this action where plaintiff was injured when he fell from a six-foot A-frame ladder while performing work on the sprinkler system in defendant's building ... . According to plaintiff, as he was tightening a bolt, the ladder moved and he fell to the floor. Contrary to defendant's contention, the record shows that the work that plaintiff was engaged in at the time of his accident constituted an alteration within the meaning of section 240(1). Such work included reconfiguring the premises' sprinkler system to comply with the fire code and entailed, inter alia, cutting and removing pipes, relocating pipes and valves, and installing components ... .
>
> That plaintiff is the sole witness to the accident does not preclude summary judgment in his favor where nothing in the record contradicts his account or raises an issue of fact as to his credibility ... . Furthermore, any failure on plaintiff's part to ensure that his coworker had properly set up the ladder would, at most, constitute comparative negligence, a defense inapplicable to a Labor Law § 240(1) cause of action ... . **Concepcion v 333 Seventh LLC, 2018 NY Slip Op 04422, First Dept 6-14-18**

LABOR LAW-CONSTRUCTION LAW (PLAINTIFF WAS ENGAGED IN ALTERATION WHEN HE FELL FROM AN A FRAME LADDER AND WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION, RECOVERY NOT PRECLUDED ON THE GROUND THAT PLAINTIFF WAS THE ONLY WITNESS OR ON THE GROUND OF COMPARATIVE NEGLIGENCE (FIRST DEPT))/ALTERATION (LABOR LAW-CONSTRUCTION LAW, PLAINTIFF WAS ENGAGED IN ALTERATION WHEN HE FELL FROM AN A FRAME LADDER AND WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION, RECOVERY NOT PRECLUDED ON THE GROUND THAT PLAINTIFF WAS THE ONLY WITNESS OR ON THE GROUND OF COMPARATIVE NEGLIGENCE (FIRST DEPT))/EVIDENCE (LABOR LAW-CONSTRUCTION LAW, (PLAINTIFF WAS ENGAGED IN ALTERATION WHEN HE FELL FROM AN A FRAME LADDER AND WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION, RECOVERY NOT PRECLUDED ON THE GROUND THAT PLAINTIFF WAS THE ONLY WITNESS OR ON THE GROUND OF COMPARATIVE NEGLIGENCE (FIRST DEPT))/COMPARATIVE NEGLIGENCE (LABOR LAW-CONSTRUCTION LAW, (PLAINTIFF WAS ENGAGED IN ALTERATION WHEN HE FELL FROM AN A FRAME LADDER AND WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION, RECOVERY NOT PRECLUDED ON THE GROUND THAT PLAINTIFF WAS THE ONLY WITNESS OR ON THE GROUND OF COMPARATIVE NEGLIGENCE (FIRST DEPT))/LADDERS (LABOR LAW-CONSTRUCTION LAW, (PLAINTIFF WAS ENGAGED IN ALTERATION WHEN HE FELL FROM AN A FRAME LADDER AND WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION, RECOVERY NOT PRECLUDED ON THE GROUND THAT PLAINTIFF WAS THE ONLY WITNESS OR ON THE GROUND OF COMPARATIVE NEGLIGENCE (FIRST DEPT))

LABOR LAW-CONSTRUCTION LAW, NEGLIGENCE.

QUESTIONS OF FACT ON THE LABOR LAW 240 (1), LABOR LAW 241 (6), AND COMMON LAW NEGLIGENCE CAUSES OF ACTION, PLAINTIFF WAS USING THE TOP HALF OF AN EXTENSION LADDER AND THE LADDER SLIPPED OUT FROM UNDER HIM (FOURTH DEPT).

The Fourth Department, modifying Supreme Court, determined neither party was entitled to summary judgment on Labor Law 240 (1), Labor Law 241 (6) and common law negligence causes of action stemming from plaintiff's use of the top half of an extension ladder that slipped out from under him. With respect to the common law negligence cause of action against the property owner, the court explained:

> Where the injured worker's employer provides the allegedly defective equipment, the analysis turns on whether the defendant owner had the authority to supervise or control the work ... . Where, however, the defendant owner provides the allegedly defective equipment, the legal standard "is whether the owner created the dangerous or defective condition or had actual or constructive notice thereof" ... , because in that situation the defendant property owner "is possessed of the authority, as owner, to remedy the condition" of the defective equipment ... . Contrary to defendants' contention, they failed to establish as a matter of law that they did not create the dangerous condition of the ladder or have either actual or constructive notice of it. Moreover, "the absence of rubber shoes on a ladder is a visible and apparent defect,' evidence of which may be sufficient to raise a triable issue of fact on the issue of constructive notice" ... . **Sochan v Mueller, 2018 NY Slip Op 04457, Fourth Dept 6-15-18**

LABOR LAW-CONSTRUCTION LAW (QUESTIONS OF FACT ON THE LABOR LAW 240 (1), LABOR LAW 241 (6), AND COMMON LAW NEGLIGENCE CAUSES OF ACTION, PLAINTIFF WAS USING THE TOP HALF OF AN EXTENSION LADDER AND THE LADDER SLIPPED OUT FROM UNDER HIM (FOURTH DEPT))/LADDERS (LABOR LAW-CONSTRUCTION LAW, QUESTIONS OF FACT ON THE LABOR LAW 240 (1), LABOR LAW 241 (6), AND COMMON LAW NEGLIGENCE CAUSES OF ACTION, PLAINTIFF WAS USING THE TOP HALF OF AN EXTENSION LADDER AND THE LADDER SLIPPED OUT FROM UNDER HIM (FOURTH DEPT))/NEGLIGENCE (LABOR LAW-CONSTRUCTION LAW, QUESTIONS OF FACT ON THE LABOR LAW 240 (1), LABOR LAW 241 (6), AND COMMON LAW NEGLIGENCE CAUSES OF ACTION, PLAINTIFF WAS USING THE TOP HALF OF AN EXTENSION LADDER AND THE LADDER SLIPPED OUT FROM UNDER HIM (FOURTH DEPT))

MEDICAID

MEDICAID, ADMINISTRATIVE LAW, APPEALS.

PETITION SEEKING MEDICAL ASSISTANCE SHOULD NOT HAVE BEEN DENIED BASED UPON THE INABILITY TO DETERMINE THE FINANCIAL RESOURCES AVAILABLE TO THE NURSING HOME RESIDENT'S ESTRANGED WIFE, COURT MAY NOT CONSIDER THEORY NOT RAISED BEFORE THE AGENCY (FOURTH DEPT).

The Fourth Department, annulling the determination of the Erie County Department of Social Services, held that petitioner's application for medical assistance should not have been denied on the ground that the financial resources available to the nursing home resident's estranged wife could not be determined. The court noted that it may not consider any theories argued on appeal that were not raised before the agency:

> [18 NYCRR] Section 360-2.3 (a) (2) provides that a medical assistance "applicant/recipient will not have eligibility denied or discontinued solely because he/she does not possess and cannot obtain information about the income or resources of a nonapplying legally responsible relative who is not living with him/her." Although denial of an application may nonetheless be appropriate under section 360-2.3 (a) (3) if an applicant/recipient refuses to grant permission for the examination of non-public records, here the parties do not dispute that petitioner and the resident cooperated with all efforts to obtain information from the resident's estranged wife.
>
> We reject respondent's contention that the determination should be confirmed because, in the absence of a showing that denial would subject the resident to undue hardship, denial of petitioner's application was permissible pursuant to 18 NYCRR 360-4.10. Regardless of the merits of that contention, we note that " [i]t is the settled rule that judicial review of an administrative determination is limited to the grounds invoked by the agency' " **Matter of Waterfront Ctr. for Rehabilitation & Healthcare v New York State Dept. of Health, 2018 NY Slip Op 04881, Fourth Dept 6-29-18**

MEDICAID (PETITION SEEKING MEDICAL ASSISTANCE SHOULD NOT HAVE BEEN DENIED BASED UPON THE INABILITY TO DETERMINE THE FINANCIAL RESOURCES AVAILABLE TO THE NURSING HOME RESIDENT'S ESTRANGED WIFE (FOURTH DEPT))/ADMINISTRATIVE LAW (MEDICAID, PETITION SEEKING MEDICAL ASSISTANCE SHOULD NOT HAVE BEEN DENIED BASED UPON THE INABILITY TO DETERMINE THE FINANCIAL RESOURCES AVAILABLE TO THE NURSING HOME RESIDENT'S ESTRANGED WIFE (FOURTH DEPT))/APPEALS (ADMINISTRATIVE LAW, MEDICAID, PETITION SEEKING MEDICAL ASSISTANCE SHOULD NOT HAVE BEEN DENIED BASED UPON THE INABILITY TO DETERMINE THE FINANCIAL RESOURCES AVAILABLE TO THE NURSING HOME RESIDENT'S ESTRANGED WIFE, COURT MAY NOT CONSIDER THEORY NOT RAISED BEFORE THE AGENCY (FOURTH DEPT))

MEDICAL MALPRACTICE

MEDICAL MALPRACTICE, EVIDENCE.

EDUCATION LAW AND PUBLIC HEALTH LAW DID NOT PROHIBIT RELEASE OF THE IDENTITIES OF NONPARTY PARTICIPANTS IN A QUALITY ASSURANCE REVIEW INVOLVING PLAINTIFF DOCTOR (FIRST DEPT).

The First Department determined the Education Law and Public Health Law did not prohibit the release of the identities of persons who participated in a quality assurance review involving plaintiff doctor:

> Plaintiffs' claims in this suit are based on [Peconic Bay Medical Center's] alleged misrepresentations about the existence of an investigation and the filing of an AAR [adverse action report], and the AAR did not report plaintiff for malpractice but for resigning during an ongoing investigation ... . * * *
>
> ... [P]laintiffs' request to compel defendants to un-redact the identities of nonparty participants in the quality assurance review process should be granted. Education Law § 6527(3) and Public Health Law § 2805-m protect documents "prepared by or at the behest of" a quality assurance committee ... . However, they do not protect the mere identities of participants. **Brook v Peconic Bay Med. Ctr., 2018 NY Slip Op 04432, First Dept 6-14-18**

MEDICAL MALPRACTICE (EDUCATION LAW AND PUBLIC HEALTH LAW DID NOT PROHIBIT RELEASE OF THE IDENTITIES OF NONPARTY PARTICIPANTS IN A QUALITY ASSURANCE REVIEW INVOLVING PLAINTIFF DOCTOR (FIRST DEPT))/EDUCATION LAW (MEDICAL MALPRACTICE, EDUCATION LAW AND PUBLIC HEALTH LAW DID NOT PROHIBIT RELEASE OF THE IDENTITIES OF NONPARTY PARTICIPANTS IN A QUALITY ASSURANCE REVIEW INVOLVING PLAINTIFF DOCTOR (FIRST DEPT))/PUBLIC HEALTH LAW (MEDICAL MALPRACTICE, EDUCATION LAW AND PUBLIC HEALTH LAW DID NOT PROHIBIT RELEASE OF THE IDENTITIES OF NONPARTY PARTICIPANTS IN A QUALITY ASSURANCE REVIEW INVOLVING PLAINTIFF DOCTOR (FIRST DEPT))/QUALITY ASSURANCE REVIEW (MEDICAL MALPRACTICE, EDUCATION LAW AND PUBLIC HEALTH LAW DID NOT PROHIBIT RELEASE OF THE IDENTITIES OF NONPARTY PARTICIPANTS IN A QUALITY ASSURANCE REVIEW INVOLVING PLAINTIFF DOCTOR (FIRST DEPT))/EVIDENCE (MEDICAL MALPRACTICE, EDUCATION LAW AND PUBLIC HEALTH LAW DID NOT PROHIBIT RELEASE OF THE IDENTITIES OF NONPARTY PARTICIPANTS IN A QUALITY ASSURANCE REVIEW INVOLVING PLAINTIFF DOCTOR (FIRST DEPT))

MEDICAL MALPRACTICE, NEGLIGENCE, BATTERY.

COMPLAINT ALLEGING A MEDICAL PROCEDURE WAS PERFORMED TO WHICH PLAINTIFF DID NOT CONSENT STATED A CAUSE OF ACTION FOR BATTERY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff had stated a cause of action for battery alleging a medical procedure was performed without her consent:

> "It is well settled that a medical professional may be deemed to have committed battery, rather than malpractice, if he or she carries out a procedure or treatment to which the patient has provided no consent at all' " ... . Here, in moving under CPLR 3211 (a) (7), defendants attached all of the pleadings, which alleged, inter alia, that defendants "performed a procedure upon the Plaintiff while she was under general anesthesia without informing her or obtaining any consent, which conduct constituted a battery upon her." Defendants also referenced and provided to the court the informed consent form executed by plaintiff that explicitly authorized the performance of a flexible sigmoidoscopy, but not a colonoscopy. The form further noted in relevant part that, "[i]f any unforeseen condition arises during the procedure calling for, in the physician's judgment, additional procedures, treatments, or operations, [defendant is] authorize[d] . . . to do whatever he . . . deems advisable." We conclude that plaintiff has sufficiently asserted a cause of action sounding in battery by alleging that she provided no consent to the performance of a colonoscopy ... , and that the evidentiary submissions considered by the court, including the consent form, do not "establish conclusively that plaintiff has no cause of action" sounding in battery ... . **McCarthy v Shah, 2018 NY Slip Op 04887, Fourth Dept 6-29-18**

MEDICAL MALPRACTICE (BATTERY, COMPLAINT ALLEGING A MEDICAL PROCEDURE WAS PERFORMED TO WHICH PLAINTIFF DID NOT CONSENT STATED A CAUSE OF ACTION FOR BATTERY (FOURTH DEPT))/NEGLIGENCE (MEDICAL MALPRACTICE, BATTERY, COMPLAINT ALLEGING A MEDICAL PROCEDURE WAS PERFORMED TO WHICH PLAINTIFF DID NOT CONSENT STATED A CAUSE OF ACTION FOR BATTERY (FOURTH DEPT))/BATTERY (MEDICAL MALPRACTICE, COMPLAINT ALLEGING A MEDICAL PROCEDURE WAS PERFORMED TO WHICH PLAINTIFF DID NOT CONSENT STATED A CAUSE OF ACTION FOR BATTERY (FOURTH DEPT))

MUNICIPAL LAW

MUNICIPAL LAW, EMPLOYMENT LAW.

LOCAL LAWS CONCERNING HEALTH BENEFITS FOR RETIRED TOWN EMPLOYEES WHICH WERE NOT ENACTED BY REFERENDUM ARE ENTIRELY INVALID (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Troutman, determined local laws concerning health benefits for retired town employees were invalid because they were not enacted by referendum:

> Plaintiffs correctly acknowledge that the modification clauses in the 2009 Law and the 2014 Law run afoul of Municipal Home Rule Law § 23 (2) (f) because those laws were not enacted by referendum. "[A] local law shall be subject to mandatory referendum if it . . . [a]bolishes, transfers or curtails any power of an elective officer" (id.). Therefore, a local legislative body lacks the power to enact legislation curtailing the voting powers of its own members; such legislation cannot be enacted except by referendum. Here, the modification clauses in the 2009 Law and the 2014 Law curtailed the voting powers of the elected members of the Town Board by requiring a supermajority vote to enact certain kinds of legislation. The 2009 Law and 2014 Law are thus invalid inasmuch as they were not enacted by referendum. ...
>
> Where, as here, a local law is subject to a mandatory referendum, the failure to enact it by referendum renders the entire law invalid ... . **Parker v Town of Alexandria, 2018 NY Slip Op 04126, Fourth Dept 6-8-18**

MUNICIPAL LAW (LOCAL LAWS CONCERNING HEALTH BENEFITS FOR RETIRED TOWN EMPLOYEES WHICH WERE NOT ENACTED BY REFERENDUM ARE ENTIRELY INVALID (FOURTH DEPT))/EMPLOYMENT LAW (MUNICIPAL LAW, LOCAL LAWS CONCERNING HEALTH BENEFITS FOR RETIRED TOWN EMPLOYEES WHICH WERE NOT ENACTED BY REFERENDUM ARE ENTIRELY INVALID (FOURTH DEPT))/MUNICIPAL HOME RULE LAW (LOCAL LAWS CONCERNING HEALTH BENEFITS FOR RETIRED TOWN EMPLOYEES WHICH WERE NOT ENACTED BY REFERENDUM ARE ENTIRELY INVALID (FOURTH DEPT))/LOCAL LAWS (MUNICIPAL LAW, (LOCAL LAWS CONCERNING HEALTH BENEFITS FOR RETIRED TOWN EMPLOYEES WHICH WERE NOT ENACTED BY REFERENDUM ARE ENTIRELY INVALID (FOURTH DEPT))/HEALTH BENEFITS (MUNICIPAL LAW, EMPLOYMENT LAW, LOCAL LAWS CONCERNING HEALTH BENEFITS FOR RETIRED TOWN EMPLOYEES WHICH WERE NOT ENACTED BY REFERENDUM ARE ENTIRELY INVALID (FOURTH DEPT))

MUNICIPAL LAW, CIVIL PROCEDURE.

PETITIONER WAS REQUIRED TO FILE A NOTICE OF CLAIM PURSUANT TO CPLR 9802 IN AN ACTION SEEKING A DECLARATORY JUDGMENT THAT A LOCAL LAW WAS INVALID, DECLARATORY JUDGMENT CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined petitioner's (BT Holdings') cause of action for a declaratory judgment declaring a local law invalid should have been dismissed because petitioner did not file a notice of claim as required by CPLR 9802:

> Contrary to BT Holdings' contention, the notice of claim requirements of CPLR 9802 apply to the causes of action for declaratory relief ... . **Matter of BT Holdings, LLC v Village of Chester, 2018 NY Slip Op 04544, Second Dept 6-20-18**

MUNICIPAL LAW (NOTICE OF CLAIM, PETITIONER WAS REQUIRED TO FILE A NOTICE OF CLAIM PURSUANT TO CPLR 9802 IN AN ACTION SEEKING A DECLARATORY JUDGMENT THAT A LOCAL LAW WAS INVALID, DECLARATORY JUDGMENT CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED (SECOND DEPT))/NOTICE OF CLAIM (MUNICIPAL LAW, CIVIL PROCEDURE, PETITIONER WAS REQUIRED TO FILE A NOTICE OF CLAIM PURSUANT TO CPLR 9802 IN AN ACTION SEEKING A DECLARATORY JUDGMENT THAT A LOCAL LAW WAS INVALID, DECLARATORY JUDGMENT CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED (SECOND DEPT))/CIVIL PROCEDURE (MUNICIPAL LAW, NOTICE OF CLAIM, PETITIONER WAS REQUIRED TO FILE A NOTICE OF CLAIM PURSUANT TO CPLR 9802 IN AN ACTION SEEKING A DECLARATORY JUDGMENT THAT A LOCAL LAW WAS INVALID, DECLARATORY JUDGMENT CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED (SECOND DEPT))/DECLARATORY JUDGMENT (MUNICIPAL LAW, CIVIL PROCEDURE, NOTICE OF CLAIM, PETITIONER WAS REQUIRED TO FILE A NOTICE OF CLAIM PURSUANT TO CPLR 9802 IN AN ACTION SEEKING A DECLARATORY JUDGMENT THAT A LOCAL LAW WAS INVALID, DECLARATORY JUDGMENT CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED (SECOND DEPT))/CPLR 9802 (NOTICE OF CLAIM, PETITIONER WAS REQUIRED TO FILE A NOTICE OF CLAIM PURSUANT TO CPLR 9802 IN AN ACTION SEEKING A DECLARATORY JUDGMENT THAT A LOCAL LAW WAS INVALID, DECLARATORY JUDGMENT CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED (SECOND DEPT))

MUNICIPAL LAW, CONTRACT LAW, EMPLOYMENT LAW.

THE COLLECTIVE BARGAINING AGREEMENTS ARE AMBIGUOUS ON THE ISSUE WHETHER COUNTY RETIREES WHO BECOME ELIGIBLE FOR MEDICARE ARE ENTITLED TO THE FULL MEDICAL BENEFITS AFFORDED THEM AT RETIREMENT, EXTRINSIC EVIDENCE, I.E., WHAT HAD BEEN DONE IN THE PAST, SUPPORTS THE DETERMINATION THAT RETIREES WHO BECOME ELIGIBLE FOR MEDICARE ARE NOT ENTITLED TO FULL BENEFITS (FOURTH DEPT).

The Fourth Department determined retired Monroe County employees who become eligible for Medicare are not entitled to the full medical insurance benefits which were afforded them at retirement. The collective bargaining agreements (CBAs) were deemed ambiguous on the issue and the court looked to what had been done in the past as controlling extrinsic evidence:

> Inasmuch as the contract language is reasonably susceptible of more than one interpretation, we conclude that the CBAs are ambiguous with respect to whether retirees who are eligible for or enrolled in Medicare are entitled to fully-paid health insurance coverage that is equivalent to the insurance coverage in effect at the time they retired. Thus, we turn to extrinsic evidence to determine the parties' intent with respect to the health insurance coverage to be provided to those retirees who are eligible for or enrolled in Medicare. Where, as here, "a contract is ambiguous, its interpretation remains the exclusive function of the court unless determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence' " ... .
>
> For decades, defendants provided retirees who were not yet eligible for Medicare with health insurance benefits, but provided retirees enrolled in Medicare with only Medicare supplement plans. No objection was made and, until recently, the union representing plaintiffs never sought to negotiate any additional benefits for retirees eligible for or enrolled in Medicare. **Ames v County of Monroe, 2018 NY Slip Op 04886, Fourth Dept 6-29-18**

MUNICIPAL LAW (EMPLOYMENT LAW, THE COLLECTIVE BARGAINING AGREEMENTS ARE AMBIGUOUS ON THE ISSUE WHETHER COUNTY RETIREES WHO BECOME ELIGIBLE FOR MEDICARE ARE ENTITLED TO THE FULL MEDICAL BENEFITS AFFORDED THEM AT RETIREMENT, EXTRINSIC EVIDENCE, I.E., WHAT HAD BEEN DONE IN THE PAST, SUPPORTS THE DETERMINATION THAT RETIREES WHO BECOME ELIGIBLE FOR MEDICARE ARE NOT ENTITLED TO FULL BENEFITS (FOURTH DEPT))/CONTRACT LAW (MUNICIPAL LAW, THE COLLECTIVE BARGAINING AGREEMENTS ARE AMBIGUOUS ON THE ISSUE WHETHER COUNTY RETIREES WHO BECOME ELIGIBLE FOR MEDICARE ARE ENTITLED TO THE FULL MEDICAL BENEFITS AFFORDED THEM AT RETIREMENT, EXTRINSIC EVIDENCE, I.E., WHAT HAD BEEN DONE IN THE PAST, SUPPORTS THE DETERMINATION THAT RETIREES WHO BECOME ELIGIBLE FOR MEDICARE ARE NOT ENTITLED TO FULL BENEFITS (FOURTH DEPT))/EMPLOYMENT LAW (MUNICIPAL LAW, THE COLLECTIVE BARGAINING AGREEMENTS ARE AMBIGUOUS ON THE ISSUE WHETHER COUNTY RETIREES WHO BECOME ELIGIBLE FOR MEDICARE ARE ENTITLED TO THE FULL MEDICAL BENEFITS AFFORDED THEM AT RETIREMENT, EXTRINSIC EVIDENCE, I.E., WHAT HAD BEEN DONE IN THE PAST, SUPPORTS THE DETERMINATION THAT RETIREES WHO BECOME ELIGIBLE FOR MEDICARE ARE NOT ENTITLED TO FULL BENEFITS (FOURTH DEPT))/COLLECTIVE BARGAINING AGREEMENTS (MUNICIPAL LAW, THE COLLECTIVE BARGAINING AGREEMENTS ARE AMBIGUOUS ON THE ISSUE WHETHER COUNTY RETIREES WHO BECOME ELIGIBLE FOR MEDICARE ARE ENTITLED TO THE FULL MEDICAL BENEFITS AFFORDED THEM AT RETIREMENT, EXTRINSIC EVIDENCE, I.E., WHAT HAD BEEN DONE IN THE PAST, SUPPORTS THE DETERMINATION THAT RETIREES WHO BECOME ELIGIBLE FOR MEDICARE ARE NOT ENTITLED TO FULL BENEFITS (FOURTH DEPT))/MEDICAL INSURANCE BENEFITS (MUNICIPAL LAW, EMPLOYMENT LAW, THE COLLECTIVE BARGAINING AGREEMENTS ARE AMBIGUOUS ON THE ISSUE WHETHER COUNTY RETIREES WHO BECOME ELIGIBLE FOR MEDICARE ARE ENTITLED TO THE FULL MEDICAL BENEFITS AFFORDED THEM AT RETIREMENT, EXTRINSIC EVIDENCE, I.E., WHAT HAD BEEN DONE IN THE PAST, SUPPORTS THE DETERMINATION THAT RETIREES WHO BECOME ELIGIBLE FOR MEDICARE ARE NOT ENTITLED TO FULL BENEFITS (FOURTH DEPT))

MUNICIPAL LAW, EMPLOYMENT LAW.

CITY'S DETERMINATION IT WOULD NOT DEFEND A POLICE OFFICER IN A CIVIL ACTION STEMMING FROM THE OFFICER'S STRIKING A CIVILIAN WAS ARBITRARY AND CAPRICIOUS (FOURTH DEPT).

The Fourth Department. over a two-justice dissent, determined the city's refusal to defend and indemnify a police officer who was sued civilly for striking a civilian was arbitrary and capricious:

> We respectfully disagree with the view of our dissenting colleagues that a 30-second-long video recording of a portion of the incident, considered in conjunction with the indictment, provides a factual basis for respondent's implicit determination that petitioner was not acting within the scope of his employment and duties as a police officer. First, it is well settled that "[a]n indictment is a mere accusation and raises no presumption of guilt" ... . Thus, the filing of an indictment against petitioner does not provide a factual basis to support the denial of a defense to petitioner in the civil action. Second, the video recording captured only part of the encounter between petitioner and the complainant, and did not capture the beginning or the end of the encounter. As a result, the recorded images of petitioner striking the complainant in the area of his legs and feet with a baton are unaccompanied by contextual factual information that would be essential to support a determination that petitioner's actions fell outside the scope of his employment and duties as a police officer. Notably, the brief video clip shows a loud and chaotic intersection with a heavy police presence, and petitioner appeared to be dressed in police uniform and wearing a jacket with the word "POLICE" printed in bold letters. Three of the officers in the video appeared to be carrying batons, like petitioner, and one other officer appeared to have been engaged in a physical struggle with a civilian on the sidewalk. That struggle appeared to continue into the roadway before the other officer and the civilian disengaged, at which point the camera panned over to a parking lot where petitioner was already engaged with the complainant.
>
> Although it is well settled that an employee's conduct does not fall within the scope of his or her employment where his or her actions are taken for wholly personal reasons not related to the employee's job ... , we conclude that the video recording does not establish that petitioner's actions were taken for wholly personal reasons unrelated to his job as a police officer. **Matter of Krug v City of Buffalo, 2018 NY Slip Op 04118, Fourth Dept 6-8-18**

MUNICIPAL LAW (EMPLOYMENT LAW, POLICE OFFICERS, CITY'S DETERMINATION IT WOULD NOT DEFEND A POLICE OFFICER IN A CIVIL ACTION STEMMING FROM THE OFFICER'S STRIKING A CIVILIAN WAS ARBITRARY AND CAPRICIOUS (FOURTH DEPT))/EMPLOYMENT LAW (MUNICIPAL LAW, POLICE OFFICERS, CITY'S DETERMINATION IT WOULD NOT DEFEND A POLICE OFFICER IN A CIVIL ACTION STEMMING FROM THE OFFICER'S STRIKING A CIVILIAN WAS ARBITRARY AND CAPRICIOUS (FOURTH DEPT))/POLICE OFFICERS (CITY'S DETERMINATION IT WOULD NOT DEFEND A POLICE OFFICER IN A CIVIL ACTION STEMMING FROM THE OFFICER'S STRIKING A CIVILIAN WAS ARBITRARY AND CAPRICIOUS (FOURTH DEPT))

MUNICIPAL LAW, NEGLIGENCE.

APPLICATION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED, ALTHOUGH THE EXCUSE WAS NOT REASONABLE, THE NOTICE WAS ONLY TWO WEEKS LATE AND THERE WAS NO SHOWING DEFENDANT WAS PREJUDICED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined petitioner's application for leave to file a late notice of claim in this sidewalk slip and fall case should have been granted. Petitioner's counsel served a timely notice on the city but the abutting owner was the NYC Housing Authority (NYCHA). The notice was served on the NYCHA two weeks after the expiration of the 90-day period:

> ... [W]hile the petitioner's counsel's error concerning the identity of the responsible public corporation does not provide a reasonable excuse for the delay in giving notice ... , the absence of a reasonable excuse is not, standing alone, fatal to the petitioner's application .... Notably, considering that the petitioner's application was made approximately two weeks after the expiration of the 90-day period, NYCHA acquired actual knowledge of the essential facts constituting the claim within a "reasonable time" after the expiration of the 90-day period (General Municipal Law § 50-e[5]...).
>
> Moreover, the petitioner met her initial burden of showing that the late notice will not substantially prejudice NYCHA, thereby requiring NYCHA "to rebut that showing with particularized evidence" ... . NYCHA's conclusory assertion of substantial prejudice was insufficient to rebut the petitioner's showing. **Matter of Ramos v New York City Hous. Auth., 2018 NY Slip Op 04547, Second Dept 6-20-18**

MUNICIPAL LAW (NEGLIGENCE, NOTICE OF CLAIM, APPLICATION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED, ALTHOUGH THE EXCUSE WAS NOT REASONABLE, THE NOTICE WAS ONLY TWO WEEKS LATE AND THERE WAS NO SHOWING DEFENDANT WAS PREJUDICED (SECOND DEPT))/NEGLIGENCE (MUNICIPAL LAW, NOTICE OF CLAIM, APPLICATION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED, ALTHOUGH THE EXCUSE WAS NOT REASONABLE, THE NOTICE WAS ONLY TWO WEEKS LATE AND THERE WAS NO SHOWING DEFENDANT WAS PREJUDICED (SECOND DEPT))/NOTICE OF CLAIM (MUNICIPAL LAW, NEGLIGENCE, APPLICATION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED, ALTHOUGH THE EXCUSE WAS NOT REASONABLE, THE NOTICE WAS ONLY TWO WEEKS LATE AND THERE WAS NO SHOWING DEFENDANT WAS PREJUDICED (SECOND DEPT))

MUNICIPAL LAW, NEGLIGENCE.

CITY HAD ASSIGNED A CROSSING GUARD TO THE CROSSWALK WHERE INFANT PLAINTIFF WAS STRUCK BY A SCHOOL BUS, THE GUARD HAD CALLED IN SICK THAT DAY, NO SPECIAL RELATIONSHIP BETWEEN THE CITY AND THE PLAINTIFFS, CITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defendant city's motion for summary judgment in this crosswalk pedestrian accident case should have been granted. The city had assigned a school crossing guard for the crosswalk where infant plaintiff was struck by a school bus, but the guard had called in sick that day. The First Department held the plaintiffs did not demonstrate a special relationship with the city:

> In order to establish that the City voluntarily assumed a duty, plaintiffs have the burden of showing: (1) an assumption by the City's agents, through promises or action, of an affirmative duty to act on behalf of plaintiffs; (2) knowledge on the part of the City's agents that inaction could lead to harm; (3) some form of direct contact between the City's agents and plaintiffs; and (4) justifiable reliance by plaintiffs... . Here, the record shows that no special duty existed between the City and plaintiffs before the accident. There was no direct contact between the City's agents and plaintiffs, and the facts that the school crossing guard greeted infant plaintiffs and the children relied upon the crossing guard's instructions when the guard was at the intersection before the accident is insufficient to create a special duty. **Ivan D. v Little Richie Bus Serv. Inc., 2018 NY Slip Op 04823, First Dept 6-28-18**

MUNICIPAL LAW (NEGLIGENCE, SPECIAL RELATIONSHIP, CITY HAD ASSIGNED A CROSSING GUARD TO THE CROSSWALK WHERE INFANT PLAINTIFF WAS STRUCK BY A SCHOOL BUS, THE GUARD HAD CALLED IN SICK THAT DAY, NO SPECIAL RELATIONSHIP BETWEEN THE CITY AND THE PLAINTIFFS, CITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT))/NEGLIGENCE (MUNICIPAL LAW, SPECIAL RELATIONSHIP, CITY HAD ASSIGNED A CROSSING GUARD TO THE CROSSWALK WHERE INFANT PLAINTIFF WAS STRUCK BY A SCHOOL BUS, THE GUARD HAD CALLED IN SICK THAT DAY, NO SPECIAL RELATIONSHIP BETWEEN THE CITY AND THE PLAINTIFFS, CITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT))/PEDESTRIANS (TRAFFIC ACCIDENT, MUNICIPAL LAW, CITY HAD ASSIGNED A CROSSING GUARD TO THE CROSSWALK WHERE INFANT PLAINTIFF WAS STRUCK BY A SCHOOL BUS, THE GUARD HAD CALLED IN SICK THAT DAY, NO SPECIAL RELATIONSHIP BETWEEN THE CITY AND THE PLAINTIFFS, CITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT))/TRAFFIC ACCIDENTS (MUNICIPAL LAW, CITY HAD ASSIGNED A CROSSING GUARD TO THE CROSSWALK WHERE INFANT PLAINTIFF WAS STRUCK BY A SCHOOL BUS, THE GUARD HAD CALLED IN SICK THAT DAY, NO SPECIAL RELATIONSHIP BETWEEN THE CITY AND THE PLAINTIFFS, CITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT))/CROSSWALKS (TRAFFIC ACCIDENT, MUNICIPAL LAW, CITY HAD ASSIGNED A CROSSING GUARD TO THE CROSSWALK WHERE INFANT PLAINTIFF WAS STRUCK BY A SCHOOL BUS, THE GUARD HAD CALLED IN SICK THAT DAY, NO SPECIAL RELATIONSHIP BETWEEN THE CITY AND THE PLAINTIFFS, CITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT))

MUNICIPAL LAW, NEGLIGENCE, IMMUNITY.

COMPLAINT STATED A NEGLIGENCE CAUSE OF ACTION AGAINST THE TOWN STEMMING FROM THE SHOOTING DEATH OF PLAINTIFF'S DECEDENT BY HER LIVE-IN COMPANION, THE COMPLAINT ALLEGED A SPECIAL RELATIONSHIP BETWEEN THE TOWN AND PLAINTIFF'S DECEDENT AND THE TOWN DID NOT DEMONSTRATE THAT GOVERNMENTAL IMMUNITY APPLIED AS A MATTER OF LAW (SECOND DEPT).

The Second Department, in a comprehensive and informative analysis, determined plaintiff had stated a negligence cause of against the town for the shooting death of plaintiff's decedent, Nigro. The town police had responded to Nigro's residence where she told the police her live-in companion, Groesbeck, had assaulted her. She also told the police Groesbeck, a former New Jersey police officer, had an unlicensed handgun. The police did not arrest Groesbeck, but took possession of the handgun. The police later returned the handgun to Groesbeck who subsequently shot and killed Nigro with it. The Second Department found that the complaint adequately alleged a special relationship between Nigro and the town, and further found that the town did not demonstrate the doctrine of governmental immunity applied as matter of law:

> ... [C]onstruing the complaint liberally and according the plaintiff the benefit of every possible favorable inference, it was sufficient to allege the existence of a special relationship between the Town and Nigro. The complaint adequately alleged "direct contact" between the agents of the Town and Nigro ... , and that the Town police department undertook "through promises or actions" an affirmative duty, on behalf of Nigro, to safeguard Groesbeck's handgun ... . In addition, the complaint adequately alleged circumstances indicating that the Town, through its agents, knew that the return of the handgun to Groesbeck "could lead to harm" ... . The Town's evidentiary submissions failed to "utterly refute" these factual allegations as a matter of law ... .
>
> ... [T]he complaint was also sufficient to allege Nigro's "justifiable reliance" on the Town's affirmative undertaking to safeguard Groesbeck's handgun ... . * * *
>
> ... [A] factfinder could reasonably conclude that Groesbeck's use of the allegedly illegal handgun to harm Nigro was a "foreseeable consequence of the situation created by the [Town's] negligence" ... . * * *
>
> The issue of whether a defendant is entitled to governmental immunity is distinct from the issue of whether a special duty exists in a particular case... . The doctrine of governmental immunity refers to "an affirmative defense on which [a defendant] bears the burden of proof" ... . * * *
>
> Even assuming that the allegedly negligent act of returning the handgun was discretionary in nature, it cannot be said, as a matter of law, that "the discretion possessed by [the Town] was in fact exercised" ... , or that any such exercise of discretion was "in compliance with the municipality's procedures" ... . **Santaiti v Town of Ramapo, 2018 NY Slip Op 04584, Second Dept 6-20-18**

MUNICIPAL LAW (NEGLIGENCE, COMPLAINT STATED A NEGLIGENCE CAUSE OF ACTION AGAINST THE TOWN STEMMING FROM THE SHOOTING DEATH OF PLAINTIFF'S DECEDENT BY HER LIVE-IN COMPANION, THE COMPLAINT ALLEGED A SPECIAL RELATIONSHIP BETWEEN THE TOWN AND PLAINTIFF'S DECEDENT AND THE TOWN DID NOT DEMONSTRATE THAT GOVERNMENTAL IMMUNITY APPLIED AS A MATTER OF LAW (SECOND DEPT))/NEGLIGENCE (MUNICIPAL LAW, COMPLAINT STATED A NEGLIGENCE CAUSE OF ACTION AGAINST THE TOWN STEMMING FROM THE SHOOTING DEATH OF PLAINTIFF'S DECEDENT BY HER LIVE-IN COMPANION, THE COMPLAINT ALLEGED A SPECIAL RELATIONSHIP BETWEEN THE TOWN AND PLAINTIFF'S DECEDENT AND THE TOWN DID NOT DEMONSTRATE THAT GOVERNMENTAL IMMUNITY APPLIED AS A MATTER OF LAW (SECOND DEPT))/SPECIAL RELATIONSHIP (MUNICIPAL LAW, NEGLIGENCE, COMPLAINT STATED A NEGLIGENCE CAUSE OF ACTION AGAINST THE TOWN STEMMING FROM THE SHOOTING DEATH OF PLAINTIFF'S DECEDENT BY HER LIVE-IN COMPANION, THE COMPLAINT ALLEGED A SPECIAL RELATIONSHIP BETWEEN THE TOWN AND PLAINTIFF'S DECEDENT AND THE TOWN DID NOT DEMONSTRATE THAT GOVERNMENTAL IMMUNITY APPLIED AS A MATTER OF LAW (SECOND DEPT))/IMMUNITY (MUNICIPAL LAW, NEGLIGENCE, COMPLAINT STATED A NEGLIGENCE CAUSE OF ACTION AGAINST THE TOWN STEMMING FROM THE SHOOTING DEATH OF PLAINTIFF'S DECEDENT BY HER LIVE-IN COMPANION, THE COMPLAINT ALLEGED A SPECIAL RELATIONSHIP BETWEEN THE TOWN AND PLAINTIFF'S DECEDENT AND THE TOWN DID NOT DEMONSTRATE THAT

GOVERNMENTAL IMMUNITY APPLIED AS A MATTER OF LAW (SECOND DEPT))/GOVERNMENTAL IMMUNITY (MUNICIPAL LAW, NEGLIGENCE, COMPLAINT STATED A NEGLIGENCE CAUSE OF ACTION AGAINST THE TOWN STEMMING FROM THE SHOOTING DEATH OF PLAINTIFF'S DECEDENT BY HER LIVE-IN COMPANION, THE COMPLAINT ALLEGED A SPECIAL RELATIONSHIP BETWEEN THE TOWN AND PLAINTIFF'S DECEDENT AND THE TOWN DID NOT DEMONSTRATE THAT GOVERNMENTAL IMMUNITY APPLIED AS A MATTER OF LAW (SECOND DEPT))/POLICE (NEGLIGENCE, COMPLAINT STATED A NEGLIGENCE CAUSE OF ACTION AGAINST THE TOWN STEMMING FROM THE SHOOTING DEATH OF PLAINTIFF'S DECEDENT BY HER LIVE-IN COMPANION, THE COMPLAINT ALLEGED A SPECIAL RELATIONSHIP BETWEEN THE TOWN AND PLAINTIFF'S DECEDENT AND THE TOWN DID NOT DEMONSTRATE THAT GOVERNMENTAL IMMUNITY APPLIED AS A MATTER OF LAW (SECOND DEPT))/THIRD PARTY ASSAULT, LIABILITY FOR (MUNICIPAL LAW, NEGLIGENCE, COMPLAINT STATED A NEGLIGENCE CAUSE OF ACTION AGAINST THE TOWN STEMMING FROM THE SHOOTING DEATH OF PLAINTIFF'S DECEDENT BY HER LIVE-IN COMPANION, THE COMPLAINT ALLEGED A SPECIAL RELATIONSHIP BETWEEN THE TOWN AND PLAINTIFF'S DECEDENT AND THE TOWN DID NOT DEMONSTRATE THAT GOVERNMENTAL IMMUNITY APPLIED AS A MATTER OF LAW (SECOND DEPT))

MUNICIPAL LAW, NEGLIGENCE, IMMUNITY.

PLAINTIFFS DID NOT DEMONSTRATE A SPECIAL RELATIONSHIP WITH THE TOWN, TOWN WAS NOT LIABLE FOR FLOODING CAUSED BY LANDSLIDE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined there was no special relationship between the town and the plaintiffs. The town had allowed fill to be dumped near a stream (Normanskill) by issuing a permit to the property owner, 165 Salisbury Road LLC. A landslide occurred which caused flooding on plaintiffs' property:

> To establish that a municipality created a special relationship by voluntarily assuming a duty, a plaintiff must show: "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) the party's justifiable reliance on the municipality's affirmative undertaking"... . Plaintiffs failed to allege any assumption by the Town to act on their behalf, any direct contact between them and any agent of the Town or any justifiable reliance by plaintiffs ... .
>
> As for the third way of forming a special relationship, the municipality must not only assume positive direction or control when a known, blatant and dangerous safety violation exists, but must "affirmatively act to place the plaintiff in harm's way," through words or conduct that "induc[e] the plaintiff to embark on a dangerous course he or she would otherwise have avoided" ... . Although we recently held that Normanskill and 165 Salisbury Road alleged a special relationship with the Town on this basis ... , the alleged safety violation existed on property owned or leased by those parties. They were in a markedly different position than plaintiffs.
>
> Plaintiffs are removed from the Normanskill property that was directly affected by the fill and permit activities, and the complaint contains no allegations that plaintiffs were even aware of, or had contact with any of the parties involved in, those activities. The allegations provide no indication of how plaintiffs could have been induced by the Town to embark on any course of action, let alone a dangerous one that they would otherwise have avoided ... . **Szydlowski v Town of Bethlehem, 2018 NY Slip Op 04066, Third Dept 6-7-18**

MUNICIPAL LAW (NEGLIGENCE, PLAINTIFFS DID NOT DEMONSTRATE A SPECIAL RELATIONSHIP WITH THE TOWN, TOWN WAS NOT LIABLE FOR FLOODING CAUSED BY LANDSLIDE (THIRD DEPT))/NEGLIGENCE (MUNICIPAL LAW, PLAINTIFFS DID NOT DEMONSTRATE A SPECIAL RELATIONSHIP WITH THE TOWN, TOWN WAS NOT LIABLE FOR FLOODING CAUSED BY LANDSLIDE (THIRD DEPT))/SPECIAL RELATIONSHIP (MUNICIPAL LAW, NEGLIGENCE, PLAINTIFFS DID NOT DEMONSTRATE A SPECIAL RELATIONSHIP WITH THE TOWN, TOWN WAS NOT LIABLE FOR FLOODING CAUSED BY LANDSLIDE (THIRD DEPT))/LANDSLIDES (MUNICIPAL LAW, NEGLIGENCE, PLAINTIFFS DID NOT DEMONSTRATE A SPECIAL RELATIONSHIP WITH THE TOWN, TOWN WAS NOT LIABLE FOR FLOODING CAUSED BY LANDSLIDE (THIRD DEPT))/FLOODING (MUNICIPAL LAW, NEGLIGENCE, PLAINTIFFS DID NOT DEMONSTRATE A SPECIAL RELATIONSHIP WITH THE TOWN, TOWN WAS NOT LIABLE FOR FLOODING CAUSED BY LANDSLIDE (THIRD DEPT))/IMMUNITY (MUNICIPAL LAW, NEGLIGENCE, PLAINTIFFS DID NOT DEMONSTRATE A SPECIAL RELATIONSHIP WITH THE TOWN, TOWN WAS NOT LIABLE FOR FLOODING CAUSED BY LANDSLIDE (THIRD DEPT))

MUNICIPAL LAW, NEGLIGENCE, CIVIL PROCEDURE.

STATUTE OF LIMITATIONS FOR COMMENCING AN ACTION AGAINST THE MUNICIPALITY TOLLED WHEN PLAINTIFF MOVED FOR LEAVE TO FILE A LATE NOTICE OF CLAIM (THIRD DEPT).

The Third Department, reversing Supreme Court, determined plaintiff's action against the municipality was timely commenced. The one-year-and-ninety-day statute of limitations was tolled when plaintiff filed a successful motion for leave to file a late notice of claim:

> Pursuant to General Municipal Law, a plaintiff must first serve a notice of claim against a municipality within 90 days after the claim arises ... and commence any subsequent tort action against the municipality within one year and 90 days after the claim arises (see General Municipal Law § 50-i). Because plaintiff's claims against defendants, if any, arise from the fire that occurred on February 18, 2014, he was therefore required to file and serve a notice of claim by May 19, 2014 and commence any subsequent tort action by May 19, 2015. Having failed to file and serve his notice of claim by May 19, 2014, plaintiff was permitted to, and did, commence a special proceeding seeking leave to file a late notice of claim. While the applicable one year and 90-day statute of limitations began to run on February 18, 2014, upon plaintiff's commencement of the proceeding, the provisions of CPLR 204 (a) operated to toll the remainder of the statute of limitations until the date that the court granted the requested relief, at which point the statute began to run once again ... . To put it in mathematical terms, when plaintiff commenced the proceeding seeking leave to serve a late notice of claim on November 14, 2014, he had 186 days remaining in order to timely commence this action within the applicable statute of limitations. As of that date, the statute of limitations stopped running and did not resume until May 27, 2015, when Supreme Court issued its order granting plaintiff's application. Thus, plaintiff had 186 days running from May 27, 2015 or until November 29, 2015 to timely commence this action. Since plaintiff commenced this action on October 20, 2015, it was timely commenced and may now proceed to a determination as to whether it has any merit. **Kulon v Liberty Fire Dist., 2018 NY Slip Op 04062, Third Dept 6-7-18**

MUNICIPAL LAW (NEGLIGENCE, NOTICE OF CLAIM, STATUTE OF LIMITATIONS FOR COMMENCING AN ACTION AGAINST THE MUNICIPALITY TOLLED WHEN PLAINTIFF MOVED FOR LEAVE TO FILE A LATE NOTICE OF CLAIM (THIRD DEPT))/NEGLIGENCE (MUNICIPAL LAW, NOTICE OF CLAIM, STATUTE OF LIMITATIONS FOR COMMENCING AN ACTION AGAINST THE MUNICIPALITY TOLLED WHEN PLAINTIFF MOVED FOR LEAVE TO FILE A LATE NOTICE OF CLAIM (THIRD DEPT))/CIVIL PROCEDURE (MUNICIPAL LAW, NOTICE OF CLAIM,, STATUTE OF LIMITATIONS FOR COMMENCING AN ACTION AGAINST THE MUNICIPALITY TOLLED WHEN PLAINTIFF MOVED FOR LEAVE TO FILE A LATE NOTICE OF CLAIM (THIRD DEPT))/NOTICE OF CLAIM (MUNICIPAL LAW, STATUTE OF LIMITATIONS FOR COMMENCING AN ACTION AGAINST THE MUNICIPALITY TOLLED WHEN PLAINTIFF MOVED FOR LEAVE TO FILE A LATE NOTICE OF CLAIM (THIRD DEPT))/STATUTE OF LIMITATIONS (MUNICIPAL LAW, NEGLIGENCE, NOTICE OF CLAIM, STATUTE OF LIMITATIONS FOR COMMENCING AN ACTION AGAINST THE MUNICIPALITY TOLLED WHEN PLAINTIFF MOVED FOR LEAVE TO FILE A LATE NOTICE OF CLAIM (THIRD DEPT))

MUNICIPAL LAW, REAL PROPERTY TAX LAW.

PROPERTY USED BY THE TOWN AS A PUBLIC PARK WAS NOT SUBJECT TO COUNTY TAX (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the town had used land as a public park and, therefore, the land was not subject to taxation by the county:

> The New York State Legislature has declared that "[a]ll real property within the state shall be subject to real property taxation . . . unless exempt therefrom by law"... . "Tax exclusions are never presumed or preferred and before [a party] may have the benefit of them, the burden rests on it to establish that the item comes within the language of the exclusion" ... .
>
> Here, the Town relies upon section 406 of the Real Property Tax Law. That section provides, with limited exceptions not applicable to this appeal, that "[r]eal property owned by a municipal corporation within its corporate limits held for a public use shall be exempt from taxation and exempt from special ad valorem levies and special assessments" ... .
>
> "Although what comprises a public use' within the meaning of the statute has never been defined with exactitude' and must necessarily depend upon the peculiar circumstances of each case', it has been said . . . that [h]eld for a public use, in this connection, means that the property should be occupied, employed, or availed of, by and for the benefit of the community at large, and implies a possession, occupation and enjoyment by the public, or by public agencies'" ... .
>
> The Town's submissions demonstrated that the subject property was exempt from taxation from the time of its conveyance to the Town in 2005, and that the subsequent tax liens issued by the County were therefore "void ab initio" ... . **Town of N. Hempstead v County of Nassau, 2018 NY Slip Op 04021, Second Dept 6-6-18**

MUNICIPAL LAW (REAL PROPERTY TAX LAW, PROPERTY USED BY THE TOWN AS A PUBLIC PARK WAS NOT SUBJECT TO COUNTY TAX (SECOND DEPT))/REAL PROPERTY TAX LAW (MUNICIPAL LAW, PROPERTY USED BY THE TOWN AS A PUBLIC PARK WAS NOT SUBJECT TO COUNTY TAX (SECOND DEPT))/PARKS (REAL PROPERTY TAX LAW, MUNICIPAL LAW, PROPERTY USED BY THE TOWN AS A PUBLIC PARK WAS NOT SUBJECT TO COUNTY TAX (SECOND DEPT))

NEGLIGENCE

NEGLIGENCE.

BICYCLIST STRUCK BY SIDE OF TRUCK MAKING A LEFT TURN ENTITLED TO SUMMARY JUDGMENT, PLAINTIFF NEED NOT SHOW FREEDOM FROM COMPARATIVE FAULT (FIRST DEPT).

The First Department determined plaintiff bicyclist was entitled to summary judgment in this traffic accident case. Plaintiff was struck by the passenger side door of a truck making a left turn:

> While traveling on a bicycle, plaintiff collided with the passenger side of defendants' northbound truck as it turned left into plaintiff's path at the intersection of St. Nicholas Avenue and 155th Street in New York County. Plaintiff submitted evidence showing that defendant was negligent by making a left turn without ensuring that it was safe to do so (see Vehicle and Traffic Law § 1141...).
>
> Moreover, plaintiff is not required to demonstrate the absence of his own comparative fault to obtain partial summary judgment on defendant's liability ... . **Bermeo v Time Warner Entertainment Co., 2018 NY Slip Op 03927, First Dept 6-5-18**

NEGLIGENCE (TRAFFIC ACCIDENTS, BICYCLIST STRUCK BY SIDE OF TRUCK MAKING A LEFT TURN ENTITLED TO SUMMARY JUDGMENT, PLAINTIFF NEED NOT SHOW FREEDOM FROM COMPARATIVE FAULT (FIRST DEPT))/TRAFFIC ACCIDENTS (BICYCLIST STRUCK BY SIDE OF TRUCK MAKING A LEFT TURN ENTITLED TO SUMMARY JUDGMENT, PLAINTIFF NEED NOT SHOW FREEDOM FROM COMPARATIVE FAULT (FIRST DEPT))/BICYCLISTS (TRAFFIC ACCIDENTS, BICYCLIST STRUCK BY SIDE OF TRUCK MAKING A LEFT TURN ENTITLED TO SUMMARY JUDGMENT, PLAINTIFF NEED NOT SHOW FREEDOM FROM COMPARATIVE FAULT (FIRST DEPT))/COMPARATIVE FAULT (TRAFFIC ACCIDENTS, BICYCLIST STRUCK BY SIDE OF TRUCK MAKING A LEFT TURN ENTITLED TO SUMMARY JUDGMENT, PLAINTIFF NEED NOT SHOW FREEDOM FROM COMPARATIVE FAULT (FIRST DEPT))

NEGLIGENCE.

QUESTIONS OF FACT ABOUT THE APPLICABILITY OF THE EMERGENCY DOCTRINE IN THIS TRAFFIC ACCIDENT CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendant's motion for summary judgment should not have been granted in this traffic accident case. Plaintiff's decedent apparently backed into defendant's lane of traffic from the median. There was conflicting evidence about defendant's speed and the distance between decedent's car and defendant (i.e., there was conflicting evidence about the applicability of the emergency doctrine):

> Given the conflicting accounts about the distance and the elapsed time between when decedent's vehicle moved into defendant's lane and the collision and defendant's speed prior to the accident, we conclude that triable issues of fact exist as to whether defendant's actions, when confronted with an emergency situation, were reasonable and whether he could have taken evasive action to avoid decedent's vehicle ... . We further conclude that there are issues of fact as to whether decedent's actions, under the circumstances of this case, were not the sole proximate cause of the accident. Accordingly, viewing the evidence in the light most favorable to plaintiff, Supreme Court should have denied defendant's motion for summary judgment ... . **Brust v McDaniel, 2018 NY Slip Op 04069, Third Dept 6-7-18**

NEGLIGENCE (QUESTIONS OF FACT ABOUT THE APPLICABILITY OF THE EMERGENCY DOCTRINE IN THIS TRAFFIC ACCIDENT CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT))/TRAFFIC ACCIDENTS (QUESTIONS OF FACT ABOUT THE APPLICABILITY OF THE EMERGENCY DOCTRINE IN THIS TRAFFIC ACCIDENT CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT))/EMERGENCY DOCTRINE (TRAFFIC ACCIDENTS, QUESTIONS OF FACT ABOUT THE APPLICABILITY OF THE EMERGENCY DOCTRINE IN THIS TRAFFIC ACCIDENT CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT))

NEGLIGENCE.

QUESTION OF FACT WHETHER PLAINTIFF ASSUMED THE RISK OF FALLING FROM A CLIMBING WALL (FOURTH DEPT).

The Fourth Department determined defendant did not demonstrate plaintiff assumed the risk that his harness would become detached causing him to fall from defendant's climbing wall:

> The climbing wall amusement attraction included a safety harness worn by the patron and a belay cable system that attached to the harness by use of a carabiner. There is no dispute that the carabiner detached from the safety harness worn by plaintiff, and that plaintiff fell approximately 18 feet to the ground below.
>
> The doctrine of assumption of the risk operates "as a defense to tort recovery in cases involving certain types of athletic or recreational activities" ... . A person who engages in such an 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" ... . However, "participants are not deemed to have assumed risks resulting from the reckless or intentional conduct of others, or risks that are concealed or unreasonably enhanced" ... . Here, we conclude that the court properly denied that part of defendant's motion based on assumption of the risk inasmuch as it failed to meet its initial burden of establishing that the risk of falling from the climbing wall is a risk inherent in the use and enjoyment thereof ... . **Stillman v Mobile Mtn., Inc., 2018 NY Slip Op 04149, Fourth Dept 6-8-18**

NEGLIGENCE (QUESTION OF FACT WHETHER PLAINTIFF ASSUMED THE RISK OF FALLING FROM A CLIMBING WALL (FOURTH DEPT))/ASSUMPTION OF THE RISK (CLIMBING WALL, QUESTION OF FACT WHETHER PLAINTIFF ASSUMED THE RISK OF FALLING FROM A CLIMBING WALL (FOURTH DEPT))/CLIMBING WALL (ASSUMPTION OF THE RISK, QUESTION OF FACT WHETHER PLAINTIFF ASSUMED THE RISK OF FALLING FROM A CLIMBING WALL (FOURTH DEPT))

NEGLIGENCE.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IN THIS VEHICLE-PEDESTRIAN ACCIDENT CASE SHOULD HAVE BEEN GRANTED, PLAINTIFFS NEED NOT SHOW THE ABSENCE OF COMPARATIVE NEGLIGENCE (FOURTH DEPT).

The Fourth Department determined plaintiffs' summary judgment motion in this vehicle-pedestrian accident case should have been granted. Plaintiff demonstrated the driver's (Gorman's) negligence and was not required to show the absence of comparative negligence:

> Plaintiffs commenced this action seeking damages for injuries sustained by Michael Edwards (plaintiff) when he was struck by an ambulance driven by defendant Francine M. Gorman. At the time of the collision, plaintiff, a parking attendant, was tasked with instructing vehicles traveling in a two-lane, one-way "pass-through" road of the entrance loop of Strong Memorial Hospital on how to reach an alternate entrance for a nearby parking garage. Plaintiff was standing in the center of the pass-through road between the two lanes of travel, and Gorman struck him as she was slowing down for a stop sign at the end of the pass-through road. ...
>
> ... [P]laintiffs were required to establish only that Gorman was negligent and that her negligence was a proximate cause of the accident. We conclude that plaintiffs met that burden by providing photographs, video footage and Gorman's deposition testimony in which she admitted that she executed a wide turn through multiple lanes of the pass-through road, which constitutes a violation of Vehicle and Traffic Law § 1128 (a) ... . In opposition, defendants failed to raise a triable issue of fact ... . Although defendants successfully raised triable issues of fact with respect to plaintiff's negligence, that is of no moment in the context of plaintiffs' appeal. "To be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault" ... . **Edwards v Gorman, 2018 NY Slip Op 04129, Fourth Dept 6-8-18**

NEGLIGENCE (TRAFFIC ACCIDENTS, PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IN THIS VEHICLE-PEDESTRIAN ACCIDENT CASE SHOULD HAVE BEEN GRANTED, PLAINTIFFS NEED NOT SHOW THE ABSENCE OF COMPARATIVE NEGLIGENCE (FOURTH DEPT))/TRAFFIC ACCIDENTS (PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IN THIS VEHICLE-PEDESTRIAN ACCIDENT CASE SHOULD HAVE BEEN GRANTED, PLAINTIFFS NEED NOT SHOW THE ABSENCE OF COMPARATIVE NEGLIGENCE (FOURTH DEPT))/PEDESTRIANS (TRAFFIC ACCIDENTS, PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IN THIS VEHICLE-PEDESTRIAN ACCIDENT CASE SHOULD HAVE BEEN GRANTED, PLAINTIFFS NEED NOT SHOW THE ABSENCE OF COMPARATIVE NEGLIGENCE (FOURTH DEPT))/COMPARATIVE NEGLIGENCE (TRAFFIC ACCIDENTS, PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IN THIS VEHICLE-PEDESTRIAN ACCIDENT CASE SHOULD HAVE BEEN GRANTED, PLAINTIFFS NEED NOT SHOW THE ABSENCE OF COMPARATIVE NEGLIGENCE (FOURTH DEPT))

NEGLIGENCE.

BURDENS OF PROOF IN SUMMARY JUDGMENT MOTIONS AND THE APPLICABILITY OF COMPARATIVE NEGLIGENCE AS AN AFFIRMATIVE DEFENSE CAREFULLY EXPLAINED IN THIS REAR-END COLLISION CASE INVOLVING THREE CARS (SECOND DEPT).

In a rear-end collision case involving three cars and motions and cross motions for summary judgment, the Second Department carefully laid out the burdens of proof on summary judgment motions in this context, as well as the applicability of comparative negligence in this context. The plaintiff's car was stopped and was struck in the rear by the Ramos car. Ramos alleged the Nisanov car was on the shoulder and the collision happened when Ramos avoided collision with the Nisanov car. The Nisanov defendants alleged plaintiff was comparatively negligent. The court held that the plaintiff was entitled to summary judgment in the action against Ramos, and plaintiff was entitled to summary judgment dismissing the affirmative defense of the Nisamov defendants alleging plaintiff's comparative negligence:

> A plaintiff moving for summary judgment on a cause of action asserted in a complaint generally has the burden of establishing, prima facie, "all of the essential elements of the cause of action"... . By contrast, a defendant moving for summary judgment dismissing one of the plaintiff's causes of action may generally sustain his or her prima facie burden "by negating a single essential element" of that cause of action ... . To defeat summary judgment, the nonmoving party need only rebut the prima facie showing made by the moving party so as to demonstrate the existence of a triable issue of fact ... .
>
> Ramos's version of the accident raised a triable issue of fact as to whether Dayan Nisanov was free from fault in the happening of the accident... . Accordingly, we agree with the Supreme Court's determination to deny that branch of the Nisanov defendants' cross motion which was for summary judgment dismissing the complaint and all cross claims insofar as asserted against them on the ground that they were not at fault in the happening of the accident. ...
>
> Inasmuch as the deposition testimony of Dayan Nisanov and the plaintiff indicated that Dayan Nisanov was not negligent in the operation of his vehicle, while the deposition testimony of Ramos indicated that Dayan Nisanov was negligent in the operation of his vehicle, the plaintiff's submissions failed to eliminate all triable issues of fact as to whether Dayan Nisanov was negligent and, if so, whether any such negligence caused or contributed to the accident ... . Accordingly, the Supreme Court should have denied that branch of the plaintiff's motion which was for summary judgment on the issue of liability on the complaint insofar as asserted against the Nisanov defendants ... .
>
> Although a plaintiff need not demonstrate the absence of his or her own comparative negligence to be entitled to partial summary judgment as to a defendant's liability... , the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence ... . **Poon v Nisanov, 2018 NY Slip Op 04365, Second Dept 6-13-18**

NEGLIGENCE (BURDENS OF PROOF IN SUMMARY JUDGMENT MOTIONS AND THE APPLICABILITY OF COMPARATIVE NEGLIGENCE AS AN AFFIRMATIVE DEFENSE CAREFULLY EXPLAINED IN THIS REAR-END COLLISION CASE INVOLVING THREE CARS (SECOND DEPT))/TRAFFIC ACCIDENTS (BURDENS OF PROOF IN SUMMARY JUDGMENT MOTIONS AND THE APPLICABILITY OF COMPARATIVE NEGLIGENCE AS AN AFFIRMATIVE DEFENSE CAREFULLY EXPLAINED IN THIS REAR-END COLLISION CASE INVOLVING THREE CARS (SECOND DEPT))/REAR-END COLLISIONS (BURDENS OF PROOF IN SUMMARY JUDGMENT MOTIONS AND THE APPLICABILITY OF COMPARATIVE NEGLIGENCE AS AN AFFIRMATIVE DEFENSE CAREFULLY EXPLAINED IN THIS REAR-END COLLISION CASE INVOLVING THREE CARS (SECOND DEPT))/SUMMARY JUDGMENT (TRAFFIC ACCIDENTS, BURDENS OF PROOF IN SUMMARY JUDGMENT MOTIONS AND THE APPLICABILITY OF COMPARATIVE NEGLIGENCE AS AN AFFIRMATIVE DEFENSE CAREFULLY EXPLAINED IN THIS REAR-END COLLISION CASE INVOLVING THREE CARS (SECOND DEPT))/COMPARATIVE NEGLIGENCE (TRAFFIC ACCIDENTS, BURDENS OF PROOF IN SUMMARY JUDGMENT MOTIONS AND THE APPLICABILITY OF COMPARATIVE NEGLIGENCE AS AN AFFIRMATIVE DEFENSE CAREFULLY EXPLAINED IN THIS REAR-END COLLISION CASE INVOLVING THREE CARS (SECOND DEPT))

NEGLIGENCE.

ALLEGATION THAT CHAIN OVER WHICH PLAINTIFF TRIPPED AND FELL WAS OPEN AND OBVIOUS RELATES TO PLAINTIFF'S COMPARATIVE NEGLIGENCE WHICH DOES NOT PRECLUDE SUMMARY JUDGMENT IN PLAINTIFF'S FAVOR (FIRST DEPT).

The First Department determined plaintiff was entitled to summary judgment in this slip and fall case. Plaintiff tripped over a yellow plastic chain lying on the ground. Because plaintiff need not show freedom from comparative fault, the allegation that the chain was open and obvious did not preclude summary judgment:

> ... [P]laintiff was not required to demonstrate his own freedom from comparative negligence to be entitled to summary judgment as to defendant's liability (see Rodriguez v City of New York, ___ NY3d ___, 2018 NY Slip Op 02287 [2018]). For this reason, we also reject defendant's argument that the chain on which plaintiff tripped was open and obvious, since that issue too is relevant to comparative fault and does not preclude summary resolution of the issue of defendant's liability ... . **Derix v Port Auth. of N.Y. & N.J., 2018 NY Slip Op 04507, First Dept 6-19-18**

NEGLIGENCE (SLIP AND FALL, ALLEGATION THAT CHAIN OVER WHICH PLAINTIFF TRIPPED AND FELL WAS OPEN AND OBVIOUS RELATES TO PLAINTIFF'S COMPARATIVE NEGLIGENCE WHICH DOES NOT PRECLUDE SUMMARY JUDGMENT IN PLAINTIFF'S FAVOR (FIRST DEPT))/SLIP AND FALL (ALLEGATION THAT CHAIN OVER WHICH PLAINTIFF TRIPPED AND FELL WAS OPEN AND OBVIOUS RELATES TO PLAINTIFF'S COMPARATIVE NEGLIGENCE WHICH DOES NOT PRECLUDE SUMMARY JUDGMENT IN PLAINTIFF'S FAVOR (FIRST DEPT))/OPEN AND OBVIOUS (SLIP AND FALL, ALLEGATION THAT CHAIN OVER WHICH PLAINTIFF TRIPPED AND FELL WAS OPEN AND OBVIOUS RELATES TO PLAINTIFF'S COMPARATIVE NEGLIGENCE WHICH DOES NOT PRECLUDE SUMMARY JUDGMENT IN PLAINTIFF'S FAVOR (FIRST DEPT))/COMPARATIVE NEGLIGENCE (SLIP AND FALL, ALLEGATION THAT CHAIN OVER WHICH PLAINTIFF TRIPPED AND FELL WAS OPEN AND OBVIOUS RELATES TO PLAINTIFF'S COMPARATIVE NEGLIGENCE WHICH DOES NOT PRECLUDE SUMMARY JUDGMENT IN PLAINTIFF'S FAVOR (FIRST DEPT))/SUMMARY JUDGMENT (SLIP AND FALL, ALLEGATION THAT CHAIN OVER WHICH PLAINTIFF TRIPPED AND FELL WAS OPEN AND OBVIOUS RELATES TO PLAINTIFF'S COMPARATIVE NEGLIGENCE WHICH DOES NOT PRECLUDE SUMMARY JUDGMENT IN PLAINTIFF'S FAVOR (FIRST DEPT))

NEGLIGENCE.

PLAINTIFF INJURED WHEN LAWN CHAIR SANK INTO A HOLE CONCEALED BY GRASS, QUESTION OF FACT WHETHER LANDOWNER HAD ACTUAL NOTICE OF THE CONDITION (SECOND DEPT).

The Second Department determined defendant property owner's motion for summary judgment should not have been granted. Plaintiff was injured when she sat down in a lawn chair which sank into a hole concealed by grass:

> Landowners have a duty to maintain their property in a reasonably safe condition under all of the circumstances, including the likelihood of injury to others, the seriousness of the potential injuries, and the burden of avoiding the risk... . Contrary to the defendants' contention, viewing the evidence in the light most favorable to the plaintiff, the defendants failed to demonstrate, prima facie, that the alleged concealed hole in the lawn was a " naturally occurring topographic condition,'" inherent in the nature of the property, that the defendants " could not reasonably be expected to remedy'" ... .
>
> The defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint by demonstrating, prima facie, that they did not create the allegedly dangerous condition or have actual or constructive notice of it prior to the subject accident... . However, in opposition, the plaintiff raised a triable issue of fact, at least, as to whether the defendants had actual notice of the condition prior to the accident. **Mustafaj v Macri, 2018 NY Slip Op 04554, Second Dept 6-20-18**

NEGLIGENCE (PLAINTIFF INJURED WHEN LAWN CHAIR SANK INTO A HOLE CONCEALED BY GRASS, QUESTION OF FACT WHETHER LANDOWNER HAD ACTUAL NOTICE OF THE CONDITION (SECOND DEPT))/LAWN CHAIRS (NEGLIGENCE, PLAINTIFF INJURED WHEN LAWN CHAIR SANK INTO A HOLE CONCEALED BY GRASS, QUESTION OF FACT WHETHER LANDOWNER HAD ACTUAL NOTICE OF THE CONDITION (SECOND DEPT))

NEGLIGENCE.

QUESTION OF FACT WHETHER A FLOOR MAT NINE-SIXTEENTHS OF AN INCH THICK CREATED A TRIPPING HAZARD IN THIS SLIP AND FALL CASE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined plaintiff, in response to defendant's motion for summary judgment, had raised a question of fact about whether mats outside shower stalls created a dangerous condition, Plaintiff alleged she tripped on the exposed edge of a mat, which was nine-sixteenths of an inch thick:

> ... [P]laintiff submitted, among other things, her affidavit, photographs of the mats and the affidavit of Frederick Bremer, an architect who investigated the condition of the locker room. Plaintiff also relied on her own deposition testimony. Plaintiff testified that she was familiar with the locker room and showers because she had been utilizing them five days each week for 11 years and that the photographs accurately depict the condition of the mats. She noted that there were two large, square mats in the shower area that were each comprised of nine smaller interlocking squares. Plaintiff claimed that because the larger mats were never connected, they often moved in relation to each other so that they sometimes overlapped and at other times were located several inches apart — a condition that she claimed had existed continuously since the mats were installed. Plaintiff also stated that she had personally rearranged the mats on several occasions prior to her injury to eliminate the risk of her tripping on them. According to plaintiff, she fell when the toe of her sneaker caught the exposed edge of a mat near the exit to the shower in the location that she marked on one of the photographs that she had submitted.
>
> Bremer concluded that the mats were not properly installed. Specifically, he opined that a gap was created between the mats because they were neither attached to each other nor otherwise properly secured. The resulting gap exposed the edges of the mats, and Bremer opined that the nine-sixteenth-inch height of the exposed mat edges constituted a tripping hazard that violated applicable design standards. He also noted that the manufacturer of the mats recommended installation of a sloped transition piece to eliminate such exposed edges, and that transition pieces were not utilized in the location where plaintiff fell. **Facteau v Mediquest Corp., 2018 NY Slip Op 04631, Third Dept 6-21-18**

NEGLIGENCE (QUESTION OF FACT WHETHER A FLOOR MAT NINE-SIXTEENTHS OF AN INCH THICK CREATED A TRIPPING HAZARD IN THIS SLIP AND FALL CASE (THIRD DEPT))/SLIP AND FALL (QUESTION OF FACT WHETHER A FLOOR MAT NINE-SIXTEENTHS OF AN INCH THICK CREATED A TRIPPING HAZARD IN THIS SLIP AND FALL CASE (THIRD DEPT))/FLOOR MATS (SLIP AND FALL, QUESTION OF FACT WHETHER A FLOOR MAT NINE-SIXTEENTHS OF AN INCH THICK CREATED A TRIPPING HAZARD IN THIS SLIP AND FALL CASE (THIRD DEPT))

NEGLIGENCE.

DEFECT IN ROADWAY WHICH ALLEGEDLY CAUSED PLAINTIFF TO FALL OFF HER BICYCLE OVER THE HANDLEBARS WAS PROPERLY DEEMED TRIVIAL AND NOT ACTIONABLE (THIRD DEPT).

The Third Department determined the road defect which allegedly caused plaintiff to fall off her bicycle over the handlebars was properly found to be trivial and summary judgment was properly awarded to the defendant:

> Although a landowner has a duty to maintain its property in a reasonably safe condition…, trivial defects are not actionable… . "[T]here is no predetermined height differential that renders a defect trivial"… . Instead, courts must consider "the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury"… . Thus, "a small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses, so that it unreasonably imperil[s] the safety of a pedestrian" …
>
> The record includes photographs that confirm the size and location of the defect, relative to the roadway and crosswalk, and evinces that plaintiff previously traversed this area on bicycle several times prior to the accident, without incident. The photographs also reveal that the crosswalk against which the defect is located, made of bricks and demarcated from the asphalt with a granite boarder, would be visible to a bicyclist well before his or her tires made contact with the defect… . **Gami v Cornell Univ.,2018 NY Slip Op 04812, Third Dept 6-28-18**

NEGLIGENCE (BICYCLE ACCIDENT, TRIVIAL DEFECT, DEFECT IN ROADWAY WHICH ALLEGEDLY CAUSED PLAINTIFF TO FALL OFF HER BICYCLE OVER THE HANDLEBARS WAS PROPERLY DEEMED TRIVIAL AND NOT ACTIONABLE (THIRD DEPT))/BICYCLES (NEGLIGENCE, TRIVIAL DEFECT, DEFECT IN ROADWAY WHICH ALLEGEDLY CAUSED PLAINTIFF TO FALL OFF HER BICYCLE OVER THE HANDLEBARS WAS PROPERLY DEEMED TRIVIAL AND NOT ACTIONABLE (THIRD DEPT))/TRIVIAL DEFECT (NEGLIGENCE, BICYCLE ACCIDENT, TRIVIAL DEFECT, DEFECT IN ROADWAY WHICH ALLEGEDLY CAUSED PLAINTIFF TO FALL OFF HER BICYCLE OVER THE HANDLEBARS WAS PROPERLY DEEMED TRIVIAL AND NOT ACTIONABLE (THIRD DEPT))/HIGHWAYS AND ROADS (NEGLIGENCE, BICYCLE ACCIDENTS, TRIVIAL DEFECT, DEFECT IN ROADWAY WHICH ALLEGEDLY CAUSED PLAINTIFF TO FALL OFF HER BICYCLE OVER THE HANDLEBARS WAS PROPERLY DEEMED TRIVIAL AND NOT ACTIONABLE (THIRD DEPT))

NEGLIGENCE, CIVIL PROCEDURE.

DEFENDANT OFFERED TWO NON-NEGLIGENT EXPLANATIONS FOR THE REAR-END COLLISION SUFFICIENT TO DEFEAT PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, A WAIVED AFFIRMATIVE DEFENSE MAY BE CONSIDERED IN OPPOSITION TO SUMMARY JUDGMENT WHERE THE MOVING PARTY IS NOT SURPRISED AND HAS AN OPPORTUNITY TO RESPOND (THIRD DEPT).

The Third Department determined defendant Kain had raised two non-negligent explanations for rear-ending the car in front of him and therefore plaintiffs' motion for summary judgment was properly denied. Kain had testified that his brakes didn't work properly and the cars in front of him stopped abruptly. Although Kain had not raised brake failure as an affirmative defense, the court noted that the defense could be considered in opposition to a summary judgment motion absent surprise and provided the moving party has a chance to respond:

> The claim that an accident was unavoidable due to brake failure is an affirmative defense ... . However, "[e]ven an unpleaded defense may be raised on a summary judgment motion, as long as it would not be likely to surprise the adverse party or raise issues of fact not previously apparent" ... .. Accordingly, a nonmovant may invoke a waived defense to defeat a motion for summary judgment if the movant has the opportunity to respond ... . Kain testified at his deposition that the brakes in his vehicle failed, and plaintiffs addressed that issue in their moving papers and again in their reply.
>
> ... [D]efendants met their burden to provide a nonnegligent explanation for the accident. Kain testified that the brakes did not operate normally when he applied them and, further, that the application of the brakes did not appreciably slow the speed of the vehicle as he approached the vehicles that were stopped at the traffic signal. Further, he testified that his vehicle was relatively new and was in good working order, and that the only mechanical problems he had experienced prior to the accident were unrelated to the brakes. He further testified that the brakes operated properly prior to the accident, the inspection was current and the malfunction caused him to apply his emergency brake. ...
>
> Kain also testified [the two cars in front of him] abruptly stopped directly in front of his vehicle. He specifically stated that [plaintiffs'] vehicle approached the intersection without slowing, as if it was going to proceed, and that it stopped immediately when the light turned red, thereby forcing the [car behind plaintiffs'] to also stop abruptly. He further testified that he was traveling at or below the speed limit and that he applied his brakes immediately upon seeing that both vehicles had stopped abruptly in his path. **Warner v Kain, 2018 NY Slip Op 04630, Third Dept 6-21-18**

NEGLIGENCE (REAR-END COLLISIONS, DEFENDANT OFFERED TWO NON-NEGLIGENT EXPLANATIONS FOR THE REAR-END COLLISION SUFFICIENT TO DEFEAT PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, A WAIVED AFFIRMATIVE DEFENSE MAY BE CONSIDERED IN OPPOSITION TO SUMMARY JUDGMENT WHERE THE MOVING PARTY IS NOT SURPRISED AND HAS AN OPPORTUNITY TO RESPOND (THIRD DEPT))/REAR-END COLLISIONS (DEFENDANT OFFERED TWO NON-NEGLIGENT EXPLANATIONS FOR THE REAR-END COLLISION SUFFICIENT TO DEFEAT PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, A WAIVED AFFIRMATIVE DEFENSE MAY BE CONSIDERED IN OPPOSITION TO SUMMARY JUDGMENT WHERE THE MOVING PARTY IS NOT SURPRISED AND HAS AN OPPORTUNITY TO RESPOND (THIRD DEPT))/SUMMARY JUDGMENT (A WAIVED AFFIRMATIVE DEFENSE MAY BE CONSIDERED IN OPPOSITION TO SUMMARY JUDGMENT WHERE THE MOVING PARTY IS NOT SURPRISED AND HAS AN OPPORTUNITY TO RESPOND (THIRD DEPT))/AFFIRMATIVE DEFENSES (SUMMARY JUDGMENT, A WAIVED AFFIRMATIVE DEFENSE MAY BE CONSIDERED IN OPPOSITION TO SUMMARY JUDGMENT WHERE THE MOVING PARTY IS NOT SURPRISED AND HAS AN OPPORTUNITY TO RESPOND (THIRD DEPT))/TRAFFIC ACCIDENTS (REAR-END COLLISIONS, DEFENDANT OFFERED TWO NON-NEGLIGENT EXPLANATIONS FOR THE REAR-END COLLISION SUFFICIENT TO DEFEAT PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, A WAIVED AFFIRMATIVE DEFENSE MAY BE CONSIDERED IN OPPOSITION TO SUMMARY JUDGMENT WHERE THE MOVING PARTY IS NOT SURPRISED AND HAS AN OPPORTUNITY TO RESPOND (THIRD DEPT))/BRAKE FAILURE (REAR-END COLLISIONS, DEFENDANT OFFERED TWO NON-NEGLIGENT EXPLANATIONS FOR THE REAR-END COLLISION SUFFICIENT TO DEFEAT PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, A WAIVED AFFIRMATIVE DEFENSE MAY BE CONSIDERED IN OPPOSITION TO SUMMARY JUDGMENT WHERE THE MOVING PARTY IS NOT SURPRISED AND HAS AN OPPORTUNITY TO RESPOND (THIRD DEPT))

NEGLIGENCE, COURT OF CLAIMS.

DEFECT WHICH CAUSED CLAIMANT TO SLIP AND FALL WAS NOT TRIVIAL AS A MATTER OF LAW, QUESTION OF FACT WHETHER DEFENDANT HAD ACTUAL AND CONSTRUCTIVE NOTICE OF THE DEFECT, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing the Court of Claims, determined that the defect which caused the claimant's slip and fall was not trivial as a matter of law and there were questions of fact about the defendant's constructive and actual notice of the defect. Claimant is incarcerated and the slip and fall occurred in a walkway at a correctional facility:

> In claimant's deposition testimony, which defendant submitted in support of the motion, claimant testified that he was proceeding along a walkway from the housing area to the commissary. It had rained, and a large puddle of water had accumulated on the walkway. Claimant attempted to step over the flooded portion of the walkway, but his foot came down on a portion of the walkway that was cracked and damaged. The concrete shifted under his foot, causing him to lose his balance, and he fell. ...
>
> We also agree with claimant that defendant failed to meet its burden of establishing that it lacked actual or constructive notice of the allegedly dangerous condition ... . In support of the motion, defendant submitted the affidavit of a correction officer who had worked at the prison for the prior 27 years. The correction officer averred that he was familiar with the walkway and its condition before claimant fell, that the concrete was broken and uneven, and that water can gather there after it rains, but he did not consider the condition to be dangerous. Furthermore, the correction officer averred that he periodically walked the premises to look for anything in need of repair, and claimant testified at his deposition that the walkway was cracked prior to his arrival at the prison and that it flooded every time it rained. **Bennett v State of New York, 2018 NY Slip Op 04212, Fourth Dept 6-8-18**

NEGLIGENCE (SLIP AND FALL, DEFECT WHICH CAUSED CLAIMANT TO SLIP AND FALL WAS NOT TRIVIAL AS A MATTER OF LAW, QUESTION OF FACT WHETHER DEFENDANT HAD ACTUAL AND CONSTRUCTIVE NOTICE OF THE DEFECT, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/SLIP AND FALL (DEFECT WHICH CAUSED CLAIMANT TO SLIP AND FALL WAS NOT TRIVIAL AS A MATTER OF LAW, QUESTION OF FACT WHETHER DEFENDANT HAD ACTUAL AND CONSTRUCTIVE NOTICE OF THE DEFECT, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/TRIVIAL DEFECT (SLIP AND FALL, DEFECT WHICH CAUSED CLAIMANT TO SLIP AND FALL WAS NOT TRIVIAL AS A MATTER OF LAW, QUESTION OF FACT WHETHER DEFENDANT HAD ACTUAL AND CONSTRUCTIVE NOTICE OF THE DEFECT, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))

NEGLIGENCE, COURT OF CLAIMS.

SKATER DID NOT ASSUME THE RISK CREATED BY A NEGLIGENTLY MAINTAINED ICE SURFACE AND SKATER'S AWARENESS OF THE CONDITION RELATES ONLY TO COMPARATIVE NEGLIGENCE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing the Court of Claims, determined defendant's motion for summary judgment in this ice-skating slip and fall case should not have been granted. The claimant could not assume the risk created by a negligently maintained ice surface, and claimant's awareness of the dangerous condition relates only to the issue of comparative fault (which does not preclude summary judgment):

> We ... agree with claimant that her claim is not barred by the doctrine of assumption of the risk. It is well settled that "[a claimant] will not be held to have assumed those risks that are not inherent . . . , i.e., not ordinary and necessary in the sport" ... . Although the risk of falling while ice skating is " inherent in and arise[s] out of the nature of the sport generally' " ... , we conclude that skating on a negligently maintained ice surface is not a risk that is inherent in the sport. Contrary to defendant's contention, under the circumstances presented here, claimant's awareness of the poor ice conditions and her decision to continue skating for some period of time, apparently to have a photograph taken, relate only to the issue of her comparative fault, if any ... . **Wyzykowski v State of New York, 2018 NY Slip Op 04875, Fourth Dept 6-29-18**

NEGLIGENCE (SKATER DID NOT ASSUME THE RISK CREATED BY A NEGLIGENTLY MAINTAINED ICE SURFACE AND SKATER'S AWARENESS OF THE CONDITION RELATES ONLY TO COMPARATIVE NEGLIGENCE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/SLIP AND FALL (SKATER DID NOT ASSUME THE RISK CREATED BY A NEGLIGENTLY MAINTAINED ICE SURFACE AND SKATER'S AWARENESS OF THE CONDITION RELATES ONLY TO COMPARATIVE NEGLIGENCE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/ICE SKATING (SKATER DID NOT ASSUME THE RISK CREATED BY A NEGLIGENTLY MAINTAINED ICE SURFACE AND SKATER'S AWARENESS OF THE CONDITION RELATES ONLY TO COMPARATIVE NEGLIGENCE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/ASSUMPTION OF RISK (ICE SKATING, (SKATER DID NOT ASSUME THE RISK CREATED BY A NEGLIGENTLY MAINTAINED ICE SURFACE AND SKATER'S AWARENESS OF THE CONDITION RELATES ONLY TO COMPARATIVE NEGLIGENCE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/COMPARATIVE NEGLIGENCE (ICE SKATING, SKATER DID NOT ASSUME THE RISK CREATED BY A NEGLIGENTLY MAINTAINED ICE SURFACE AND SKATER'S AWARENESS OF THE CONDITION RELATES ONLY TO COMPARATIVE NEGLIGENCE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/SUMMARY JUDGMENT (COMPARATIVE NEGLIGENCE, SKATER DID NOT ASSUME THE RISK CREATED BY A NEGLIGENTLY MAINTAINED ICE SURFACE AND SKATER'S AWARENESS OF THE CONDITION RELATES ONLY TO COMPARATIVE NEGLIGENCE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/COURT OF CLAIMS (SKATER DID NOT ASSUME THE RISK CREATED BY A NEGLIGENTLY MAINTAINED ICE SURFACE AND SKATER'S AWARENESS OF THE CONDITION RELATES ONLY TO COMPARATIVE NEGLIGENCE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))

NEGLIGENCE, DAMAGES, EMPLOYMENT LAW, CIVIL PROCEDURE.

DEFENDANT GENERAL CONTRACTOR NOT ENTITLED TO DISMISSAL OF THE PUNITIVE DAMAGES CLAIM STEMMING FROM A HIGH RISE FIRE, QUESTION OF FACT WHETHER GENERAL CONTRACTOR LIABLE FOR PUNITIVE DAMAGES STEMMING FROM THE ACTS AND OMISSIONS OF ITS SAFETY ENGINEER, NEW MOTION PAPERS SUBMITTED BY PLAINTIFFS BEFORE DEFENDANT'S REPLY PAPERS WERE DUE PROPERLY CONSIDERED (FIRST DEPT).

The First Department determined defendant general contractor was not entitled to dismissal of the punitive damages claim in connection with a high rise fire during demolition. 42 feet of the water standpipe had been removed, stairways were blocked and a no smoking policy was not enforced. One hundred firefighters were injured and two were killed fighting the blaze. The court found that the general contractor (Bovis) could be held liable for punitive damages based upon the acts and omissions of its safety manager, Melofchik. The court further found that the motion court properly considered plaintiffs' new motion papers which were submitted before Bovis's reply papers were due and which did not change the substance of the prior papers or prejudice Bovis:

> Conduct justifying punitive damages "must manifest spite or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton'" ... . Although issues of fact exist as to whether Bovis's site safety manger, Jeff Melofchik, was present shortly after the subcontractor removed the 42-foot section of the pipe in November 2006, and whether Melofchik became aware at that point that the segment was part of the standpipe, it is undisputed that Melofchik did not test the standpipe system to ensure that it was operational during the 16-month period from March 2006 (when Bovis became the general contractor on the project) to August 2007 (when the fire occurred). ...
>
> An employer may be assessed punitive damages for an employee's conduct "only where management has authorized, participated in, consented to or ratified the conduct giving rise to such damages, or deliberately retained the unfit servant," such that it is complicit in that conduct ... . Complicity is evident when "a superior officer in the course of employment orders, participates in, or ratifies outrageous conduct" ... . Although Melofchik was not a "superior officer" and nothing suggests that Bovis management authorized or ratified Melofchik's conduct, an issue of fact exists as to whether management was aware of Melofchik's incompetence but still "deliberately retained the unfit servant ... ." **Borst v Lower Manhattan Dev. Corp., 2018 NY Slip Op 04679, First Dept 6-26-18**

NEGLIGENCE (PUNITIVE DAMAGES, DEFENDANT GENERAL CONTRACTOR NOT ENTITLED TO DISMISSAL OF THE PUNITIVE DAMAGES CLAIM STEMMING FROM A HIGH RISE FIRE, QUESTION OF FACT WHETHER GENERAL CONTRACTOR LIABLE FOR PUNITIVE DAMAGES STEMMING FROM THE ACTS AND OMISSIONS OF ITS SAFETY ENGINEER, NEW MOTION PAPERS SUBMITTED BY PLAINTIFFS BEFORE DEFENDANT'S REPLY PAPERS WERE DUE PROPERLY CONSIDERED (FIRST DEPT))/DAMAGES (PUNITIVE DAMAGES, DEFENDANT GENERAL CONTRACTOR NOT ENTITLED TO DISMISSAL OF THE PUNITIVE DAMAGES CLAIM STEMMING FROM A HIGH RISE FIRE, QUESTION OF FACT WHETHER GENERAL CONTRACTOR LIABLE FOR PUNITIVE DAMAGES STEMMING FROM THE ACTS AND OMISSIONS OF ITS SAFETY ENGINEER, NEW MOTION PAPERS SUBMITTED BY PLAINTIFFS BEFORE DEFENDANT'S REPLY PAPERS WERE DUE PROPERLY CONSIDERED (FIRST DEPT))/PUNITIVE DAMAGES (DEFENDANT GENERAL CONTRACTOR NOT ENTITLED TO DISMISSAL OF THE PUNITIVE DAMAGES CLAIM STEMMING FROM A HIGH RISE FIRE, QUESTION OF FACT WHETHER GENERAL CONTRACTOR LIABLE FOR PUNITIVE DAMAGES STEMMING FROM THE ACTS AND OMISSIONS OF ITS SAFETY ENGINEER, NEW MOTION PAPERS SUBMITTED BY PLAINTIFFS BEFORE DEFENDANT'S REPLY PAPERS WERE DUE PROPERLY CONSIDERED (FIRST DEPT))/EMPLOYMENT LAW (NEGLIGENCE, PUNITIVE DAMAGES, DEFENDANT GENERAL CONTRACTOR NOT ENTITLED TO DISMISSAL OF THE PUNITIVE DAMAGES CLAIM STEMMING FROM A HIGH RISE FIRE, QUESTION OF FACT WHETHER GENERAL CONTRACTOR LIABLE FOR PUNITIVE DAMAGES STEMMING FROM THE ACTS AND OMISSIONS OF ITS SAFETY ENGINEER, NEW MOTION PAPERS SUBMITTED BY PLAINTIFFS BEFORE DEFENDANT'S REPLY PAPERS WERE DUE PROPERLY CONSIDERED (FIRST DEPT))/CIVIL PROCEDURE (MOTION PAPERS, NEW MOTION PAPERS SUBMITTED BY PLAINTIFFS BEFORE DEFENDANT'S REPLY PAPERS WERE DUE PROPERLY CONSIDERED (FIRST DEPT))

NEGLIGENCE, EVIDENCE.

FAILURE TO PRESERVE VIDEO WHICH WOULD HAVE SHOWN THE CONDITION OF THE FLOOR PRIOR TO PLAINTIFF'S SLIP AND FALL JUSTIFIED THE AWARD OF SUMMARY JUDGMENT TO PLAINTIFF (FIRST DEPT).

The First Department determined summary judgment was properly granted to the plaintiff in this slip and fall case because the defendant store did not preserve video which would have shown the condition of the floor prior to the fall:

> Although it was demanded within days of plaintiff's slip and fall, defendants failed to preserve a video recording of its store that depicted the area of plaintiff's fall prior to it occurring. Instead, a store employee selectively edited the video to retain only that portion showing approximately 30 seconds prior to plaintiff's fall and the fall itself. Without the video recording, plaintiff may be unable to establish the origin of the liquid on the floor that she claims caused her to fall, and thus be unable to establish the requisite notice of the alleged condition ... . Despite a court order and a discovery conference stipulation, defendants failed to explain why the remainder of the video became unavailable. **Davis v Pathmark, 2018 NY Slip Op 04656, First Dept 6-21-18**

NEGLIGENCE (SLIP AND FALL, EVIDENCE, FAILURE TO PRESERVE VIDEO WHICH WOULD HAVE SHOWN THE CONDITION OF THE FLOOR PRIOR TO PLAINTIFF'S SLIP AND FALL JUSTIFIED THE AWARD OF SUMMARY JUDGMENT TO PLAINTIFF (FIRST DEPT))/EVIDENCE (SLIP AND FALL, SPOLIATION, FAILURE TO PRESERVE VIDEO WHICH WOULD HAVE SHOWN THE CONDITION OF THE FLOOR PRIOR TO PLAINTIFF'S SLIP AND FALL JUSTIFIED THE AWARD OF SUMMARY JUDGMENT TO PLAINTIFF (FIRST DEPT))/SPOLIATION (SLIP AND FALL, VIDEO, FAILURE TO PRESERVE VIDEO WHICH WOULD HAVE SHOWN THE CONDITION OF THE FLOOR PRIOR TO PLAINTIFF'S SLIP AND FALL JUSTIFIED THE AWARD OF SUMMARY JUDGMENT TO PLAINTIFF (FIRST DEPT))/VIDEO (EVIDENCE, SPOLIATION, FAILURE TO PRESERVE VIDEO WHICH WOULD HAVE SHOWN THE CONDITION OF THE FLOOR PRIOR TO PLAINTIFF'S SLIP AND FALL JUSTIFIED THE AWARD OF SUMMARY JUDGMENT TO PLAINTIFF (FIRST DEPT))/NOTICE (SLIP AND FALL, VIDEO, SPOLIATION, FAILURE TO PRESERVE VIDEO WHICH WOULD HAVE SHOWN THE CONDITION OF THE FLOOR PRIOR TO PLAINTIFF'S SLIP AND FALL JUSTIFIED THE AWARD OF SUMMARY JUDGMENT TO PLAINTIFF (FIRST DEPT))

NEGLIGENCE, EVIDENCE, INSURANCE LAW, VEHICLE AND TRAFFIC LAW.

DEFENDANT'S SUMMARY JUDGMENT MOTION IN THIS VEHICLE-PEDESTRIAN ACCIDENT CASE SHOULD NOT HAVE BEEN GRANTED, DEFENDANT MAY HAVE VIOLATED THE DUTY TO SEE WHAT SHOULD HAVE BEEN SEEN, AND PLAINTIFF'S FRACTURED FOOT CONSTITUTED A SERIOUS INJURY AS A MATTER OF LAW (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment in this vehicle-pedestrian traffic accident case should not have been granted. Plaintiff demonstrated she suffered a serious injury within the meaning of the Insurance Law (fractures in her foot). And defendant did not demonstrate plaintiff's negligence was the sole proximate cause of the accident:

> Plaintiff commenced this negligence action seeking damages for injuries that she sustained when a vehicle operated by defendant struck her foot while she was walking her bicycle on the street beneath an overpass. We agree with plaintiff, as limited by her brief, that Supreme Court erred in granting defendant's motion for summary judgment dismissing the complaint and denying that part of plaintiff's cross motion for partial summary judgment on the issue of serious injury.
>
> Viewing the evidence in the light most favorable to plaintiff and affording her the benefit of every reasonable inference ... , we conclude that defendant failed to meet his initial burden on his motion of establishing as a matter of law that plaintiff's negligence was the sole proximate cause of the accident ... . Defendant's own submissions raise triable issues of fact, including whether he violated his " common-law duty to see that which he should have seen [as a driver] through the proper use of his senses' " ... and his statutory duty to "exercise due care to avoid colliding with any bicyclist[or] pedestrian" (Vehicle and Traffic Law § 1146 [a]).
>
> Finally, it is uncontested that plaintiff established as a matter of law on her cross motion that she sustained fractures in her foot as a result of the accident and, therefore, she is entitled to partial summary judgment on the issue of serious injury (see Insurance Law § 5102 [d]). **Luttrell v Vega, 2018 NY Slip Op 04468, Fourth Dept 6-15-18**

NEGLIGENCE (DEFENDANT'S SUMMARY JUDGMENT MOTION IN THIS VEHICLE-PEDESTRIAN ACCIDENT CASE SHOULD NOT HAVE BEEN GRANTED, DEFENDANT MAY HAVE VIOLATED THE DUTY TO SEE WHAT SHOULD HAVE BEEN SEEN, AND PLAINTIFF'S FRACTURED FOOT CONSTITUTED A SERIOUS INJURY AS A MATTER OF LAW (FOURTH DEPT))/EVIDENCE (NEGLIGENCE, TRAFFIC ACCIDENTS, DEFENDANT'S SUMMARY JUDGMENT MOTION IN THIS VEHICLE-PEDESTRIAN ACCIDENT CASE SHOULD NOT HAVE BEEN GRANTED, DEFENDANT MAY HAVE VIOLATED THE DUTY TO SEE WHAT SHOULD HAVE BEEN SEEN, AND PLAINTIFF'S FRACTURED FOOT CONSTITUTED A SERIOUS INJURY AS A MATTER OF LAW (FOURTH DEPT))/TRAFFIC ACCIDENTS (DEFENDANT'S SUMMARY JUDGMENT MOTION IN THIS VEHICLE-PEDESTRIAN ACCIDENT CASE SHOULD NOT HAVE BEEN GRANTED, DEFENDANT MAY HAVE VIOLATED THE DUTY TO SEE WHAT SHOULD HAVE BEEN SEEN, AND PLAINTIFF'S FRACTURED FOOT CONSTITUTED A SERIOUS INJURY AS A MATTER OF LAW (FOURTH DEPT))/PEDESTRIANS (TRAFFIC ACCIDENTS, DEFENDANT'S SUMMARY JUDGMENT MOTION IN THIS VEHICLE-PEDESTRIAN ACCIDENT CASE SHOULD NOT HAVE BEEN GRANTED, DEFENDANT MAY HAVE VIOLATED THE DUTY TO SEE WHAT SHOULD HAVE BEEN SEEN, AND PLAINTIFF'S FRACTURED FOOT CONSTITUTED A SERIOUS INJURY AS A MATTER OF LAW (FOURTH DEPT))/INSURANCE LAW (TRAFFIC ACCIDENTS, SERIOUS INJURY, DEFENDANT'S SUMMARY JUDGMENT MOTION IN THIS VEHICLE-PEDESTRIAN ACCIDENT CASE SHOULD NOT HAVE BEEN GRANTED, DEFENDANT MAY HAVE VIOLATED THE DUTY TO SEE WHAT SHOULD HAVE BEEN SEEN, AND PLAINTIFF'S FRACTURED FOOT CONSTITUTED A SERIOUS INJURY AS A MATTER OF LAW (FOURTH DEPT))/SERIOUS INJURY (TRAFFIC ACCIDENTS, SERIOUS INJURY, DEFENDANT'S SUMMARY JUDGMENT MOTION IN THIS VEHICLE-PEDESTRIAN ACCIDENT CASE SHOULD NOT HAVE BEEN GRANTED, DEFENDANT MAY HAVE VIOLATED THE DUTY TO SEE WHAT SHOULD HAVE BEEN SEEN, AND PLAINTIFF'S FRACTURED FOOT CONSTITUTED A SERIOUS INJURY AS A MATTER OF LAW (FOURTH DEPT))/VEHICLE AND TRAFFIC LAW (TRAFFIC ACCIDENTS, (DEFENDANT'S SUMMARY JUDGMENT MOTION IN THIS VEHICLE-PEDESTRIAN ACCIDENT CASE SHOULD NOT HAVE BEEN GRANTED, DEFENDANT MAY HAVE VIOLATED THE DUTY TO SEE WHAT SHOULD HAVE BEEN SEEN, AND PLAINTIFF'S FRACTURED FOOT CONSTITUTED A SERIOUS INJURY AS A MATTER OF LAW (FOURTH DEPT))

NEGLIGENCE, LANDLORD-TENANT.

TENANT WAS INJURED TRYING TO MOVE A HEAVY RADIATOR THAT HAD BEEN LEFT OUTSIDE HIS APARTMENT FOR MONTHS, DEFENDANT LANDLORD'S MOTION FOR SUMMARY JUDGMENT CLAIMING PLAINTIFF'S CONDUCT WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT WAS PROPERLY DENIED (SECOND DEPT).

The Second Department determined defendant landlord's motion for summary judgment in this negligence action by a tenant was properly denied. Plaintiff was injured attempting to move a heavy radiator that was in the common area outside his apartment. Plaintiff's family members had complained that the radiator obstructed the path from the apartment to the staircase, but the radiator had remained there for months:

> ... [T]he defendant landlord moved for summary judgment dismissing the complaint insofar as asserted against it, contending that the plaintiff's conduct was the sole proximate cause of the accident. ...
>
> The defendant landlord failed to establish, prima facie, that it was not foreseeable that the plaintiff would attempt to move the heavy radiator and that the plaintiff's conduct constituted a superseding and intervening act which severed any nexus between the defendant landlord's alleged negligence and the plaintiff's injuries ... . **Munoz v Kiryat Stockholm, LLC, 2018 NY Slip Op 04552, Second Dept 6-20-18**

NEGLIGENCE (TENANT WAS INJURED TRYING TO MOVE A HEAVY RADIATOR THAT HAD BEEN LEFT OUTSIDE HIS APARTMENT FOR MONTHS, DEFENDANT LANDLORD'S MOTION FOR SUMMARY JUDGMENT CLAIMING PLAINTIFF'S CONDUCT WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT WAS PROPERLY DENIED (SECOND DEPT))/SOLE PROXIMATE CAUSE (TENANT WAS INJURED TRYING TO MOVE A HEAVY RADIATOR THAT HAD BEEN LEFT OUTSIDE HIS APARTMENT FOR MONTHS, DEFENDANT LANDLORD'S MOTION FOR SUMMARY JUDGMENT CLAIMING PLAINTIFF'S CONDUCT WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT WAS PROPERLY DENIED (SECOND DEPT))/SUPERSEDING CAUSE (TENANT WAS INJURED TRYING TO MOVE A HEAVY RADIATOR THAT HAD BEEN LEFT OUTSIDE HIS APARTMENT FOR MONTHS, DEFENDANT LANDLORD'S MOTION FOR SUMMARY JUDGMENT CLAIMING PLAINTIFF'S CONDUCT WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT WAS PROPERLY DENIED (SECOND DEPT))/LANDLORD-TENANT (NEGLIGENCE, TENANT WAS INJURED TRYING TO MOVE A HEAVY RADIATOR THAT HAD BEEN LEFT OUTSIDE HIS APARTMENT FOR MONTHS, DEFENDANT LANDLORD'S MOTION FOR SUMMARY JUDGMENT CLAIMING PLAINTIFF'S CONDUCT WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT WAS PROPERLY DENIED (SECOND DEPT))/FORESEEABILITY (TENANT WAS INJURED TRYING TO MOVE A HEAVY RADIATOR THAT HAD BEEN LEFT OUTSIDE HIS APARTMENT FOR MONTHS, DEFENDANT LANDLORD'S MOTION FOR SUMMARY JUDGMENT CLAIMING PLAINTIFF'S CONDUCT WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT WAS PROPERLY DENIED (SECOND DEPT))

NEGLIGENCE, MEDICAL MALPRACTICE, EVIDENCE.

CROSS EXAMINATION OF PLAINTIFF ABOUT HIS CRIMINAL HISTORY PROPERLY PRECLUDED IN THIS MEDICAL MALPRACTICE ACTION, EXPERT OPINION PROPERLY RELIED UPON HEARSAY STATEMENTS BY PLAINTIFF'S TREATING PHYSICIAN (FOURTH DEPT).

The Fourth Department determined the trial court properly prohibited cross examination of the plaintiff about his criminal history and plaintiff's expert properly relied upon hearsay statements by plaintiff's treating physician:

> ... [W]hile a civil litigant is granted broad authority to use the criminal convictions of a witness to impeach the credibility of that witness, the nature and extent of cross-examination, including with respect to criminal convictions, remains firmly within the discretion of the trial court ... .
>
> It is well settled that " opinion evidence must be based on facts in the record or personally known to the witness' " ... . It is equally well settled, however, that an expert is permitted to offer opinion testimony based upon facts not in evidence where the material is " of a kind accepted in the profession as reliable in forming a professional opinion' "... . "The professional reliability exception to the hearsay rule enables an expert witness to provide opinion evidence based on otherwise inadmissible hearsay, provided it is demonstrated to be the type of material commonly relied on in the profession' "... , and "provided that it does not constitute the sole or principal basis for the expert's opinion" ... . **Tornatore v Cohen, 2018 NY Slip Op 04145, Fourth Dept 6-8-18**

NEGLIGENCE (MEDICAL MALPRACTICE, EVIDENCE, CROSS EXAMINATION OF PLAINTIFF ABOUT HIS CRIMINAL HISTORY PROPERLY PRECLUDED IN THIS MEDICAL MALPRACTICE ACTION, EXPERT OPINION PROPERLY RELIED UPON HEARSAY STATEMENTS BY PLAINTIFF'S TREATING PHYSICIAN (FOURTH DEPT))/MEDICAL MALPRACTICE (EVIDENCE, CROSS EXAMINATION OF PLAINTIFF ABOUT HIS CRIMINAL HISTORY PROPERLY PRECLUDED IN THIS MEDICAL MALPRACTICE ACTION, EXPERT OPINION PROPERLY RELIED UPON HEARSAY STATEMENTS BY PLAINTIFF'S TREATING PHYSICIAN (FOURTH DEPT))/EVIDENCE (MEDICAL MALPRACTICE, CROSS EXAMINATION OF PLAINTIFF ABOUT HIS CRIMINAL HISTORY PROPERLY PRECLUDED IN THIS MEDICAL MALPRACTICE ACTION, EXPERT OPINION PROPERLY RELIED UPON HEARSAY STATEMENTS BY PLAINTIFF'S TREATING PHYSICIAN (FOURTH DEPT))/EXPERT OPINION (MEDICAL MALPRACTICE, CROSS EXAMINATION OF PLAINTIFF ABOUT HIS CRIMINAL HISTORY PROPERLY PRECLUDED IN THIS MEDICAL MALPRACTICE ACTION, EXPERT OPINION PROPERLY RELIED UPON HEARSAY STATEMENTS BY PLAINTIFF'S TREATING PHYSICIAN (FOURTH DEPT))/CRIMINAL HISTORY (EVIDENCE, MEDICAL MALPRACTICE, CROSS EXAMINATION OF PLAINTIFF ABOUT HIS CRIMINAL HISTORY PROPERLY PRECLUDED IN THIS MEDICAL MALPRACTICE ACTION, EXPERT OPINION PROPERLY RELIED UPON HEARSAY STATEMENTS BY PLAINTIFF'S TREATING PHYSICIAN (FOURTH DEPT))

NEGLIGENCE, MEDICAL MALPRACTICE, EVIDENCE, CIVIL PROCEDURE.

MOTION TO SET ASIDE THE VERDICT IN THIS MEDICAL MALPRACTICE CASE SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant's motion to set aside the verdict as against the weight of the evidence should not have been granted:

> "It is well established that [a] verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that it could not have been reached on any fair interpretation of the evidence"... . "Where a verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view" ... .
>
> Here, there was sharply conflicting expert testimony with respect to whether plaintiff's postoperative symptoms could have occurred without negligence on the part of defendant, and the jury was entitled to credit the testimony of defendants' experts and reject the testimony of plaintiff's expert ... . We conclude that the court erred in setting aside the verdict as against the weight of the evidence inasmuch as "the jury had ample basis to conclude that plaintiff's postoperative condition was not attributable to any deviation from accepted community standards of medical practice by defendant" ... , and thus the jury's finding that defendant was not negligent was not "palpably irrational or wrong" ... . **Clark v Loftus, 2018 NY Slip Op 04473, Fourth Dept 6-15-18**

NEGLIGENCE (MEDICAL MALPRACTICE, MOTION TO SET ASIDE THE VERDICT IN THIS MEDICAL MALPRACTICE CASE SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/MEDICAL MALPRACTICE (MOTION TO SET ASIDE THE VERDICT IN THIS MEDICAL MALPRACTICE CASE SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/EVIDENCE (MEDICAL MALPRACTICE, MOTION TO SET ASIDE THE VERDICT IN THIS MEDICAL MALPRACTICE CASE SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/CIVIL PROCEDURE (SET ASIDE THE VERDICT, MOTION TO, MEDICAL MALPRACTICE, MOTION TO SET ASIDE THE VERDICT IN THIS MEDICAL MALPRACTICE CASE SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/VERDICT, MOTION TO SET ASIDE (MEDICAL MALPRACTICE, MOTION TO SET ASIDE THE VERDICT IN THIS MEDICAL MALPRACTICE CASE SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))

NEGLIGENCE, MUNICIPAL LAW.

BUS DRIVER REACTED TO AN EMERGENCY, NOT LIABLE FOR SUDDENLY APPLYING THE BRAKES (FIRST DEPT).

The First Department determined the driver of a bus, Garcia, was not liable for suddenly applying the brakes pursuant to the emergency doctrine. A taxi had suddenly swerved into the bus's lane:

> The motion court properly invoked the emergency doctrine in finding that no issues of fact exist as to defendants' negligence given plaintiff's failure in opposition to adduce any evidence tending to show that the bus operator, defendant Garcia, created the emergency or could have avoided a collision with the nonparty livery taxi by taking some action other than applying his brakes ... . The sudden unexpected swerving of the livery taxi into the bus's lane required Garcia to take immediate action ... . Garcia's reaction of pressing the brakes with enough force to prevent an impact between his bus and the taxi and swerving the bus to the right was a reasonable response to the emergency that was not of his own making ... . That Garcia was aware that taxis often cut buses off does not require a different result. **Jones v New York City Tr. Auth., 2018 NY Slip Op 04281, First Dept 6-12-18**

NEGLIGENCE (BUS DRIVER REACTED TO AN EMERGENCY, NOT LIABLE FOR SUDDENLY APPLYING THE BRAKES (FIRST DEPT))/BUSES (BUS DRIVER REACTED TO AN EMERGENCY, NOT LIABLE FOR SUDDENLY APPLYING THE BRAKES (FIRST DEPT))/EMERGENCY DOCTRINE (BUSES, BUS DRIVER REACTED TO AN EMERGENCY, NOT LIABLE FOR SUDDENLY APPLYING THE BRAKES (FIRST DEPT))/MUNICIPAL LAW (BUSES, (BUS DRIVER REACTED TO AN EMERGENCY, NOT LIABLE FOR SUDDENLY APPLYING THE BRAKES (FIRST DEPT))/BRAKES (BUSES, BUS DRIVER REACTED TO AN EMERGENCY, NOT LIABLE FOR SUDDENLY APPLYING THE BRAKES (FIRST DEPT))

NEGLIGENCE, MUNICIPAL LAW.

BENCH TRIAL VERDICT REVERSED, COMMON CARRIER NOT LIABLE FOR BUS PASSENGER'S SLIP AND FALL ON BLACK ICE AFTER STEPPING OFF THE BUS (SECOND DEPT).

The Second Department, reversing a bench trial verdict in Supreme Court, determined defendant transit authority was not liable for plaintiff's slip and fall on black ice upon exiting defendant's bus:

> The defendant, as a common carrier, "owe[d] a duty to alighting passenger[s] to stop at a place where [they] may safely disembark and leave the area" ... , and towards that end "to exercise reasonable and commensurate care in view of the dangers to be apprehended" ... . However, whether the defendant has breached its duty to provide a passenger a safe place to alight from the bus will depend on whether the bus driver could have observed the dangerous condition from the driver's vantage point... . Here, there was no evidence that the bus driver was aware of or reasonably should have been aware of the ice in the roadway. The fact that it was cold and there was a pile of snow near the rear exit does not create a basis to conclude that the bus driver should have known of the dangerous condition ... . **Guzman v New York City Tr. Auth., 2018 NY Slip Op 04310, Second Dept 6-13-18**

NEGLIGENCE (MUNICIPAL LAW, BUSES, BENCH TRIAL VERDICT REVERSED, COMMON CARRIER NOT LIABLE FOR BUS PASSENGER'S SLIP AND FALL ON BLACK ICE AFTER STEPPING OFF THE BUS (SECOND DEPT))/MUNICIPAL LAW (BUSES, BENCH TRIAL VERDICT REVERSED, COMMON CARRIER NOT LIABLE FOR BUS PASSENGER'S SLIP AND FALL ON BLACK ICE AFTER STEPPING OFF THE BUS (SECOND DEPT))/BUSES (NEGLIGENCE, MUNICIPAL LAW, BENCH TRIAL VERDICT REVERSED, COMMON CARRIER NOT LIABLE FOR BUS PASSENGER'S SLIP AND FALL ON BLACK ICE AFTER STEPPING OFF THE BUS (SECOND DEPT))/SLIP AND FALL (NEGLIGENCE, MUNICIPAL LAW, BENCH TRIAL VERDICT REVERSED, COMMON CARRIER NOT LIABLE FOR BUS PASSENGER'S SLIP AND FALL ON BLACK ICE AFTER STEPPING OFF THE BUS (SECOND DEPT

NEGLIGENCE, MUNICIPAL LAW.

MOTION TO AMEND NOTICE OF CLAIM TO CORRECT THE ADDRESS OF THE ACCIDENT TWO YEARS AFTER THE CLAIM ACCRUED PROPERLY DENIED, PLAINTIFF DID NOT SHOW DEFENDANT WAS NOT PREJUDICED BY THE WRONG ADDRESS (SECOND DEPT).

The Second Department determined plaintiff's motion to amend the notice of claim, two years after the claim accrued, to add the correct address of the accident was properly denied. Plaintiff did not demonstrate the failure to provide the correct address did not prejudice the NYC Housing Authority (defendant):

> A motion for leave to amend a notice of claim may be granted provided that the error in the original notice of claim was made in good faith and the municipality has not been prejudiced thereby ... .
>
> Here, the plaintiff failed to meet her initial burden of demonstrating the absence of prejudice to the defendant arising from the plaintiff's incorrect description of the accident location... . The plaintiff relied solely on the transient nature of the condition that allegedly caused her to fall to support her contention that the defendant did not suffer prejudice. The plaintiff did not allege that there were any witnesses to the incident or to the condition complained of, that the plaintiff received any medical assistance at the site, or that the accident was reported to anyone so as to give the defendant actual knowledge of the essential facts constituting the claim within the statutory period or a reasonable time thereafter ... . **Jenkins v New York City Hous. Auth., 2018 NY Slip Op 04313, Second Dept 6-13-18**

NEGLIGENCE (MUNICIPAL LAW, MOTION TO AMEND NOTICE OF CLAIM TO CORRECT THE ADDRESS OF THE ACCIDENT TWO YEARS AFTER THE CLAIM ACCRUED PROPERLY DENIED, PLAINTIFF DID NOT SHOW DEFENDANT WAS NOT PREJUDICED BY THE WRONG ADDRESS (SECOND DEPT))/MUNICIPAL LAW (NEGLIGENCE, NOTICE OF CLAIM, MOTION TO AMEND NOTICE OF CLAIM TO CORRECT THE ADDRESS OF THE ACCIDENT TWO YEARS AFTER THE CLAIM ACCRUED PROPERLY DENIED, PLAINTIFF DID NOT SHOW DEFENDANT WAS NOT PREJUDICED BY THE WRONG ADDRESS (SECOND DEPT))/NOTICE OF CLAIM (MUNICIPAL LAW, MOTION TO AMEND NOTICE OF CLAIM TO CORRECT THE ADDRESS OF THE ACCIDENT TWO YEARS AFTER THE CLAIM ACCRUED PROPERLY DENIED, PLAINTIFF DID NOT SHOW DEFENDANT WAS NOT PREJUDICED BY THE WRONG ADDRESS (SECOND DEPT))

NEGLIGENCE, MUNICIPAL LAW.

MOTION FOR LEAVE TO FILE LATE NOTICE OF CLAIM AGAINST A PUBLIC CORPORATION SHOULD NOT HAVE BEEN GRANTED FOR ONE OF TWO ACCIDENTS, CLAIMANT FAILED TO SHOW DEFENDANT HAD TIMELY ACTUAL KNOWLEDGE OF THE FIRST OF TWO ACCIDENTS (FOURTH DEPT).

The Fourth Department, modifying Supreme Court, determined that claimant's motion for leave to file a late notice of claim against defendant public corporation was properly granted for only one of two accidents. The Fourth Department held that the defendant did not have timely actual knowledge of the first accident because there was no evidence defendant was provided with the relevant accident report:

> While we agree with respondent that claimant failed to establish a reasonable excuse for the delay ... , "[t]he failure to offer an excuse for the delay is not fatal where . . . actual notice was had and there is no compelling showing of prejudice to [respondent]" ... .
>
> ... [W]e agree with claimant that he established that respondent would not be substantially prejudiced by any delay in serving the notice of claim. "[B]ecause the injur[ies] allegedly resulted from . . . fall[s] at a construction site, it is highly unlikely that the conditions existing at the time of the accident[s] would [still] have existed' " had the notice of claim been timely filed ... .
>
> ... [C]laimant failed to meet his burden of demonstrating that respondent had timely actual knowledge of the first accident. Despite having engaged in pre-action discovery, claimant is unable to provide any evidence that the incident report related to the first accident was ever transmitted to respondent, and there was no mention of the first accident in the construction closeout report submitted to respondent. Inasmuch as there is no evidence that respondent received timely actual knowledge of the occurrence of the first accident, respondent could not have received timely actual knowledge of " the injuries or damages' " resulting therefrom ... . **Matter of Szymkowiak v New York Power Auth., 2018 NY Slip Op 04482, Fourth Dept 6-15-18**

NEGLIGENCE (MUNICIPAL LAW, LATE NOTICE OF CLAIM, MOTION FOR LEAVE TO FILE LATE NOTICE OF CLAIM AGAINST A PUBLIC CORPORATION SHOULD NOT HAVE BEEN GRANTED FOR ONE OF TWO ACCIDENTS, CLAIMANT FAILED TO SHOW DEFENDANT HAD TIMELY ACTUAL KNOWLEDGE OF THE FIRST OF TWO ACCIDENTS (FOURTH DEPT))/MUNICIPAL LAW (MOTION FOR LEAVE TO FILE LATE NOTICE OF CLAIM AGAINST A PUBLIC CORPORATION SHOULD NOT HAVE BEEN GRANTED FOR ONE OF TWO ACCIDENTS, CLAIMANT FAILED TO SHOW DEFENDANT HAD TIMELY ACTUAL KNOWLEDGE OF THE FIRST OF TWO ACCIDENTS (FOURTH DEPT))/NOTICE OF CLAIM (MUNICIPAL LAW, LATE NOTICE OF CLAIM, MOTION FOR LEAVE TO FILE LATE NOTICE OF CLAIM AGAINST A PUBLIC CORPORATION SHOULD NOT HAVE BEEN GRANTED FOR ONE OF TWO ACCIDENTS, CLAIMANT FAILED TO SHOW DEFENDANT HAD TIMELY ACTUAL KNOWLEDGE OF THE FIRST OF TWO ACCIDENTS (FOURTH DEPT))/PUBLIC CORPORATION (NOTICE OF CLAIM, MOTION FOR LEAVE TO FILE LATE NOTICE OF CLAIM AGAINST A PUBLIC CORPORATION SHOULD NOT HAVE BEEN GRANTED FOR ONE OF TWO ACCIDENTS, CLAIMANT FAILED TO SHOW DEFENDANT HAD TIMELY ACTUAL KNOWLEDGE OF THE FIRST OF TWO ACCIDENTS (FOURTH DEPT))

NEGLIGENCE, MUNICIPAL LAW.

UTILITY BOX RECESSED IN CITY SIDEWALK WAS OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY GRANTED (SECOND DEPT).

The Second Department determined the utility box recessed into a city sidewalk was open and obvious and was not inherently dangerous. Defendants were therefore entitled to summary judgment in this slip and fall case:

> There is " no duty to protect against an open and obvious condition provided that, as a matter of law, the condition is not inherently dangerous'" ... . "While the issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question, a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion, and may do so on the basis of clear and undisputed evidence" ... . "Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances" ... .Similarly, the determination of whether "a condition is not inherently dangerous . . . depends on the totality of the specific facts of each case"... .
>
> Here, contrary to the plaintiff's contention, each of the defendants established, prima facie, that the complained-of condition "was open and obvious, as it was not only readily observable by those employing the reasonable use of their senses, but was known to [the decedent] prior to the accident and, as a matter of law, was not inherently dangerous" ... . **Graffino v City of New York, 2018 NY Slip Op 04702, Second Dept 6-27-18**

NEGLIGENCE (UTILITY BOX RECESSED IN CITY SIDEWALK WAS OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY GRANTED (SECOND DEPT))/MUNICIPAL LAW (NEGLIGENCE, UTILITY BOX RECESSED IN CITY SIDEWALK WAS OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY GRANTED (SECOND DEPT))/SLIP AND FALL UTILITY BOX RECESSED IN CITY SIDEWALK WAS OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY GRANTED (SECOND DEPT))/SIDEWALKS (SLIP AND FALL, UTILITY BOX RECESSED IN CITY SIDEWALK WAS OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY GRANTED (SECOND DEPT))/OPEN AND OBVIOUS (SLIP AND FALL, (UTILITY BOX RECESSED IN CITY SIDEWALK WAS OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY GRANTED (SECOND DEPT))

NEGLIGENCE, MUNICIPAL LAW, CIVIL PROCEDURE.

SUMMARY JUDGMENT SHOULD NOT HAVE BEEN AWARDED TO PLAINTIFF IN THIS SIDEWALK SLIP AND FALL CASE ON A THEORY RAISED IN REPLY PAPERS, CITY DEFENDANTS DID NOT DEMONSTRATE THEY HAD NO NOTICE OF THE CONDITION OR DID NOT CREATE THE CONDITION, EVIDENCE SUBMITTED BY THE CITY DEFENDANTS IN REPLY PAPERS COULD NOT BE CONSIDERED (SECOND DEPT).

The Second Department, modifying Supreme Court, determined (1) the court should not have searched the record and awarded summary judgment to the plaintiff in this sidewalk slip and fall case based upon a theory raised for the first time in reply papers, (2) the city defendants did not demonstrate that they did not have written notice of the condition or that they did not create the condition, and (3) evidence submitted by the city defendants for the first time in reply papers could not be considered with respect to a prima facie showing of entitlement to summary judgment:

> The plaintiff alleged, for the first time in opposition to the motion and cross motion for summary judgment, that the defendants were strictly liable under an absolute nuisance theory. However, a plaintiff cannot defeat an otherwise proper motion for summary judgment by asserting, for the first time in opposition to the motion, a new theory of liability that was not pleaded in the complaint or bill of particulars … . …
>
> … [T]he City defendants' … "failed to demonstrate their prima facie entitlement to judgment as a matter of law on the ground that they had no prior written notice as they failed to submit proof of such lack of notice from the proper municipal official"…, or that they did not create the alleged dangerous condition through an affirmative act of negligence… . The evidence submitted by the City defendants for the first time in their reply papers cannot be considered for the purpose of determining whether they met their prima facie burden … . **Troia v City of New York, 2018 NY Slip Op 04770, Second Dept 6-27-18**

NEGLIGENCE (SLIP AND FALL, MUNICIPAL LAW, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN AWARDED TO PLAINTIFF IN THIS SIDEWALK SLIP AND FALL CASE ON A THEORY RAISED IN REPLY PAPERS, CITY DEFENDANTS DID NOT DEMONSTRATE THEY HAD NO NOTICE OF THE CONDITION OR DID NOT CREATE THE CONDITION, EVIDENCE SUBMITTED BY THE CITY DEFENDANTS IN REPLY PAPERS COULD NOT BE CONSIDERED (SECOND DEPT))/MUNICIPAL LAW (SLIP AND FALL, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN AWARDED TO PLAINTIFF IN THIS SIDEWALK SLIP AND FALL CASE ON A THEORY RAISED IN REPLY PAPERS, CITY DEFENDANTS DID NOT DEMONSTRATE THEY HAD NO NOTICE OF THE CONDITION OR DID NOT CREATE THE CONDITION, EVIDENCE SUBMITTED BY THE CITY DEFENDANTS IN REPLY PAPERS COULD NOT BE CONSIDERED (SECOND DEPT))/CIVIL PROCEDURE (SUMMARY JUDGMENT SHOULD NOT HAVE BEEN AWARDED TO PLAINTIFF IN THIS SIDEWALK SLIP AND FALL CASE ON A THEORY RAISED IN REPLY PAPERS, CITY DEFENDANTS DID NOT DEMONSTRATE THEY HAD NO NOTICE OF THE CONDITION OR DID NOT CREATE THE CONDITION, EVIDENCE SUBMITTED BY THE CITY DEFENDANTS IN REPLY PAPERS COULD NOT BE CONSIDERED (SECOND DEPT))/REPLY PAPERS (SUMMARY JUDGMENT SHOULD NOT HAVE BEEN AWARDED TO PLAINTIFF IN THIS SIDEWALK SLIP AND FALL CASE ON A THEORY RAISED IN REPLY PAPERS, CITY DEFENDANTS DID NOT DEMONSTRATE THEY HAD NO NOTICE OF THE CONDITION OR DID NOT CREATE THE CONDITION, EVIDENCE SUBMITTED BY THE CITY DEFENDANTS IN REPLY PAPERS COULD NOT BE CONSIDERED (SECOND DEPT))/SUMMARY JUDGMENT (REPLY PAPERS, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN AWARDED TO PLAINTIFF IN THIS SIDEWALK SLIP AND FALL CASE ON A THEORY RAISED IN REPLY PAPERS, CITY DEFENDANTS DID NOT DEMONSTRATE THEY HAD NO NOTICE OF THE CONDITION OR DID NOT CREATE THE CONDITION, EVIDENCE SUBMITTED BY THE CITY DEFENDANTS IN REPLY PAPERS COULD NOT BE CONSIDERED (SECOND DEPT))/SLIP AND FALL (SUMMARY JUDGMENT SHOULD NOT HAVE BEEN AWARDED TO PLAINTIFF IN THIS SIDEWALK SLIP AND FALL CASE ON A THEORY RAISED IN REPLY PAPERS, CITY DEFENDANTS DID NOT DEMONSTRATE THEY HAD NO NOTICE OF THE CONDITION OR DID NOT CREATE THE CONDITION, EVIDENCE SUBMITTED BY THE CITY DEFENDANTS IN REPLY PAPERS COULD NOT BE CONSIDERED (SECOND DEPT))/SIDEWALKS (SLIP AND FALL, MUNICIPAL LAW, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN AWARDED TO PLAINTIFF IN THIS SIDEWALK SLIP AND FALL CASE ON A THEORY RAISED IN REPLY PAPERS, CITY DEFENDANTS DID NOT DEMONSTRATE THEY HAD NO NOTICE OF THE CONDITION OR DID NOT CREATE THE CONDITION, EVIDENCE SUBMITTED BY THE CITY DEFENDANTS IN REPLY PAPERS COULD NOT BE CONSIDERED (SECOND DEPT))

NEGLIGENCE, MUNICIPAL LAW, IMMUNITY.

CITY LIABLE FOR STABBING DEATH OF PLAINTIFF'S DECEDENT IN PARKING GARAGE, SECURITY INADEQUATE, HISTORY OF CRIMINAL ACTIVITY, BUT CITY SHOULD NOT HAVE BEEN HELD 100% LIABLE (SECOND DEPT).

The Second Department determined the city was properly found liable for the stabbing death of plaintiff's decedent in a parking garage, but found that the city should not have been held 100% liable. Operating a parking garage is a proprietary function to which governmental immunity does not apply:

> Contrary to the City's contention, it was not entitled to governmental immunity for these claims, which arose out of the performance of proprietary functions. In that respect, the plaintiffs offered proof that the City failed in its capacity as a commercial owner of a public parking garage to meet the basic proprietary obligation of providing minimal security for its garage property ... .
>
> ... [T]he plaintiffs made out a prima facie case of negligence at trial, and the jury's finding in this regard was not against the weight of the evidence. Under the circumstances of this case, in which the plaintiffs established that the City employed almost no security measures in the parking garage where the decedent was murdered, no expert testimony was necessary for the plaintiffs to establish that the City breached its duty to provide minimal security precautions to protect the patrons of the parking garage where the decedent was murdered ... . Additionally, in light of the history of criminal activity in the parking garage, which included people being ambushed as they walked to their cars, as was the decedent in this case, the City should have been aware of the "likelihood of conduct on the part of third [parties]" that would "endanger the safety" of visitors to the garage ... .
>
> ... [T]he apportionment of 100% of the fault in the happening of the attack to the City was not supported by a fair interpretation of the evidence ... . An apportionment of 65% of the fault to the defendant and 35% of the fault to the nonparty tortfeasor better reflects a fair interpretation of the evidence ... . **Granata v City of White Plains, 2018 NY Slip Op 03964, Second Dept 6-6-18**

NEGLIGENCE (MUNICIPAL LAW, CITY LIABLE FOR STABBING DEATH OF PLAINTIFF'S DECEDENT IN PARKING GARAGE, SECURITY INADEQUATE, HISTORY OF CRIMINAL ACTIVITY, CITY SHOULD NOT HAVE BEEN HELD 100% LIABLE (SECOND DEPT))/MUNICIPAL LAW (NEGLIGENCE, ASSAULT, CITY LIABLE FOR STABBING DEATH OF PLAINTIFF'S DECEDENT IN PARKING GARAGE, SECURITY INADEQUATE, HISTORY OF CRIMINAL ACTIVITY, CITY SHOULD NOT HAVE BEEN HELD 100% LIABLE (SECOND DEPT))/IMMUNITY (MUNICIPAL LAW, ASSAULT, CITY LIABLE FOR STABBING DEATH OF PLAINTIFF'S DECEDENT IN PARKING GARAGE, SECURITY INADEQUATE, HISTORY OF CRIMINAL ACTIVITY, CITY SHOULD NOT HAVE BEEN HELD 100% LIABLE (SECOND DEPT))/ASSAULT (MUNICIPAL LAW, NEGLIGENCE, CITY LIABLE FOR STABBING DEATH OF PLAINTIFF'S DECEDENT IN PARKING GARAGE, SECURITY INADEQUATE, HISTORY OF CRIMINAL ACTIVITY, CITY SHOULD NOT HAVE BEEN HELD 100% LIABLE (SECOND DEPT))/PARKING GARAGE (MUNICIPAL LAW, CITY LIABLE FOR STABBING DEATH OF PLAINTIFF'S DECEDENT IN PARKING GARAGE, SECURITY INADEQUATE, HISTORY OF CRIMINAL ACTIVITY, CITY SHOULD NOT HAVE BEEN HELD 100% LIABLE (SECOND DEPT))

NEGLIGENCE, MUNICIPAL LAW, IMMUNITY.

NO SPECIAL RELATIONSHIP BETWEEN PLAINTIFF'S DECEDENT AND THE POLICE DEPARTMENT, PLAINTIFF'S DECEDENT WAS KILLED BY HER HUSBAND SHORTLY AFTER SHE REPORTED TO THE POLICE THAT HER HUSBAND HAD CONTACTED HER IN VIOLATION OF AN ORDER OF PROTECTION (SECOND DEPT).

The Second Department determined no special relationship had been formed between the police department and plaintiff's decedent, who was killed by her husband after she alerted the police he had contacted her in violation of an order of protection. The husband had previously taken plaintiff's decedent and their two teenage daughters hostage and threatened them with knives and a shotgun. The police department was immune from suit:

> Generally, "a municipality may not be held liable to a person injured by the breach of a duty owed to the general public, such as a duty to provide police protection" ... . When a cause of action alleging negligence is asserted against a municipality, and the municipality is exercising a governmental function, the plaintiff must first demonstrate that the municipality owed a special duty to the injured person ... . The elements required to establish such a duty are: "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" ... .
>
> Here, the defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that, while the police endeavored to contact the husband in order to instruct him not to further communicate with the decedent, the police did not promise to arrest the husband and the decedent could not have justifiably relied upon assurances of police protection ... . **Axt v Hyde Park Police Dept., 2018 NY Slip Op 04298, Second Dept 6-13-18**

NEGLIGENCE (MUNICIPAL LAW, POLICE, NO SPECIAL RELATIONSHIP BETWEEN PLAINTIFF'S DECEDENT AND THE POLICE DEPARTMENT, PLAINTIFF'S DECEDENT WAS KILLED BY HER HUSBAND SHORTLY AFTER SHE REPORTED TO THE POLICE THAT HER HUSBAND HAD CONTACTED HER IN VIOLATION OF AN ORDER OF PROTECTION (SECOND DEPT))/MUNICIPAL LAW (NEGLIGENCE, POLICE, NO SPECIAL RELATIONSHIP BETWEEN PLAINTIFF'S DECEDENT AND THE POLICE DEPARTMENT, PLAINTIFF'S DECEDENT WAS KILLED BY HER HUSBAND SHORTLY AFTER SHE REPORTED TO THE POLICE THAT HER HUSBAND HAD CONTACTED HER IN VIOLATION OF AN ORDER OF PROTECTION (SECOND DEPT))/IMMUNITY (MUNICIPAL LAW, NEGLIGENCE, POLICE, NO SPECIAL RELATIONSHIP BETWEEN PLAINTIFF'S DECEDENT AND THE POLICE DEPARTMENT, PLAINTIFF'S DECEDENT WAS KILLED BY HER HUSBAND SHORTLY AFTER SHE REPORTED TO THE POLICE THAT HER HUSBAND HAD CONTACTED HER IN VIOLATION OF AN ORDER OF PROTECTION (SECOND DEPT))/SPECIAL RELATIONSHIP (MUNICIPAL LAW, POLICE, NEGLIGENCE, IMMUNITY, NO SPECIAL RELATIONSHIP BETWEEN PLAINTIFF'S DECEDENT AND THE POLICE DEPARTMENT, PLAINTIFF'S DECEDENT WAS KILLED BY HER HUSBAND SHORTLY AFTER SHE REPORTED TO THE POLICE THAT HER HUSBAND HAD CONTACTED HER IN VIOLATION OF AN ORDER OF PROTECTION (SECOND DEPT))

NEGLIGENCE, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

QUESTION OF FACT WHETHER SNOW PLOW DRIVER ACTED WITH RECKLESS DISREGARD IN THIS TRAFFIC ACCIDENT CASE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendants' motion for summary judgment in this snow plow traffic accident case should not have been granted. The snow plow driver was backing up below the crest of a hill and plaintiff was unable to brake in time when he crested the hill. The Fourth Department held that there was a question of fact whether the snow plow driver acted in reckless disregard of the safety of others in violation of Vehicle and Traffic Law 1103:

> Defendants failed to meet their initial burden of establishing that Marsh did not operate the snowplow with reckless disregard for the safety of others, and defendants thus were not entitled to summary judgment dismissing the complaint against them. Vehicle and Traffic Law § 1103 (b) "exempts from the rules of the road all vehicles actually engaged in work on a highway"... . However, the statute does not protect snowplow drivers "from the consequences of their reckless disregard for the safety of others" (§ 1103 [b]). The operator of a snowplow acts with such "reckless disregard" when he or she " acts in conscious disregard of a known or obvious risk that is so great as to make it highly probable that harm will follow' " ... . The reckless disregard standard "requires a showing of more than a momentary judgment lapse" ... .
>
> Here, defendants' submissions in support of the motion establish that Marsh had been a driver of the snowplow route for 15 years and was aware that an intersection where he could safely turn around was less than a quarter of a mile away. Despite that knowledge, Marsh drove the snowplow in reverse, in front of a hill that obscured his view of approaching traffic on a narrow, two-lane country road with a speed limit of 55 miles per hour, without first sounding his horn in warning. Marsh's deposition testimony that he did not realize that he had collided with plaintiff's vehicle until several seconds after the collision raises a question of fact whether he was utilizing his rear view mirrors while traveling in reverse. **Chase v Marsh, 2018 NY Slip Op 04231, Fourth Dept 6-8-18**

NEGLIGENCE (TRAFFIC ACCIDENTS, MUNICIPAL LAW, QUESTION OF FACT WHETHER SNOW PLOW DRIVER ACTED WITH RECKLESS DISREGARD IN THIS TRAFFIC ACCIDENT CASE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/MUNICIPAL LAW (NEGLIGENCE, TRAFFIC ACCIDENTS, QUESTION OF FACT WHETHER SNOW PLOW DRIVER ACTED WITH RECKLESS DISREGARD IN THIS TRAFFIC ACCIDENT CASE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/VEHICLE AND TRAFFIC LAW (NEGLIGENCE, MUNICIPAL LAW, QUESTION OF FACT WHETHER SNOW PLOW DRIVER ACTED WITH RECKLESS DISREGARD IN THIS TRAFFIC ACCIDENT CASE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/TRAFFIC ACCIDENTS (MUNICIPAL LAW, QUESTION OF FACT WHETHER SNOW PLOW DRIVER ACTED WITH RECKLESS DISREGARD IN THIS TRAFFIC ACCIDENT CASE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/SNOW PLOWS (TRAFFIC ACCIDENTS, MUNICIPAL LAW, QUESTION OF FACT WHETHER SNOW PLOW DRIVER ACTED WITH RECKLESS DISREGARD IN THIS TRAFFIC ACCIDENT CASE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))

NEGLIGENCE, UTILITIES.

PLAINTIFF'S DECEDENT'S RECKLESSNESS WAS THE SOLE LEGAL CAUSE OF HER DEATH BY ELECTROCUTION BY DOWNED POWER LINES (FIRST DEPT).

The First Department determined plaintiff's decedent's recklessness was the sole legal cause of her death. During Superstorm Sandy plaintiff's decedent went outside, barefoot, to photograph downed power lines and was electrocuted:

> The decedent was killed during Superstorm Sandy when she twice ventured outside her home to photograph downed power lines, and was electrocuted when one of the lines came in contact with her ankle. Her friend, who witnessed the incident, provided statements attesting to the fact that decedent left her home to investigate whether there was a fire, was shocked when she touched a metal gate in her front yard, returned to her home, and then exited the house again, barefoot this time, in order to photograph the scene. Decedent's friend stated that he warned her repeatedly to stay away from the live wires and to get back inside, but she disregarded his warnings.
>
> Defendants' motion for summary judgment was properly granted since decedent's recklessness in approaching live power wires in the midst of a major storm in order to take photographs was the sole legal cause of her death... . Plaintiffs contend that defendants were negligent in failing to properly maintain the power wires, adequately prepare for the storm, and respond rapidly enough to the notice of the emergency situation resulting from the downed wires. However, even if defendants were negligent, decedent's recklessness was a superseding cause of her death ... . **Abraham v Consolidated Edison Co. of N.Y., Inc., 2018 NY Slip Op 04517, First Dept 6-19-18**

NEGLIGENCE (ELECTROCUTION, PLAINTIFF'S DECEDENT'S RECKLESSNESS WAS THE SOLE LEGAL CAUSE OF HER DEATH BY ELECTROCUTION BY DOWNED POWER LINES (FIRST DEPT))/UTILITIES (ELECTROCUTION, PLAINTIFF'S DECEDENT'S RECKLESSNESS WAS THE SOLE LEGAL CAUSE OF HER DEATH BY ELECTROCUTION BY DOWNED POWER LINES (FIRST DEPT))/RECKLESSNESS (NEGLIGENCE, SOLE LEGAL CAUSE, ELECTROCUTION, PLAINTIFF'S DECEDENT'S RECKLESSNESS WAS THE SOLE LEGAL CAUSE OF HER DEATH BY ELECTROCUTION BY DOWNED POWER LINES (FIRST DEPT))/SOLE LEGAL CAUSE (ELECTROCUTION, PLAINTIFF'S DECEDENT'S RECKLESSNESS WAS THE SOLE LEGAL CAUSE OF HER DEATH BY ELECTROCUTION BY DOWNED POWER LINES (FIRST DEPT))/SUPERSEDING CAUSE (ELECTROCUTION, PLAINTIFF'S DECEDENT'S RECKLESSNESS WAS THE SOLE LEGAL CAUSE OF HER DEATH BY ELECTROCUTION BY DOWNED POWER LINES (FIRST DEPT))

PARTNERSHIP LAW

PARTNERSHIP LAW, CORPORATION LAW.

A PARTNERSHIP CANNOT OPERATE THROUGH AN EXISTING CORPORATE STRUCTURE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, noted that a partnership cannot operate through an existing corporate structure:

> Plaintiffs operated a court reporting partnership from 1975 to 1999. Upon dissolution of the partnership, they agreed to consolidate their business with defendant, an existing court reporting corporation ... . * * *
>
> ... [A] party "cannot recover on a claim that he [or she] and [another individual] entered into a joint venture to be set up and run through the corporate . . . structure" ... . "[A]s a general rule, a partnership may not exist where the business is conducted in a corporate form, as each is governed by a separate body of law . . . Parties may not be partners between themselves while using the corporate shield to protect themselves against personal liability" ... . Although that rule has been qualified "so as not to preclude members of a preexisting joint venture from acting as partners between themselves and as a corporation to the rest of the world,' " that qualification is inapplicable here because defendant [corporation] was formed before the partnership was allegedly created by an oral agreement ... . In other words, "there was no preexisting joint venture that later spawned the creation of a corporation in which aspects of the joint venture could survive" ... . **Bianchi v Midtown Reporting Serv., Inc., 2018 NY Slip Op 04895, Fourth Dept 6-29-18**

PARTNERSHIP LAW (A PARTNERSHIP CANNOT OPERATE THROUGH AN EXISTING CORPORATE STRUCTURE (FOURTH DEPT))/CORPORATION LAW (A PARTNERSHIP CANNOT OPERATE THROUGH AN EXISTING CORPORATE STRUCTURE (FOURTH DEPT))/JOINT VENTURES (A PARTNERSHIP CANNOT OPERATE THROUGH AN EXISTING CORPORATE STRUCTURE (FOURTH DEPT))

REAL ESTATE

REAL ESTATE.

EASEMENT COVENANT CONCERNING A THREE INCH ENCROACHMENT WAS A PERMITTED EXCEPTION UNDER THE REAL ESTATE PURCHASE AGREEMENT AND COULD NOT SERVE AS A GROUND FOR DEMONSTRATING SELLER WAS NOT READY, WILLING AND ABLE TO SELL THE PROPERTY ON THE TIME OF THE ESSENCE DATE, SELLER ENTITLED TO SECURITY DEPOSIT AND ATTORNEY'S FEES (FIRST DEPT).

The First Department determined defendant buyer failed to demonstrate the seller was not ready, willing and able to close on the time-of-the-essence date. The seller was entitled to keep the deposit. The buyer claimed that an easement-covenant addressing a three inch encroachment was an encumbrance which violated the purchase agreement. The court held that the encroachment was a "permitted exception" under the purchase agreement:

> ... [B]uyer claimed that seller had not been ready, willing, and able to close because the property had an easement-covenant that had not been removed and therefore seller's representation in the contract that there would be no encumbrances on the property at closing was untrue. The easement-covenant, which allowed the subject property to encroach three inches onto neighboring property, was disclosed in a title report issued eight months prior to the scheduled closing. ...
>
> ... [D]efendant buyer failed to demonstrate that it had a lawful basis for refusing to close since the easement-covenant, which benefitted the property and was evident in the title survey, was a "permitted exception" as defined in schedule 1.21 of the contract for sale. Thus, buyer materially breached the contract when it failed to appear on the time-is-of-the-essence closing date, and, under the limited amendment to the Contract of Sale, seller is entitled to retain the deposit as liquidated damages ... Pursuant to the contract, plaintiff seller is also entitled to recover its attorneys' fees for both the proceedings before Supreme Court and this Court, to be determined, as directed by the court, by a referee. **45 Renwick St., LLC v Lionbridge, LLC, 2018 NY Slip Op 04641, First Dept 6-21-18**

REAL ESTATE (EASEMENT COVENANT CONCERNING A THREE INCH ENCROACHMENT WAS A PERMITTED EXCEPTION UNDER THE REAL ESTATE PURCHASE AGREEMENT AND COULD NOT SERVE AS A GROUND FOR DEMONSTRATING SELLER WAS NOT READY, WILLING AND ABLE TO SELL THE PROPERTY ON THE TIME OF THE ESSENCE DATE, SELLER ENTITLED TO SECURITY DEPOSIT AND ATTORNEY'S FEES (FIRST DEPT))/EASEMENTS (EASEMENT COVENANT CONCERNING A THREE INCH ENCROACHMENT WAS A PERMITTED EXCEPTION UNDER THE REAL ESTATE PURCHASE AGREEMENT AND COULD NOT SERVE AS A GROUND FOR DEMONSTRATING SELLER WAS NOT READY, WILLING AND ABLE TO SELL THE PROPERTY ON THE TIME OF THE ESSENCE DATE, SELLER ENTITLED TO SECURITY DEPOSIT AND ATTORNEY'S FEES (FIRST DEPT))/TIME OF THE ESSENCE (REAL ESTATE, EASEMENT COVENANT CONCERNING A THREE INCH ENCROACHMENT WAS A PERMITTED EXCEPTION UNDER THE REAL ESTATE PURCHASE AGREEMENT AND COULD NOT SERVE AS A GROUND FOR DEMONSTRATING SELLER WAS NOT READY, WILLING AND ABLE TO SELL THE PROPERTY ON THE TIME OF THE ESSENCE DATE, SELLER ENTITLED TO SECURITY DEPOSIT AND ATTORNEY'S FEES (FIRST DEPT))/PURCHASE CONTRACT (REAL ESTATE, EASEMENT COVENANT CONCERNING A THREE INCH ENCROACHMENT WAS A PERMITTED EXCEPTION UNDER THE REAL ESTATE PURCHASE AGREEMENT AND COULD NOT SERVE AS A GROUND FOR DEMONSTRATING SELLER WAS NOT READY, WILLING AND ABLE TO SELL THE PROPERTY ON THE TIME OF THE ESSENCE DATE, SELLER ENTITLED TO SECURITY DEPOSIT AND ATTORNEY'S FEES (FIRST DEPT))/PERMITTED EXCEPTION (REAL ESTATE, PURCHASE CONTRACT, EASEMENT COVENANT CONCERNING A THREE INCH ENCROACHMENT WAS A PERMITTED EXCEPTION UNDER THE REAL ESTATE PURCHASE AGREEMENT AND COULD NOT SERVE AS A GROUND FOR DEMONSTRATING SELLER WAS NOT READY, WILLING AND ABLE TO SELL THE PROPERTY ON THE TIME OF THE ESSENCE DATE, SELLER ENTITLED TO SECURITY DEPOSIT AND ATTORNEY'S FEES (FIRST DEPT))/SPECIFIC PERFORMANCE (REAL ESTATE, EASEMENT COVENANT CONCERNING A THREE INCH ENCROACHMENT WAS A PERMITTED EXCEPTION UNDER THE REAL ESTATE PURCHASE AGREEMENT AND COULD NOT SERVE AS A GROUND FOR DEMONSTRATING SELLER WAS NOT READY, WILLING AND ABLE TO SELL THE PROPERTY ON THE TIME OF THE ESSENCE DATE, SELLER ENTITLED TO SECURITY DEPOSIT AND ATTORNEY'S FEES (FIRST DEPT))/SECURITY DEPOSIT (REAL ESTATE, EASEMENT COVENANT CONCERNING A THREE INCH ENCROACHMENT WAS A PERMITTED

EXCEPTION UNDER THE REAL ESTATE PURCHASE AGREEMENT AND COULD NOT SERVE AS A GROUND FOR DEMONSTRATING SELLER WAS NOT READY, WILLING AND ABLE TO SELL THE PROPERTY ON THE TIME OF THE ESSENCE DATE, SELLER ENTITLED TO SECURITY DEPOSIT AND ATTORNEY'S FEES (FIRST DEPT))/ATTORNEY'S FEES (REAL ESTATE, EASEMENT COVENANT CONCERNING A THREE INCH ENCROACHMENT WAS A PERMITTED EXCEPTION UNDER THE REAL ESTATE PURCHASE AGREEMENT AND COULD NOT SERVE AS A GROUND FOR DEMONSTRATING SELLER WAS NOT READY, WILLING AND ABLE TO SELL THE PROPERTY ON THE TIME OF THE ESSENCE DATE, SELLER ENTITLED TO SECURITY DEPOSIT AND ATTORNEY'S FEES (FIRST DEPT))

REAL ESTATE.

DEFENDANT SELLER DID NOT DEMONSTRATE PLAINTIFF BUYER COULD NOT BE READY, WILLING AND ABLE TO CLOSE ON THE PROPERTY BY POINTING TO REQUIREMENTS IN THE COMMITMENT LETTER, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SPECIFIC PERFORMANCE ACTION PROPERLY DENIED (SECOND DEPT).

The Second Department determined the defendant seller did not demonstrate the plaintiff buyer would not have been ready, willing and able to close on the property in this specific performance action. Pointing to the requirements of the plaintiff's commitment letter was not enough to warrant summary judgment in defendant's favor:

> Even when a seller repudiates a contract, the buyer asserting a cause of action for specific performance or to recover damages for breach of contract must demonstrate that he or she was ready, willing, and able to perform... . As the movant on a motion for summary judgment, however, it was the defendant's burden to demonstrate the absence of any issues of fact and make a prima facie showing that the plaintiff would not and could not perform ... . Here, the defendant did not meet its prima facie burden. The defendant relied solely upon the nonconforming commitment letter, which does not conclusively demonstrate that the plaintiff would not have been able to satisfy the conditions prior to or at the closing. **Mendoza v Sterling Props., Inc., 2018 NY Slip Op 04543, Second Dept 6-20-18**

REAL ESTATE (SPECIFIC PERFORMANCE, DEFENDANT SELLER DID NOT DEMONSTRATE PLAINTIFF BUYER COULD NOT BE READY, WILLING AND ABLE TO CLOSE ON THE PROPERTY BY POINTING TO REQUIREMENTS IN THE COMMITMENT LETTER, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SPECIFIC PERFORMANCE ACTION PROPERLY DENIED (SECOND DEPT))/SPECIFIC PERFORMANCE (REAL ESTATE, DEFENDANT SELLER DID NOT DEMONSTRATE PLAINTIFF BUYER COULD NOT BE READY, WILLING AND ABLE TO CLOSE ON THE PROPERTY BY POINTING TO REQUIREMENTS IN THE COMMITMENT LETTER, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SPECIFIC PERFORMANCE ACTION PROPERLY DENIED (SECOND DEPT))/COMMITMENT LETTER (REAL ESTATE, SPECIFIC PERFORMANCE, DEFENDANT SELLER DID NOT DEMONSTRATE PLAINTIFF BUYER COULD NOT BE READY, WILLING AND ABLE TO CLOSE ON THE PROPERTY BY POINTING TO REQUIREMENTS IN THE COMMITMENT LETTER, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SPECIFIC PERFORMANCE ACTION PROPERLY DENIED (SECOND DEPT))

REAL PROPERTY LAW

REAL PROPERTY.

DEFENDANT PROPERTY OWNER DID NOT REBUT THE PRESUMPTION THAT THE DEED WAS DELIVERED AND ACCEPTED ON THE DATE OF THE DEED IN THIS SLIP AND FALL CASE, THE PLAINTIFF'S ALLEGED FALL OCCURRED THE DAY AFTER THE DATE OF THE DEED (THIRD DEPT).

The Third Department determined that defendant did not rebut the presumption that the deed to the property where plaintiff fell was delivered and accepted the day before plaintiff's fall:

> ... [D]efendant submitted, among other things, an executed copy of the referee's deed transferring ownership of the subject property to defendant, dated March 28, 2013, one day before plaintiff's alleged accident. Based on the foregoing, there is a strong presumption that the deed was delivered and accepted as of that date (see Real Property Law § 244...). The only additional documentation that defendant submitted to overcome the presumption was an affidavit from Anthony Iacchetta, an attorney who represented defendant's predecessor in interest in its acquisition of the subject premises and a letter from Iacchetta's firm dated April 11, 2013. In his affidavit, Iacchetta represents "that the transfer documents executed by the referee were not received by [his] firm until April 11, 2013," and he provided a copy of the letter sent that same day forwarding said documentation to be countersigned. The documents submitted by defendant, however, do not address the parties' intent or whether the deed was intended to be delivered and accepted as of April 11, 2013, as opposed to the deed's March 28, 2013 execution date. Defendant, therefore, failed to rebut the presumption that the deed was delivered and accepted on March 28, 2013 ... . **Wisdom v Reoco, LLC, 2018 NY Slip Op 04628, Third Dept 6-21-18**

REAL PROPERTY (DEFENDANT PROPERTY OWNER DID NOT REBUT THE PRESUMPTION THAT THE DEED WAS DELIVERED AND ACCEPTED ON THE DATE OF THE DEED IN THIS SLIP AND FALL CASE, THE PLAINTIFF'S ALLEGED FALL OCCURRED THE DAY AFTER THE DATE OF THE DEED (THIRD DEPT))/DEEDS (DEFENDANT PROPERTY OWNER DID NOT REBUT THE PRESUMPTION THAT THE DEED WAS DELIVERED AND ACCEPTED ON THE DATE OF THE DEED IN THIS SLIP AND FALL CASE, THE PLAINTIFF'S ALLEGED FALL OCCURRED THE DAY AFTER THE DATE OF THE DEED (THIRD DEPT))/DELIVERY AND ACCEPTANCE (DEEDS, DEFENDANT PROPERTY OWNER DID NOT REBUT THE PRESUMPTION THAT THE DEED WAS DELIVERED AND ACCEPTED ON THE DATE OF THE DEED IN THIS SLIP AND FALL CASE, THE PLAINTIFF'S ALLEGED FALL OCCURRED THE DAY AFTER THE DATE OF THE DEED (THIRD DEPT))/SLIP AND FALL (OWNERSHIP OF PROPERTY, DEEDS, (DEFENDANT PROPERTY OWNER DID NOT REBUT THE PRESUMPTION THAT THE DEED WAS DELIVERED AND ACCEPTED ON THE DATE OF THE DEED IN THIS SLIP AND FALL CASE, THE PLAINTIFF'S ALLEGED FALL OCCURRED THE DAY AFTER THE DATE OF THE DEED (THIRD DEPT))

REAL PROPERTY, CIVIL PROCEDURE.

PLAINTIFFS' MOTION FOR LEAVE TO REPLEAD WITH AN AMENDED COMPLAINT ALLEGING DEFENDANTS' PLANTING AND WATERING ON DEFENDANTS' SIDE OF PLAINTIFFS' RETAINING WALL CONSTITUTED NEGLIGENCE, TRESPASS AND A PRIVATE NUISANCE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiffs' motion for leave to replead a private nuisance and trespass action should have been granted. Plaintiffs alleged defendants had negligently planted and watered on their side of plaintiffs' retaining wall, damaging the wall:

> ... [T]he court improvidently exercised its discretion in denying the plaintiffs' motion, in effect, for leave to replead ... . The standard to be applied on such a motion "is consistent with the standard governing motions for leave to amend pursuant to CPLR 3025"... . In particular, such motions "should be freely granted absent prejudice or surprise to the opposing party, unless the proposed amendment is devoid of merit or palpably insufficient"... .
>
> The proposed amended complaint alleged that the defendants had (1) engaged in "digging, excavating, grading and altering the soil, past the property line with [the] plaintiffs' property and abutting [the plaintiffs'] property and wall," (2) planted bushes, shrubs, and trees, and added significant amounts of mulch on the plaintiffs' property, near the property line, and along the plaintiffs' wall, and (3) excessively watered the location where the work was performed. The amended complaint further alleged that the "lateral load and pressure has been increased as a result of the planting of trees, bushes, shrubs and plants and the lack of drainage" so as to damage the plaintiffs' retaining wall. The complaint alleges that this conduct was negligent, and that it constituted a private nuisance and trespass. Contrary to the defendants' contention, these amended causes of action were neither palpably insufficient nor patently devoid of merit ... , and no unfair prejudice or surprise to the defendants would arise from permitting the amendment ... . **Chaikin v Karipas, 2018 NY Slip Op 04525, Second Dept 6-20-18**

REAL PROPERTY (PLAINTIFFS' MOTION FOR LEAVE TO REPLEAD WITH AN AMENDED COMPLAINT ALLEGING DEFENDANTS' PLANTING AND WATERING ON DEFENDANTS' SIDE OF PLAINTIFFS' RETAINING WALL CONSTITUTED NEGLIGENCE, TRESPASS AND A PRIVATE NUISANCE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/CIVIL PROCEDURE (PLAINTIFFS' MOTION FOR LEAVE TO REPLEAD WITH AN AMENDED COMPLAINT ALLEGING DEFENDANTS' PLANTING AND WATERING ON DEFENDANTS' SIDE OF PLAINTIFFS' RETAINING WALL CONSTITUTED NEGLIGENCE, TRESPASS AND A PRIVATE NUISANCE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/CPLR 3025 (PLAINTIFFS' MOTION FOR LEAVE TO REPLEAD WITH AN AMENDED COMPLAINT ALLEGING DEFENDANTS' PLANTING AND WATERING ON DEFENDANTS' SIDE OF PLAINTIFFS' RETAINING WALL CONSTITUTED NEGLIGENCE, TRESPASS AND A PRIVATE NUISANCE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/TRESPASS (PLAINTIFFS' MOTION FOR LEAVE TO REPLEAD WITH AN AMENDED COMPLAINT ALLEGING DEFENDANTS' PLANTING AND WATERING ON DEFENDANTS' SIDE OF PLAINTIFFS' RETAINING WALL CONSTITUTED NEGLIGENCE, TRESPASS AND A PRIVATE NUISANCE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/NUISANCE (PLAINTIFFS' MOTION FOR LEAVE TO REPLEAD WITH AN AMENDED COMPLAINT ALLEGING DEFENDANTS' PLANTING AND WATERING ON DEFENDANTS' SIDE OF PLAINTIFFS' RETAINING WALL CONSTITUTED NEGLIGENCE, TRESPASS AND A PRIVATE NUISANCE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/RETAINING WALL (PLAINTIFFS' MOTION FOR LEAVE TO REPLEAD WITH AN AMENDED COMPLAINT ALLEGING DEFENDANTS' PLANTING AND WATERING ON DEFENDANTS' SIDE OF PLAINTIFFS' RETAINING WALL CONSTITUTED NEGLIGENCE, TRESPASS AND A PRIVATE NUISANCE SHOULD HAVE BEEN GRANTED (SECOND DEPT))

RETIREMENT AND SOCIAL SECURITY LAW

ETIREMENT AND SOCIAL SECURITY LAW.

POLICE OFFICER'S INJURY WHEN HELPING LIFT A HEAVY DECEASED PERSON WAS NOT THE RESULT OF AN ACCIDENT WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW (THIRD DEPT).

The Third Department, over a partial dissent, determined the injury to petitioner police officer's hand was not caused by an "accident" within the meaning of the Retirement and Social Security Law. The injury occurred when officer was helping to lift a heavy deceased person:

> With regard to accidental disability retirement benefits, "[p]etitioner bears the burden of demonstrating that his disability arose out of an accident as defined by the Retirement and Social Security Law, and respondent's determination in that regard will be upheld if supported by substantial evidence"… . To qualify as an accident, the underlying incident "must be a sudden, fortuitous, out of the ordinary and unexpected event that does not result from an activity undertaken in the performance of regular or routine employment duties"… . "[A]n injury which occurs without an unexpected event as the result of activity undertaken in the performance of ordinary employment duties, considered in view of the particular employment in question, is not an accidental injury"… .
>
> Here, petitioner responded to a call and sustained an injury to his fingers while assisting the medical examiner in carrying a large, deceased male to a transport vehicle. Petitioner acknowledged that this work was within the scope of his job duties, regardless of the heft of the body to be carried. **Matter of Iovino v DiNapoli, 2018 NY Slip Op 04814, Third Dept 6-28-18**

RETIREMENT AND SOCIAL SECURITY LAW (ACCIDENTAL DISABILITY RETIREMENT BENEFITS, POLICE OFFICER'S INJURY WHEN HELPING LIFT A HEAVY DECEASED PERSON WAS NOT THE RESULT OF AN ACCIDENT WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW (THIRD DEPT))/POLICE OFFICERS (ACCIDENTAL DISABILITY RETIREMENT BENEFITS, POLICE OFFICER'S INJURY WHEN HELPING LIFT A HEAVY DECEASED PERSON WAS NOT THE RESULT OF AN ACCIDENT WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW (THIRD DEPT))/ACCIDENTAL DISABILITY RETIREMENT BENEFITS (POLICE OFFICER'S INJURY WHEN HELPING LIFT A HEAVY DECEASED PERSON WAS NOT THE RESULT OF AN ACCIDENT WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW (THIRD DEPT))

RETIREMENT AND SOCIAL SECURITY LAW, MUNICIPAL LAW.

TIER 3 POLICE OFFICERS NOT ENTITLED TO SERVICE CREDIT FOR PERIODS OF UNPAID CHILD CARE LEAVE (FIRST DEPT).

The First Department, reversing Supreme Court, determined tier 3 police officers were not entitled to service credit for periods of unpaid child care leave:

> In recognizing that Administrative Code § 13-107(k) did not apply to tier 3 correction officers and that RSSL [Retirement and Social Security Law] § 513 had to be amended to define a service credit for unpaid child care leave, the legislature also evinced its understanding that extending the benefit to tier 3 police officers would require another amendment to RSSL § 513. However, it declined to extend the benefit to tier 3 police officers.
>
> In 2012, the legislature amended Administrative Code § 13-218(h), not to make the unpaid child care leave service credit benefit available to tier 3 police officers but "to make new NYC Tier 3 uniformed correction members ineligible to obtain service credit for child care leave in order to equate their benefits with Tier 3 police/fire benefits" ... . This legislation is consistent with the legislative intent in the creation of tier 3, "a comprehensive retirement program designed to provid[e] uniform benefits for all public employees and eliminat[e] the costly special treatment of selected groups . . . inherent in the previous program" ... . **Lynch v City of New York, 2018 NY Slip Op 04826, First Dept 6-28-18**

RETIREMENT AND SOCIAL SECURITY LAW (TIER 3 POLICE OFFICERS NOT ENTITLED TO SERVICE CREDIT FOR PERIODS OF UNPAID CHILD CARE LEAVE (FIRST DEPT))/MUNICIPAL LAW (POLICE OFFICERS, RETIREMENT AND SOCIAL SECURITY LAW, TIER 3 POLICE OFFICERS NOT ENTITLED TO SERVICE CREDIT FOR PERIODS OF UNPAID CHILD CARE LEAVE (FIRST DEPT))/[POLICE OFFICERS (RETIREMENT AND SOCIAL SECURITY LAW, TIER 3 POLICE OFFICERS NOT ENTITLED TO SERVICE CREDIT FOR PERIODS OF UNPAID CHILD CARE LEAVE (FIRST DEPT))/CHILD CARE LEAVE (POLICE OFFICERS, TIER 3 POLICE OFFICERS NOT ENTITLED TO SERVICE CREDIT FOR PERIODS OF UNPAID CHILD CARE LEAVE (FIRST DEPT))

SOCIAL SERVICES LAW

SOCIAL SERVICES LAW, CIVIL PROCEDURE.

IN DETERMINING ELIGIBILITY FOR PUBLIC ASSISTANCE THE APPLICANT'S EQUITY IN AN AUTOMOBILE, NOT ITS FAIR MARKET VALUE, MUST BE CONSIDERED, THE APPLICANT WAS ENTITLED TO DISCOVERY TO DETERMINE HOW MANY OTHERS HAVE BEEN AFFECTED BY THE WRONG ASSET-CALCULATION TECHNIQUE IN SEEKING CLASS CERTIFICATION (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Rumsey, modifying Supreme Court, determined the amount of an applicant's equity in an automobile, not the fair market value (FMV), should be used in calculating whether an applicant is eligible for public assistance. Here the applicant owed more than the car was worth, but she was erroneously deemed ineligible because of the fair market value of the car. The Third Department further determined that the applicant was entitled to discovery in her effort to get class action certification seeking retroactive relief for persons who had been wrongly denied public assistance under similar circumstances:

> Only the net amount that could be received upon the sale of an asset that is encumbered by an outstanding loan balance, i.e., the FMV less the outstanding loan balance, could be available to eliminate or reduce an applicant's need for public assistance. The arbitrary nature of OTDA's [Office of Temporary and Disability Assistance's] contrary position is aptly illustrated in this case, where the sale of the vehicle would not have generated any resources that petitioner could have used to meet her own support needs. Indeed, based on the automobile's FMV, she would not have received enough upon its sale to pay the entire outstanding loan balance. For these reasons, we conclude that Supreme Court properly held that the extent to which the FMV of an automobile that exceeds the exempt amount is an available resource must be determined based on the applicant's equity interest therein, and that OTDA's contrary interpretation was irrational and unreasonable. * * *
>
> ... [T]he present record does not permit identification of the number of individuals who were the subject of adverse action based on application of respondent's erroneous rule within the specified time period. The petition seeks a judgment directing respondent to identify all individuals meeting the characteristics of the proposed class and, in her brief on appeal, she again seeks discovery regarding class size. Timely requests for disclosure on the issue of numerosity must be granted ... . **Matter of Stewart v Roberts, 2018 NY Slip Op 04609, Third Dept 6-21-18**

SOCIAL SERVICES LAW (PUBLIC ASSISTANCE, IN DETERMINING ELIGIBILITY FOR PUBLIC ASSISTANCE THE APPLICANT'S EQUITY IN AN AUTOMOBILE, NOT ITS FAIR MARKET VALUE, MUST BE CONSIDERED, THE APPLICANT WAS ENTITLED TO DISCOVERY TO DETERMINE HOW MANY OTHERS HAVE BEEN AFFECTED BY THE WRONG ASSET-CALCULATION TECHNIQUE IN SEEKING CLASS CERTIFICATION (THIRD DEPT))/PUBLIC ASSISTANCE (WAS ENTITLED TO DISCOVERY TO DETERMINE HOW MANY OTHERS HAVE BEEN AFFECTED BY THE WRONG ASSET-CALCULATION TECHNIQUE IN SEEKING CLASS CERTIFICATION (THIRD DEPT))/CIVIL PROCEDURE (CLASS ACTIONS, DISCOVERY , NUMEROSITY, IN DETERMINING ELIGIBILITY FOR PUBLIC ASSISTANCE THE APPLICANT'S EQUITY IN AN AUTOMOBILE, NOT ITS FAIR MARKET VALUE, MUST BE CONSIDERED, THE APPLICANT WAS ENTITLED TO DISCOVERY TO DETERMINE HOW MANY OTHERS HAVE BEEN AFFECTED BY THE WRONG ASSET-CALCULATION TECHNIQUE IN SEEKING CLASS CERTIFICATION (THIRD DEPT))/CLASS ACTIONS (DISCOVERY, NUMEROSITY, IN DETERMINING ELIGIBILITY FOR PUBLIC ASSISTANCE THE APPLICANT'S EQUITY IN AN AUTOMOBILE, NOT ITS FAIR MARKET VALUE, MUST BE CONSIDERED, THE APPLICANT WAS ENTITLED TO DISCOVERY TO DETERMINE HOW MANY OTHERS HAVE BEEN AFFECTED BY THE WRONG ASSET-CALCULATION TECHNIQUE IN SEEKING CLASS CERTIFICATION (THIRD DEPT))/DISCOVERY (CLASS ACTIONS, NUMEROSITY, IN DETERMINING ELIGIBILITY FOR PUBLIC ASSISTANCE THE APPLICANT'S EQUITY IN AN AUTOMOBILE, NOT ITS FAIR MARKET VALUE, MUST BE CONSIDERED, THE APPLICANT WAS ENTITLED TO DISCOVERY TO DETERMINE HOW MANY OTHERS HAVE BEEN AFFECTED BY THE WRONG ASSET-CALCULATION TECHNIQUE IN SEEKING CLASS CERTIFICATION (THIRD DEPT))/NUMEROSITY (CLASS ACTIONS, DISCOVERY, IN DETERMINING ELIGIBILITY FOR PUBLIC ASSISTANCE THE APPLICANT'S EQUITY IN AN AUTOMOBILE, NOT ITS FAIR MARKET VALUE, MUST BE CONSIDERED, THE APPLICANT WAS ENTITLED TO DISCOVERY TO DETERMINE HOW MANY OTHERS HAVE BEEN AFFECTED BY THE WRONG ASSET-CALCULATION TECHNIQUE IN SEEKING CLASS CERTIFICATION (THIRD DEPT))

TAX LAW

TAX LAW. CONSTITUTIONAL LAW.

NEW YORK'S TAX SCHEME DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE BY DOUBLE TAXATION OF INTANGIBLE INCOME RE PLAINTIFFS WHO ARE STATUTORY RESIDENTS OF NEW YORK AND DOMICILED IN CONNECTICUT (FIRST DEPT).

The First Department determined that New York's tax scheme did not violate the dormant Commerce Clause. Plaintiffs argued New York permitted double taxation of their intangible income by both New York, where they were "statutory residents." and Connecticut, where they domiciled. The First Department rejected plaintiffs' contentions "that this taxation burdens interstate commerce, particularly by inhibiting their free movement into New York State to work and their ability to buy or lease a home in New York due to the risk of being deemed a resident and subject to double taxation of intangible income... [and] that New York's tax scheme fails the 'internal consistency' test, which requires fair apportionment of income between states and nondiscrimination against interstate commerce ...". The First Department found that the controlling New York case, Matter of Tamagni v Tax Appeals Trib. of State of N.Y. (91 NY2d 530 [1998]...), had not been abrogated by the US Supreme Court's decision in Comptroller of the Treasury of Maryland v Wynne (___ US ___, 135 S Ct 1787 [2015]):

> ... [T]he income at issue ... in the instant case ... was not "out-of-state income" but intangible investment income, which "has no identifiable situs," "cannot be traced to any jurisdiction outside New York," and is "subject to taxation by New York as the State of residence" ... . **Edelman v New York State Dept. of Taxation & Fin., 2018 NY Slip Op 04672, First Dept (6-26-18)**

TAX LAW (NEW YORK'S TAX SCHEME DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE BY DOUBLE TAXATION OF INTANGIBLE INCOME RE PLAINTIFFS WHO ARE STATUTORY RESIDENTS OF NEW YORK AND DOMICILED IN CONNECTICUT (FIRST DEPT))/CONSTITUTIONAL LAW (TAX LAW, COMMERCE CLAUSE, (NEW YORK'S TAX SCHEME DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE BY DOUBLE TAXATION OF INTANGIBLE INCOME RE PLAINTIFFS WHO ARE STATUTORY RESIDENTS OF NEW YORK AND DOMICILED IN CONNECTICUT (FIRST DEPT))/COMMERCE CLAUSE (TAX LAW, NEW YORK'S TAX SCHEME DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE BY DOUBLE TAXATION OF INTANGIBLE INCOME RE PLAINTIFFS WHO ARE STATUTORY RESIDENTS OF NEW YORK AND DOMICILED IN CONNECTICUT (FIRST DEPT))/INTANGIBLE INCOME (TAX LAW, NEW YORK'S TAX SCHEME DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE BY DOUBLE TAXATION OF INTANGIBLE INCOME RE PLAINTIFFS WHO ARE STATUTORY RESIDENTS OF NEW YORK AND DOMICILED IN CONNECTICUT (FIRST DEPT))

UNEMPLOYMENT INSURANCE

UNEMPLOYMENT INSURANCE.

COURIER FOR A WEB BASED DELIVERY SERVICE NOT AN EMPLOYEE (THIRD DEPT).

The Third Department, reversing the Unemployment Insurance Appeals Board, over a two-justice dissent, determined that a courier for a web based delivery service (Postmate) was not an employee entitled to unemployment insurance benefits:

> ... [I]n order to work as a courier or delivery professional for Postmates, claimant and others similarly situated need only download Postmates' application software platform and provide his or her name, telephone number, Social Security number and driver's license number; there is no application and no interview. Although Postmates thereafter obtains a criminal background check from a third-party provider and provides an orientation session on how to utilize the application software platform, significantly, claimant and those similarly situated are not thereafter required to report to any supervisor, and they unilaterally retain the unfettered discretion as to whether to ever log on to Postmates' platform and actually work. When a courier does elect to log on to the platform, indicating his or her availability for deliveries, he or she is free to work as much or little as he or she wants — there is no set work schedule, there is no minimum time requirement that a courier must remain logged on to the platform and there is no minimum or maximum requirement with respect to the number of deliveries a courier must perform. In fact, once logged on to the platform, a courier may decline to do anything. When a customer requests a delivery using Postmates' platform, the platform identifies the closest available courier(s) and sends basic information about the delivery request. Couriers, however, may accept, reject or ignore a delivery request, without penalty. Moreover, while logged on to Postmates' platform, couriers maintain the freedom to simultaneously work for other companies, including Postmates' direct competitors. Further, they are free to choose the mode of transportation they wish to use for deliveries, they provide and maintain their own transportation, they choose the route they wish to take for the delivery, they are not required to adhere to a stringent delivery schedule, they are not required to wear a uniform, they are not provided any identification card or logo, they are only paid for the deliveries they complete and they are not reimbursed for any of their delivery-related expenses. **Matter of Vega (Commissioner of Labor), 2018 NY Slip Op 04610, Third Dept 6-21-18**

UNEMPLOYMENT INSURANCE (COURIER FOR A WEB BASED DELIVERY SERVICE NOT AN EMPLOYEE (THIRD DEPT))/COURIERS (UNEMPLOYMENT INSURANCE, COURIER FOR A WEB BASED DELIVERY SERVICE NOT AN EMPLOYEE (THIRD DEPT))/DELIVERY SERVICE (UNEMPLOYMENT INSURANCE, COURIER FOR A WEB BASED DELIVERY SERVICE NOT AN EMPLOYEE (THIRD DEPT))

WORKERS' COMPENSATION LAW

WORKERS' COMPENSATION LAW.

RECENT AMENDMENT TO THE WORKERS' COMPENSATION LAW APPLIES RETROACTIVELY, CLAIMANT WITH A PERMANENT PARTIAL DISABILITY WHO HAS INVOLUNTARILY WITHDRAWN FROM THE LABOR MARKET NEED NOT DEMONSTRATE A CONTINUED ATTACHMENT TO THE LABOR MARKET (THIRD DEPT).

The Third Department determined a recent amendment to the Workers' Compensation Law applied retroactively and was properly applied to claimant's case. The amendment provides that a worker who has involuntarily withdrawn from the labor market with a permanent partial disability need not demonstrate a continued attachment to the labor market:

> ... [T]he Board panel ... issued an amended decision finding that claimant was not required to demonstrate an attachment to the labor market based upon a recent amendment to Workers' Compensation Law § 15 (3) (w) ... . That amendment states, in relevant part, that in cases such as claimant's, "compensation . . . shall be payable during the continuance of such permanent partial disability, without the necessity for the claimant who is entitled to benefits at the time of classification to demonstrate ongoing attachment to the labor market" ... .
>
> ... [W]e find that the amendment is applicable here and relieves claimant from the need to demonstrate a continued attachment to the labor market. Although it is generally preferable to construe a statute in a prospective manner, a retroactive application is warranted if the statutory language expressly or by necessary implication so provides ... . **Matter of O'Donnell v Erie County, 2018 NY Slip Op 04410, Third Dept 6-14-18**

WORKERS' COMPENSATION LAW (RECENT AMENDMENT TO THE WORKERS' COMPENSATION LAW APPLIES RETROACTIVELY, CLAIMANT WITH A PERMANENT PARTIAL DISABILITY WHO HAS INVOLUNTARILY WITHDRAWN FROM THE LABOR MARKET NEED NOT DEMONSTRATE A CONTINUED ATTACHMENT TO THE LABOR MARKET (THIRD DEPT))

WORKERS' COMPENSATION LAW.

DIFFERENCE BETWEEN A SCHEDULE LOSS OF USE AND NONSCHEDULE PERMANENT PARTIAL DISABILITY EXPLAINED (THIRD DEPT).

The Third Department explained the difference between a schedule loss of use and a nonschedule permanent partial disability:

> Workers' Compensation Law § 15 (3) contains a schedule of awards for a permanent partial disability resulting from a loss of specific body parts or functions, such as vision and hearing (see Workers' Compensation Law § 15 [3] [a]-[v]). Workers' Compensation Law § 15 (3) (w) pertains to "all other cases of permanent partial disability" — i.e., those cases that are not amenable to a schedule award. Whether a schedule loss of use award or a nonschedulable permanent partial disability classification is appropriate constitutes a question of fact for the Board's resolution, and its determination will be upheld if supported by substantial evidence ... . A nonschedulable permanent partial disability classification, rather than a schedule loss of use award, "is indicated where there is a continuing condition of pain or continuing need for medical treatment or the medical condition remains unsettled" ... .
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> ... [S]ubstantial evidence, in the form of the medical evidence that claimant suffers from RSD/CRPS, a chronic continuing pain of the face and the opinion that the ptosis of the eyebrow is worsening, supports the Board's determination that an award of a nonschedulable permanent partial disability pursuant to Workers' Compensation Law § 15 (3) (w), rather than a schedule loss of use award, is appropriate ... . **Matter of Tobin v Finger Lakes DDSO, 2018 NY Slip Op 04413, Third Dept 6-14-18**

WORKERS' COMPENSATION LAW (DIFFERENCE BETWEEN A SCHEDULE LOSS OF USE AND NONSCHEDULE PERMANENT PARTIAL DISABILITY EXPLAINED (THIRD DEPT))/SCHEDULE LOSS OF USE (WORKERS' COMPENSATION LAW, DIFFERENCE BETWEEN A SCHEDULE LOSS OF USE AND NONSCHEDULE PERMANENT PARTIAL DISABILITY EXPLAINED (THIRD DEPT))/NONSCHEDULE PERMANENT PARTIAL DISABILITY (WORKERS' COMPENSATION LAW, DIFFERENCE BETWEEN A SCHEDULE LOSS OF USE AND NONSCHEDULE PERMANENT PARTIAL DISABILITY EXPLAINED (THIRD DEPT))

WORKERS' COMPENSATION LAW.

A CLAIMANT MAY NOT RECEIVE BOTH A SCHEDULE LOSS OF USE AWARD AND A NONSCHEDULE PERMANENT PARTIAL DISABILITY AWARD FOR INJURIES FROM THE SAME ACCIDENT, BUT BOTH INJURY CLASSIFICATIONS CAN BE CONSIDERED IN DETERMINING LOSS OF WAGE-EARNING CAPACITY (THIRD DEPT).

The Third Department determined claimant cannot receive both a schedule loss of use (SLU) award and a nonschedule permanent partial disability award for injuries stemming from the same accident, but both classifications of injury can be considered in determining loss of wage-earning capacity:

> The amount of an SLU award is based upon the body member that was injured and the degree of impairment sustained; it is not allocable to any particular period of disability and is independent of any time that the claimant might lose from work . By contrast, compensation for a permanent partial disability that arises from a nonschedule injury, i.e., an injury to a body member not specifically enumerated in [Workers' Compensation Law 15 (3)], is based on a factual determination of the effect that the disability has on the claimant's future wage-earning capacity (see Workers' Compensation Law § 15 [3] [w]).
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> A claimant who sustains both schedule and nonschedule injuries in the same accident may receive only one initial award ... , because an SLU award and an award made for permanent partial disabilities are both intended to compensate a claimant for loss of wage-earning capacity sustained in a work-related accident and concurrent payment of an award for a schedule loss and an award for a nonschedule permanent partial disability for injuries arising out of the same work-related accident would amount to duplicative compensation ... . Nevertheless, all impairments sustained by a claimant, whether resulting from schedule or nonschedule injuries, must be considered in determining lost wage-earning capacity attributable to a nonschedule permanent partial disability classification ... . However, in the unique circumstance where no initial award is made based on a nonschedule permanent partial disability classification, a claimant is entitled to an SLU award ... . **Matter of Taher v Yiota Taxi, Inc., 2018 NY Slip Op 04414, Third Dept 6-14-18**

WORKERS' COMPENSATION LAW (A CLAIMANT MAY NOT RECEIVE BOTH A SCHEDULE LOSS OF USE AWARD AND A NONSCHEDULE PERMANENT PARTIAL DISABILITY AWARD FOR INJURIES FROM THE SAME ACCIDENT, BUT BOTH INJURY CLASSIFICATIONS CAN BE CONSIDERED IN DETERMINING LOSS OF WAGE-EARNING CAPACITY (THIRD DEPT))/SCHEDULE LOSS OF USE (WORKERS' COMPENSATION LAW, A CLAIMANT MAY NOT RECEIVE BOTH A SCHEDULE LOSS OF USE AWARD AND A NONSCHEDULE PERMANENT PARTIAL DISABILITY AWARD FOR INJURIES FROM THE SAME ACCIDENT, BUT BOTH INJURY CLASSIFICATIONS CAN BE CONSIDERED IN DETERMINING LOSS OF WAGE-EARNING CAPACITY (THIRD DEPT))/NONSCHEDULE PERMANENT PARTIAL DISABILITY (WORKERS' COMPENSATION LAW, A CLAIMANT MAY NOT RECEIVE BOTH A SCHEDULE LOSS OF USE AWARD AND A NONSCHEDULE PERMANENT PARTIAL DISABILITY AWARD FOR INJURIES FROM THE SAME ACCIDENT, BUT BOTH INJURY CLASSIFICATIONS CAN BE CONSIDERED IN DETERMINING LOSS OF WAGE-EARNING CAPACITY (THIRD DEPT))

WORKERS' COMPENSATION LAW.

NEW LAW THAT WENT INTO EFFECT WHEN THE CLAIM WAS BEING RECONSIDERED SHOULD HAVE BEEN APPLIED, CLAIMS MAY NO LONGER BE DENIED ON THE FACTUAL FINDING THAT THE STRESS EXPERIENCED BY CLAIMANT IS NOT GREATER THAN THAT WHICH USUALLY OCCURS IN THE WORK ENVIRONMENT, POLICE OFFICER CLAIMED ANXIETY AND PHOBIAS RELATED TO THE SIGHT OF BLOOD (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined that a new provision of the Workers' Compensation Law, which directly related to claimant police officer's disability claim (anxiety and phobias related to the sight of blood), was intended to take effect immediately and should have been applied by the Board. The Board had denied the claim finding that the sight of blood is a usual occurrence in police work:

> In September 2016, claimant applied for reconsideration and/or full Board review, which the carrier opposed. On April 10, 2017, while that application was pending, Workers' Compensation Law § 10 (3) (b) was materially amended, effective immediately. The amendment provided that, as relevant here, "[w]here a police officer . . . files a claim for mental injury premised upon extraordinary work-related stress incurred in a work-related emergency, the [B]oard may not disallow the claim, upon a factual finding that the stress was not greater than that which usually occurs in the normal work environment" … . …
>
> In our view, by directing that the apparent substantive change in the law was to take effect immediately, "the Legislature clearly indicated that th[is] amendment[is] to be viewed as remedial, designed to correct imperfections in prior law, by giving relief to [an] aggrieved party"… . Moreover, as a general rule, "the law as it exists at the time a decision is rendered on appeal is controlling"… . Consequently, we find that, under these circumstances, the Board was bound to apply the law as it existed at the time it was considering and determining the reconsideration and/or review application, notwithstanding the parties' apparent failure to make supplemental arguments in submissions to the Board addressing this change in the law. **Matter of McMillan v Town of New Castle, 2018 NY Slip Op 04801, Third Dept 6-28-18**

WORKERS'S COMPENSATION LAW (NEW LAW THAT WENT INTO EFFECT WHEN THE CLAIM WAS BEING RECONSIDERED SHOULD HAVE BEEN APPLIED, CLAIMS MAY NO LONGER BE DENIED ON THE FACTUAL FINDING THAT THE STRESS EXPERIENCED BY CLAIMANT IS NOT GREATER THAN THAT WHICH USUALLY OCCURS IN THE WORK ENVIRONMENT, POLICE OFFICER CLAIMED ANXIETY AND PHOBIAS RELATED TO THE SIGHT OF BLOOD (THIRD DEPT))/POLICE OFFICERS (WORKERS' COMPENSATION LAW, NEW LAW THAT WENT INTO EFFECT WHEN THE CLAIM WAS BEING RECONSIDERED SHOULD HAVE BEEN APPLIED, CLAIMS MAY NO LONGER BE DENIED ON THE FACTUAL FINDING THAT THE STRESS EXPERIENCED BY CLAIMANT IS NOT GREATER THAN THAT WHICH USUALLY OCCURS IN THE WORK ENVIRONMENT, POLICE OFFICER CLAIMED ANXIETY AND PHOBIAS RELATED TO THE SIGHT OF BLOOD (THIRD DEPT))/BLOOD (ANXIETY RELATED TO THE SIGHT OF BLOOD, POLICE OFFICERS, WORKERS' COMPENSATION LAW, NEW LAW THAT WENT INTO EFFECT WHEN THE CLAIM WAS BEING RECONSIDERED SHOULD HAVE BEEN APPLIED, CLAIMS MAY NO LONGER BE DENIED ON THE FACTUAL FINDING THAT THE STRESS EXPERIENCED BY CLAIMANT IS NOT GREATER THAN THAT WHICH USUALLY OCCURS IN THE WORK ENVIRONMENT, POLICE OFFICER CLAIMED ANXIETY AND PHOBIAS RELATED TO THE SIGHT OF BLOOD (THIRD DEPT))/ANXIETY (WORKERS' COMPENSATION LAW, ANXIETY RELATED TO THE SIGHT OF BLOOD, POLICE OFFICERS, WORKERS' COMPENSATION LAW, NEW LAW THAT WENT INTO EFFECT WHEN THE CLAIM WAS BEING RECONSIDERED SHOULD HAVE BEEN APPLIED, CLAIMS MAY NO LONGER BE DENIED ON THE FACTUAL FINDING THAT THE STRESS EXPERIENCED BY CLAIMANT IS NOT GREATER THAN THAT WHICH USUALLY OCCURS IN THE WORK ENVIRONMENT, POLICE OFFICER CLAIMED ANXIETY AND PHOBIAS RELATED TO THE SIGHT OF BLOOD (THIRD DEPT))

WORKERS' COMPENSATION LAW, EVIDENCE.

BOARD CONSIDERED MEDICAL FILE FROM A PRIOR INJURY WITHOUT NOTICE TO CLAIMANT, DENIAL OF CLAIM REVERSED (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined the claimant (wife of the decedent worker who died of cardiac arrest) was not notified the board would consider a medical file relating to a prior injury:

> Here, the Board relied on medical records apparently contained in the case file for a separate claim filed by decedent based on a November 2014 fall at work. ... The employer did not request that the Board rely on those 2014 records, nor did it adhere to the procedure for introducing additional evidence into the administrative appeal that was not before the Workers' Compensation Law Judge... . The Board's rule provides that, if that procedure is not followed, the Board "will not" consider such new evidence... .
>
> Claimant was prejudiced because she was not on notice — until she received the Board decision — that the Board would rely on documents from another case file. The employer argues that the referenced medical reports cannot be objectionable because they accurately reflect the treatment rendered, but we cannot verify that without reviewing those reports. The employer further argues that no response to the medical records would change the strength of either side's argument, but that proposition is mere speculation. Either party may have chosen to submit additional medical records reflecting on decedent's medical treatment from November 2014 until his death in July 2015 had the parties been on notice that this period of treatment would be at issue. **Matter of Kaplan v New York City Tr. Auth., 2018 NY Slip Op 04068, Third Dept 6-7-18**

WORKERS' COMPENSATION LAW (BOARD CONSIDERED MEDICAL FILE FROM A PRIOR INJURY WITHOUT NOTICE TO CLAIMANT, DENIAL OF CLAIM REVERSED (THIRD DEPT))/EVIDENCE (WORKERS' COMPENSATION LAW, BOARD CONSIDERED MEDICAL FILE FROM A PRIOR INJURY WITHOUT NOTICE TO CLAIMANT, DENIAL OF CLAIM REVERSED (THIRD DEPT))

ZONING

ZONING, CIVIL PROCEDURE, APPEALS.

PETITIONER WAS ENTITLED TO A VARIANCE ON FINANCIAL HARDSHIP GROUNDS, REGULATORY TAKING CAUSE OF ACTION WAS NOT RIPE FOR REVIEW (THIRD DEPT).

The Third Department, modifying Supreme Court, determined petitioner's application for a variance should have been granted on financial hardship grounds, but the action alleging a regulatory taking was not ripe, an issue which can be raised on appeal for the first time. Petitioner demonstrated the character of the surrounding area had changed from residential to commercial over the past 30 years rendering the property unmarketable as residential property:

> The ZBA [zoning board of appeals] actually agreed that "the location of this property on a corner may impact its value," and its ultimate conclusion that the financial hardship was not unique seemingly ran counter to that observation ... . Moreover, in light of the proof that the need for a use variance only arose decades after the property was acquired due to a gradual shift in the character of the area that rendered the permitted residential use onerous and obsolete, petitioners sufficiently alleged "that the hardship identified by [them] . . . was [not] self-created" ... . Accepting the foregoing as true, as we must, petitioners stated a viable claim attacking the ZBA's determination.
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> ... [T]he remaining regulatory taking claim must be dismissed. The petition/complaint states, and petitioners' arguments on appeal reflect, that the owner's taking claim is solely premised upon a deprivation of rights afforded under the Federal Constitution (see US Const 5th Amend; 42 USC § 1983). In order for a 42 USC § 1983 claim based upon a regulatory taking to be ripe, however, it is necessary for a petitioner/plaintiff to "demonstrate that [he or] she has both received a 'final decision regarding the application of the [challenged] regulations to the property at issue' from 'the government entity charged with implementing the regulations,' and sought 'compensation through the procedures the [s]tate has provided for doing so'"... . The denial of the application for a use variance constituted a final decision regarding the application of the zoning regulations to its property... , but there is no indication that the owner then asserted a state claim for inverse condemnation... . Thus, inasmuch as ripeness is a "matter[] pertaining to subject matter jurisdiction which can be raised at any time" and the second cause of action founded upon 42 USC § 1983 is "unripe because [the owner] failed to seek compensation from the [s]tate before" asserting it... , it must be dismissed. **Matter of 54 Marion Ave., LLC v City of Saratoga Springs, 2018 NY Slip Op 04611, Third Dept 6-21-18**

ZONING (PETITIONER WAS ENTITLED TO A VARIANCE ON FINANCIAL HARDSHIP GROUNDS, REGULATORY TAKING CAUSE OF ACTION WAS NOT RIPE FOR REVIEW (THIRD DEPT))/VARIANCE (ZONING, PETITIONER WAS ENTITLED TO A VARIANCE ON FINANCIAL HARDSHIP GROUNDS, REGULATORY TAKING CAUSE OF ACTION WAS NOT RIPE FOR REVIEW (THIRD DEPT))/CIVIL PROCEDURE (RIPENESS, PETITIONER WAS ENTITLED TO A VARIANCE ON FINANCIAL HARDSHIP GROUNDS, REGULATORY TAKING CAUSE OF ACTION WAS NOT RIPE FOR REVIEW (THIRD DEPT))/RIPENESS (REGULATORY TAKING, PETITIONER WAS ENTITLED TO A VARIANCE ON FINANCIAL HARDSHIP GROUNDS, REGULATORY TAKING CAUSE OF ACTION WAS NOT RIPE FOR REVIEW (THIRD DEPT))/REGULATORY TAKING (RIPENESS, PETITIONER WAS ENTITLED TO A VARIANCE ON FINANCIAL HARDSHIP GROUNDS, REGULATORY TAKING CAUSE OF ACTION WAS NOT RIPE FOR REVIEW (THIRD DEPT))/APPEALS (RIPENESS, PETITIONER WAS ENTITLED TO A VARIANCE ON FINANCIAL HARDSHIP GROUNDS, REGULATORY TAKING CAUSE OF ACTION WAS NOT RIPE FOR REVIEW (THIRD DEPT))

COURT OF APPEALS

ADMINISTRATIVE LAW (COA)

ADMINISTRATIVE LAW, MUNICIPAL LAW.

NYC DEPARTMENT OF HEALTH AND BOARD OF HEALTH DID NOT VIOLATE THE SEPARATION OF POWERS BY PROMULGATING HEALTH CODE PROVISIONS REQUIRING YOUNG CHILDREN IN CITY REGULATED PROGRAMS TO RECEIVE FLU VACCINATIONS, NOR ARE THE CODE PROVISIONS PREEMPTED BY STATE LAW (CT APP).

The Court of Appeal, in a full-fledged opinion by Judge Stein, reversing the Appellate Division, determined that the NYC Department of Health and Mental Hygiene and the NYC Board of Health properly amended the health code to provide that children between the ages of 6 and 59 months who attended city regulated child care or school programs must receive annual flu vaccinations. The court went through all the Boreali (71 NY2d 11-14) factors, as well as all the preemption theories:

> Separation of powers challenges often involve the question of whether a regulatory body has exceeded the scope of its delegated powers and encroached upon the legislative domain of policymaking ... . * * *
>
> In Boreali and subsequent cases, we have clarified the "difficult-to-define line between administrative rule-making and legislative policy-making" by articulating four "coalescing circumstances" relevant to rendering such a determination (71 NY2d at 11 ...). These circumstances are: whether (1) the regulatory agency " balanc[ed] costs and benefits according to preexisting guidelines,' or instead made value judgments entail[ing] difficult and complex choices between broad policy goals to resolve social problems'"... ; (2) 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) the legislature had unsuccessfully attempted to enact laws pertaining to the issue... ; and (4) the agency used special technical expertise in the applicable field ... . * * *
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> Public Health Law §§ 2164 and 2165 set forth mandatory vaccinations that are preconditions to enrollment in school and in institutions of higher education. Those statutes include exemptions, incorporate an appeal process, and explain the procedures to be followed when a student is unable to afford the necessary vaccinations. Taking each of the aforementioned statutes into consideration, the Appellate Division correctly determined that the flu vaccine rules are not preempted by state law. **Garcia v New York City Dept. of Health & Mental Hygiene, 2018 NY Slip Op 04778, CtApp 6-28-18**

ADMINISTRATIVE LAW (FLU VACCINES, NYC DEPARTMENT OF HEALTH AND BOARD OF HEALTH DID NOT VIOLATE THE SEPARATION OF POWERS BY PROMULGATING HEALTH CODE PROVISIONS REQUIRING YOUNG CHILDREN IN CITY REGULATED PROGRAMS TO RECEIVE FLU VACCINATIONS, NOR ARE THE CODE PROVISIONS PREEMPTED BY STATE LAW (CT APP))/MUNICIPAL LAW (FLU VACCINES, NYC DEPARTMENT OF HEALTH AND BOARD OF HEALTH DID NOT VIOLATE THE SEPARATION OF POWERS BY PROMULGATING HEALTH CODE PROVISIONS REQUIRING YOUNG CHILDREN IN CITY REGULATED PROGRAMS TO RECEIVE FLU VACCINATIONS, NOR ARE THE CODE

PROVISIONS PREEMPTED BY STATE LAW (CT APP))/FLU VACCINES (NYC DEPARTMENT OF HEALTH AND BOARD OF HEALTH DID NOT VIOLATE THE SEPARATION OF POWERS BY PROMULGATING HEALTH CODE PROVISIONS REQUIRING YOUNG CHILDREN IN CITY REGULATED PROGRAMS TO RECEIVE FLU VACCINATIONS, NOR ARE THE CODE PROVISIONS PREEMPTED BY STATE LAW (CT APP))/SEPARATION OF POWERS (FLU VACCINES, NYC DEPARTMENT OF HEALTH AND BOARD OF HEALTH DID NOT VIOLATE THE SEPARATION OF POWERS BY PROMULGATING HEALTH CODE PROVISIONS REQUIRING YOUNG CHILDREN IN CITY REGULATED PROGRAMS TO RECEIVE FLU VACCINATIONS, NOR ARE THE CODE PROVISIONS PREEMPTED BY STATE LAW (CT APP))/PREEMPTION (ADMINISTRATIVE LAW, NYC DEPARTMENT OF HEALTH AND BOARD OF HEALTH DID NOT VIOLATE THE SEPARATION OF POWERS BY PROMULGATING HEALTH CODE PROVISIONS REQUIRING YOUNG CHILDREN IN CITY REGULATED PROGRAMS TO RECEIVE FLU VACCINATIONS, NOR ARE THE CODE PROVISIONS PREEMPTED BY STATE LAW (CT APP))/DEPARTMENT OF HEALTH (NYC) (FLU VACCINES, NYC DEPARTMENT OF HEALTH AND BOARD OF HEALTH DID NOT VIOLATE THE SEPARATION OF POWERS BY PROMULGATING HEALTH CODE PROVISIONS REQUIRING YOUNG CHILDREN IN CITY REGULATED PROGRAMS TO RECEIVE FLU VACCINATIONS, NOR ARE THE CODE PROVISIONS PREEMPTED BY STATE LAW (CT APP))

ADMINISTRATIVE LAW, SOCIAL SERVICES LAW.

NEGLECT ALLEGATION AGAINST NURSING HOME FOR SYSTEMIC FAILURE PROPERLY FOUND TO BE SUBSTANTIATED, EVEN THOUGH THE RELATED ALLEGATIONS AGAINST TWO EMPLOYEES WERE DEEMED TO BE UNSUBSTANTIATED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a dissent, reversing the Appellate Division, determined that the Justice Center for the Protection of People with Special Needs had the statutory authority to find that a neglect allegation against a nursing home was substantiated, even though the neglect allegations against two employees of the nursing home where deemed unsubstantiated. A female resident had, for the third time, been sexually assaulted by another resident in the common room while the common room was unattended. The employees were not required to be in the common room at all times. But the nursing home, the administrative law judge (ALJ) found, should have increased the level of required supervision because of the prior assaults:

> Petitioner's narrow construction of the statute would paradoxically leave the Justice Center powerless to address many systemic issues, defeating the purpose of the Act and preventing the Justice Center from protecting vulnerable persons where it is most critical to do so. As noted throughout the text and legislative history, the statutory overhaul embodied in the Act was necessary not only to address isolated incidents of abuse and neglect, but also to resolve systemic problems, such as inadequate staffing, training, and supervision, which often cause or contribute to incidents of abuse and neglect... . Indeed, systemic deficiencies may present a greater hazard to vulnerable residents than do discrete instances of employee misconduct, since employee-related incidents can often be remedied through targeted disciplinary action. Latent systemic problems, by contrast, are often more challenging to identify and more complicated to rectify—and therefore more likely to recur. **Matter of Anonymous v Molik, 2018 NY Slip Op 04779, CtApp 6-28-18**

ADMINISTRATIVE LAW (SOCIAL SERVICES LAW, NEGLECT ALLEGATION AGAINST NURSING HOME FOR SYSTEMIC FAILURE PROPERLY FOUND TO BE SUBSTANTIATED, EVEN THOUGH THE RELATED ALLEGATIONS AGAINST TWO EMPLOYEES WERE DEEMED TO BE UNSUBSTANTIATED (CT APP))/SOCIAL SERVICES LAW (NURSING HOMES, NEGLECT ALLEGATION AGAINST NURSING HOME FOR SYSTEMIC FAILURE PROPERLY FOUND TO BE SUBSTANTIATED, EVEN THOUGH THE RELATED ALLEGATIONS AGAINST TWO EMPLOYEES WERE DEEMED TO BE UNSUBSTANTIATED (CT APP))/SPECIAL NEEDS (JUSTICE CENTER FOR THE PROTECTION OF PERSONS WITH SPECIAL NEEDS, SOCIAL SERVICES LAW, NEGLECT ALLEGATION AGAINST NURSING HOME FOR SYSTEMIC FAILURE PROPERLY FOUND TO BE SUBSTANTIATED, EVEN THOUGH THE RELATED ALLEGATIONS AGAINST TWO EMPLOYEES WERE DEEMED TO BE UNSUBSTANTIATED (CT

APP))/JUSTICE CENTER FOR THE PROTECTION OF PERSONS WITH SPECIAL NEEDS, SOCIAL SERVICES LAW, NEGLECT ALLEGATION AGAINST NURSING HOME FOR SYSTEMIC FAILURE PROPERLY FOUND TO BE SUBSTANTIATED, EVEN THOUGH THE RELATED ALLEGATIONS AGAINST TWO EMPLOYEES WERE DEEMED TO BE UNSUBSTANTIATED (CT APP))/NURSING HOMES (SOCIAL SERVICES LAW, NEGLECT ALLEGATION AGAINST NURSING HOME FOR SYSTEMIC FAILURE PROPERLY FOUND TO BE SUBSTANTIATED, EVEN THOUGH THE RELATED ALLEGATIONS AGAINST TWO EMPLOYEES WERE DEEMED TO BE UNSUBSTANTIATED (CT APP))/NEGLECT (SOCIAL SERVICES LAW, NEGLECT ALLEGATION AGAINST NURSING HOME FOR SYSTEMIC FAILURE PROPERLY FOUND TO BE SUBSTANTIATED, EVEN THOUGH THE RELATED ALLEGATIONS AGAINST TWO EMPLOYEES WERE DEEMED TO BE UNSUBSTANTIATED (CT APP))/SUPERVISION (NURSING HOMES, SOCIAL SERVICES LAW, NEGLECT ALLEGATION AGAINST NURSING HOME FOR SYSTEMIC FAILURE PROPERLY FOUND TO BE SUBSTANTIATED, EVEN THOUGH THE RELATED ALLEGATIONS AGAINST TWO EMPLOYEES WERE DEEMED TO BE UNSUBSTANTIATED (CT APP))

ARBITRATION (COA)

ARBITRATION, CONTRACT LAW, EMPLOYMENT LAW.

PLAIN LANGUAGE OF THE COLLECTIVE BARGAINING AGREEMENT LIMITED THE RIGHT TO DEMAND ARBITRATION TO THE UNION, NOT THE FIRED EMPLOYEE (CT APP).

The Court of Appeals, in a brief memorandum, over a three-judge dissenting opinion, determined that the plain language of the collective bargaining agreement (CBA) limited the right to demand arbitration to the union and not the fired employee:

From the dissent:

The language of CBA clearly grants the employee the right to elect arbitration. Even were the agreement ambiguous in that regard, it must be construed in favor of the employee's right to demand arbitration. New York has established a policy favoring arbitration ... , and the CBA itself provides that "in order to establish a more harmonious and cooperative relationship between the County. . . and its [p]ublic [e]mployees. . . [t]he provisions of this resolution shall be liberally construed."

The majority's contrary interpretation — that the CBA gives the right to proceed to arbitration only to the union — would mean that the employee could "elect" to exercise "his/her rights" only where the union agrees to arbitrate — a restriction that does not appear in the agreement. The employee may not know at the time of election whether the union will pursue arbitration, and therefore could not know the scope of "his/her rights" until it is too late. Further, the rights-granting language in the CBA treats the arbitration right and the [Civil Service Law] 75 right in parallel, emphasizing the employee's right to choose. **Matter of Widrick (Carpinelli), 2018 NY Slip Op 04780, CtApp 6-28-18**

ARBITRATION (COLLECTIVE BARGAINING AGREEMENT, PLAIN LANGUAGE OF THE COLLECTIVE BARGAINING AGREEMENT LIMITED THE RIGHT TO DEMAND ARBITRATION TO THE UNION, NOT THE FIRED EMPLOYEE (CT APP))/CONTRACT LAW (COLLECTIVE BARGAINING AGREEMENT, PLAIN LANGUAGE OF THE COLLECTIVE BARGAINING AGREEMENT LIMITED THE RIGHT TO DEMAND ARBITRATION TO THE UNION, NOT THE FIRED EMPLOYEE (CT APP))/EMPLOYMENT LAW (COLLECTIVE BARGAINING AGREEMENT, PLAIN LANGUAGE OF THE COLLECTIVE BARGAINING AGREEMENT LIMITED THE RIGHT TO DEMAND ARBITRATION TO THE UNION, NOT THE FIRED EMPLOYEE (CT APP))/COLLECTIVE BARGAINING AGREEMENT (PLAIN LANGUAGE OF THE COLLECTIVE BARGAINING AGREEMENT LIMITED THE RIGHT TO DEMAND ARBITRATION TO THE UNION, NOT THE FIRED EMPLOYEE (CT APP))/UNIONS (ARBITRATION, COLLECTIVE BARGAINING AGREEMENT, PLAIN LANGUAGE OF THE COLLECTIVE BARGAINING AGREEMENT LIMITED THE RIGHT TO DEMAND ARBITRATION TO THE UNION, NOT THE FIRED EMPLOYEE (CT APP))

CIVIL PROCEDURE (COA)

CIVIL PROCEDURE, SECURITIES, FRAUD.

THE MARTIN ACT CLAIMS IN THIS DECEPTIVE PRACTICES ACTION INVOLVING RESIDENTIAL MORTGAGE BACKED SECURITIES ARE TIME-BARRED UNDER THE THREE-YEAR STATUTE OF LIMITATIONS FOR STATUTORY VIOLATIONS, BUT THE EXECUTIVE LAW CLAIMS MAY NOT BE TIME-BARRED IF THEY ARE BASED SOLELY ON THE ELEMENTS OF COMMON LAW FRAUD SUBJECT TO THE SIX-YEAR STATUTE OF LIMITATIONS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over an extensive two-judge concurring opinion and an extensive dissent, determined that some of the claims in this deceptive-practices/fraud action involving residential mortgage backed securities may not be time-barred. The Appellate Division had held both the General Business Law (Martin Act) and Executive Law claims were subject to the three-year statute of limitations for statutory violations and were therefore untimely. The Court of Appeals agreed the Martin Act claims were time-barred but ruled the Executive Law claims may not be time-barred if they are based entirely on the elements of common law fraud subject to a six-year statute of limitations:

> ... [T]he Martin Act imposes numerous obligations — or "liabilities" — that did not exist at common law, justifying the imposition of a three-year statute of limitations under CPLR 214(2). The broad definition of "fraudulent practices," as repeatedly amended by the Legislature and interpreted by the courts, encompasses "wrongs" not cognizable under the common law and dispenses, among other things, with any requirement that the Attorney General prove scienter or justifiable reliance on the part of investors. * * *
>
> ... [W]hile the lower courts concluded that a six-year statute of limitations applied to defendants' Executive Law § 63(12) claim — regardless of whether the specific elements of common law fraud had been made out — that holding was not correct. Rather, it is necessary to examine whether the conduct underlying the Executive Law § 63(12) claim amounts to a type of fraud recognized in the common law and, if so, the action will be governed by a six-year statute of limitations ... . Although the parties raised various arguments with respect to this question, not all the issues were addressed or resolved by the lower courts. A remittal — which permits consideration of the question in the current procedural posture — is therefore appropriate. If it is determined that the prima facie elements of a common law cause of action were made out in this case, the Attorney General will be obliged to demonstrate each such element at the proof stage or the claim will be subject to dismissal as time-barred. **People v Credit Suisse Sec. (USA) LLC, 2018 NY Slip Op 04272, Ct App 6-12-18**

CIVIL PROCEDURE (THE MARTIN ACT CLAIMS IN THIS DECEPTIVE PRACTICES ACTION INVOLVING RESIDENTIAL MORTGAGE BACKED SECURITIES ARE TIME-BARRED UNDER THE THREE-YEAR STATUTE OF LIMITATIONS FOR STATUTORY VIOLATIONS, BUT THE EXECUTIVE LAW CLAIMS MAY NOT BE TIME-BARRED IF THEY ARE BASED SOLELY ON THE ELEMENTS OF COMMON LAW FRAUD SUBJECT TO THE SIX-YEAR STATUTE OF LIMITATIONS (CT APP))/STATUTE OF LIMITATIONS (THE MARTIN ACT CLAIMS IN THIS DECEPTIVE PRACTICES ACTION INVOLVING RESIDENTIAL MORTGAGE BACKED SECURITIES ARE TIME-BARRED UNDER THE THREE-YEAR STATUTE OF LIMITATIONS FOR STATUTORY VIOLATIONS, BUT THE EXECUTIVE LAW CLAIMS MAY NOT BE TIME-BARRED IF THEY ARE BASED SOLELY ON THE ELEMENTS OF COMMON LAW FRAUD SUBJECT TO THE SIX-YEAR STATUTE OF LIMITATIONS (CT APP))/SECURITIES (THE MARTIN ACT CLAIMS IN THIS DECEPTIVE PRACTICES ACTION INVOLVING RESIDENTIAL MORTGAGE BACKED SECURITIES ARE TIME-BARRED UNDER THE THREE-YEAR STATUTE OF LIMITATIONS FOR STATUTORY VIOLATIONS, BUT THE EXECUTIVE LAW CLAIMS MAY NOT BE TIME-BARRED IF THEY ARE BASED SOLELY ON THE ELEMENTS OF COMMON LAW FRAUD SUBJECT TO THE SIX-YEAR STATUTE OF LIMITATIONS (CT APP))/RESIDENTIAL MORTGAGE BACKED SECURITIES (THE MARTIN ACT CLAIMS IN THIS DECEPTIVE PRACTICES ACTION INVOLVING RESIDENTIAL MORTGAGE BACKED SECURITIES ARE TIME-BARRED UNDER THE THREE-YEAR STATUTE OF LIMITATIONS FOR STATUTORY VIOLATIONS, BUT THE EXECUTIVE LAW CLAIMS MAY NOT BE TIME-BARRED IF THEY ARE BASED SOLELY ON THE ELEMENTS OF COMMON LAW FRAUD SUBJECT TO THE SIX-YEAR STATUTE OF LIMITATIONS (CT APP))FRAUD (RESIDENTIAL MORTGAGE BACKED SECURITIES, STATUTE OF LIMITATIONS, THE MARTIN ACT CLAIMS IN THIS DECEPTIVE PRACTICES ACTION INVOLVING RESIDENTIAL MORTGAGE BACKED SECURITIES ARE TIME-BARRED UNDER THE THREE-

YEAR STATUTE OF LIMITATIONS FOR STATUTORY VIOLATIONS, BUT THE EXECUTIVE LAW CLAIMS MAY NOT BE TIME-BARRED IF THEY ARE BASED SOLELY ON THE ELEMENTS OF COMMON LAW FRAUD SUBJECT TO THE SIX-YEAR STATUTE OF LIMITATIONS (CT APP))/CPLR 213 (THE MARTIN ACT CLAIMS IN THIS DECEPTIVE PRACTICES ACTION INVOLVING RESIDENTIAL MORTGAGE BACKED SECURITIES ARE TIME-BARRED UNDER THE THREE-YEAR STATUTE OF LIMITATIONS FOR STATUTORY VIOLATIONS, BUT THE EXECUTIVE LAW CLAIMS MAY NOT BE TIME-BARRED IF THEY ARE BASED SOLELY ON THE ELEMENTS OF COMMON LAW FRAUD SUBJECT TO THE SIX-YEAR STATUTE OF LIMITATIONS (CT APP))/CPLR 214 (THE MARTIN ACT CLAIMS IN THIS DECEPTIVE PRACTICES ACTION INVOLVING RESIDENTIAL MORTGAGE BACKED SECURITIES ARE TIME-BARRED UNDER THE THREE-YEAR STATUTE OF LIMITATIONS FOR STATUTORY VIOLATIONS, BUT THE EXECUTIVE LAW CLAIMS MAY NOT BE TIME-BARRED IF THEY ARE BASED SOLELY ON THE ELEMENTS OF COMMON LAW FRAUD SUBJECT TO THE SIX-YEAR STATUTE OF LIMITATIONS (CT APP))/GENERAL BUSINESS LAW (MARTIN ACT, THE MARTIN ACT CLAIMS IN THIS DECEPTIVE PRACTICES ACTION INVOLVING RESIDENTIAL MORTGAGE BACKED SECURITIES ARE TIME-BARRED UNDER THE THREE-YEAR STATUTE OF LIMITATIONS FOR STATUTORY VIOLATIONS, BUT THE EXECUTIVE LAW CLAIMS MAY NOT BE TIME-BARRED IF THEY ARE BASED SOLELY ON THE ELEMENTS OF COMMON LAW FRAUD SUBJECT TO THE SIX-YEAR STATUTE OF LIMITATIONS (CT APP))/EXECUTIVE LAW (THE MARTIN ACT CLAIMS IN THIS DECEPTIVE PRACTICES ACTION INVOLVING RESIDENTIAL MORTGAGE BACKED SECURITIES ARE TIME-BARRED UNDER THE THREE-YEAR STATUTE OF LIMITATIONS FOR STATUTORY VIOLATIONS, BUT THE EXECUTIVE LAW CLAIMS MAY NOT BE TIME-BARRED IF THEY ARE BASED SOLELY ON THE ELEMENTS OF COMMON LAW FRAUD SUBJECT TO THE SIX-YEAR STATUTE OF LIMITATIONS (CT APP))/MARTIN ACT (THE MARTIN ACT CLAIMS IN THIS DECEPTIVE PRACTICES ACTION INVOLVING RESIDENTIAL MORTGAGE BACKED SECURITIES ARE TIME-BARRED UNDER THE THREE-YEAR STATUTE OF LIMITATIONS FOR STATUTORY VIOLATIONS, BUT THE EXECUTIVE LAW CLAIMS MAY NOT BE TIME-BARRED IF THEY ARE BASED SOLELY ON THE ELEMENTS OF COMMON LAW FRAUD SUBJECT TO THE SIX-YEAR STATUTE OF LIMITATIONS (CT APP))

CIVIL PROCEDURE, CONTRACT LAW.

NEW YORK'S BORROWING STATUTE APPLIED TO THE CONTRACT WITH A CANADIAN COMPANY WHICH CALLED FOR THE CONTRACT TO BE 'ENFORCED' ACCORDING TO NEW YORK LAW, ONTARIO'S TWO-YEAR STATUTE OF LIMITATIONS RENDERED THE ACTION UNTIMELY (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, determined New York's borrowing statute, CPLR 202, applied to a contract with a Canadian company in which the parties agreed the contract would be "enforced" according to New York law. The borrowing statute required that Ontario's two-year statute of limitations controlled and the action was untimely:

> The [agreement] contained the following choice-of-law provision: "This Agreement shall be governed by, construed and enforced in accordance with the laws of the State of New York." * * *
>
> CPLR 202 provides: "An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply." * * *
>
> Plaintiff argues that because the contract in this case specified that it would be "enforced" according to New York law, the parties intended to apply New York's procedural law except for its statutory choice-of-law provisions, which, plaintiff alleges, includes CPLR 202. We conclude, however, that the mere addition of the word "enforced" to the [agreement's] choice-of-law provision does not demonstrate the intent of the contracting parties to apply solely New York's six-year statute of limitations in CPLR 213 (2) to the exclusion of CPLR 202. Rather, the parties have agreed that the use of the word "enforced" evinces the parties' intent to apply New York's procedural law. CPLR 202 is part of that procedural law, and the statute therefore applies here. **2138747 Ontario, Inc. v Samsung C&T Corp., 2018 NY Slip Op 04274, CtApp 6-12-18**

CIVIL PROCEDURE (NEW YORK'S BORROWING STATUTE APPLIED TO THE CONTRACT WITH A CANADIAN COMPANY WHICH CALLED FOR THE CONTRACT TO BE 'ENFORCED' ACCORDING TO NEW YORK LAW, ONTARIO'S TWO-YEAR STATUTE OF LIMITATIONS RENDERED THE ACTION UNTIMELY (CT APP))/CPLR 202 (NEW YORK'S BORROWING STATUTE APPLIED TO THE CONTRACT WITH A CANADIAN COMPANY WHICH CALLED FOR THE CONTRACT TO BE 'ENFORCED' ACCORDING TO NEW YORK LAW, ONTARIO'S TWO-YEAR STATUTE OF LIMITATIONS RENDERED THE ACTION UNTIMELY (CT APP))/CONTRACT (CHOICE OF LAW, NEW YORK'S BORROWING STATUTE APPLIED TO THE CONTRACT WITH A CANADIAN COMPANY WHICH CALLED FOR THE CONTRACT TO BE 'ENFORCED' ACCORDING TO NEW YORK LAW, ONTARIO'S TWO-YEAR STATUTE OF LIMITATIONS RENDERED THE ACTION UNTIMELY (CT APP))/CHOICE OF LAW (CONTRACT LAW, (NEW YORK'S BORROWING STATUTE APPLIED TO THE CONTRACT WITH A CANADIAN COMPANY WHICH CALLED FOR THE CONTRACT TO BE 'ENFORCED' ACCORDING TO NEW YORK LAW, ONTARIO'S TWO-YEAR STATUTE OF LIMITATIONS RENDERED THE ACTION UNTIMELY (CT APP))/BORROWING STATUTE (CIVIL PROCEDURE, CIVIL PROCEDURE (NEW YORK'S BORROWING STATUTE APPLIED TO THE CONTRACT WITH A CANADIAN COMPANY WHICH CALLED FOR THE CONTRACT TO BE 'ENFORCED' ACCORDING TO NEW YORK LAW, ONTARIO'S TWO-YEAR STATUTE OF LIMITATIONS RENDERED THE ACTION UNTIMELY (CT APP))/STATUTE OF LIMITATIONS (NEW YORK'S BORROWING STATUTE APPLIED TO THE CONTRACT WITH A CANADIAN COMPANY WHICH CALLED FOR THE CONTRACT TO BE 'ENFORCED' ACCORDING TO NEW YORK LAW, ONTARIO'S TWO-YEAR STATUTE OF LIMITATIONS RENDERED THE ACTION UNTIMELY (CT APP))

CRIMINAL LAW (COA)

CRIMINAL LAW.

DEFENDANT PROPERLY ACCUSED AND CONVICTED OF ATTEMPTED POSSESSION OF A SWITCHBLADE, EXTENSIVE DISSENTING OPINION (CT APP).

The Court of Appeals, over an extensive dissenting opinion by Judge Rivera, affirmed defendant's conviction for attempted possession of a weapon, i.e., a switchblade. The dissent argued that the proof at the non-jury trial and the allegations in the accusatory instrument did not demonstrate the knife met the statutory definition of a switchblade:

> **From the dissent:** ... [T]he narrow issue presented on this appeal is whether the knife described in the accusatory instrument and at trial meets the statutory description for a per se weapon, one which is outlawed regardless of the defendant's reasons for possession. The majority holds that the accusatory instrument is jurisdictionally sound because the knife as described meets the statutory definition of a switchblade... . I disagree. Moreover, even if the majority were correct, the evidence at trial established that the knife in question was not a switchblade within the meaning of the Penal Law. **People v Berrezueta, 2018 NY Slip Op 04032, CtApp 6-7-18**

CRIMINAL LAW (DEFENDANT PROPERLY ACCUSED AND CONVICTED OF ATTEMPTED POSSESSION OF A SWITCHBLADE, DISSENTING OPINION DISAGREED (CT APP))/SWITCHBLADES (CRIMINAL LAW, DEFENDANT PROPERLY ACCUSED AND CONVICTED OF ATTEMPTED POSSESSION OF A SWITCHBLADE, DISSENTING OPINION DISAGREED (CT APP))

CRIMINAL LAW.

DEFENDANT'S SIGNING A WRITTEN WAIVER OF THE RIGHT TO AN INDICTMENT BY GRAND JURY MET CONSTITUTIONAL REQUIREMENTS, ALTHOUGH BETTER PRACTICE WOULD INCLUDE ELICITING DEFENDANT'S UNDERSTANDING OF THE RIGHT BEING WAIVED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a two-judge dissent, determined that the defendant's waiver of his right to indictment by grand jury followed proper procedure and was therefore valid. However the court noted that it would be better practice to elicit defendant's understanding of the right being waived in accordance with a model colloquy (see Waiver of Indictment; Superior Court Information Procedure & Colloquy, https://www.nycourts.gov/judges/cji/8-Colloquies/ [accessed June 22, 2018]):

> Mr. Myers [the defendant] signed a waiver, under oath, in open court, after consulting counsel, and with counsel present at the signing. In that statement, Mr. Myers affirmed that he was aware our Constitution guaranteed him the right to be prosecuted by a grand jury indictment and that he would have the right to testify before that grand jury; that he waived those rights in favor of prosecution by Superior Court Information, and that he did so voluntarily after discussing the facts of his case "as well as the meaning of this waiver" with his attorney. The waiver also set forth the offense with which the Superior Court information would charge him. In addition, Mr. Myers' counsel signed an affirmation that he had discussed the case and the meaning of the waiver with Mr. Myers, and that counsel was satisfied that Mr. Myers understood "the waiver and its consequences." Those steps satisfied the constitutional requirements. **People v Myers, 2018 NY Slip Op 04685, CtApp 6-27-18**

CRIMINAL LAW (WAIVER OF INDICTMENT, DEFENDANT'S SIGNING A WRITTEN WAIVER OF THE RIGHT TO AN INDICTMENT BY GRAND JURY MET CONSTITUTIONAL REQUIREMENTS, ALTHOUGH BETTER PRACTICE WOULD INCLUDE ELICITING DEFENDANT'S UNDERSTANDING OF THE RIGHT BEING WAIVED (CT APP))/INDICTMENT, WAIVER OF (DEFENDANT'S SIGNING A WRITTEN WAIVER OF THE RIGHT TO AN INDICTMENT BY GRAND JURY MET CONSTITUTIONAL REQUIREMENTS, ALTHOUGH BETTER PRACTICE WOULD INCLUDE ELICITING DEFENDANT'S UNDERSTANDING OF THE RIGHT BEING WAIVED (CT APP))/WAIVER OF INDICTMENT (DEFENDANT'S SIGNING A WRITTEN WAIVER OF THE RIGHT TO AN INDICTMENT BY GRAND JURY MET CONSTITUTIONAL REQUIREMENTS, ALTHOUGH BETTER PRACTICE WOULD INCLUDE ELICITING DEFENDANT'S UNDERSTANDING OF THE RIGHT BEING WAIVED (CT APP))

CRIMINAL LAW.

STRICT REQUIREMENTS FOR NOTIFICATION OF COUNSEL OF THE CONTENTS OF JURY NOTES AND THE CREATION OF A COMPLETE RECORD OF HOW THE NOTES WERE HANDLED REAFFIRMED (CT APP).

The Court of Appeals, in a memorandum decision with an extensive three-judge dissent, determined that the trial judge's failure to comply with the notice requirements for jury notes pursuant to Criminal Procedure Law 310.30 and O'Rama mandated reversal:

> "[M]eaningful notice means notice of the actual specific content of the jurors' request'" ... . Although the record demonstrates that "defense counsel was made aware of the existence of the note, there is no indication that the entire contents of the note were shared with counsel"... . We therefore reject the People's argument that defense counsel's awareness of the existence and the "gist" of the note satisfied the court's meaningful notice obligation, or that preservation was required. "Where the record fails to show that defense counsel was apprised of the specific, substantive contents of the note—as it is in this case—preservation is not required" ... .
>
> Moreover, "[w]here a trial transcript does not show compliance with O'Rama's procedure as required by law, we cannot assume that the omission was remedied at an off-the-record conference that the transcript does not refer to" (id.). In other words, "[i]n the absence of record proof that the trial court complied with its [meaningful notice obligation] under CPL 310.30, a mode of proceedings error occurred requiring reversal"... . We again decline "to disavow our holding in Walston [23 NY3d 986] . . . that imposes an affirmative obligation on a trial court to create a record of compliance under CPL 310.30 and O'Rama" ... . **People v Morrison, 2018 NY Slip Op 04777, CtApp 6-28-18**

CRIMINAL LAW (JURY NOTES, STRICT REQUIREMENTS FOR NOTIFICATION OF COUNSEL OF THE CONTENTS OF JURY NOTES AND THE CREATION OF A COMPLETE RECORD OF HOW THE NOTES WERE HANDLED REAFFIRMED (CT APP))/JURY NOTES (CRIMINAL LAW, STRICT REQUIREMENTS FOR NOTIFICATION OF COUNSEL OF THE CONTENTS OF JURY NOTES AND THE CREATION OF A COMPLETE RECORD OF HOW THE NOTES WERE HANDLED REAFFIRMED (CT APP))/O'RAMA (CRIMINAL LAW, JURY NOTES, STRICT REQUIREMENTS FOR NOTIFICATION OF COUNSEL OF THE CONTENTS OF JURY NOTES AND THE CREATION OF A COMPLETE RECORD OF HOW THE NOTES WERE HANDLED REAFFIRMED (CT APP))

CRIMINAL LAW, APPEALS, ATTORNEYS.

BENCH TRIAL JUDGE'S RESCINDING OF THE RULING DEFENSE COUNSEL COULD GIVE A SUMMATION IN THIS MISDEMEANOR CASE VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL, RULING IS APPEALABLE BECAUSE DEFENSE COUNSEL DID NOT HAVE THE MEANINGFUL ABILITY TO OBJECT (CT APP).

The Court of Appeals, reversing the Appellate Term, determined the bench trial judge had deprived defendant of his Sixth Amendment right to counsel in this misdemeanor case by first ruling defense counsel could give a summation and then rescinding that ruling. The court further determined the judge's action was appealable because defense counsel did not have an opportunity to object:

> We conclude that defendant's claim is reviewable on appeal. The trial court, in specifically ruling that defendant's permission to deliver a summation was rescinded and concomitantly rendering a verdict, deprived defense counsel of a practical ability to timely and meaningfully object to the court's ruling of law ... .
>
> Turning to the merits, the United States Supreme Court has held that New York's former CPL 320.20 (3) (c) violated a defendant's Sixth Amendment right to counsel by allowing the trial court the discretion whether to grant defense counsel the opportunity to give a summation in nonjury trials on indictments ... . In this single judge trial on a class B misdemeanor, the trial court's imposition of a sentence of 90 days in jail required that defendant be afforded the right to counsel at the trial under the Sixth Amendment... . That right was violated when the court denied defense counsel the opportunity to present summation ... . **People v Harris, 2018 NY Slip Op 04667, CtApp 6-26-18**

CRIMINAL LAW (BENCH TRIAL JUDGE'S RESCINDING OF THE RULING DEFENSE COUNSEL COULD GIVE A SUMMATION IN THIS MISDEMEANOR CASE VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL, RULING IS APPEALABLE BECAUSE DEFENSE COUNSEL DID NOT HAVE THE MEANINGFUL ABILITY TO OBJECT (CT APP))/APPEALS (CRIMINAL LAW, (BENCH TRIAL JUDGE'S RESCINDING OF THE RULING DEFENSE COUNSEL COULD GIVE A SUMMATION IN THIS MISDEMEANOR CASE VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL, RULING IS APPEALABLE BECAUSE DEFENSE COUNSEL DID NOT HAVE THE MEANINGFUL ABILITY TO OBJECT (CT APP))/ATTORNEYS (CRIMINAL LAW, RIGHT TO COUNSEL, BENCH TRIAL JUDGE'S RESCINDING OF THE RULING DEFENSE COUNSEL COULD GIVE A SUMMATION IN THIS MISDEMEANOR CASE VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL, RULING IS APPEALABLE BECAUSE DEFENSE COUNSEL DID NOT HAVE THE MEANINGFUL ABILITY TO OBJECT (CT APP))/RIGHT TO COUNSEL (BENCH TRIAL JUDGE'S RESCINDING OF THE RULING DEFENSE COUNSEL COULD GIVE A SUMMATION IN THIS MISDEMEANOR CASE VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL, RULING IS APPEALABLE BECAUSE DEFENSE COUNSEL DID NOT HAVE THE MEANINGFUL ABILITY TO OBJECT (CT APP))

CRIMINAL LAW, APPEALS, CIVIL PROCEDURE.

NO APPEAL LIES FROM THE DENIAL OF A REPORTER'S MOTION TO QUASH SUBPOENAS ISSUED IN A CRIMINAL ACTION BECAUSE THERE IS NO STATUTORY AUTHORITY IN THE CRIMINAL PROCEDURE LAW FOR SUCH AN APPEAL, THE SUBPOENAS SOUGHT THE REPORTER'S APPEARANCE AT TRIAL AND NOTES OF THE REPORTER'S POST-ARREST INTERVIEW WITH THE DEFENDANT, IN CONTRAST, HAD THE SUBPOENAS BEEN ISSUED PRIOR TO THE COMMENCEMENT OF CRIMINAL PROCEEDINGS, THE MOTION TO QUASH WOULD HAVE BEEN CIVIL IN NATURE AND THE DENIAL APPEALABLE (CT APP).

The Court of Appeals, in a memorandum decision which sparked two dissenting opinions involving three judges, determined no appeal lies from the denial of a nonparty's motion to quash a subpoena issued in a criminal action because there is no statutory authority for such an appeal. In contrast, the same motion brought prior to the commencement of a criminal action is civil in nature and is appealable. Here a reporter interviewed the defendant who had confessed in 2013 to the murder of a four-year-old girl in 1991. The reporter wrote a story stating that the defendant alleged his confession was not truthful. The subpoenas sought the appearance of the reporter at trial and the notes of the interview. The trial court for the most part denied the motions to quash. The Appellate Division reversed without addressing the jurisdictional issue:

> The critical distinction between orders addressing subpoenas that precede, as opposed to follow, the commencement of a criminal action is grounded in the plain language of the CPL, which governs "[a]ll criminal actions and proceedings" ... . Specifically, a "criminal action commences . . . with the filing of an accusatory instrument against a defendant in a criminal court" ... , and a "criminal proceeding" includes "any proceeding which (a) constitutes a part of a criminal action or (b) occurs in a criminal court and is related to a . . . criminal action . . . or involves a criminal investigation" ... . Definitionally, an order resolving a motion to quash a subpoena that is issued prior to the filing of an accusatory instrument does not arise within the context of a "criminal action." Moreover, while such an order may relate to a criminal investigation, when issued in a court of general jurisdiction prior to the commencement of a criminal action, it "arises . . . on the civil side of the court"... . Therefore, an order resolving a motion to quash a subpoena falls outside of the ambit of the CPL—and its concomitant limitations upon appellate review—when the order is issued before a criminal action begins. Review of an order issued in the investigatory stage does not undermine the legislative aim of "limit[ing] appellate proliferation in criminal matters"... insofar as appellate practice at this stage cannot be said to intrude significantly upon a criminal action that may never be commenced. The order here, however, issued after the accusatory instrument was filed, plainly arose in a "criminal action" within the meaning of that term as prescribed by the CPL. **Matter of People v Juarez, 2018 NY Slip Op 04684, CtApp 6-27-18**

CRIMINAL LAW (NO APPEAL LIES FROM THE DENIAL OF A REPORTER'S MOTION TO QUASH SUBPOENAS ISSUED IN A CRIMINAL ACTION BECAUSE THERE IS NO STATUTORY AUTHORITY IN THE CRIMINAL PROCEDURE LAW FOR SUCH AN APPEAL, THE SUBPOENAS SOUGHT THE REPORTER'S APPEARANCE AT TRIAL AND NOTES OF THE REPORTER'S POST-ARREST INTERVIEW WITH THE DEFENDANT, IN CONTRAST, HAD THE SUBPOENAS BEEN ISSUED PRIOR TO THE COMMENCEMENT OF CRIMINAL PROCEEDINGS, THE MOTION TO QUASH WOULD HAVE BEEN CIVIL IN NATURE AND THE DENIAL APPEALABLE (CT APP))/APPEALS (CRIMINAL LAW, SUBPOENAS, NO APPEAL LIES FROM THE DENIAL OF A REPORTER'S MOTION TO QUASH SUBPOENAS ISSUED IN A CRIMINAL ACTION BECAUSE THERE IS NO STATUTORY AUTHORITY IN THE CRIMINAL PROCEDURE LAW FOR SUCH AN APPEAL, THE SUBPOENAS SOUGHT THE REPORTER'S APPEARANCE AT TRIAL AND NOTES OF THE REPORTER'S POST-ARREST INTERVIEW WITH THE DEFENDANT, IN CONTRAST, HAD THE SUBPOENAS BEEN ISSUED PRIOR TO THE COMMENCEMENT OF CRIMINAL PROCEEDINGS, THE MOTION TO QUASH WOULD HAVE BEEN CIVIL IN NATURE AND THE DENIAL APPEALABLE (CT APP))/CIVIL PROCEDURE (APPEALS, SUBPOENAS, NO APPEAL LIES FROM THE DENIAL OF A REPORTER'S MOTION TO QUASH SUBPOENAS ISSUED IN A CRIMINAL ACTION BECAUSE THERE IS NO STATUTORY AUTHORITY IN THE CRIMINAL PROCEDURE LAW FOR SUCH AN APPEAL, THE SUBPOENAS SOUGHT THE REPORTER'S APPEARANCE AT TRIAL AND NOTES OF THE REPORTER'S POST-ARREST INTERVIEW WITH THE DEFENDANT, IN CONTRAST, HAD THE SUBPOENAS BEEN ISSUED PRIOR TO THE COMMENCEMENT OF CRIMINAL PROCEEDINGS, THE MOTION TO QUASH WOULD HAVE BEEN CIVIL IN NATURE AND THE DENIAL APPEALABLE (CT APP))/SUBPOENAS, MOTION TO QUASH (CRIMINAL LAW, APPEALS, NO APPEAL LIES FROM THE DENIAL OF A REPORTER'S MOTION TO QUASH SUBPOENAS ISSUED IN A CRIMINAL ACTION BECAUSE THERE IS NO

STATUTORY AUTHORITY IN THE CRIMINAL PROCEDURE LAW FOR SUCH AN APPEAL, THE SUBPOENAS SOUGHT THE REPORTER'S APPEARANCE AT TRIAL AND NOTES OF THE REPORTER'S POST-ARREST INTERVIEW WITH THE DEFENDANT, IN CONTRAST, HAD THE SUBPOENAS BEEN ISSUED PRIOR TO THE COMMENCEMENT OF CRIMINAL PROCEEDINGS, THE MOTION TO QUASH WOULD HAVE BEEN CIVIL IN NATURE AND THE DENIAL APPEALABLE (CT APP))/QUASH SUBPOENAS, MOTION TO (CRIMINAL LAW, APPEALS, NO APPEAL LIES FROM THE DENIAL OF A REPORTER'S MOTION TO QUASH SUBPOENAS ISSUED IN A CRIMINAL ACTION BECAUSE THERE IS NO STATUTORY AUTHORITY IN THE CRIMINAL PROCEDURE LAW FOR SUCH AN APPEAL, THE SUBPOENAS SOUGHT THE REPORTER'S APPEARANCE AT TRIAL AND NOTES OF THE REPORTER'S POST-ARREST INTERVIEW WITH THE DEFENDANT, IN CONTRAST, HAD THE SUBPOENAS BEEN ISSUED PRIOR TO THE COMMENCEMENT OF CRIMINAL PROCEEDINGS, THE MOTION TO QUASH WOULD HAVE BEEN CIVIL IN NATURE AND THE DENIAL APPEALABLE (CT APP))

CRIMINAL LAW, APPEALS, EVIDENCE.

VALIDITY OF STREET STOPS PRESENTS A MIXED QUESTION OF LAW AND FACT WHICH THE COURT OF APPEALS CAN REVIEW ONLY TO THE EXTENT OF WHETHER THE LOWER COURT RULING HAS SUPPORT IN THE RECORD, HERE THE RECORD SUPPORTED THE VALIDITY OF THE STOPS UNDER DE BOUR, TRIAL COURT'S FAILURE TO CREATE A RECORD CONCERNING TWO JURY NOTES REQUIRED REVERSAL HOWEVER (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over two dissents, reversing the Appellate Division, determined that the street stops and searches of the defendants (Nonni and Parker) were valid under the DeBour criteria. The police had received a report of a robbery at the location, the defendants were the only persons seen when the police arrived, and both ran or walked away when asked to stop. The court noted that justification for street stops presents a mixed question of law and fact which can be reviewed by the Court of Appeals only to the extent of determining whether the lower court rulings have support in the record. The Court of Appeals reversed, however, because the record did not allow review of two jury notes received by the judge but not specifically addressed by the trial judge or counsel:

> Here, for both defendants, the police had a founded suspicion of criminal activity to support a common-law right of inquiry. The police received a radio transmission of a burglary in progress, and their encounter with defendants at the reported address occurred a mere five minutes later. The officers first saw defendants exiting private property, the scene of a suspected crime. The officers observed no other persons or cars in the secluded, residential area, and it was early in the morning on a federal holiday. In accordance with De Bour, those circumstances were sufficient to justify the officers asking defendants what they were doing and where they were going, and to continue inquiring when defendants did not respond after the officers identified themselves. Further, the officers' testimony, credited by the court, that defendant Nonni then "actively fled from the police," combined with the specific circumstances observed by the officers during their initial encounter with defendants, provides sufficient record support for the court's determination that there was reasonable suspicion of criminal activity to justify defendant Nonni's pursuit, forcible stop, and detainment ... .
>
> According to the arresting officers' testimony, after defendant Parker saw defendant Nonni run and some police officers give chase, defendant Parker increased his pace, acted in an evasive manner, and crossed the street onto the front lawn of another property. The officer twice characterized Parker's movements as "running," albeit at a slow pace. While active avoidance of a confrontation between the police and an acquaintance does not itself give rise to reasonable suspicion, its combination with the specific, highly-suspicious circumstances observed by the police may give rise to heightened suspicion. Thus, record support exists for the court's conclusion that the officers had reasonable suspicion, and that the pursuit, stop, and detainment of defendant Parker, as well as the subsequent search of his bag, were permissible. * * *
>
> .. .[T]he court did not read into the record the contents of the notes at issue here .... Further, there is no hint in the record that the court provided counsel the contents of the notes; rather, an inference may be drawn to the contrary. Tellingly, while the court had read other notes, and had confirmed that counsel had read their contents on the record in the past, there is no such record regarding these two substantive notes. Indeed, the court's reference with respect to the first note—that it believed counsel had agreed to the readback it would provide in response—made no reference to the other two notes, suggesting that there was no discussion about those notes. Whether the record demonstrates a court has shown counsel prior jury notes as a matter of practice is irrelevant, since there must be specific, record proof that the court did so for each note. **People v Parker, 2018 NY Slip Op 04776, CtApp 6-28-18**

CRIMINAL LAW (VALIDITY OF STREET STOPS PRESENTS A MIXED QUESTION OF LAW AND FACT WHICH THE COURT OF APPEALS CAN REVIEW ONLY TO THE EXTENT OF WHETHER THE LOWER COURT RULING HAS SUPPORT IN THE RECORD, HERE THE RECORD SUPPORTED THE VALIDITY OF THE STOPS UNDER DE BOUR, TRIAL COURT'S FAILURE TO CREATE A RECORD CONCERNING TWO JURY NOTES REQUIRED REVERSAL HOWEVER (CT APP))/APPEALS (CRIMINAL LAW, VALIDITY OF STREET STOPS PRESENTS A MIXED QUESTION OF LAW AND FACT WHICH THE COURT OF APPEALS CAN REVIEW ONLY TO THE EXTENT OF WHETHER THE LOWER COURT RULING HAS SUPPORT IN THE RECORD, HERE THE RECORD

SUPPORTED THE VALIDITY OF THE STOPS UNDER DE BOUR, TRIAL COURT'S FAILURE TO CREATE A RECORD CONCERNING TWO JURY NOTES REQUIRED REVERSAL HOWEVER (CT APP))/STREET STOPS (VALIDITY OF STREET STOPS PRESENTS A MIXED QUESTION OF LAW AND FACT WHICH THE COURT OF APPEALS CAN REVIEW ONLY TO THE EXTENT OF WHETHER THE LOWER COURT RULING HAS SUPPORT IN THE RECORD, HERE THE RECORD SUPPORTED THE VALIDITY OF THE STOPS UNDER DE BOUR, TRIAL COURT'S FAILURE TO CREATE A RECORD CONCERNING TWO JURY NOTES REQUIRED REVERSAL HOWEVER (CT APP))/EVIDENCE (CRIMINAL LAW, VALIDITY OF STREET STOPS PRESENTS A MIXED QUESTION OF LAW AND FACT WHICH THE COURT OF APPEALS CAN REVIEW ONLY TO THE EXTENT OF WHETHER THE LOWER COURT RULING HAS SUPPORT IN THE RECORD, HERE THE RECORD SUPPORTED THE VALIDITY OF THE STOPS UNDER DE BOUR, TRIAL COURT'S FAILURE TO CREATE A RECORD CONCERNING TWO JURY NOTES REQUIRED REVERSAL HOWEVER (CT APP))/SUPPRESSION (CRIMINAL LAW, STREET STOPS, VALIDITY OF STREET STOPS PRESENTS A MIXED QUESTION OF LAW AND FACT WHICH THE COURT OF APPEALS CAN REVIEW ONLY TO THE EXTENT OF WHETHER THE LOWER COURT RULING HAS SUPPORT IN THE RECORD, HERE THE RECORD SUPPORTED THE VALIDITY OF THE STOPS UNDER DE BOUR, TRIAL COURT'S FAILURE TO CREATE A RECORD CONCERNING TWO JURY NOTES REQUIRED REVERSAL HOWEVER (CT APP))/DE BOUR (STREET STOPS, VALIDITY OF STREET STOPS PRESENTS A MIXED QUESTION OF LAW AND FACT WHICH THE COURT OF APPEALS CAN REVIEW ONLY TO THE EXTENT OF WHETHER THE LOWER COURT RULING HAS SUPPORT IN THE RECORD, HERE THE RECORD SUPPORTED THE VALIDITY OF THE STOPS UNDER DE BOUR, TRIAL COURT'S FAILURE TO CREATE A RECORD CONCERNING TWO JURY NOTES REQUIRED REVERSAL HOWEVER (CT APP))/EVIDENCE (CRIMINAL LAW, STREET STOPS, VALIDITY OF STREET STOPS PRESENTS A MIXED QUESTION OF LAW AND FACT WHICH THE COURT OF APPEALS CAN REVIEW ONLY TO THE EXTENT OF WHETHER THE LOWER COURT RULING HAS SUPPORT IN THE RECORD, HERE THE RECORD SUPPORTED THE VALIDITY OF THE STOPS UNDER DE BOUR, TRIAL COURT'S FAILURE TO CREATE A RECORD CONCERNING TWO JURY NOTES REQUIRED REVERSAL HOWEVER (CT APP))/JURY NOTES (CRIMINAL LAW, COURT'S FAILURE TO CREATE A RECORD CONCERNING TWO JURY NOTES REQUIRED REVERSAL HOWEVER (CT APP))/O'RAMA (JURY NOTES, CRIMINAL LAW, COURT'S FAILURE TO CREATE A RECORD CONCERNING TWO JURY NOTES REQUIRED REVERSAL HOWEVER (CT APP))

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

ALTHOUGH DEFENDANT WAS REPRESENTED ON A MARIJUANA CHARGE, QUESTIONING ABOUT AN UNRELATED MURDER DID NOT VIOLATE DEFENDANT'S RIGHT TO COUNSEL, APPELLATE DIVISION SHOULD NOT HAVE SUPPRESSED DEFENDANT'S STATEMENT ABOUT THE MURDER (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, reversing the Appellate Division, determined defendant's right to counsel was not violated when he was questioned about a murder while he was represented on an unrelated marijuana charge. Defendant was stopped for traffic violations and arrested when marijuana was found in the car he was driving, a black Hyundai with tinted windows. An attorney was assigned for the marijuana charge. A BlackBerry found in the car was subsequently traced to a robbery where a black Hyundai with tinted windows was seen. According to a witness to a shooting, unrelated to the robbery, the shooter arrived and sped away in a black Hyundai with tinted windows. Defendant, when he was represented only on the marijuana charge, was questioned about the robbery and the murder and admitted to being the get-away driver. Supreme Court allowed defendant's statement about the murder in evidence and defendant was convicted of murder. The Appellate Division held that the statement about the murder should have been suppressed because the robbery and the marijuana charge were related and Supreme Court had suppressed the statement about the robbery. The Court of Appeals held that the proper analysis required looking at the marijuana charge and the murder, not the marijuana charge and the robbery. Because the marijuana charge was completely unrelated to the murder, questioning about the murder did not violate defendant's right to counsel:

> Under *Cohen* [90 NY2d 632] the relevant comparison is between the unrepresented and the represented charges. The first category concerns whether "questioning on the unrepresented matter would all but inevitably elicit incriminating responses regarding the matter in which there had been an entry of counsel"... . The purpose of the rule is to protect the right to counsel once it has attached; if the questioning on the unrepresented charge will inevitably lead to statements about the represented charge, the statements should be suppressed. However, if the relationship between the unrepresented and the represented charges is insufficient, then "discrete questioning [on the unrepresented charge] by a police officer mindful and respectful of the indelible attachment of defendant's right to counsel [on the represented charge] would not [] create[] any serious risk of incriminating responses as to the latter crime[]" ... . Thus, the question the Appellate Division should have considered is whether the murder charge was sufficiently related to the marijuana charge. No evidence in the record would support that claim; indeed, even [defendant] does not press it. **People v Henry, 2018 NY Slip Op 04275, CtApp 6-12-18**

CRIMINAL LAW (RIGHT TO COUNSEL, ALTHOUGH DEFENDANT WAS REPRESENTED ON A MARIJUANA CHARGE, QUESTIONING ABOUT AN UNRELATED MURDER DID NOT VIOLATE DEFENDANT'S RIGHT TO COUNSEL, APPELLATE DIVISION SHOULD NOT HAVE SUPPRESSED DEFENDANT'S STATEMENT ABOUT THE MURDER (CT APP))/ATTORNEYS (RIGHT TO COUNSEL, ALTHOUGH DEFENDANT WAS REPRESENTED ON A MARIJUANA CHARGE, QUESTIONING ABOUT AN UNRELATED MURDER DID NOT VIOLATE DEFENDANT'S RIGHT TO COUNSEL, APPELLATE DIVISION SHOULD NOT HAVE SUPPRESSED DEFENDANT'S STATEMENT ABOUT THE MURDER (CT APP))/RIGHT TO COUNSEL (ALTHOUGH DEFENDANT WAS REPRESENTED ON A MARIJUANA CHARGE, QUESTIONING ABOUT AN UNRELATED MURDER DID NOT VIOLATE DEFENDANT'S RIGHT TO COUNSEL, APPELLATE DIVISION SHOULD NOT HAVE SUPPRESSED DEFENDANT'S STATEMENT ABOUT THE MURDER (CT APP))/EVIDENCE (CRIMINAL LAW, ALTHOUGH DEFENDANT WAS REPRESENTED ON A MARIJUANA CHARGE, QUESTIONING ABOUT AN UNRELATED MURDER DID NOT VIOLATE DEFENDANT'S RIGHT TO COUNSEL, APPELLATE DIVISION SHOULD NOT HAVE SUPPRESSED DEFENDANT'S STATEMENT ABOUT THE MURDER (CT APP))/SUPPRESSION (CRIMINAL LAW, STATEMENTS, RIGHT TO COUNSEL, LTHOUGH DEFENDANT WAS REPRESENTED ON A MARIJUANA CHARGE, QUESTIONING ABOUT AN UNRELATED MURDER DID NOT VIOLATE DEFENDANT'S RIGHT TO COUNSEL, APPELLATE DIVISION SHOULD NOT HAVE SUPPRESSED DEFENDANT'S STATEMENT ABOUT THE MURDER (CT APP))

CRIMINAL LAW, ATTORNEYS.

BRIEF QUESTIONING OF THE DEFENDANT ON A REPRESENTED MATTER WAS SEPARABLE AS A MATTER OF LAW FROM THE QUESTIONING ON AN UNREPRESENTED MATTER (CT APP).

In a brief memorandum, reversing the Appellate Division, the Court of Appeals determined brief questioning of defendant on a matter on which defendant was represented by counsel was separable as a matter of law from the interrogation on an unrepresented matter. There was no discussion of the facts of the case:

> ... [T]he impermissible questioning of defendant on a represented matter was so brief, flippant, and minimal that it was discrete and fairly separable as a matter of law from the interrogation of defendant on an unrepresented matter (see People v Cohen , 90 NY2d 632, 641 [1997]). **People v Silvagnoli, 2018 NY Slip Op 04276, CtApp 6-12-18**

CRIMINAL LAW (BRIEF QUESTIONING OF THE DEFENDANT ON A REPRESENTED MATTER WAS SEPARABLE AS A MATTER OF LAW FROM THE QUESTIONING ON AN UNREPRESENTED MATTER (CT APP))/ATTORNEYS (CRIMINAL LAW, BRIEF QUESTIONING OF THE DEFENDANT ON A REPRESENTED MATTER WAS SEPARABLE AS A MATTER OF LAW FROM THE QUESTIONING ON AN UNREPRESENTED MATTER (CT APP))/RIGHT TO COUNSEL (BRIEF QUESTIONING OF THE DEFENDANT ON A REPRESENTED MATTER WAS SEPARABLE AS A MATTER OF LAW FROM THE QUESTIONING ON AN UNREPRESENTED MATTER (CT APP))

CRIMINAL LAW, EVIDENCE.

THERE IS NO ACTUAL INNOCENCE GROUND FOR VACATION OF A GUILTY PLEA UNDER CRIMINAL PROCEDURE LAW 440.10 (h) (CT APP).

The Court of Appeals, reversing the Appellate Division, over a concurring opinion and a two-judge dissent, determined defendant's motion to vacate her conviction (by guilty plea) on actual innocence grounds should not have been granted. Actual innocence, the court held, is not a ground for relief in this context. Defendant was a nurse who pled guilty to endangering the welfare of a disabled person. Defendant had given the severely disabled child a bath and the child apparently sustained third degree burns. In support of her motion to vacate, the defendant presented expert evidence, including biopsy testing, that the apparent burns were the result of an allergic reaction (TEN/SJS). Defendant had been sued civilly and won, despite being precluded from contesting liability:

> The evidence at issue here was not newly discovered. The information regarding TEN/SJS and the existence of the biopsy testing were a part of the victim's medical records, and the possibility of obtaining a medical expert on behalf of defendant had been discussed with defense counsel before the guilty plea was entered. Since the evidence put forth in support of defendant's actual innocence claim was discoverable before the guilty plea had her attorney pursued that course of investigation, defendant's challenge to her conviction falls squarely within CPL 440.10 (1) (h) ... .
>
> Moreover, although defendant provided the biopsy results and an expert affidavit to support the conclusion that she was innocent of scalding the victim with hot water, that evidence only raises some doubt as to her guilt by setting up a battle of experts. It does not establish her factual innocence — particularly in light of the significant barrier presented by her inculpatory statements and guilty plea. ...
>
> Permitting a collateral attack on a guilty plea based on a claim of new evidence that contradicts the solemn admission of guilt entered during the course of a judicial proceeding free of constitutional error would have enormous ramifications to the efficacy of our criminal justice system. The legislature has not sanctioned such claims in CPL 440.10 with the exception of the production of DNA evidence demonstrating the identity of the actual assailant, and even that narrow exception has legislatively imposed procedural limitations ... . Defendant nonetheless asks us to judicially create this extraordinary path for a defendant who has pleaded guilty. We decline to do so. ...
>
> ... [W]here the defendant has been convicted by guilty plea, there is no actual innocence claim cognizable under CPL 440.10 (1) (h). **People v Tiger, 2018 NY Slip Op 04377, CtApp 6-14-18**

CRIMINAL LAW (ACTUAL INNOCENCE, THERE IS NO ACTUAL INNOCENCE GROUND FOR VACATION OF A GUILTY PLEA UNDER CRIMINAL PROCEDURE LAW 440.10 (h) (CT APP))/VACATE CONVICTION, MOTION TO (ACTUAL INNOCENCE, THERE IS NO ACTUAL INNOCENCE GROUND FOR VACATION OF A GUILTY PLEA UNDER CRIMINAL PROCEDURE LAW 440.10 (h) (CT APP))/ACTUAL INNOCENCE (VACATE CONVICTION, MOTION TO, THERE IS NO ACTUAL INNOCENCE GROUND FOR VACATION OF A GUILTY PLEA UNDER CRIMINAL PROCEDURE LAW 440.10 (h) (CT APP))/GUILTY PLEA (ACTUAL INNOCENCE, THERE IS NO ACTUAL INNOCENCE GROUND FOR VACATION OF A GUILTY PLEA UNDER CRIMINAL PROCEDURE LAW 440.10 (h) (CT APP))

CRIMINAL LAW, EVIDENCE.

STATEMENTS ALLEGED TO EXCULPATE DEFENDANT DID NOT MEET THE CRITERIA FOR DECLARATIONS AGAINST PENAL INTEREST, DEFENDANT'S MOTION TO VACATE HIS CONVICTION PROPERLY DENIED (CT APP).

The Court of Appeals, over an extensive three-judge dissenting opinion, determined that the alleged declarations of three witnesses who testified at the hearing on defendant's motion to vacate his conviction did not meet the criteria for declarations against penal interest. Therefore the statements were not admissible and the motion to vacate was properly denied. The decision is fact-specific and cannot be fairly summarized here. The defendant was convicted of kidnapping Allen, who has not been seen since she disappeared in 1994:

> At the hearing defendant called as witnesses all three declarants of the hearsay statements proffered as admissions against penal interests, as well as additional witnesses who testified to inculpatory statements alleged to have been made by each of the declarants. The declarants denied making the admissions and any complicity in Allen's kidnapping. Nevertheless, enabled by the speculative nature of the disparate admissions containing few details, defendant pursued more than one theory of complicity at the hearing — attempting to establish that, either singly or in combination, the declarants were involved in the kidnapping or the murder or the disposal of Allen's body ... . * * *
>
> In order to be admissible under that exception, "the following elements must be present: first, the declarant must be unavailable as a witness at [the hearing]; second, when the statement was made the declarant must be aware that it was adverse to his penal interest; third, the declarant must have competent knowledge of the facts underlying the statement; and, fourth, and most important, supporting circumstances independent of the statement itself must be present to attest to its trustworthiness and reliability" ... .
>
> .. [T]the record supports County Court's determination that the independent corroboration necessary for admissibility of the declarations against penal interest was not sufficient. The requisite independent evidence circumvents fabrication and augments the trustworthiness of the declaration. "By imposing such a requirement, a balance is struck between the interest of defendant to introduce evidence on his own behalf and the compelling interest of the State to preserve the integrity of the fact-finding process in this aspect of criminal prosecutions" ... . As we have explained, this determination of the reliability of proffered declarations against penal interest "involves a delicate balance of diverse factors and is entrusted to the sound discretion of the trial court, which is aptly suited to weigh the circumstances surrounding the declaration and the evidence used to bolster its reliability. The crucial inquiry focuses on the intrinsic trustworthiness of the statement as confirmed by competent evidence independent of the declaration itself" ... . **People v Thibodeau, 2018 NY Slip Op 04378, CtApp 6-14-18**

CRIMINAL LAW (EVIDENCE, DECLARATIONS AGAINST PENAL INTEREST, STATEMENTS ALLEGED TO EXCULPATE DEFENDANT DID NOT MEET THE CRITERIA FOR DECLARATIONS AGAINST PENAL INTEREST, DEFENDANT'S MOTION TO VACATE HIS CONVICTION PROPERLY DENIED (CT APP))/EVIDENCE (CRIMINAL LAW, DECLARATIONS AGAINST PENAL INTEREST, STATEMENTS ALLEGED TO EXCULPATE DEFENDANT DID NOT MEET THE CRITERIA FOR DECLARATIONS AGAINST PENAL INTEREST, DEFENDANT'S MOTION TO VACATE HIS CONVICTION PROPERLY DENIED (CT APP))/HEARSAY (CRIMINAL LAW, DECLARATIONS AGAINST PENAL INTEREST, STATEMENTS ALLEGED TO EXCULPATE DEFENDANT DID NOT MEET THE CRITERIA FOR DECLARATIONS AGAINST PENAL INTEREST, DEFENDANT'S MOTION TO VACATE HIS CONVICTION PROPERLY DENIED (CT APP))/DECLARATIONS AGAINST PENAL INTEREST (STATEMENTS ALLEGED TO EXCULPATE DEFENDANT DID NOT MEET THE CRITERIA FOR DECLARATIONS AGAINST PENAL INTEREST, DEFENDANT'S MOTION TO VACATE HIS CONVICTION PROPERLY DENIED (CT APP))/VACATE CONVICTION, MOTION TO (STATEMENTS ALLEGED TO EXCULPATE DEFENDANT DID NOT MEET THE CRITERIA FOR DECLARATIONS AGAINST PENAL INTEREST, DEFENDANT'S MOTION TO VACATE HIS CONVICTION PROPERLY DENIED (CT APP))

CRIMINAL LAW, EVIDENCE.

DEPRAVED INDIFFERENCE ASSAULT CONVICTION INVOLVING A SINGLE VICTIM AFFIRMED, DEPRAVED INDIFFERENCE ASSAULT NEED NOT FIT WITHIN THE NARROW EXCEPTIONS CARVED OUT FOR DEPRAVED INDIFFERENCE MURDER (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a concurring opinion, determined that defendant was properly convicted of depraved indifference assault in connection with the long-term abuse and serious injury inflicted on his live-in girlfriend. The court noted that there is no conflict between the intention to inflict serious injury and a finding of depraved indifference in assault cases (grave risk of death). The court further noted that the circumstances giving rise to depraved indifference assault need not fit into the narrow exceptions carved out for depraved indifference murder:

> Here, the trial court instructed the jury ... that they could find defendant acted with depraved indifference to human life if, "having a conscious objective not to kill but to harm, he engages in . . . a brutal, prolonged and potentially fatal course of conduct against a particularly vulnerable victim." The failure of either party to object to the charge meant that "the law as stated in that charge became the law applicable to the determination of the rights of the parties . . . and thus established the legal standard by which the sufficiency of the evidence to support the verdict must be judged"... . Thus, "the legal sufficiency of defendant's conviction must be viewed in light of the court's charge as given without exception" ... .
>
> Viewed as such, the jury could reasonably conclude that the victim's injuries were so severely debilitating that the repeated trauma rendered her particularly vulnerable. In fact, the victim could barely move and speak before she lapsed into a coma. The People also presented sufficient evidence from which the jury could infer that the victim's injuries persisted for a prolonged period of time. * * *
>
> .. [D]defendant is incorrect that depraved indifference assault must fit into one of the narrow exceptions for bringing depraved indifference murder charges in one-on-one killings. * * * ... [D]epraved indifference assault should not be constrained to the exceptions to the rule against charging depraved indifference murder in one-on-one killings. **People v Wilson, 2018 NY Slip Op 04380, CtApp 6-14-18**

CRIMINAL LAW (EVIDENCE, DEPRAVED INDIFFERENCE ASSAULT CONVICTION INVOLVING A SINGLE VICTIM AFFIRMED, DEPRAVED INDIFFERENCE ASSAULT NEED NOT FIT WITHIN THE NARROW EXCEPTIONS CARVED OUT FOR DEPRAVED INDIFFERENCE MURDER (CT APP))/EVIDENCE (CRIMINAL LAW, DEPRAVED INDIFFERENCE ASSAULT CONVICTION INVOLVING A SINGLE VICTIM AFFIRMED, DEPRAVED INDIFFERENCE ASSAULT NEED NOT FIT WITHIN THE NARROW EXCEPTIONS CARVED OUT FOR DEPRAVED INDIFFERENCE MURDER (CT APP))/DEPRAVED INDIFFERENCE ASSAULT (DEPRAVED INDIFFERENCE ASSAULT CONVICTION INVOLVING A SINGLE VICTIM AFFIRMED, DEPRAVED INDIFFERENCE ASSAULT NEED NOT FIT WITHIN THE NARROW EXCEPTIONS CARVED OUT FOR DEPRAVED INDIFFERENCE MURDER (CT APP))/ASSAULT (DEPRAVED INDIFFERENCE ASSAULT CONVICTION INVOLVING A SINGLE VICTIM AFFIRMED, DEPRAVED INDIFFERENCE ASSAULT NEED NOT FIT WITHIN THE NARROW EXCEPTIONS CARVED OUT FOR DEPRAVED INDIFFERENCE MURDER (CT APP))

CRIMINAL LAW, APPEALS, EVIDENCE.

FAILURE TO RAISE THE SPECIFIC OBJECTION ARGUED ON APPEAL AND FAILURE TO SPECIFICALLY JOIN IN AN OBJECTION BY CO-COUNSEL RENDERED THE OBJECTIONS UNPRESERVED FOR APPEAL, EVIDENCE OF GANG STRUCTURE PROPERLY ADMITTED TO SHOW DEFENDANT'S MOTIVE AND INTENT, AND TO PROVIDE BACKGROUND INFORMATION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a two judge dissenting opinion, determined defendant's objection to a juror who spoke out during the about defense counsel's repeated use of a racial slur was not preserved for appeal. Defense counsel did not make the specific objection relied upon on appeal and was silent when objections were made by another defense attorney. The court further held that references to gang structure in the prison where the assault occurred were admissible to show the defendant's motive and intent to join the assault:

> To preserve an issue of law for appellate review, "counsel must register an objection and apprise the court of grounds upon which the objection is based at the time' of the allegedly erroneous ruling or at any subsequent time when the court had an opportunity of effectively changing the same'" ... . * * *
>
> We are unpersuaded, first, by defendant's argument that because his counsel referred to Juror Six as "grossly unqualified," he preserved his Buford claim that the trial court had to make an inquiry into the juror's ability to be impartial. What defendant ignores is that counsel's reference to Juror Six being grossly unqualified was raised solely in relation to his consistent position that the only way to protect defendant's right to a fair and impartial jury was to grant the specific remedy of a mistrial. Counsel argued vigorously that Juror Six had irreversibly tainted the entire jury——a defect in the process that would require more than the discharge of a single juror ... . That being the case, counsel's failure to join another codefendant's request for a Buford inquiry after the court denied the mistrial motion makes plain the singular course set by counsel. ...
>
> Defendant's alternative argument, that he preserved the issue for appellate review by way of his codefendant's objection, is similarly unpersuasive. The Court has, in a different context, rejected the proposition that an issue is preserved for appellate review, notwithstanding a defendant's failure to expressly present the matter to the trial court, merely because another party or codefendant protested or objected. * * *
>
> ... [T]he testimony elicited by the People about the Bloods was probative of defendant's motive and intent to join the assault on complainant, and provided necessary background information on the nature of the relationship between the codefendants, thus placing the charged conduct in context ... . The testimony was intended to explain why defendant and one of the codefendants were quick to join in the fight, as well as the gang-related meaning of the words complainant alleged that the codefendant used during and after the attack. In fact, very little of the investigator's testimony focused on sensational details about the Bloods. The testimony described how members are identified and briefly discussed how carrying out an act of violence on behalf of a member might allow another member to rise in the gang's hierarchy. **People v Bailey, 2018 NY Slip Op 04383, CtApp 6-14-18**

CRIMINAL LAW (APPEALS, EVIDENCE, FAILURE RAISE THE SPECIFIC OBJECTION ARGUED ON APPEAL AND FAILURE TO SPECIFICALLY JOIN IN AN OBJECTION BY CO-COUNSEL RENDERED THE OBJECTIONS UNPRESERVED FOR APPEAL, EVIDENCE OF GANG STRUCTURE PROPERLY ADMITTED TO SHOW DEFENDANT'S MOTIVE AND INTENT, AND TO PROVIDE BACKGROUND INFORMATION (CT APP))/APPEALS (CRIMINAL LAW, FAILURE RAISE THE SPECIFIC OBJECTION ARGUED ON APPEAL AND FAILURE TO SPECIFICALLY JOIN IN AN OBJECTION BY CO-COUNSEL RENDERED THE OBJECTIONS UNPRESERVED FOR APPEAL, EVIDENCE OF GANG STRUCTURE PROPERLY ADMITTED TO SHOW DEFENDANT'S MOTIVE AND INTENT, AND TO PROVIDE BACKGROUND INFORMATION (CT APP))/EVIDENCE (CRIMNAL LAW, EVIDENCE OF GANG STRUCTURE PROPERLY ADMITTED TO SHOW DEFENDANT'S MOTIVE AND INTENT, AND TO PROVIDE BACKGROUND INFORMATION (CT APP))/GANGS (CRIMINAL LAW, EVIDENCE OF GANG STRUCTURE PROPERLY ADMITTED TO SHOW DEFENDANT'S MOTIVE AND INTENT, AND TO PROVIDE BACKGROUND INFORMATION (CT APP))

DEFAMATION (COA)

DEFAMATION, PRIVILEGE.

QUALIFIED, NOT ABSOLUTE, PRIVILEGE APPLIES WHEN THE SUBJECT OF THE ALLEGED DEFAMATION HAS NO OPPORTUNITY TO REBUT THE ALLEGEDLY DEFAMATORY STATEMENTS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a two-judge dissent, determined that qualified privilege, rather than absolute privilege, applied to allegations made to a Federal Drug Administration (FDA) investigator about plaintiff doctor's involvement in a cancer-drug trial. The controlling issue was whether the statements were made in a proceeding which would allow the plaintiff to counter them:

> Was plaintiff entitled to participate, by way of a hearing or otherwise, in the FDA's review of the IRB [Institutional Review Board] and thereby challenge the accusations against her ...? On this point, there is little disagreement. She was not. Plaintiff insists that she did not receive notice of any stage in the FDA's investigation of the IRB. Nothing in the FDA regulations gives a third party, even one "with a direct interest" ... in the matter, the right to notice of an FDA report concerning IRB noncompliance... or the right to attend a "regulatory hearing" at which the IRB, as the subject of the investigation, would challenge disqualification by the FDA ... . Moreover, while the regulatory scheme provides for judicial review... , defendants do not dispute plaintiff's contention that she lacks standing to seek such review ,,, because the proceeding was not adversarial to her. Nor do defendants allege any alternative avenues available to plaintiff to contest, before the FDA, the alleged harm to her reputation. ...
>
> [Defendants'] theory ... flies in the face of the policy rationale for insisting on an adversarial procedure, namely to prevent the absolute privilege from shielding statements published in a setting in which the defamed party may never know of the statements and, even if he or she did, would have no way to rebut them ... . **Stega v New York Downtown Hosp., 2018 NY Slip Op 04687, CtApp 6-27-18**

DEFAMATION (QUALIFIED, NOT ABSOLUTE, PRIVILEGE APPLIES WHEN THE SUBJECT OF THE ALLEGED DEFAMATION HAS NO OPPORTUNITY TO REBUT THE ALLEGEDLY DEFAMATORY STATEMENTS (CT APP))/PRIVILEGE (DEFAMATION, QUALIFIED, NOT ABSOLUTE, PRIVILEGE APPLIES WHEN THE SUBJECT OF THE ALLEGED DEFAMATION HAS NO OPPORTUNITY TO REBUT THE ALLEGEDLY DEFAMATORY STATEMENTS (CT APP))/ABSOLUTE PRIVILEGE (DEFAMATION, QUALIFIED, NOT ABSOLUTE, PRIVILEGE APPLIES WHEN THE SUBJECT OF THE ALLEGED DEFAMATION HAS NO OPPORTUNITY TO REBUT THE ALLEGEDLY DEFAMATORY STATEMENTS (CT APP))/QUALIFIED PRIVILEGE (DEFAMATION, QUALIFIED, NOT ABSOLUTE, PRIVILEGE APPLIES WHEN THE SUBJECT OF THE ALLEGED DEFAMATION HAS NO OPPORTUNITY TO REBUT THE ALLEGEDLY DEFAMATORY STATEMENTS (CT APP))

FAMILY LAW (COA)

FAMILY LAW.

TERMINATION OF PARENTAL RIGHTS BASED UPON ABANDONMENT REVERSED, AGENCY DID NOT MEET ITS BURDEN OF DEMONSTRATING FATHER, WHO WAS INCARCERATED, FAILED TO COMMUNICATE WITH THE CHILD DURING THE SIX MONTHS PRIOR TO THE PROCEEDING (CT APP).

The Court of Appeals, reversing the Appellate Division, in a brief memorandum decision, determined the petitioner agency did not meet its burden of demonstrating father, who was incarcerated, had abandoned his child:

> An order terminating parental rights may be entered upon the ground that a child's parent "abandoned such child for the period of six months immediately prior to the date on which the petition is filed in the court" ... . A child is "abandoned" within the meaning of Social Services Law § 384-b, if the "parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency" ... . Parents are presumed able to visit and communicate with their children and, although incarcerated parents may be unable to visit, they are still presumed able to communicate with their children absent proof to the contrary ... .
>
> The petitioner agency bears the burden of proving abandonment by clear and convincing evidence... . Here, petitioner's caseworker testified that respondent—who was incarcerated—did not visit with the child or communicate with the caseworker or other agency personnel in the six months preceding the filing of the abandonment petition. However, the record is bereft of evidence establishing that respondent failed to communicate with the child, directly or through the child's foster parent, during the relevant time period. Thus, petitioner did not meet its burden of demonstrating, by clear and convincing evidence, that respondent abandoned the child. **Matter of Mason H. (Joseph H.), 2018 NY Slip Op 04384, CtApp 6-14-18**

FAMILY LAW (PARENTAL RIGHTS, TERMINATION OF PARENTAL RIGHTS BASED UPON ABANDONMENT REVERSED, AGENCY DID NOT MEET ITS BURDEN OF DEMONSTRATING FATHER, WHO WAS INCARCERATED, FAILED TO COMMUNICATE WITH THE CHILD DURING THE SIX MONTHS PRIOR TO THE PROCEEDING (CT APP))/PARENTAL RIGHTS (TERMINATION OF PARENTAL RIGHTS BASED UPON ABANDONMENT REVERSED, AGENCY DID NOT MEET ITS BURDEN OF DEMONSTRATING FATHER, WHO WAS INCARCERATED, FAILED TO COMMUNICATE WITH THE CHILD DURING THE SIX MONTHS PRIOR TO THE PROCEEDING (CT APP))/ABANDONMENT (FAMILY LAW, TERMINATION OF PARENTAL RIGHTS BASED UPON ABANDONMENT REVERSED, AGENCY DID NOT MEET ITS BURDEN OF DEMONSTRATING FATHER, WHO WAS INCARCERATED, FAILED TO COMMUNICATE WITH THE CHILD DURING THE SIX MONTHS PRIOR TO THE PROCEEDING (CT APP))/TERMINATION OF PARENTAL RIGHTS (ABANDONMENT, TERMINATION OF PARENTAL RIGHTS BASED UPON ABANDONMENT REVERSED, AGENCY DID NOT MEET ITS BURDEN OF DEMONSTRATING FATHER, WHO WAS INCARCERATED, FAILED TO COMMUNICATE WITH THE CHILD DURING THE SIX MONTHS PRIOR TO THE PROCEEDING (CT APP))

FAMILY LAW, ADMINISTRATIVE LAW.

ADMINISTRATIVE LAW JUDGE'S MARKING AN ADMINISTRATION OF CHILDREN'S SERVICES REPORT AS 'INDICATED' FOR MALTREATMENT OF PETITIONER'S CHILD HAD A RATIONAL BASIS AND SHOULD STAND, APPELLATE DIVISION REVERSED (CT APP).

The Court of Appeals, reversing the Appellate Division, over an extensive dissenting opinion, determined that the administrative law judge's (ALJ's) marking a NYC Administration for Children's Services (ACS) report as "indicated" for maltreatment of petitioner's (Natasha's) child had a rational basis. Natasha had used her five-year-old child as a pawn in a shoplifting scheme. Natasha had an unblemished record and was pursuing a degree in early childhood education. The "indicated" designation will probably make it impossible for Natasha to find work in the childhood education field:

> ... [I]t was rational for the Administrative Law Judge to have concluded that the child was placed in imminent risk of impairment, constituting maltreatment ... , and that petitioner's actions are reasonably related to employment in the childcare field...). The act in question — specifically, using the child as a pawn in a shoplifting scheme — "was sufficiently egregious so as to create an imminent risk of physical, mental[,] and emotional harm to the child" ... . There is imminent potential for physical confrontation during a theft from a department store monitored by security. Moreover, ... under the circumstances presented here, "utilizing a child to commit a crime and teaching a child that such behavior is acceptable must have an immediate impact on that child's emotional and mental well-being," particularly where, as here, the child is "young [and] just learning to differentiate between right and wrong" ... . Likewise, the Administrative Law Judge rationally concluded that petitioner's actions are reasonably related to employment in the childcare field "[a]s a matter of common sense" ... . **Matter of Natasha W. v New York State Off. of Children & Family Servs., 2018 NY Slip Op 04379, CtApp 6-14-18**

FAMILY LAW (CHILD MALTREATMENT, ADMINISTRATIVE LAW JUDGE'S MARKING AN ADMINISTRATION OF CHILDREN'S SERVICES REPORT AS 'INDICATED' FOR MALTREATMENT OF PETITIONER'S CHILD HAD A RATIONAL BASIS AND SHOULD STAND, APPELLATE DIVISION REVERSED (CT APP))/ADMINISTRATIVE LAW (FAMILY LAW, CHILD MALTREATMENT, ADMINISTRATIVE LAW JUDGE'S MARKING AN ADMINISTRATION OF CHILDREN'S SERVICES REPORT AS 'INDICATED' FOR MALTREATMENT OF PETITIONER'S CHILD HAD A RATIONAL BASIS AND SHOULD STAND, APPELLATE DIVISION REVERSED (CT APP))/ADMINISTRATION OF CHILDREN'S SERVICES (ADMINISTRATIVE LAW JUDGE'S MARKING AN ADMINISTRATION OF CHILDREN'S SERVICES REPORT AS 'INDICATED' FOR MALTREATMENT OF PETITIONER'S CHILD HAD A RATIONAL BASIS AND SHOULD STAND, APPELLATE DIVISION REVERSED (CT APP))/MALTREATMENT (FAMILY LAW, CHILDREN, ADMINISTRATIVE LAW JUDGE'S MARKING AN ADMINISTRATION OF CHILDREN'S SERVICES REPORT AS 'INDICATED' FOR MALTREATMENT OF PETITIONER'S CHILD HAD A RATIONAL BASIS AND SHOULD STAND, APPELLATE DIVISION REVERSED (CT APP))

INSURANCE LAW (COA)

INSURANCE LAW, FRAUD, CONTRACT LAW, SECURITIES.

IN THIS ACTION STEMMING FROM PLAINTIFF'S INSURING OF RESIDENTIAL MORTGAGE BACKED SECURITIES ISSUED BY DEFENDANT, PLAINTIFF WAS REQUIRED TO SHOW JUSTIFIABLE RELIANCE AND LOSS CAUSATION FOR ITS FRAUDULENT INDUCEMENT CAUSE OF ACTION, PLAINTIFF'S RECOVERY WAS LIMITED TO THAT DESCRIBED IN THE SOLE REMEDY PROVISION, AND PLAINTIFF WAS NOT ENTITLED TO ATTORNEY'S FEES (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a partial dissent, determined certain aspects of defendant Countrywide's motion for summary judgment against plaintiff insurer, Ambac, stemming from residential mortgage backed securities issued by Countrywide, were properly granted. Ambac's argument that it need not demonstrate justifiable reliance or loss causation in support of its fraudulent inducement cause of action was rejected, as was Ambac's argument that it was entitled to relief over and above that specified in the sole remedy clause, as well as attorney's fees:

> Public policy reasons support the justifiable reliance requirement. Where a "sophisticated business person or entity . . . claims to have been taken in," the justifiable reliance rule "serves to rid the court of cases in which the claim of reliance is likely to be hypocritical" ... . Excusing a sophisticated party such as a monoline financial guaranty insurer from demonstrating justifiable reliance would not further the policy underlying this "venerable rule."
>
> Likewise, there is no merit to Ambac's argument that it need not show loss causation. Loss causation is a well-established requirement of a common law fraudulent inducement claim for damages. * * *
>
> Ambac's complaint fails to include breach of contract allegations beyond those that fall under the sole remedy provision ... , and accordingly Ambac is limited to the repurchase protocol as the potential remedy for those claims. * * *
>
> In New York, "the prevailing litigant ordinarily cannot collect . . . attorneys' fees from its unsuccessful opponents. . . . Attorneys' fees are treated as incidents of litigation, rather than damages. . . . The exception is when an award is authorized by agreement between the parties or by statute or court rule" ... . [T]his Court [has] held that a court "should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise ... . **Ambac Assur. Corp. v Countrywide Home Loans, Inc., 2018 NY Slip Op 04686, CtApp 6-27-18**

INSURANCE LAW (IN THIS ACTION STEMMING FROM PLAINTIFF'S INSURING OF RESIDENTIAL MORTGAGE BACKED SECURITIES ISSUED BY DEFENDANT, PLAINTIFF WAS REQUIRED TO SHOW JUSTIFIABLE RELIANCE AND LOSS CAUSATION FOR ITS FRAUDULENT INDUCEMENT CAUSE OF ACTION, PLAINTIFF'S RECOVERY WAS LIMITED TO THAT DESCRIBED IN THE SOLE REMEDY PROVISION, AND PLAINTIFF WAS NOT ENTITLED TO ATTORNEY'S FEES (CT APP))/FRAUD (IN THIS ACTION STEMMING FROM PLAINTIFF'S INSURING OF RESIDENTIAL MORTGAGE BACKED SECURITIES ISSUED BY DEFENDANT, PLAINTIFF WAS REQUIRED TO SHOW JUSTIFIABLE RELIANCE AND LOSS CAUSATION FOR ITS FRAUDULENT INDUCEMENT CAUSE OF ACTION, PLAINTIFF'S RECOVERY WAS LIMITED TO THAT DESCRIBED IN THE SOLE REMEDY PROVISION, AND PLAINTIFF WAS NOT ENTITLED TO ATTORNEY'S FEES (CT APP))/CONTRACT LAW (IN THIS ACTION STEMMING FROM PLAINTIFF'S INSURING OF RESIDENTIAL MORTGAGE BACKED SECURITIES ISSUED BY DEFENDANT, PLAINTIFF WAS REQUIRED TO SHOW JUSTIFIABLE RELIANCE AND LOSS CAUSATION FOR ITS FRAUDULENT INDUCEMENT CAUSE OF ACTION, PLAINTIFF'S RECOVERY WAS LIMITED TO THAT DESCRIBED IN THE SOLE REMEDY PROVISION, AND PLAINTIFF WAS NOT ENTITLED TO ATTORNEY'S FEES (CT APP))/SECURITIES (IN THIS ACTION STEMMING FROM PLAINTIFF'S INSURING OF RESIDENTIAL MORTGAGE BACKED SECURITIES ISSUED BY DEFENDANT, PLAINTIFF WAS REQUIRED TO SHOW JUSTIFIABLE RELIANCE AND LOSS CAUSATION FOR ITS FRAUDULENT INDUCEMENT CAUSE OF ACTION, PLAINTIFF'S RECOVERY WAS LIMITED TO THAT DESCRIBED IN THE SOLE REMEDY PROVISION, AND PLAINTIFF

WAS NOT ENTITLED TO ATTORNEY'S FEES (CT APP))/RESIDENTIAL MORTGAGE BACKED SECURITIES (IN THIS ACTION STEMMING FROM PLAINTIFF'S INSURING OF RESIDENTIAL MORTGAGE BACKED SECURITIES ISSUED BY DEFENDANT, PLAINTIFF WAS REQUIRED TO SHOW JUSTIFIABLE RELIANCE AND LOSS CAUSATION FOR ITS FRAUDULENT INDUCEMENT CAUSE OF ACTION, PLAINTIFF'S RECOVERY WAS LIMITED TO THAT DESCRIBED IN THE SOLE REMEDY PROVISION, AND PLAINTIFF WAS NOT ENTITLED TO ATTORNEY'S FEES (CT APP))/ATTORNEY'S FEES (IN THIS ACTION STEMMING FROM PLAINTIFF'S INSURING OF RESIDENTIAL MORTGAGE BACKED SECURITIES ISSUED BY DEFENDANT, PLAINTIFF WAS REQUIRED TO SHOW JUSTIFIABLE RELIANCE AND LOSS CAUSATION FOR ITS FRAUDULENT INDUCEMENT CAUSE OF ACTION, PLAINTIFF'S RECOVERY WAS LIMITED TO THAT DESCRIBED IN THE SOLE REMEDY PROVISION, AND PLAINTIFF WAS NOT ENTITLED TO ATTORNEY'S FEES (CT APP))

LANDLORD-TENANT (COA)

LANDLORD-TENANT, ADMINISTRATIVE LAW.

TENANT'S HUSBAND HAD MOVED TO A NURSING HOME, DIVISION OF HOUSING AND COMMUNITY RENEWAL PROPERLY ONLY COUNTED TENANT'S PORTION OF THE COUPLE'S INCOME TO FIND HER ELIGIBLE FOR RENT CONTROL (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over an extensive dissenting opinion, determined the Division of Housing and Community Renewal (DHCR) properly counted only the resident's income, and not her husband's income, for purposes of her eligibility for rent control. Her husband had moved to a nursing home:

> Petitioner's main contention is that because, under federal tax law, a joint tax return results in joint tax liability attributable to both filers ... , under the RCL [rent control law], tenant's federal AGI [adjusted gross income] cannot be apportioned and therefore her total annual income exceeds the income threshold. Petitioner offers no sound explanation why federal income tax liability should be outcome determinative of how DHCR interprets and applies the RCL. ...
>
> To be sure, RCL ... characterizes annual income as the federal AGI. The statute also provides that total annual income is calculated as the "sum" of the annual incomes of all those "who occupy the housing accommodation as their primary residence" ... . To read the statute as petitioner and the dissent suggest would mean that total annual income may include those persons who do not occupy the housing accommodation as their primary residence. "Such a construction, resulting in the nullification of one part of the [statute] by another,' is impermissible, and violates the rule that all parts of a statute are to be harmonized with each other" ... . **Matter of Brookford, LLC v New York State Div. of Hous. & Community Renewal, 2018 NY Slip Op 04381, CtApp 6-14-18**

LANDLORD-TENANT (TENANT'S HUSBAND HAD MOVED TO A NURSING HOME, DIVISION OF HOUSING AND COMMUNITY RENEWAL PROPERLY ONLY COUNTED TENANT'S PORTION OF THE COUPLE'S INCOME TO FIND HER ELIGIBLE FOR RENT CONTROL (CT APP))/ADMINISTRATIVE LAW (RENT CONTROL, TENANT'S HUSBAND HAD MOVED TO A NURSING HOME, DIVISION OF HOUSING AND COMMUNITY RENEWAL PROPERLY ONLY COUNTED TENANT'S PORTION OF THE COUPLE'S INCOME TO FIND HER ELIGIBLE FOR RENT CONTROL (CT APP))/RENT CONTROL (TENANT'S HUSBAND HAD MOVED TO A NURSING HOME, DIVISION OF HOUSING AND COMMUNITY RENEWAL PROPERLY ONLY COUNTED TENANT'S PORTION OF THE COUPLE'S INCOME TO FIND HER ELIGIBLE FOR RENT CONTROL (CT APP))/DIVISION OF HOUSING AND COMMUNITY RENEWAL (TENANT'S HUSBAND HAD MOVED TO A NURSING HOME, DIVISION OF HOUSING AND COMMUNITY RENEWAL PROPERLY ONLY COUNTED TENANT'S PORTION OF THE COUPLE'S INCOME TO FIND HER ELIGIBLE FOR RENT CONTROL (CT APP))

MUNICIPAL LAW (COA)

MUNICIPAL LAW.

TOWN PROPERLY DISSOLVED THE EXISTING FIRE PROTECTION DISTRICT AND CREATED TWO NEW FIRE PROTECTION DISTRICTS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a dissenting opinion, determined the Town of Champion had properly dissolved the existing fire protection district (FPD) and replaced it with two new FPD's. The dissent argued the existing FPD had not been properly dissolved, but rather was merely divided:

> ... [P]etitioners claim that respondent failed to accomplish and complete the dissolution of the Town of Champion Fire Protection District as required by the General Municipal Law. On the facts of this case, we conclude that respondent's actions are not affected by an error of law because it prepared, approved, and implemented a dissolution plan in compliance with the applicable statutory requirements, and lawfully created two legally distinct fire protection districts to deliver fire protection services to the Town of Champion residents, in accordance with Town Law section 170. **Matter of Waite v Town of Champion, 2018 NY Slip Op 04688, CtApp 6-27-18**

MUNICIPAL LAW (FIRE PROTECTION DISTRICTS, TOWN PROPERLY DISSOLVED THE EXISTING FIRE PROTECTION DISTRICT AND CREATED TWO NEW FIRE PROTECTION DISTRICTS (CT APP))/FIRE PROTECTION DISTRICTS (MUNICIPAL LAW, FIRE PROTECTION DISTRICTS, TOWN PROPERLY DISSOLVED THE EXISTING FIRE PROTECTION DISTRICT AND CREATED TWO NEW FIRE PROTECTION DISTRICTS (CT APP))/GENERAL MUNICIPAL LAW (FIRE PROTECTION DISTRICTS, TOWN PROPERLY DISSOLVED THE EXISTING FIRE PROTECTION DISTRICT AND CREATED TWO NEW FIRE PROTECTION DISTRICTS (CT APP))/TOWN LAW (FIRE PROTECTION DISTRICTS, TOWN PROPERLY DISSOLVED THE EXISTING FIRE PROTECTION DISTRICT AND CREATED TWO NEW FIRE PROTECTION DISTRICTS (CT APP))

MUNICIPAL LAW, ADMINISTRATIVE LAW.

NASSAU COUNTY PROPERLY DETERMINED A POLICE OFFICER WAS NOT ENTITLED TO INDEMNIFICATION FOR CIVIL DAMAGES STEMMING FROM A LAWSUIT BY AN ARRESTEE ALLOWED TO REMAIN IN JAIL AFTER THE OFFICER KNEW HE COULD NOT HAVE COMMITTED THE CRIME (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined that Nassau County did not act arbitrarily and capriciously when it decided petitioner police officer was not entitled to indemnification for civil damages stemming from a law suit by an arrestee (Crews) who was allowed to remain incarcerated despite the police officer's knowledge Crews could not have committed the offense:

> General Municipal Law § 50-l, the statute at issue here, authorizes Nassau County to defend and indemnify police officers named as defendants in civil actions or proceedings, providing indemnification from "any judgment . . . for damages, including punitive or exemplary damages, arising out of a negligent act or other tort of such police officer committed while in the proper discharge of [the officer's] duties and within the scope of [the officer's] employment" ... . The statute declares that "[s]uch proper discharge and scope shall be determined by a majority vote of a panel . . . appointed by" various Nassau County officials — respondent Indemnification Board. The legislature, thus, left the determination of whether the statutory prerequisites are met to the discretion of the Board.
>
> In this case, we are essentially asked to determine the meaning of the word "proper" in the phrase: "proper discharge of [the officer's] duties." Petitioner argues that the phrases "proper discharge of [ ] duties" and "scope of [ ] employment" are interchangeable in this statute, requiring only that the officer be engaged in police work to be entitled to indemnification. However, such an interpretation reads the word "proper" out of the statute. The legislature's inclusion of this modifier indicates an intent to hold officers to a higher standard than mere performance of duty. Read literally, the statute permits the Board to consider the propriety of the officer's actions in determining whether defense and indemnification is appropriate, as it did here when it revisited its determination after learning petitioner concealed information that extended the pretrial detention of an innocent person. **Matter of Lemma v Nassau County Police Officer Indem. Bd., 2018 NY Slip Op 04382, CtApp 5-14-18**

MUNICIPAL LAW (POLICE OFFICERS, NASSAU COUNTY PROPERLY DETERMINED A POLICE OFFICER WAS NOT ENTITLED TO INDEMNIFICATION FOR CIVIL DAMAGES STEMMING FROM A LAWSUIT BY AN ARRESTEE ALLOWED TO REMAIN IN JAIL AFTER THE OFFICER KNEW HE COULD NOT HAVE COMMITTED THE CRIME (CT APP))/ADMINISTRATIVE LAW (MUNICIPAL LAW, POLICE OFFICERS, NASSAU COUNTY PROPERLY DETERMINED A POLICE OFFICER WAS NOT ENTITLED TO INDEMNIFICATION FOR CIVIL DAMAGES STEMMING FROM A LAWSUIT BY AN ARRESTEE ALLOWED TO REMAIN IN JAIL AFTER THE OFFICER KNEW HE COULD NOT HAVE COMMITTED THE CRIME (CT APP))/POLICE OFFICERS (MUNICIPAL LAW, INDEMNIFICATION, NASSAU COUNTY PROPERLY DETERMINED A POLICE OFFICER WAS NOT ENTITLED TO INDEMNIFICATION FOR CIVIL DAMAGES STEMMING FROM A LAWSUIT BY AN ARRESTEE ALLOWED TO REMAIN IN JAIL AFTER THE OFFICER KNEW HE COULD NOT HAVE COMMITTED THE CRIME (CT APP))/INDEMNIFICATION (CIVIL DAMAGES, MUNICIPAL LAW, POLICE OFFICERS, NASSAU COUNTY PROPERLY DETERMINED A POLICE OFFICER WAS NOT ENTITLED TO INDEMNIFICATION FOR CIVIL DAMAGES STEMMING FROM A LAWSUIT BY AN ARRESTEE ALLOWED TO REMAIN IN JAIL AFTER THE OFFICER KNEW HE COULD NOT HAVE COMMITTED THE CRIME (CT APP))/POLICE OFFICERS (CIVIL DAMAGES, MUNICIPAL LAW, POLICE OFFICERS, NASSAU COUNTY PROPERLY DETERMINED A POLICE OFFICER WAS NOT ENTITLED TO INDEMNIFICATION FOR CIVIL DAMAGES STEMMING FROM A LAWSUIT BY AN ARRESTEE ALLOWED TO REMAIN IN JAIL AFTER THE OFFICER KNEW HE COULD NOT HAVE COMMITTED THE CRIME (CT APP))

MEDICAID (COA)

MEDICAID. ADMINISTRATIVE LAW.

OFFICE OF THE MEDICAID INSPECTOR GENERAL (OMIG) WAS ENTITLED TO THE FULL AMOUNT OF OVERPAYMENT MADE BY MEDICAID TO A METHADONE CLINIC, DESPITE THE INCLUSION OF A LOWER SETTLEMENT AMOUNT IN TWO NOTICES (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, reversing the Appellate Division, determined that the Office of the Medicaid Inspector General (OMIG) had properly notified the operator of a methadone clinic of the amount of overpayment by Medicaid that the OMIG was seeking. The OMIG had notified the clinic it was seeking about 1.8 million but was willing to settle for about 1.4 million. The clinic did not take any of the administrative steps or appeals that were available to it and did not agree to settle. The clinic argued that because two notices included only the 1.4 million settlement amount, the lower amount was owed. The Court of Appeals rejected that argument:

> The pertinent regulations provide that, if an audit report is challenged, "[a]n extrapolation based upon an audit utilizing a statistical sampling method certified as valid will be presumed, in the absence of expert testimony and evidence to the contrary, to be an accurate determination of the total overpayments made or the penalty to be imposed" ... . By contrast, the $1,460,914 figure, as explained in ... the cover letter, merely represented, with 95% accuracy, a lower bound on the true amount overpaid. The [final audit report] and cover letter sufficiently notified [the clinic] ... of OMIG's $1,857,401 overpayment assessment which OMIG would be entitled to withhold ... . **West Midtown Mgt. Group, Inc. v State of New York, 2018 NY Slip Op 04666, CtApp 6-26-18**

MEDICAID (OFFICE OF THE MEDICAID INSPECTOR GENERAL (OMIG) WAS ENTITLED TO THE FULL AMOUNT OF OVERPAYMENT MADE BY MEDICAID TO A METHADONE CLINIC, DESPITE THE INCLUSION OF A LOWER SETTLEMENT AMOUNT IN TWO NOTICES (CT APP))/ADMINISTRATIVE LAW (MEDICAID, OFFICE OF THE MEDICAID INSPECTOR GENERAL (OMIG) WAS ENTITLED TO THE FULL AMOUNT OF OVERPAYMENT MADE BY MEDICAID TO A METHADONE CLINIC, DESPITE THE INCLUSION OF A LOWER SETTLEMENT AMOUNT IN TWO NOTICES (CT APP))

NEGLIGENCE (COA)

NEGLIGENCE, CIVIL PROCEDURE,

DAMAGES AWARD IN A NEGLIGENCE SUIT BROUGHT BY A POLICE OFFICER RECEIVING ACCIDENTAL RETIREMENT DISABILITY BENEFITS MUST BE OFFSET BY THOSE BENEFITS AS A COLLATERAL SOURCE PURSUANT TO CPLR 4545 (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a two-judge dissent, determined that a damages award in a negligence suit brought by a police officer receiving accident disability retirement (ADR) benefits must be offset by those benefits as a collateral source pursuant to CPLR 4545:

> The ... question presented ... is whether a retired New York City police officer's accident disability retirement (ADR) benefits are a collateral source that a court must offset against the injured retiree's jury award for future lost earnings and pension. We hold that ADR benefits operate to replace earnings during the period when the retiree could have been employed, absent the disabling injury, and then serve as pension allotments, and so a court must offset a retiree's projected ADR benefits against the jury award for both categories of economic loss. * * *
>
> The statutory and regulatory scheme governing ADR benefits, and the text and legislative intent of CPLR 4545 ... provide the basis for our conclusion that ADR benefits operate sequentially as payment for future lost earnings and pension benefits. Accordingly, on a motion pursuant to CPLR 4545, a court must apply ADR benefits, dollar-for-dollar, to offset the jury award for future lost earnings during the period they represent lost earnings, and future lost pension during the period they represent lost pension. **Andino v Mills, 2018 NY Slip Op 04273, CtApp, 6-12-18**

NEGLIGENCE (DAMAGES, COLLATERAL SOURCE, DAMAGES AWARD IN A NEGLIGENCE SUIT BROUGHT BY A POLICE OFFICER RECEIVING ACCIDENTAL RETIREMENT DISABILITY BENEFITS MUST BE OFFSET BY THOSE BENEFITS AS A COLLATERAL SOURCE PURSUANT TO CPLR 4545 (CT APP))/CIVIL PROCEDURE (NEGLIGENCE, MUNICIPAL LAW, DAMAGES, COLLATERAL SOURCE, DAMAGES AWARD IN A NEGLIGENCE SUIT BROUGHT BY A POLICE OFFICER RECEIVING ACCIDENTAL RETIREMENT DISABILITY BENEFITS MUST BE OFFSET BY THOSE BENEFITS AS A COLLATERAL SOURCE PURSUANT TO CPLR 4545 (CT APP))/DAMAGES (COLLATERAL SOURCE, DAMAGES AWARD IN A NEGLIGENCE SUIT BROUGHT BY A POLICE OFFICER RECEIVING ACCIDENTAL RETIREMENT DISABILITY BENEFITS MUST BE OFFSET BY THOSE BENEFITS AS A COLLATERAL SOURCE PURSUANT TO CPLR 4545 (CT APP))/COLLATERAL SOURCE (DAMAGES AWARD IN A NEGLIGENCE SUIT BROUGHT BY A POLICE OFFICER RECEIVING ACCIDENTAL RETIREMENT DISABILITY BENEFITS MUST BE OFFSET BY THOSE BENEFITS AS A COLLATERAL SOURCE PURSUANT TO CPLR 4545 (CT APP))/CPLR 4545 (DAMAGES, COLLATERAL SOURCE, DAMAGES AWARD IN A NEGLIGENCE SUIT BROUGHT BY A POLICE OFFICER RECEIVING ACCIDENTAL RETIREMENT DISABILITY BENEFITS MUST BE OFFSET BY THOSE BENEFITS AS A COLLATERAL SOURCE PURSUANT TO CPLR 4545 (CT APP))/ACCIDENTAL DISABILITY RETIREMENT BENEFITS (DAMAGES, COLLATERAL SOURCE, DAMAGES AWARD IN A NEGLIGENCE SUIT BROUGHT BY A POLICE OFFICER RECEIVING ACCIDENTAL RETIREMENT DISABILITY BENEFITS MUST BE OFFSET BY THOSE BENEFITS AS A COLLATERAL SOURCE PURSUANT TO CPLR 4545 (CT APP))/POLICE OFFICERS (DAMAGES, COLLATERAL SOURCE, DAMAGES AWARD IN A NEGLIGENCE SUIT BROUGHT BY A POLICE OFFICER RECEIVING ACCIDENTAL RETIREMENT DISABILITY BENEFITS MUST BE OFFSET BY THOSE BENEFITS AS A COLLATERAL SOURCE PURSUANT TO CPLR 4545 (CT APP))

NEGLIGENCE, COURT OF CLAIMS.

STATE'S FAILURE TO TAKE STEPS TO ADDRESS SAFETY PROBLEMS AT AN INTERSECTION WHICH WAS THE SITE OF FOURTEEN RIGHT-ANGLE COLLISIONS WAS THE PROXIMATE CAUSE OF THE FATAL COLLISION, STATE WAS 100% LIABLE DESPITE VEHICLE AND TRAFFIC LAW VIOLATION ON THE PART OF ONE OF THE DRIVERS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, determined the state was properly held 100% liable in this fatal motorcycle-truck collision case. The truck driver testified that he looked both ways and didn't see the motorcycle before pulling out into the motorcycle's lane of traffic. There had been 14 right-angle collisions at this intersection. The state started but never finished an investigation into whether safety measures should be implemented. The Court of Appeals held the plaintiff need not demonstrate the state could have timely made effective safety improvements, i.e., a four-way stop and/or a reduction of the speed limit. The fact that the truck driver violated the Vehicle and Traffic Law did not require the apportionment of some liability to the truck driver:

> The State agrees it cannot invoke qualified immunity because it did not complete the safety study; therefore, ordinary rules of negligence apply ... . The State has a nondelegable duty to keep its roads reasonably safe ... , and the State breaches that duty "when [it] is made aware of a dangerous highway condition and does not take action to remedy it"... . A breach proximately causes harm if it is a substantial factor in the plaintiff's injury ... . * * *
>
> We have never required accident victims to identify a specific remedy and prove it would have been timely implemented and prevented the accident. * * *
>
> Here, there is record support for the finding that the State's breach was a proximate cause of the accident. * * *
>
> Once on notice of the dangerous condition, it was the State's burden to take reasonable steps in a reasonable amount of time. Instead, it did nothing. That right-angle collisions would continue to occur absent the adoption of some safety measure is hardly surprising. "[T]he most significant inquiry in the proximate cause analysis is often that of foreseeability"... . Where, as here, the risk of harm created by the defendant corresponds to the harm that actually resulted, we cannot say that proximate cause is lacking as a matter of law. **Brown v State of New York, 2018 NY Slip Op 04029, CtApp 6-7-18**

NEGLIGENCE (TRAFFIC ACCIDENTS, STATE'S FAILURE TO TAKE STEPS TO ADDRESS SAFETY PROBLEMS AT AN INTERSECTION WHICH WAS THE SITE OF FOURTEEN RIGHT-ANGLE COLLISIONS WAS THE PROXIMATE CAUSE OF THE FATAL COLLISION, STATE WAS 100% LIABLE DESPITE VEHICLE AND TRAFFIC LAW VIOLATION ON THE PART OF ONE OF THE DRIVERS (CT APP))/COURT OF CLAIMS (INTERSECTION SAFETY, TRAFFIC ACCIDENTS, STATE'S FAILURE TO TAKE STEPS TO ADDRESS SAFETY PROBLEMS AT AN INTERSECTION WHICH WAS THE SITE OF FOURTEEN RIGHT-ANGLE COLLISIONS WAS THE PROXIMATE CAUSE OF THE FATAL COLLISION, STATE WAS 100% LIABLE DESPITE VEHICLE AND TRAFFIC LAW VIOLATION ON THE PART OF ONE OF THE DRIVERS (CT APP))/INTERSECTIONS (TRAFFIC ACCIDENTS, STATE'S FAILURE TO TAKE STEPS TO ADDRESS SAFETY PROBLEMS AT AN INTERSECTION WHICH WAS THE SITE OF FOURTEEN RIGHT-ANGLE COLLISIONS WAS THE PROXIMATE CAUSE OF THE FATAL COLLISION, STATE WAS 100% LIABLE DESPITE VEHICLE AND TRAFFIC LAW VIOLATION ON THE PART OF ONE OF THE DRIVERS (CT APP))/HIGHWAYS AND ROADS (INTERSECTIONS, TRAFFIC ACCIDENTS, STATE'S FAILURE TO TAKE STEPS TO ADDRESS SAFETY PROBLEMS AT AN INTERSECTION WHICH WAS THE SITE OF FOURTEEN RIGHT-ANGLE COLLISIONS WAS THE PROXIMATE CAUSE OF THE FATAL COLLISION, STATE WAS 100% LIABLE DESPITE VEHICLE AND TRAFFIC LAW VIOLATION ON THE PART OF ONE OF THE DRIVERS (CT APP))/TRAFFIC ACCIDENTS (INTERSECTIONS, STATE'S FAILURE TO TAKE STEPS TO ADDRESS SAFETY PROBLEMS AT AN INTERSECTION WHICH WAS THE SITE OF FOURTEEN RIGHT-ANGLE COLLISIONS WAS THE PROXIMATE CAUSE OF THE FATAL COLLISION, STATE WAS 100% LIABLE DESPITE VEHICLE AND TRAFFIC LAW VIOLATION ON THE PART OF ONE OF THE DRIVERS (CT APP))/VEHICLE AND TRAFFIC LAW (TRAFFIC ACCIDENTS, INTERSECTIONS, STATE'S FAILURE TO TAKE STEPS TO ADDRESS SAFETY PROBLEMS AT AN INTERSECTION WHICH WAS THE SITE OF FOURTEEN RIGHT-ANGLE COLLISIONS WAS THE PROXIMATE CAUSE OF THE FATAL COLLISION, STATE WAS 100% LIABLE DESPITE VEHICLE AND TRAFFIC LAW VIOLATION ON THE PART OF ONE OF THE DRIVERS (CT APP))

TAX LAW (COA)

REQUIREMENT THAT INDIAN RETAILERS COLLECT AND REMIT TAXES ON CIGARETTES SOLD TO NON-INDIAN CONSUMERS DOES NOT VIOLATE INDIAN LAW OR THE BUFFALO CREEK TREATY OF 1842 (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined the requirement that retailers on Indian lands collect and remit taxes on cigarettes sold to non-Indian consumers did not violate the Indian Law or the Buffalo Creek Treaty of 1842:

> Plaintiffs commenced this action seeking (1) a declaration that Tax Law § 471 is unconstitutional and invalid and (2) a permanent injunction enjoining defendants from enforcing the law against them. The complaint alleged that the tax law conflicts with the Buffalo Creek Treaty of 1842 and Indian Law § 6. * * *
>
> ... "[I]t is the legal burden of a tax—as opposed to its practical economic burden—that a state is categorically barred by federal law from imposing on tribes or tribal members" ... . The express language of New York's tax law provides that "the ultimate incidence of and liability for the tax shall be upon the consumer," and mandates that the tax money advanced by any "agent or dealer" be paid back by the consumer ... . * * *
>
> Tax Law § 471 does not constitute a tax on an Indian retailer, and therefore it does not run afoul of the plain language of the Treaty or Indian Law § 6. **White v Schneiderman, 2018 NY Slip Op 04028, CtApp 6-7-18**

TAX LAW (CIGARETTES, REQUIREMENT THAT INDIAN RETAILERS COLLECT AND REMIT TAXES ON CIGARETTES SOLD TO NON-INDIAN CONSUMERS DOES NOT VIOLATE INDIAN LAW OR THE BUFFALO CREEK TREATY OF 1842 (CT APP))/INDIAN LAW CIGARETTES, REQUIREMENT THAT INDIAN RETAILERS COLLECT AND REMIT TAXES ON CIGARETTES SOLD TO NON-INDIAN CONSUMERS DOES NOT VIOLATE INDIAN LAW OR THE BUFFALO CREEK TREATY OF 1842 (CT APP))/TREATIES (INDIAN LAW, CIGARETTES, REQUIREMENT THAT INDIAN RETAILERS COLLECT AND REMIT TAXES ON CIGARETTES SOLD TO NON-INDIAN CONSUMERS DOES NOT VIOLATE INDIAN LAW OR THE BUFFALO CREEK TREATY OF 1842 (CT APP))/CIGARETTES (INDIAN LAW, REQUIREMENT THAT INDIAN RETAILERS COLLECT AND REMIT TAXES ON CIGARETTES SOLD TO NON-INDIAN CONSUMERS DOES NOT VIOLATE INDIAN LAW OR THE BUFFALO CREEK TREATY OF 1842 (CT APP))

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