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FEATURED DECISION

ADVANCES IN MEDICINE AND SCIENCE CALL INTO QUESTION PREVIOUS OPINIONS ABOUT SHAKEN BABY SYNDROME, MOTION TO VACATE DEFENDANT'S CONVICTION GRANTED AND NEW TRIAL ORDERED.

The Fourth Department affirmed the grant of defendant's motion to vacate her conviction based on newly-discovered evidence. Defendant, a daycare provider, was convicted in the death of a toddler. Medical testimony at trial attributed the death to shaken baby syndrome. In the motion to vacate her conviction, defendant argued that advances in medicine and science have called into question the prior opinions about shaken baby syndrome, and indicate a short-distance fall can mimic the shaken baby symptoms:

Memorandum: The People appeal from an order granting defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting her, following a jury trial in 2002, of murder in the second degree (Penal Law § 125.25 [4]) based on newly discovered evidence (see CPL 440.10 [1] [g]), and granting her a new trial. The evidence at trial included medical testimony from three witnesses that the injuries sustained by the toddler, who was in the custody of defendant, a daycare provider, could have been caused only by shaken baby syndrome (SBS), also known as shaken baby impact syndrome (SBIS), and could not have been caused by a short-distance fall from a chair that was 18 inches in height, as defendant contended. On her direct appeal, we rejected defendant's challenges to the verdict, but we reduced the sentence as a matter of discretion in the interest of justice (People v Bailey, 8 AD3d 1024, lv denied 3 NY3d 670).

In 2013, defendant moved to vacate the judgment of conviction contending, inter alia, that advances in medicine and science had established that the injuries sustained by the toddler could have been caused by a short-distance fall and that newly discovered evidence related to another child's alleged observation of the incident established that the toddler had, in fact, jumped or fallen from the chair. Although County Court rejected other grounds for the CPL 440.10 motion, the court granted a hearing on the allegations of newly discovered evidence. Following that hearing,

FROM THE EDITOR

This is the 32nd issue of the Digest---an indexed compilation of the summaries of New York State appellate decisions posted weekly in November, 2016, on the “Just Released” page of www.newyorkappellatedigest.com

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the court granted the motion, vacated the judgment of conviction and granted defendant a new trial (People v Bailey, 47 Misc 3d 355). We now affirm.

"It is well settled that on a motion to vacate a judgment of conviction based on newly discovered evidence, the movant must establish, inter alia, that there is newly discovered evidence: (1) which will probably change the result if a new trial is granted; (2) which was discovered since the trial; (3) which could not have been discovered prior to trial; (4) which is material; (5) which is not cumulative; and[] (6) which does not merely impeach or contradict the record evidence . . . Defendant has the burden of establishing by a preponderance of the evidence every fact essential to support the motion" (People v Backus, 129 AD3d 1621, 1623, lv denied 27 NY3d 991 [internal quotation marks omitted]; see People v Salemi, 309 NY 208, 215-216, cert [*2]denied 350 US 950; People v White, 125 AD3d 1372, 1373). The determination of such a motion "rests within the sound discretion of the court" (Salemi, 309 NY at 215; see Backus, 129 AD3d at 1623-1624; White, 125 AD3d at 1373).

The People do not dispute that the allegedly new evidence is material, is not cumulative and does not merely impeach or contradict the record evidence. Rather, the People contend that the evidence submitted at the hearing does not constitute newly discovered evidence and would not change the result if a new trial were granted. We reject the People's contentions.

In general, advancements in science and/or medicine may constitute newly discovered evidence (see People v Chase, 8 Misc 3d 1016[A], 2005 NY Slip Op 51125[U], *8; People v Callace, 151 Misc 2d 464, 466), and we conclude that defendant established, by a preponderance of the evidence (see CPL 440.30 [6]), that "a significant and legitimate debate in the medical community has developed in the past ten years over whether infants [and toddlers] can be fatally injured through shaking alone, . . . and whether other causes [such as short-distance falls] may mimic the symptoms traditionally viewed as indicating shaken baby or shaken impact syndrome" (Wisconsin v Edmunds, 308 Wis 2d 374, 385-386, 746 NW2d 590, 596, review denied 308 Wis 2d 612, 749 NW2d 663; cf. People v Caldavado, 26 NY3d 1034, 1037; see generally Cavazos v Smith, ___ US ___, ___, 132 S Ct 2, 10 [Ginsburg, J., dissenting]).

We further conclude that defendant established, by a preponderance of the evidence (see CPL 440.30 [6]), that the newly discovered evidence would probably change the result if a new trial were held today. "A motion to vacate a judgment of conviction upon the ground of newly discovered evidence rests within the discretion of the hearing court . . . The court must make its final decision based upon the likely cumulative effect of the new evidence had it been presented at trial' " (People v Deacon, 96 AD3d 965, 967, appeal dismissed 20 NY3d 1046; see People v McFarland, 108 AD3d 1121, 1121, lv denied 24 NY3d 1220). Here, the cumulative effect of the research and findings on retinal hemorrhages, subdural hematomas or hemorrhages and cerebral edemas as presented in SBS/SBIS cases and short-distance fall cases supports the court's ultimate decision that, had this evidence been presented at trial, the verdict would probably have been different (cf. Caldavado, 26 NY3d at 1037).

We note that the court did not address defendant's contentions concerning evidence related to the child who had allegedly witnessed the incident because those contentions were moot, and we likewise decline to address those contentions on that ground. **People v Bailey, 2016 NY Slip Op 07490, 4th Dept 11-101-6**

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APPELLATE DIVISION

APPEALS

APPEALS (CIVIL, APPELLATE COURT MAY VACATE A JUDGMENT OR ORDER IN SOME CIRCUMSTANCES, EVEN WHERE THE APPEAL IS MOOT)

APPEALS.

APPELLATE COURT MAY VACATE A JUDGMENT OR ORDER IN SOME CIRCUMSTANCES, EVEN WHERE THE APPEAL IS MOOT.

The Second Department explained when an order of judgment can be vacated by an appellate court, even though the appeal has been rendered moot:

> "While it is the general policy of New York courts to simply dismiss an appeal which has been rendered academic, vacatur of an order or judgment on appeal may be an appropriate exercise of discretion where necessary in order to prevent a judgment which is unreviewable for mootness from spawning any legal consequences or precedent'" ... . **Markowits v Friedman, 2016 NY Slip Op 07933, 2nd Dept 11-23-16**

ARBITRATION

ARBITRATION (GRIEVANCE FILED AGAINST SCHOOL DISTRICT REGARDING THE DISTRICT'S STARTING A PLENARY ACTIONS AGAINST A TEACHER UNDER A FAITHLESS SERVANT THEORY WAS ARBITRABLE UNDER THE COLLECTIVE BARGAINING AGREEMENT)/EMPLOYMENT LAW (COLLECTIVE BARGAINING AGREEMENT, GRIEVANCE FILED AGAINST SCHOOL DISTRICT REGARDING THE DISTRICT'S STARTING A PLENARY ACTIONS AGAINST A TEACHER UNDER A FAITHLESS SERVANT THEORY WAS ARBITRABLE UNDER THE COLLECTIVE BARGAINING AGREEMENT)/EDUCATION-SCHOOL LAW (GRIEVANCE FILED AGAINST SCHOOL DISTRICT REGARDING THE DISTRICT'S STARTING A PLENARY ACTIONS AGAINST A TEACHER UNDER A FAITHLESS SERVANT THEORY WAS ARBITRABLE UNDER THE COLLECTIVE BARGAINING AGREEMENT)/FAITHLESS SERVANT THEORY (GRIEVANCE FILED AGAINST SCHOOL DISTRICT REGARDING THE DISTRICT'S STARTING A PLENARY ACTIONS AGAINST A TEACHER UNDER A FAITHLESS SERVANT THEORY WAS ARBITRABLE UNDER THE COLLECTIVE BARGAINING AGREEMENT)/TEACHERS (GRIEVANCE FILED AGAINST SCHOOL DISTRICT REGARDING THE DISTRICT'S STARTING A PLENARY ACTIONS AGAINST A TEACHER UNDER A FAITHLESS SERVANT THEORY WAS ARBITRABLE UNDER THE COLLECTIVE BARGAINING AGREEMENT)

ARBITRATION, EMPLOYMENT LAW, EDUCATION-SCHOOL LAW.

GRIEVANCE FILED AGAINST SCHOOL DISTRICT REGARDING THE DISTRICT'S STARTING A PLENARY ACTION AGAINST A TEACHER UNDER A FAITHLESS SERVANT THEORY WAS ARBITRABLE UNDER THE COLLECTIVE BARGAINING AGREEMENT.

The Second Department determined a grievance involving a teacher was arbitrable under the collective bargaining agreement (CBA). The grievance was filed by the teachers' association against the school district regarding the district's starting a plenary action against a teacher under a faithless servant theory:

Here, the respondent, Locust Valley Teachers' Association (hereinafter the LVTA), filed a grievance against the petitioner, Locust Valley Central School District (hereinafter the School District), regarding the commencement by the School District of a plenary action against a teacher formerly employed by the School District. The former teacher was a member of the LVTA. The applicable collective bargaining agreement (hereinafter CBA) between the parties provided that either party had the right to submit a grievance to arbitration, where that grievance was not resolved by the School District. The CBA defined a "grievance" as "a claimed violation, misinterpretation or inequitable application [of a] provision of th[e] Agreement." In the plenary action, the School District sought, under a "faithless servant" theory, the forfeiture of all compensation earned by the subject teacher pursuant to the CBA during a period of time in which the teacher allegedly engaged in certain criminal conduct. That conduct ultimately resulted in the teacher's plea of guilty to several criminal charges.

The School District has not identified any statutory, constitutional, or public policy prohibition against arbitrating the grievance. Further, in light of the fact that the grievance concerns the right of the School District to bring a plenary action seeking the equitable forfeiture of compensation paid to the teacher under the CBA, there exists a reasonable relationship between the grievance and the CBA. Therefore, the Supreme Court did not err in finding the grievance to be arbitrable pursuant to the CBA ... . **Locust Val. Cent. Sch. Dist. v Benstock, 2016 NY Slip Op 07299, 2nd Dept 11-9-16**

CIVIL PROCEDURE

CIVIL PROCEDURE (CHINESE NATIONAL NOT DOMICILED IN NEW YORK, NO RELATIONSHIP BETWEEN THE ALLEGATIONS IN THE COMPLAINT AND DEFENDANT'S TRANSACTION OF BUSINESS IN NEW YORK, COMPLAINT PROPERLY DISMISSED FOR LACK OF JURISDICTION)/JURISDICTION (PERSONAL) (CHINESE NATIONAL NOT DOMICILED IN NEW YORK, NO RELATIONSHIP BETWEEN THE ALLEGATIONS IN THE COMPLAINT AND DEFENDANT'S TRANSACTION OF BUSINESS IN NEW YORK, COMPLAINT PROPERLY DISMISSED FOR LACK OF JURISDICTION)

CIVIL PROCEDURE.

CHINESE NATIONAL NOT DOMICILED IN NEW YORK, NO RELATIONSHIP BETWEEN THE ALLEGATIONS IN THE COMPLAINT AND DEFENDANT'S TRANSACTION OF BUSINESS IN NEW YORK, COMPLAINT PROPERLY DISMISSED FOR LACK OF JURISDICTION.

The Second Department determined the complaint against a Chinese national was properly dismissed for lack of jurisdiction. The court explained the law re: (1) the burdens of proof for the motion to dismiss, (2) the procedure when discovery is required to determine jurisdiction, (3) the definition of "domicile" and (4) the nature of business transactions which will provide New York with jurisdiction:

... [T]he plaintiffs failed to make a prima facie showing that the defendant was domiciled in New York at the time the action was commenced in July 2013. Evidence of the defendant's ownership of a cooperative apartment in Queens is, on its own, insufficient to confer personal jurisdiction over him absent evidence of his intent to make the apartment his "fixed and permanent home" ... . The record demonstrated that the defendant resided in Shanghai, China, while his wife and daughter resided in the cooperative apartment in Queens. It was undisputed that the defendant had not even visited New York since March 2013. * * *

The transaction of business is established where it is shown that a " defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted'"... .

" Purposeful activities are those with which a defendant, through volitional acts, avails [himself or herself] of the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws'" ... . A single transaction in New York may suffice to invoke jurisdiction even if the defendant never enters the state, provided that the activity was purposeful and " there is a substantial relationship between the transaction and the claim asserted'"... . Indeed, absent " some articulable nexus'" between a defendant's purposeful business activities in the state and the plaintiff's claims, personal jurisdiction pursuant to CPLR 302(a)(1) may not be exercised ... .

Here, the sole purposeful activity cited by the plaintiffs in support of their argument that the defendant is subject to personal jurisdiction pursuant to CPLR 302(a)(1) is the employment relationship between Crystal Window and the defendant. However, the alleged wrongdoing upon which the complaint primarily is based occurred during the defendant's employment with Huai'an Crystal, a Chinese company, prior to any employment with Crystal Window. **Chen v Guo Liang Lu, 2016 NY Slip Op 07290, 2nd Dept 10-9-16**

CIVIL PROCEDURE (COURT SHOULD NOT HAVE DENIED DISMISSAL-SUMMARY JUDGMENT MOTIONS ON A GROUND NOT RAISED IN OPPOSITION AND ON TECHNICAL GROUNDS WHICH SHOULD HAVE BEEN IGNORED)/SUMMARY JUDGMENT, MOTIONS FOR (COURT SHOULD NOT HAVE DENIED DISMISSAL-SUMMARY JUDGMENT MOTIONS ON A GROUND NOT RAISED IN OPPOSITION AND ON TECHNICAL GROUNDS WHICH SHOULD HAVE BEEN IGNORED)

CIVIL PROCEDURE.

COURT SHOULD NOT HAVE DENIED DISMISSAL-SUMMARY JUDGMENT MOTIONS ON A GROUND NOT RAISED IN OPPOSITION AND ON TECHNICAL GROUNDS WHICH SHOULD HAVE BEEN IGNORED.

The Second Department determined: (1) a motion for summary judgment should not have been denied based upon a ground not raised by any party in opposition; (2) a motion for summary judgment should not have been denied based on the failure to attach all of the parties' pleadings to the motion papers; and (3) a motion should not have been denied because it was directed at an amended complaint which was never served, rather than the original complaint:

> The Supreme Court erred in denying that branch of the ... defendants' motion which was for summary judgment dismissing the complaint insofar as asserted against them due to their failure to provide all of the pleadings, as required by CPLR 3212(b). In this regard, the ... defendants submitted the complaint and their answer, but did not submit the answers of the other defendants. The ... plaintiffs, in opposition, did not contend that this branch of the ... defendants' motion should be denied due to the ... defendants' failure to fully comply with CPLR 3212(b). Consequently, the court should not have raised the issue on the ... plaintiffs' behalf ... . Moreover, under the circumstances, the ... defendants' failure to submit the answers of the other defendants was a mere irregularity and, since no substantial right of any party was prejudiced, the court should have disregarded that defect and reached the merits of that branch of the ... defendants' motion ... .
>
> ... [T]he court should have disregarded the error ... in moving against the amended complaint instead of the original complaint, since it did not affect the merits or prejudice a substantial right of the ... plaintiffs ... . **Mew Equity, LLC v Sutton Land Servs., LLC, 2016 NY Slip Op 07630, 2nd Dept 11-16-16**

CIVIL PROCEDURE (COURT PROPERLY AWARDED DECLARATORY JUDGMENT IN DEFENDANT'S FAVOR AS A MATTER OF LAW UPON DEFENDANT'S MOTION TO DISMISS)/DECLARATORY JUDGMENT (COURT PROPERLY AWARDED DECLARATORY JUDGMENT IN DEFENDANT'S FAVOR AS A MATTER OF LAW UPON DEFENDANT'S MOTION TO DISMISS)

CIVIL PROCEDURE.

COURT PROPERLY AWARDED DECLARATORY JUDGMENT IN DEFENDANT'S FAVOR AS A MATTER OF LAW UPON DEFENDANT'S MOTION TO DISMISS.

The Second Department determined Supreme Court properly determined a declaratory judgment action in defendant's favor as a matter of law in the context of defendant's motion to dismiss:

A motion to dismiss a cause of action for declaratory relief generally "presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration" ... . However, "where the court, deeming the material allegations of the complaint to be true, is nonetheless able to determine, as a matter of law, that the defendant is entitled to a declaration in his or her favor, the court may enter a judgment making the appropriate declaration" ... . Here, deeming the material allegations of the complaint to be true and considering the documents that were attached to and made part of the complaint (see CPLR 3014), including the stipulation of settlement, the Supreme Court properly determined, as a matter of law, that defendant was entitled to a declaration in her favor ... . **Pilgrim v Pantorilla, 2016 NY Slip Op 07634, 2nd Dept 11-16-16**

CIVIL PROCEDURE (FAILURE TO FILE PROOF OF SERVICE IS A CORRECTABLE DEFECT, PETITION SHOULD NOT HAVE BEEN DENIED ON THAT GROUND)/SERVICE, PROOF OF (FAILURE TO FILE PROOF OF SERVICE IS A CORRECTABLE DEFECT, PETITION SHOULD NOT HAVE BEEN DENIED ON THAT GROUND)

CIVIL PROCEDURE.

FAILURE TO FILE PROOF OF SERVICE IS A CORRECTABLE DEFECT, PETITION SHOULD NOT HAVE BEEN DENIED ON THAT GROUND.

The Second Department determined failure to file proof of service of a petition and notice of petition should not have resulted in the denial of the petition. The motion court raised the ground for denial itself. Rather than denying the petition, the motion court should have alerted the parties to the defect and allowed it to be cured:

"The failure to file proof of service is a procedural irregularity, not a jurisdictional defect, that may be cured by motion or sua sponte by the court in its discretion pursuant to CPLR 2004" ... . Here, there is no dispute that the respondents were served with the notice of petition and petition, as they moved to dismiss on the ground that the petition failed to state a cause of action. At no time did they argue that the proceeding should be dismissed for failure to file proof of service. As such, the parties did not have an opportunity to address the purported failure to file proof of service, the ground upon which the Supreme Court relied in denying the petition and dismissing the proceeding, even though such defect is readily curable (see CPLR 2001, 2004). "The lack of notice and opportunity to be heard implicates the fundamental issue of fairness that is the cornerstone of due process" ... . Therefore, the Supreme Court should have alerted the parties to the purported defect and afforded the appellant an opportunity to correct it, rather than denying the petition and dismissing the proceeding... . **Matter of Meighan v Ponte, 2016 NY Slip Op 07653, 2nd Dept 11-16-16**

CIVIL PROCEDURE (MOTION TO AMEND ANSWER TO ASSERT STATUTE OF LIMITATIONS DEFENSE, MADE SIX YEARS AFTER INITIAL ANSWER WAS SERVED, SHOULD HAVE BEEN DENIED)/ANSWER, MOTION TO AMEND MOTION TO AMEND ANSWER TO ASSERT STATUTE OF LIMITATIONS DEFENSE, MADE SIX YEARS AFTER INITIAL ANSWER WAS SERVED, SHOULD HAVE BEEN DENIED)/STATUTE OF LIMITATIONS (MOTION TO AMEND ANSWER TO ASSERT STATUTE OF LIMITATIONS DEFENSE, MADE SIX YEARS AFTER INITIAL ANSWER WAS SERVED, SHOULD HAVE BEEN DENIED)

CIVIL PROCEDURE.

MOTION TO AMEND ANSWER TO ASSERT STATUTE OF LIMITATIONS DEFENSE, MADE SIX YEARS AFTER INITIAL ANSWER WAS SERVED, SHOULD HAVE BEEN DENIED.

The Second Department, reversing Supreme Court, determined the County's motion to amend its answer to assert a statute of limitations defense, six years after the initial answer was served, should have been denied:

The County waived a defense based on the statute of limitations by not raising that defense in its answer ... . Nevertheless, defenses waived under CPLR 3211(e) can be interposed in an answer amended by leave of the court pursuant to CPLR 3025(b) ... . " In the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit'" ... . " A determination whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed'" ... . " In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated [and] whether a reasonable excuse for the delay was offered'" ... . " [W]here the application for leave to amend is made long after the action has been certified for trial, judicial discretion in allowing such amendments should be discrete, circumspect, prudent and cautious'" ... .

We agree with the plaintiffs that the Supreme Court improvidently exercised its discretion in granting the County's motion for leave to amend its answer to assert the statute of limitations as a defense and for summary judgment dismissing the complaint as time-barred ... . The County's motion was not made until approximately six years after service of its answer, after the parties had completed discovery, and after the note of issue had been filed. Under these circumstances, the plaintiffs have suffered significant prejudice from the County's delay in asserting the statute of limitations as a defense ... . **Civil Serv. Empls. Assn. v County of Nassau, 2016 NY Slip Op 08038, 2nd Dept 11-30-16**

CIVIL PROCEDURE (1983 ACTIONS AGAINST INDIVIDUAL POLICE OFFICERS DO NOT RELATE BACK TO THE ACTION AGAINST THE CITY, MOTION TO AMEND THE COMPLAINT BY ADDING NAMED OFFICERS PROPERLY DENIED)/CIVIL RIGHTS (18 USC 1983) (1983 ACTIONS AGAINST INDIVIDUAL POLICE OFFICERS DO NOT RELATE BACK TO THE ACTION AGAINST THE CITY, MOTION TO AMEND THE COMPLAINT BY ADDING NAMED OFFICERS PROPERLY DENIED)/MUNICIPAL LAW (1983 ACTIONS AGAINST INDIVIDUAL POLICE OFFICERS DO NOT RELATE BACK TO THE ACTION AGAINST THE CITY, MOTION TO AMEND THE COMPLAINT BY ADDING NAMED OFFICERS PROPERLY DENIED)/POLICE OFFICERS (1983 ACTIONS AGAINST INDIVIDUAL POLICE OFFICERS DO NOT RELATE BACK TO THE ACTION AGAINST THE CITY, MOTION TO AMEND THE COMPLAINT BY ADDING NAMED OFFICERS PROPERLY DENIED)

CIVIL PROCEDURE, CIVIL RIGHTS (18 USC 1983), MUNICIPAL LAW.

1983 ACTIONS AGAINST INDIVIDUAL POLICE OFFICERS DO NOT RELATE BACK TO THE ACTION AGAINST THE CITY, MOTION TO AMEND THE COMPLAINT BY ADDING NAMED OFFICERS PROPERLY DENIED.

The First Department determined plaintiffs motion to amend the complaint by adding named police officers (previously listed in the complaint as John or Jane Doe) as defendants was properly denied. The statute of limitations for civil rights violation under 18 USC 1983 had passed. The plaintiffs unsuccessfully argued the relation-back doctrine applied because there was a unity of interest between the city defendant and the named police officers:

Plaintiffs argue that Officers Crocitto and Palmerini are united in interest with the City of New York, one of the original defendants, because the officers are employees of the City. It is undisputed, however, that the City cannot be held vicariously liable for its employees' violations of 42 USC § 1983. Rather, the City can be held liable under 42 USC § 1983 only for violating that statute through an unconstitutional official policy or custom ... . Thus, it simply cannot be said that the fortunes in this action of the City and of either Officer Crocitto or Officer Palmerini "stand or fall together and that judgment against one will similarly affect the other" ... . Because the City has no vicarious liability for Officers Crocitto's and Palmerini's alleged misconduct under 42 USC § 1983, the two officers are not united in interest with the City with respect to the federal false arrest and excessive force claims against them, and the interposition of those claims against the officers does not relate back to the commencement of the action against the City for purposes of the statute of limitations. **Higgins v City of New York, 2016 NY Slip Op 07748, 1st Dept 11-17-16**

CIVIL PROCEDURE (CIVIL MATTER PROPERLY STAYED UNTIL RELATED CRIMINAL MATTER RESOLVED)/CRIMINAL LAW (CIVIL MATTER PROPERLY STAYED UNTIL RELATED CRIMINAL MATTER RESOLVED)

CIVIL PROCEDURE, CRIMINAL LAW.

CIVIL MATTER PROPERLY STAYED UNTIL RELATED CRIMINAL MATTER RESOLVED, DISCRETIONARY CRITERIA EXPLAINED.

The Second Department determined Supreme Court properly stayed a civil matter after the defendant was indicted in a related criminal matter and indicated he would invoke his Fifth Amendment right to remain silent if the civil matter went forward:

> A motion pursuant to CPLR 2201 to stay a civil action pending resolution of a related criminal action is directed to the sound discretion of the trial court ... . "Factors to consider include avoiding the risk of inconsistent adjudications, [duplication] of proof and potential waste of judicial resources. A compelling factor is a situation where a defendant will invoke his or her constitutional right against self incrimination" ... . "Although the pendency of a criminal proceeding does not give rise to an absolute right under the United States or New York State Constitutions to a stay of a related civil proceeding . . . there is no question but that the court may exercise its discretion to stay proceedings in a civil action until a related criminal dispute is resolved" ... .
>
> Here, this action and the criminal proceeding against Samuel arise from the same facts. While a stay may cause inconvenience and delay to the plaintiffs, the failure to grant the stay would cause Samuel to "suffer the severe prejudice of being deprived of a defense" ... . Moreover, a prior determination in the criminal proceeding could have collateral estoppel effect in this action, thereby simplifying the issues ... . **Mook v Homesafe Am., Inc., 2016 NY Slip Op 08054, 2nd Dept 11-30-16**

CIVIL PROCEDURE (CRITERIA FOR A MOTION TO DISMISS NOT MET, SUPREME COURT SHOULD NOT HAVE DISMISSED BY MAKING A FINDING IN A MATTER PENDING BEFORE THE COMPTROLLER)/DISMISS, MOTION TO (CRITERIA FOR A MOTION TO DISMISS NOT MET, SUPREME COURT SHOULD NOT HAVE DISMISSED BY MAKING A FINDING IN A MATTER PENDING BEFORE THE COMPTROLLER)

CIVIL PROCEDURE, EMPLOYMENT LAW, CONTRACT LAW.

CRITERIA FOR A MOTION TO DISMISS NOT MET, SUPREME COURT SHOULD NOT HAVE DISMISSED BY MAKING A FINDING IN A MATTER PENDING BEFORE THE COMPTROLLER.

In an action stemming from the withholding of payment to plaintiff subcontractor, the Second Department determined the breach of contract cause of action should not have been dismissed, but noted that a conversion action cannot be based upon a breach of contract, and an unjust enrichment cause of action cannot coexist with a breach of contract cause of action. Supreme Court had dismissed the breach of contract cause of action, finding the defendant had a legal right to withhold payment under Labor Law 220 because complaints had been lodged for failure to pay the prevailing wage for this school construction project. But since the Comptroller had not yet ruled on the Labor Law 220 complaints, Supreme Court should not have based its dismissal on them by making its own finding:

> On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" ... . While a court is "permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7)" ... , "where the

motion is not converted to one for summary judgment, the criterion is whether the [third-party plaintiff] has a cause of action, not whether [it] has stated one, and, unless it has been shown that a material fact as claimed by the [third-party plaintiff] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it . . . dismissal should not eventuate'" ... . A motion to dismiss pursuant to CPLR 3211(a)(1) may appropriately be granted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" ... . * * *

The Supreme Court erred in dismissing the third-party cause of action alleging breach of contract on the ground that the third-party defendants had a legal right to withhold payment pursuant to Labor Law §§ 220 and 220-b. Based upon the record before us, there is no indication that the Comptroller has rendered a final determination regarding the alleged Labor Law § 220 violation. As such, the court, in effect, determined the prevailing wage issue, which is within the exclusive province of the Comptroller, prior to a determination by the Comptroller ... . Thus, the evidentiary material submitted by the third-party defendants, which demonstrated that payment to AGC under the subject contracts was withheld pending the Comptroller's determination, failed to establish that any fact alleged in support of the third-party breach of contract cause of action was undisputedly not a fact, and failed to conclusively establish a defense as a matter of law to that cause of action. **Gym Door Repairs, Inc. v Astoria Gen. Contr. Corp., 2016 NY Slip Op 08047, 2nd Dept 11-30-16**

CIVIL PROCEDURE (EXPERT DISCLOSURE NOTICE NEED NOT DISCLOSE FACTS AND OPINIONS ABOUT WHICH EXPERT WILL TESTIFY, LATE EXPERT OPINION NOTICE FOR A REBUTTAL WITNESS SHOULD HAVE BEEN ACCEPTED)/EVIDENCE (EXPERT DISCLOSURE NOTICE NEED NOT DISCLOSE FACTS AND OPINIONS ABOUT WHICH EXPERT WILL TESTIFY, LATE EXPERT OPINION NOTICE FOR A REBUTTAL WITNESS SHOULD HAVE BEEN ACCEPTED)/EXPERT OPINION (EXPERT DISCLOSURE NOTICE NEED NOT DISCLOSE FACTS AND OPINIONS ABOUT WHICH EXPERT WILL TESTIFY, LATE EXPERT OPINION NOTICE FOR A REBUTTAL WITNESS SHOULD HAVE BEEN ACCEPTED)/REBUTTAL EXPERT OPINION (EXPERT DISCLOSURE NOTICE NEED NOT DISCLOSE FACTS AND OPINIONS ABOUT WHICH EXPERT WILL TESTIFY, LATE EXPERT OPINION NOTICE FOR A REBUTTAL WITNESS SHOULD HAVE BEEN ACCEPTED)

CIVIL PROCEDURE, EVIDENCE, NEGLIGENCE.

EXPERT DISCLOSURE NOTICE NEED NOT DISCLOSE FACTS AND OPINIONS ABOUT WHICH EXPERT WILL TESTIFY, LATE EXPERT DISCLOSURE NOTICE FOR A REBUTTAL WITNESS SHOULD HAVE BEEN ACCEPTED.

The First Department, in remanding for a new trial, determined (1) the expert disclosure notice provided by the defense was sufficient, and (2) plaintiff should have been allowed, during the trial, to submit an expert disclosure notice for a rebuttal witness. Plaintiff alleged his foot was run over by a bus:

After the defense rested, plaintiff's attorney sought permission to call two rebuttal witnesses. He submitted a CPLR 3101(d)(1) notice for an expert in biomechanical medicine, arguing that the disclosure notice for Dr. Kurtz had provided no indication that the doctor's opinion was based on the lack of tread marks or injury to the metatarsals and ankle. He argued that the notice's insufficiency had not allowed him to prepare an expert witness to address these issues directly. His proposed expert would demonstrate, by use of an anatomical model of a foot, that plaintiff's foot could have been positioned after he fell in such a manner that when the bus wheel rolled over his foot, his ankle and upper foot would not have been injured as Dr. Kurtz claimed. The court denied his request based on the timing of the notice and its reasoning that no rebuttal was needed. ...

We find that Dr. Kurtz's CPLR 3101(d)(1) disclosure notice was legally sufficient; it provided plaintiff with notice that the doctor would question whether a bus would have caused the injuries sustained by plaintiff. It is improper for a party to request the facts and opinions upon which another party's expert is expected to testify ... . * * *

... [N]otwithstanding the delay by plaintiff in providing a CPLR 3101(d)(1) disclosure for his medical expert, the trial court, in the interest of justice, should have permitted the medical expert to testify in rebuttal. The court had allowed Dr. Kurtz to opine that there were inconsistencies between the claim of how the accident occurred and the resulting injuries, and although the testimony was not in his expertise, it was heard by the jury and opened the door to the

necessity for plaintiff to produce a medical expert to attempt to rebut those opinions. **Tate-Mitros v MTA N.Y. City Tr., 2016 NY Slip Op 07394, 1st Dept 11-10-16**

CIVIL PROCEDURE (SUPREME COURT SHOULD NOT HAVE DISMISSED THE DECLARATORY JUDGMENT PORTION OF THIS HYBRID ACTION BECAUSE NO MOTION FOR SUMMARY DETERMINATION OF THAT PORTION OF THE PROCEEDING HAD BEEN MADE)/DECLARATORY JUDGMENT (SUPREME COURT SHOULD NOT HAVE DISMISSED THE DECLARATORY JUDGMENT PORTION OF THIS HYBRID ACTION BECAUSE NO MOTION FOR SUMMARY DETERMINATION OF THAT PORTION OF THE PROCEEDING HAD BEEN MADE)/HYBRID ACTIONS (SUPREME COURT SHOULD NOT HAVE DISMISSED THE DECLARATORY JUDGMENT PORTION OF THIS HYBRID ACTION BECAUSE NO MOTION FOR SUMMARY DETERMINATION OF THAT PORTION OF THE PROCEEDING HAD BEEN MADE)/ARTICLE 78 (HYBRID ARTICLE 78-DECLARATORY JUDGMENT ACTION, (SUPREME COURT SHOULD NOT HAVE DISMISSED THE DECLARATORY JUDGMENT PORTION OF THIS HYBRID ACTION BECAUSE NO MOTION FOR SUMMARY DETERMINATION OF THAT PORTION OF THE PROCEEDING HAD BEEN MADE)

CIVIL PROCEDURE.

SUPREME COURT SHOULD NOT HAVE DISMISSED THE DECLARATORY JUDGMENT PORTION OF THIS HYBRID ARTICLE 78/SUMMARY JUDGMENT ACTION BECAUSE NO MOTION FOR SUMMARY DETERMINATION OF THAT PORTION OF THE PROCEEDING HAD BEEN MADE.

The Second Department reversed the dismissal of a petition because a question of fact had been raised about the adequacy of notice of a tax lien. The Second Department also reversed the dismissal of the declaratory judgment portion of this hybrid Article 78/declaratory judgment action because no motion had been made for summary determination of declaratory judgment request:

> "In a hybrid proceeding and action, separate procedural rules apply to those causes of action which are asserted pursuant to CPLR article 78, on the one hand, and those which seek to recover damages and declaratory relief, on the other hand. The Supreme Court may not employ the summary procedure applicable to a CPLR article 78 cause of action to dispose of causes of action to recover damages or seeking a declaratory judgment" ... . "Thus, where no party makes a request for a summary determination of the causes of action which seek to recover damages or declaratory relief, it is error for the Supreme Court to summarily dispose of those causes of action" ... . Here, since no party made such a motion, the Supreme Court should not have summarily disposed of the cause of action that sought declaratory relief, and the matter must be remitted to the Supreme Court, Nassau County, for further proceedings on that cause of action ... . **Matter of East W. Bank v L & L Assoc. Holding Corp., 2016 NY Slip Op 07956, 2nd Dept 11-23-16**

CIVIL PROCEDURE (NEW YORK DID NOT HAVE JURISDICTION OVER DEFENDANT IN THIS SUIT SEEKING PAYMENT OF A PROMISSORY NOTE, DEFENDANT HAD NO CONNECTION WITH NEW YORK OTHER THAN A NEW YORK AGENT OVER WHICH DEFENDANT EXERCISED NO CONTROL AND A NEW YORK CHOICE OF LAW PROVISION IN THE SUBSCRIPTION AGREEMENT)/JURISDICTION (LONG-ARM, NEW YORK DID NOT HAVE JURISDICTION OVER DEFENDANT IN THIS SUIT SEEKING PAYMENT OF A PROMISSORY NOTE, DEFENDANT HAD NO CONNECTION WITH NEW YORK OTHER THAN A NEW YORK AGENT OVER WHICH DEFENDANT EXERCISED NO CONTROL AND A NEW YORK CHOICE OF LAW PROVISION IN THE SUBSCRIPTION AGREEMENT)/LONG-ARM JURISDICTION (NEW YORK DID NOT HAVE JURISDICTION OVER DEFENDANT IN THIS SUIT SEEKING PAYMENT OF A PROMISSORY NOTE, DEFENDANT HAD NO CONNECTION WITH NEW YORK OTHER THAN A NEW YORK AGENT OVER WHICH DEFENDANT EXERCISED NO CONTROL AND A NEW YORK CHOICE OF LAW PROVISION IN THE SUBSCRIPTION AGREEMENT)

CIVIL PROCEDURE.

NEW YORK DID NOT HAVE JURISDICTION OVER DEFENDANT IN THIS SUIT SEEKING PAYMENT OF A PROMISSORY NOTE, DEFENDANT HAD NO CONNECTION WITH NEW YORK OTHER THAN A NEW YORK AGENT OVER WHICH DEFENDANT EXERCISED NO CONTROL AND A NEW YORK CHOICE OF LAW PROVISION IN THE SUBSCRIPTION AGREEMENT.

In a lengthy opinion by Justice Austin, too detailed to be fairly summarized here, the Second Department determined a New York agent (Kraft) which acted on the investors', including defendant's, behalf, but over which the defendant exercised no control, and a subscription agreement with a New York choice of law provision were insufficient, under the facts, to confer jurisdiction of New York courts over the lawsuit. The lawsuit sought payment on a note which was related to defendant's investment in an oil and gas joint venture (AIV). Defendant resided in Illinois, the note was executed in Illinois, and defendant did not transact any business in New York:

> Here, the defendant did not personally transact business in New York, and the complaint does not contain any allegations that he did so ... . After the defendant executed the Subscription Agreement and the note in Illinois, the only acts connecting him to New York with respect to his investment in AIV were sending one letter in December 1997 to representatives of AIV and engaging in a telephone conversation with representatives of AIV ... . Moreover, no meetings were held in New York between the defendant and the plaintiffs ... . Even though CPLR 302(a) is a single-act statute, contrary to the plaintiffs' contention, the defendant's act of appointing Kraft, a corporation that maintains its principal office in New York, as his attorney-in-fact upon investing in the joint venture is not sufficient to invoke jurisdiction. * * *
>
> Accepting the plaintiffs' assertions that Kraft executed business orders and drilling and operating agreements and collected and distributed monies on the defendant's behalf in New York State, and that knowledge of and consent to Kraft's actions were established by the Subscription Agreement, which appointed Kraft as his attorney-in-fact with regard to these transactions, the defendant's lack of control undermines a finding of an agency relationship. **America/International 1994 Venture v Mau, 2016 NY Slip Op 07915, 2nd Dept 11-23-16**

CONTRACT LAW

CONTRACT LAW (THE FACT THAT THE AMOUNT TO BE USED TO CALCULATE DEFENDANT'S COMPENSATION WAS NOT SET IN THE CONTRACT, BUT RATHER WAS TO BE ESTABLISHED AND AGREED TO LATER, DID NOT INVALIDATE THE CONTRACT AS A MERE AGREEMENT TO AGREE, THE AMOUNT COULD BE DETERMINED BY EXTRINSIC INFORMATION)

CONTRACT LAW.

THE FACT THAT THE AMOUNT TO BE USED TO CALCULATE DEFENDANT'S COMPENSATION WAS NOT SET IN THE CONTRACT, BUT RATHER WAS TO BE ESTABLISHED AND AGREED TO, DID NOT INVALIDATE THE CONTRACT AS A MERE AGREEMENT TO AGREE; THE AMOUNT COULD BE DETERMINED BY EXTRINSIC INFORMATION.

The Third Department, reversing (modifying Supreme Court) determined a material term of a contract could be adequately fleshed out by extrinsic evidence. Therefore the contract should not have been invalidated as a mere "agreement to agree." Defendant was hired as a consultant by plaintiff, the parent company of a number of banks, to maximize income from overdrafts. Defendant's fee was to be based on plaintiff's income over a "baseline" amount to be established by defendant (and agreed to by plaintiff):

> Supreme Court determined that, because the baseline was an indefinite material term, the agreement was unenforceable as a "mere agreement to agree" ... . We do not agree. "[W]here it is clear from the language of an agreement that the parties intended to be bound and there exists an objective method for supplying a missing term, the court should endeavor to hold the parties to their bargain. Striking down a contract as indefinite and in essence meaningless is at best a last resort" ... . If, "at the time of agreement the parties have manifested their intent to be bound, a price term may be sufficiently definite if the amount can be determined objectively without the need for new expressions by the parties; . . . for example, [the price term might] be . . . ascertained by reference to an extrinsic event" ... . Here, the parties' conduct evinced that they intended to be bound by the agreement and, in our view, the baseline could be ascertained with reference to an extrinsic event, that is, defendant's calculation derived from the existing historical data ... . Accordingly, we find that the agreement was enforceable. **Tompkins Fin. Corp. v John M. Floyd & Assoc., Inc., 2016 NY Slip Op 07252, 3rd Dept 11-3-16**

CONTRACT LAW (AMBIGUOUS TERMS IN CONTRACT NOT CLARIFIED BY PAROL EVIDENCE, TRIABLE ISSUES OF FACT PRECLUDED SUMMARY JUDGMENT)

CONTRACT LAW.

AMBIGUOUS TERMS IN CONTRACT NOT CLARIFIED BY PAROL EVIDENCE, TRIABLE ISSUES OF FACT PRECLUDED SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined the applicable provisions of a construction contract were ambiguous and defendant's motion for summary judgment should have been denied. The plaintiff installed a sidewalk shed around a school building to facilitate its roof work. A dispute arose whether the construction of the sidewalk shed was included in the contract, or whether it was extra work for which extra compensation was due:

> A contractor may properly recover payment for extra work that is not contemplated by the terms of the original agreement, and which is performed at the direction of the defendant ... . However, a contractor may not recover for any alleged extra work that was actually covered by the terms of the original contract ... . * * *

... [T]he contract provision requiring the plaintiff to install sidewalk shedding "to provide proper protection to the school population, workers and pedestrians" is ambiguous with respect to whether it obligated the plaintiff to install a sidewalk shed around the existing building. Moreover, contrary to the Supreme Court's conclusion, the provision in the contract providing that the plaintiff must install "sidewalk sheds and/or fences . . . in the most conservative manner" is also ambiguous as to whether the plaintiff was required to install a sidewalk shed around the existing building and is subject to different interpretations. The parol evidence submitted by the plaintiff does not conclusively resolve this ambiguity. Thus, in light of these ambiguities as to whether the contract required the plaintiff to perform the work in question, there are triable issues of fact which preclude a grant of summary judgment to either party... . **Arnell Constr. Corp. v New York City Sch. Constr. Auth., 2016 NY Slip Op 07282, 2nd Dept 11-9-16**

CONTRACT LAW (INDEMNITOR WAS NOT NOTIFIED OF A TAX AUDIT UNTIL A TAX ASSESSMENT WAS IMPOSED, PREJUDICE SUFFICIENT TO RELIEVE THE INDEMNITOR OF THE CONTRACTUAL OBLIGATION TO INDEMNIFY NEED NOT ENTAIL TANGIBLE ECONOMIC LOSS, IT IS ENOUGH THE INDEMNITOR WAS DENIED THE OPPORTUNITY TO CONTROL THE DEFENSE OF THE AUDIT)/INDEMNIFICATION (INDEMNITOR WAS NOT NOTIFIED OF A TAX AUDIT UNTIL A TAX ASSESSMENT WAS IMPOSED, UNDER THE CONTRACT, PREJUDICE SUFFICIENT TO RELIEVE THE INDEMNITOR OF THE CONTRACTUAL OBLIGATION TO INDEMNIFY NEED NOT ENTAIL TANGIBLE ECONOMIC LOSS, IT WAS ENOUGH THE INDEMNITOR WAS DENIED THE OPPORTUNITY TO CONTROL THE DEFENSE OF THE AUDIT)

CONTRACT LAW.

INDEMNITOR WAS NOT NOTIFIED OF A TAX AUDIT UNTIL A TAX ASSESSMENT WAS IMPOSED, UNDER THE CONTRACT, PREJUDICE SUFFICIENT TO RELIEVE THE INDEMNITOR OF THE CONTRACTUAL OBLIGATION TO INDEMNIFY NEED NOT ENTAIL TANGIBLE ECONOMIC LOSS, IT WAS ENOUGH THE INDEMNITOR WAS DENIED THE OPPORTUNITY TO CONTROL THE DEFENSE OF THE AUDIT.

The First Department determined the plaintiffs' motion for summary judgment relieving them of liability for the costs of a tax audit should have been granted. In a stock purchase agreement (SPA) plaintiffs agreed to indemnify Dearborn for costs associated with tax audits relating to any time up until the closing date. Dearborn had been sold by plaintiffs to a third party. A tax audit of Dearborn was conducted resulting in a $2.2 million tax assessment. In violation of the SPA, Dearborn did not notify plaintiffs of the tax audit. The SPA provided that the failure to notify would be actionable only to the extent plaintiffs were prejudiced by it. The issue before the First Department was whether the prejudice must be economic loss, or whether the inability to control the defense of the tax audit was sufficient. Reversing Supreme Court, the First Department held the deprivation of the right to control the defense of the audit was sufficient:

> What we must determine, therefore, is the standard that plaintiffs must meet to demonstrate that the untimely notice of the second audit that they received caused them actual prejudice, and whether, on this record, that standard has been met. We agree with plaintiffs that, contrary to the view of Supreme Court and the position of defendants, in view of their "sole right" under the SPA to "control" the defense of the second audit (expressly including the rights to choose counsel and to settle), plaintiffs need not establish "tangible economic injury" to show that they have been actually prejudiced by the late notice ... . Rather, to establish actual prejudice due to late notice, it suffices for an indemnitor afforded the right to control the defense of an idemnifiable claim to show that it was deprived of its right to exercise that right for a material portion of the proceedings on the claim. **Conergics Corp. v Dearborn Mid-West Conveyor Co., 2016 NY Slip Op 07750, 1st Dept 11-17-16**

CONTRACT LAW (DIFFERENCE BETWEEN A DESIGN SPECIFICATION CONSTRUCTION CONTRACT AND A PERFORMANCE SPECIFICATION CONSTRUCTION CONTRACT EXPLAINED)/DESIGN SPECIFICATION CONTRACT (DIFFERENCE BETWEEN A DESIGN SPECIFICATION CONSTRUCTION CONTRACT AND A PERFORMANCE SPECIFICATION CONSTRUCTION CONTRACT EXPLAINED)/PERFORMANCE SPECIFICATION CONTRACT (DIFFERENCE BETWEEN A DESIGN SPECIFICATION CONSTRUCTION CONTRACT AND A PERFORMANCE SPECIFICATION CONSTRUCTION CONTRACT EXPLAINED)/CONSTRUCTION CONTRACTS (DIFFERENCE BETWEEN A DESIGN SPECIFICATION CONSTRUCTION CONTRACT AND A PERFORMANCE SPECIFICATION CONSTRUCTION CONTRACT EXPLAINED)

CONTRACT LAW.

DIFFERENCE BETWEEN A DESIGN SPECIFICATION CONSTRUCTION CONTRACT AND A PERFORMANCE SPECIFICATION CONSTRUCTION CONTRACT EXPLAINED.

The Third Department determined the contract between plaintiff contractor and property-owner defendant was a design specification contract, as opposed to a performance specification contract. Therefore plaintiff contractor could not be held responsible for defects in materials, methods or design, which were the responsibility of the property owner:

> In contrast to a performance specification contract, which affords a contractor the freedom to choose the materials and methods employed to achieve a specified result, a design specification contract requires a contractor to use the materials, methods and design dictated by the owner, without bearing any "responsibility if the design proves inadequate to achieve the intended result" ... . In other words, when there is a design specification contract, a contractor follows the architectural plans and specifications provided by an owner, and the contractor will not be responsible for the consequences of defects in such plans and specifications or be prevented from recovering contractually-agreed upon payments for work completed in compliance with them ... . Whether a construction contract is one of performance or design specification turns on the language of the contract as a whole, with consideration given to factors such as "the nature and degree of the contractor's involvement in the specification process, and the degree to which the contractor is allowed to exercise discretion in carrying out its performance" ... . **CGM Constr., Inc. v Sydor, 2016 NY Slip Op 07895, 3rd Dept 11-23-16**

CONTRACT LAW (CONTRACTUALLY SHORTENED STATUTE OF LIMITATIONS ENFORCED)/CIVIL PROCEDURE (CONTRACTUALLY SHORTENED STATUTE OF LIMITATIONS ENFORCED)/STATUTE OF LIMITATIONS (CONTRACTUALLY SHORTENED STATUTE OF LIMITATIONS ENFORCED)

CONTRACT LAW, CIVIL PROCEDURE.

CONTRACTUALLY SHORTENED STATUTE OF LIMITATIONS ENFORCED.

The Second Department determined a shortened statute of limitations agreed to in a stock purchase contract was properly enforced. Plaintiff discovered that defendant had not paid the full purchase price for the stock, and brought a breach of contract action after the contractual statute of limitations had expired:

> "Parties to a contract may agree to limit the period of time within which an action must be commenced to a period shorter than that provided by the applicable statute of limitations" ... . To be enforceable, such provision must be clear and unambiguous ... . "Whether or not a writing is ambiguous is a question of law to be resolved by the courts" ... . " Absent proof that the contract is one of adhesion or the product of overreaching, or that [the] altered period is unreasonably short, the abbreviated period of limitation will be enforced'" ... .
>
> Contrary to the plaintiff's contention, the plain language of the provision limiting the time period to bring an "action based on any warranty, covenant or representation contained in this Agreement" is clear and unambiguous, and applies to the defendant's covenant to pay ... . This interpretation is consistent with the plain meaning of the contract and basic principles of contract construction that an interpretation which renders language in the contract superfluous cannot be supported ... . **Batales v Friedman, 2016 NY Slip Op 07615, 2nd Dept 11-16-16**

COOPERATIVES

COOPERATIVES (COOPERATIVE BOARD'S PARKING RESTRICTION WAS A PROPER EXERCISE OF THE BUSINESS JUDGMENT RULE)/BUSINESS JUDGMENT RULE (COOPERATIVES, COOPERATIVE BOARD'S PARKING RESTRICTION WAS A PROPER EXERCISE OF THE BUSINESS JUDGMENT RULE)

COOPERATIVES.

COOPERATIVE BOARD'S PARKING RESTRICTION WAS A PROPER EXERCISE OF THE BUSINESS JUDGMENT RULE.

The Second Department determined the cooperative board's parking restriction was a proper exercise of the business judgment rule (and did not constitute a breach of fiduciary duty):

> "In the context of cooperative dwellings, the business judgment rule provides that a court should defer to a cooperative board's determination [s]o long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith'"... . "[D]ecision making tainted by discriminatory considerations is not protected by the business judgment rule'" ... .
>
> Here, the defendants demonstrated their prima facie entitlement to judgment as a matter of law dismissing the complaint by establishing that the decision to enforce parking rules and prohibit parking in the grass area behind one of the cooperative buildings was protected by the business judgment rule ... . In particular, the defendants demonstrated that they were acting in the best interests of the cooperative after making a number of capital improvements that added to the aesthetics and value of the property. **Beach Point Partners v Beachcomber, Ltd., 2016 NY Slip Op 07284, 2nd Dept 11-9-16**

CORPORATION LAW

CORPORATION LAW(COMPLAINT SUFFICIENTLY ALLEGED A CAUSE OF ACTION UNDER THE DOCTRINE OF PIERCING THE CORPORATE VEIL, ISSUE NOT RAISED BELOW PROPERLY CONSIDERED ON APPEAL)/PIERCING THE CORPORATE VEIL (COMPLAINT SUFFICIENTLY ALLEGED A CAUSE OF ACTION UNDER THE DOCTRINE OF PIERCING THE CORPORATE VEIL, ISSUE NOT RAISED BELOW PROPERLY CONSIDERED ON APPEAL)/APPEALS (COMPLAINT SUFFICIENTLY ALLEGED A CAUSE OF ACTION UNDER THE DOCTRINE OF PIERCING THE CORPORATE VEIL, ISSUE NOT RAISED BELOW PROPERLY CONSIDERED ON APPEAL)

CORPORATION LAW, APPEALS.

COMPLAINT SUFFICIENTLY ALLEGED A CAUSE OF ACTION UNDER THE DOCTRINE OF PIERCING THE CORPORATE VEIL, ISSUE NOT RAISED BELOW PROPERLY CONSIDERED ON APPEAL.

The Second Department determined plaintiff had stated a cause of action under the "pierce the corporate veil" theory. Weaver was the developer of a construction project and Andrea was the general contractor. Defendant Weinberg was a member of Weaver and a shareholder of Andrea. Plaintiff had obtained a unpaid judgment against Andrea. Plaintiff alleged Weinberg abused the privilege of doing business in corporate form and sought to pierce the corporate veil and hold Weinberg liable for Andrea's debts. The court noted that, although the contention that New York does not recognize a cause of action for piercing the corporate veil was not raised below, the question could be considered on appeal because it involves a question of law which appears on the record and which could not have been avoided if raised at the proper time:

To survive a motion to dismiss the complaint, a party seeking to pierce the corporate veil must allege facts that, if proved, establish that the party against whom the doctrine is asserted (1) exercised complete domination over the corporation with respect to the transaction at issue, and (2) through such domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against the plaintiff such that a court in equity will intervene ... . "Factors to be considered in determining whether an individual has abused the privilege of doing business in the corporate or LLC form include the failure to adhere to [corporate or] LLC formalities, inadequate capitalization, commingling of assets, and the personal use of [corporate or] LLC funds" ... .

"Additionally, the corporate veil will be pierced to achieve equity, even absent fraud, when a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego" ... . A cause of action under the doctrine of piercing the corporate veil is "not required to meet any heightened level of particularity in its allegations ... .

Here, the plaintiff adequately pleaded allegations that Weinberg dominated Andrea, and that he engaged in acts amounting to an abuse of the corporate form to perpetrate a wrong or injustice against the plaintiff. In this regard, the plaintiff alleged that Andrea was inadequately capitalized, that Weinberg commingled the assets of Andrea with the assets of Weaver, that Weinberg failed to adhere to corporate formalities with respect to Andrea, that Weinberg kept assets out of Andrea to avoid paying its debts and the judgment to the plaintiff, and that Weinberg used the account of Weaver to partially pay the debts of Andrea to the plaintiff. The plaintiff also sufficiently pleaded allegations that Weaver was the alter ego of Andrea. **Olivieri Constr. Corp. v WN Weaver St., LLC, 2016 NY Slip Op 07302, 2nd Dept 11-9-16**

CRIMINAL LAW

CRIMINAL LAW (DEFENDANT WAS NOT PRESENT AT AN OFF-THE-RECORD DISCUSSION OF THE ADMISSIBILITY OF PRIOR UNCHARGED OFFENSES; DEFENDANT WAS THEREFORE DEPRIVED OF HIS RIGHT TO BE PRESENT AT A MATERIAL STAGE OF HIS TRIAL)/MOLINEUX-VENTIMIGLIA HEARING (DEFENDANT WAS NOT PRESENT AT AN OFF-THE-RECORD DISCUSSION OF THE ADMISSIBILITY OF PRIOR UNCHARGED OFFENSES; DEFENDANT WAS THEREFORE DEPRIVED OF HIS RIGHT TO BE PRESENT AT A MATERIAL STAGE OF HIS TRIAL)/MATERIAL STAGE OF TRIAL (CRIMINAL LAW, DEFENDANT WAS NOT PRESENT AT AN OFF-THE-RECORD DISCUSSION OF THE ADMISSIBILITY OF PRIOR UNCHARGED OFFENSES; DEFENDANT WAS THEREFORE DEPRIVED OF HIS RIGHT TO BE PRESENT AT A MATERIAL STAGE OF HIS TRIAL)

CRIMINAL LAW.

DEFENDANT WAS NOT PRESENT AT AN OFF-THE-RECORD DISCUSSION OF THE ADMISSIBILITY OF PRIOR UNCHARGED OFFENSES; DEFENDANT WAS THEREFORE DEPRIVED OF HIS RIGHT TO BE PRESENT AT A MATERIAL STAGE OF HIS TRIAL.

The First Department, in a full-fledged opinion by Justice Feinman, determined defendant was deprived of his right to be present during a material stage of the trial and he was therefore entitled to a new trial and a new Molineux/Ventimiglia hearing concerning the admissibility of prior bad acts and uncharged offenses allegedly committed against his girlfriend. Defendant was charged with assaulting his girlfriend. A year before trial, a Molineux/Ventimiglia hearing was held in the defendant's presence, but the judge never ruled on the admissibility of prior uncharged offenses. The trial was held before a different judge who conducted an off-the-record conference about the uncharged offenses at which defendant was not present. Although a written summary of the off-the-record conference was drawn up, the judge's reasoning for allowing evidence of uncharged offenses was not stated in the summary. The First Department held defendant's right to be present at a material stage of his trial had been violated:

...[T]he arguments on admissibility were conducted before two different judges, a year apart, and defendant was not present the second time, when the attorneys conferred with the judge who considered their arguments and

made rulings. Furthermore, some of the discussions were not even recorded, occurring as they did in the trial judge's chambers or robing room without a court reporter. ... It is not clear, for instance, that the papers originally submitted to the hearing court were also submitted to the trial court, or whether the trial court considered them. Nor is it clear whether the trial court read the hearing transcript or conducted its own de novo hearing. Even if the trial court considered the same papers and read the hearing transcript, the record is silent as to what particular facts were emphasized at the hearing before the trial court, what the court's concerns were, and its reasons for making its rulings. The informal pretrial hearing was not, therefore, a sort of reargument of purely legal issues at which defendant could have nothing to contribute ... . Thus, it cannot be said with any degree of certainty that defendant's presence at the pretrial Molineux/Ventimiglia hearing before the trial court would have been "useless, or the benefit but a shadow" ... . **People v Hoey, 2016 NY Slip Op 07150, 1st Dept 11-1-16**

CRIMINAL LAW (RECORD SILENT ON WHETHER DEFENSE COUNSEL WAS APPRISED OF A JURY NOTE, MURDER CONVICTION REVERSED)/JURY NOTE (RECORD SILENT ON WHETHER DEFENSE COUNSEL WAS APPRISED OF A JURY NOTE, MURDER CONVICTION REVERSED)/MODE OF PROCEEDINGS ERROR (RECORD SILENT ON WHETHER DEFENSE COUNSEL WAS APPRISED OF A JURY NOTE, MURDER CONVICTION REVERSED)

CRIMINAL LAW.

RECORD SILENT ON WHETHER DEFENSE COUNSEL WAS APPRISED OF A JURY NOTE, MURDER CONVICTION REVERSED.

The Fourth Department determined a mode of proceedings error required reversal of a murder conviction. The record was silent about whether defense counsel was apprised of the contents of a jury note requesting further instruction:

... [A] mode of proceedings error occurred and reversal is required because the record fails to show that defense counsel was advised of the contents of a jury note requesting, inter alia, further instruction on reasonable doubt, murder in the second degree and manslaughter in the first degree ... . Moreover, because the record does not establish that the court advised defense counsel of the contents of the note, we cannot assume that the court complied with its core responsibilities pursuant to CPL 310.30 and People v O'Rama (78 NY2d 270) ... . **People v Owens, 2016 NY Slip Op 07431, 4th Dept 11-10-16**

CRIMINAL LAW (DEFENDANT'S GUILTY PLEA COERCED BY JUDGE'S REMARKS ABOUT A POTENTIAL SENTENCE AFTER TRIAL)/GUILTY PLEA (DEFENDANT'S GUILTY PLEA COERCED BY JUDGE'S REMARKS ABOUT A POTENTIAL SENTENCE AFTER TRIAL)

CRIMINAL LAW.

DEFENDANT'S GUILTY PLEA COERCED BY JUDGE'S REMARKS ABOUT A POTENTIAL SENTENCE AFTER TRIAL.

The Fourth Department vacated defendant's guilty plea, finding the trial judge's comments about the possible sentence after trial amounted to coercion:

Pursuant to the terms of the plea agreement, defendant entered his guilty plea in satisfaction of the indictment by which he was charged with, inter alia, murder in the second degree (§ 125.25 [1]), and County Court imposed a determinate term of incarceration of 25 years. During discussions over the plea offer, the court addressed the

possibility of a jury convicting defendant of the lesser included offense of manslaughter in the first degree by stating: "[Y]ou wouldn't get any better than 25 [years] if you get a manslaughter. That's a big if.' " Defendant contends that the court erred in denying his motion to withdraw his guilty plea on the ground that it was coerced. We agree. "[T]he court's statements do not amount to a description of the range of potential sentences but, rather, they constitute impermissible coercion, rendering the plea involuntary and requiring its vacatur" ... . **People v Williams, 2016 NY Slip Op 07450, 4th Dept 11-10-16**

CRIMINAL LAW (SANDOVAL HEARING HELD IN DEFENDANT'S ABSENCE REQUIRED DISMISSAL OF THE INDICTMENT, PLACING THE RESULTS OF THE HEARING ON THE RECORD IN DEFENDANT'S PRESENCE DID NOT RECTIFY THE DEFECT)/SANDOVAL HEARING (SANDOVAL HEARING HELD IN DEFENDANT'S ABSENCE REQUIRED DISMISSAL OF THE INDICTMENT, PLACING THE RESULTS OF THE HEARING ON THE RECORD IN DEFENDANT'S PRESENCE DID NOT RECTIFY THE DEFECT)

CRIMINAL LAW.

SANDOVAL HEARING HELD IN DEFENDANT'S ABSENCE REQUIRED DISMISSAL OF THE INDICTMENT, PLACING THE RESULTS OF THE HEARING ON THE RECORD IN DEFENDANT'S PRESENCE DID NOT RECTIFY THE DEFECT.

The Fourth Department determined holding the Sandoval hearing in the defendant's absence required dismissal of the indictment (without prejudice to file another charge):

We agree with defendant that Supreme Court erred in conducting the Sandoval hearing in his absence ... . The court's Sandoval ruling in this case was not wholly favorable to defendant, and thus "it cannot be said that defendant's presence at the hearing would have been superfluous" ... . Contrary to the People's contention, although the court placed its Sandoval ruling on the record in defendant's presence the morning after the hearing, "[a] mere repetition or recitation in the defendant's presence of what has already been determined in [the defendant's] absence is insufficient compliance with the Sandoval rule" ... . **People v Gardner, 2016 NY Slip Op 07469, 4th Dept 11-10-16**

CRIMINAL LAW (ADVANCES IN MEDICINE AND SCIENCE CALL INTO QUESTIONS PREVIOUS OPINIONS ABOUT SHAKEN BABY SYNDROME, MOTION TO VACATE DEFENDANT'S CONVICTION GRANTED AND NEW TRIAL ORDER)/VACATE CONVICTION, MOTION TO (ADVANCES IN MEDICINE AND SCIENCE CALL INTO QUESTIONS PREVIOUS OPINIONS ABOUT SHAKEN BABY SYNDROME, MOTION TO VACATE DEFENDANT'S CONVICTION GRANTED AND NEW TRIAL ORDER)/SHAKEN BABY SYNDROME (ADVANCES IN MEDICINE AND SCIENCE CALL INTO QUESTIONS PREVIOUS OPINIONS ABOUT SHAKEN BABY SYNDROME, MOTION TO VACATE DEFENDANT'S CONVICTION GRANTED AND NEW TRIAL ORDER)

CRIMINAL LAW.

ADVANCES IN MEDICINE AND SCIENCE CALL INTO QUESTION PREVIOUS OPINIONS ABOUT SHAKEN BABY SYNDROME, MOTION TO VACATE DEFENDANT'S CONVICTION GRANTED AND NEW TRIAL ORDERED.

The Fourth Department affirmed the grant of defendant's motion to vacate her conviction based on newly-discovered evidence. Defendant, a daycare provider, was convicted in the death of a toddler. Medical testimony at trial attributed the death to shaken baby syndrome. In the motion to vacate her conviction, defendant argued that advances in medicine and

science have called into question the prior opinions about shaken baby syndrome, and indicate a short-distance fall can mimic the shaken baby symptoms:

> In general, advancements in science and/or medicine may constitute newly discovered evidence ... , and we conclude that defendant established, by a preponderance of the evidence (see CPL 440.30 [6]), that "a significant and legitimate debate in the medical community has developed in the past ten years over whether infants [and toddlers] can be fatally injured through shaking alone, . . . and whether other causes [such as short-distance falls] may mimic the symptoms traditionally viewed as indicating shaken baby or shaken impact syndrome" ... .
>
> We further conclude that defendant established, by a preponderance of the evidence (see CPL 440.30 [6]), that the newly discovered evidence would probably change the result if a new trial were held today. "A motion to vacate a judgment of conviction upon the ground of newly discovered evidence rests within the discretion of the hearing court . . . The court must make its final decision based upon the likely cumulative effect of the new evidence had it been presented at trial' " ... . Here, the cumulative effect of the research and findings on retinal hemorrhages, subdural hematomas or hemorrhages and cerebral edemas as presented in SBS/SBIS cases and short-distance fall cases supports the court's ultimate decision that, had this evidence been presented at trial, the verdict would probably have been different ... . **People v Bailey, 2016 NY Slip Op 07490, 4th Dept 11-101-6**

CRIMINAL LAW (STRICT LIABILITY OFFENSE CANNOT SERVE AS A PREDICATE FELONY FOR FELONY ASSAULT)/UNAUTHORIZED PRACTICE OF MEDICINE (STRICT LIABILITY OFFENSE CANNOT SERVE AS A PREDICATE FELONY FOR FELONY ASSAULT)/FELONY ASSAULT (STRICT LIABILITY OFFENSE CANNOT SERVE AS A PREDICATE FELONY FOR FELONY ASSAULT)

CRIMINAL LAW.

STRICT LIABILITY OFFENSE CANNOT SERVE AS A PREDICATE FELONY FOR FELONY ASSAULT.

The First Department determined a strict liability offense cannot serve as a predicate felony for felony assault. The defendant was charged with the unauthorized practice of medicine (Education Law 6512) which resulted in the serious injury of one victim and the death of another. Because the Education Law offense is a strict liability offense (no mens rea requirement), it cannot serve as the basis for felony assault:

> An assault committed during the course of a felony that causes serious physical injury to the victim may be charged as felony assault under Penal Law § 120.10(4). The Court of Appeals has explained that, under the doctrine of constructive malice, the mens rea element of the assault charge is satisfied by the mens rea element of the predicate felony ... .
>
> Education Law § 6512(1) does not contain a mens rea element and solely requires a voluntary act of the unauthorized practice of medicine ... . Accordingly, Supreme Court correctly held that the felony of the unauthorized practice of medicine cannot serve as a predicate felony to support the felony assault charges.
>
> Further, although the Penal Law states that a "statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime of mental culpability" (Penal Law § 15.15[2]), the felony of unauthorized practice of medicine was created by the legislature as part of a comprehensive regulatory scheme to require licensing for occupations that pose safety risks to the public. These malum prohibitum crimes are generally construed as strict liability crimes, as a mens rea element would negatively affect enforcement of these statutes and minimize their impact ... . **People v Mobley, 2016 NY Slip Op 07576, 1st Dept 11-15-16**

CRIMINAL LAW (PAUCITY OF INFORMATION PROVIDED TO DEFENDANT CONCERNING THE BASIS FOR HER ARREST WARRANTED A SUPPRESSION HEARING DESPITE THE CONCLUSORY ALLEGATIONS IN THE MOTION TO SUPPRESS)/SUPPRESS, MOTION TO (STATEMENTS, PAUCITY OF INFORMATION PROVIDED TO DEFENDANT CONCERNING THE BASIS FOR HER ARREST WARRANTED A SUPPRESSION HEARING DESPITE THE CONCLUSORY ALLEGATIONS IN THE MOTION TO SUPPRESS)

CRIMINAL LAW.

PAUCITY OF INFORMATION PROVIDED TO DEFENDANT CONCERNING THE BASIS FOR HER ARREST WARRANTED A SUPPRESSION HEARING DESPITE THE CONCLUSORY ALLEGATIONS IN THE MOTION TO SUPPRESS.

The First Department determined the conclusory allegations in defendant's motion to suppress were sufficient, under the circumstances, to warrant a suppression hearing:

> In People v Wynn (117 AD3d 487 [1st Dept 2014]), we held that the court erred in summarily denying the motion of defendant's codefendant to suppress statements and physical evidence as the fruits of an unlawful arrest, notwithstanding the conclusory nature of the factual allegations in her suppression motion, where "[a]lthough the People provided defendant with extensive information about the facts of the crime and the proof to be offered at trial, they provided no information whatsoever, at any stage of the proceedings, about how defendant came to be a suspect, and the basis for her arrest, made hours after the crime at a different location" (id. at 487-488). Because the factual allegations in the People's pleadings and relevant disclosures were materially the same in this case, we conclude that defendant's motion to suppress, although it asserted nothing more than that probable cause was lacking, was sufficient under the circumstances to entitle him to a hearing. Unlike the situation in People v Lopez (5 NY3d 753, 754 [2005]), defendant's statement did not "on its face show[] probable cause for defendant's arrest." **People v Terry, 2016 NY Slip Op 07751, 1st Dept 11-17-16**

CRIMINAL LAW (JUDGE SHOULD HAVE MADE AN INQUIRY INTO ALLEGATIONS OF JUROR BIAS BASED UPON AN OBSERVATION DURING A RECESS, NEW TRIAL ORDERED)/JURORS (CRIMINAL LAW, JUROR BIAS, JUDGE SHOULD HAVE MADE AN INQUIRY INTO ALLEGATIONS OF JUROR BIAS BASED UPON AN OBSERVATION DURING A RECESS, NEW TRIAL ORDERED)

CRIMINAL LAW.

JUDGE SHOULD HAVE MADE AN INQUIRY INTO ALLEGATIONS OF JUROR BIAS BASED UPON AN OBSERVATION DURING A RECESS, NEW TRIAL ORDERED.

The Fourth Department, over a two-justice dissent, determined the trial judge should have inquired further into the allegation of juror bias. One of defendant's friends told the court two jurors were overheard referring to defendant as a scumbag during a recess:

> "If at any time after the trial jury has been sworn and before the rendition of its verdict, . . . the court finds, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case . . . the court must discharge such juror" (CPL 270.35 [1]). The standard for discharging a sworn juror is satisfied " when it becomes obvious that a particular juror possesses a state of mind which would prevent the rendering of an impartial verdict' " ... . There is a well-established framework by which the court must evaluate a sworn juror who, for one reason or another, may possess such a state of mind ... .
>
> To make a proper determination, the court "must question each allegedly unqualified juror individually in camera in the presence of the attorneys and defendant" (Buford, 69 NY2d at 299). "In a probing and tactful inquiry, the court

should evaluate the nature of what the juror has seen, heard, or has acquired knowledge of, and assess its importance and its bearing on the case" (id.). During the inquiry, "the court should carefully consider the juror's answers and demeanor to ascertain whether [his or] her state of mind will affect [his or] her deliberations" (id.). That accomplished, the court must place the reasons for its ruling on the record (see id.).

It has been emphasized repeatedly that " each case must be evaluated on its unique facts' " ... . To that end, the court must hold a Buford inquiry whenever there are facts indicating the possibility of juror bias, and must not base its ruling on speculation ... . Not only does the court's failure to hold an inquiry under such circumstances constitute reversible error, but its failure to place the reasons for its ruling on the record also constitutes reversible error ... . Such errors are not subject to harmless error analysis ... . **People v Kuzdzal, 2016 NY Slip Op 07768, 4th Dept 11-18-16**

CRIMINAL LAW (NOT ASKING A GRAND JURY TO CONSIDER A CHARGE FOR WHICH SOME EVIDENCE WAS PRESENTED DID NOT AMOUNT TO WITHDRAWAL OF THE CHARGE, WHICH WOULD REQUIRE JUDICIAL PERMISSION TO RE-PRESENT)/GRAND JURIES (NOT ASKING A GRAND JURY TO CONSIDER A CHARGE FOR WHICH SOME EVIDENCE WAS PRESENTED DID NOT AMOUNT TO WITHDRAWAL OF THE CHARGE, WHICH WOULD REQUIRE JUDICIAL PERMISSION TO RE-PRESENT)

CRIMINAL LAW.

NOT ASKING A GRAND JURY TO CONSIDER A CHARGE FOR WHICH SOME EVIDENCE WAS PRESENTED DID NOT AMOUNT TO WITHDRAWAL OF THE CHARGE (WHICH WOULD REQUIRE JUDICIAL PERMISSION TO RE-PRESENT).

The Fourth Department determined that not asking a grand jury to consider a charge is not the same as withdrawing a charge from the grand jury (which would require a judge's permission to re-present):

... [T]he Court of Appeals has made clear that, " [b]efore a grand jury may be said to have acted upon a charge, there must be some indication that it knew about it' " (Wilkins, 68 NY2d at 274). Moreover, "[t]here is no evidence in this record that would raise the primary concern of . . . Wilkins, namely that the People withdrew [the criminal sale charges] in order to present [them] to a more compliant grand jury" ... . The People's decision not to present the criminal sale charges for the consideration of the first grand jury is not " fundamentally inconsistent with the objectives underlying CPL 190.75' " ... , and we therefore conclude that this case does not present those " limited circumstances' " to which the holding of Wilkins applies (id.). **People v Lopez, 2016 NY Slip Op 07772, 4th Dept 11-18-16**

CRIMINAL LAW (ASKING DEFENDANT WHY HE WAS NERVOUS DEEMED A NONINCRIMINATING QUESTION, SUPPRESSION PROPERLY DENIED)/SUPPRESSION (ASKING DEFENDANT WHY HE WAS NERVOUS DEEMED A NONINCRIMINATING QUESTION, SUPPRESSION PROPERLY DENIED)/STREET STOPS (ASKING DEFENDANT WHY HE WAS NERVOUS DEEMED AN NONINCRIMINATING QUESTION, SUPPRESSION PROPERLY DENIED)

CRIMINAL LAW.

ASKING DEFENDANT WHY HE WAS NERVOUS DEEMED A NONINCRIMINATING QUESTION, SUPPRESSION PROPERLY DENIED.

The Fourth Department determined the police officer's asking defendant (a passenger in a car pulled over for a traffic infraction) why he was nervous was a nonincriminating question. Therefore defendant's statement he had "a little bit of weed" and the results of a search were not subject to suppression:

> We conclude that, after the stop, the officer was permitted to approach defendant as a passenger in the vehicle and ask nonincriminating questions ... . Contrary to defendant's contention, the officer's question in response to defendant's manifest nervousness did not "exceed[ ] a request for information and the question[ ] was neither invasive nor focused on possible criminality" ... . Indeed, defendant's admission that he possessed marihuana in response to the officer's inquiry "went far beyond what the officer's words could reasonably expect to evoke" ... . **People v Williams, 2016 NY Slip Op 07776, 4th Dept 11-18-16**

CRIMINAL LAW (ASKING DEFENDANT WHY HE WAS NERVOUS AND WHETHER HE WAS CARRYING DRUGS DEEMED INVASIVE QUESTIONING, SUPPRESSION GRANTED)/SUPPRESSION (ASKING DEFENDANT WHY HE WAS NERVOUS AND WHETHER HE WAS CARRYING DRUGS DEEMED INVASIVE QUESTIONING, SUPPRESSION GRANTED)/STREET STOPS (ASKING DEFENDANT WHY HE WAS NERVOUS AND WHETHER HE WAS CARRYING DRUGS DEEMED INVASIVE QUESTIONING, SUPPRESSION GRANTED)

CRIMINAL LAW.

ASKING DEFENDANT WHY HE WAS NERVOUS AND WHETHER HE WAS CARRYING DRUGS DEEMED INVASIVE QUESTIONING, SUPPRESSION GRANTED.

The Fourth Department determined asking defendant (who was on a bicycle and properly stopped) why he was so nervous and whether he was carrying drugs was invasive questioning unsupported by an indication of criminal activity. Suppression of defendant's statements and seized evidence should have been granted:

> ... [F]ollowing the permissible stop of defendant on his bicycle, the officers improperly escalated the encounter to a level two common-law inquiry by asking defendant why he was so nervous and whether he was carrying drugs. The officers' inquiries, which involved "invasive questioning" that was "focuse[d] on the possible criminality" of defendant ... , were not supported by the requisite founded suspicion of criminality ... . The testimony at the suppression hearing establishes that the officers observed nothing indicative of criminality, and we conclude that defendant's nervousness upon being confronted by the police did not give rise to a founded suspicion that criminal activity was afoot ... . Because defendant's inculpatory oral response to the impermissible accusatory questioning resulted in the seizure of the drugs from defendant's pocket and a postarrest written statement from defendant, the drugs and the oral and written statements must be suppressed ... . **People v Freeman, 2016 NY Slip Op 07784, 4th Dept 11-18-16**

CRIMINAL LAW (ACCEPTING A VERDICT BEFORE REQUESTED TESTIMONY WAS READ BACK TO THE JURY WAS NOT A MODE OF PROCEEDINGS ERROR AND WAS UNPRESERVED FOR REVIEW)/APPEALS (CRIMINAL LAW, ACCEPTING A VERDICT BEFORE REQUESTED TESTIMONY WAS READ BACK TO THE JURY WAS NOT A MODE OF PROCEEDINGS ERROR AND WAS UNPRESERVED FOR REVIEW)

CRIMINAL LAW, APPEALS.

ACCEPTING A VERDICT BEFORE REQUESTED TESTIMONY WAS READ BACK TO THE JURY WAS NOT A MODE OF PROCEEDINGS ERROR AND WAS NOT PRESERVED FOR REVIEW.

The Third Department determined any error associated with a jury-request for a readback of testimony not a mode of proceedings error and was unpreserved for review. Before the requested testimony was readback, the jury indicated it had reached a verdict. The verdict was accepted without the readback taking place:

> The court read the note from the jury verbatim and announced its intention to permit a readback of the requested testimony one witness at a time, to which defense counsel did not object. In explaining the procedure to the jury, the court stated, "once you've heard the first readback . . . it might answer your questions" and explained that the jury could return to deliberations while the court reporter prepared additional testimony for readback, to which defense counsel did not object. After the readback of the relevant portions of one witness's testimony, and presumably while the court reporter was preparing additional testimony for readback, the jury informed the court that it had reached a verdict. As defendant concedes, no mode of proceedings error occurred ... , and, thus, defendant's failure to lodge any complaint to any of the steps that the court took to respond to the request renders the issue unpreserved for our review ... . Moreover, defendant's current contention that the court should not have allowed the jury to reach a verdict until the entire readback had been completed is unavailing. By informing the court that it had reached a verdict prior to the completion of the readback, the jury unambiguously indicated that it was no longer in need of previously requested information ... . **People v Robtoy, 2016 NY Slip Op 07232, 3rd Dept 11-3-16**

CRIMINAL LAW (DEFENDANT HAD STANDING TO CONTEST THE SEARCH, MATTER REMITTED FOR A SUPPRESSION HEARING BECAUSE AN APPELLATE COURT CANNOT CONSIDER A MATTER NOT RULED UPON BELOW)/APPEALS (CRIMINAL LAW, DEFENDANT HAD STANDING TO CONTEST THE SEARCH, MATTER REMITTED FOR A SUPPRESSION HEARING BECAUSE AN APPELLATE COURT CANNOT CONSIDER A MATTER NOT RULED UPON BELOW)

CRIMINAL LAW, APPEALS.

DEFENDANT HAD STANDING TO CONTEST THE SEARCH, MATTER REMITTED FOR A SUPPRESSION HEARING BECAUSE AN APPELLATE COURT CANNOT CONSIDER A MATTER NOT RULED UPON BELOW.

The Second Department determined Supreme Court erred in finding defendant did not have standing to contest the search of a van. The court explained that it could not consider the merits of the suppression motion because the merits were not ruled upon by the court below. The options for handling this scenario were explained in some detail. The court opted to hold the appeal in abeyance and remit the matter for a suppression hearing:

> This Court has deemed it appropriate to reverse or modify the judgment of conviction, rather than holding the appeal in abeyance, where no purpose would be served by holding the appeal and directing that a new determination be made. This is the case, for example, where a determination of the alternative issue would not change the ultimate determination of the suppression motion ... , or where the trial court has already determined the alternative issue in the defendant's favor, in which case the issue would, in all likelihood, be decided in the defendant's favor again, and thus would remain unreviewable after remittal ... . However, where, as here, the alternative issue raised by the People on appeal has not been determined by the trial court, and the resolution of that issue could affect the determination of the suppression motion, we deem it appropriate to hold the defendant's

appeal in abeyance and remit the matter for consideration of the alternative issue. **People v Chazbani, 2016 NY Slip Op 07337, 2nd Dept 11-9-16**

CRIMINAL LAW (DEFENDANT'S REQUEST TO REPRESENT HIMSELF, MADE DURING JURY SELECTION, WAS TIMELY, SUMMARY REJECTION OF THE REQUEST WITHOUT ANY INQUIRY REQUIRED REVERSAL)/ATTORNEYS (CRIMINAL LAW, DEFENDANT'S REQUEST TO REPRESENT HIMSELF, MADE DURING JURY SELECTION, WAS TIMELY, SUMMARY REJECTION OF THE REQUEST WITHOUT ANY INQUIRY REQUIRED REVERSAL)/PRO SE (CRIMINAL LAW, DEFENDANT'S REQUEST TO REPRESENT HIMSELF, MADE DURING JURY SELECTION, WAS TIMELY, SUMMARY REJECTION OF THE REQUEST WITHOUT ANY INQUIRY REQUIRED REVERSAL)

CRIMINAL LAW, ATTORNEYS.

DEFENDANT'S REQUEST TO REPRESENT HIMSELF, MADE DURING JURY SELECTION, WAS TIMELY, SUMMARY REJECTION OF THE REQUEST WITHOUT ANY INQUIRY REQUIRED REVERSAL.

The First Department reversed defendant's conviction because the trial judge did not make an inquiry into his request to represent himself. Defendant's request was made during jury selection and was summarily rejected as untimely:

> The right to self-representation ... is subject to several restrictions ... . Thus, "[a] defendant in a criminal case may invoke the right to defend pro se provided: (1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues" ... . When a defendant timely invokes the right to self-representation, "the trial court should conduct a thorough inquiry to determine whether the waiver was made intelligently and voluntarily" ... .
>
> Judged by these principles, we conclude that defendant's right to self-representation was violated. Contrary to the trial court's finding, defendant's requests to proceed pro se, made during jury selection, were timely asserted ... . **People v Crespo, 2016 NY Slip Op 07396, 1st Dept 11-10-16**

CRIMINAL LAW (CRITERIA FOR INQUIRY INTO DEFENDANT'S REQUEST TO REPRESENT HIMSELF EXPLAINED, NOT MET HERE)/ATTORNEYS (CRIMINAL LAW, CRITERIA FOR INQUIRY INTO DEFENDANT'S REQUEST TO REPRESENT HIMSELF EXPLAINED, NOT MET HERE)/PRO SE CRIMINAL LAW, CRITERIA FOR INQUIRY INTO DEFENDANT'S REQUEST TO REPRESENT HIMSELF EXPLAINED, NOT MET HERE)/RIGHT TO COUNSEL (CRITERIA FOR INQUIRY INTO DEFENDANT'S REQUEST TO REPRESENT HIMSELF EXPLAINED, NOT MET HERE)

CRIMINAL LAW, ATTORNEYS.

CRITERIA FOR INQUIRY INTO DEFENDANT'S REQUEST TO REPRESENT HIMSELF EXPLAINED, NOT MET HERE.

The Third Department, reversing defendant's conviction, determined the trial judge did not use the right criteria in denying defendant's request to represent himself:

> County Court inquired into defendant's background, emphasized the importance of having counsel represent him, cautioned against the dangers of representing himself and tested defendant's skill as an advocate with several

evidentiary questions. The issue, however, is not the extent of defendant's legal knowledge, but his capacity to knowingly waive the right to counsel ... . In denying the request, County Court essentially ruled that it was not in defendant's best interest and that the application was untimely, without expressly addressing defendant's capacity to waive his right to counsel. Since defendant's request was made prior to the commencement of trial, it was unquestionably timely ... . Moreover, we are satisfied that defendant, who informed the court that he had obtained his GED and engaged in paralegal studies for a year, and was described by the court as "bright" and "articulate," competently, intelligently and voluntarily waived his right to the counsel. **People v Poulos, 2016 NY Slip Op 07879, 3rd Dept 11-23-16**

CRIMINAL LAW (FAILURE TO MOVE TO SUPPRESS STATEMENT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL)/ATTORNEYS (CRIMINAL LAW, FAILURE TO MOVE TO SUPPRESS STATEMENT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL)/INEFFECTIVE ASSISTANCE (FAILURE TO MOVE TO SUPPRESS STATEMENT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL)

CRIMINAL LAW, ATTORNEYS.

FAILURE TO MOVE TO SUPPRESS STATEMENT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

The Third Department determined, under the facts, defendant's counsel was ineffective in failing to move to suppress defendant's statement, which was made after 26 hours of interrogation:

... "[C]ounsel had everything to gain and nothing to lose by moving to suppress the [oral statements]" ... . This is not to say that counsel must always seek to suppress evidence, and we reiterate that counsel is not ineffective for failing to make meritless motions ... . Under the circumstances of this case, however, had counsel taken steps to suppress statements from the interrogation, the potential upside would have been the exclusion of the inconsistent statements ... . Another potential gain would have been a basis to exclude the seized physical evidence obtained by the search warrants inasmuch as these warrants were secured, in part, by information obtained from defendant's interrogation ... . Indeed, with respect to this physical evidence, counsel recognized that, by not seeking to suppress the physical evidence on which blood had been found, he had to explain the blood's presence to the jury. He further admitted that the People's case would have been weaker had this physical evidence been excluded. While we do not pass on whether counsel would have been ultimately successful in suppressing either defendant's oral statements or the seized physical evidence, we do conclude that a colorable basis existed for seeking suppression. Given the potential benefit in doing so, we discern no strategic or legitimate reason to let any of this crucial evidence come in unabated at trial ... . **People v Zeh, 2016 NY Slip Op 07881, 3rd Dept 11-23-16**

CRIMINAL LAW (DEFENSE COUNSEL INEFFECTIVE FOR FAILURE TO MOVE TO SEVER AT TRIAL AFTER AN ANTAGONISTIC DEFENSE WAS PURSUED BY THE CO-DEFENDANT)/ATTORNEYS (CRIMINAL, DEFENSE COUNSEL INEFFECTIVE FOR FAILURE TO MOVE TO SEVER AT TRIAL AFTER AN ANTAGONISTIC DEFENSE WAS PURSUED BY THE CO-DEFENDANT)/INEFFECTIVE ASSISTANCE (DEFENSE COUNSEL INEFFECTIVE FOR FAILURE TO MOVE TO SEVER AT TRIAL AFTER AN ANTAGONISTIC DEFENSE WAS PURSUED BY THE CO-DEFENDANT)/SEVERANCE, MOTION FOR (DEFENSE COUNSEL INEFFECTIVE FOR FAILURE TO MOVE TO SEVER AT TRIAL AFTER AN ANTAGONISTIC DEFENSE WAS PURSUED BY THE CO-DEFENDANT)

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL INEFFECTIVE FOR FAILURE TO MOVE TO SEVER AT TRIAL AFTER AN ANTAGONISTIC DEFENSE WAS PURSUED BY THE CO-DEFENDANT.

The Second Department, reversing the conviction, determined the defense attorney's failure to move to sever the defendant's trial from the co-defendant's and request a missing witness charge constituted ineffective assistance. The need for severance became apparent during the trial when counsel for the co-defendant pursued a defense antagonistic to that of the defendant. The court noted the motion for severance can be made any time before the end of the trial when the defendant could not previously have been aware of the basis for it:

> Where a defendant claims prejudice as a result of a joint trial because his defense is antagonistic to that of a codefendant, "severance is not required solely because of hostility between the parties, differences in their trial strategies or inconsistencies in their defenses" ... . However, "severance is compelled where the core of each defense is in irreconcilable conflict with the other and where there is a significant danger, as both defenses are portrayed to the trial court, that the conflict alone would lead the jury to infer defendant's guilt" ... . Thus, severance should be granted where the defenses are not only antagonistic, but also mutually exclusive and irreconcilable ... . Although a severance motion must generally be made before the commencement of trial ... , CPL 255.20(3) permits a pretrial motion to be made and decided "at any time before the end of trial" when "the defendant could not, with due diligence, have been previously aware" of the basis for the motion. CPL 255.20(3) further provides that the court may, "in the interest of justice, and for good cause shown," entertain and dispose of a pretrial motion "at any time before sentence." **People v Davydov, 2016 NY Slip Op 08090, 2nd Dept 11-30-16**

CRIMINAL LAW (QUESTIONING OF DEFENDANT, WHO WAS REPRESENTED ON ANOTHER CHARGE, VIOLATED DEFENDANT'S RIGHT TO COUNSEL, STATEMENTS SHOULD HAVE BEEN SUPPRESSED)/ATTORNEYS (CRIMINAL LAW, QUESTIONING OF DEFENDANT, WHO WAS REPRESENTED ON ANOTHER CHARGE, VIOLATED DEFENDANT'S RIGHT TO COUNSEL, STATEMENTS SHOULD HAVE BEEN SUPPRESSED)/EVIDENCE (CRIMINAL LAW, QUESTIONING OF DEFENDANT, WHO WAS REPRESENTED ON ANOTHER CHARGE, VIOLATED DEFENDANT'S RIGHT TO COUNSEL, STATEMENTS SHOULD HAVE BEEN SUPPRESSED)/SUPPRESSION (CRIMINAL LAW, QUESTIONING OF DEFENDANT, WHO WAS REPRESENTED ON ANOTHER CHARGE, VIOLATED DEFENDANT'S RIGHT TO COUNSEL, STATEMENTS SHOULD HAVE BEEN SUPPRESSED)/RIGHT TO COUNSEL (CRIMINAL LAW, QUESTIONING OF DEFENDANT, WHO WAS REPRESENTED ON ANOTHER CHARGE, VIOLATED DEFENDANT'S RIGHT TO COUNSEL, STATEMENTS SHOULD HAVE BEEN SUPPRESSED)

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

QUESTIONING OF DEFENDANT, WHO WAS REPRESENTED ON ANOTHER CHARGE, VIOLATED DEFENDANT'S RIGHT TO COUNSEL, STATEMENTS SHOULD HAVE BEEN SUPPRESSED.

The Second Department determined defendant's statements in connection with a murder charge were made in violation of his right to counsel. A new trial was ordered. At the time defendant was questioned about a robbery and a murder (the "gas station shooting"), he was represented on a marijuana charge. The robbery and murder occurred at different times and places, but defendant allegedly was the getaway driver for both. The trial court ruled the statements related to the

robbery were made in violation of defendant's right to counsel but the statements related to the murder were admissible. The Second Department noted that it is statutorily prohibited from revisiting the trial court's suppression of the robbery statements. Since the Second Department concluded that the robbery and murder interrogations were necessarily intertwined, the murder statements should have been suppressed:

> The Court of Appeals has recognized two categories of cases in which the attachment of counsel on one crime may preclude the police from interrogating a suspect on the subject of another crime. In People v Cohen (90 NY2d 632), the Court of Appeals stated that "where the two criminal matters are so closely related transactionally, or in space or time, that questioning on the unrepresented matter would all but inevitably elicit incriminating responses regarding the matter in which there had been an entry of counsel[,] . . . interrogation on the unrepresented crime is prohibited even in the absence of direct questioning regarding the crime on which counsel had appeared" ... . With respect to the second category, the Court of Appeals has stated that "a statement may be subject to suppression where impermissible questioning on a represented charge was, when viewed as an integrated whole, not fairly separable from otherwise permissible questioning on the unrepresented matter and was, in fact, purposely exploited to aid in securing inculpatory admissions on the [unrepresented matter]" ... . * * *
>
> In light of the determination that the defendant's right to counsel was violated when he was questioned with regard to the robbery charges, we further find that his right to counsel was violated by questioning on the factually interwoven homicide matter. Indeed, the robbery and the murder cases were so closely related that questioning about the gas station shooting "would all but inevitably elicit incriminating responses regarding" the robbery ... . **People v Henry, 2016 NY Slip Op 07676, 2nd Dept 11-16-16**

CRIMINAL LAW (STATEMENT WHICH WAS NOT IN THE 710.30 NOTICE, AND WHICH PROVIDED EVIDENCE OF DEFENDANT'S DOMINION AND CONTROL OF THE RESIDENCE WHERE DRUGS WERE FOUND, SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE)/710.30 NOTICE (STATEMENT WHICH WAS NOT IN THE 710.30 NOTICE, AND WHICH PROVIDED EVIDENCE OF DEFENDANT'S DOMINION AND CONTROL OF THE RESIDENCE WHERE DRUGS WERE FOUND, SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE)

CRIMINAL LAW, EVIDENCE.

STATEMENT WHICH WAS NOT IN THE 710.30 NOTICE, AND WHICH PROVIDED EVIDENCE OF DEFENDANT'S DOMINION AND CONTROL OF THE RESIDENCE WHERE DRUGS WERE FOUND, SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE.

The Fourth Department, over a two-justice dissent, determined a statement alleged to have been made during a search, but which was not part of the 710.30 notice, should not have been admitted at trial. The defendant was charged and convicted of constructive possession of drugs found in the searched residence. The statement indicated where defendant's "own room was." There was little or no other evidence defendant lived at the searched residence. The court rejected the argument that the statement was "pedigree information" and further rejected the argument that the search consent form, signed by the defendant, was an admission of his dominion and control of the residence:

> The People served on defendant a CPL 710.30 notice of their intent to offer defendant's admissions as evidence at trial and attached a police report to the notice. The police report referenced defendant's statement to the deputies, during the search, that one of the bedrooms belonged to another person. At trial, however, the court permitted an investigator to testify that defendant "explained where his [own] room was," referring to another of the bedrooms. Inasmuch as the CPL 710.30 notice did not cover that statement, the court's ruling on that point was error (see CPL 710.30 [1]...). That error permitted the court to conclude that defendant was an occupant of the residence and, consequently, to find that defendant had constructive possession of the drugs found therein ... . **People v Buza, 2016 NY Slip Op 07423, 4th Dept 11-10-16**

CRIMINAL LAW (RECORDED STATEMENTS MADE TO THE MOTHER OF DEFENDANT'S CHILDREN, WHO WAS ACTING AS A POLICE AGENT AT THE TIME THE STATEMENTS WERE MADE, REQUIRED THE REOPENING OF THE HUNTLEY HEARING)/EVIDENCE (CRIMINAL LAW, RECORDED STATEMENTS MADE TO THE MOTHER OF DEFENDANT'S CHILDREN, WHO WAS ACTING AS A POLICE AGENT AT THE TIME THE STATEMENTS WERE MADE, REQUIRED THE REOPENING OF THE HUNTLEY HEARING)/HUNTLEY HEARING (RECORDED STATEMENTS MADE TO THE MOTHER OF DEFENDANT'S CHILDREN, WHO WAS ACTING AS A POLICE AGENT AT THE TIME THE STATEMENTS WERE MADE, REQUIRED THE REOPENING OF THE HUNTLEY HEARING)

CRIMINAL LAW, EVIDENCE.

RECORDED STATEMENTS MADE TO THE MOTHER OF DEFENDANT'S CHILDREN, WHO WAS ACTING AS A POLICE AGENT AT THE TIME THE STATEMENTS WERE MADE, REQUIRED THE REOPENING OF THE HUNTLEY HEARING, CASE REMITTED.

The Fourth Department sent the case back for a reopened *Huntley* hearing concerning recorded statements made by the defendant to the mother of defendant's children, who was acting as a police agent at the time the statements were made. The statements were under a protective order until two weeks before the trial. The defendant was convicted of the murder of a man he mistakenly believed was having a relationship with the mother of his children:

> ... [T]he court erred in failing to reopen the Huntley hearing at defense counsel's request with respect to recorded statements that he made to an agent of the police (see CPL 60.45 [2] [b] [i], [ii]), i.e., the mother of his children, which were the subject of a protective order until approximately two weeks before trial. Because the admission of those statements at trial cannot be deemed harmless error ... , we hold the case, reserve decision and remit the matter to Supreme Court to reopen the Huntley hearing with respect to those recorded statements ... . **People v Mitchell, 2016 NY Slip Op 07543, 4th Dept 11-10-16**

CRIMINAL LAW (COURT SHOULD NOT HAVE DISMISSED INDICTMENT ON GROUND NOT RAISED BY THE DEFENDANT WITHOUT GIVING THE PEOPLE THE OPPORTUNITY TO ADDRESS IT, EVIDENCE BEFORE THE GRAND JURY DID NOT SUPPORT THE AGENCY DEFENSE)/EVIDENCE (CRIMINAL LAW, AGENCY DEFENSE, COURT SHOULD NOT HAVE DISMISSED INDICTMENT ON GROUND NOT RAISED BY THE DEFENDANT WITHOUT GIVING THE PEOPLE THE OPPORTUNITY TO ADDRESS IT, EVIDENCE BEFORE THE GRAND JURY DID NOT SUPPORT THE AGENCY DEFENSE)/GRAND JURY (COURT SHOULD NOT HAVE DISMISSED INDICTMENT ON GROUND NOT RAISED BY THE DEFENDANT WITHOUT GIVING THE PEOPLE THE OPPORTUNITY TO ADDRESS IT, EVIDENCE BEFORE THE GRAND JURY DID NOT SUPPORT THE AGENCY DEFENSE)/AGENCY DEFENSE (CRIMINAL LAW, COURT SHOULD NOT HAVE DISMISSED INDICTMENT ON GROUND NOT RAISED BY THE DEFENDANT WITHOUT GIVING THE PEOPLE THE OPPORTUNITY TO ADDRESS IT, EVIDENCE BEFORE THE GRAND JURY DID NOT SUPPORT THE AGENCY DEFENSE)

CRIMINAL LAW, EVIDENCE.

COURT SHOULD NOT HAVE DISMISSED INDICTMENT ON GROUND NOT RAISED BY THE DEFENDANT WITHOUT GIVING THE PEOPLE THE OPPORTUNITY TO ADDRESS IT, EVIDENCE BEFORE THE GRAND JURY DID NOT SUPPORT THE AGENCY DEFENSE.

The Second Department determined County Court should not have dismissed the indictment upon reading the grand jury minutes, on a ground not raised by the defendant, without giving the People the opportunity to address it. County Court found that the evidence presented to the grand jury warranted the agency-defense instruction, which was not given:

> The County Court erred in dismissing the indictment based upon a specific defect in the grand jury proceedings not raised by the defendant, without affording the People notice of the specific defect and an opportunity to respond (see CPL 210.45[1]...). Contrary to the defendant's contention, the People did not waive their right to notice and an opportunity to be heard by failing to move to reargue the court's order ... . Furthermore, upon our review of the record, we find that no reasonable view of the evidence presented to the grand jury warrants an instruction on the

defense of agency ... . The defendant's actions were consistent with that of a "steerer," and not a mere extension of the buyer ... . In addition, because the defendant did not testify before the grand jury, no evidence was presented indicating that he did not stand to profit from the sale or that he had no independent desire to promote the transaction ... . **People v Cruz, 2016 NY Slip Op 07673, 2nd Dept 11-16-16**

CRIMINAL LAW (ALLEGED VICTIM OF ASSAULT PROPERLY ALLOWED TO TESTIFY FROM EGYPT VIA SKYPE)/EVIDENCE (CRIMINAL LAW, ALLEGED VICTIM OF ASSAULT PROPERLY ALLOWED TO TESTIFY FROM EGYPT VIA SKYPE)/VIDEO, REMOTE TESTIMONY (CRIMINAL LAW, ALLEGED VICTIM OF ASSAULT PROPERLY ALLOWED TO TESTIFY FROM EGYPT VIA SKYPE)/SKYPE (CRIMINAL LAW, ALLEGED VICTIM OF ASSAULT PROPERLY ALLOWED TO TESTIFY FROM EGYPT VIA SKYPE)

CRIMINAL LAW, EVIDENCE.

ALLEGED VICTIM OF ASSAULT PROPERLY ALLOWED TO TESTIFY FROM EGYPT VIA SKYPE.

The First Department determined the alleged victim of an assault was properly allowed to testify by Skype from Egypt. The victim had been prohibited from returning to the US from Egypt and the prosecutor had done everything possible to facilitate his return:

We conclude that, given the unusual circumstances of this case, and the prosecutor's good faith, the People made the specific, individualized showing necessary to justify remote video testimony. The Confrontation Clause's general guarantee of face-to-face testimony is not absolute ... . Video testimony is permissible "provided there is an individualized determination that denial of physical, face-to-face confrontation is necessary to further an important public policy and the reliability of the testimony is otherwise assured" (People v Wrotten, 14 NY3d 33...). Moreover, in Wrotten, the Court of Appeals recognized that video testimony could be employed in circumstances other than those involving a vulnerable child witness or a witness who was too ill to appear in court, as was the case in Wrotten (id. at 39-40).

Defendant concedes that the two-way video testimony at issue "preserve[d] the essential safeguards of testimonial reliability" ... . The dispositive question is whether the testimony was " necessary to further an important public policy'" ... , which, in this case, is "the public policy of justly resolving criminal cases" ... , a showing that must be made by clear and convincing evidence ... . **People v Giurdanella, 2016 NY Slip Op 07577, 1st Dept 11-15-16**

CRIMINAL LAW (UNDER THE FACTS, ERROR TO ALLOW EVIDENCE OF DEFENDANT'S FACEBOOK COMMENT AND GANG AFFILIATION)/EVIDENCE (CRIMINAL LAW, SANDOVAL, UNDER THE FACTS, ERROR TO ALLOW EVIDENCE OF DEFENDANT'S FACEBOOK COMMENT AND GANG AFFILIATION)/SANDOVAL (UNDER THE FACTS, ERROR TO ALLOW EVIDENCE OF DEFENDANT'S FACEBOOK COMMENT AND GANG AFFILIATION)

CRIMINAL LAW, EVIDENCE.

UNDER THE FACTS, ERROR TO ALLOW EVIDENCE OF DEFENDANT'S FACEBOOK COMMENT AND GANG AFFILIATION AS SANDOVAL EVIDENCE.

Although the errors were deemed harmless, the Second Department noted that allowing, as Sandoval evidence, a comment posted by defendant on Facebook and evidence of defendant's gang affiliation was improper under the facts:

The Supreme Court erred, in its Sandoval ruling ... , in permitting the People to elicit testimony from the defendant regarding a comment posted on his Facebook page, since the comment was not probative of the defendant's credibility ... . The Supreme Court further erred in permitting the People to elicit testimony from certain witnesses regarding the defendant's alleged gang affiliation and involvement in a prior violent incident. Contrary to the People's contention and the Supreme Court's conclusion, the defendant did not introduce evidence that could properly be construed as character evidence and, thus, it was improper to permit the People to elicit evidence as to the defendant's alleged prior bad acts on that basis ... . In addition, the Supreme Court improperly modified its Sandoval ruling by permitting the prosecutor to question the defendant regarding his alleged gang affiliation and the prior violent incident, as the defendant did not "open the door" to the otherwise precluded evidence ... . **People v Borgella, 2016 NY Slip Op 07972, 2nd Dept 11-23-16**

CRIMINAL LAW (DEFENDANT, WHO WAS CHARGED WITH POSSESSION OF A WEAPON, SHOULD HAVE BEEN ALLOWED TO CROSS-EXAMINE THE ARRESTING OFFICER ABOUT A CIVIL LAWSUIT WHICH ALLEGED THE OFFICER FABRICATED A WEAPONS CHARGE)/EVIDENCE (CRIMINAL LAW, DEFENDANT, WHO WAS CHARGED WITH POSSESSION OF A WEAPON, SHOULD HAVE BEEN ALLOWED TO CROSS-EXAMINE THE ARRESTING OFFICER ABOUT A CIVIL LAWSUIT WHICH ALLEGED THE OFFICER FABRICATED A WEAPONS CHARGE)/POLICE OFFICERS (CROSS-EXAMINATION, (DEFENDANT, WHO WAS CHARGED WITH POSSESSION OF A WEAPON, SHOULD HAVE BEEN ALLOWED TO CROSS-EXAMINE THE ARRESTING OFFICER ABOUT A CIVIL LAWSUIT WHICH ALLEGED THE OFFICER FABRICATED A WEAPONS CHARGE)

CRIMINAL LAW, EVIDENCE.

DEFENDANT, WHO WAS CHARGED WITH POSSESSION OF A WEAPON, SHOULD HAVE BEEN ALLOWED TO CROSS-EXAMINE THE ARRESTING OFFICER ABOUT A CIVIL LAWSUIT WHICH ALLEGED THE OFFICER FABRICATED A WEAPONS CHARGE.

The Second Department determined prohibiting the cross-examination of a police officer about a federal lawsuit which alleged the officer fabricated a weapons charged was reversible error. Defendant was arrested by the officer and charged with possession of a weapon allegedly found by the officer in the seat of the car where defendant was sitting:

The Court of Appeals has held that law enforcement witnesses should be treated in the same manner as any other prosecution witness for purposes of cross-examination and that civil allegations of misconduct in a federal lawsuit filed against a law enforcement agent are favorable to a defendant as impeachment evidence insofar as such allegations bear on a law enforcement officer's credibility as a witness ... . Furthermore, there is no prohibition against cross-examining a witness, including a police officer, about bad acts that have never been formally proven at a trial ... .

In cross-examining a law enforcement witness, the same standard for good faith basis and specific allegations relevant to credibility applies, as does the same broad latitude to preclude or limit cross-examination ... . Counsel must first present a good faith basis for inquiring, namely the lawsuit relied upon. Second, specific allegations from the lawsuit that are relevant to the credibility of the law enforcement witness must be identified. Third, the trial judge must exercise discretion in assessing whether inquiry into such allegations would confuse or mislead the jury, or create a substantial risk of undue prejudice to the parties ... . **People v Enoe, 2016 NY Slip Op 07977, 2nd Dept 11-23-16**

CRIMINAL LAW (JURY SHOULD HAVE BEEN INSTRUCTED A WITNESS WAS AN ACCOMPLICE AS A MATTER OF LAW (REQUIRING CORROBORATION OF THE WITNESS' TESTIMONY), REQUEST FOR ACCOMPLICE INSTRUCTION DURING JURY DELIBERATIONS PRESEVED THE ISSUE FOR APPEAL)/EVIDENCE (CRIMINAL LAW, JURY SHOULD HAVE BEEN INSTRUCTED A WITNESS WAS AN ACCOMPLICE AS A MATTER OF LAW (REQUIRING CORROBORATION OF THE WITNESS' TESTIMONY), REQUEST FOR ACCOMPLICE INSTRUCTION DURING JURY DELIBERATIONS PRESEVED THE ISSUE FOR APPEAL)/APPEALS (CRIMINAL LAW, REQUEST FOR ACCOMPLICE INSTRUCTION DURING JURY DELIBERATIONS PRESEVED THE ISSUE FOR APPEAL)

CRIMINAL LAW, EVIDENCE, APPEALS.

JURY SHOULD HAVE BEEN INSTRUCTED A WITNESS WAS AN ACCOMPLICE AS A MATTER OF LAW (REQUIRING CORROBORATION OF THE WITNESS' TESTIMONY), REQUEST FOR ACCOMPLICE INSTRUCTION DURING JURY DELIBERATIONS PRESERVED THE ISSUE FOR APPEAL.

The Third Department, reversing defendant's conviction, determined the jury should have been instructed a witness (Perkins) was an accomplice as a matter of law. The defendant was charged and convicted of tampering with evidence (attempting to dispose of a jacket allegedly worn when defendant committed murder). It was alleged defendant instructed Perkins to get rid of his boots. The court noted that defendant's request for the instruction, made during deliberations in response to a jury note, preserved the issue for appeal:

> ... [I]t is well settled that, "to be an accomplice for corroboration purposes, the witness must somehow be criminally implicated and potentially subject to prosecution for the conduct or factual transaction related to the crime[] for which the defendant is on trial" ... . Thus, "a 'witness is an accomplice as a matter of law only if the jury could reasonably reach no other conclusion but that he [or she] participated in the offense charged or an offense based upon the same or some of the same facts or conduct which constitute the offense charged'" ... .
>
> Perkins' testimony established that she picked defendant up at the same location that the jacket was later found and she subsequently disposed of defendant's boots pursuant to his direction. In addition, she was arrested the same day as defendant, was charged with a felony, entered into a cooperation agreement with the People and, pursuant to that agreement, pleaded guilty to a misdemeanor in exchange for her truthful testimony against defendant. When defendant requested the accomplice charge, he stated that Perkins had pleaded guilty to "obstructing governmental administration . . . in exchange for not being prosecuted for tampering." In light of this, we find that Perkins was an accomplice as a matter of law "since [s]he could have been (and was) charged with a crime 'based upon some of the same facts or conduct' upon which the charge[] against defendant [was] based" ... . **People v Whyte, 2016 NY Slip Op 07880, 3rd Dept 11-23-16**

CRIMINAL LAW (DENIAL OF PAROLE PROPERLY ANNULLED, NEW HEARING BEFORE DIFFERENT COMMISSIONERS ORDERED)/PAROLE (DENIAL OF PAROLE PROPERLY ANNULLED, NEW HEARING BEFORE DIFFERENT COMMISSIONERS ORDERED)

CRIMINAL LAW, PAROLE.

DENIAL OF PAROLE PROPERLY ANNULLED, NEW HEARING BEFORE DIFFERENT COMMISSIONERS ORDERED.

The First Department, in a full-fledged opinion by Justice Gesmer, affirmed Supreme Court's annulment of parole denial and ordered a new hearing before different commissioners. Petitioner shot and killed her husband. Evidence presented at trial indicated she had been abused by her husband for many years and her husband was threatening severe abuse at the time of the shooting. Petitioner earned two college degrees while in prison, participated in every available rehabilitation program, taught other inmates, served on a grievance committee, successfully worked for the Department of Motor Vehicles and testing indicated it was highly unlikely she would re-offend. Yet she was denied parole three times:

Based on the record before us, we conclude that the motion court correctly determined that the Board acted with an irrationality bordering on impropriety in denying petitioner parole. The Board focused exclusively on the seriousness of petitioner's conviction and the decedent's family's victim impact statements (which it incorrectly described as "community opposition to her release") without giving genuine consideration to petitioner's remorse, institutional achievements, release plan, and her lack of any prior violent criminal history.

The Board's statement that, "[d]espite your assertions of abuse being rejected by a jury after hearing you testify for eight days, and having no corroboration on record of the abuse, you continue to blame your victim for his death," disregards petitioner's testimony accepting responsibility and expressing remorse for her actions. It also fails to recognize that petitioner may legitimately view herself as a battered woman, even though the jury did not find that she met New York's exacting requirements for the defenses of justification (Penal Law § 35.15[2]) and extreme emotional disturbance (Penal Law § 125.25[1][a]). * * * ...[W]e agree with the motion court that apologizing for the shooting while steadfastly maintaining that she was an abuse victim does not indicate a lack of remorse for her actions. **Matter of Rossakis v New York State Bd. of Parole, 2016 NY Slip Op 07415, 1st Dept 10-10-16**

DEFAMATION

DEFAMATION (STATEMENT IN SUMMONS WITH NOTICE ABSOLUTELY PRIVILEGED)/PRIVILEGE (DEFAMATION, STATEMENT IN SUMMONS WITH NOTICE ABSOLUTELY PRIVILEGED)/IMMUNITY (DEFAMATION, STATEMENT IN SUMMONS WITH NOTICE ABSOLUTELY PRIVILEGED)

DEFAMATION, PRIVILEGE.

STATEMENT IN SUMMONS WITH NOTICE ABSOLUTELY PRIVILEGED.

The Second Department determined the statement in a summons with notice alleging a mortgage was obtained by fraud was protected by judicial-proceedings privilege:

Generally, statements made at all stages of a judicial proceeding in communications among the parties, witnesses, counsel, and the court are accorded an absolute privilege, as long as the statements may be considered in some way "pertinent" to the issue in the proceeding ... . This privilege, or "immunity" ... , applies to statements made in or out of court, on or off the record, and regardless of the motive with which they were made ... .

The test of pertinency to the litigation is extremely liberal, so as to embrace anything that may possibly or plausibly be relevant or pertinent ... . The purpose of the privilege is to allow the parties, witnesses, and attorneys in a litigation to communicate freely without fear of defamation litigation ... . **Weinstock v Sanders, 2016 NY Slip Op 07947, 2nd Dept 11-23-16**

DISCIPLINARY HEARINGS

DISCIPLINARY HEARINGS (INMATES) (HEARING OFFICER DID NOT MAKE AN ADEQUATE INQUIRY INTO THE NATURE AND RELIABILITY OF CONFIDENTIAL INFORMATION, DETERMINATION ANNULLED)/EVIDENCE (INMATE DISCIPLINARY HEARINGS, HEARING OFFICER DID NOT MAKE AN ADEQUATE INQUIRY INTO THE NATURE AND RELIABILITY OF CONFIDENTIAL INFORMATION, DETERMINATION ANNULLED)

DISCIPLINARY HEARINGS (INMATES).

HEARING OFFICER DID NOT MAKE AN ADEQUATE INQUIRY INTO THE NATURE AND RELIABILITY OF CONFIDENTIAL INFORMATION, DETERMINATION ANNULLED.

The Third Department concluded the nature of the confidential information provided to the hearing officer and the hearing officer's failure to adequately inquire into the reliability of the information required annulment of the determination:

> Here, the confidential information considered by the Hearing Officer consisted of, among other things, memoranda prepared by correction officials that briefly summarized their interviews with three confidential sources who stated, in conclusory fashion, that petitioner was the individual who broke the window. In addition, a memorandum and photo array identification were provided by one of the confidential sources, but were similarly lacking in detail. The Hearing Officer also considered the confidential testimony of the two correction officials who spoke directly with the confidential sources. The officials related that the sources identified petitioner as the individual who broke the window, but did not reveal any specific information regarding the basis of their knowledge. Significantly, there is no indication that the sources actually witnessed petitioner break the window nor any explanation as to how they acquired this information. In addition, the correction officials who interviewed them did not provide any endorsement of their reliability other than to state that they freely provided the information and were not coerced. Under these circumstances, we conclude that the Hearing Officer failed to undertake the requisite independent assessment of the confidential information to establish its reliability ... . **Matter of Belliard v New York State Dept. of Corr., 2016 NY Slip Op 07382, 3rd Dept 11-10-16**

EDUCATION-SCHOOL LAW

EDUCATION SCHOOL LAW (LATE NOTICE OF CLAIM, SCHOOL MAY HAVE HAD CONSTRUCTIVE KNOWLEDGE OF THE STUDENT'S CLAIM, BUT DID NOT HAVE ACTUAL KNOWLEDGE, LEAVE TO SERVE A LATE NOTICE OF CLAIM SHOULD NOT HAVE BEEN GRANTED)/NEGLIGENCE (SCHOOL, LATE NOTICE OF CLAIM, SCHOOL MAY HAVE HAD CONSTRUCTIVE KNOWLEDGE OF THE STUDENT'S CLAIM, BUT DID NOT HAVE ACTUAL KNOWLEDGE, LEAVE TO SERVE A LATE NOTICE OF CLAIM SHOULD NOT HAVE BEEN GRANTED)/NOTICE OF CLAIM (SCHOOL, LATE NOTICE OF CLAIM, SCHOOL MAY HAVE HAD CONSTRUCTIVE KNOWLEDGE OF THE STUDENT'S CLAIM, BUT DID NOT HAVE ACTUAL KNOWLEDGE, LEAVE TO SERVE A LATE NOTICE OF CLAIM SHOULD NOT HAVE BEEN GRANTED)

EDUCATION-SCHOOL LAW, NEGLIGENCE.

SCHOOL MAY HAVE HAD CONSTRUCTIVE KNOWLEDGE OF THE STUDENT'S CLAIM, BUT DID NOT HAVE ACTUAL KNOWLEDGE; LEAVE TO SERVE A LATE NOTICE OF CLAIM SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department determined claimant high school wrestler should not have been granted leave to serve a late notice of claim against one of the two named schools, Akron. The claimant alleged he contracted herpes from an Akron wrestler during a tournament at Akron. Although Akron was deemed to have constructive knowledge of the claim, the court found it did not have timely actual knowledge of the essential facts of the claim:

We agree with Akron ... that it did not have actual knowledge of the essential facts constituting the claim. Akron established that it was not aware until it received claimant's application for leave to serve a late notice of claim that he was allegedly infected with herpes by wrestling Akron's student at the tournament. ...[C]laimant here established that, at most, Akron had constructive knowledge of the claim, which is insufficient ... . It is well settled that actual knowledge of the claim is the factor that is accorded "great weight" in determining whether to grant leave to serve a late notice of claim ... . Even if we agree with claimant that Akron suffered no prejudice from the delay, we nevertheless conclude that the court abused its discretion in granting claimant's application for leave to serve a late notice of claim against Akron ... . **Matter of Ficek v Akron Cent. Sch. Dist., 2016 NY Slip Op 07545, 4th Dept 11-10-16**

EMPLOYMENT LAW

EMPLOYMENT LAW (PLAINTIFF STATED A CAUSE OF ACTION FOR SEXUAL ORIENTATION-BASED DISCRIMINATION, DEFENDANT'S ARGUMENT THERE WAS A NON-DISCRIMINATORY REASON FOR ADVERSE ACTION SHOULD NOT BE CONSIDERED IN A CPLR 3211 (a)(7) MOTION TO DISMISS)/HUMAN RIGHTS LAW (NYC) (PLAINTIFF STATED A CAUSE OF ACTION FOR SEXUAL ORIENTATION-BASED DISCRIMINATION, DEFENDANT'S ARGUMENT THERE WAS A NON-DISCRIMINATORY REASON FOR ADVERSE ACTION SHOULD NOT BE CONSIDERED IN A CPLR 3211 (a)(7) MOTION TO DISMISS)/CIVIL PROCEDURE (MOTION TO DISMISS, PLAINTIFF STATED A CAUSE OF ACTION FOR SEXUAL ORIENTATION-BASED DISCRIMINATION, DEFENDANT'S ARGUMENT THERE WAS A NON-DISCRIMINATORY REASON FOR ADVERSE ACTION SHOULD NOT BE CONSIDERED IN A CPLR 3211 (a)(7) MOTION TO DISMISS)/CPLR 3211 (a)(7) (PLAINTIFF STATED A CAUSE OF ACTION FOR SEXUAL ORIENTATION-BASED DISCRIMINATION, DEFENDANT'S ARGUMENT THERE WAS A NON-DISCRIMINATORY REASON FOR ADVERSE ACTION SHOULD NOT BE CONSIDERED IN A CPLR 3211 (a)(7) MOTION TO DISMISS)

EMPLOYMENT LAW, NYC HUMAN RIGHTS LAW, CIVIL PROCEDURE.

PLAINTIFF STATED A CAUSE OF ACTION FOR SEXUAL ORIENTATION-BASED DISCRIMINATION, DEFENDANT'S ARGUMENT THERE WAS A NON-DISCRIMINATORY REASON FOR ADVERSE ACTION SHOULD NOT BE CONSIDERED IN A CPLR 3211 (a)(7) MOTION TO DISMISS.

The First Department, reversing (modifying) Supreme Court, determined plaintiff had stated a cause of action under the New York City Human Rights Law for sexual orientation-based discrimination:

Plaintiff's allegations that he is an openly gay man and was qualified for the positions of correction officer and captain meet the first two elements of his discrimination claim. Plaintiff's allegations that he was written up, twice suspended, and ultimately demoted meet the third element of disadvantageous treatment ... . Defendant's argument that plaintiff has not alleged that he was treated worse than similarly situated captains — as opposed to correction officers — is unavailing. Suspension and demotion are, on their faces, adverse employment actions. Defendant's argument is, effectively, that those actions were warranted by plaintiff's conduct while a captain, but this argument goes more properly to the second leg of the ... burden-shifting framework ... , namely rebuttal of a prima facie claim of employment discrimination by showing a legitimate, nondiscriminatory reason for the adverse action, and is misplaced at this early procedural juncture. **James v City of New York, 2016 NY Slip Op 07400, 1st Dept 11-10-16**

FAMILY LAW

FAMILY LAW (FAMILY COURT RETAINS JURISDICTION TO CONDUCT A PERMANENCY HEARING (RE: PLACEMENT IN FOSTER CARE) AFTER THE UNDERLYING NEGLECT PETITION (WHICH LED TO TEMPORARY PLACEMENT) HAS BEEN DISMISSED)/NEGLECT (FAMILY COURT RETAINS JURISDICTION TO CONDUCT A PERMANENCY HEARING (RE: PLACEMENT IN FOSTER CARE) AFTER THE UNDERLYING NEGLECT PETITION (WHICH LED TO TEMPORARY PLACEMENT) HAS BEEN DISMISSED)/PERMANENCY HEARING (FAMILY COURT RETAINS JURISDICTION TO CONDUCT A PERMANENCY HEARING (RE: PLACEMENT IN FOSTER CARE) AFTER THE UNDERLYING NEGLECT PETITION (WHICH LED TO TEMPORARY PLACEMENT) HAS BEEN DISMISSED)/SUBJECT MATTER JURISDICTION (FAMILY COURT RETAINS JURISDICTION TO CONDUCT A PERMANENCY HEARING (RE: PLACEMENT IN FOSTER CARE) AFTER THE UNDERLYING NEGLECT PETITION (WHICH LED TO TEMPORARY PLACEMENT) HAS BEEN DISMISSED)

FAMILY LAW.

FAMILY COURT RETAINS JURISDICTION TO CONDUCT A PERMANENCY HEARING (RE: PLACEMENT IN FOSTER CARE) AFTER THE UNDERLYING NEGLECT PETITION (WHICH LED TO TEMPORARY PLACEMENT) HAS BEEN DISMISSED.

The Fourth Department, in a full-fledged opinion by Justice Scudder, over a two-justice dissent, determined Family Court had jurisdiction to conduct a permanency hearing (re: placement in foster care) even though the underlying neglect petition which led to temporary placement of the child was dismissed:

> We ... conclude, based upon the plain language of the provisions of Family Court Act article 10-A, that the court obtains jurisdiction as a result of a placement with petitioner pursuant to section 1022 (see § 1088), and that the court is required to make a determination whether to return the child to the parent based upon the best interests and safety of the child, including whether the child would be at risk of abuse or neglect if the child were to return to the parent (see § 1089 [d] [1], [2] [i]). Thus, we conclude that the court retained jurisdiction to conduct the permanency hearing despite the dismissal of the neglect petition. Moreover, our interpretation of the statutory provisions of article 10-A comports with the longstanding principle that "an overarching consideration always obtains for children to be returned to biological parents, if at all possible and responsible . . . When that cannot be done, the emphasis shifts to securing permanent, stable solutions and settings"... . **Matter of Jamie J. (Michelle E.C.), 2016 NY Slip Op 07424, 4th Dept 11-10-16**

FAMILY LAW (DEFENDANT MOTHER, WHO SUCCESSFULLY OBTAINED AN ORDER REQUIRING DEFENDANT TO PAY CHILD SUPPORT, WAS JUDICIALLY ESTOPPED FROM ARGUING DEFENDANT WAS NOT A PARENT FOR THE PURPOSE OF VISITATION)/VISITATION (DEFENDANT MOTHER, WHO SUCCESSFULLY OBTAINED AN ORDER REQUIRING DEFENDANT TO PAY CHILD SUPPORT, WAS JUDICIALLY ESTOPPED FROM ARGUING DEFENDANT WAS NOT A PARENT FOR THE PURPOSE OF VISITATION)/CHILD SUPPORT (DEFENDANT MOTHER, WHO SUCCESSFULLY OBTAINED AN ORDER REQUIRING DEFENDANT TO PAY CHILD SUPPORT, WAS JUDICIALLY ESTOPPED FROM ARGUING DEFENDANT WAS NOT A PARENT FOR THE PURPOSE OF VISITATION)/JUDICIAL ESTOPPEL (FAMILY LAW, DEFENDANT MOTHER, WHO SUCCESSFULLY OBTAINED AN ORDER REQUIRING DEFENDANT TO PAY CHILD SUPPORT, WAS JUDICIALLY ESTOPPED FROM ARGUING DEFENDANT WAS NOT A PARENT FOR THE PURPOSE OF VISITATION)

FAMILY LAW.

DEFENDANT MOTHER, WHO SUCCESSFULLY OBTAINED AN ORDER REQUIRING PLAINTIFF TO PAY CHILD SUPPORT, WAS JUDICIALLY ESTOPPED FROM ARGUING PLAINTIFF WAS NOT A PARENT FOR THE PURPOSE OF VISITATION.

The Second Department, reversing Family Court, determined defendant mother was judicially estopped from arguing plaintiff was not a parent for the purpose of visitation. Defendant had previously successfully obtain an order requiring plaintiff to pay child support:

The defendant was judicially estopped from arguing that the plaintiff was not a parent for the purpose of visitation. First, by asserting in her child support petition that the plaintiff was chargeable with support for the subject child, the plaintiff assumed the position before the Family Court that the plaintiff was the subject child's parent, as it is parents who are chargeable with the support of their children (see Family Ct Act § 413[1][a]). Next, based on her assertion that the plaintiff was chargeable with the subject child's support, the defendant successfully obtained an order compelling the plaintiff to pay child support for the subject child ... . Under this order, the plaintiff was required to pay child support for his children, including the subject child. Furthermore, the record does not support the court's finding that the defendant unequivocally waived the right to child support. Therefore, the defendant is judicially estopped from arguing that the plaintiff is not a parent for the purpose of visitation ... . **Paese v Paese, 2016 NY Slip Op 07304, 2nd Dept 11-9-16**

FAMILY LAW (WHEN PARENTS HAVE EQUAL PARENTING TIME, THE PARENT WITH THE HIGHER INCOME SHOULD BE DEEMED THE NONCUSTODIAL PARENT FOR CHILD SUPPORT PURPOSES)/CHILD SUPPORT (WHEN PARENTS HAVE EQUAL PARENTING TIME, THE PARENT WITH THE HIGHER INCOME SHOULD BE DEEMED THE NONCUSTODIAL PARENT FOR CHILD SUPPORT PURPOSES)/NONCUSTODIAL PARENT (WHEN PARENTS HAVE EQUAL PARENTING TIME, THE PARENT WITH THE HIGHER INCOME SHOULD BE DEEMED THE NONCUSTODIAL PARENT FOR CHILD SUPPORT PURPOSES)

FAMILY LAW.

WHEN PARENTS HAVE EQUAL PARENTING TIME, THE PARENT WITH THE HIGHER INCOME SHOULD BE DEEMED THE NONCUSTODIAL PARENT FOR CHILD SUPPORT PURPOSES.

The Second Department, reversing Family Court, determined that mother, who had a substantially higher income than father, should be deemed the noncustodial parent because mother and father had equal parenting time. Therefore, father was entitled to child support from mother:

The "custodial parent" within the meaning of the Child Support Standards Act is the parent who has physical custody of the child for the majority of the time ... . Where neither parent has the child for a majority of the time, the parent with the higher income, who bears the greater share of the child support obligation, should be deemed the noncustodial parent for the purposes of child support ... . **Matter of Conway v Gartmond, 2016 NY Slip Op 07319, 2nd Dept 11-9-16**

FAMILY LAW (APPELLANT PROPERLY FOUND TO BE A PERSON LEGALLY RESPONSIBLE FOR THE CHILD, CRITERIA EXPLAINED)/NEGLECT (APPELLANT PROPERLY FOUND TO BE A PERSON LEGALLY RESPONSIBLE FOR THE CHILD, CRITERIA EXPLAINED)/PERSON LEGALLY RESPONSIBLE FOR CHILD (FAMILY LAW, NEGLECT, APPELLANT PROPERLY FOUND TO BE A PERSON LEGALLY RESPONSIBLE FOR THE CHILD, CRITERIA EXPLAINED)

FAMILY LAW.

APPELLANT PROPERLY FOUND TO BE A PERSON LEGALLY RESPONSIBLE FOR THE CHILD, CRITERIA EXPLAINED.

The First Department, affirming a neglect finding, explained that appellant was properly found to be "a person legally responsible for the subject child:"

A person legally responsible for a child is defined as the child's "custodian, guardian, or any other person responsible for the child's care at the relevant time." A "[c]ustodian may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the . . . neglect of the child" (Family Ct Act § 1012[g]). A person who "acts as the functional equivalent of a parent in a familial or household setting" is a person legally responsible for a child's care ... .

The determination of whether a particular person has acted as the functional equivalent of a parent is a discretionary, fact-intensive inquiry which will vary according to the circumstances in each case. Factors to be considered include the frequency and nature of the contact, the nature and extent of the control exercised by appellant over the child's environment, the duration of appellant's contact with the child, and appellant's relationship with the child's parent ... .

Appellant testified that he cared for the younger children every work day by taking them to school and picking them up, preparing meals, cleaning the home, preparing the children's clothing, grocery shopping, and providing financial assistance to the household. The school social worker and appellant both testified that M.W. lived in the home in September 2014, when the incident took place. Although appellant later changed his testimony concerning her residence, the court properly credited his initial statement and found that he was a person legally responsible for M.W. Given her age, she did not require the same hands-on care as the younger children, but his testimony reflected that he contributed to the functioning of the household of which she was a part and had frequent regular contact with her ... . **Matter of Keniya G. (Avery P.), 2016 NY Slip Op 07752, 1st Dept 11-17-16**

FAMILY LAW (QUESTION OF FACT RAISED ABOUT WHETHER A SEPARATION AGREEMENT WAS UNCONSCIONABLE)/SEPARATION AGREEMENT (QUESTION OF FACT RAISED ABOUT WHETHER A SEPARATION AGREEMENT WAS UNCONSCIONABLE)/UNCONSCIONABILITY (FAMILY LAW, QUESTION OF FACT RAISED ABOUT WHETHER A SEPARATION AGREEMENT WAS UNCONSCIONABLE)

FAMILY LAW.

QUESTION OF FACT RAISED ABOUT WHETHER A SEPARATION AGREEMENT WAS UNCONSCIONABLE.

The Second Department determined summary judgment should not have been granted enforcing the parties' separation agreement. Defendant had raised a question of fact about whether the agreement was unconscionable:

Under the terms of the separation agreement, the defendant relinquished all of the property rights that he acquired during the marriage, including any interest that he may have had in the plaintiff's partnership interest in a neurological practice and the parties' four properties in Florida, as well as any spousal maintenance. Given the vast disparity in the parties' earnings, the evidence that the defendant had no assets of value, and the defendant's documented medical condition which inhibits his future earning capacity, the defendant's submissions were sufficient to create an inference that the separation agreement was unconscionable ... . In addition, the defendant's evidence indicating that the plaintiff sold almost $1 million in securities in the months preceding his execution of the separation agreement, the value of which were not accounted for in the list of her bank and brokerage accounts therein, raises a triable issue of fact as to whether the plaintiff concealed assets ... . Under these circumstances, the Supreme Court should have exercised its equitable powers and directed further financial disclosure, to be followed by a hearing to test the validity of the separation agreement ... . **Gardella v Remizov, 2016 NY Slip Op 07924, 2nd Dept 11-23-16**

FAMILY LAW (CUSTODY, FATHER DOES NOT HAVE A RIGHT TO A TRANSCRIPT OF LINCOLN HEARING)/CUSTODY (LINCOLN HEARING, FATHER DOES NOT HAVE A RIGHT TO A TRANSCRIPT OF LINCOLN HEARING)/LINCOLN HEARING (CUSTODY, FATHER DOES NOT HAVE A RIGHT TO A TRANSCRIPT OF LINCOLN HEARING)

FAMILY LAW.

FATHER DOES NOT HAVE A RIGHT TO A TRANSCRIPT OF LINCOLN HEARING.

The Third Department, in rejecting father's request for a transcript of a Lincoln hearing (in a custody matter), explained why children's testimony in a Lincoln hearing must be kept confidential:

> A child's testimony in a Lincoln hearing in a proceeding pursuant to Family Ct Act article 6 is not akin to the testimony that may be taken from a child in proceedings pursuant to Family Ct Act article 10. In an article 10 proceeding, an adversarial relationship may exist between the child and the accused parent. As the child's testimony may be the sole basis for a finding of abuse or neglect, the parent's due process rights are implicated. Although there are circumstances in which a child's testimony in such a proceeding may be obtained in camera or outside the presence of the respondent parent, this must be carefully balanced with the rights of the accused parent ... .
>
> By clear contrast, in a Family Ct Act article 6 proceeding, in which a Lincoln hearing may be conducted, such a hearing serves entirely different, nonadversarial purposes, and a parent's constitutional rights are not implicated. The purpose of a Lincoln hearing is not primarily evidentiary; it is instead to assist the court in making the determination of what serves the best interests of the child. The Lincoln hearing is allowed as a manner of directly ascertaining the child's wishes and may also serve to corroborate information that has been adduced on the record during the course of the fact-finding hearing ... .
>
> "[T]he right to confidentiality during a Lincoln hearing belongs to the child and is superior to the rights or preferences of the parents" ... . **Matter of Heasley v Morse, 2016 NY Slip Op 07883, 3rd Dept 11-23-16**

FAMILY LAW (DERIVATIVE NEGLECT FINDING REVERSED)/NEGLECT (DERIVATIVE NEGLECT FINDING REVERSED)

FAMILY LAW.

DERIVATIVE NEGLECT FINDING REVERSED.

The Third Department, reversing Family Court, determined the derivative neglect was not supported by the evidence:

> Here, the proof relied upon by petitioner to support its claim of derivative neglect — namely, 1999 and 2010 indicated hotline reports involving different children — was insufficient to support a finding of derivative neglect. Neither the 1999 report nor the 2010 report resulted in a finding of neglect against respondent ... . Moreover, the conduct that formed the basis for each of the indicated reports failed to demonstrate that respondent's understanding of the responsibilities accompanying parenthood were fundamentally flawed at the time of this proceeding ... . In addition to its remoteness, the 1999 report was made against the biological parents of the child who was the subject of the report, as well as respondent, who was temporarily residing with the biological parents of the child at the age of 18, and did not conclusively establish which of the three adults had engaged in the conduct giving rise to the indicated findings. The 2010 report was indicated against respondent and his then-paramour for inadequate guardianship based on the children witnessing domestic violence, conduct that may not necessarily form the basis for a neglect finding ... . Accordingly, inasmuch as petitioner failed to satisfy its burden of proof, Family Court's finding of neglect cannot stand. **Matter of Choice I. (Warren I.), 2016 NY Slip Op 07899, 3rd Dept 11-23-16**

FAMILY LAW (FATHER DID NOT ABUSE THE JUDICIAL PROCESS, FAMILY COURT SHOULD NOT HAVE PROHIBITED FUTURE PETITIONS)/CIVIL PROCEDURE (FATHER DID NOT ABUSE THE JUDICIAL PROCESS, FAMILY COURT SHOULD NOT HAVE PROHIBITED FUTURE PETITIONS)

FAMILY LAW, CIVIL PROCEDURE.

FATHER DID NOT ABUSE THE JUDICIAL PROCESS, FAMILY COURT SHOULD NOT HAVE PROHIBITED FUTURE PETITIONS.

The Fourth Department determined father, who was incarcerated in Michigan, was afforded due process in the proceedings in which his petition for visitation was denied. However, the court noted that Family Court did not have the power, under the circumstances, to prohibit any further petitions by father:

> ... [W]e agree with the father that the court erred in sua sponte imposing conditions restricting him from filing new petitions. It is well settled that "[p]ublic policy mandates free access to the courts" ... , but " a party may forfeit that right if she or he abuses the judicial process by engaging in meritless litigation motivated by spite or ill will' " ... . Here, however, there is no basis in the record from which to conclude that the father had engaged in meritless, frivolous, or vexatious litigation, or that he had otherwise abused the judicial process ... . **Matter of Otrosinka v Hageman, 2016 NY Slip Op 07553, 4th Dept 11-10-16**

FAMILY LAW (PATERNITY, FAMILY COURT SHOULD NOT HAVE APPLIED THE DOCTRINE OF COLLATERAL ESTOPPEL TO DENY A PETITION TO VACATE AN ACKNOWLEDGMENT OF PATERNITY)/PATERNITY (FAMILY COURT SHOULD NOT HAVE APPLIED THE DOCTRINE OF COLLATERAL ESTOPPEL TO DENY A PETITION TO VACATE AN ACKNOWLEDGMENT OF PATERNITY)/COLLATERAL ESTOPPEL (FAMILY LAW, PATERNITY, FAMILY COURT SHOULD NOT HAVE APPLIED THE DOCTRINE OF COLLATERAL ESTOPPEL TO DENY A PETITION TO VACATE AN ACKNOWLEDGMENT OF PATERNITY)

FAMILY LAW, CIVIL PROCEDURE.

FAMILY COURT SHOULD NOT HAVE APPLIED THE DOCTRINE OF COLLATERAL ESTOPPEL TO DENY A PETITION TO VACATE AN ACKNOWLEDGMENT OF PATERNITY.

Under the unique facts, the Second Department determined Family Court should not have applied the doctrine of collateral estoppel to prohibit Omar from contesting paternity. Omar had signed an acknowledgment of paternity two days after the child was born. However, twice thereafter Omar filed petitions to vacate his acknowledgment supported by DNA tests:

> Family Court should have declined to apply the doctrine of collateral estoppel. " Collateral estoppel, an equitable doctrine, is based upon the general notion that a party, or one in privity with a party, should not be permitted to relitigate an issue decided against it'" ... . "[W]hether to apply collateral estoppel in a particular case depends upon general notions of fairness involving a practical inquiry into the realities of the litigation'" ... . The doctrine is highly flexible in nature, and should not be rigidly or mechanically applied, even where its technical requirements are met ... . "[T]he fundamental inquiry is whether relitigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results. No rigid rules are possible, because even these factors may vary in relative importance depending on the nature of the proceedings" ... .
>
> Here, the nature of the proceedings is highly relevant, as it involves the determination of the paternity of a child not yet seven years of age. Although Omar executed an acknowledgment of paternity two days after the subject child's

birth in November 2009, he obtained, in 2011, a private DNA test indicating that he could not be the father. In 2013, the mother consented to the vacatur of the acknowledgment of paternity based upon the results of a second DNA test. Moreover, at a 2014 court appearance, the mother advised the Support Magistrate, in contrast to statements she made in connection with Omar's first petition, that she was involved in an ongoing sexual relationship with Britton at the time of the child's conception. Under these circumstances, there is potential merit to Omar's second petition ... . It is also significant to note that neither Omar nor the mother was represented by counsel in connection with Omar's first petition ... , and that Omar was still unrepresented when the Support Magistrate instructed him to file a second petition after he unsuccessfully attempted to restore the first petition.

Taking into consideration the particular facts of this case, we are persuaded that application of the doctrine of collateral estoppel would not promote fairness to the parties. **Matter of Kaori (Omar J.--Shalette S.), 2016 NY Slip Op 07649, 2nd Dept 11-16-16**

FAMILY LAW (INADVERTENT RECORDING OF A CONVERSATION BETWEEN MOTHER AND CHILD SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE, NO TESTIMONY THE RECORDING WAS NOT ALTERED AND NO EVIDENCE OF CHAIN OF CUSTODY)/EVIDENCE (FAMILY LAW, CUSTODY, INADVERTENT RECORDING OF A CONVERSATION BETWEEN MOTHER AND CHILD SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE, NO TESTIMONY THE RECORDING WAS NOT ALTERED AND NO EVIDENCE OF CHAIN OF CUSTODY)/CUSTODY (EVIDENCE, INADVERTENT RECORDING OF A CONVERSATION BETWEEN MOTHER AND CHILD SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE, NO TESTIMONY THE RECORDING WAS NOT ALTERED AND NO EVIDENCE OF CHAIN OF CUSTODY)/RECORDINGS (FAMILY LAW, CUSTODY, INADVERTENT RECORDING OF A CONVERSATION BETWEEN MOTHER AND CHILD SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE, NO TESTIMONY THE RECORDING WAS NOT ALTERED AND NO EVIDENCE OF CHAIN OF CUSTODY)

FAMILY LAW, EVIDENCE.

INADVERTENT RECORDING OF A CONVERSATION BETWEEN MOTHER AND CHILD SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE, NO TESTIMONY THE RECORDING WAS NOT ALTERED AND NO EVIDENCE OF CHAIN OF CUSTODY.

The Third Department determined the inadvertent recording of a conversation between mother and child in this custody proceeding should not have been admitted in evidence. Although mother testified the recording capture her and the child's voices, she did not testify the recording had not been altered:

"The predicate for admission of tape recordings in evidence is clear and convincing proof that the tapes are genuine and that they have not been altered. Absent such proof, the [witness's] concession that the voice on the tapes is his or hers and that he or she recalls making some of the statements on the tapes does not exclude the possibility of alteration and, therefore, does not sufficiently establish authenticity to make the tapes admissible" ... . The foundation laid for the introduction of the recording into evidence was the mother's testimony that the telephone call was made by the child using the mother's cell phone, the voices on the recording were hers and the child's, she listened to the recording "[q]uite a few" times and her friend, Amanda Coon, was present when the recording was made. After this testimony, Family Court admitted the recording into evidence. The mother's testimony was insufficient to authenticate the recording because she did not testify as to whether or not the recording was the complete and unaltered conversation between her and the child, and "there was no attempt to offer proof about who recorded the conversation, how it was recorded (e.g., the equipment used) or the chain of custody" ... . **Matter of Williams v Rolf, 2016 NY Slip Op 07884, 3rd Dept 11-23-16**

FAMILY LAW (FAMILY COURT JUDGE SHOULD HAVE RECUSED HERSELF AFTER DEATH THREAT BY FATHER)/JUDGES (FAMILY COURT JUDGE SHOULD HAVE RECUSED HERSELF AFTER DEATH THREAT BY FATHER)/RECUSAL (FAMILY COURT JUDGE SHOULD HAVE RECUSED HERSELF AFTER DEATH THREAT BY FATHER)

FAMILY LAW, JUDGES.

FAMILY COURT JUDGE SHOULD HAVE RECUSED HERSELF AFTER DEATH THREAT BY FATHER.

The Fourth Department determined the Family Court judge should have recused herself from a dispositional hearing in a permanent neglect proceeding. Father had made a death threat against the judge following the finding of permanent neglect:

> It is well settled that, "[a]bsent a legal disqualification under Judiciary Law § 14, a . . . Judge is the sole arbiter of recusal" ... , and the decision whether to recuse is committed to his or her discretion ... . Under these circumstances, and particularly in view of the order of protection, we conclude that the court abused its discretion in refusing to recuse itself ... . **Matter of Trinity E. (Robert E.), 2016 NY Slip Op 07804, 4th Dept 11-18-16**

FORECLOSURE

FORECLOSURE (RULES OF THE CHIEF ADMINISTRATIVE JUDGE CONCERNING THE CONTENTS OF AFFIDAVITS SUBMITTED BY BANK ATTORNEYS IN FORECLOSURE ACTIONS DID NOT EXCEED RULEMAKING POWERS AND MUST BE FOLLOWED)/ATTORNEYS (FORECLOSURE, RULES OF THE CHIEF ADMINISTRATIVE JUDGE CONCERNING THE CONTENTS OF AFFIDAVITS SUBMITTED BY BANK ATTORNEYS IN FORECLOSURE ACTIONS DID NOT EXCEED RULEMAKING POWERS AND MUST BE FOLLOWED)/EVIDENCE (FORECLOSURE, RULES OF THE CHIEF ADMINISTRATIVE JUDGE CONCERNING THE CONTENTS OF AFFIDAVITS SUBMITTED BY BANK ATTORNEYS IN FORECLOSURE ACTIONS DID NOT EXCEED RULEMAKING POWERS AND MUST BE FOLLOWED)

FORECLOSURE, ATTORNEYS, EVIDENCE.

RULES OF THE CHIEF ADMINISTRATIVE JUDGE CONCERNING THE CONTENTS OF AFFIDAVITS SUBMITTED BY BANK ATTORNEYS IN FORECLOSURE ACTIONS DID NOT EXCEED RULEMAKING POWERS AND MUST BE FOLLOWED.

The Second Department, reversing Supreme Court, determined that the rules promulgated by the Chief Administrative Judge, concerning the affidavits submitted by bank attorneys in foreclosure actions, did not exceed the rule-making powers of the Chief Administrative Judge and must be complied with in actions commenced before August 30, 2013 (when a new CPLR statute went into effect):

> Contrary to the Supreme Court's determination, the Chief Administrative Judge was not acting ultra vires in issuing Administrative Orders 548/10 and 431/11 (hereinafter together the Administrative Orders), but pursuant to authority delegated by the Legislature to adopt rules and orders regulating practice in the courts after consulting with the administrative board ... . Moreover, the attorney affirmation itself is not substantive ... and, thus, is within the authority of the Chief Administrative Judge to promulgate rules of procedure.
>
> In addition, that the Legislature manifested a clear intent to apply the certificate of merit requirement of CPLR 3012-b only to those actions commenced on or after August 30, 2013, does not manifest an intent by the Legislature to relieve a plaintiff's counsel of the affirmation requirement in actions commenced prior to August 30, 2013. **Bank of N.Y. Mellon v Izmirligil, 2016 NY Slip Op 08033, 2nd Dept 11-30-16**

FORECLOSURE (PLAINTIFF'S ATTEMPT TO DEMONSTRATE STANDING FAILED BECAUSE THE SUBMITTED AFFIDAVIT DID NOT MEET THE REQUIREMENTS OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE, AFFIDAVIT SUBMITTED IN REPLY PAPERS CANNOT BE CONSIDERED)/EVIDENCE (FORECLOSURE, PLAINTIFF'S ATTEMPT TO DEMONSTRATE STANDING FAILED BECAUSE THE SUBMITTED AFFIDAVIT DID NOT MEET THE REQUIREMENTS OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE, AFFIDAVIT SUBMITTED IN REPLY PAPERS CANNOT BE CONSIDERED)/BUSINESS RECORDS EXCEPTION TO HEARSAY RULE (FORECLOSURE, PLAINTIFF'S ATTEMPT TO DEMONSTRATE STANDING FAILED BECAUSE THE SUBMITTED AFFIDAVIT DID NOT MEET THE REQUIREMENTS OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE, AFFIDAVIT SUBMITTED IN REPLY PAPERS CANNOT BE CONSIDERED)/CIVIL PROCEDURE (REPLY PAPERS, PLAINTIFF'S ATTEMPT TO DEMONSTRATE STANDING FAILED BECAUSE THE SUBMITTED AFFIDAVIT DID NOT MEET THE REQUIREMENTS OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE, AFFIDAVIT SUBMITTED IN REPLY PAPERS CANNOT BE CONSIDERED)/REPLY PAPERS (PLAINTIFF'S ATTEMPT TO DEMONSTRATE STANDING FAILED BECAUSE THE SUBMITTED AFFIDAVIT DID NOT MEET THE REQUIREMENTS OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE, AFFIDAVIT SUBMITTED IN REPLY PAPERS CANNOT BE CONSIDERED)

FORECLOSURE, EVIDENCE, CIVIL PROCEDURE.

PLAINTIFF'S ATTEMPT TO DEMONSTRATE STANDING FAILED BECAUSE THE SUBMITTED AFFIDAVIT DID NOT MEET THE REQUIREMENTS OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE; AFFIDAVIT SUBMITTED IN REPLY PAPERS CANNOT BE CONSIDERED.

The Second Department determined plaintiff loan service did not demonstrate standing to bring this foreclosure action. The affidavit submitted by the plaintiff did not meet the requirements of the business records exception to the hearsay rule. In addition, an affidavit submitted with the reply papers could not be considered:

> ...[T]he plaintiff relied on the affidavit of Jaclyn Holloway, an assistant secretary of Nationstar Mortgage, LLC (hereinafter Nationstar). Holloway alleged that, after the action was commenced, the plaintiff delivered the note to NationStar. She alleged that, "pursuant to the business records of [the plaintiff]," the plaintiff had physical possession of the note when it commenced the action. However, the plaintiff failed to demonstrate the admissibility of the records relied upon by Holloway under the business records exception to the hearsay rule (see CPLR 4518[a]) since Holloway did not attest that she was personally familiar with the record-keeping practices and procedures of the plaintiff ... . Consequently, Holloway's allegations based on those records were inadmissible ... , and, therefore, insufficient to meet the plaintiff's prima facie burden to establish its standing ... .
>
> The plaintiff could not rely on the affidavit of its vice president to meet its prima facie burden since the affidavit was improperly submitted for the first time in its reply papers ... . **Aurora Loan Servs., LLC v Baritz, 2016 NY Slip Op 07154, 2nd Dept 11-2-16**

FORECLOSURE (LOAN WHICH INCLUDED A SET AMOUNT DESIGNATED AS INTEREST WAS NOT USURIOUS, CRITERIA EXPLAINED)/MORTGAGES (LOAN WHICH INCLUDED A SET AMOUNT DESIGNATED AS INTEREST WAS NOT USURIOUS, CRITERIA EXPLAINED)/USURY (LOAN WHICH INCLUDED A SET AMOUNT DESIGNATED AS INTEREST WAS NOT USURIOUS, CRITERIA EXPLAINED)

FORECLOSURE, USURY.

LOAN WHICH INCLUDED A SET AMOUNT DESIGNATED AS INTEREST WAS NOT USURIOUS, CRITERIA EXPLAINED.

The Fourth Department determined the loan secured by a mortgage was not usurious. The $170,000 loan included $43,000 designated as interest. Whether the interest was usurious should have been determined based upon the term of loan, not when the foreclosure action was commenced:

In determining whether the interest charged exceeded the usury limit, courts must apply the traditional method for calculating the effective interest rate as set forth in Band Realty Co. v North Brewster, Inc. (37 NY2d 460, 462 ...). According to that method, "[s]o long as all payments on account of interest did not aggregate a sum greater than the aggregate of interest that could lawfully have been earned had the debt continued to the earliest maturity date, there would be no usury" ... . In applying the traditional formula, "[t]he discount, divided by the number of years in the term of the mortgage, should be added to the amount of interest due in one year, and this sum is compared to the difference between the principal and the discount in order to determine the true interest rate" ... .

Applying that formula to the case at bar, which involves a five-year mortgage of $170,000 with a $43,000 "discount" with no additional interest, we add $8,600, which is one-fifth of the discount, to the interest over the first year (0%), arriving at a sum of $8,600. Comparing the $8,600 figure to the difference between the principal and the discount retained by plaintiff, i.e., $127,000, the interest rate was 6.77% per annum. That interest rate is well below the civil usury rate of 16% per annum ... . **Canal v Munassar, 2016 NY Slip Op 07793, 4th Dept 11-18-16**

FRAUD

FRAUD (ELEMENTS OF AIDING AND ABETTING FRAUD EXPLAINED, WHEN FRAUD IN THE INDUCEMENT CAN INVALIDATE AN ARBITRATION CLAUSE EXPLAINED)/CONTRACT LAW (ELEMENTS OF AIDING AND ABETTING FRAUD EXPLAINED, WHEN FRAUD IN THE INDUCEMENT CAN INVALIDATE AN ARBITRATION CLAUSE EXPLAINED)/ARBITRATION (WHEN FRAUD IN THE INDUCEMENT CAN INVALIDATE AN ARBITRATION CLAUSE EXPLAINED)

FRAUD, CONTRACT LAW, ARBITRATION.

ELEMENTS OF AIDING AND ABETTING FRAUD EXPLAINED, WHEN FRAUD IN THE INDUCEMENT CAN INVALIDATE AN ARBITRATION CLAUSE EXPLAINED (NOT THE CASE HERE).

The Second Department, finding that a cause of action for aiding and abetting breach of contract does not exist, explained the elements of aiding and abetting fraud. The court further found that the arbitration clause was not invalidated by the allegations of fraud in the inducement:

There is no cause of action for aiding and abetting a breach of contract ... . To recover for aiding and abetting fraud, the plaintiff must plead "the existence of an underlying fraud, knowledge of the fraud by the aider and abettor, and substantial assistance by the aider and abettor in the achievement of the fraud" ... . "Substantial assistance" requires an affirmative act on the defendant's part ... . "[T]he mere inaction of an alleged aider or abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff" ... . * * *

The plaintiffs contend that the arbitration agreement is invalid because it was fraudulently induced. However, a broad arbitration provision is separable from the substantive provisions of a contract such that the agreement to arbitrate is valid even if the substantive provisions of the contract were induced by fraud ... . "The issue of fraud in the inducement affects the validity of the arbitration clause only when the fraud relates to the arbitration provision itself, or was part of a grand scheme that permeated the entire contract'" ... . "To demonstrate that fraud permeated the entire contract, it must be established that the agreement was not the result of an arm's length negotiation, or the arbitration clause was inserted into the contract to accomplish a fraudulent scheme" ... . **Markowits v Friedman, 2016 NY Slip Op 07932, 2nd Dept 11-23-16**

HUMAN RIGHTS LAW

HUMAN RIGHTS LAW (ALTHOUGH COMPLAINANT DID NOT DEMONSTRATE SHE WAS DISCRIMINATED AGAINST BY THE COOPERATIVE BASED UPON A DISABILITY, COMPLAINANT DID DEMONSTRATE THE COOPERATIVE IMPROPERLY RETALIATED AGAINST COMPLAINANT AFTER SHE FILED THE DISCRIMINATION ACTION WITH THE NYS DIVISION OF HUMAN RIGHTS)/DISABILITIES (HUMAN RIGHTS LAW, ALTHOUGH COMPLAINANT DID NOT DEMONSTRATE SHE WAS DISCRIMINATED AGAINST BY THE COOPERATIVE BASED UPON A DISABILITY, COMPLAINANT DID DEMONSTRATE THE COOPERATIVE IMPROPERLY RETALIATED AGAINST COMPLAINANT AFTER SHE FILED THE DISCRIMINATION ACTION WITH THE NYS DIVISION OF HUMAN RIGHTS)/DISCRIMINATION (ALTHOUGH COMPLAINANT DID NOT DEMONSTRATE SHE WAS DISCRIMINATED AGAINST BY THE COOPERATIVE BASED UPON A DISABILITY, COMPLAINANT DID DEMONSTRATE THE COOPERATIVE IMPROPERLY RETALIATED AGAINST COMPLAINANT AFTER SHE FILED THE DISCRIMINATION ACTION WITH THE NYS DIVISION OF HUMAN RIGHTS)/RETALIATION (ALTHOUGH COMPLAINANT DID NOT DEMONSTRATE SHE WAS DISCRIMINATED AGAINST BY THE COOPERATIVE BASED UPON A DISABILITY, COMPLAINANT DID DEMONSTRATE THE COOPERATIVE IMPROPERLY RETALIATED AGAINST COMPLAINANT AFTER SHE FILED THE DISCRIMINATION ACTION WITH THE NYS DIVISION OF HUMAN RIGHTS)

HUMAN RIGHTS LAW, COOPERATIVES.

ALTHOUGH COMPLAINANT DID NOT DEMONSTRATE SHE WAS DISCRIMINATED AGAINST BY THE COOPERATIVE BASED UPON A DISABILITY, COMPLAINANT DID DEMONSTRATE THE COOPERATIVE IMPROPERLY RETALIATED AGAINST HER AFTER SHE FILED THE DISCRIMINATION COMPLAINT WITH THE NYS DIVISION OF HUMAN RIGHTS.

Although the complainant, a shareholder in a cooperative, did not demonstrate she was discriminated against when the cooperative and the board (petitioners) refused to allow her to keep a dog in her apartment, the Second Department determined she did demonstrate petitioners retaliated against her for bringing her complaint to the New York State Division of Human Rights (SDHR). Complainant alleged she was disabled and the dog helped her cope with her disabilities:

> To establish that a violation of the Human Rights Law occurred and that a reasonable accommodation should have been made, the complainant was required to demonstrate that she is disabled, that she is otherwise qualified for the tenancy, that because of her disability it is necessary for her to keep the dog in order for her to use and enjoy the apartment, and that reasonable accommodations could be made to allow her to keep the dog (see Executive Law § 296[2][a]...). ...
>
> ... [T]he complainant failed to present medical or psychological evidence sufficient to demonstrate that the dog was actually necessary in order for her to enjoy the apartment. Notably, the complainant had resided in the apartment for more than 20 years without the dog. ...
>
> ...[T]he complainant established that she participated in the protected activity of filing an SDHR discrimination complaint against the petitioners, the petitioners were aware of this action, and there was a causal connection between the protected activity and the petitioners' retaliatory conduct, which included taking away the complainant's designated parking space for a nine-day period, refusing to accept her maintenance checks, filing eviction proceedings against her, falsely informing her that the SDHR had ruled in the petitioners' favor, and directing her to immediately remove her dog from her apartment ... . **Matter of Delkap Mgt., Inc. v New York State Div. of Human Rights, 2016 NY Slip Op 08073, 2nd Dept 11-30-16**

INSURANCE LAW

INSURANCE LAW (COURT ERRED IN REFUSING TO APPLY THE "MADE WHOLE" RULE IN THIS SUBROGATION ACTION)/MADE WHOLE RULE (INSURANCE LAW, COURT ERRED IN REFUSING TO APPLY THE "MADE WHOLE" RULE IN THIS SUBROGATION ACTION)/SUBROGATION (INSURANCE LAW, COURT ERRED IN REFUSING TO APPLY THE "MADE WHOLE" RULE IN THIS SUBROGATION ACTION)

INSURANCE LAW.

COURT ERRED IN REFUSING TO APPLY THE "MADE WHOLE" RULE IN THIS SUBROGATION ACTION.

The Fourth Department determined Supreme Court erred when it refused to apply the "made whole" rule in this subrogation action. After settling for the full amount of the policy, respondent insurer sought the full amount paid to plaintiff by another insurer. The matter was sent back because it was unclear whether the settlement made plaintiff whole:

> Plaintiff contends that, under the "made whole" rule, respondent has no right of subrogation because plaintiff's damages exceed the amount of the settlement. By way of background, the "made whole" rule provides that, if "the sources of recovery ultimately available are inadequate to fully compensate the insured for its losses, then the insurer—who has been paid by the insured to assume the risk of loss—has no right to share in the proceeds of the insured's recovery from the tortfeasor" ... . "In other words, the insurer may seek subrogation against only those funds and assets that remain after the insured has been compensated. This designation of priority interests . . . assures that the injured party's claim against the tortfeasor takes precedence over the subrogation rights of the insurer" ... . Although we agree with plaintiff that the court erred in refusing to apply that rule, on this record, it is unclear whether the settlement made plaintiff whole. **Grinage v Durawa, 2016 NY Slip Op 07429, 4th Dept 11-10-16**

INSURANCE LAW (EVEN IF THE MISREPRESENTATION THE HOME WAS TO BE OWNER-OCCUPIED WAS INNOCENTLY MADE, RESCISSION OF THE FIRE INSURANCE POLICY WAS JUSTIFIED)/CONTRACT LAW (INSURANCE POLICY, EVEN IF THE MISREPRESENTATION THE HOME WAS TO BE OWNER-OCCUPIED WAS INNOCENTLY MADE, RESCISSION OF THE FIRE INSURANCE POLICY WAS JUSTIFIED)/MATERIAL MISREPRESENTATION (INSURANCE POLICY, EVEN IF THE MISREPRESENTATION THE HOME WAS TO BE OWNER-OCCUPIED WAS INNOCENTLY MADE, RESCISSION OF THE FIRE INSURANCE POLICY WAS JUSTIFIED)

INSURANCE LAW, CONTRACT LAW.

EVEN IF THE MISREPRESENTATION THE HOME WAS TO BE OWNER-OCCUPIED WAS INNOCENTLY MADE, RESCISSION OF THE FIRE INSURANCE POLICY WAS JUSTIFIED.

The Second Department determined defendant insurer properly rescinded the plaintiffs' fire insurance policy based upon the plaintiffs' misrepresentation the residence would be owner-occupied. The court noted that a misrepresentation can be innocently made and still trigger rescission. The court also found that the broker had no obligation to make sure the insurance application was properly filled out by the plaintiffs:

> Here, [the insurer] established its prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that the plaintiffs' application for insurance contained a misrepresentation regarding whether the premises would be owner occupied and that it would not have issued the subject policy if the application had disclosed that the subject premises would not be owner occupied ... .
>
> In opposition, the plaintiffs failed to raise a triable issue of fact. The plaintiffs admit that, at the time the application was completed, they did not intend to occupy the premises. Thus, contrary to the plaintiffs' contentions, although

the application was completed prior to closing and prior to the inception of the policy, the representation therein that the premises was an owner-occupied primary residence established, in effect, a material misrepresentation of a then existing fact that the premises would be owner occupied, which was sufficient for rescission under Insurance Law § 3105 ... . **Joseph v Interboro Ins. Co., 2016 NY Slip Op 08050, 2nd Dept 11-30-16**

INSURANCE LAW (COMPLAINT STATED A CAUSE OF ACTION AGAINST BROKER INDIVIDUALLY FOR NEGLIGENT MISREPRESENTATION AND FOR BREACH OF A FIDUCIARY DUTY AGAINST THE BROKER'S CORPORATION)/CORPORATION LAW (INSURANCE LAW, COMPLAINT STATED A CAUSE OF ACTION AGAINST BROKER INDIVIDUALLY FOR NEGLIGENT MISREPRESENTATION AND FOR BREACH OF A FIDUCIARY DUTY AGAINST THE BROKER'S CORPORATION)/NEGLIGENT MISREPRESENTATION (INSURANCE LAW, COMPLAINT STATED A CAUSE OF ACTION AGAINST BROKER INDIVIDUALLY FOR NEGLIGENT MISREPRESENTATION AND FOR BREACH OF A FIDUCIARY DUTY AGAINST THE BROKER'S CORPORATION)/FIDUCIARY DUTY (INSURANCE LAW, COMPLAINT STATED A CAUSE OF ACTION AGAINST BROKER INDIVIDUALLY FOR NEGLIGENT MISREPRESENTATION AND FOR BREACH OF A FIDUCIARY DUTY AGAINST THE BROKER'S CORPORATION)

INSURANCE LAW, CORPORATION LAW.

COMPLAINT STATED A CAUSE OF ACTION AGAINST BROKER INDIVIDUALLY FOR NEGLIGENT MISREPRESENTATION AND FOR BREACH OF A FIDUCIARY DUTY AGAINST THE BROKER'S CORPORATION.

The Second Department, reversing (modifying), Supreme Court determined the complaint stated a cause of against for negligent misrepresentation against an insurance broker (Weiss) individually and for breach of fiduciary duty against the broker's corporation (JDW). It was alleged that the defendants failed to add plaintiff's landlord as an additional insured and the broker signed a certificate which falsely indicated the landlord had been added to the policy:

Here, the Supreme Court erred in determining, upon reargument, that the complaint failed to state a cause of action sounding in negligent misrepresentation against Weiss individually. ... [W]e note that the complaint, as amplified by the evidentiary materials submitted by the plaintiffs, alleged that Weiss personally signed a certificate of insurance falsely stating that the plaintiffs' landlord had been added as an additional insured on a certain commercial general liability insurance policy, and forwarded this certificate to the plaintiffs, knowing that it was required by the plaintiffs' landlord. This is sufficient, for purposes of CPLR 3211(a)(7), to state a cause of action against Weiss, based on his personal participation in the commission of a tort ... . * * *

The common-law rule is that "an insurance broker acting as an agent of its customer has a duty of reasonable care to the customer to obtain [specifically] requested coverage within a reasonable time after the request, or to inform the customer of the agent's inability to do so, [but] the agent owes no continuing duty to advise, guide or direct the customer insured to obtain additional coverage" ... . However "[w]here a special relationship develops between the broker and client, . . . [the] broker may be liable, even in the absence of a specific request, for failing to advise or direct the client to obtain additional coverage" ... . The Court of Appeals has identified three "exceptional situations" which may give rise to such a special relationship: " (1) the agent receives compensation for consultation apart from payment of the premiums; (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent; or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on'" ... .

Here, contrary to the defendants' contention, the complaint sufficiently alleged that there was a course of dealing between JDW and the plaintiffs over an extended period of time, which may have given rise to a special relationship between them ... . **JT Queens Carwash, Inc. v JDW & Assoc., Inc., 2016 NY Slip Op 07295, 2nd Dept 11-9-16**

INSURANCE LAW (STOCK INSURANCE, MISREPRESENTATION CAUSE OF ACTION AGAINST BEAR STEARNS RE COLLATERALIZED DEBT OBLIGATIONS AND RESIDENTIAL MORTGAGE-BACKED SECURITIES SHOULD NOT HAVE BEEN DISMISSED WITH PREJUDICE)/SECURITIES (MISREPRESENTATION CAUSE OF ACTION AGAINST BEAR STEARNS RE COLLATERALIZED DEBT OBLIGATIONS AND RESIDENTIAL MORTGAGE-BACKED SECURITIES SHOULD NOT HAVE BEEN DISMISSED WITH PREJUDICE/FRAUD (MISREPRESENTATION CAUSE OF ACTION AGAINST BEAR STEARNS RE COLLATERALIZED DEBT OBLIGATIONS AND RESIDENTIAL MORTGAGE-BACKED SECURITIES SHOULD NOT HAVE BEEN DISMISSED WITH PREJUDICE)/COLLATERALIZED DEBT OBLIGATIONS (MISREPRESENTATION CAUSE OF ACTION AGAINST BEAR STEARNS RE COLLATERALIZED DEBT OBLIGATIONS AND RESIDENTIAL MORTGAGE-BACKED SECURITIES SHOULD NOT HAVE BEEN DISMISSED WITH PREJUDICE)/RESIDENTIAL MORTGAGE-BACKED SECURITIES (MISREPRESENTATION CAUSE OF ACTION AGAINST BEAR STEARNS RE COLLATERALIZED DEBT OBLIGATIONS AND RESIDENTIAL MORTGAGE-BACKED SECURITIES SHOULD NOT HAVE BEEN DISMISSED WITH PREJUDICE)

INSURANCE LAW, SECURTIES, FRAUD.

MISREPRESENTATION CAUSE OF ACTION AGAINST BEAR STEARNS RE COLLATERALIZED DEBT OBLIGATIONS AND RESIDENTIAL MORTGAGE-BACKED SECURITIES SHOULD NOT HAVE BEEN DISMISSED WITH PREJUDICE.

The First Department, in a full-fledged opinion by Justice Richter, determined (1) plaintiff's misrepresentation cause of action was properly dismissed because of a lack of specificity in the allegations, (2) the cause of action should not have been dismissed with prejudice, (3) and the specificity provided in the appellate briefs may support an amended complaint. Plaintiff, a stock insurance company, alleged it was induced to insure collateralized debt obligations (CDO's) by misrepresentations made by Bear Stearns:

> [P]laintiff CIFG Assurance North America, Inc., a stock insurance company, alleges that Bear Stearns & Co. Inc., a predecessor of defendant J.P. Morgan Securities LLC, made material misrepresentations that induced CIFG to provide financial guaranty insurance in connection with two collateralized debt obligations (CDOs). According to CIFG, Bear Stearns had on its books a large number of high-risk residential mortgage-backed securities (RMBSs), and embarked on a scheme to rid itself of these toxic assets by offloading them into the two CDOs, and marketing the CDOs' securities to investors. * * *
>
> ... [T]he claim should not have been dismissed with prejudice, but rather, CIFG should be given the opportunity to replead. A request for leave to amend a complaint should be "freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law" ... . **CIFG Assur. N. Am., Inc. v J.P. Morgan Sec. LLC, 2016 NY Slip Op 08029, 1st Dept 11-29-16**

LABOR LAW-CONSTRUCTION LAW (PLAINTIFF'S MOTION PAPERS RAISED A QUESTION OF FACT WHETHER HIS FAILURE TO USE A LADDER WAS THE SOLE PROXIMATE CAUSE OF HIS FALL, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED WITHOUT REFERENCE TO THE OPPOSING PAPERS)/SOLE PROXIMATE CAUSE (LABOR LAW 240(1), PLAINTIFF'S MOTION PAPERS RAISED A QUESTION OF FACT WHETHER HIS FAILURE TO USE A LADDER WAS THE SOLE PROXIMATE CAUSE OF HIS FALL, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED WITHOUT REFERENCE TO THE OPPOSING PAPERS)/LADDERS (LABOR LAW 240(1), PLAINTIFF'S MOTION PAPERS RAISED A QUESTION OF FACT WHETHER HIS FAILURE TO USE A LADDER WAS THE SOLE PROXIMATE CAUSE OF HIS FALL, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED WITHOUT REFERENCE TO THE OPPOSING PAPERS)

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF'S MOTION PAPERS RAISED A QUESTION OF FACT WHETHER HIS FAILURE TO USE A LADDER WAS THE SOLE PROXIMATE CAUSE OF HIS FALL, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED WITHOUT REFERENCE TO THE OPPOSING PAPERS.

The Fourth Department, over a two-justice dissent, reversing Supreme Court, determined plaintiff's motion papers in the Labor Law 240(1) action raised a triable issue of fact whether his failure to use an available ladder was the sole proximate cause of his fall from a wall. Plaintiff's motion must therefore be denied without any need to consider the opposing papers:

> Liability under section 240 (1) does not attach when the safety devices that [the] plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and [the] plaintiff knew he [or she] was expected to use them but for no good reason chose not to do so, causing an accident" ... . Under those circumstances, the "plaintiff's own negligence is the sole proximate cause of his [or her] injury" ... .
>
> Where the plaintiff's submissions in support of the motion raise a triable issue of fact whether his or her own actions were the sole proximate cause of the injury, the plaintiff has failed to make a prima facie showing of entitlement to judgment as a matter of law on the issue of liability because "if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation" ... . In this case, plaintiff's submissions raised triable issues of fact whether plaintiff knew that he was expected to use a readily available ladder at the work site to perform his task, but for no good reason chose not to do so, and whether he would not have been injured had he not made that choice ... . **Scruton v Acro-Fab Ltd., 2016 NY Slip Op 07428, 4th Dept 11-10-16**

LABOR LAW-CONSTRUCTION LAW (REPLACING A SPEAKER IN CONJUNCTION WITH INSTALLING PANELING CONSTITUTED ALTERING, ALLEGATION THE LADDER SWAYED SUFFICIENT TO DEMONSTRATE THE FAILURE TO SECURE THE LADDER CAUSED THE FALL)/ALTERING (LABOR LAW 240(1), REPLACING A SPEAKER IN CONJUNCTION WITH INSTALLING PANELLING CONSTITUTED ALTERING, ALLEGATION THE LADDER SWAYED SUFFICIENT TO DEMONSTRATE THE FAILURE TO SECURE THE LADDER CAUSED THE FALL)/LADDERS (LABOR LAW 240(1), REPLACING A SPEAKER IN CONJUNCTION WITH INSTALLING PANELLING CONSTITUTED ALTERING, ALLEGATION THE LADDER SWAYED SUFFICIENT TO DEMONSTRATE THE FAILURE TO SECURE THE LADDER CAUSED THE FALL)

LABOR LAW-CONSTRUCTION LAW.

REPLACING A SPEAKER IN CONJUNCTION WITH INSTALLING PANELING CONSTITUTED ALTERING, ALLEGATION THE LADDER SWAYED SUFFICIENT TO DEMONSTRATE THE FAILURE TO SECURE THE LADDER CAUSED THE FALL.

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law 240(10 cause of action should have been granted. Plaintiff had been hired to install wood paneling. Speakers were removed from wall to install the paneling. Plaintiff was standing on an A-frame ladder, replacing one of the speakers when the ladder swayed and he fell. The Second Department held that plaintiff was engaged in "altering," a covered activity, and the allegation that the ladder swayed was sufficient to link the fall to a failure of a safety device (failure to secure the ladder):

> Although the defendant contends that the act of rehanging a speaker does not constitute the "altering" of a building or structure, "[t]he intent of [Labor Law § 240(1)] was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts" ... . The plaintiff was injured while rehanging a speaker that he and his coworkers had removed to enable them to install the wood paneling and, therefore, we conclude that the plaintiff was injured while performing work that was "ancillary to" a covered activity, entitling him to the protections afforded by Labor Law § 240(1) ... . "To myopically focus on a job title or the plaintiff's activities at the moment of the injury would be to ignore the totality of the circumstances in which the plaintiff and his employer were engaged in contravention of the spirit of the statute which requires a liberal construction in order to accomplish its purpose of protecting workers" ... .
>
> Further, the plaintiff established, prima facie, the existence of a violation of Labor Law § 240(1) that was a substantial factor in causing his injuries ... . "A fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240(1). There must be evidence that the subject ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries" ... . Here, the plaintiff's proof established that the ladder from which he fell was inadequately secured to provide him with proper protection, and that the failure to secure the ladder was a proximate cause of his injuries ... . **Goodwin v Dix Hills Jewish Ctr., 2016 NY Slip Op 07293, 2nd Dept 11-9-16**

LABOR LAW-CONSTRUCTION LAW (REPAIR OF AN AIR CONDITIONER WAS NOT A PROTECTED ACTIVITY UNDER LABOR LAW 240(1) OR 246(1), LADDER WAS NOT DEFECTIVE AND DEFENDANT DID NOT CONTROL PLAINTIFF'S WORK, THEREFORE NO LIABILITY UNDER LABOR LAW 200(1) AS WELL)/LADDERS (REPAIR OF AN AIR CONDITIONER WAS NOT A PROTECTED ACTIVITY UNDER LABOR LAW 240(1) OR 246(1), LADDER WAS NOT DEFECTIVE AND DEFENDANT DID NOT CONTROL PLAINTIFF'S WORK, THEREFORE NO LIABILITY UNDER LABOR LAW 200(1) AS WELL)

LABOR LAW-CONSTRUCTION LAW

REPAIR OF AN AIR CONDITIONER WAS NOT A PROTECTED ACTIVITY UNDER LABOR LAW 240(1) OR 246(1), LADDER WAS NOT DEFECTIVE AND DEFENDANT DID NOT CONTROL PLAINTIFF'S WORK, THEREFORE NO LIABILITY UNDER LABOR LAW 200(1) AS WELL.

The Second Department determined defendant (Nickel) was entitled to summary judgment dismissing the Labor Law 200(1), 246(1) and 240(1) causes of action. Plaintiff was injured when he fell of a ladder while attempting to fix an air

conditioner which had stopped running. Plaintiff was not engaged in a protected activity under Labor Law 240(1) or 246(1). The Labor Law 200(1) cause of action was properly dismissed because defendant did not control the manner of plaintiff's work:

> Nickel submitted evidence sufficient to establish, prima facie, that the plaintiff was not engaged in an enumerated activity protected under Labor Law § 240(1) at the time of his accident. Furthermore, Nickel submitted evidence sufficient to establish, prima facie, that the plaintiff's accident did not involve construction, demolition, or excavation and, accordingly, that Labor Law § 241(6) does not apply. In opposition, the plaintiff failed to raise a triable issue of fact.
>
> Supreme Court properly granted that branch of Nickel's motion which was for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action insofar as asserted against it, albeit for a different reason. Nickel established, prima facie, that the ladder was not defective, and the plaintiff conceded that fact. Thus, the potential liability of Nickel, contrary to the Supreme Court's finding, was not based on its actual or constructive notice of any dangerous or defective condition of the ladder ... . Instead, the plaintiff allegedly was injured as a result of the manner in which he performed his work. Accordingly, recovery against Nickel under Labor Law § 200 or under the common law may only be found if Nickel had the authority to supervise or control the performance of the work ... . Nickel established, prima facie, that it did not have authority to exercise supervision or control over the means and methods of the plaintiff's work. In opposition, the plaintiff failed to raise a triable issue of fact ... . **Mammone v T.G. Nickel & Assoc., LLC, 2016 NY Slip Op 07300, 2nd Dept 11-9-16**

LABOR LAW-CONSTRUCTION LAW (FALL WHEN DESCENDING A 28-FOOT LADDER ENTITLED PLAINTIFF TO SUMMARY JUDGMENT, APPARENTLY A 40-FOOT LADDER WOULD HAVE BEEN SAFER BUT NONE WAS AVAILABLE, THEREFORE USE OF THE SHORTER LADDER COULD NOT BE THE SOLE PROXIMATE CAUSE OF THE INJURY)/LADDERS (FALL WHEN DESCENDING A 28-FOOT LADDER ENTITLED PLAINTIFF TO SUMMARY JUDGMENT, APPARENTLY A 40-FOOT LADDER WOULD HAVE BEEN SAFER BUT NONE WAS AVAILABLE, THEREFORE USE OF THE SHORTER LADDER COULD NOT BE THE SOLE PROXIMATE CAUSE OF THE INJURY)/SOLE PROXIMATE CAUSE (LABOR LAW, FALL WHEN DESCENDING A 28-FOOT LADDER ENTITLED PLAINTIFF TO SUMMARY JUDGMENT, APPARENTLY A 40-FOOT LADDER WOULD HAVE BEEN SAFER BUT NONE WAS AVAILABLE, THEREFORE USE OF THE SHORTER LADDER COULD NOT BE THE SOLE PROXIMATE CAUSE OF THE INJURY)

LABOR LAW-CONSTRUCTION LAW.

FALL WHEN DESCENDING A 28-FOOT LADDER ENTITLED PLAINTIFF TO SUMMARY JUDGMENT, APPARENTLY A 40-FOOT LADDER WOULD HAVE BEEN SAFER BUT NONE WAS AVAILABLE, THEREFORE USE OF THE SHORTER LADDER COULD NOT BE THE SOLE PROXIMATE CAUSE OF THE INJURY.

The Second Department determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff fell when he attempted to descend a 28-foot ladder. Apparently a 40-foot ladder would have been safer, but there was no showing a 40-foot ladder was available. Therefore plaintiff's use of a 28-foot ladder could not be the sole proximate cause of his injury:

> ... [T]he plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by demonstrating that he was injured when he fell while descending an unsecured, 28-foot ladder, and that he was not provided with a safety device to prevent him from falling ... . Contrary to Halsted's (defendant's) contention, it failed to raise a triable issue of fact as to whether the plaintiff's decision to use a 28-foot ladder, rather than a 40-foot ladder, was the sole proximate cause of his injuries. The record reveals that there were no 40-foot ladders readily available to the plaintiff on the date of his accident, and that a Halsted employee nevertheless instructed the plaintiff that he was required to complete his job, or be fired. Under these circumstances, the plaintiff's use of the 28-foot ladder cannot be said to be the sole proximate cause of his injuries ... . **Pacheco v Halsted Communications, Ltd., 2016 NY Slip Op 07303, 2nd Dept 11-9-16**

LABOR LAW-CONSTRUCTION LAW (A TWO-FOOT DEEP TRENCH WAS NOT AN ELEVATION HAZARD OR A HAZARDOUS OPENING)

LABOR LAW-CONSTRUCTION LAW.

A TWO-FOOT DEEP TRENCH WAS NOT AN ELEVATION HAZARD OR A HAZARDOUS OPENING.

The Second Department determined defendant was entitled to summary judgment dismissing the Labor Law 240(1) and 241(6) causes of action. Plaintiff alleged he was pulled into a two-foot deep trench while holding a cable. The court held the hazard was not "elevation-related" and the two-foot deep trench was not a "hazardous opening:"

> The defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff's alleged injuries were not caused by the elevation or gravity-related hazards encompassed by Labor Law § 240(1) ... .
>
> ... [T]he defendants made a prima facie showing of entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 241(6) by demonstrating, inter alia, that 12 NYCRR 23-1.7(b)(1), which is the only Industrial Code provision upon which the plaintiff presently relies, is inapplicable to the facts of this case. That provision provides, in pertinent part, that "[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing" (12 NYCRR 23-1.7[b][1][i]). Although this provision is sufficiently specific to support a cause of action under Labor Law § 241(6) ... , the trench in this particular case, which was only two feet deep, is not a hazardous opening within the meaning of 12 NYCRR 23-1.7(b)(1) ... . **Palumbo v Transit Tech., LLC, 2016 NY Slip Op 07305, 2nd Dept 11-9-16**

LABOR LAW-CONSTRUCTION LAW (FALL OFF BACK OF FLATBED TRUCK WARRANTED SUMMARY JUDGMENT ON LABOR LAW 240 (1) CAUSE OF ACTION)/FLATBED TRUCK (LABOR LAW, (FALL OFF BACK OF FLATBED TRUCK WARRANTED SUMMARY JUDGMENT ON LABOR LAW 240 (1) CAUSE OF ACTION)

LABOR LAW-CONSTRUCTION LAW.

FALL OFF BACK OF FLATBED TRUCK WARRANTED SUMMARY JUDGMENT ON LABOR LAW 240 (1) CAUSE OF ACTION.

The First Department determined plaintiff's motion for summary judgment on his Labor Law 240 (1) cause of action should have been granted. Plaintiff was knocked off the back of a flatbed truck. The Labor Law 241(6) cause of action was properly dismissed (no sufficiently specific industrial code regulation applied). And defendants' control over the injury-producing work was insufficient to support the Labor Law 200 cause of action:

> The injured plaintiff testified that a metal beam, while being placed on a flatbed truck, fell off the blades of a forklift, slamming plaintiff's foot and causing him to fall off the truck. This unrefuted testimony established prima facie that "plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" and therefore that liability exists under Labor Law § 240(1) ... . The cases that defendants rely on are inapposite, since they involve not objects falling on or toward workers on flatbeds but workers falling from flatbeds, implicating only the adequacy of safety devices for falling workers, which is not at issue here ... .

Nor was plaintiff the sole proximate cause of his injuries since the injuries "were caused at least in part by the lack of safety devices to check the beam's descent as well as the manner in which [his coworker] lowered the beam" ... . **McLean v Tishman Constr. Corp., 2016 NY Slip Op 07754, 1st Dept 11-17-16**

LABOR LAW-CONSTRUCTION LAW (FALL FROM A SCAFFOLD DID NOT WARRANT SUMMARY JUDGMENT ON PLAINTIFF'S LABOR LAW 240 (1) CAUSE OF ACTION, PLAINTIFF DID NOT DEMONSTRATE THE FAILURE TO PROVIDE PROPER PROTECTION)/SCAFFOLDS (FALL FROM A SCAFFOLD DID NOT WARRANT SUMMARY JUDGMENT ON PLAINTIFF'S LABOR LAW 240 (1) CAUSE OF ACTION, PLAINTIFF DID NOT DEMONSTRATE THE FAILURE TO PROVIDE PROPER PROTECTION)

LABOR LAW-CONSTRUCTION LAW.

FALL FROM A SCAFFOLD DID NOT WARRANT SUMMARY JUDGMENT ON PLAINTIFF'S LABOR LAW 240 (1) CAUSE OF ACTION, PLAINTIFF DID NOT DEMONSTRATE THE FAILURE TO PROVIDE PROPER PROTECTION.

The Second Department determined summary judgment should not have been granted to plaintiff on his Labor Law 240 (1) cause of action. Plaintiff fell from a scaffold but his papers did not make out a prima facie case:

To establish liability pursuant to Labor Law § 240(1), a plaintiff must show that the statute was violated, and that the violation was a proximate cause of his or her injuries ... . The mere fact that a plaintiff fell from a scaffold " does not establish, in and of itself, that proper protection was not provided, and the issue of whether a particular safety device provided proper protection is generally a question of fact for the jury'" ... . Here, the plaintiff's own submissions demonstrated the existence of triable issues of fact as to how the accident occurred and it cannot be concluded, as a matter of law, that the alleged failure to provide him with protection proximately caused his injuries ... . **Karwowski v Grolier Club of City of N.Y., 2016 NY Slip Op 07625, 2nd Dept 11-16-16**

LABOR LAW-CONSTRUCTION LAW (SCAFFOLD DID NOT HAVE A SAFETY RAILING, PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON 240 (1) CAUSE OF ACTION)/SCAFFOLDS (SCAFFOLD DID NOT HAVE A SAFETY RAILING, PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON 240 (1) CAUSE OF ACTION)

LABOR LAW-CONSTRUCTION LAW.

SCAFFOLD DID NOT HAVE A SAFETY RAILING, PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON 240 (1) CAUSE OF ACTION.

The First Department determined plaintiff was properly awarded summary judgment in this Labor Law 240(1) action. Plaintiff fell from a scaffold which did not have safety railings. Any comparative negligence on plaintiff's part (not locking the wheels) was irrelevant:

Plaintiff made a prima facie showing of entitlement to judgment as a matter of law on the Labor Law § 240(1) claim by presenting undisputed evidence that he "fell off a scaffold without guardrails that would have prevented his fall" ... . Plaintiff's alleged "failure to use the locking wheel devices and his movement of the scaffold while standing on it" were at most comparative negligence, which is not a defense to a Labor Law § 240(1) claim ... . **Celaj v Cornell, 2016 NY Slip Op 07996, 1st Dept 11-29-16**

LABOR LAW-CONSTRUCTION LAW (ALTHOUGH PLAINTIFF WAS ON A LADDER WHEN INJURED, THE INJURY WAS NOT CAUSED BY GRAVITY, LABOR LAW 240 (1) CAUSE OF ACTION PROPERLY DISMISSED, DEFENDANT DID NOT HAVE SUFFICIENT CONTROL OVER THE INJURY-PRODUCING WORK TO BE LIABLE UNDER LABOR LAW 200)

LABOR LAW-CONSTRUCTION LAW.

ALTHOUGH PLAINTIFF WAS ON A LADDER WHEN INJURED, THE INJURY WAS NOT CAUSED BY GRAVITY, LABOR LAW 240 (1) CAUSE OF ACTION PROPERLY DISMISSED, DEFENDANT DID NOT HAVE SUFFICIENT CONTROL OVER THE INJURY-PRODUCING WORK TO BE LIABLE UNDER LABOR LAW 200.

The Second Department determined plaintiff's Labor Law 240 (1) and 200 causes of action were properly dismissed. Plaintiff was on a ladder bolting an elevated steel beam when a forklift struck another (connected) beam pinning plaintiff's arm between the beam he was working on and the wall. The injury was deemed unrelated to the force of gravity. In addition the court found that defendant did not exercise sufficient control over the injury-producing work to be liable under Labor Law 200. However, certain Labor Law 241 (6) causes of action, alleging the injury was linked to violations of the industrial code, should not have been dismissed:

> Labor Law § 240(1) " was designed to provide exceptional protection for workers against the special hazards which stem from a work site that is either elevated or positioned below the level where materials are hoisted or secured'" ... . Its purpose is "to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction work site elevation differentials" ... . Merely because "a worker is injured while working above ground does not ipso facto mean that the injury resulted from an elevation-related risk contemplated by Section 240(1) of the Labor Law" ... . * * *
>
> To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have the authority to exercise supervision and control over the work ... . " A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed'" ... . " [T]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence'"... . **Guallpa v Canarsie Plaza, LLC, 2016 NY Slip Op 08046, 2nd Dept 11-30-16**

LABOR LAW-CONSTRUCTION LAW (FALLING PLYWOOD NOT ACTIONABLE UNDER LABOR LAW 240 (1), NOT BEING HOISTED OR REQUIRED TO BE SECURED, LABOR LAW 246 (1) CAUSE OF ACTION PROPERLY SURVIVED)

LABOR LAW-CONSTRUCTION LAW.

FALLING PLYWOOD NOT ACTIONABLE UNDER LABOR LAW 240 (1), PLYWOOD WAS NOT BEING HOISTED AND WAS NOT REQUIRED TO BE SECURED, LABOR LAW 246 (1) CAUSE OF ACTION PROPERLY SURVIVED.

The Second Department determined plaintiff's Labor Law 240 (1) cause of action, based upon injury caused by a falling piece of plywood, was properly dismissed because the plywood was not being hoisted and did not need to be secured. Plaintiff's 241 (6) cause of action was properly allowed to proceed:

> ... [T]he Supreme Court correctly determined that the defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging violations of Labor Law § 240(1) by submitting the deposition transcript of [defendant's] superintendent, which demonstrated that the plywood that fell was not being hoisted or secured and did not require securing for the purposes of the undertaking at the time it fell ... . * * *

As to the Labor Law § 241(6) cause of action, which was predicated upon a violation of 12 NYCRR 23-1.7(a)(1), the Supreme Court ... correctly determined that ... the defendants established their prima facie entitlement to judgment as a matter of law based upon the plaintiff's supervisor's affidavit, in which he averred that the area where the plaintiff was working was not normally exposed to falling material or objects (see 12 NYCRR 23-1.7[a][1]...). In opposition, the plaintiff raised a triable issue of fact by submitting the plaintiff's supervisor's deposition testimony, in which he testified, in contradiction to his affidavit, that it was known that objects were "always" falling at the plaintiff's worksite, and that objects fell "sometimes" and "once in a while" ... . **Millette v Tishman Constr. Corp., 2016 NY Slip Op 08053, 2nd Dept 11-30-16**

LABOR LAW-CONSTRUCTION LAW (MAKESHIFT TABLE SAW, MADE FROM A PORTABLE SAW, SUBJECT TO INDUSTRIAL CODE PROVISION REQUIRING GUARDS ON TABLE SAWS)/CIVIL PROCEDURE (UNTIMELY SUMMARY JUDGMENT MOTION BASED ON GROUNDS IDENTICAL TO A TIMELY MOTION BROUGHT BY ANOTHER PARTY SHOULD BE CONSIDERED)/SUMMARY JUDGMENT, MOTIONS FOR (UNTIMELY SUMMARY JUDGMENT MOTION BASED ON GROUNDS IDENTICAL TO A TIMELY MOTION BROUGHT BY ANOTHER PARTY SHOULD BE CONSIDERED)/TABLE SAWS (LABOR LAW, MAKESHIFT TABLE SAW, MADE FROM A PORTABLE SAW, SUBJECT TO INDUSTRIAL CODE PROVISION REQUIRING GUARDS ON TABLE SAWS)

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE.

MAKESHIFT TABLE SAW, MADE FROM A PORTABLE SAW, SUBJECT TO INDUSTRIAL CODE PROVISION REQUIRING GUARDS ON TABLE SAWS, UNTIMELY SUMMARY JUDGMENT MOTION BASED ON GROUNDS IDENTICAL TO A TIMELY MOTION BROUGHT BY ANOTHER PARTY SHOULD BE CONSIDERED.

The Second Department determined plaintiff's Labor Law 241 (6) cause of action should not have been dismissed. Although the specific Industrial Code regulation relied upon by plaintiff was not identified in the pleadings no prejudice resulted from any delay in identifying it. Plaintiff's thumb was severed using a makeshift table saw consisting of a circular saw attached to the bottom of a table. Supreme Court held the Industrial Code regulation requiring a guard on a table saw did not apply to a portable saw. However, the portable saw was being used as a table saw, thus the regulation applied. The Second Department also noted that an otherwise untimely motion or cross motion for summary judgment should be considered if the issues raised are identical to a timely summary judgment motion made by another party. Here portions of the untimely motion were identical to the timely motion, but other portions were not. The identical portions should have been considered:

12 NYCRR 23-1.12(c)(2) requires that "[e]very power-driven saw, other than a portable saw, . . . be equipped with a guard which covers the saw blade to such an extent as will prevent contact with the teeth." The Supreme Court incorrectly concluded that this provision was inapplicable to the facts of this case because it applies to table saws, not portable saws. "[W]hen determining the applicability of a regulation," the court must "take into consideration the function of a piece of equipment, and not merely the name" ... . The circular saw at issue was being used as a table saw at the time of the plaintiff's accident, and, thus, the same safety precautions as are required for other power-driven table saws are applicable ... . Accordingly, the branch of [defendant's] motion which was for summary judgment dismissing the Labor Law § 241(6) cause of action insofar as asserted against him should have been denied. ...

Although [defendant's] cross motion was untimely, an untimely motion or cross motion for summary judgment may be considered by the court where a timely motion for summary judgment was made on nearly identical grounds ... . The branch of [defendant's] cross motion which was for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action insofar as asserted against it was not made on grounds nearly identical to the similar branch of [the] timely motion, since it rested on the separate factual assertion that it did not exercise supervisory control over the work. **Sheng Hai Tong v K & K 7619, Inc., 2016 NY Slip Op 07637, 2nd Dept 11-16-16**

LABOR LAW-CONSTRUCTION LAW (FALL FROM SCAFFOLD WITH NO SIDE RAILS ENTITLED PLAINTIFF TO SUMMARY JUDGMENT, HEARSAY ALONE WILL NOT DEFEAT SUMMARY JUDGMENT MOTION, UNSIGNED DEPOSITION TRANSCRIPT PROPERLY CONSIDERED)/CIVIL PROCEDURE (HEARSAY ALONE WILL NOT DEFEAT SUMMARY JUDGMENT MOTION, UNSIGNED DEPOSITION TRANSCRIPT PROPERLY CONSIDERED)/EVIDENCE (HEARSAY ALONE WILL NOT DEFEAT SUMMARY JUDGMENT MOTION, UNSIGNED DEPOSITION TRANSCRIPT PROPERLY CONSIDERED)/SCAFFOLDS (FALL FROM SCAFFOLD WITH NO SIDE RAILS ENTITLED PLAINTIFF TO SUMMARY JUDGMENT, HEARSAY ALONE WILL NOT DEFEAT SUMMARY JUDGMENT MOTION, UNSIGNED DEPOSITION TRANSCRIPT PROPERLY CONSIDERED)/SUMMARY JUDGMENT (HEARSAY ALONE WILL NOT DEFEAT SUMMARY JUDGMENT MOTION, UNSIGNED DEPOSITION TRANSCRIPT PROPERLY CONSIDERED)

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE, EVIDENCE.

FALL FROM SCAFFOLD WITH NO SIDE RAILS ENTITLED PLAINTIFF TO SUMMARY JUDGMENT, HEARSAY ALONE WILL NOT DEFEAT SUMMARY JUDGMENT MOTION, UNSIGNED DEPOSITION TRANSCRIPT PROPERLY CONSIDERED.

The First Department determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action. Plaintiff fell from a Baker's scaffold that had no side rails. Although hearsay can be submitted in opposition to a summary judgment motion, the motion will not be defeated by hearsay alone (the case here). The court noted that the plaintiff's unsigned deposition transcript was properly considered because it was certified by the reporter, its accuracy was not challenged by the defendant, and plaintiff adopted it as accurate by submitting it:

> Plaintiff was entitled to summary judgment on his Labor Law § 240(1) claim where he fell from a six-foot-high Baker's scaffold, which he was directed to use in order to plaster a ceiling. The record shows that the scaffold "had no side rails, and no other protective device was provided to protect him from falling off the sides" ... .
>
> ... [T]he statement in the affidavit of [defendant's] owner that a subcontractor had assured him that the subcontractor had instructed all his employees to use the lifeline, belt and harness is insufficient raise a triable issue of fact as to whether plaintiff may be the sole proximate cause for disregarding such an instruction ... . While hearsay may be considered in opposition to defeat a summary judgment motion if it is not the only evidence upon which opposition to the motion is predicated, because it was the only evidence establishing that plaintiff disregarded an instruction to use the safety devices, it is insufficient to defeat plaintiff's motion ... . **Chong v 457 W. 22nd St. Tenants Corp., 2016 NY Slip Op 07997, 1st Dept 11-29-16**

LANDLORD-TENANT

LANDLORD-TENANT (FAILURE TO RETURN KEYS DID NOT CONSTITUTE A FAILURE TO SURRENDER THE APARTMENT, TENANT ENTITLED TO RETURN OF SECURITY DEPOSIT)/KEYS (LANDLORD-TENANT, FAILURE TO RETURN KEYS DID NOT CONSTITUTE A FAILURE TO SURRENDER THE APARTMENT, TENANT ENTITLED TO RETURN OF SECURITY DEPOSIT)/SECURITY DEPOSIT (LANDLORD-TENANT, FAILURE TO RETURN KEYS DID NOT CONSTITUTE A FAILURE TO SURRENDER THE APARTMENT, TENANT ENTITLED TO RETURN OF SECURITY DEPOSIT)

LANDLORD-TENANT.

FAILURE TO RETURN KEYS DID NOT CONSTITUTE A FAILURE TO SURRENDER THE APARTMENT, TENANT ENTITLED TO RETURN OF SECURITY DEPOSIT.

The Second Department, reversing Supreme Court, determined the tenant was entitled to the return of the security deposit. The fact that the tenant did not return the keys did not show a failure to surrender the apartment:

> The tenant established his prima facie entitlement to judgment as a matter of law on the cause of action alleging breach of the lease for failing to return the security deposit (see General Obligations Law § 7-103). The evidence established that the tenant paid the landlord a security deposit and vacated the apartment a few days before the

lease terminated. In opposition, the landlord failed to raise a triable issue of fact. Contrary to the landlord's contention, the tenant's failure to return the keys prior to the expiration of the lease did not show a failure to surrender ... . Furthermore, there was no provision in the lease requiring the tenant to notify the landlord that he was vacating the apartment. In fact, the "Tenant Cooperation Rider" stated that such notice was not required. Moreover, the landlord failed to submit evidentiary proof that the tenant damaged the apartment. **Pezzo v 26 Seventh Ave. S., LLC, 2016 NY Slip Op 07310, 2nd Dept 11-9-16**

MEDICAID

MEDICAID (TRANSFERS MADE DURING 60-MONTH LOOK-BACK PERIOD WERE NOT MADE IN ANTICIPATION OF THE FUTURE NEED FOR MEDICAL ASSISTANCE, DETERMINATION OF THE DEPARTMENT OF HEALTH ANNULLED)

MEDICAID.

TRANSFERS MADE DURING 60-MONTH LOOK-BACK PERIOD WERE NOT MADE IN ANTICIPATION OF THE FUTURE NEED FOR MEDICAL ASSISTANCE, DETERMINATION OF THE DEPARTMENT OF HEALTH ANNULLED.

The Third Department, reversing the Department of Health, determined petitioner rebutted the presumption certain property transfers made during the 60-month look-back period were motivated by the future need to qualify for medical assistance:

> Considering the medical evidence in light of the substantiated testimony that the transfers were made for the purpose of assisting in the purchase of a home for the grandson's use, as well as the evidence that the transfers took place several years before decedent applied for assistance and that she retained most of her assets thereafter, we find that the presumption was successfully rebutted. The determination by DOH was not supported by substantial evidence and must be annulled ... . **Matter of Collins v Zucker, 2016 NY Slip Op 07897, 3rd Dept 11-23-16**

MENTAL HYGIENE LAW

MENTAL HYGIENE LAW (CRITERIA FOR EXCEPTION TO THE MOOTNESS DOCTRINE EXPLAINED, INVOLUNTARY TREATMENT ORDER REVERSED)/APPEALS (CRITERIA FOR EXCEPTION TO THE MOOTNESS DOCTRINE EXPLAINED, INVOLUNTARY TREATMENT ORDER REVERSED)/MOOTNESS DOCTRINE, EXCEPTION TO (APPEALS, CRITERIA FOR EXCEPTION TO THE MOOTNESS DOCTRINE EXPLAINED, INVOLUNTARY TREATMENT ORDER REVERSED)/INVOLUTARY TREATMENT (MENTAL HYGIENE LAW, CRITERIA FOR EXCEPTION TO THE MOOTNESS DOCTRINE EXPLAINED, INVOLUNTARY TREATMENT ORDER REVERSED)

MENTAL HYGIENE LAW, APPEALS.

CRITERIA FOR EXCEPTION TO THE MOOTNESS DOCTRINE EXPLAINED, INVOLUNTARY TREATMENT ORDER REVERSED.

The Third Department, in a full-fledged opinion by Justice Lynch, reversing Supreme Court, determined petitioner psychiatric hospital did not present sufficient evidence to support an order permitting involuntary treatment of respondent for schizophrenia. The Third Department heard the appeal as an exception to the mootness doctrine (the involuntary treatment order had already expired):

The exception to the mootness doctrine applies where an issue (1) could readily recur, (2) will typically evade review, (3) is of public importance and (4) represents a substantial and novel issue yet to be decided by this Court ... . As pointed out in respondent's brief, there were 322 applications for authorization to forcibly treat patients who are within the Third Department during 2014 — a contention that adequately demonstrates that proceedings of this nature will readily recur. Since the duration of these orders is tied into the treatment of the patient, who may, as here, be discharged before an appeal is even perfected, we agree that these proceedings do typically evade review ... . And, certainly, the proceeding is of public importance because it implicates a patient's "fundamental liberty interest to reject antipsychotic medication" ... . * * *

What we find significant and novel here is how that standard is to be met by a petitioner and applied by the trial court with respect to the formulation of a medication treatment plan, and, for that reason, we will address the merits of the appeal .. .

The fundamental flaw established by this record is that the scope of medications authorized by Supreme Court was overbroad — a flaw conceded by petitioner. The order actually authorized the use of 28 various medications, including medications for symptoms and illnesses that respondent did not have. ...

This point implicates the secondary problem presented in that Supreme Court failed to make specific findings on the record as to respondent's capacity and the viability of the treatment plan. **Matter of Lucas QQ. (Lucas QQ.), 2016 NY Slip Op 07904, 3rd Dept 11-23-16**

MORTGAGES

MORTGAGES (STANDING REQUIREMENTS TO BRING AN ACTION CONTESTING A SATISFACTION OF MORTGAGE ARE THE SAME AS FOR BRINGING A FORECLOSURE ACTION)/SATISFACTION OF MORTGAGE (STANDING REQUIREMENTS TO BRING AN ACTION CONTESTING A SATISFACTION OF MORTGAGE ARE THE SAME AS FOR BRINGING A FORECLOSURE ACTION)/STANDING (MORTGAGES (STANDING REQUIREMENTS TO BRING AN ACTION CONTESTING A SATISFACTION OF MORTGAGE ARE THE SAME AS FOR BRINGING A FORECLOSURE ACTION)

MORTGAGES.

STANDING REQUIREMENTS TO BRING AN ACTION CONTESTING A SATISFACTION OF MORTGAGE ARE THE SAME AS FOR BRINGING A FORECLOSURE ACTION.

The Second Department determined there was a question of fact whether plaintiff had standing to bring an action contesting a satisfaction of mortgage. The court determined the standing requirements for a foreclosure action applied and explained the burdens of proof for summary judgment:

"The plaintiff may demonstrate that it is the holder or assignee of the underlying note by showing either a written assignment of the underlying note or the physical delivery of the note" ... . "As a general matter, once a promissory note is tendered to and accepted by an assignee, the mortgage passes as an incident to the note. However, the transfer of the mortgage without the debt is a nullity, and no interest is acquired by it . . . because a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation" ... .

On a defendant's motion to dismiss a complaint based upon the plaintiff's alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law ... . "To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff's submissions raise a question of fact as to its standing" ... . **U.S. Bank, N.A. v Noble, 2016 NY Slip Op 07315, 2nd Dept 11-9-16**

MUNICIPAL LAW (COUNTY DID NOT DEMONSTRATE THE NEED FOR A LEFT TURN SIGNAL HAD BEEN STUDIED, THEREFORE THE COUNTY WAS NOT ENTITLED TO SUMMARY JUDGMENT ON IMMUNITY GROUNDS)/IMMUNITY (HIGHWAYS, COUNTY DID NOT DEMONSTRATE THE NEED FOR A LEFT TURN SIGNAL HAD BEEN STUDIED, THEREFORE THE COUNTY WAS NOT ENTITLED TO SUMMARY JUDGMENT ON IMMUNITY GROUNDS)/NEGLIGENCE (MUNICIPAL LAW, HIGHWAYS, COUNTY DID NOT DEMONSTRATE THE NEED FOR A LEFT TURN SIGNAL HAD BEEN STUDIED, THEREFORE THE COUNTY WAS NOT ENTITLED TO SUMMARY JUDGMENT ON IMMUNITY GROUNDS)/HIGHWAYS (COUNTY DID NOT DEMONSTRATE THE NEED FOR A LEFT TURN SIGNAL HAD BEEN STUDIED, THEREFORE THE COUNTY WAS NOT ENTITLED TO SUMMARY JUDGMENT ON IMMUNITY GROUNDS)

MUNICIPAL LAW, IMMUNITY, NEGLIGENCE.

COUNTY DID NOT DEMONSTRATE THE NEED FOR A LEFT TURN SIGNAL HAD BEEN STUDIED, THEREFORE THE COUNTY WAS NOT ENTITLED TO SUMMARY JUDGMENT ON IMMUNITY GROUNDS.

The Second Department determined the county's motion for summary judgment was properly denied in this intersection car accident case. Plaintiff alleged the county was negligent in failing to install a traffic control device with a left turn signal, because there was a designated lane for a left turn. The accident occurred when plaintiff attempted to make a left turn. Because the county did not demonstrate the issue had been adequately studied, it did not demonstrate government immunity applied. Therefore the county's motion was properly denied without need to address the opposing papers:

> A governmental entity has a duty to the public to keep its streets in a reasonably safe condition ... . "While this duty is nondelegable, it is measured by the courts with consideration given to the proper limits on intrusion into the [government's] planning and decision-making functions. Thus, in the field of traffic design engineering, the State is accorded a qualified immunity from liability arising out of a highway planning decision" ... . Under the doctrine of qualified immunity, a governmental entity may not be held liable for a highway safety planning decision unless its study of a traffic condition is plainly inadequate, or there is no reasonable basis for its traffic plan ... . Immunity will apply only "where a duly authorized public planning body has entertained and passed on the very same question of risk as would ordinarily go to the jury" ... .
>
> Here, the County failed to establish that the design of the subject traffic signal, including the determination that no left-turn signal was warranted, was based on a study which entertained and passed on the very same question of risk that the plaintiff would put to a jury ... . **Warren v Evans, 2016 NY Slip Op 07641, 2nd Dept 11-16-16**

MUNICIPAL LAW (FIRE REKINDLED AFTER FIRE DEPARTMENT PERSONNEL ASSURED PLAINTIFFS THE FIRE WAS OUT, NEGLIGENCE CAUSE OF ACTION AGAINST THE CITY SHOULD NOT HAVE BEEN DISMISSED, QUESTION OF FACT WHETHER THERE WAS A SPECIAL RELATIONSHIP BETWEEN CITY AND PLAINTIFFS)/NEGLIGENCE (MUNICIPAL LAW, FIRE REKINDLED AFTER FIRE DEPARTMENT PERSONNEL ASSURED PLAINTIFFS THE FIRE WAS OUT, NEGLIGENCE CAUSE OF ACTION AGAINST THE CITY SHOULD NOT HAVE BEEN DISMISSED, QUESTION OF FACT WHETHER THERE WAS A SPECIAL RELATIONSHIP BETWEEN CITY AND PLAINTIFFS)/IMMUNITY (MUNICIPAL LAW, FIRE REKINDLED AFTER FIRE DEPARTMENT PERSONNEL ASSURED PLAINTIFFS THE FIRE WAS OUT, NEGLIGENCE CAUSE OF ACTION AGAINST THE CITY SHOULD NOT HAVE BEEN DISMISSED, QUESTION OF FACT WHETHER THERE WAS A SPECIAL RELATIONSHIP BETWEEN CITY AND PLAINTIFFS)/FIRE (MUNICIPAL LAW, NEGLIGENCE, FIRE REKINDLED AFTER FIRE DEPARTMENT PERSONNEL ASSURED PLAINTIFFS THE FIRE WAS OUT, NEGLIGENCE CAUSE OF ACTION AGAINST THE CITY SHOULD NOT HAVE BEEN DISMISSED, QUESTION OF FACT WHETHER THERE WAS A SPECIAL RELATIONSHIP BETWEEN CITY AND PLAINTIFFS)

MUNICIPAL LAW, IMMUNITY, NEGLIGENCE.

FIRE REKINDLED AFTER FIRE DEPARTMENT PERSONNEL ASSURED PLAINTIFFS THE FIRE WAS OUT, NEGLIGENCE CAUSE OF ACTION AGAINST THE CITY SHOULD NOT HAVE BEEN DISMISSED, QUESTION OF FACT WHETHER THERE WAS A SPECIAL RELATIONSHIP BETWEEN CITY AND PLAINTIFFS.

The Third Department determined the action against the city alleging negligence resulting in the destruction of plaintiffs' property by fire should not have been dismissed. Fire department personnel told the plaintiffs the fire had been extinguished and that it was safe to reenter. However the fire rekindled. The Third Department held that there was a "special relationship" between the city and the plaintiffs stemming from the assurances the fire was out:

> To establish a special relationship, plaintiffs were required to 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) that party's justifiable reliance on the municipality's affirmative undertaking" ... .
>
> Construing the evidence in the light most favorable to plaintiffs and providing them the benefit of every favorable inference ..., we conclude that plaintiffs raised a triable issue of fact as to whether a special relationship existed. With regard to the first element, there is no dispute that defendants' agents dispatched the Department to plaintiffs' residence in response to their 911 call for assistance and that the responding crew thereafter assumed control over the ongoing fire. Even if the Department's actions in that regard simply constituted the performance of a duty owed to the public generally ... , we are of the view that, by making affirmative representations to plaintiffs that the fire had been fully extinguished and that it was safe to reenter the home, the Department assumed an affirmative duty to plaintiffs ... . As for the second and third elements, knowledge on the part of the Department that inaction could result in harm can be reasonably inferred from the circumstances ... , and the Department's employees undisputedly had direct contact with plaintiffs. With respect to the final element, plaintiffs allege that they relied upon the Department's assurances that the fire was completely extinguished in choosing to leave their home unattended for the evening. **Trimble v City of Albany, 2016 NY Slip Op 07912, 3rd Dept 11-23-16**

MUNICIPAL LAW (COUNTY NOT LIABLE FOR FLOODING, NO SPECIAL RELATIONSHIP WITH PLAINTIFF)/IMMUNITY (COUNTY NOT LIABLE FOR FLOODING, NO SPECIAL RELATIONSHIP WITH PLAINTIFF)/NEGLIGENCE (FLOODING, COUNTY NOT LIABLE FOR FLOODING, NO SPECIAL RELATIONSHIP WITH PLAINTIFF)/ENVIRONMENTAL LAW (FLOODING, COUNTY NOT LIABLE FOR FLOODING, NO SPECIAL RELATIONSHIP WITH PLAINTIFF)/FLOODING (COUNTY NOT LIABLE FOR FLOODING, NO SPECIAL RELATIONSHIP WITH PLAINTIFF)

MUNICIPAL LAW, IMMUNITY, NEGLIGENCE, ENVIRONMENTAL LAW.

COUNTY NOT LIABLE FOR FLOODING, NO SPECIAL RELATIONSHIP WITH PLAINTIFF.

The Second Department determined the county could not be held liable for flooding by a brook which overflowed its banks. There was not special relationship between the county and the plaintiff:

> "[A] municipal corporation is not liable for failure to restrain waters between banks of a stream or to keep a channel free from obstructions it did not cause. Absent any special duty owed to the private landowners, a municipal corporation cannot be held liable for failing to provide adequate flood protection" ... . Here, the County demonstrated that it did not owe a special duty to the plaintiff, and that the overflow was caused by natural phenomena, rather than its conduct. In opposition, the plaintiff failed to raise a triable issue of fact. **Kimball Brooklands Corp. v County of Westchester, 2016 NY Slip Op 07297, 2nd Dept 11-9-16**

MUNICIPAL LAW (POLICE OFFICERS, RECKLESS DISREGARD STANDARD APPLIED TO COLLISION BETWEEN BICYCLE AND POLICE CAR, EVEN THOUGH THE OFFICER WAS NOT IN PURSUIT)/NEGLIGENCE (POLICE OFFICERS, RECKLESS DISREGARD STANDARD APPLIED TO COLLISION BETWEEN BICYCLE AND POLICE CAR, EVEN THOUGH THE OFFICER WAS NOT IN PURSUIT)/EMERGENCY VEHICLES (POLICE OFFICERS, RECKLESS DISREGARD STANDARD APPLIED TO COLLISION BETWEEN BICYCLE AND POLICE CAR, EVEN THOUGH THE OFFICER WAS NOT IN PURSUIT)/POLICE OFFICERS (RECKLESS DISREGARD STANDARD APPLIED TO COLLISION BETWEEN BICYCLE AND POLICE CAR, EVEN THOUGH THE OFFICER WAS NOT IN PURSUIT)

MUNICIPAL LAW, NEGLIGENCE.

RECKLESS DISREGARD STANDARD APPLIED TO COLLISION BETWEEN BICYCLE AND POLICE CAR, EVEN THOUGH THE OFFICER WAS NOT IN PURSUIT.

The Fourth Department, reversing (modifying) Supreme Court, determined that the "reckless disregard" standard applied to the defendant police officer's driving and dismissed plaintiff bicyclist's complaint. Apparently, the officer was moving his car into an intersection, trying to get the attention of another driver to whom he wished to speak. Plaintiff bicyclist, who had the green light, collided with the officer's car:

> ... [W]e note that there is no dispute that defendant officer was operating an "authorized emergency vehicle" (Vehicle and Traffic Law § 101). We reject plaintiff's contention that, in determining whether defendant officer's operation of the police vehicle qualifies as an "emergency operation" within the meaning of Vehicle and Traffic Law § 114-b, we should adopt the definition of "pursuit" contained in the operations manual of defendant City of Syracuse Police Department ... . Likewise, it is irrelevant whether defendant officer believed he was involved in an emergency operation ... . Contrary to plaintiff's further contentions, we conclude that defendant officer's actions constituted an "emergency operation" as contemplated by Vehicle and Traffic Law § 114-b ... ; the applicable standard of liability is reckless disregard for the safety of others rather than ordinary negligence (see § 1104 [e]...); and defendants established as a matter of law that defendant officer's conduct did not constitute the type of recklessness necessary for liability to attach ... . **Lacey v City of Syracuse, 2016 NY Slip Op 07794, 4th Dept 11-18-16**

MUNICIPAL LAW (CAUSE OF ACTION ALLEGING NEGLIGENT MAINTENANCE OF A SEWER SYSTEM SHOULD NOT HAVE BEEN DISMISSED)/NEGLIGENCE (CAUSE OF ACTION ALLEGING NEGLIGENT MAINTENANCE OF A SEWER SYSTEM SHOULD NOT HAVE BEEN DISMISSED)/SEWER SYSTEMS (CAUSE OF ACTION ALLEGING NEGLIGENT MAINTENANCE OF A SEWER SYSTEM SHOULD NOT HAVE BEEN DISMISSED)

MUNICIPAL LAW, NEGLIGENCE.

CAUSE OF ACTION ALLEGING NEGLIGENT MAINTENANCE OF A SEWER SYSTEM SHOULD NOT HAVE BEEN DISMISSED.

The Third Department determined an action alleging negligent maintenance of a sewer system should not have been dismissed. The court noted that the written notice requirement (a common prerequisite for municipal liability) applies to defects in roads and sidewalks, etc. and does not apply to subsurface structures:

> It is settled that a municipality is under a continuing duty to maintain and repair its sewage and water systems ... , and this duty is independent of the duty not to create a dangerous or defective condition ... . "[T]he breach of this ongoing duty is the 'event' that forms the basis for the claim" for purposes of General Municipal Law § 50-i ... . Thus, defendant's negligence, if any, in failing to maintain or repair its water and/or sewage system constitutes a continuing wrong that gives rise to a new cause of action for each injury that occurred ... . Plaintiff's recoverable damages, however, are limited "'to those caused by the alleged unlawful acts sustained within 90 days preceding the date of filing of the notice of claim'" ... . **461 Broadway, LLC v Village of Monticello, 2016 NY Slip Op 07905, 3rd Dept 11-23-16**

MUNICIPAL LAW (INMATES, QUESTION OF FACT WHETHER COUNTY NEGLIGENT IN FAILING TO REVIEW INMATE'S PAST RECORD OF VIOLENT BEHAVIOR, INMATE ASSAULTED PLAINTIFF)/NEGLIGENCE (MUNICIPAL LAW, INMATES, QUESTION OF FACT WHETHER COUNTY NEGLIGENT IN FAILING TO REVIEW INMATE'S PAST RECORD OF VIOLENT BEHAVIOR, INMATE ASSAULTED PLAINTIFF)/INMATES (MUNICIPAL LAW, NEGLIGENCE, QUESTION OF FACT WHETHER COUNTY NEGLIGENT IN FAILING TO REVIEW INMATE'S PAST RECORD OF VIOLENT BEHAVIOR, INMATE ASSAULTED PLAINTIFF)/ASSAULT (MUNICIPAL LAW, NEGLIGENCE, QUESTION OF FACT WHETHER COUNTY NEGLIGENT IN FAILING TO REVIEW INMATE'S PAST RECORD OF VIOLENT BEHAVIOR, INMATE ASSAULTED PLAINTIFF)

MUNICIPAL LAW, NEGLIGENCE.

QUESTION OF FACT WHETHER COUNTY NEGLIGENT IN FAILING TO REVIEW INMATE'S PAST RECORD OF VIOLENT BEHAVIOR, INMATE ASSAULTED PLAINTIFF.

The Third Department, reversing Supreme Court, determined there was question of fact whether the county defendants were negligent in failing to determine whether an inmate was violent. Plaintiff was assaulted by the inmate and alleged the county should have reviewed the inmate's past record of violent behavior:

> "Having assumed physical custody of inmates, who cannot protect and defend themselves in the same way as those at liberty can, the [s]tate [or its political subdivisions] owe[] a duty of care to safeguard inmates, even from attacks by fellow inmates" ... . This duty of care does not render the custodial entity "an insurer of inmate safety[,] and negligence cannot be inferred merely because an incident occurred" ... . The duty owed is instead "limited to providing reasonable care to protect inmates from risks of harm that are reasonably foreseeable, i.e., those that [the custodial entity or its agents] knew or should have known" ... . * * *
>
> Correction Law § 500-b (7) (a) states that the reviewing officer "shall exercise good judgment and discretion and shall take all reasonable steps to ensure that the assignment of persons to facility housing units" advances the safety and security of all inmates and that of the facility in general. The statute enumerates a number of factors to consider in that analysis, but an inmate's history of assaultive behavior or his or her prior prison disciplinary history are not among them ... . The statute further lacks a specific requirement that the reviewing officer obtain all records pertaining to an inmate, instead directing a review of whatever "relevant and known" records are "accessible and

available" (Correction Law § 500-b [7] [c] [3]). The statute accordingly creates a "possibility of exceptions . . . significant enough to justify a case-by-case determination of negligence without the automatic imposition of negligence under the negligence per se doctrine," although a failure to obtain specific records could well constitute evidence of negligence in a given case ... . **Wassmann v County of Ulster, 2016 NY Slip Op 07907, 3rd Dept 11-23-16**

MUNICIPAL LAW (CAUSE OF ACTION ALLEGING NEGLIGENT FAILURE TO INSTALL A GUARDRAIL SHOULD NOT HAVE BEEN DISMISSED)/NEGLIGENCE (MUNICIPAL LAW, HIGHWAYS, CAUSE OF ACTION ALLEGING NEGLIGENT FAILURE TO INSTALL A GUARDRAIL SHOULD NOT HAVE BEEN DISMISSED)/HIGHWAYS (MUNICIPAL LAW, HIGHWAYS, CAUSE OF ACTION ALLEGING NEGLIGENT FAILURE TO INSTALL A GUARDRAIL SHOULD NOT HAVE BEEN DISMISSED)/GUARDRAILS (MUNICIPAL LAW, HIGHWAYS, CAUSE OF ACTION ALLEGING NEGLIGENT FAILURE TO INSTALL A GUARDRAIL SHOULD NOT HAVE BEEN DISMISSED)

MUNICIPAL LAW, NEGLIGENCE.

CAUSE OF ACTION ALLEGING NEGLIGENT FAILURE TO INSTALL A GUARDRAIL SHOULD NOT HAVE BEEN DISMISSED.

The Third Department determined plaintiff's action alleging defective design and construction of a highway should not have been dismissed. Plaintiff's car slid on ice and snow and went off the road. Plaintiff alleged a guardrail should have been installed. The court noted that the written notice requirement did not apply to the guardrail allegation:

> A municipality has a nondelegable duty to the public to construct and maintain its roads in a reasonably safe condition, and this duty extends to furnishing and maintaining adequate barriers or guardrails where appropriate ... . To that end, a municipality is under no obligation to upgrade its roads that complied with design standards when they were built merely because the standards were subsequently upgraded ... .
>
> We conclude that defendant failed to establish that the design of the road comported with the applicable standards at the time that County Road 113 was constructed. County Road 113, over which defendant admitted ownership, was constructed in the late 1940s. Defendant's engineering expert did not identify what standards were in effect at the time that County Road 113 was designed or constructed ... . Rather, defendant's expert cited to the Department of Transportation Highway Design Manual in concluding that there was little justification for the placement of a guardrail at the location of [the] accident. This manual, however, was published in the 1970s and, therefore, does not apply to County Road 113. **Fu v County of Wash., 2016 NY Slip Op 07910, 3rd Dept 11-23-16**

MUNICIPAL LAW (MOTION FOR LEAVE TO FILE LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED, DEFENDANT HAD ALREADY CONDUCTED A 50-h HEARING AND THEREFORE HAD NOTICE OF THE ESSENTIAL FACTS WITHIN ONE MONTH OF THE EXPIRATION OF THE 90-DAY TIME LIMIT)/NOTICE OF CLAIM (MOTION FOR LEAVE TO FILE LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED, DEFENDANT HAD ALREADY CONDUCTED A 50-h HEARING AND THEREFORE HAD NOTICE OF THE ESSENTIAL FACTS WITHIN ONE MONTH OF THE EXPIRATION OF THE 90-DAY TIME LIMIT)/NEGLIGENCE (MUNICIPAL LAW, MOTION FOR LEAVE TO FILE LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED, DEFENDANT HAD ALREADY CONDUCTED A 50-h HEARING AND THEREFORE HAD NOTICE OF THE ESSENTIAL FACTS WITHIN ONE MONTH OF THE EXPIRATION OF THE 90-DAY TIME LIMIT)/MEDICAL MALPRACTICE (MUNICIPAL LAW, MOTION FOR LEAVE TO FILE LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED, DEFENDANT HAD ALREADY CONDUCTED A 50-h HEARING AND THEREFORE HAD NOTICE OF THE ESSENTIAL FACTS WITHIN ONE MONTH OF THE EXPIRATION OF THE 90-DAY TIME LIMIT)

MUNICIPAL LAW, NEGLIGENCE, MEDICAL MALPRACTICE.

MOTION FOR LEAVE TO FILE LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED, DEFENDANT HAD ALREADY CONDUCTED A 50-h HEARING AND THEREFORE HAD NOTICE OF THE ESSENTIAL FACTS WITHIN ONE MONTH OF THE EXPIRATION OF THE 90-DAY TIME LIMIT.

The Second Department determined plaintiff's motion to serve a late notice of claim should have been granted. The plaintiff served a notice of claim 30 days after the 90-day time limit expired, but defendant NYC Health and Hospitals Corporation conducted a 50-h hearing. After serving the summons and complaint, the plaintiff moved for leave to file a late notice of claim:

> General Municipal Law § 50-e(5) permits a court to extend the time to serve a notice of claim. In determining whether to grant such an extension, the court must consider various factors, of which the " most important'" is "whether the public corporation acquired actual notice of the essential facts constituting the claim within 90 days of the accrual of the claim or within a reasonable time thereafter" ... .
>
> Under the circumstances of this case, in which the defendant received a late notice of claim less than one month after the expiration of the 90-day period, which it accepted and with respect to which it conducted an examination pursuant to General Municipal Law § 50-h, the defendant acquired actual knowledge of the essential facts underlying the claim within a reasonable time after the expiration of the 90-day period ... . **Brunson v New York City Health & Hosps. Corp., 2016 NY Slip Op 07618, 2nd Dept 11-16-16**

MUNICIPAL LAW (ALL PROPERTY OWNERS AFFECTED BY A CHALLENGED ZONING ORDINANCE ARE NOT NECESSARY PARTIES IN THE ACTION, ORIGINAL PETITION, WHICH DID NOT NAME ALL AFFECTED PARTIES, ALLOWED TO PROCEED)/ZONING (ALL PROPERTY OWNERS AFFECTED BY A CHALLENGED ZONING ORDINANCE ARE NOT NECESSARY PARTIES IN THE ACTION, ORIGINAL PETITION, WHICH DID NOT NAME ALL AFFECTED PARTIES, ALLOWED TO PROCEED)/ENVIRONMENTAL LAW (ALL PROPERTY OWNERS AFFECTED BY A CHALLENGED ZONING ORDINANCE ARE NOT NECESSARY PARTIES IN THE ACTION, ORIGINAL PETITION, WHICH DID NOT NAME ALL AFFECTED PARTIES, ALLOWED TO PROCEED)/CIVIL PROCEDURE (ALL PROPERTY OWNERS AFFECTED BY A CHALLENGED ZONING ORDINANCE ARE NOT NECESSARY PARTIES IN THE ACTION, ORIGINAL PETITION, WHICH DID NOT NAME ALL AFFECTED PARTIES, ALLOWED TO PROCEED)

MUNICIPAL LAW, ZONING, ENVIRONMENTAL LAW, CIVIL PROCEDURE.

ALL PROPERTY OWNERS AFFECTED BY A CHALLENGED ZONING ORDINANCE ARE NOT NECESSARY PARTIES IN THE ACTION, ORIGINAL PETITION, WHICH DID NOT NAME ALL AFFECTED PARTIES, ALLOWED TO PROCEED.

The Third Department determined all "rezoned" property-owners, deemed "necessary parties" by Supreme Court in this action to annul a local law rezoning property for industrial use. were, in fact, not "necessary parties." The petition, which

had been dismissed for failure to timely serve the newly-added "necessary parties," was reinstated. The local law, which would allow a recycling center in a previously residential-agricultural zone, was challenged based upon an alleged failure to comply with the State Environment Quality Review Act:

> The newly-added respondents were not necessary parties merely because the ordinance at issue affected their property rights. "'[T]he absence of a necessary party may be raised at any stage of the proceedings, by any party or by the court on its own motion'" (Bayview Loan Servicing, LLC v Sulyman, 130 AD3d 1197, 1198 [2015], quoting Matter of Estate of Prospect v New York State Teachers' Retirement Sys., 13 AD3d 699, 700 [2004]). Given a court's power to raise the issue, it is notable that the Court of Appeals and this state's appellate courts, including this Court, have long entertained challenges to municipalities' legislative actions in regard to zoning ordinances without requiring the joinder of every property owner whose rights are affected by the ordinance at issue ... .]). This has been true even when the ordinance at issue is one that, on its face, is likely to dramatically affect the property rights held by real property owners (see e.g. Matter of Wallach v Town of Dryden, 23 NY3d 728, 740 [2014]). Although this Court has, in limited cases, found property owners to be necessary parties in regard to legal challenges to municipal ordinances that affect the property owners' rights, it has only done so in cases where the owners had obtained an actual approval pursuant to the challenged zoning ordinance that would be adversely impacted by a judgment annulling that ordinance ... . **Matter of Hudson Riv. Sloop Clearwater, Inc. v Town Bd. of The Town of Coeymans, 2016 NY Slip Op 07358, 3rd Dept 11-10-16**

NEGLIGENCE

NEGLIGENCE (PLAINTIFF UNABLE TO IDENTIFY THE CAUSE OF HIS FALL, DEFENDANT SHOULD HAVE BEEN GRANTED SUMMARY JUDGMENT)/SLIP AND FALL (PLAINTIFF UNABLE TO IDENTIFY THE CAUSE OF HIS FALL, DEFENDANT SHOULD HAVE BEEN GRANTED SUMMARY JUDGMENT)

NEGLIGENCE.

PLAINTIFF UNABLE TO IDENTIFY THE CAUSE OF HIS FALL, DEFENDANT SHOULD HAVE BEEN GRANTED SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment should have been granted in this slip and fall case. The plaintiff could not identify the cause of his fall as he attempted to board a bus:

> "[A] plaintiff's inability to identify the cause of the fall is fatal to the cause of action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation" ... . Although "[p]roximate cause may be established without direct evidence of causation, by inference from the circumstances of the accident[,] . . . mere speculation as to the cause of an accident, when there could have been many possible causes, is fatal to a cause of action" ... . "Where it is just as likely that some other factor, such as a misstep or a loss of balance, could have caused a trip and fall accident, any determination by the trier of fact as to causation would be based upon sheer speculation" ... . **Hahn v Go Go Bus Tours, Inc., 2016 NY Slip Op 07294, 2nd Dept 11-9-16**

NEGLIGENCE (ROPE WHICH CAUSED PLAINTIFF TO FALL WAS AN OPEN AND OBVIOUS CONDITION KNOWN THE PLAINTIFF, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED)/SLIP AND FALL (ROPE WHICH CAUSED PLAINTIFF TO FALL WAS AN OPEN AND OBVIOUS CONDITION KNOWN THE PLAINTIFF, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED)/OPEN AND OBVIOUS (ROPE WHICH CAUSED PLAINTIFF TO FALL WAS AN OPEN AND OBVIOUS CONDITION KNOWN THE PLAINTIFF, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED)

NEGLIGENCE.

ROPE WHICH CAUSED PLAINTIFF TO FALL WAS AN OPEN AND OBVIOUS CONDITION KNOWN TO THE PLAINTIFF, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the rope (connected to a tree and a metal stanchion in a building atrium) which caused plaintiff to trip and fall was a non-actionable open and obvious condition:

> [Defendant] moved for summary judgment dismissing the complaint insofar as asserted against it, arguing that the subject metal stanchions and connecting rope were open and obvious, and not inherently dangerous. The Supreme Court denied [defendant's] motion.
>
> [Defendant] met its prima facie burden by showing that the subject rope and stanchions, which were known to the plaintiff, were open and obvious, and not inherently dangerous ... . In opposition, the plaintiff failed to raise a triable issue of fact... . **LeComples v More Specialized Transp., Inc., 2016 NY Slip Op 07298, 2nd Dept 11-9-16**

NEGLIGENCE (STORM IN PROGRESS RULE REQUIRED SUMMARY JUDGMENT TO DEFENDANT IN THIS SLIP AND FALL CASE, FAILURE TO REMOVE ALL SNOW FROM A PARKING LOT DOES NOT CREATE A HAZARD)/STORM IN PROGRESS (STORM IN PROGRESS RULE REQUIRED SUMMARY JUDGMENT TO DEFENDANT IN THIS SLIP AND FALL CASE, FAILURE TO REMOVE ALL SNOW FROM A PARKING LOT DOES NOT CREATE A HAZARD)/SLIP AND FALL (STORM IN PROGRESS RULE REQUIRED SUMMARY JUDGMENT TO DEFENDANT IN THIS SLIP AND FALL CASE, FAILURE TO REMOVE ALL SNOW FROM A PARKING LOT DOES NOT CREATE A HAZARD)

NEGLIGENCE.

STORM IN PROGRESS RULE REQUIRED SUMMARY JUDGMENT TO DEFENDANT IN THIS SLIP AND FALL CASE, FAILURE TO REMOVE ALL SNOW FROM A PARKING LOT DOES NOT CREATE A HAZARD.

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should have been granted. Defendants established they had no duty to remove snow at the time of plaintiff's fall under the storm in progress doctrine. The court noted that the duty to render a parking lot safe does not entail the removal of all the snow:

> It is undisputed that defendants met their initial burden on the motion "by establishing that a storm was in progress at the time of the accident and, thus, that they had no duty to remove the snow and ice until a reasonable time ha[d] elapsed after cessation of the storm" ... . In opposition, plaintiff failed to raise a triable issue of fact " whether the accident was caused by a slippery condition at the location where [she] fell that existed prior to the storm, as opposed to precipitation from the storm in progress, and that the defendant[s] had actual or constructive notice of the preexisting condition' " ... . Even assuming, arguendo, that plaintiff was entitled to rely upon the theory that the icy condition formed prior to the storm upon the melting and refreezing of snow piles created by defendants' plowing practices ... , we conclude that plaintiff's assertion is based on mere speculation and thus is insufficient to raise an issue of fact ... . Indeed, in surmising that there must have been snow piles throughout the parking lot from

prior accumulations, plaintiff relied upon inadmissible printouts from a weather data website ... , as well as defendants' general practices regarding snow removal as set forth in their contract ... . The record is devoid of competent evidence that any such snow piles existed or, more specifically, that a pile of snow was located near the area of the parking lot where plaintiff fell that had melted and had then refrozen prior to the storm, resulting in the icy condition that caused plaintiff's accident ... . Finally, to the extent that plaintiff contends that defendants' snow removal efforts created the hazardous condition because they did not properly care for the area where she fell even though they had treated other areas of the parking lot during the storm, we note that it is well settled that " [t]he mere failure to remove all snow and ice from a . . . parking lot does not constitute negligence' and does not constitute creation of a hazard" ... . **Hanifan v Cor Dev. Co., LLC, 2016 NY Slip Op 07498, 4th Dept 11-10-16**

NEGLIGENCE (PLAINTIFF COULD NOT IDENTIFY CAUSE OF FALL AND ANY DEFECTS IN THE SIDEWALK WERE INSIGNIFICANT)/SLIP AND FALL (PLAINTIFF COULD NOT IDENTIFY CAUSE OF FALL AND ANY DEFECTS IN THE SIDEWALK WERE INSIGNIFICANT)/SIDEWALKS (SLIP AND FALL, PLAINTIFF COULD NOT IDENTIFY CAUSE OF FALL AND ANY DEFECTS IN THE SIDEWALK WERE INSIGNIFICANT)/TRIVIAL DEFECTS (PLAINTIFF COULD NOT IDENTIFY CAUSE OF FALL AND ANY DEFECTS IN THE SIDEWALK WERE INSIGNIFICANT)

NEGLIGENCE.

PLAINTIFF COULD NOT IDENTIFY CAUSE OF THE FALL AND ANY DEFECTS IN THE SIDEWALK WERE INSIGNIFICANT.

The First Department determined defendants' motion for summary judgment in this sidewalk slip and fall case was properly granted. Plaintiff could not identify the cause of the fall and any defect that might have existed was deemed trivial:

Defendants established prima facie that any defect in the sidewalk that allegedly caused plaintiff to trip and fall was insignificant and that there were no surrounding circumstances that magnified the dangers it posed ... . They submitted plaintiff's testimony that he could not describe the characteristics of the alleged defect or specify exactly where on the sidewalk he fell, and an affidavit by an expert who took photographs and measured the area and found no defect presenting an elevation differential of more than one quarter inch and no space between sidewalk slabs greater than one half inch. Contrary to plaintiff's contention, the fact that the photographs were taken and the inspection performed almost two years after the accident is immaterial. Defendants submitted testimony that there had been no repairs to the sidewalk since the accident, and plaintiff does not argue that the photographs do not show the sidewalk in substantially the same condition as existed at the time of the accident.

In opposition, plaintiff failed to raise a triable issue of fact. He was unable to describe the defect, except to say that it was not wide and it was not deep, and he cites no surrounding circumstances that enhanced the danger. Nor did he offer any measurements of the alleged defects in the area of his fall in refutation of defendants' expert's measurements. **Saab v CVS Caremark Corp., 2016 NY Slip Op 07763, 1st Dept 11-17-16**

NEGLIGENCE (ABSENCE OF MARKINGS OR COLOR DIFFERENTIATION BETWEEN STEP AND SIDEWALK CREATED AN ISSUE OF FACT WHETHER THE STEP WAS A DANGEROUS CONDITION, IRRESPECTIVE OF PLAINTIFF'S POSSIBLE COMPARATIVE NEGLIGENCE)/SLIP AND FALL (ABSENCE OF MARKINGS OR COLOR DIFFERENTIATION BETWEEN STEP AND SIDEWALK CREATED AN ISSUE OF FACT WHETHER THE STEP WAS A DANGEROUS CONDITION, IRRESPECTIVE OF PLAINTIFF'S POSSIBLE COMPARATIVE NEGLIGENCE)/STEPS (SLIP AND FALL, ABSENCE OF MARKINGS OR COLOR DIFFERENTIATION BETWEEN STEP AND SIDEWALK CREATED AN ISSUE OF FACT WHETHER THE STEP WAS A DANGEROUS CONDITION, IRRESPECTIVE OF PLAINTIFF'S POSSIBLE COMPARATIVE NEGLIGENCE)

NEGLIGENCE.

ABSENCE OF MARKINGS OR COLOR DIFFERENTIATION BETWEEN STEP AND SIDEWALK CREATED AN ISSUE OF FACT WHETHER THE STEP WAS A DANGEROUS CONDITION, IRRESPECTIVE OF PLAINTIFF'S POSSIBLE COMPARATIVE NEGLIGENCE.

The Fourth Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case should not have been granted. There was evidence a step leading to defendants' premises was dangerous because there were no markings or differences in color between the step and the sidewalk:

> "[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the particular facts and circumstances of each case and is generally a question of fact for the jury" ... . In view of the pertinent "factors that may render a physically small defect actionable" ... , we conclude that ... (defendants) failed to sustain their burden of establishing as a matter of law the absence of any defect with the step ... . In any event, we conclude that, in opposition to the motion and cross motion, plaintiff raised a triable issue of fact concerning the existence of a defect by submitting evidence that there were no markings on the step or differences in color between the step and the sidewalk ... . Furthermore, the step was located in or very near a doorway, "where a person's attention would be drawn to the door, not to the [step]" ... .
>
> We further conclude that the court erred in determining that plaintiff's inattention to the step upon exiting the premises was the sole proximate cause of her injuries as a matter of law inasmuch as defendants "failed to establish that plaintiff's fall was unrelated to the alleged defect" ... . Thus, "while plaintiff may have been comparatively negligent in failing to observe the step or in failing to remember that the step was there, any such comparative negligence would not serve to negate the liability of the . . . landowner[,] who has a duty to keep the premises safe' " ... . **Grefrath v DeFelice, 2016 NY Slip Op 07786, 4th Dept 11-18-16**

NEGLIGENCE (PROFESSIONAL WRESTLER ASSUMED RISK OF INJURY WHEN JUMPING FROM THE ROPES INTO THE RING)/ASSUMPTION OF THE RISK (PROFESSIONAL WRESTLER ASSUMED RISK OF INJURY WHEN JUMPING FROM THE ROPES INTO THE RING)

NEGLIGENCE.

PROFESSIONAL WRESTLER ASSUMED RISK OF INJURY WHEN JUMPING FROM THE ROPES INTO THE RING.

The Fourth Department determined the doctrine of primary assumption of the risk precluded recovery by a professional wrestler for injuries resulting from a planned jump from the ropes into the ring:

> It is well settled that the primary "assumption of [the] risk doctrine applies where a consenting participant in sporting and amusement activities is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks' " ... . The participant assumes the risks that are inherent in the "sporting or amusement activit[y]" (id.), which "commensurately negates any duty on the part of the defendant to safeguard him or her from the risk" ... . Consequently, a participant in such activity " consents to those commonly appreciated risks which are inherent in and arise out of the nature of the [activity] generally and flow from such participation' " ... . "[F]or purposes of determining the extent of the threshold duty of care, knowledge plays a role but inherency is the sine

qua non" ... . Finally, "[t]he primary assumption of the risk doctrine also encompasses risks involving less than optimal conditions . . . It is not necessary to the application of assumption of [the] risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results' " ... .

Here, the court properly concluded that the risk of severe neck and back injuries is inherent in the planned and staged activity engaged in by plaintiff, i.e., jumping from a four-foot high rope onto a wrestling ring, landing on one's back, and then being pushed out of the ring by another performer. Thus, "it is indisputable that . . . plaintiff assumed the risk of landing incorrectly when tumbling in the manner he had been trained to do during his [five-year career as a professional wrestling performer]. The fact that the [rope was slightly looser], a circumstance of which . . . plaintiff was plainly aware, does not raise an issue of fact" ... . Therefore, "by participating in the [exhibition], plaintiff consented that the duty of care owed him by defendants was no more than a duty to avoid reckless or intentionally harmful conduct . . . [and] consent[ed] to accept the risk of injuries that are known, apparent or reasonably foreseeable consequences of his participation in" that exhibition ... , including the risk of the injuries he sustained. **Kingston v Cardinal O'Hara High School, 2016 NY Slip Op 07798, 4th Dept 11-18-16**

NEGLIGENCE (A SMOOTH SLIPPERY SURFACE, STANDING ALONE, WILL NOT SUPPORT A CAUSE OF ACTION FOR NEGLIGENCE IN A SLIP AND FALL CASE)/SLIP AND FALL (A SMOOTH SLIPPERY SURFACE, STANDING ALONE, WILL NOT SUPPORT A CAUSE OF ACTION FOR NEGLIGENCE IN A SLIP AND FALL CASE)

NEGLIGENCE.

A SMOOTH SLIPPERY SURFACE, STANDING ALONE, WILL NOT SUPPORT A CAUSE OF ACTION FOR NEGLIGENCE IN A SLIP AND FALL CASE.

The Second Department, reversing Supreme Court, determined defendant was entitled to summary judgment in a slip and fall case. The court noted that a smooth surface which is slippery, standing alone, does not raise a question of fact:

The plaintiffs commenced this action, alleging that the defendants had negligently applied wax to the staircase, making it dangerously slippery. The defendants moved for summary judgment dismissing the complaint, and the Supreme Court denied the motion. We reverse.

During the injured plaintiff's deposition, the transcript of which was submitted in support of the defendants' motion, he testified that he did not see any foreign substance, liquids, or other slippery substance on the steps, either before or after the subject accident. "[I]n the absence of evidence of a negligent application of floor wax or polish, the mere fact that a smooth floor may be slippery does not support a cause of action to recover damages for negligence" ... . Here, in support of their motion for summary judgment dismissing the complaint, the defendants submitted evidence sufficient to establish their prima facie entitlement to judgment as a matter of law dismissing so much of the complaint as was based on the defendants' alleged negligent application of wax or polish to the subject staircase ... . **Kapoor v Randlett, 2016 NY Slip Op 07927, 2nd Dept 11-23-16**

NEGLIGENCE (PLAINTIFF RAISED A QUESTION OF FACT WHETHER DEFENDANT CONTRACTOR CREATED AN UNREASONABLE RISK OF HARM WHEN INSTALLING A FLOOR AND THEREFORE OWED A DUTY TO PLAINTFF, HOWEVER THE DEFECT WAS TRIVIAL AS A MATTER OF LAW)/CONTRACT LAW (TORT LIABILITY TO THIRD PARTIES, PLAINTIFF RAISED A QUESTION OF FACT WHETHER DEFENDANT CONTRACTOR CREATED AN UNREASONABLE RISK OF HARM WHEN INSTALLING A FLOOR AND THEREFORE OWED A DUTY TO PLAINTFF, HOWEVER THE DEFECT WAS TRIVIAL AS A MATTER OF LAW)/SLIP AND FALL (PLAINTIFF RAISED A QUESTION OF FACT WHETHER DEFENDANT CONTRACTOR CREATED AN UNREASONABLE RISK OF HARM WHEN INSTALLING A FLOOR AND THEREFORE OWED A DUTY TO PLAINTFF, HOWEVER THE DEFECT WAS TRIVIAL AS A MATTER OF LAW)/TRIVIAL DEFECT (SLIP AND FALL, PLAINTIFF RAISED A QUESTION OF FACT WHETHER DEFENDANT CONTRACTOR CREATED AN UNREASONABLE RISK OF HARM WHEN INSTALLING A FLOOR AND THEREFORE OWED A DUTY TO PLAINTFF, HOWEVER THE DEFECT WAS TRIVIAL AS A MATTER OF LAW)

NEGLIGENCE, CONTRACT LAW.

PLAINTIFF RAISED A QUESTION OF FACT WHETHER DEFENDANT CONTRACTOR CREATED AN UNREASONABLE RISK OF HARM WHEN INSTALLING A FLOOR AND THEREFORE OWED A DUTY TO PLAINTFF, HOWEVER THE DEFECT WAS TRIVIAL AS A MATTER OF LAW.

The Fourth Department, reversing Supreme Court, determined plaintiff had raised an issue of fact whether defendant contractor owed a duty to plaintiff because its flooring work created an unreasonable risk of harm to others. However Supreme Court erred in not finding the defect trivial as a matter of law:

> Here, the record establishes that the bullnose tile was slightly less than one-half of an inch in height and was not the same color as the tile floor. * * * ..."[T]he test established by the case law in New York is not whether a defect is capable of catching a pedestrian's shoe. ... [T]he relevant questions are whether the defect was difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances" ... . Upon our review of the photos of the alleged defect and in view of the less than ½-inch height of the bullnose tile and the circumstances surrounding decedent's accident ... , we conclude that, although an accident occurred that is "traceable to the defect, there is no liability" because the alleged defect " is so slight that no careful or prudent [person] would reasonably anticipate any danger from its existence' " under the circumstances present here ... . **Stein v Sarkisian Bros., Inc., 2016 NY Slip Op 07501, 4th Dept 11-10-16**

NEGLIGENCE (DEFENDANT EMPLOYEE WAS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN THE REAR-END COLLISION OCCURRED, DEFENDANT WAS DRIVING HIS OWN CAR TO WORK)/EMPLOYMENT LAW (NEGLIGENCE, RESPONDEAT SUPERIOR, DEFENDANT EMPLOYEE WAS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN THE REAR-END COLLISION OCCURRED, DEFENDANT WAS DRIVING HIS OWN CAR TO WORK)/RESPONDEAT SUPERIOR (DEFENDANT EMPLOYEE WAS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN THE REAR-END COLLISION OCCURRED, DEFENDANT WAS DRIVING HIS OWN CAR TO WORK)

NEGLIGENCE, EMPLOYMENT LAW.

DEFENDANT EMPLOYEE WAS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN THE REAR-END COLLISION OCCURRED; DEFENDANT WAS DRIVING HIS OWN CAR TO WORK.

Defendant, Frasier, was driving to work in his own car when he was involved in a rear-end collision with plaintiff. Plaintiff sued defendant's employer under the doctrine of respondeat superior. The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment should have been granted. The defendant was not acting within the scope of his employment when the accident occurred:

> As a general rule, an employee driving to and from work is not acting in the scope of his [or her] employment . . . Although such activity is work motivated, the element of control is lacking" ... . "Although the issue whether an

employee is acting within the scope of his or her employment generally is one of fact, it may be decided as a matter of law in a case such as this, in which the relevant facts are undisputed" ... .

Contrary to plaintiffs' contention, the mere fact that Frasier carried his own tools in his vehicle was insufficient to "transform the use of the automobile into a special errand [for defendant] or an extension of the employment" ... . Moreover, the fact that Frasier drove a coworker to work that morning is of no significance because he was not directed to do so, and the carpool was based on the employees' "personal arrangement" ... . Finally, the fact that defendant paid for lodging for Frasier while he was at a remote work site also does not require a different finding inasmuch as defendant did not require its employees to stay at the procured hotel, and the employees did not have "to inform defendant of their whereabouts [outside of working hours]" ... . **Figura v Frasier, 2016 NY Slip Op 07525, 4th Dept 11-10-16**

NEGLIGENCE (ALLOWING IN EVIDENCE INTERNAL RULES WHICH IMPOSED A HIGHER STANDARD OF CARE THAN REQUIRED BY THE COMMON LAW WAS REVERSIBLE ERROR)/EVIDENCE (NEGLIGENCE, ALLOWING IN EVIDENCE INTERNAL RULES WHICH IMPOSED A HIGHER STANDARD OF CARE THAN REQUIRED BY THE COMMON LAW WAS REVERSIBLE ERROR)/STANDARD OF CARE (ALLOWING IN EVIDENCE INTERNAL RULES WHICH IMPOSED A HIGHER STANDARD OF CARE THAN REQUIRED BY THE COMMON LAW WAS REVERSIBLE ERROR)

NEGLIGENCE, EVIDENCE.

ALLOWING IN EVIDENCE INTERNAL RULES WHICH IMPOSED A HIGHER STANDARD OF CARE THAN REQUIRED BY THE COMMON LAW WAS REVERSIBLE ERROR.

The First Department determined a new liability trial was necessary in a personal injury case because of erroneous evidentiary rulings. The trial court allowed into evidence internal rules (apparently dealing with the operation of a subway train) which imposed a higher standard of care than that required by the common law:

The court erred in admitting into evidence portions of defendant's internal rules, which imposed a higher standard of care than required by common law ... . Moreover, the prejudice to defendant was heightened by plaintiff's expert's reading of those internal rules to the jury.

The court also erred in allowing plaintiff's counsel to question defendant's train operator about his discussions with counsel. **Sebhat v MTA N.Y. City Tr., 2016 NY Slip Op 07872, 1st Dept 11-22-16**

REAL ESTATE

REAL ESTATE (BUYER NOT ENTITLED TO RETURN OF DEPOSIT, BUYER DID NOT COMPLY WITH THE MORTGAGE CONTINGENCY PROVISIONS OF THE PURCHASE AGREEMENT AND DID NOT ACT IN GOOD FAITH, APPELLATE COURT SEARCHED THE RECORD AND AWARDED SUMMARY JUDGMENT TO SELLERS)/CONTRACT LAW (REAL ESTATE PURCHASE CONTRACT, BUYER NOT ENTITLED TO RETURN OF DEPOSIT, BUYER DID NOT COMPLY WITH THE MORTGAGE CONTINGENCY PROVISIONS OF THE PURCHASE AGREEMENT AND DID NOT ACT IN GOOD FAITH, APPELLATE COURT SEARCHED THE RECORD AND AWARDED SUMMARY JUDGMENT TO SELLERS)/APPEALS (SUMMARY JUDGMENT, BUYER NOT ENTITLED TO RETURN OF DEPOSIT, BUYER DID NOT COMPLY WITH THE MORTGAGE CONTINGENCY PROVISIONS OF THE PURCHASE AGREEMENT AND DID NOT ACT IN GOOD FAITH, APPELLATE COURT SEARCHED THE RECORD AND AWARDED SUMMARY JUDGMENT TO SELLERS)

REAL ESTATE, CONTRACT LAW, APPEALS.

BUYER NOT ENTITLED TO RETURN OF DEPOSIT, BUYER DID NOT COMPLY WITH THE MORTGAGE CONTINGENCY PROVISIONS OF THE PURCHASE AGREEMENT AND DID NOT ACT IN GOOD FAITH, APPELLATE COURT SEARCHED THE RECORD AND AWARDED SUMMARY JUDGMENT TO SELLERS.

The Second Department, reversing Supreme Court, searched the record and awarded summary judgment to the defendants-sellers in this action to recover the deposit for a home purchase. The court found the buyer did not comply with the mortgage contingency provisions of the purchase agreement and misled the sellers, not informing them of the rejection of his mortgage applications:

> ... [T]he Supreme Court erred in determining that the buyer had made a prima facie showing of entitlement to judgment as a matter of law. The correspondence submitted by the buyer on renewal demonstrated, among other things, that the seller agreed to the buyer's initial request to extend the commitment date but refused to consider his request for a second extension of the commitment date until the buyer provided copies of his loan applications and declinations. Additionally, this new evidence demonstrated that when the buyer sought an extension of the commitment date, he did not advise the seller of the fact that he had already been rejected by more than one lender. Contrary to the buyer's contention, the evidence demonstrated that the buyer failed to comply with several provisions of the mortgage contingency clause in the contract ... , and acted in bad faith in obtaining an extension of the commitment date by misleading the seller about the fact that multiple lenders rejected his mortgage loan applications based on his "delinquent credit obligations" and the lenders' inability to verify his income. * * *
>
> This Court has the authority to search the record and award summary judgment to a nonmoving party with respect to issues that were the subject of the motion before the Supreme Court ... . Under the unique and compelling circumstances of this case, and given the wealth of evidence which supports judgment in favor of the defendants, we search the record and award summary judgment to the defendants dismissing the complaint ... . **Kweku v Thomas, 2016 NY Slip Op 08051, 2nd Dept 11-30-16**

TAX LAW

TAX LAW (AMUSEMENT TAX AND CABARET TAX PROVISIONS ARE NOT UNCONSTITUTIONALLY APPLIED TO AN ADULT ENTERTAINMENT CLUB, TAX EXEMPTIONS FOR CERTAIN TYPES OF DRAMATIC OR MUSICAL ART PERFORMANCES ARE PROPERLY NOT AVAILABLE TO THE CLUB)/AMUSEMENT TAX (AMUSEMENT TAX AND CABARET TAX PROVISIONS ARE NOT UNCONSTITUTIONALLY APPLIED TO AN ADULT ENTERTAINMENT CLUB, TAX EXEMPTIONS FOR CERTAIN TYPES OF DRAMATIC OR MUSICAL ART PERFORMANCES ARE PROPERLY NOT AVAILABLE TO THE CLUB)/CABARET TAX (AMUSEMENT TAX AND CABARET TAX PROVISIONS ARE NOT UNCONSTITUTIONALLY APPLIED TO AN ADULT ENTERTAINMENT CLUB, TAX EXEMPTIONS FOR CERTAIN TYPES OF DRAMATIC OR MUSICAL ART PERFORMANCES ARE PROPERLY NOT AVAILABLE TO THE CLUB)/ADULT ENTERTAINMENT (AMUSEMENT TAX AND CABARET TAX PROVISIONS ARE NOT UNCONSTITUTIONALLY APPLIED TO AN ADULT ENTERTAINMENT CLUB, TAX EXEMPTIONS FOR CERTAIN TYPES OF DRAMATIC OR MUSICAL ART PERFORMANCES ARE PROPERLY NOT AVAILABLE TO THE CLUB)

TAX LAW.

AMUSEMENT TAX AND CABARET TAX PROVISIONS ARE NOT UNCONSTITUTIONALLY APPLIED TO AN ADULT ENTERTAINMENT CLUB; TAX EXEMPTIONS FOR CERTAIN TYPES OF DRAMATIC OR MUSICAL ART PERFORMANCES ARE PROPERLY NOT AVAILABLE TO THE CLUB.

The First Department, in a full-fledged opinion by Justice Tom, determined the provisions of the Tax Law which allow the imposition of an amusement tax and a cabaret tax were not unconstitutional either facially or as applied to the plaintiffs. The plaintiffs operate a men's entertainment club featuring topless dancers (Hustler Club). The Tax Law includes exemptions for certain types of entertainment, i.e., dramatic or musical art performances. Plaintiffs argued the exemptions should apply to the adult entertainment at the club, as well. In rejecting the constitutional arguments, the court wrote:

> Here, the Tax Laws are laws "of general application" ... . The Amusement Tax applies to sales at "[a]ny place where any facilities for entertainment, amusement, or sports are provided" (Tax Law § 1101[d][10]), and the Cabaret Tax applies to sales at "[a]ny roof garden, cabaret or other similar place which furnishes a public performance for profit" (Tax Law § 1101[d][12]). The Tax Laws "ha[ve] not selected a narrow group to bear fully the burden of the tax" ... , since the taxes imposed on plaintiffs are equally applicable to many other types of entertainment and recreational activities, including sporting events, car races, amusement parks, arcades, zoos, animal performances, and magic acts ... . Nor are the performances of the sort presented at the Hustler Club "singled out for special treatment"... based on their erotic, sexual, or adult nature. The performances merely happen to fall under the very broad categories of "entertainment" or "amusement," for purposes of the Amusement Tax, and "public performance for profit," for purposes of the Cabaret Tax. **CMSG Rest. Group, LLC v State of New York, 2016 NY Slip Op 07280, 1st Dept 11-3-16**

UNEMPLOYMENT INSURANCE

UNEMPLOYMENT INSURANCE (CLAIMANT'S CONNECTION TO A CORPORATION WAS NOT SUFFICIENT TO WARRANT FINDING HE WAS NOT TOTALLY UNEMPLOYED)

UNEMPLOYMENT INSURANCE.

CLAIMANT'S CONNECTION TO A CORPORATION WAS NOT SUFFICIENT TO WARRANT FINDING HE WAS NOT TOTALLY UNEMPLOYED.

The Third Department determined claimant, who was listed as a principal of a corporation (Reel One), did not have a sufficient connection to the corporation to warrant the board's decision claimant was not totally unemployed:

It is well settled that "[a] claimant who is a principal of an ongoing corporation will not be considered totally unemployed if he or she stands to benefit financially from its continued operation, no matter how minimal the activities performed on its behalf" ... .

Here, there is no evidence that claimant performed any activities, however trivial, on behalf of Reel One in 2010 during the time period at issue. In addition, there is no evidence that claimant's name appeared on any bank accounts or corporate documents. Claimant testified that his wife created Reel One as a nonprofit corporation in the 1990s before they were married and that she was the sole shareholder. Although claimant and his wife, who both had extensive journalism experience, were listed as principals of Reel One on its website, claimant testified that his wife provided this information for marketing purposes only and that the website functioned as a type of advertisement. There is no evidence that the website was actively used to transact business. **Matter of Petrick (Commissioner of Labor), 2016 NY Slip Op 07363, 3rd Dept. 11-10-16**

UNEMPLOYMENT INSURANCE (DISSATISFACTION WITH JOB ASSIGNMENTS NOT GOOD CAUSE FOR RESIGNING)

UNEMPLOYMENT INSURANCE.

DISSATISFACTION WITH JOB ASSIGNMENTS NOT GOOD CAUSE FOR RESIGNING.

The Third Department upheld the board's finding claimant did not demonstrate good cause to leave her job and therefore was ineligible for unemployment insurance benefits:

... [D]issatisfaction with job assignments or responsibilities has been held to not constitute good cause for resigning ... . The Board credited the testimony of claimant's supervisor regarding the reorganization and its effect upon claimant. Claimant's title, grade, salary, work schedule and location were not being changed and, while there were changes in her job duties, her precise duties had not been finally determined due to the ongoing and preliminary nature of the reorganization.

Significantly, claimant did not attempt to speak with any of her supervisors before resigning to raise concerns or clarify the new job duties. The Board was free to reject claimant's disputed testimony that she resigned as a result of ongoing retaliation ... . **Matter of Flint-Jones (Federal Reserve Bank of N.Y.--Commissioner of Labor), 2016 NY Slip Op 07368, 3rd Dept 11-10-16**

UNEMPLOYMENT INSURANCE (EXCESSIVE ABSENTEEISM JUSTIFIED DENIAL OF BENEFITS)/ABSENTEEISM (EXCESSIVE ABSENTEEISM JUSTIFIED DENIAL OF BENEFITS)

UNEMPLOYMENT INSURANCE.

EXCESSIVE ABSENTEEISM JUSTIFIED DENIAL OF BENEFITS.

The Third Department determined claimant's excessive absenteeism justified the denial of unemployment insurance benefits. The fact claimant didn't realize the last warning was a final warning did not excuse the behavior:

Excessive absenteeism, which continues despite repeated warnings, has been held to constitute misconduct disqualifying a claimant from receiving unemployment insurance benefits ... . Here, it is undisputed that claimant

was continually absent from work even after she was warned that further absences would result in disciplinary action, including discharge. Although claimant maintains that she did not realize that the last warning was her final one, this does not excuse her behavior under the circumstances presented. **Matter of Mead (Commissioner of Labor), 2016 NY Slip Op 07374, 3rd Dept 11-10-16**

WORKERS' COMPENSATION LAW

WORKERS' COMPENSATION LAW (VOCATIONAL FACTORS PROPERLY CONSIDERED IN SETTING COMPENSTATION FOR PERMANENTLY DISABLED LABORER)

WORKERS' COMPENSATION LAW.

VOCATIONAL FACTORS PROPERLY CONSIDERED IN SETTING COMPENSTATION FOR PERMANENTLY DISABLED LABORER.

The Third Department determined the Workers' Compensation Board properly took into account the claimant's "vocational factors," i.e., limited education, language barrier, work history, when setting the appropriate compensation. Claimant suffered a permanent partial disability and had been employed as a landscaper:

> Here, ... claimant suffered a permanent partial disability, there is no expectation that he will ever return to his former or similar employment as a laborer, and the Board necessarily considered vocational factors when it established his loss of wage-earning capacity. Because the evidence established that claimant did not earn actual wages, the statute authorized the Board to "[fix] in the interest of justice . . . such wage[-]earning capacity as shall be reasonable . . . having due regard to the nature of his injury and his physical impairment" (Workers' Compensation Law § 15 [5-a]). ... [W]e find that the [statute's] broad discretionary language authorized the Board to consider vocational factors that reflected claimant's true ability to secure employment, particularly in the absence of evidence to negate claimant's testimony that his injury contributed to his loss of wage-earning capacity ... . Consequently, under the circumstances presented, we perceive no error in the Board's determination to fix claimant's wage-earning capacity based on the undisputed evidence of his physical disability and loss of wage-earning capacity resulting from his functional limitations and vocational impediments ... . **Matter of Rosales v Eugene J. Felice Landscaping, 2016 NY Slip Op 07239, 2nd Dept 11-3-16**

WORKERS' COMPENSATION LAW (NONWORKING CLAIMANT SUBJECT TO THE 75% CAP ON WAGE-EARNING CAPACITY IS NOT AUTOMATICALLY ENTITLED TO NO LESS THAN 25% LOSS OF WAGE- EARNING CAPACITY FOR PURPOSES OF DETERMINING THE DURATION OF BENEFITS)

WORKERS' COMPENSATION LAW.

NONWORKING CLAIMANT SUBJECT TO THE 75% CAP ON *WAGE-EARNING CAPACITY* IS NOT AUTOMATICALLY ENTITLED TO NO LESS THAN 25% *LOSS OF WAGE- EARNING CAPACITY* FOR PURPOSES OF DETERMINING THE DURATION OF BENEFITS; HERE A 15% LOSS OF WAGE-EARNING CAPACITY UPHELD.

The Third Department rejected the argument by the permanently disabled claimant that, because of a conflict between two applicable statutes, she could not be deemed to have sustained anything less than a 25% loss of wage-earning

capacity. The Third Department determined the two statutory provisions were not in conflict and the evidence supported a 15% loss of wage-earning capacity:

> Claimant argues that, because Workers' Compensation Law § 15 (5-a) limited her wage-earning capacity as a nonworking claimant to no more than 75% of her "former full time actual earnings," the Board was statutorily prohibited from determining that she had less than a 25% loss of wage-earning capacity under Workers' Compensation Law § 15 (3) (w). She asserts that Workers' Compensation Law § 15 (3) (w) (xi) and (xii) are in conflict with Workers' Compensation Law § 15 (5-a) and that, to reconcile this perceived conflict, we should construe these provisions as applying only to claimants who are employed at the time of classification — i.e., those claimants who are not subject to the 75% restriction imposed by Workers' Compensation Law § 15 (5-a). * * *
>
> As relevant here, in cases of permanent partial disability that are not amenable to schedule awards, "wage-earning capacity" is used to determine a claimant's weekly rate of compensation. Specifically, in such cases, a claimant's rate of compensation is two thirds of the difference between his or her average weekly wage and his or her wage-earning capacity (see Workers' Compensation Law § 15 [3] [w]). Where a claimant is unemployed, wage-earning capacity is fixed by the Board — subject to a 75% cap (see Workers' Compensation Law § 15 [5-a]). In contrast, "loss of wage-earning capacity," a term that was added in 2007 as part of a comprehensive reform of the Workers' Compensation Law (see L 2007, ch 6, § 4), is used at the time of classification to set the maximum number of weeks over which a claimant with a permanent partial disability is entitled to receive benefits (see Workers' Compensation Law § 15 [3] [w]). For instance, where, as here, a claimant is found to have sustained a 15% loss of wage-earning capacity, he or she is entitled to receive benefits for 225 weeks (see Workers' Compensation Law § 15 [3] [w] [xii]). **Matter of Till v Apex Rehabilitation, 2016 NY Slip Op 07247, 3rd Dept 11-3-16**

WORKERS' COMPENSATION LAW (CLAIMANT PRECLUDED FROM FURTHER WORKERS' COMPENSATION BENEFITS FOR FAILURE TO SEEK PERMISSION BEFORE SETTLING A RELATED TORT ACTION, MEANING OF THIRD PARTY ACTION IN THIS CONTEXT EXPLAINED)

WORKERS' COMPENSATION LAW.

CLAIMANT PRECLUDED FROM FURTHER WORKERS' COMPENSATION BENEFITS FOR FAILURE TO SEEK PERMISSION BEFORE SETTLING A RELATED TORT ACTION, MEANING OF THIRD PARTY ACTION IN THIS CONTEXT EXPLAINED.

The Third Department determined claimant did not seek permission from her Workers' Compensation carrier before settling another action which arose from the some of the same allegations as her Workers' Compensation claim. Therefore she was precluded from receiving future Workers' Compensation benefits. Claimant unsuccessfully argued that the federal court action which settled was not a "third party" action within the meaning of the Workers' Compensation Law because the action was against claimant's co-worker and employer, not a "third party:"

> "Workers' Compensation Law § 29 (5) requires either the carrier's consent or a compromise order from the court in which the third-party action is pending for a claimant to settle a third-party action and continue receiving compensation benefits" ... . Claimant urges that her federal lawsuit was not a third-party action since the statute addresses "the negligence or wrong of another not in the same employ" (Workers' Compensation Law § 29 [1]) and the associate dean who harassed her had the same employer as her. The Court of Appeals, however, has recently reiterated that Workers' Compensation Law § 29, "'read in its entirety and in context, clearly reveals a legislative design to provide for reimbursement of the compensation carrier whenever a recovery is obtained in tort for the same injury that was a predicate for the payment of compensation benefits'" ... . "The Court reasoned that "'[i]t would be unreasonable to read the statute as mandating a different result merely because the recovery came out of the pockets of a coemployee [or the employer] and not from the resources of a stranger'" ... . **Matter of Shiner v SUNY At Buffalo, 2016 NY Slip Op 07738, 3rd Dept 11-17-16**

ZONING

ZONING (ADJACENT PROPERTY OWNER DID NOT HAVE STANDING TO CHALLENGE VARIANCE, THE CHALLENGE WAS NOT WITHIN THE ZONE OF INTEREST OF THE RELEVANT STATUTE)/VARIANCE (ADJACENT PROPERTY OWNER DID NOT HAVE STANDING TO CHALLENGE VARIANCE, THE CHALLENGE WAS NOT WITHIN THE ZONE OF INTEREST OF THE RELEVANT STATUTE)/STANDING (ZONING, ADJACENT PROPERTY OWNER DID NOT HAVE STANDING TO CHALLENGE VARIANCE, THE CHALLENGE WAS NOT WITHIN THE ZONE OF INTERESTS OF THE RELEVANT STATUTE)/ZONE OF INTERESTS (ZONING, (ADJACENT PROPERTY OWNER DID NOT HAVE STANDING TO CHALLENGE VARIANCE, THE CHALLENGE WAS NOT WITHIN THE ZONE OF INTEREST OF THE RELEVANT STATUTE)

ZONING.

ADJACENT PROPERTY OWNERS DID NOT HAVE STANDING TO CHALLENGE VARIANCE, THE CHALLENGE WAS NOT WITHIN THE ZONE OF INTEREST OF THE RELEVANT STATUTE.

The Second Department determined petitioners, who own property adjacent to the property for which the contested variance was granted, did not have standing to challenge the variance. The challenge was deemed not to be within the "zone of interest" encompassed by the relevant statute. Any increase in parking related to the variance affected only the subject property, and not parking on the street:

> ... [A] petitioner whose property is adjacent to the property that is the subject of the administrative action may rely on a presumption of direct injury for purposes of standing ... . Nevertheless, even a petitioner whose property is adjacent to the subject property must demonstrate that its alleged injury is within the "zone of interest" of the statute ... . "Simply stated, a party must show that the in-fact injury of which it complains (its aggrievement, or the adverse effect upon it) falls within the zone of interests,' or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted" ... .
>
> Here, we agree with the Supreme Court that the petitioners/plaintiffs did not allege any legally cognizable injury with respect to parking or traffic. Simply put, the only effect that the petitioners/plaintiffs allege the area variances will have with respect to parking is limited to parking actually on the subject property. There is no allegation of impact as to on-street parking ... . **Matter of Panevan Corp. v Town of Greenburgh, 2016 NY Slip Op 07327, 2nd Dept 11-9-16**

ZONING (ZONING BOARD PROPERLY REJECTED APPLICATION TO EXTEND THE ONE-YEAR DEADLINE FOR A REBUILD OF A FIRE-DAMAGED, NON-CONFORMING HOME)

ZONING.

ZONING BOARD PROPERLY REJECTED APPLICATION TO EXTEND THE ONE-YEAR DEADLINE FOR A REBUILD OF A FIRE-DAMAGED, NON-CONFORMING HOME.

The Second Department, reversing Supreme Court, over an extensive dissent, determined the zoning board (ZBA) properly rejected petitioner's application to rebuild a fire-damaged, non-conforming home after the statutory one-year period for a rebuild had passed. The unambiguous language of the town code provision supported the board's action (therefore the action was not arbitrary and/or capricious):

> The ZBA's affirmance of the ... denial of the complete application for a building permit was based on its interpretation of Town Code § 77-48(A) as then in effect. Since the interpretation of the terms of that section involves a pure legal interpretation of statutory terms, we do not defer to the ZBA's interpretation, but instead make

an independent review of the law ... . We conclude that the ZBA correctly interpreted the then-current version of Town Code § 77-48(A). Indeed, the provision "could not be clearer" ... ; it enunciated a strict one-year limit for completion of the rebuilding of a destroyed nonconforming residence. Thus, the ZBA's affirmance of the denial of the ... permit application was a correct interpretation of the law. The ZBA correctly concluded that it was not authorized to disregard that clear language. **Matter of Warner v Town of Kent Zoning Bd. of Appeals, 2016 NY Slip Op 07332, 2nd Dept 11-9-16**

ZONING (NO VARIANCE REQUIRED TO ALLOW CHURCH PROPERTY TO BE USED TO HOUSE HOMELESS PERSONS)/CHURCH PROPERTY (ZONING, NO VARIANCE REQUIRED TO ALLOW CHURCH PROPERTY TO BE USED TO HOUSE HOMELESS PERSONS)/HOMELESS (ZONING, NO VARIANCE REQUIRED TO ALLOW CHURCH PROPERTY TO BE USED TO HOUSE HOMELESS PERSONS)

ZONING.

NO VARIANCE REQUIRED TO ALLOW CHURCH PROPERTY TO BE USED TO HOUSE HOMELESS PERSONS.

The Third Department, reversing Supreme Court, determined the proposed use of church property to house homeless persons did not require a variance:

Strictly religious uses and activities are more than prayer and sacrifice and all churches recognize that the area of their responsibility is broader than leading the congregation in prayer. . . . To limit a church to being merely a house of prayer and sacrifice would, in a large degree, be depriving the church of the opportunity of enlarging, perpetuating and strengthening itself and the congregation" ... . To that end, "[s]ervices to the homeless have been judicially recognized as religious conduct" ... . **Matter of Sullivan v Board of Zoning Appeals of City of Albany, 2016 NY Slip Op 07911, 3rd Dept 11-23-16**

MUNICIPAL LAW (ALL PROPERTY OWNERS AFFECTED BY A CHALLENGED ZONING ORDINANCE ARE NOT NECESSARY PARTIES IN THE ACTION, ORIGINAL PETITION, WHICH DID NOT NAME ALL AFFECTED PARTIES, ALLOWED TO PROCEED)/ZONING (ALL PROPERTY OWNERS AFFECTED BY A CHALLENGED ZONING ORDINANCE ARE NOT NECESSARY PARTIES IN THE ACTION, ORIGINAL PETITION, WHICH DID NOT NAME ALL AFFECTED PARTIES, ALLOWED TO PROCEED)/ENVIRONMENTAL LAW (ALL PROPERTY OWNERS AFFECTED BY A CHALLENGED ZONING ORDINANCE ARE NOT NECESSARY PARTIES IN THE ACTION, ORIGINAL PETITION, WHICH DID NOT NAME ALL AFFECTED PARTIES, ALLOWED TO PROCEED)/CIVIL PROCEDURE (ALL PROPERTY OWNERS AFFECTED BY A CHALLENGED ZONING ORDINANCE ARE NOT NECESSARY PARTIES IN THE ACTION, ORIGINAL PETITION, WHICH DID NOT NAME ALL AFFECTED PARTIES, ALLOWED TO PROCEED)

ZONING, CIVIL PROCEDURE, ENVIRONMENTAL LAW.

ALL PROPERTY OWNERS AFFECTED BY A CHALLENGED ZONING ORDINANCE ARE NOT NECESSARY PARTIES IN THE ACTION, ORIGINAL PETITION, WHICH DID NOT NAME ALL AFFECTED PARTIES, ALLOWED TO PROCEED.

The Third Department determined all "rezoned" property-owners, deemed "necessary parties" by Supreme Court in this action to annul a local law rezoning property for industrial use, were, in fact, not "necessary parties." The petition, which had been dismissed for failure to timely serve the newly-added "necessary parties," was reinstated. The local law, which

would allow a recycling center in a previously residential-agricultural zone, was challenged based upon an alleged failure to comply with the State Environment Quality Review Act:

> The newly-added respondents were not necessary parties merely because the ordinance at issue affected their property rights. "'[T]he absence of a necessary party may be raised at any stage of the proceedings, by any party or by the court on its own motion'" ... . Given a court's power to raise the issue, it is notable that the Court of Appeals and this state's appellate courts, including this Court, have long entertained challenges to municipalities' legislative actions in regard to zoning ordinances without requiring the joinder of every property owner whose rights are affected by the ordinance at issue ... .]). This has been true even when the ordinance at issue is one that, on its face, is likely to dramatically affect the property rights held by real property owners ... . Although this Court has, in limited cases, found property owners to be necessary parties in regard to legal challenges to municipal ordinances that affect the property owners' rights, it has only done so in cases where the owners had obtained an actual approval pursuant to the challenged zoning ordinance that would be adversely impacted by a judgment annulling that ordinance ... . **Matter of Hudson Riv. Sloop Clearwater, Inc. v Town Bd. of The Town of Coeymans, 2016 NY Slip Op 07358, 3rd Dept 11-10-16**

CIVIL PROCEDURE (COA)

CIVIL PROCEDURE (FOREIGN DEFENDANTS' USE OF A NEW YORK CORRESPONDENT BANK ACCOUNT IN A SWISS BANK PROVIDED JURISDICTION OVER A LAWSUIT AGAINST THE BANK BY A SAUDI NATIONAL)/JURISDICTION (FOREIGN DEFENDANTS' USE OF A NEW YORK CORRESPONDENT BANK ACCOUNT IN A SWISS BANK PROVIDED JURISDICTION OVER A LAWSUIT AGAINST THE BANK BY A SAUDI NATIONAL)/BANKING LAW (FOREIGN DEFENDANTS' USE OF A NEW YORK CORRESPONDENT BANK ACCOUNT IN A SWISS BANK PROVIDED JURISDICTION OVER A LAWSUIT AGAINST THE BANK BY A SAUDI NATIONAL)

CIVIL PROCEDURE, BANKING LAW.

FOREIGN DEFENDANTS' USE OF A NEW YORK CORRESPONDENT BANK ACCOUNT IN A SWISS BANK PROVIDED JURISDICTION OVER A LAWSUIT AGAINST THE BANK BY A SAUDI NATIONAL.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a three-judge dissent and a concurrence, reversing Supreme Court, determined money-laundering transactions using a correspondent bank account in a New York branch of a Swiss bank provided jurisdiction over a lawsuit involving foreign parties. The individual plaintiff is a Saudi resident and co-owner of plaintiff corporation which builds oil rigs. Plaintiffs alleged three of its employees received bribes and kickbacks which were then deposited in defendant-bank (Pictet, based in Geneva) using a correspondent bank account in New York State:

> We conclude that defendants' use of the correspondent bank accounts was purposeful and that plaintiffs' aiding and abetting and conspiracy claims arise from these transactions. ... [T]he requirements of CPLR 302 (a)(1) are satisfied where the quantity and quality of contacts establish a "course of dealing" with New York, and the transaction and claim are not "merely coincidental" ... . * * *
>
> ... [T]he defendants actively used a correspondent bank to further a scheme that caused harm. ... [T]he defendants' use of the New York account to transfer money provided the employees with the "laundered" profits from the bribery and kickback scheme. Also, ... defendants used the correspondent account in New York "to move the necessary" money ... . * * *
>
> Here, the money laundering could not proceed without the use of the correspondent bank account, and, as plaintiffs argue, their claims require proof that the bribes and kickbacks were in fact paid. **Rushaid v Pictet &**

CRIMINAL LAW (MISDEMEANOR COMPLAINT ADEQUATELY ALLEDGED POSSESSION OF BRASS KNUCKLES)/MISDEMEANOR COMPLAINT (MISDEMEANOR COMPLAINT ADEQUATELY ALLEDGED POSSESSION OF BRASS KNUCKLES)/BRASS KNUCKLES (MISDEMEANOR COMPLAINT ADEQUATELY ALLEDGED POSSESSION OF BRASS KNUCKLES)

CRIMINAL LAW

MISDEMEANOR COMPLAINT ADEQUATELY ALLEDGED POSSESSION OF BRASS KNUCKLES.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, determined the misdemeanor complaint sufficiently alleged possession of "brass knuckles:"

> "[A] reasonable, not overly technical reading" of the accusatory instrument here satisfies our sufficiency standard ... , as it supplied "defendant with sufficient notice of the charged crime to satisfy the demands of due process and double jeopardy" ... . The accusatory instrument clearly informed defendant that he was in criminal possession of "brass metal knuckles," a per se weapon, in violation of Penal Law § 265.01 (1). The term "brass metal knuckles" gave defendant a clear description of the object recovered from his pocket at a specific time and place. Under the common and natural definition of the term, as well as the dictionary definition, defendant was adequately informed of the charge against him. * * *
>
> [T]he character of metal knuckles is such that one need only look at the object to discern whether it is in fact metal knuckles. Thus, the officer here did not have to "exercise . . . professional skill or experience" to conclude defendant possessed metal knuckles ... , and the accusatory instrument did not require any specific description of the officer's training or experience. **People v Aragon, 2016 NY Slip Op 07104, CtApp 11-1-16**

CRIMINAL LAW (EXPANDABLE, METAL BATON IS A "BILLY" WITHIN THE MEANING OF THE PENAL LAW)/BILLY (EXPANDABLE, METAL BATON IS A "BILLY" WITHIN THE MEANING OF THE PENAL LAW)

CRIMINAL LAW.

EXPANDABLE, METAL BATON IS A "BILLY" WITHIN THE MEANING OF THE PENAL LAW.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over an extensive dissent, determined the accusatory instrument sufficiently alleged the illegal possession of a "billy." The accusatory instrument stated that a police officer observed defendant with a "rubber gripped, metal, extendable baton (billy club)" in his rear pants pocket. Based upon his training and experience, the officer stated that "said baton device is designed primarily as a weapon, consisting of a tubular, metal body with a rubber grip and extendable feature and used to inflict serious injury upon a person by striking or choking." The term "billy" is not defined in the Penal Law. When the law was enacted a billy club was a fixed wooden baton. The question before the court was whether a metal, expandable baton constituted a "billy" within the meaning of the statute:

> In our view, ,,, the only plausible interpretation of the term "billy" encompasses a collapsible metal baton ... . Our conclusion in this regard does not rest — as the dissent suggests — on whether or not law enforcement personnel has chosen to use this particular type of instrument. Rather, our determination follows from the common understanding of the term "billy" and our view that the baton at issue here fits comfortably within the definition thereof. Therefore, we hold that the accusatory instrument alleging that defendant possessed a metal, extendable striking weapon with a handle grip, was sufficient to charge him with possessing a "billy" under Penal Law § 265.01

(1) so as to provide sufficient notice for him to prepare a defense and to protect him from multiple prosecutions. **People v Ocasio, 2016 NY Slip Op 07105, CtApp 11-1-16**

CRIMINAL LAW (PEOPLE VS CATU, WHICH INVALIDATED GUILTLY PLEAS WHERE THE PERIOD OF POSTRELEASE SUPERVISION WAS NOT DISCUSSED, SHOULD NOT BE APPLIED RETROACTIVELY)/POSTRELEASE SUPERVISION (PEOPLE VS CATU, WHICH INVALIDATED GUILTLY PLEAS WHERE THE PERIOD OF POSTRELEASE SUPERVISION WAS NOT DISCUSSED, SHOULD NOT BE APPLIED RETROACTIVELY)/CATU, PEOPLE V (PEOPLE VS CATU, WHICH INVALIDATED GUILTLY PLEAS WHERE THE PERIOD OF POSTRELEASE SUPERVISION WAS NOT DISCUSSED, SHOULD NOT BE APPLIED RETROACTIVELY)/GUILTY PLEAS (PEOPLE VS CATU, WHICH INVALIDATED GUILTLY PLEAS WHERE THE PERIOD OF POSTRELEASE SUPERVISION WAS NOT DISCUSSED, SHOULD NOT BE APPLIED RETROACTIVELY)

CRIMINAL LAW.

PEOPLE VS CATU, WHICH INVALIDATED GUILTY PLEAS WHERE THE PERIOD OF POSTRELEASE SUPERVISION WAS NOT DISCUSSED, SHOULD NOT BE APPLIED RETROACTIVELY.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, with a concurring opinion and over a dissenting opinion, determined the 2005 case which invalidated guilty pleas accepted without express notice of the period of postrelase supervision (PRS) (People v Catu, 4 NY3d 242) should not be applied retroactively. In both cases before the court, the pre-Catu convictions by guilty plea were challenged to prohibit their consideration as predicate crimes for sentencing in post-Catu offenses. The analysis, which encompasses federal and state constitutional law, is too complex to fairly summarize here:

> ... [N]either [defendant's] conviction was obtained in violation of the law as it existed at the time of their respective convictions. Both state and federal law required that a defendant demonstrate that he would not have pleaded guilty had he known about a mandatory term of his sentence. It was not until our 2005 decision in Catu that a defendant was entitled to automatic vacatur. * * *
>
> Our Catu "automatic vacatur" rule did not constitute ,,, a "watershed rule"... . Catu was not necessary to prevent an impermissibly large risk of an inaccurate conviction, and it is doubtful that the failure of the courts to apprise defendants ... of the PRS component resulted in them pleading guilty to crimes that they did not commit. Indeed, when presented with their prior convictions, defendants ... acknowledged that they were the individuals mentioned in the predicate felony statements filed by the People, and that they did not wish to challenge any of the allegations contained within their respective statements. **People v Smith, 2016 NY Slip Op 07106, CtApp 11-1-16**

CRIMINAL LAW (THE TOLLING PROVISION, WHICH TOLLS THE FIVE-YEAR STATUTE OF LIMITATIONS FOR CERTAIN SEXUAL OFFENSES UNTIL THE VICTIM TURNS 18, WAS PROPERLY APPLIED TO RENDER THE INDICTMENT TIMELY, THERE IS NO CONFLICT BETWEEN THE TOLLING PROVISION AND THE STATUTE OF LIMITATIONS)/STATUTE OF LIMITATIONS (CRIMINAL LAW, THE TOLLING PROVISION, WHICH TOLLS THE FIVE-YEAR STATUTE OF LIMITATIONS FOR CERTAIN SEXUAL OFFENSES UNTIL THE VICTIM TURNS 18, WAS PROPERLY APPLIED TO RENDER THE INDICTMENT TIMELY, THERE IS NO CONFLICT BETWEEN THE TOLLING PROVISION AND THE STATUTE OF LIMITATIONS)/TOLLING PROVISION (STATUTE OF LIMITATIONS, CRIMINAL LAW, (THE TOLLING PROVISION, WHICH TOLLS THE FIVE-YEAR STATUTE OF LIMITATIONS FOR CERTAIN SEXUAL OFFENSES UNTIL THE VICTIM TURNS 18, WAS PROPERLY APPLIED TO RENDER THE INDICTMENT TIMELY, THERE IS NO CONFLICT BETWEEN THE TOLLING PROVISION AND THE STATUTE OF LIMITATIONS)/CHILDREN, SEX OFFENSES INVOLVING (THE TOLLING PROVISION, WHICH TOLLS THE FIVE-YEAR STATUTE OF LIMITATIONS FOR CERTAIN SEXUAL OFFENSES UNTIL THE VICTIM TURNS 18, WAS PROPERLY APPLIED TO RENDER THE INDICTMENT TIMELY, THERE IS NO CONFLICT BETWEEN THE TOLLING PROVISION AND THE STATUTE OF LIMITATIONS)

CRIMINAL LAW.

THE TOLLING PROVISION, WHICH TOLLS THE FIVE-YEAR STATUTE OF LIMITATIONS FOR CERTAIN SEXUAL OFFENSES UNTIL THE VICTIM TURNS 18, WAS PROPERLY APPLIED TO RENDER THE INDICTMENT TIMELY; THERE IS NO CONFLICT BETWEEN THE TOLLING PROVISION AND THE STATUTE OF LIMITATIONS.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, with a two-judge concurrence, determined that the tolling provision, which tolls the five-year statute of limitations for certain sexual offenses involving a child until the child turns 18, applied here and the indictment, brought when the victim was 21, was timely. The opinion delves into an extensive statutory-interpretation analysis which is too detailed to fairly summarize here:

> Defendant claims his prosecution is time-barred because the applicable five-year limitations period set forth in CPL former 30.10 (3)(e) expired before the filing of the felony complaint, and the statute of limitations is not subject to tolling under CPL 30.10 (3)(f). Defendant's argument is unpersuasive, misconstrues the statutory provisions, and ignores the relevant legislative history. The crime for which defendant stands convicted is expressly encompassed by CPL 30.10 (3)(f), and involves the type of conduct the legislature sought to address by expansive, albeit delayed, prosecution of multiple acts of sexual abuse against a minor. * * *
>
> Unlike CPL 30.10 (3)(e), which is a self-contained statute of limitations, CPL 30.10 (3)(f) is a tolling provision and as such is dependent on reference to time limits found elsewhere in the statute. Defendant mistakenly equates the two subsections — as if they are both statutes of limitations — when he claims they are in conflict and the specific provision of CPL 30.10 (3)(e) overrides the general provision of CPL 30.10 (3)(f). The more apt comparison is to the two statutes of limitations CPL 30.10 (3)(e) and 30.10 (2)(b), which harmoniously coexist as a specific and general statute of limitations, respectively, and which in no way lead to the conclusion promoted by defendant, that CPL 30.10 (3)(e) is superfluous. Regardless, there is no conflict obvious from the interplay of subsections (3)(e) and (3)(f). One sets forth a five-year prosecution deadline and the other explains when the clock begins to run on that deadline. **People v Pabon, 2016 NY Slip Op 07108, CtApp 11-1-16**

CRIMINAL LAW (NOT ADMINISTERING THE DWI COORDINATION TESTS TO DEFENDANT BECAUSE OF A LANGUAGE BARRIER DID NOT VIOLATE EQUAL PROTECTION OR DUE PROCESS)/DWI (NOT ADMINISTERING THE DWI COORDINATION TESTS TO DEFENDANT BECAUSE OF A LANGUAGE BARRIER DID NOT VIOLATE EQUAL PROTECTION OR DUE PROCESS)/EQUAL PROTECTION (NOT ADMINISTERING THE DWI COORDINATION TESTS TO DEFENDANT BECAUSE OF A LANGUAGE BARRIER DID NOT VIOLATE EQUAL PROTECTION OR DUE PROCESS)/DUE PROCESS (NOT ADMINISTERING THE DWI COORDINATION TESTS TO DEFENDANT BECAUSE OF A LANGUAGE BARRIER DID NOT VIOLATE EQUAL PROTECTION OR DUE PROCESS)

CRIMINAL LAW.

NOT ADMINISTERING THE DWI COORDINATION TESTS TO DEFENDANT BECAUSE OF A LANGUAGE BARRIER DID NOT VIOLATE EQUAL PROTECTION OR DUE PROCESS.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a two-judge dissent, determined the failure to administer coordination tests in a DWI case because of a "language barrier," did not violate equal protection or due process. In this case the defendant was of Hispanic origin and spoke Spanish. The requirement that the tests be administered in English was deemed facially neutral and not directed at a suspect class, and the state was deemed to have a substantial interest in avoiding the cumbersome requirement that an arresting officer administer the tests in the arrestee's language:

> The challenged policy withstands rational basis review. Both the NYPD and the public have a substantial interest in ensuring the reliability of coordination tests, and the clarity of the instructions is crucial to the reliability of the results. Indeed, the record makes clear that coordination tests are designed not only to assess a suspect's "motor skills in completing the specific tasks," but also to evaluate the suspect's "capacity to [] follow instructions." But coordination tests are uniquely ill-suited for administration via translation; they are generally lengthy — containing thirty lines of instructions — and require contemporaneous demonstration and explanation of the tasks to be performed. * * *
>
> ... [T]he implicated State interests are substantial. The State has a clear interest in avoiding the cumbersome and prohibitively expensive administrative and fiscal burdens of providing the requested translation services. The State also has a strong interest in ensuring the accuracy of physical coordination tests, and the use of translated instructions — either through qualified interpreters or through multilingual officers — could compromise the test's reliability. Given the substantial State interests involved, defendant's due process claim must be rejected ...
> . **People v Aviles, 2016 NY Slip Op 07836, CtApp 11-22-16**

CRIMINAL LAW (TOWING OF DEFENDANT'S CAR (AND INVENTORY SEARCH) AFTER DEFENDANT'S ARREST FOR SHOPLIFTING WAS CONSISTENT WITH POLICE DEPARTMENT'S WRITTEN POLICY)/INVENTORY SEARCH (TOWING OF DEFENDANT'S CAR (AND INVENTORY SEARCH) AFTER DEFENDANT'S ARREST FOR SHOPLIFTING WAS CONSISTENT WITH POLICE DEPARTMENT'S WRITTEN POLICY)/TOWING (TOWING OF DEFENDANT'S CAR (AND INVENTORY SEARCH) AFTER DEFENDANT'S ARREST FOR SHOPLIFTING WAS CONSISTENT WITH POLICE DEPARTMENT'S WRITTEN POLICY)

CRIMINAL LAW.

TOWING OF DEFENDANT'S CAR (AND INVENTORY SEARCH) AFTER DEFENDANT'S ARREST FOR SHOPLIFTING WAS CONSISTENT WITH POLICE DEPARTMENT'S WRITTEN POLICY.

The Court of Appeals, over a dissent, determined the police properly towed defendant's car (which resulted in an inventory search) after defendant's arrest for shoplifting. The towing of the car was consistent with the provisions of the police department's written policy:

> ... [T]he police officers' decision to tow defendant's vehicle, which was parked in the same parking lot in which defendant was arrested, was properly made in accordance with "standard criteria" set forth in the police department's written policy ... . Those criteria, among other things, limit an officer's discretion to tow a vehicle upon

a driver's arrest to situations in which such action is necessary to ensure the safety of the vehicle and its contents and where releasing the vehicle to an owner or designee is not otherwise appropriate. Upon defendant's arrest, the vehicle would have been left unattended indefinitely in the complainant's private parking lot, which had a history of vandalism, and the complainant requested that the police remove the vehicle. In our view, the officers' decision to tow the vehicle was, therefore, consistent with a community caretaking function ... . Moreover, there is no indication that the officers suspected that they would discover evidence of further criminal activity in defendant's vehicle, or that they towed the vehicle for that purpose ... . **People v Tardi, 2016 NY Slip Op 07822, CtApp 11-21-16**

CRIMINAL LAW (STANDARD OF REVIEW IN COURT OF APPEALS FOR MIXED QUESTION OF LAW AND FACT REQUIRED AFFIRMANCE OF DENIAL OF SUPPRESSION MOTION)/APPEALS (CRIMINAL LAW, STANDARD OF REVIEW IN COURT OF APPEALS FOR MIXED QUESTION OF LAW AND FACT REQUIRED AFFIRMANCE OF DENIAL OF SUPPRESSION MOTION)/STREET STOPS (STANDARD OF REVIEW IN COURT OF APPEALS FOR MIXED QUESTION OF LAW AND FACT REQUIRED AFFIRMANCE OF DENIAL OF SUPPRESSION MOTION)/SUPPRESS, MOTIONS TO (STANDARD OF REVIEW IN COURT OF APPEALS FOR MIXED QUESTION OF LAW AND FACT REQUIRED AFFIRMANCE OF DENIAL OF SUPPRESSION MOTION)

CRIMINAL LAW, APPEALS.

STANDARD OF REVIEW IN COURT OF APPEALS FOR MIXED QUESTION OF LAW AND FACT REQUIRED AFFIRMANCE OF DENIAL OF SUPPRESSION MOTION.

The Court of Appeals, affirming the denial of a suppression motion, explained the standard of review in the Court of Appeals for mixed questions of law and fact:

> ... [P]olice were dispatched ... after an anonymous caller informed a 911 operator that two black males were walking back and forth ... carrying silver colored guns on their waists. One individual was described as wearing a white t-shirt with red letters. The other was wearing a black t-shirt.
>
> Two uniformed police officers, each driving a marked patrol car, responded to a radio dispatch concerning the 911 call. The first officer to arrive observed two black males walking side-by-side ... . One male had a black t-shirt and the other male wore a two-toned blue jacket, over what appeared to the officer to be a light-colored t-shirt. The officer parked his vehicle and approached the men on foot. As soon as they saw the officer, one man fled into a backyard and the other man, defendant, continued to walk southbound ... . The officer pursued the fleeing man with his gun drawn and observed the man hide what was later discovered to be a handgun underneath a pile of leaves.
>
> When the second officer arrived at the scene, he observed the fleeing man run into the backyard with the first officer running after him and defendant walking ... . No one else was in the area. As the second officer parked and exited his vehicle, defendant yelled an expletive and fled. The officer gave chase and observed a handgun fall from defendant's waist.
>
> The [Appellate Division] explained that defendant's flight upon seeing the second officer exit his vehicle provided the officer with the requisite reasonable suspicion of criminal activity to warrant his pursuit of defendant, and the fact that defendant dropped the gun during the pursuit gave rise to probable cause to arrest ... .
>
> The issue of whether the second officer had reasonable suspicion to pursue defendant is a mixed question of law and fact, limiting our review ... . Because there is record support for the determination of the lower courts, we affirm ... . **People v Gayden, 2016 NY Slip Op 07702, CtApp 11-17-16**

CRIMINAL LAW (INEFFECTIVE ASSISTANCE OF COUNSEL COULD NOT HAVE AFFECTED THE PROCEEDINGS, DEFENDANT'S MOTION TO SET ASIDE HIS CONVICTION PROPERLY DENIED)/ATTORNEYS (CRIMINAL LAW, INEFFECTIVE ASSISTANCE OF COUNSEL COULD NOT HAVE AFFECTED THE PROCEEDINGS, DEFENDANT'S MOTION TO SET ASIDE HIS CONVICTION PROPERLY DENIED)/INEFFECTIVE ASSISTANCE OF COUNSEL (INEFFECTIVE ASSISTANCE OF COUNSEL COULD NOT HAVE AFFECTED THE PROCEEDINGS, DEFENDANT'S MOTION TO SET ASIDE HIS CONVICTION PROPERLY DENIED)

CRIMINAL LAW, ATTORNEYS.

INEFFECTIVE ASSISTANCE OF COUNSEL COULD NOT HAVE AFFECTED THE PROCEEDINGS; DEFENDANT'S MOTION TO SET ASIDE HIS CONVICTION PROPERLY DENIED.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, determined defendant had been wrongly informed by his attorney that he was subject to consecutive sentences, and therefore defendant had received ineffective assistance of counsel. However, the People presented evidence that, because of the horrendous nature of the crime, there was no possibility defendant would have been offered a plea bargain. Therefore the erroneous advice could not have affected the proceedings. Defendant's motion to set aside his conviction was properly denied:

> ... [D]efendant was required to show more than incorrect advice by defense counsel. Here, the record supports the Appellate Division's determination that there was no possibility that a reduced plea would have been offered to defendant. Therefore, the incorrect advice could not have affected the outcome of the proceedings. The People entertained no plea possibility or any reduction in the sentence given, among other things, the maximum sentence defendant faced for killing two adults and injuring a third was an aggregate term of just 5 to 15 years. Nor was there any proof that the court would have extended an offer to a reduced sentence. Rather, the sentencing court remarked that it did not think the maximum sentence was enough punishment for defendant under the circumstances of this case. **People v Bank, 2016 NY Slip Op 07110, CtApp 11-1-16**

CRIMINAL LAW (CONSECUTIVE-CONCURRENT SENTENCING RULES EXPLAINED IN SOME DETAIL)/SENTENCING (CONSECUTIVE-CONCURRENT SENTENCING RULES EXPLAINED IN SOME DETAIL)/CONSECUTIVE SENTENCES (CONSECUTIVE-CONCURRENT SENTENCING RULES EXPLAINED IN SOME DETAIL)/CONCURRENT SENTENCES (CONSECUTIVE-CONCURRENT SENTENCING RULES EXPLAINED IN SOME DETAIL)/ATTORNEYS (TELLING DEFENDANT HE COULD RECEIVE CONSECUTIVE SENTENCES FOR ATTEMPTED FELONY MURDER AND THE UNDERLYING FELONY (ROBBERY) DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE)/FELONY MURDER (TELLING DEFENDANT HE COULD RECEIVE CONSECUTIVE SENTENCES FOR ATTEMPTED FELONY MURDER AND THE UNDERLYING FELONY (ROBBERY) DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE)

CRIMINAL LAW, ATTORNEYS.

CONSECUTIVE-CONCURRENT SENTENCING RULES EXPLAINED IN SOME DETAIL, TELLING DEFENDANT HE COULD RECEIVE CONSECUTIVE SENTENCES FOR ATTEMPTED FELONY MURDER AND THE UNDERLYING FELONY (ROBBERY) DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE.

The Court of Appeals, in an opinion by Judge Abdus-Salaam, resolving two appeals stemming from the same incident, over a three-judge dissent in the "sentencing" appeal, affirmed the defendant's conviction, finding that the concurrent/consecutive sentencing rules were properly applied, and the Alford plea was not tainted by erroneous information provided by defense counsel. Defendant, during the course of an armed robbery of several victims in a park, discharged a weapon, grazing one of the victims. Defendant was charged with robbery, attempted robbery and attempted first degree felony murder. The court noted that the Appellate Division here (Fourth Department) found that consecutive

sentences for felony murder and the underlying felony could have been imposed (not the case here). while two other departments have held such sentences must be concurrent. The Court of Appeals did not address that issue because it was raised in a reply brief:

> In People v Laureano, we explained that when "determining whether concurrent sentences are required, the sentencing court must first examine the statutory definitions of the crimes for which defendant has been convicted" (87 NY2d at 643). The court must then determine "whether the actus reus element is, by definition, the same for both offenses (under the first prong of the statute), or if the actus reus for one offense is, by definition, a material element of the second offense (under the second prong)" (id.). The court must focus on actus reus rather than mens rea "[b]ecause both prongs of Penal Law § 70.25 (2) refer to the 'act or omission' . . . that constitutes the offense" ... .
>
> If a defendant's acts or omissions do not fit under either prong of the statute, "the People have satisfied their obligation of showing that concurrent sentences are not required" ... . When there "is some overlap of the elements of multiple statutory offenses," courts retain discretion to impose consecutive sentences "if the People can demonstrate that the acts or omissions committed by the defendant were separate and distinct acts" ... , even "though they are part of a single transaction" ... . * * *
>
> We have not directly addressed whether the sentence on a first-degree felony murder charge must run concurrently with the sentence imposed on the underlying felony. At the time of defendant's sentencing, the Fourth Department had yet to address this issue, but the Second and Third Departments had, holding that a sentence for first-degree felony murder had to run concurrently with the sentence imposed on the underlying felony ... . However, when faced with the issue in this case, the Fourth Department affirmed the sentencing court's conclusion that the sentences could run consecutively. Under these circumstances, we cannot say that defense counsel's advice to defendant, even if erroneous, rendered him ineffective ... . **People v Couser, 2016 NY Slip Op 07831, CtApp 11-22-16**

CRIMINAL LAW (DEFENDANT PROPERLY IMPEACHED WITH SPONTANEOUS STATEMENTS MADE TO THE POLICE AT THE SCENE OF HIS ARREST, SPONTANEOUS STATEMENT MADE NO MENTION OF AN ATTACK ON DEFENDANT BY THE COMPLAINANT WHICH DEFENDANT DESCRIBED AT TRIAL)/EVIDENCE DEFENDANT PROPERLY IMPEACHED WITH SPONTANEOUS STATEMENTS MADE TO THE POLICE AT THE SCENE OF HIS ARREST, SPONTANEOUS STATEMENT MADE NO MENTION OF AN ATTACK ON DEFENDANT BY THE COMPLAINANT WHICH DEFENDANT DESCRIBED AT TRIAL)/IMPEACHMENT (CRIMINAL LAW, DEFENDANT PROPERLY IMPEACHED WITH SPONTANEOUS STATEMENTS MADE TO THE POLICE AT THE SCENE OF HIS ARREST, SPONTANEOUS STATEMENT MADE NO MENTION OF AN ATTACK ON DEFENDANT BY THE COMPLAINANT WHICH DEFENDANT DESCRIBED AT TRIAL)/STATEMENTS (CRIMINAL LAW, IMPEACHMENT, DEFENDANT PROPERLY IMPEACHED WITH SPONTANEOUS STATEMENTS MADE TO THE POLICE AT THE SCENE OF HIS ARREST, SPONTANEOUS STATEMENT MADE NO MENTION OF AN ATTACK ON DEFENDANT BY THE COMPLAINANT WHICH DEFENDANT DESCRIBED AT TRIAL)

CRIMINAL LAW, EVIDENCE.

DEFENDANT PROPERLY IMPEACHED WITH SPONTANEOUS STATEMENTS MADE TO THE POLICE AT THE SCENE OF HIS ARREST; SPONTANEOUS STATEMENT MADE NO MENTION OF AN ATTACK ON DEFENDANT BY THE COMPLAINANT WHICH DEFENDANT DESCRIBED AT TRIAL.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, with a concurring opinion, determined defendant was properly impeached with a spontaneous statement made to police at the time of his arrest for robbing the complainant. At trial, defendant testified the complainant had struck him with a board. However, the alleged attack with a board was not mentioned in defendant's spontaneous statement at the scene:

> Here ... defendant's statement was not the product of interrogation, but was made spontaneously at the scene, prior to the issuance of Miranda warnings. In addition, the substance of defendant's spontaneous statement was not inculpatory, but a description of the complainant's conduct and was made to inform the police when the

information was timely to their decision as to whether to arrest defendant or complainant. Even more significant, defendant admitted in his direct testimony that he was not silent and that he had given the police his version of complainant's misconduct at the scene. Consequently, the credibility of his initial spontaneous statement was legitimately called into question by his trial testimony.

Here, defendant elected to provide some explanation of what happened at the scene, and it was unnatural to have omitted the significantly more favorable version of events to which he testified at trial — that complainant had assaulted him. "[D]efendant's conspicuous omission of these exculpatory facts in his voluntary statement to police tended to show that his trial testimony was a recent fabrication" ... . **People v Chery, 2016 NY Slip Op 07109, CtApp 11-1-16**

CRIMINAL LAW (EVIDENCE OF CONSENSUAL SEXUAL ACTS WITH ADULTS, ALTHOUGH NOT PRIOR CRIMES OR BAD ACTS, PROPERLY ADMITTED TO CORROBORATE CHILDREN'S TESTIMONY)/EVIDENCE (CRIMINAL LAW, EVIDENCE OF CONSENSUAL SEXUAL ACTS WITH ADULTS, ALTHOUGH NOT PRIOR CRIMES OR BAD ACTS, PROPERLY ADMITTED TO CORROBORATE CHILDREN'S TESTIMONY)/MOLINEUX EVIDENCE (EVIDENCE OF CONSENSUAL SEXUAL ACTS WITH ADULTS, ALTHOUGH NOT PRIOR CRIMES OR BAD ACTS, PROPERLY ADMITTED TO CORROBORATE CHILDREN'S TESTIMONY)

CRIMINAL LAW EVIDENCE.

EVIDENCE OF CONSENSUAL SEXUAL ACTS WITH ADULTS, ALTHOUGH NOT PRIOR CRIMES OR BAD ACTS, PROPERLY ADMITTED TO CORROBORATE CHILDREN'S TESTIMONY.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, affirming the Appellate Division, determined evidence of defendant's sexual acts with consenting adults was properly admitted to corroborate the testimony of children who described sexual abuse by the defendant. The children alleged defendant took them into a closet where he abused them (oral sex) while he smoked crack cocaine with his shirt pulled over his head. The children's mother alleged the same scenario with her and other adults. The court noted that the consensual sexual acts with adults were not Molineux evidence because they were not prior bad acts or crimes. The only Molineux evidence was the allegation defendant smoked crack cocaine. Because all the evidence served to corroborate the children's testimony it was not prohibited "propensity" evidence and the probative value outweighed its prejudicial effect:

... [W]e ... note that evidence of defendant's prior sexual acts with adult women is not "propensity" evidence in its traditional sense. When we limit Molineux or other propensity evidence, we do so for policy reasons, due to fear of the jury's "human tendency" to more readily "believe in the guilt of an accused person when it is known or suspected that he has previously committed a similar crime" ... . But here, that defendant had engaged in oral sex with consenting adult women, while in a closet smoking crack with his shirt pulled over his head, showed no propensity to commit the crimes for which he was on trial. That this evidence corroborated the girls' accounts does not render it propensity evidence, because corroboration and propensity are distinct concepts. Because "there [was] a proper nonpropensity purpose, the decision whether to admit evidence of defendant's prior . . . acts rests upon the trial court's discretionary balancing of probative value and unfair prejudice" ... . **People v Brewer, 2016 NY Slip Op 07704, CtApp 11-17-16**

CRIMINAL LAW (ALTHOUGH THE VICTIM DID NOT DIE FROM ASSAULT RELATED INJURIES, THE MEDICAL EXAMINER'S OPINION THE VICTIM WOULD NOT HAVE DIED FROM CARDIOVASCULAR DISEASE HAD HE NOT BEEN ASSAULTED WAS SUFFICIENT TO SUPPORT A FELONY MURDER CONVICTION)/EVIDENCE (CRIMINAL LAW, (ALTHOUGH THE VICTIM DID NOT DIE FROM ASSAULT RELATED INJURIES, THE MEDICAL EXAMINER'S OPINION THE VICTIM WOULD NOT HAVE DIED FROM CARDIOVASCULAR DISEASE HAD HE NOT BEEN ASSAULTED WAS SUFFICIENT TO SUPPORT A FELONY MURDER CONVICTION)/FELONY MURDER (ALTHOUGH THE VICTIM DID NOT DIE FROM ASSAULT RELATED INJURIES, THE MEDICAL EXAMINER'S OPINION THE VICTIM WOULD NOT HAVE DIED FROM CARDIOVASCULAR DISEASE HAD HE NOT BEEN ASSAULTED WAS SUFFICIENT TO SUPPORT A FELONY MURDER CONVICTION)

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE VICTIM DID NOT DIE FROM ASSAULT RELATED INJURIES, THE MEDICAL EXAMINER'S OPINION THE VICTIM WOULD NOT HAVE DIED FROM CARDIOVASCULAR DISEASE HAD HE NOT BEEN ASSAULTED WAS SUFFICIENT TO SUPPORT A FELONY MURDER CONVICTION.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a dissent, reversing the Appellate Division, determined the evidence was sufficient to support the defendant's felony murder conviction. The victim was found dead two days after an assault which fractured facial bones. The medical examiner testified the facial injuries were not the cause of death. But the medical examiner, noting the victim's obesity and enlarged heart, offered an opinion that the victim would not have died from cardiovascular disease he not been assaulted:

> Here, the medical examiner's testimony, in conjunction with the crime scene evidence, established a sufficient causal connection between defendant's infliction of blunt force trauma injuries during the violent home invasion and the victim's death. Specifically, the medical examiner testified that "[s]tress of any kind can hasten a person's demise by cardiovascular disease" and that, here, the stress caused by the injuries inflicted by defendant, "given [the victim's] underlying heart disease[,] led to his death." That testimony, along with the crime scene evidence that defendant's beating of the victim was severe and immediate in its consequences, "was sufficient to prove that defendant's conduct 'set in motion and legally caused the death' of" the victim ... . Thus, the jury could have reasonably concluded that defendant's conduct was an actual contributory cause of the victim's death.
>
> With respect to foreseeability of the death, the People must prove "that the ultimate harm is something which should have been foreseen as being reasonably related to the acts of the accused" ... . In this case, defendant violently attacked the victim, in his home, breaking his jaw and leaving him on the floor in a blood-spattered room where he was found dead. From all of the evidence and the circumstances surrounding this violent encounter, the proof was sufficient to permit the jury to conclude that the victim's heart failure, induced by the extreme stress and trauma of such a violent assault, was a directly foreseeable consequence of defendant's conduct ... . **People v Davis, 2016 NY Slip Op 07818, CtApp 11-21-16**

CRIMINAL LAW (HEARSAY STATEMENT BY BYSTANDER WHO OBSERVED DEFENDANT PROPERLY ADMITTED AS A PRESENT SENSE IMPRESSION)/EVIDENCE (CRIMINAL LAW, HEARSAY STATEMENT BY BYSTANDER WHO OBSERVED DEFENDANT PROPERLY ADMITTED AS A PRESENT SENSE IMPRESSION)/HEARSAY (HEARSAY STATEMENT BY BYSTANDER WHO OBSERVED DEFENDANT PROPERLY ADMITTED AS A PRESENT SENSE IMPRESSION)/PRESENT SENSE IMPRESSION (HEARSAY STATEMENT BY BYSTANDER WHO OBSERVED DEFENDANT PROPERLY ADMITTED AS A PRESENT SENSE IMPRESSION)

CRIMINAL LAW, EVIDENCE.

HEARSAY STATEMENT BY BYSTANDER WHO OBSERVED DEFENDANT PROPERLY ADMITTED AS A PRESENT SENSE IMPRESSION.

The Court of Appeals determined a (hearsay) spontaneous statement made by a bystander to a police officer about defendant's attempt to get into the back of a FedEx truck was properly admitted as a present sense impression:

> We hold that the statement was properly admitted as a present sense impression. That exception to the hearsay rule allows the admission of "spontaneous descriptions of events made substantially contemporaneously with the observations . . . if the descriptions are sufficiently corroborated by other evidence" ... . Here, the woman's statement was made to the officer immediately after the event she described and before she had an opportunity for studied reflection. The officer's own observations sufficiently corroborated her description to allow its admission at trial ... . **People v Jones, 2016 NY Slip Op 07820, CtApp 11-21-16**

CRIMINAL LAW (SYRACUSE NOISE ORDINANCE PROHIBITING MUSIC LOUD ENOUGH TO BE HEARD 50 FEET FROM A PERSON'S CAR IS NOT UNCONSTITUTIONALLY VAGUE)/NOISE ORDINANCE (SYRACUSE NOISE ORDINANCE PROHIBITING MUSIC LOUD ENOUGH TO BE HEARD 50 FEET FROM A PERSON'S CAR IS NOT UNCONSTITUTIONALLY VAGUE)/MUNICIPAL LAW (SYRACUSE NOISE ORDINANCE PROHIBITING MUSIC LOUD ENOUGH TO BE HEARD 50 FEET FROM A PERSON'S CAR IS NOT UNCONSTITUTIONALLY VAGUE)/STREET STOPS (SYRACUSE NOISE ORDINANCE PROHIBITING MUSIC LOUD ENOUGH TO BE HEARD 50 FEET FROM A PERSON'S CAR IS NOT UNCONSTITUTIONALLY VAGUE)

CRIMINAL LAW, MUNICIPAL LAW.

SYRACUSE NOISE ORDINANCE PROHIBITING MUSIC LOUD ENOUGH TO BE HEARD 50 FEET FROM A PERSON'S CAR IS NOT UNCONSTITUTIONALLY VAGUE.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined the Syracuse Noise Ordinance was not unconstitutionally vague and therefore defendant was properly stopped in his vehicle based upon a violation of the ordinance:

> Syracuse Noise Ordinance section 40-16 (b) is sufficiently definite to put a person on notice that playing music which can be heard over 50 feet from such person's car on a public road, in a manner that would annoy or disturb "a reasonable person of normal sensibilities" is forbidden conduct and the objective standard affords police sufficiently "clear standards [for] enforcement" ... . **People v Stephens, 2016 NY Slip Op 07819, CtApp 11-21-16**

ENVIRONMENTAL LAW

ENVIRONMENTAL LAW (NY YORK DEPARTMENT OF STATE PROPERLY DETERMINED ENTERGY'S APPLICATION TO RENEW LICENSES TO OPERATE NUCLEAR REACTORS AT INDIAN POINT FOR ANOTHER 20 YEARS WAS SUBJECT TO A CONSISTENCY REVIEW UNDER THE COASTAL MANAGEMENT PLAN)/INDAN POINT (NY YORK DEPARTMENT OF STATE PROPERLY DETERMINED ENTERGY'S APPLICATION TO RENEW LICENSES TO OPERATE NUCLEAR REACTORS AT INDIAN POINT FOR ANOTHER 20 YEARS WAS SUBJECT TO A CONSISTENCY REVIEW UNDER THE COASTAL MANAGEMENT PLAN)/COASTAL MANAGEMENT PLAN (NY YORK DEPARTMENT OF STATE PROPERLY DETERMINED ENTERGY'S APPLICATION TO RENEW LICENSES TO OPERATE NUCLEAR REACTORS AT INDIAN POINT FOR ANOTHER 20 YEARS WAS SUBJECT TO A CONSISTENCY REVIEW UNDER THE COASTAL MANAGEMENT PLAN)

ENVIRONMENTAL LAW.

NEW YORK DEPARTMENT OF STATE PROPERLY DETERMINED ENTERGY'S APPLICATION TO RENEW LICENSES TO OPERATE NUCLEAR REACTORS AT INDIAN POINT FOR ANOTHER 20 YEARS WAS SUBJECT TO A CONSISTENCY REVIEW UNDER THE COASTAL MANAGEMENT PLAN.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, reversing the Appellate Division, determined the New York Department of State's ruling that Entergy was required to undergo a Coastal Management Plan (CMP) consistency review of its application to renew licenses to operate nuclear reactors at Indian Point for another 20 years was rational:

> ... [A]side from Department of State's interpretation of the specific language of the exemptions (to a CMP review), it is plain that these narrow exemptions for projects that had final environmental impact statements completed prior to the adoption of the CMP do not apply to re-licensing. Entergy's current application for a license to operate the Indian Point nuclear reactors for an additional 20 years is a new federal action, involving a new project, with different impacts and concerns than were present when the initial environmental impact statements were issued over 40 years ago. Thus, just as renewal of a license to operate a nuclear power plant triggers the requirement that the NRC [Nuclear Regulatory Commission] produce a supplemental environmental impact statement (see 10 CFR § 51.20), both the Coastal Zone Management Act and the CMP require consistency review for re-licensing of nuclear facilities. The Department's position that the Indian Point reactors are not forever exempt from consistency review under the CMP, is reasonable.
>
> In sum, the Department of State's interpretation of the exemptions in the Coastal Management Program, and its conclusion that Entergy's application to re-license the nuclear reactors at Indian Point is subject to consistency review are rational, and must be sustained. **Matter of Entergy Nuclear Operations, Inc. v New York State Dept. of State, 2016 NY Slip Op 07821, CtApp 11-21-16**

FAMILY LAW (COA)

FAMILY LAW (WHERE A PARTY IS REPRESENTED BY COUNSEL, THE FAMILY COURT ACT TIME-LIMIT FOR OBJECTING TO AN ORDER BEGINS TO RUN WHEN THE ATTORNEY, NOT THE PARTY, IS NOTIFIED OF THE ORDER)/CIVIL PROCEDURE (FAMILY COURT ACT, WHERE A PARTY IS REPRESENTED BY COUNSEL, THE FAMILY COURT ACT TIME-LIMIT FOR OBJECTING TO AN ORDER BEGINS TO RUN WHEN THE ATTORNEY, NOT THE PARTY, IS NOTIFIED OF THE ORDER)

FAMILY LAW, CIVIL PROCEDURE.

WHERE A PARTY IS REPRESENTED BY COUNSEL, THE FAMILY COURT ACT TIME-LIMIT FOR OBJECTING TO AN ORDER BEGINS TO RUN WHEN THE ATTORNEY, NOT THE PARTY, IS NOTIFIED OF THE ORDER.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing the Appellate Division, determined the Family Court Act time-limit for objecting to a support order begins to run when the party's counsel, not the party, is notified of the order. Here the party was notified of the order by mail, but counsel was not. The objections to the order were filed more than 35 days after the order was mailed to the party and were rejected on that ground. The Court of Appeals held that, even if a statutory time-limit for service is silent about the issue, where a party is represented by counsel, the time-limit does not start to run until counsel is notified:

> "[O]nce a party chooses to be represented by counsel in an action or proceeding, whether administrative or judicial, the attorney is deemed to act as his agent in all respects relevant to the proceeding. Thus any documents, particularly those purporting to have legal effect on the proceeding, should be served on the attorney the party has chosen to handle the matter on his behalf" (Bianca, 43 NY2d at 173). Indeed, "[t]his is not simply a matter of courtesy and fairness; it is the traditional and accepted practice which has been all but universally codified" (id.). In particular, as the Court noted, CPLR 2103 (b) provides that "[e]xcept where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served upon the party's attorney."
>
> Bianca governs here. The reference to the mailing of the order to a "party or parties" in Family Court Act § 439 (e) must be read to require that the order be mailed to the party's counsel, in order for the statutory time requirement to commence. **Matter of Odunbaku v Odunbaku, 2016 NY Slip Op 07705, CtApp 11-17-16**

LABOR LAW-CONSTRUCTION LAW (COA)

LABOR LAW-CONSTRUCTIO LAW (PLAINTIFF WHO FELL FROM A-FRAME LADDER AFTER AN ELECTRICAL SHOCK NOT ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION)/LADDERS (LABOR LAW, PLAINTIFF WHO FELL FROM A-FRAME LADDER AFTER AN ELECTRICAL SHOCK NOT ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION)

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF WHO FELL FROM A-FRAME LADDER AFTER AN ELECTRICAL SHOCK NOT ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION.

The Court of Appeals, reversing (modifying) the Appellate Division, determined plaintiff was not entitled to summary judgment on his Labor Law 240 (1) cause of action. Defendant fell from an A-frame ladder after receiving an electrical shock:

Plaintiff is not entitled to summary judgment under Labor Law § 240 (1). While using an A-frame ladder, plaintiff fell after receiving an electrical shock. Questions of fact exist as to whether the ladder failed to provide proper protection, and whether plaintiff should have been provided with additional safety devices ... . **Nazario v 222 Broadway, LLC, 2016 NY Slip Op 07823, CtApp 11-21-16**

MUNICIPAL LAW (COA)

MUNICIPAL LAW (IN AWARDING A COUNTY CONTRACT TO A PRIVATE BUS COMPANY, THE COUNTY'S DEVIATION FROM A FORMULA DESCRIBED IN ITS REQUEST FOR PROPOSALS WAS ARBITRARY AND CAPRICIOUS)

MUNICIPAL LAW.

IN AWARDING A COUNTY CONTRACT TO A PRIVATE BUS COMPANY, THE COUNTY'S DEVIATION FROM A FORMULA DESCRIBED IN ITS REQUEST FOR PROPOSALS WAS ARBITRARY AND CAPRICIOUS.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing Supreme Court, over a two-judge dissent, determined that defendant county was required to use the formula outlined in its request for proposals (RFP) when evaluating bids for county contracts (here involving use of private bus services). The county included one formula in the RFP and used a different formula in awarding the contract:

> Here, the County deviated from the criteria specified in its RFP when it evaluated the proposals received pursuant to its request. The emphatic language used in the RFP's paradigm of a percentage to points ratio — stating that if a 10% cost difference exists between the lowest offeror and the next lowest, then the latter "will have 2 points deducted from the maximum score of 20" — makes clear that the "example" was meant to explain that a percentage to points ratio is one in which a one percent cost difference translates to one percent of the total number of points allocated to cost. Instead, the County used a 2-point deduction for every 4% difference in price. Applying this new formula, a one percent cost difference corresponded to 2.5%, rather than one percent, of the number of points assigned to cost.
>
> The County abandoned the cost formula it had promised to apply and instead created a new formula that disfavored ACME. This was arbitrary and capricious ... . **Matter of ACME Bus Corp. v Orange County, 2016 NY Slip Op 07835, CtApp 11-22-16**

MUNICIPAL LAW (IN A CITY WHICH DOES NOT PROVIDE WORKERS' COMPENSATION BENEFITS FOR ITS POLICE OFFICERS, AN OFFICER RECEIVING BENEFITS PURSUANT TO GENERAL MUNICIPAL LAW 207-c IS NOT BARRED FROM SUING FOR GENERAL MUNICIPAL LAW 205-e BENEFITS)/POLICE OFFICERS (IN A CITY WHICH DOES NOT PROVIDE WORKERS' COMPENSATION BENEFITS FOR ITS POLICE OFFICERS, AN OFFICER RECEIVING BENEFITS PURSUANT TO GENERAL MUNICIPAL LAW 207-c IS NOT BARRED FROM SUING FOR GENERAL MUNICIPAL LAW 205-e BENEFITS)/GENERAL MUNICIPAL LAW IN A CITY WHICH DOES NOT PROVIDE WORKERS' COMPENSATION BENEFITS FOR ITS POLICE OFFICERS, AN OFFICER RECEIVING BENEFITS PURSUANT TO GENERAL MUNICIPAL LAW 207-c IS NOT BARRED FROM SUING FOR GENERAL MUNICIPAL LAW 205-e BENEFITS)/WORKERS COMPENSATION LAW (IN A CITY WHICH DOES NOT PROVIDE WORKERS' COMPENSATION BENEFITS FOR ITS POLICE OFFICERS, AN OFFICER RECEIVING BENEFITS PURSUANT TO GENERAL MUNICIPAL LAW 207-c IS NOT BARRED FROM SUING FOR GENERAL MUNICIPAL LAW 205-e BENEFITS)

MUNICIPAL LAW, WORKERS' COMPENSATION LAW.

IN A CITY WHICH DOES NOT PROVIDE WORKERS' COMPENSATION BENEFITS FOR ITS POLICE OFFICERS, AN OFFICER RECEIVING BENEFITS PURSUANT TO GENERAL MUNICIPAL LAW 207-c IS NOT BARRED FROM SUING FOR GENERAL MUNICIPAL LAW 205-e BENEFITS.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a dissent, reversing the Appellate Division, determined a police officer who receives benefits under General Municipal Law 207-c is not barred from suing for benefits under General Municipal Law 205-e in a city which does not provide workers' compensation benefits. The officer her alleged asbestos-related injury caused by the building which housed the police station:

> "In addition to any other right of action or recovery under any other provision of law," section 205-e permits police officers to bring tort claims for injuries sustained "while in the discharge or performance at any time or place of any duty imposed by . . . superior officers" where such injuries occur "directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments" (General Municipal Law § 205-e [1]). Separately, section 207-c "provides for the payment of the full amount of regular salary or wages," along with payment for medical treatment and hospital care, "to a police officer or other covered municipal employee who is injured 'in the performance of his [or her] duties' or is taken ill 'as a result of the performance of [such] duties'" * * *
>
> ... [W]e reject the City's argument, also adopted by the dissent, that General Municipal Law § 207-c benefits can be equated to workers' compensation benefits for purposes of interpreting the proviso contained in General Municipal Law § 205-e [FN2]. The language of section 205-e prohibits only recipients of workers' compensation benefits from commencing suit against their employers; it does not, by its terms, bar the commencement of suits by recipients of section 207-c benefits — which we have repeatedly recognized to be separate and distinct from workers' compensation benefits. In fact, section 205-e states that the right contained therein is "[i]n addition to any other right of action or recovery under any other provision of law" (General Municipal Law § 205-e [1]). **Matter of Diegelman v City of Buffalo, 2016 NY Slip Op 07817, CtApp 11-21-16**

NEGLIGENCE (COA)

NEGLIGENCE (MEDICAL MALPRACTICE, DEFENSE EXPERT'S CONCLUSORY ASSEERTIONS DID NOT RAISE A QUESTION OF FACT ABOUT THE ALLEGATIONS THE NEGLIGENT PRESCRIPTION OF TWO DRUGS CAUSED HEART DAMAGE)/MEDICAL MALPRACTICE (DEFENSE EXPERT'S CONCLUSORY ASSEERTIONS DID NOT RAISE A QUESTION OF FACT ABOUT THE ALLEGATIONS THE NEGLIGENT PRESCRIPTION OF TWO DRUGS CAUSED HEART DAMAGE)

NEGLIGENCE, MEDICAL MALPRACTICE.

DEFENSE EXPERT'S CONCLUSORY ASSERTIONS DID NOT RAISE A QUESTION OF FACT ABOUT THE ALLEGATIONS THE NEGLIGENT PRESCRIPTION OF TWO DRUGS CAUSED HEART DAMAGE.

The Court of Appeals, with a concurrence and a three-judge dissent, determined defendant's motion for summary judgment was properly denied in this medical malpractice action. The complaint alleged the negligent prescription of two drugs caused heart damage. The majority concluded that conclusory statements in the defense expert's affidavit did not raise a question of fact about the plaintiff's allegations of malpractice:

> Here, defendant's expert proffered only conclusory assertions unsupported by any medical research that defendant's actions in prescribing both drugs concurrently did not proximately cause plaintiff's AV heart block. These conclusory statements did not adequately address plaintiff's allegations that the concurrent Lipitor and azithromycin prescriptions caused plaintiff's injuries. By ignoring the possible effect of the azithromycin prescription, defendant's expert failed to "tender[] sufficient evidence to demonstrate the absence of any material issues of fact" ... as to proximate causation and, as a result, defendant was not entitled to summary judgment. Because defendant failed to meet his prima facie burden, it is unnecessary to review the sufficiency of the plaintiff's opposition papers ... . **Pullman v Silverman, 2016 NY Slip Op 07107, CtApp 11-1-16**

WORKERS'S COMPENSATION LAW (COA)

WORKERS' COMPENSATION LAW (SPECIAL DISABILITY FUND CAN BE COMPELLED BY COURT ORDER TO CONSENT, NUNC PRO TUNC, TO A THIRD-PARTY SETTLEMENT)/SPECIAL DISABILITY FUND (WORKERS' COMPENSATION LAW, SPECIAL DISABILITY FUND CAN BE COMPELLED BY COURT ORDER TO CONSENT, NUNC PRO TUNC, TO A THIRD-PARTY SETTLEMENT)

WORKERS' COMPENSATION LAW.

SPECIAL DISABILITY FUND CAN BE COMPELLED BY COURT ORDER TO CONSENT, NUNC PRO TUNC, TO A THIRD-PARTY SETTLEMENT.

The Court of Appeals, reversing Supreme Court, determined the Workers' Compensation carrier could seek a court order compelling the Special Disability Fund to consent to a settlement with a third-party. Here the carrier agreed to the settlement and the carrier then sought retroactive consent from the Special Disability Fund, which refused:

> Here, as required by section 29, the injured employee sought and obtained Ace Fire's approval prior to entering the settlement of the third-party action. Ace Fire, however, did not seek the Special Disability Fund's written approval prior to settlement. When Ace Fire sought the Special Disability Fund's retroactive consent, the Fund refused, asserting that Ace Fire had forfeited its right to reimbursement. Ace Fire then commenced this proceeding asking Supreme Court to compel the Special Disability Fund's consent nunc pro tunc under Workers' Compensation Law § 29 (5).
>
> We have repeatedly recognized "that a statute . . . must be construed as a whole and that its various sections must be considered together and with reference to each other" ... . The language in section 29 (1) establishing what

entities may be deemed lienors is essentially identical to the language in section 29 (5) referring to the entities whose consent to settlement is required and, if not obtained, can be compelled upon application to the court — i.e., the "person, association, corporation, or insurance carrier liable to pay" compensation benefits. Here, the parties do not dispute that the consent of the Special Disability Fund to settlement of the employee's third party action was required. Thus, assuming, for purposes of this appeal, that the Special Disability Fund is a lienor whose consent to settlement is required under Workers' Compensation Law § 29 (1), we conclude that the carrier may seek to obtain the Fund's consent from Supreme Court nunc pro tunc under section 29 (5). There is no principled basis for concluding that the Special Disability Fund's consent is required as a lienor under one portion of the statute, but that the failure to obtain it cannot be cured, as it can for other lienors, under the same statute. **Ace Fire Underwriters Ins. Co. v Special Funds Conservation Comm., 2016 NY Slip Op 07833, CtApp 11-22-16**

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